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Dear Friends:

We hope you enjoy this edition of the Ross & Levy quarterly 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

**Tifton Workers’ Compensation – March 2010
(details coming soon)**

WORKERS’ COMPENSATION AWARDS NOW PUBLISHED ON BOARD’S WEBSITE

John David Blair

In the past, decisions of the State Board of Workers’ Compensation were a clandestine matter accessible to all but a few unless referenced in the opinions of the Georgia Court of Appeals or Supreme Court. No longer – those wishing to access the decisions of the State Board of Workers’ Compensation may obtain them, with a few redactions to protect the privacy of the parties, by using a simple Google Search tool on the State Board’s website (<http://sbwc.georgia.gov>).

Searching the awards database is simple. Just locate the box of “drop down” menus in the upper-left-hand corner of the website and choose the link that says “awards.” You will be taken to a page with instructions and a link to another site. If you click on that link, another browser window will open, and you will see a Google search box followed by a button that is labeled “Google Search.” For more tailored search

results, click the link to the right of that button that says, “Advanced Search.” This search utility is the same design that Google uses on its website, though this one is limited to searching the State Board’s online database of awards. It really is just that simple.

MODIFICATIONS NOT PERMITTED
DURING WORKERS’ COMPENSATION
ENFORCEMENT PROCEEDINGS:

Brannon v. Garcia

John David Blair

If an error in identifying one or more parties has been made in an award of workers’ compensation benefits by the State Board of Workers’ Compensation, then that error must be corrected by the Board, and not by the superior court in the course of proceedings to enforce the award pursuant to O.C.G.A. § 34-9-106 (i.e. to compel the employer/insurer to comply with the terms of the award)¹.

Case Background

- ❖ Employee/Claimant Daniel Garcia filed a petition in superior court to enforce an award of worker’s compensation benefits under O.C.G.A. § 34-9-106.
- ❖ In the course of those proceedings, he moved the superior court to substitute the Employer listed in the Board’s Award, “Brennan Roofing Company,” to “Brannon Roofing Company.”
- ❖ “Brannon Roofing Company” (with an “O”) had never previously been named as a party in the underlying State Board proceedings, though the Employee/Claimant claimed that this was due to mere “scrivener’s error.”

- ❖ The Employee/Claimant also moved the superior court to add “Gary Brannon” as a party defendant for the first time, as owner of the “Brannon Roofing Company.”

Decision/Ruling

- ❖ While the superior court granted both motions, substituting “Brannon Roofing” for “Brannen Roofing” as the Employer in the Board’s Award and also adding Gary Brannon as a party for the first time without a hearing, the Court of Appeals reversed this decision.
- ❖ The Court of Appeals reasoned that, scrivener’s error or no, if there is an error in a workers’ compensation award, then the party claiming error must either address that error before the State Board or on an appeal from that award, but the superior courts lack the authority to alter an award from the State Board or to add parties as part of an enforcement proceeding under O.C.G.A. § 34-9-106.
- ❖ The Court of Appeals cited, with emphasis, the text of O.C.G.A. § 34-9-106: “Any party in interest may file in the superior court ... an award ... *whereupon the court shall render judgment in accordance therewith...*”
- ❖ The text of that code section permits the superior court only to enforce the award as written during enforcement proceedings, and, therefore, the Court of Appeals reversed the superior court’s decision, thus removing both newly added parties.
- ❖ The Court of Appeals found that, even if the award suffered from “scrivener’s error,” the superior courts lack authority to modify awards as part of an enforcement proceeding.

Impact

This case was, unquestionably, a victory for employers and insurers. Typically speaking, superior courts possess the authority, under O.C.G.A. § 9-11-60(g), to correct their own orders, judgments, and awards for clerical or “scrivener’s error.” Based on that statutory provision, one might expect that the same would hold true for awards issued by the State Board of Workers’ Compensation.

Certainly the superior courts would have the power to review an award of the State Board for legal errors *on appeal*, but now there is no question that it would be reversible error for any superior court to modify such an award or add a new party to an award during enforcement proceedings under O.C.G.A. § 34-9-106. This case succinctly removes any doubt on that issue.

THE “LUNCH BREAK DEFENSE”

Buck Burriss

A rarely used defense in workers’ compensation cases may be applicable when an employee alleges an injury during a time when they were “off the clock” or on a regularly scheduled break. This defense, known as the “Lunch or Break Defense” may be appropriate in situations where an employee is off the clock or on break and not subject to the employer’s demands or control at the time of an accident. This defense, though riddled with exceptions, is one that employers should keep in mind when circumstances indicate an injury during a break.

In workers’ compensation matters, it is the burden of the employee to show an injury by accident that arose out of and in the course of employment. After an employee meets this burden, the employer, when asserting a “Lunch

or Break Defense” must then show that the injury occurred during a regularly scheduled break where the employee has full control of their personal actions, so called “freedom of action.” It is important to note that unscheduled breaks, such as brief restroom visits, do not fall into the category of a regularly scheduled break where an employee is not subject to the demands or control of the employer.

The freedom of action portion of this defense means that the employee is allowed to pursue his or her own affairs and is not engaged in the employer’s business. An older case, American Hardware Mutual Insurance Co., v. Burt, 103 Ga. App. 811 (1961), provides some insight into freedom of action. In Burt, the Claimant was traveling home for supper using an Employer provided vehicle, which he also used to make deliveries while working. The Claimant took his supper break at the convenience of the employer and would often make deliveries on his way home or when returning from his break. On the date of accident, the Claimant was injured on a direct route home for supper. The Court of Appeals held that claim was compensable as the Claimant did not have freedom of action and noted the following: the employer furnished the transportation, controlled the time and duration of the trips home which depended on the business in the store, and the employer also retained the right to have certain duties performed during the trip.

Also consider Travelers Ins. Co. v. Smith, 91 Ga. App. 305, 85 S.E.2d 484 (1954) where a Claimant, returning from lunch break, approximately 3 minutes before resuming his job duties, sustained an injury when he fell, while walking up the steps, in the employer’s building while going to his work station. The Court of Appeals held this injury to be compensable, noting that the Claimant was “returning to his employment and is injured at a place and time where it is necessary for him to be in order to get back to his work station at the time set for him to recommence his duties.” As

you can see, if an employer has control over the employee's break, or if the employee is in the process of returning to his work station and in close proximity to same, a "Lunch or Break Defense" will fail.

We must also consider whether or not the employee was engaged in reasonable ingress/egress. Georgia law has long held that an employee is allowed a period of time for reasonable ingress and egress from the immediate place of work, and during this time the employee remains in the course of their employment. Meaning even if the Claimant was not working, or on the clock, an injury, if on the premises could be compensable. That said, there are certain requirements when engaged in ingress/egress used in determining compensability. 1) There is no real time requirement; however, a period of 30 minutes allowing ingress has been found reasonable. 2) The Claimant must also be on the employment premises, and an employer provided parking facility has been determined to be an employment premises. You may be asking "how does ingress/egress work when an employee is on a scheduled break?" This was part of the aforementioned Travelers Ins. Co. V. Smith case. In Smith, the Claimant was still on his scheduled break; however, he was in the process of returning to work, such that he had returned to his scope of employment. The distinction here is that the Claimant was on the Employer premises, returning to his work station.

Practical Tips for Human Resources Professionals

An employer who allows employees regularly scheduled breaks, where the employee has freedom of action, should keep time records of employee breaks. This can be done through time clocks or sign in/out sheets. The documentation of an employee's break is something certainly used in determining the

compensability of and defending a workers' compensation claim should an employee sustain an accident while on break.

NEVER UNDERESTIMATE THE POWER OF IMPEACHMENT:

Hughston Orthopedic Hospital v. Wilson

John David Blair

Appeals from the State Board of Workers' Compensation exist primarily to serve one very consistent purpose: the correction of legal error. Time and time again, however, one or both of the parties will appeal a decision from the State Board on purely factual grounds and attempt to paint the error(s) alleged as one of fact rather than law.

This is one of those cases. The Court of Appeals once again reminds us that weighing the credibility of witnesses and evidence is the exclusive province of the State Board and not the superior court. The Board's findings in this regard will not be disturbed on appealⁱⁱ.

Case Background

- ❖ The Employee/Claimant Wanda Wilson asserted that temporary exposure to certain chemicals (wallpaper glue and primer fumes) at Employer Hughston Orthopedic Hospital's facility caused her to suffer permanent brain damage.
- ❖ The Employee/Claimant lost her workers' compensation claim before the State Board at both the trial and Appellate Division levels due, primarily, to credibility issues.
- ❖ Dr. Larry Empting (after meeting with the Employee/Claimant one time and conducting no tests) ruled that the

Employee/Claimant had a “chemical sensitivity” to the wallpaper materials and that the chemical exposure at work had caused lasting neurological problems.

- ❖ On the other hand, a neurologist who examined the Employee/Claimant determined that her problems were “psychogenic” or psychological rather than physiological in origin.
- ❖ The ALJ who heard the case reviewed the medical evidence and did not find Dr. Empting’s conclusions to be persuasive. The ALJ instead found that, while the Employee/Claimant may have suffered a temporary adverse reaction to the wallpaper chemicals, she failed to prove by a preponderance of the evidence that her persistent symptoms were caused by work-related chemical exposure.
- ❖ The ALJ also noted that, Wilson “stuttered in a bizarre, sporadic pattern which appeared to be feigned,” “would lapse into talking like a baby,” “would speak in a very shrill, high pitched tone at times,” and “on several occasions sounded as though she were speaking in tongues.”
- ❖ Because the ALJ found neither Dr. Empting’s testimony nor the Employee/Claimant’s testimony compelling/credible, the ALJ denied the Employee/Claimants claim for workers’ compensation benefits.
- ❖ The Employee/Claimant appealed to the Appellate Division of the State Board, and it adopted the ALJ’s findings as its own.
- ❖ The Superior Court of Muscogee County reversed the Board’s conclusions and remanded the case to be tried again by a *different* ALJ.

- ❖ The Muscogee County Superior Court found only that both levels of the State Board misconstrued the evidence and cited no purely legal error as grounds for remanding the case.

Decision/Ruling

- ❖ The Court of Appeals reversed, holding that the “any evidence” rule requires the superior courts to affirm the State Board’s holdings where there is any competent evidence in the record to support them.
- ❖ The Court of Appeals held that the medical opinions of the independent neurologist constituted valid evidence in support of the Board’s denial of benefits, which in turn constituted “any evidence” supporting the findings of the State Board.
- ❖ Moreover, the Court of Appeals held that assessing the credibility of witnesses and weighing evidence in dispute is the exclusive province of the State Board, and the superior courts are not authorized to disturb such findings on appeal.
- ❖ Because the Board did not find either Dr. Empting’s conclusions or the Employee/Claimant’s testimony to be credible, the Board was entitled to find that the Employee/Claimant failed to meet her burden of proof.
- ❖ The Court of Appeals, reaching these conclusions, found all other issues to be moot, implicitly including the superior court’s improper attempt to remand to the trial division of the State Board rather than the Appellate Division.
- ❖ Ergo, the Court of Appeals reaffirmed the decision of the State Board denying benefits.

Impact

There are many opinions issued by the Court of Appeals to be pulled from the ether reversing various superior courts for violating the “any evidence rule,” but few of them so clearly demonstrate the value to employers and insurers of winning their cases before the State Board on the issue of credibility. Such victories are, in most instances, *appellate-proof*.

For employers and insurers alike, it can be frustrating to win a case before the State Board only to eventually lose that same victory on appeal to the superior court. It is challenging enough to overcome claims of unwitnessed and/or gradual onset injuries/conditions before the State Board when there is little in the way of objective evidence to overrule an employee’s subjective complaints. To win such a case then lose it following the employee’s appeal the superior court is, in addition to being very frustrating for employers and insurers, usually the wrong result.

In cases where the employee’s subjective complaints are not verifiable by objective evidence (e.g. diagnostics), the testimony of the employee and her diagnosing physician are critical to determining who will triumph before the Board. The employee must prove his/her case by at least *some* credible evidence.

When the employee and her doctor are both effectively impeached at trial (whether for reasons related to honesty, memory, or bias), and when there is no objective evidence such as diagnostics/films to prove a work injury, there is no evidence left to support an award of benefits. Moreover, decisions reached by the Board in weighing the evidence and assessing the credibility of witnesses are final and, absent fraud, cannot be disturbed by the superior or higher courts on appeal.

The resulting denial of benefits from the Board is, therefore, appellate-proof. Whenever

possible, it is in an employer/insurer’s best interest to win contested cases before the Board on credibility/impeachment determinations, thus foreclosing reversals on appeal.

RECOMMENDATION OF PERMANENT
TOTAL DISABILITY BY DISTRICT
DIRECTOR IN LONGSHORE (LHWCA)
CASE IMPLIES SECTION 10(F) BENEFITS:
Wilson v. Services Employees Int’l.

John David Blair

In all cases arising under the US Longshore and Harbor Workers’ Compensation Act (“LHWCA”) and its extensions, including the Defense Base Act (“DBA”), an employer/insurer shall be obligated to pay an award of attorney’s fees under § 28(b) where it rejects the recommendation of the district director (USDOL/DLHWC) for disposing of the claim and the US administrative law judge later awards a greater amount of compensation than that paid by the employer/insurer. Moreover, in case rendered by the Benefits Review Board on October 19, 2010, it was held that a district director’s recommendation of permanent total disability (PTD) benefits implicitly includes §10(f) cost of living benefits and must therefore be included in calculating the award of attorney’s fees to counselⁱⁱⁱ.

Case Background

- ❖ Employee/Claimant David Wilson sustained injuries to his neck, spine, and right knee in the course of his work for the Employer, Services Employees International, Inc., as a truck driver in Iraq on September 7, 2005.
- ❖ Upon returning to the United States, the Employee/Claimant had multiple surgeries, and the Employer voluntarily paid TTD benefits under the LHWCA/DBA from

September 21, 2005 at the rate of \$1,047.16 per week.

- ❖ The Employee/Claimant filed a claim for PTD benefits, and the Employer did not controvert the claim, as the parties stipulated that maximum medical improvement was reached on March 31, 2008.
- ❖ The district director held an informal conference by correspondence and issued a recommendation on May 21, 2008 that the Employer pay PTD benefits to the Employee/Claimant from March 31, 2008.
- ❖ The recommendation of the district director did not expressly recommend, however, payment of §10(f) cost of living adjustments with respect to PTD benefits.
- ❖ The Employee requested a formal hearing before an administrative law judge to assert his entitlement to PTD benefits with the §10(f) cost of living adjustments.
- ❖ The ALJ found that the Employee/Claimant was unable to return to his usual employment.
- ❖ The ALJ further ruled that, though the Employer established the existence of suitable alternative employment, the Employee/Claimant had performed a diligent job search and was unable to obtain any work.
- ❖ The ALJ awarded TTD benefits from September 21, 2005 through March 31, 2008 (the date of maximum medical improvement) and PTD benefits from that date forward subject to annual (cost-of-living) increases under 33 USC § 910(f).
- ❖ The Employee/Claimant's attorney sought an award of attorney's fees for his work before the ALJ totaling \$16,878.01, which fee the ALJ denied.

- ❖ The ALJ denied the requested attorney's fee because it was based exclusively on work to obtain §10(f) benefits, which were not expressly included in the district director's recommendation.
- ❖ The ALJ concluded that, since the Employer did not controvert the payment of benefits, no attorney's fee could be imposed under 33 USC § 928(a), and, because the Employer paid all benefits expressly recommended by the district director, no attorney's fee could be imposed under 33 USC § 928(b) either.
- ❖ Counsel for the Employee/Claimant appealed the denial of any attorney's fees the Benefits Review Board ("BRB").

Decision/Ruling

- ❖ The BRB agreed with the ALJ that no fee was available under § 28(a), but it reversed the ALJ's denial of attorney's fees under § 28(b).
- ❖ The BRB reasoned that, under Andrepoint v. Murphy Exploration & Productions Co.^{iv}, four element must all be satisfied to justify an award of attorney's fees under §28(b): (1) an informal conference must be held; (2) the district director must then issue a written recommendation; (3) the employer must reject (in whole or in part) that recommendations; and (4) the employee/claimant must obtain following a formal hearing more compensation than was recommended by the district director.
- ❖ The BRB noted that the first two elements were undisputedly satisfied in this case, so it limited its analyses to the latter two elements.
- ❖ With respect to the third element, the BRB ruled that the district director's recommendation that PTD benefits be paid

implicitly included a recommendation that §10(f) benefits be paid as well, as the law requires the latter to follow the former, and the Employer's failure to pay the latter represented a partial rejection of the district director's (implicit) recommendation.

- ❖ It is also noteworthy that, before the ALJ, the Employer unsuccessfully argued for the imposition of PPD benefits rather than PTD benefits, in which case §10(f) benefits would not have been payable, but the ALJ imposed PTD benefits over the Employer's objection.
- ❖ With respect to the last element, as the Employer had paid the PTD benefits but not the §10(f) cost of living adjustments, the BRB found that the Employee/Claimant obtained greater compensation before the ALJ than the Employer had paid following the recommendation of the district director.
- ❖ For these reasons, the BRB reversed the ALJ's denial of an attorney's fee under §28(b) and remanded the case to the ALJ for proceedings to determine the appropriate amount of that fee.

Impact

Knowing when liability for attorney's fees under the LHWCA and its extensions arises and in what amounts can be, and often is, a complex question for employers and insurers to answer. This case, however, follows a clear, brightline rule that should, at least in part, ease this burden.

There is no longer any question, at this time, that a recommendation from the district director for the payment of permanent total disability benefits implies/includes a recommendation for the payment of benefits under 33 USC § 910(f). If the §10(f) benefits are not timely paid following such a recommendation, and if the employee/claimant is successful in obtaining PTD benefits from the Board, then some amount of attorney's fees will be owed to the employee/claimant's counsel for work obtaining the §10(f) benefits, regardless of whether the employer/insurer has previously paid PTD benefits as recommended.

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ⁱ Brannon v. Garcia, 2010 WL 4009971, Case No. A10A1459 (Ga.App. 2010).

ⁱⁱ Hughston Orthopedic Clinic v. Wilson, 2010 WL 4069333, Case No. A10A1908 (Ga.App. 2010).

ⁱⁱⁱ Wilson v. Services Employees Int'l. Inc., BRB No. 10-0261 (USDOL Benefits Review Board, October 19, 2010).

^{iv} 566 F.3d 415, 43 BRBS 27 (CRT) (5th Cir. 2009).