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## LABOR AND INDUSTRIAL RELATIONS

*Workers' Compensation: Refine the Definitions of Injury and Independent Contractor; Require the Use of Medical Evidence; Provide Exemptions for Limited Liability Corporations; Require Probate Courts to Appoint Guardians; Specify the Use of Guidelines in the Determination of Impairment*

CODE SECTIONS: O.C.G.A. §§ 34-9-1 to -2.1, -17 to -19, -40, -200.1, -226, -243, -261, -263, -265, -290, -367 (amended)

BILL NUMBER: HB 1291

ACT NUMBER: 1013

GEORGIA LAWS: 1996 Ga. Laws 1291

SUMMARY: The Act adds "stroke" to the definition of injury for purposes of workers' compensation, and allows compensation for stroke and similar medical conditions, only if medical evidence is part of the proof that the condition is work related. In the event of injury, the Act requires the use of the fourth edition of the GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT to determine proper compensation for permanent partial disability. The Act allows limited liability companies to exempt a maximum of five members. The Act requires payment of fines and penalties to the State Board of Workers' Compensation for deposit to the General Fund of the State Treasury. The Act requires employers who voluntarily provide rehabilitation services to utilize suppliers certified or approved by the Board. The Act increases weekly benefits for temporary total disability. The Act removes the jurisdiction of the Board to appoint guardians for minors and mentally incompetent workers' compensation claimants. The Act relieves the Board of the statutory duty to report hazardous occupations and occupational diseases. In cases in which the Subsequent Injury Trust Fund refuses or fails to accept a valid claim without reasonable grounds, the Act allows the assessment of the claimant's attorney fees against the Fund.

EFFECTIVE DATE: July 1, 1996

### *History*

The Georgia General Assembly enacted the workers' compensation system to protect employees in the event of work related injuries and to protect employers from large tort damages.<sup>1</sup> Because of the complexity of the system, several problems have developed since its initiation,<sup>2</sup> and the General Assembly has responded with changes to address these problems throughout the years.<sup>3</sup> To ensure that the system remains equitable to employers and employees, the General Assembly cooperates with members of the State Workers' Compensation Board (Board) when changes in the law are necessary.<sup>4</sup> This cooperation led to the introduction of HB 1291.<sup>5</sup>

### *HB 1291*

#### *Definition of Injury*

The Act amends Code section 34-9-1, which defines "injury" in several significant ways.<sup>6</sup> The Act added "stroke" to the list of compensable injuries.<sup>7</sup> Courts had allowed benefits for stroke caused by employment, and the General Assembly and Board found stroke to be similar to the other compensable injuries in the section.<sup>8</sup> Thus, the General Assembly amended the Code to reflect courts' interpretations of compensable injuries.<sup>9</sup>

The Act further alters this section by including a requirement for medical evidence in workers' compensation claims in order for "heart disease, heart attack, the failure or occlusion of any of the coronary

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1. See *Legislative Review*, 12 GA. ST. U. L. REV. 280, 281 (1995).

2. For a summary of several prior changes in the workers compensation system, see *Legislative Review*, 9 GA. ST. U. L. REV. 285 (1992) and *Legislative Review*, 12 GA. ST. U. L. REV. 280 (1995).

3. See *supra* note 2.

4. Telephone Interview with Rep. Bob Lane, House District No. 146 (May 7, 1996) [hereinafter Lane Interview]. Representative Lane is the Chairman of the House Industrial Relations Committee and the primary sponsor of HB 1291. *Id.*

5. *Id.*

6. The Act strikes 1992 Ga. Laws 1942, § 1, at 1943 (formerly found at O.C.G.A. § 34-9-1(5) (1992)). This section required disabilities to be rated using the GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT from the American Medical Association. *Id.* The requirement remains in the Code as amended by the Act, with the further requirement that the fourth edition be used. O.C.G.A. § 34-9-263(d) (Supp. 1996). The change placed the ratings guide in the most appropriate Code section. Lane Interview, *supra* note 4.

7. O.C.G.A. § 34-9-1(4) (Supp. 1996).

8. See generally Lane Interview, *supra* note 4.

9. *Id.*

blood vessels, stroke, or thrombosis” to be compensable.<sup>10</sup> The claimant must prove that the condition resulted from the “performance of the usual work of employment,”<sup>11</sup> and the proof must include medical evidence.<sup>12</sup> The statute prevents recovery for these conditions based solely on layperson testimony.<sup>13</sup>

### *Independent Contractors*

The Act refines the definition of “independent contractor.”<sup>14</sup> The General Assembly clarified the definition to equip the Board with a mechanism to classify a worker as either an employee or an independent contractor.<sup>15</sup> This classification is crucial because a worker who qualifies as an independent contractor is exempt from the workers’ compensation system.<sup>16</sup> To be an independent contractor, the worker must be “a party to a contract . . . which intends to create an independent contractor relationship, [have] the right to exercise control over the time, manner, and method of the work to be performed . . . and [be] paid on a set price per job or a per unit basis, rather than on a salary or hourly basis.”<sup>17</sup> The Act requires a worker to meet all three

10. O.C.G.A. § 34-9-1(4) (Supp. 1996); *see also* Lane Interview, *supra* note 4 (stating that medical evidence is now required to prove each of these conditions compensable under the system).

11. O.C.G.A. § 34-9-1(4) (Supp. 1996).

12. As introduced, HB 1291 provided that the specified medical conditions could be compensable “if such conditions are deemed by a physician to be related to the work of employment at the time the condition occurs,” but this language was simplified by a Senate committee substitute to state simply that a claimant’s proof “shall include medical evidence.” *Compare* HB 1291 (SCS), 1996 Ga. Gen. Assem. *with* HB 1291, as introduced, 1996 Ga. Gen. Assem. Representative Lane stated that the revision constituted no substantive change. Lane Interview, *supra* note 4.

13. Lane Interview, *supra* note 4; Telephone Interview with Jennifer Green, Fiscal/Public Affairs Officer, Georgia State Board of Workers’ Compensation (May 3, 1996) [hereinafter Green Interview]. Ms. Green worked closely with Representative Lane on HB 1291. Lane Interview, *supra* note 4. For recovery based on layperson testimony *see* Reynolds Constr. Co. v. Reynolds, 218 Ga. App. 23, 459 S.E.2d 612 (1995).

14. O.C.G.A. § 34-9-2(e) (Supp. 1996).

15. Lane Interview, *supra* note 4 (noting that the Board could not previously advise employers on whether or not certain workers qualified as independent contractors).

16. 1993 Ga. Laws 323, § 2, at 324 (codified at O.C.G.A. § 34-9-2(d) (Supp. 1996)).

17. O.C.G.A. § 34-9-2(e) (Supp. 1996). The Senate Insurance and Labor Committee added the requirement that a person or entity must “meet[ ] all of the . . . criteria.” *See* HB 1291 (SCS), 1996 Ga. Gen. Assem. No substantive change from the original version was intended. Lane Interview, *supra* note 4. The Committee also added the requirement that payment must not be “on a salary or hourly basis.” HB 1291 (SCS), 1996 Ga. Gen. Assem. Representative Lane considered this condition to be implied, but the Senate Committee clarified the language. Lane Interview, *supra* note 4; *see also* 1993 Ga. Laws 323, § 2, at 324-25 (codified at O.C.G.A. § 34-9-2(d) (Supp. 1996)).

criteria to qualify as an independent contractor, unless otherwise determined by an administrative law judge.<sup>18</sup>

### *Limited Liability Companies*

The Act amends Code section 34-9-2.1 to impose the same coverage requirements on limited liability companies (LLCs) as already exist on corporations.<sup>19</sup> In 1988, the General Assembly allowed corporate officers to exempt themselves from the workers' compensation system.<sup>20</sup> In 1995, the General Assembly limited exemptions to five corporate officers.<sup>21</sup> In order for a corporate officer or member of a LLC to be exempt, he or she must file a written certification with the insurer or the Board.<sup>22</sup> Because LLCs are relatively new in Georgia, the General Assembly amended the Code section to ensure that LLCs meet the same requirements for exemptions as corporations.<sup>23</sup> The General Assembly intended to prevent LLCs and corporations from labeling employees as LLC members or corporate officers to avoid providing workers' compensation coverage.<sup>24</sup> Before the Act, employers who had less than three employees after taking all exemptions did not have to provide workers' compensation coverage for the nonexempt employees.<sup>25</sup> The Act requires all employers with more than three employees, *before taking any exemptions*, to provide workers' compensation coverage to any employees not exempted under this section.<sup>26</sup>

The Act also changes the effective date of the invocation or revocation of an exemption. Previously, there was a thirty-day period

18. O.C.G.A. § 34-9-2(e) (Supp. 1996).

19. *Id.* § 34-9-2.1.

20. *Legislative Review*, 12 GA. ST. U. L. REV. 280, 286 (1995) (citing 1988 Ga. Laws 1679, § 1, at 1680-81 (formerly found at O.C.G.A. § 34-9-2.1 (Supp. 1995))).

21. *Id.* (citing 1995 Ga. Laws 642, § 1, at 642-43 (formerly found at O.C.G.A. § 34-9-2.1(a)(1) (Supp. 1995))).

22. O.C.G.A. § 34-9-2.1(a) (Supp. 1996).

23. Lane Interview, *supra* note 4.

24. *See Legislative Review*, 12 GA. ST. U. L. REV. 280, 286 (1995).

25. Code section 34-9-2 allows employers with fewer than three employees "regularly in service" to be exempt from the workers' compensation system. 1975 Ga. Laws 190, § 3, at 193 (codified at O.C.G.A. § 34-9-2(a) (Supp. 1996)). The Act amends O.C.G.A. § 34-9-2.1(a) to prevent employers from exempting to less than three remaining employees and thus becoming exempt from the system. O.C.G.A. § 34-9-2.1(a)(3) (Supp. 1996); Green Interview, *supra* note 13. The Act does allow exemption from coverage if no employees remain after exemptions are taken. O.C.G.A. § 34-9-2.1(a)(3) (Supp. 1996).

26. O.C.G.A. § 34-9-2.1(a)(3) (Supp. 1996).

between filing the certification with the Board and its effective date.<sup>27</sup> Now, invocations and revocations are effective when filed.<sup>28</sup>

### *Fines and Penalties*

The Act amends Code sections 34-9-18 and -19 by requiring that penalties and costs assessed be “made payable to the State Board of Workers’ Compensation.”<sup>29</sup> The amendment ensures that payments made by check are not made payable to the State of Georgia, even though the amounts are ultimately deposited in the general fund of the State Treasury.<sup>30</sup> The Act similarly amends Code section 34-9-19 to require that all criminal fines and costs be made payable to the Board and “deposited in the general fund of the state treasury.”<sup>31</sup> The Board already deposited penalties into the general fund, and the statutory amendment grants authority for this practice.<sup>32</sup>

### *Conducting Seminars*

The Board conducts seminars to educate participants about their rights and responsibilities regarding workers’ compensation claims.<sup>33</sup> Recently, state auditors, concerned with the lack of statutory authority for these seminars, requested express legislative approval for this program.<sup>34</sup> The Act authorizes the Board to conduct seminars as long as the seminars can be funded by sources other than appropriations from the General Assembly.<sup>35</sup> The Board may incorporate any excess funds generated by its seminars into its budget, subject to the approval of the Office of Planning and Budget.<sup>36</sup> Any excess funds not incorporated into the Board’s budget “lapse to the Office of Treasury and Fiscal Services.”<sup>37</sup>

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27. 1988 Ga. Laws 1679, § 1, at 1681 (formerly found at O.C.G.A. § 34-9-2.1(c) (Supp. 1995)).

28. O.C.G.A. § 34-9-2.1(c) (Supp. 1996).

29. *Id.* §§ 34-9-18(f), -19.

30. Lane Interview, *supra* note 4.

31. O.C.G.A. § 34-9-19 (Supp. 1996).

32. Lane Interview, *supra* note 4.

33. Green Interview, *supra* note 13.

34. *Id.*

35. O.C.G.A. § 34-9-40 (Supp. 1996). The Senate Insurance and Labor Commission added the language amending this Code section. HB 1291 (SCS), 1996 Ga. Gen. Assem.

36. O.C.G.A. § 34-9-40 (Supp. 1996).

37. *Id.* The Act does not provide a time frame for amending the funds into the Board’s budget, but allows the state auditors to determine whether or not the funds have been amended into the budget. *Id.*

### *Licensing of Rehabilitation Suppliers*

Rehabilitation under the workers' compensation system is required only for catastrophic injuries.<sup>38</sup> If an employer voluntarily agrees to provide a rehabilitation supplier when an injury is not catastrophic, the Act requires the rehabilitation supplier to be licensed or certified by the Board.<sup>39</sup> The requirement ensures that injured employees receive competent rehabilitation services.<sup>40</sup>

### *Appointment of Guardians*

The Act amends Code section 34-9-226 by eliminating the Board's authority, and requiring the probate court to appoint a guardian for a minor or legally incompetent claimant entitled to workers' compensation benefits.<sup>41</sup> The Act requires the probate court in the minor or incompetent's county of residence to appoint a guardian.<sup>42</sup> An appointed guardian must annually file with the probate court a copy of the guardianship returns.<sup>43</sup> A copy of the returns must also be filed with the Board, and the guardian must give notice to all parties within thirty days of any change in his status.<sup>44</sup> Prior to the Act, the Board could appoint a guardian in this situation,<sup>45</sup> but concern over the Board's possible tort liability for negligent appointment prompted legislative action.<sup>46</sup> The General Assembly and the Board felt that the probate courts were the proper entities to make such appointments; therefore, the General Assembly revised the statute.<sup>47</sup>

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38. Green Interview, *supra* note 13; see 1992 Ga. Laws 1942, § 15, at 1955-58 (codified at O.C.G.A. § 34-9-200.1 (Supp. 1996)). "Catastrophic injury" is defined as any injury that falls into one of the following categories: (1) spinal cord injury causing severe paralysis of the leg, arm, or trunk; (2) amputation of an arm, hand, foot, or leg involving the effective loss of use of that appendage; (3) severe brain or head injury; (4) second or third degree burns over 25% of the body or third degree burns over 5% of the face or hands; (5) total or industrial blindness; or (6) any other injury that would qualify an employee for diasability income benefits or supplemental security income benefits under the Social Security Act. 1992 Ga. Laws 1942, § 15, at 1957-58 (codified at O.C.G.A. § 34-9-200.1(g) (Supp. 1996)).

39. O.C.G.A. § 34-9-200.1(h) (Supp. 1996).

40. Lane Interview, *supra* note 4.

41. O.C.G.A. § 34-9-226 (Supp. 1996).

42. *Id.*

43. *Id.*

44. *Id.*

45. 1987 Ga. Laws 396 (formerly found at O.C.G.A. § 34-9-226 (1992)).

46. Green Interview, *supra* note 13.

47. Lane Interview, *supra* note 4.

*Preventing Over-Compensation*

The Act amends Code section 34-9-243 to grant employers a credit for benefits paid under chapter 8 of title 34, the Employment Security Law, toward weekly benefits due to an employee under workers' compensation.<sup>48</sup> The amended statute prevents an employee from receiving double benefits during disability periods.<sup>49</sup> The Act prevents credits to an employer for payments made as a result of permanent partial disability.<sup>50</sup>

*Increasing Maximum Weekly Benefit*

The Act increases the maximum amount of the weekly benefit payment during a period of temporary total disability to \$300.<sup>51</sup> Because Georgia ranked near the bottom in the nation in benefits paid, the General Assembly increased the statutory maximum.<sup>52</sup> Even with the increase, Georgia remains near the bottom in benefits paid.<sup>53</sup>

*Consistent Evaluation of Impairment*

The Act revises Code section 34-9-263 to require use of the fourth edition of the GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT in determining "any percentage of disability or bodily loss ratings [for permanent partial disability]. . . ."<sup>54</sup> The change is meant to ensure consistency in the rating of injuries.<sup>55</sup>

*Payment of Death Benefits*

In a compensable death case, an insurer or self-insurer that is unable to locate a dependent or a qualifying dependent of the decedent must pay one-half of the benefits, up to \$10,000, to the Board.<sup>56</sup> The Board must deposit these funds in the general fund of the State Treasury.<sup>57</sup>

48. O.C.G.A. § 34-9-243(a) (Supp. 1996).

49. Lane Interview, *supra* note 4 (noting that the amendment was enacted to prevent "double-dipping"); *see also* Green Interview, *supra* note 13.

50. O.C.G.A. § 34-9-263(f) (Supp. 1996).

51. *Id.* § 34-9-261.

52. Lane Interview, *supra* note 4.

53. *Id.*

54. O.C.G.A. § 34-9-263(d) (Supp. 1996); *see* Green Interview, *supra* note 13 (noting that a legislative change will be required every time a new edition of the GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT is released to avoid improper delegation of legislative authority); *see also* HCA Health Services v. Roach, 265 Ga. 501, 458 S.E.2d 118 (1995) (discussing improper delegation of legislative authority to an administrative agency).

55. Lane Interview, *supra* note 4.

56. O.C.G.A. § 34-9-265(f) (Supp. 1996).

57. *Id.*

Prior to the Act, death benefits had to be paid to the general fund.<sup>58</sup> Historically, the Board collected the benefits, and the amended Code section authorizes that practice.<sup>59</sup>

#### *Assessment of Attorney's Fees*

The Act amends Code section 34-9-367 by allowing a claimant to recover attorney's fees when "it is proven by a preponderance of evidence that the Subsequent Injury Trust Fund has failed or refused to accept a valid claim . . . without reasonable grounds."<sup>60</sup> The General Assembly allowed the assessment of attorney's fees because of a need for fairness to claimants.<sup>61</sup> Prior to the Act, the Subsequent Injury Trust Fund could not be held liable for attorney's fees to any party to the claim.<sup>62</sup> Because the Subsequent Injury Trust Fund can be a party to a claim, and under Georgia law all other parties can be liable for attorney's fees, the General Assembly considered it fair to allow attorney's fees against the Fund.<sup>63</sup>

#### *Removal of Obsolete Provisions*

The Act deleted Code section 34-9-290.<sup>64</sup> The section previously required reporting hazardous occupations and diseases to the Department of Human Resources.<sup>65</sup> However, since no report had ever been made, the General Assembly deleted the obsolete Code section.<sup>66</sup>

The Act also deletes a provision in Code section 34-9-17 regarding denial of compensation for an employee's willful breach of an employer-adopted and Board-approved rule or regulation.<sup>67</sup> Recognizing that the Board had never been involved in employer safety programs and did not have the necessary expertise, the General Assembly deleted the provision.<sup>68</sup>

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58. 1995 Ga. Laws 642, § 11, at 650 (formerly found at O.C.G.A. § 34-9-265(f) (Supp. 1995)).

59. Lane Interview, *supra* note 4.

60. O.C.G.A. § 34-9-367 (Supp. 1996).

61. Lane Interview, *supra* note 4.

62. 1977 Ga. Laws 608, § 1, at 617 (formerly found at O.C.G.A. § 34-9-367 (1992)); *see also* Lane Interview, *supra* note 4.

63. Lane Interview, *supra* note 4; *see also* 1992 Ga. Laws 1943, § 12, at 1952 (codified at O.C.G.A. § 34-9-108(b) (1992)).

64. O.C.G.A. § 34-9-290 (Supp. 1996).

65. 1946 Ga. Laws 103, at 119-20 (formerly found at O.C.G.A. § 34-9-290 (1992)).

66. Green Interview, *supra* note 13.

67. *Compare* O.C.G.A. § 34-9-17(a) (Supp. 1996) *with* 1994 Ga. Laws 887, § 2, at 889 (formerly found at O.C.G.A. § 34-9-17(a) (Supp. 1995)).

68. Green Interview, *supra* note 13.