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LABOR AND INDUSTRIAL RELATIONS

Workers' Compensation: Provide Guidelines and Limits on Number of Corporate Exemptions; Revise Provisions Relating to Subrogation; Create a Fraud and Compliance Unit; Provide Requirements Relating to Advertising; Revise Other Miscellaneous Aspects of Workers' Compensation System

CODE SECTIONS: O.C.G.A. §§ 34-9-2.1, -11.1, -18 to -19 (amended), -24, -30 to -32 (new), -100, -102, -200.1, -203, -265, -358 (amended)

BILL NUMBER: HB 596

ACT NUMBER: 336

GEORGIA LAWS: 1995 Ga. Laws 642

SUMMARY: The Act amends several aspects of the workers' compensation system. First, the Act makes several changes affecting legal action under the Workers' Compensation Act, including changes affecting employer's subrogation liens, the admissibility of certain evidence, and required mediation. Second, the Act attempts to eliminate fraud in the area of workers' compensation by imposing heavier penalties and by establishing a fraud and compliance unit within the Workers' Compensation Board. Furthermore, the Act includes the Workers' Compensation Truth in Advertising Act of 1995 to assure truthful and adequate disclosure in all advertisements relating to workers' compensation. Finally, the Act makes numerous miscellaneous changes that affect the system of workers' compensation, such as revising the definition of catastrophic injuries, limiting corporate exemptions, and providing for assessments of penalties against employers or their insurance carriers for delay in payment of benefits.

EFFECTIVE DATE: Retroactive to July 1, 1992, O.C.G.A. § 34-9-11.1(c); Retroactive (no specified date), § 34-9-102; July 1, 1995, §§ 34-9-2.1, -18 to -19, -24, -30 to -32, -100, -200.1, -203, -265, -358

History

The workers' compensation system was created to benefit both labor and management by providing necessary medical care to injured employees without the cost and aggravation of civil tort suits against employers.¹ However, the program has been a great burden on all parties involved.² Many businesses have been burdened by the current system or forced out of business due to the increasing cost of insurance premiums.³ In recent years, the Georgia General Assembly has struggled to reform the current workers' compensation system to control and possibly reduce the costs involved while maintaining a system that is equitable to everyone involved.⁴

While amending the program, the General Assembly discovered several other problems with the current statute that needed correction.⁵ These particular concerns were addressed in HB 596.⁶

HB 596

Revise the Cause of Action

The Act amends Code section 34-9-11.1 in several significant ways. First, it adds "death benefits" as one of the limited benefits

1. See *Legislative Review*, 9 GA. ST. U. L. REV. 285, 286 (1992).

2. Telephone Interview with Rep. Bob Lane, House District No. 146 (Apr. 28, 1995) [hereinafter Lane Interview]. Rep. Lane, a co-sponsor of HB 596, is Chairperson of the House Industrial Relations Committee. *Id.*

3. *Id.*

4. *Id.*; Telephone Interview with Sen. G.B. "Jake" Pollard, Jr., Senate District No. 24 (June 8, 1995) [hereinafter Pollard Interview]; see also *Legislative Review*, 11 GA. ST. U. L. REV. 204 (1994); *Legislative Review*, *supra* note 1, at 285. According to Sen. Pollard, the Georgia General Assembly, with the help of various groups, is constantly improving the law of workers' compensation because it affects most every business and employee in the state. Pollard Interview, *supra*.

5. Lane Interview, *supra* note 2; Pollard Interview, *supra* note 4.

6. Lane Interview, *supra* note 2; Pollard Interview, *supra* note 4.

available under the section.⁷ Because some courts interpreted the statute as not including death benefits, the General Assembly amended the statute to provide expressly for the coverage of such benefits.⁸

Additionally, the Act changes the statute of limitations for causes of action filed under this Code section.⁹ Under the 1992 version of this Code section, when an injured employee failed to bring a valid claim against a third party within one year of the date of the injury, the cause of action would be automatically assigned to the employer or its insurer.¹⁰ This language created a conflict when an employee did not assert the claim within one year but was still within the applicable statute of limitations under tort law.¹¹ Thus, the General Assembly changed the language to provide that employees do not prematurely lose their right of action to their employers.¹² Instead, an employee is now entitled to bring the action any time within the applicable statute of limitations period.¹³ Rather than provide an automatic assignment to the employer, the General Assembly chose to provide a parallel right of action in addition to the employee's right.¹⁴ Under the Act, the employer or its insurer may,¹⁵ after

7. O.C.G.A. § 34-9-11.1(b) (Supp. 1995).

8. *See, e.g.,* Bankhead v. Lucas Aerospace Ltd., 878 F. Supp. 221 (N.D. Ga. 1994) (insurer not entitled to subrogation for payment of death benefits and funeral expenses); Pollard Interview, *supra* note 4 (noting that the 1992 version of this bill omitted death benefits).

9. O.C.G.A. § 34-9-11.1(c) (Supp. 1995).

10. 1992 Ga. Laws 1942 (formerly found at O.C.G.A. § 34-9-11.1(c) (1992)).

11. *See* Bennett v. Williams Electrical Construction Co., 450 S.E.2d 873 (Ga. Ct. App. 1994) (affirming dismissal of employee's claim against third-party tortfeasor because action was not brought within one year of injury as required by O.C.G.A. § 34-9-11.1(c) (1992)).

12. *Compare* 1992 Ga. Laws 1942 (formerly found at O.C.G.A. § 34-9-11.1(c) (1992)) with O.C.G.A. § 34-9-11.1(c) (Supp. 1995).

13. O.C.G.A. § 34-9-11.1(c) (Supp. 1995). HB 596, as introduced, did not include the language "applicable statute of limitations"; rather, it merely changed the statute of limitations for the employee from one year to two years. HB 596, as introduced, 1995 Ga. Gen. Assem. The change to "applicable statute of limitations" period was made by the House Committee on Industrial Relations because a change to two years would not solve the problem since some statutes of limitation are longer than two years. Lane Interview, *supra* note 2.

14. O.C.G.A. § 34-9-11.1(c) (Supp. 1995). The previous language regarding subrogation was ambiguous and needed to be amended. Pollard Interview, *supra* note 4. According to Sen. Pollard, if an employee did not bring an

one year from the date of the injury, bring an action on behalf of the employee.¹⁶ Because the Act provides the employee, the employer, or the employer's insurer the right to intervene, the Act requires the party bringing the action to immediately notify the other parties of the cause of action.¹⁷ Regardless of which party brings the action, if the employer or its insurer recovers more than was paid to the employee, the excess amount recovered shall be paid to the employee.¹⁸ Lastly, the General Assembly provided that the changes regarding subsection (c), relating to the applicable statute of limitations and excess recovery by the employer, were to be applied retroactively to injuries occurring on or after July 1, 1992.¹⁹ The General Assembly wanted to make the change applicable to the date on which subrogation claims were first allowed.²⁰

action within the first year, there was some question as to whether an employer who failed to bring a cause of action would be liable to the employee. Pollard Interview, *supra* note 4. Thus, the General Assembly provided the employee, as well as the employer or its insurer, the right to bring an action, provided the statutory period had not yet run. Pollard Interview, *supra* note 4. Additionally, Sen. Pollard stressed the theory behind the right to subrogation in workers' compensation. The General Assembly wanted to encourage injured employees and employers to seek compensation for their damages from the third-party tortfeasor. Pollard Interview, *supra* note 4. Thus, when the General Assembly created the right to subrogation in 1992, it granted to the injured employee or the employer the right to recover attorneys' fees from the third party tortfeasor. O.C.G.A. § 34-9-11.1(d) (Supp. 1995); Pollard Interview, *supra* note 4. Sen. Pollard noted, however, that the language creating the right to attorneys' fees is discretionary; thus, the court will decide whether a party is entitled to attorneys' fees and what amount is reasonable. Pollard Interview, *supra* note 4.

15. O.C.G.A. § 34-9-11.1(c) (Supp. 1995). The Senate Committee on Insurance & Labor added the language "but is not required to" after the word "may" in the phrase "the employer or such employer's insurer may assert the employee's cause of action" because the Senate wanted to make clear that the employer's right of subrogation was optional, not mandatory. Pollard Interview, *supra* note 4; *see also* HB 596 (SCA), 1995 Ga. Gen. Assem.

16. O.C.G.A. § 34-9-11.1(c) (Supp. 1995). This action may be brought in the name of the employee or in the name of the employer or its insurer. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* § 34-9-11.1(e).

20. Pollard Interview, *supra* note 4. HB 596, as introduced, did not make

Relax Requirements for Admissibility of Medical Reports

The Act changes the requirements for the admissibility of medical reports.²¹ It eases the requirements for admissibility of medical reports by striking the language "on a form prescribed by the board or in narrative form" and replacing it with "or document."²² The Act also provides that an "opinion relevant to any medical issue" shall be admissible.²³ These changes are intended to permit a broader range of medical reports due to the difficulty and expense of obtaining expert testimony.²⁴ This Code section shall be applied retroactively as well as prospectively.²⁵

Require Mediation

The Act facilitates resolution of workers' compensation claims by providing the State Board of Workers' Compensation with authority to require parties to submit to mediation.²⁶ The

the law retroactive. *See* HB 596, as introduced, 1995 Ga. Gen. Assem. The House Committee on Industrial Relations introduced a floor amendment that included language that would make all changes in O.C.G.A. § 34-9-11.1 retroactive. HB 596 (HFA), 1995 Ga. Gen. Assem. However, Sen. Lane proposed a floor amendment that restricted the retroactivity to subsection (c). This amendment was incorporated into the final version of the bill. Without Sen. Lane's amendment, retroactive application of subsection (b) would have affected several cases that were currently pending. Lane Interview, *supra* note 2. According to Rep. Lane, the General Assembly had several complaints about the retroactivity of the "death benefits" amendment and, thus, elected to restrict the retroactivity to subsection (c). Lane Interview, *supra* note 2. Additionally, Sen. Pollard stated that the Senate usually is reluctant to make any law retroactive due to the problems that may arise. Pollard Interview, *supra* note 4. According to Sen. Pollard, the retroactive date is not meant to defeat any statute of limitations period that may have expired. Pollard Interview, *supra* note 4. Additionally, the retroactivity of this subsection should apply only to claims that have not been adjudicated. Pollard Interview, *supra* note 4. With regard to claims that were decided under the prior law but are currently on appeal, Sen. Pollard stated the former law should apply because the case was adjudicated prior to the amendment. Pollard Interview, *supra* note 4.

21. O.C.G.A. § 34-9-102(e)(2) (Supp. 1995).

22. *Id.*; 1994 Ga. Laws 887, § 7, at 893 (formerly found at O.C.G.A. § 34-9-102(e)(2) (Supp. 1994)).

23. O.C.G.A. § 34-9-102(e)(2) (Supp. 1995).

24. Lane Interview, *supra* note 2.

25. O.C.G.A. § 34-9-102(e)(2) (Supp. 1995).

26. *Id.* § 34-9-100(b). The State Board of Workers' Compensation asked the General Assembly to include provisions for mediation and non-binding

General Assembly found that mediation would aid in decreasing workers' compensation costs by avoiding litigation in some cases.²⁷

Increase Penalties for Fraud

Fraud is a prevalent problem in the area of workers' compensation.²⁸ Thus, the Georgia General Assembly made several changes in an attempt to combat this problem.²⁹ First, the General Assembly amended the statute to increase both civil³⁰ and criminal³¹ penalties against anyone who knowingly or intentionally (or "willfully" for criminal violations) makes a false or misleading statement when obtaining or denying benefits under the Act. Furthermore, the Act provides that the costs of collection,³² investigation,³³ and prosecution³⁴ may be assessed against anyone penalized under these Code sections.

In addition to increasing penalties for violations involving fraudulent behavior,³⁵ the Act establishes a fraud and compliance unit within the office of the State Board of Workers' Compensation.³⁶ According to the Act, the purpose of this unit is to assist in the investigation of allegations of fraud and noncompliance as well as to prevent fraud and abuse.³⁷ The Act

arbitration. Pollard Interview, *supra* note 4. According to Sen. Pollard, these provisions were included in the proposed 1992 legislation but were not included in the final version. Pollard Interview, *supra* note 4. Although the Board can require mediation proceedings, a party who fails to participate in mediation will not forfeit the right to bring a cause of action. Pollard Interview, *supra* note 4.

27. Lane Interview, *supra* note 2.

28. Lane Interview, *supra* note 2.

29. Lane Interview, *supra* note 2.

30. O.C.G.A. § 34-9-18(b) (Supp. 1995).

31. *Id.* § 34-9-19. HB 596 originally included language that a person violating this section would be guilty of a misdemeanor of "a high and aggravated nature." HB 596, as introduced, 1995 Ga. Gen. Assem. This language was deleted because it would limit the amount that an individual could be fined to \$1000 and the General Assembly wanted to increase the penalty to a maximum of \$10,000. Lane Interview, *supra* note 2.

32. O.C.G.A. § 34-9-18(e) (Supp. 1995).

33. *Id.* § 34-9-19.

34. *Id.*

35. *Id.* §§ 34-9-18 to -19.

36. *Id.* § 34-9-24(a).

37. *Id.*

requires the unit to notify the prosecuting attorney and to cooperate in the prosecution of any criminal activity it uncovers.³⁸ The General Assembly included this requirement to increase prosecution of fraudulent behavior.³⁹

To assist the unit in performing its duties as required under the Act, the General Assembly expressly provided that “[t]he State Board of Workers’ Compensation or any employee or agent thereof is not subject to civil liability for libel, slander, or any other relevant tort.”⁴⁰ This protection also extends to any publication of reports or bulletins prepared under authority of this Code section.⁴¹

Limit Corporate Exemptions

The 1992 version of Code section 34-9-2.1 allowed corporate officers to elect exemption from the Act.⁴² The 1995 Act limits that exemption to no more than five corporate officers.⁴³ Additionally, for the exemption to be effective, a written certification is required and must include both the officer’s name and position.⁴⁴ The General Assembly placed this restriction on a corporation’s ability to exempt its officers from the Workers’ Compensation Act because many corporations, especially closely held corporations, were labelling certain employees officers for the purpose of avoiding coverage under the Act.⁴⁵

Redefine Catastrophic Injury

The Act also changes the definition of “catastrophic injury” to include injuries which “prevent[] the employee from being able to perform his or her prior work or any work available in substantial numbers within the national economy.”⁴⁶ In determining whether an injury is catastrophic, the Workers’

38. *Id.*

39. Lane Interview, *supra* note 2.

40. O.C.G.A. § 34-9-24(b) (Supp. 1995).

41. Lane Interview, *supra* note 2.

42. 1988 Ga. Laws 1679 (formerly found at O.C.G.A. § 34-9-2.1 (1992)).

43. O.C.G.A. § 34-9-2.1(a)(1) (Supp. 1995).

44. *Id.* § 34-9-2.1(a)(2). This requirement was imposed to prevent disputes as to who was exempt from the Act when a particular injury occurs. Lane Interview, *supra* note 2.

45. Lane Interview, *supra* note 2.

46. O.C.G.A. § 34-9-200.1(g)(6) (Supp. 1995).

Compensation Board shall give deference to a decision granting or denying disability income benefits under Title II or supplemental security income benefits under Title XVI of the Social Security Act.⁴⁷ The General Assembly made these changes to eliminate the confusion caused when claimants use the Social Security Administration's definition of catastrophic injury and the state Workers' Compensation Board uses another.⁴⁸

Modify Dependency Benefits

The General Assembly amended Code section 34-9-265 by striking subsection (5).⁴⁹ Prior to the amendment, if the dependents of the employee were not citizens of the United States or the Dominion of Canada at the time of death, then the dependents were limited to a maximum compensation of \$1000.⁵⁰ The General Assembly viewed the previous limitation as both unfair and inadequate⁵¹ and, thus, chose to eliminate it entirely.⁵² Now, foreign dependents are able to recover up to \$100,000, the maximum amount allowed under the statute.⁵³

Furthermore, the Act provides that when an insurer or self-insurer does not find dependents who qualify to receive dependency benefits, the insurer nevertheless is required to pay into the state treasury's general fund either one-half of the benefits that would have been payable or \$10,000, whichever is less.⁵⁴ The General Assembly reasoned that the state should benefit from the premium payments that were made over the years to the insurance company.⁵⁵

47. *Id.*; see 42 U.S.C. §§ 416(i), 1382 (1988).

48. Lane Interview, *supra* note 2.

49. Compare 1985 Ga. Laws 727, § 11 (formerly found at O.C.G.A. § 34-9-265(b)(5) (1992)) with O.C.G.A. § 34-9-265(b) (Supp. 1995).

50. 1985 Ga. Laws 727 (formerly found at O.C.G.A. § 34-9-265(b)(5) (1992)).

51. Pollard Interview, *supra* note 4.

52. See O.C.G.A. § 34-9-265(b) (Supp. 1995).

53. *Id.* § 34-9-265(d).

54. *Id.* § 34-9-265(f).

55. Pollard Interview, *supra* note 4.

Assess Penalty for Delinquent Payment of Medical Charges

The Act amends Code section 34-9-203 by adding subsection (c).⁵⁶ This subsection allows the Board to assess a penalty against an employer or its insurance carrier when it fails to pay the medical charges within sixty days from the date that the employer or its insurer receives the charges and reports required by the Board. The penalty will be imposed only if the medical provider complied with the requirements of the law and board rules.⁵⁷ Under the Act, this penalty shall be payable to the medical provider.⁵⁸ This provision was added because employers and their insurers were not paying medical providers within a reasonable time, thus creating conflicts between the employers or their insurers and the medical profession.⁵⁹ The General Assembly resolved this conflict by establishing a timetable to which an employer or its insurer must adhere or be penalized.⁶⁰

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56. Compare 1987 Ga. Laws 806 (formerly found at O.C.G.A. § 34-9-203 (1992)) with O.C.G.A. § 34-9-203(c) (Supp. 1995).

57. O.C.G.A. § 34-9-203(c) (Supp. 1995).

58. *Id.*

59. Lane Interview, *supra* note 2.

60. Lane Interview, *supra* note 2.