WORKERS' COMPENSATION LAW

Section Newsletter

Spring 2020

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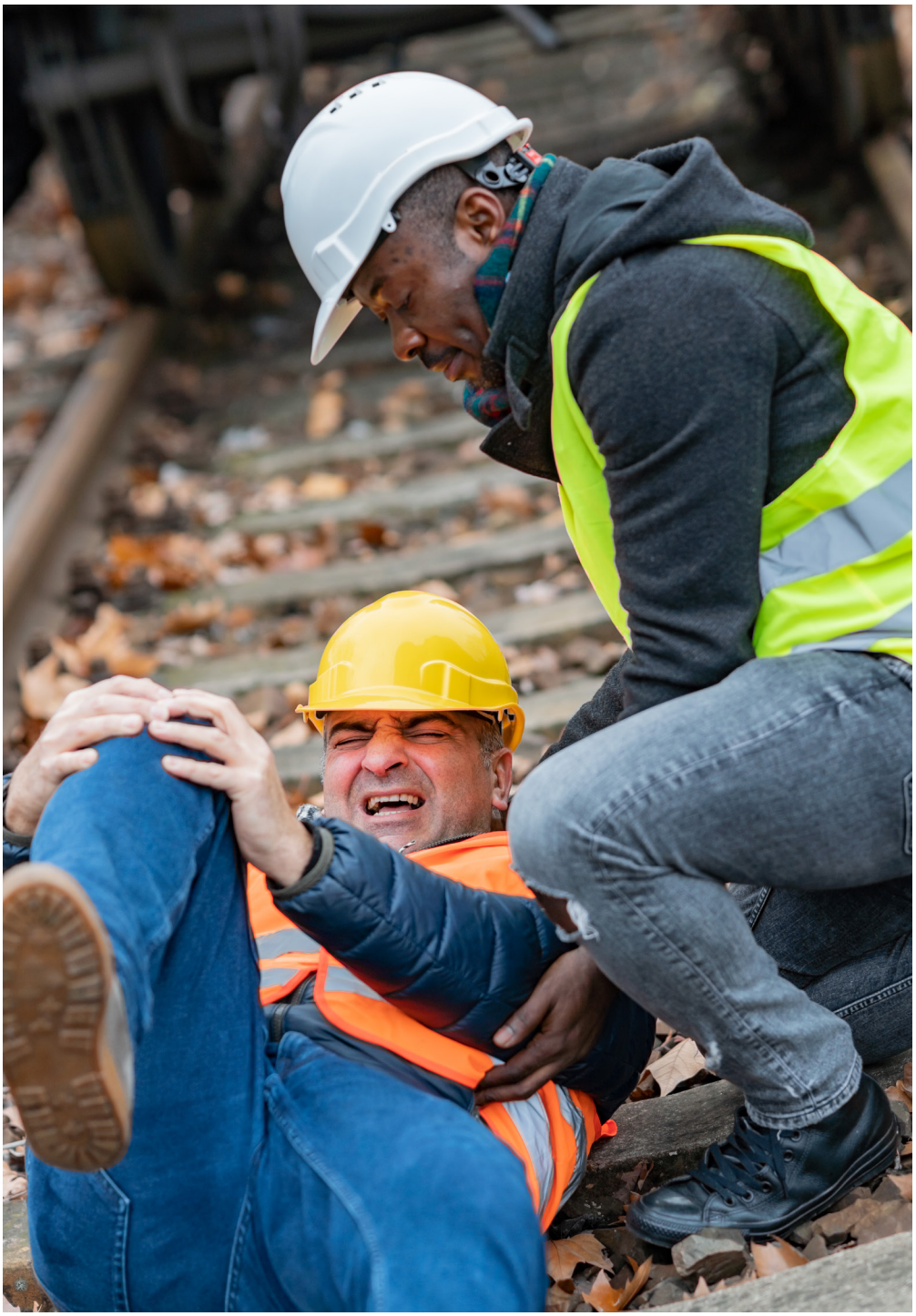

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Fast Train to Georgia's Changes: Considerations for Workers' Compensation as a Result of COVID-19

By Meredith L. Knight

Doctors' offices, claimants, attorneys, employers, and insurers have been scrambling to figure out how to move forward with medical care and other common workers' compensation issues in light of COVID-19. The changes slowly making their way through our system have now accelerated at a rapid pace. As we adapt to social distancing while we simultaneously work, see patients and serve clients, we can predict some of the changes and issues they pose as a result of COVID-19, with the most obvious issues discussed below.

Telehealth

For claimants who have already sustained a compensable injury, many medical facilities are accepting follow-up appointments via telemedicine. In workers' compensation, this is an appointment method in which a video appointment occurs between a claimant and the authorized treating physician. Telemedicine is not new; however, the workers' compensation system has never experienced a need for such appointments in the past. To move medical forward we have had to throw our skepticism aside and accept the simple reality that, if we want claimants to continue seeing the doctor during COVID-19, many must do so virtually. A number of practitioners and attorneys are uncomfortable with a medical appointment where a doctor cannot physically manipulate an injured body part. Nonetheless, patients who are coming close to the end of their medical care and physical therapy patients who are able to perform a home-exercise program now use telemedicine as a viable option.

Based on the cost of medical care, transportation, and scheduling conflicts, telemedicine is one change that is here to stay after COVID-19's social distancing mandates are over. The question will simply revolve around the frequency with which it is applied. In speaking with a number of physicians, physical therapists, and nurse practitioners, we have found that patients seeing medical providers for a follow-up may not need the literal "hands-on" touch that a new patient may require for a diagnosis, even for the determination of work restrictions. Nonetheless, an in-person assessment of a patient cannot be replaced completely. Physical therapists are professionals who watch for correct form and posture, and instruct as to the use of special equipment. They work on muscle groups, dealing with inflammation and inflexibility usually requiring a good deal of manipulation. Many claimants are successful with a home-exercise program, but a physical therapist's contact cannot be completely replaced. In the workers' compensation arena, too much gray area exists for telehealth to be the new normal.

Telehealth may not be effective for the long run due to the fact that our statutes do not address "examinations" that are not "in person." For example, a light duty release and return to work under O.C.G.A. § 34-9-104 requires an examination within 60 days of filing the WC-104 form. It is unclear as to whether a telehealth conversation satisfies this important requirement. The same goes for a full duty release and job offer pursuant to O.C.G.A. §§ 34-9-240 and 221. Attorneys will interpret these statutes to their benefit on both sides. There will be no clear rule to instruct attorneys on these points until a Board or Court of Appeals case defines the parameters of "examinations" and the requirements for job offers based on work releases procured via telemedicine.

Full duty releases and pain management will probably be the most challenged components of telemedicine in the future. Immediate concerns include the privacy of a secured connection between the doctor and patient; the ability for another party to be present without the doctor's consent or knowledge; and the ability to record the videoconference without consent of the participants. Signed expectation forms and releases will be necessary for regular telemedicine appointments in order to protect both the doctor and the patient. Some HIPAA-compliant software applications exist to serve this end, but there is no guarantee every Claimant has a smartphone or the technological ability to run such programs. This will make WC-PMT conference calls on missed appointments interesting: will the Judge ask the

Claimant to attend a telehealth appointment, or will a claimant use technology as the excuse for not attending? After COVID-19, telemedicine will probably need to be consented to by all parties, who then must accept the consequences instead of combatting the examinations' results.

Permanent Impairment Ratings and Waddell's Testing

Continuing the above, only time will tell how far telehealth can go. In the future we could see permanent impairment ratings issued via telehealth. This sounds too virtual to be true, but it is not a new idea. Further, at the end of March 2020, a number of health organizations, including the American Medical Association, supported a Telehealth Initiative website to guide physicians into telehealth and navigate difficult issues. With telehealth being a vital part of our system due to COVID-19, the impairment rating issue is forthcoming.

The problems are obvious, such as the difficulty in assessing passive and active range of motion over video. The AMA lists range of motion as an important criterion in determining impairment. This criterion seems to demand physical contact. Further, Waddell's signs cannot be assessed, including the distraction test. Defense attorneys want to see the tests properly administered, and claimant's attorneys want to see their clients passing these tests without qualification. Both sides could easily question an impairment rating or a perceived Waddell's sign interpreted over video. This is a questionable change for both sides, and we all have good reason to be wary.

Teleworking and on the Job Injuries

The most obvious accelerated change brought forth by COVID-19 is the number of individuals working from home, or "teleworking." Before mandatory social distancing, other states already experienced an influx of injury claims brought by teleworkers. The Georgia Court of Appeals has not addressed teleworking for over 15 years, (see Amedisys v. Howard, 269 Ga.App. 656, 2004), but Florida, California, New York and Colorado are seeing significant action on this topic. The advent of VPNs, advanced electronic document production and retention, cloud servers, and electronic infrastructure allows a significant number of employees to telework. The ability to define what it is to "telework" and how an employee does so will be vital to how these cases are ultimately decided in Georgia. It appears the "what, how and when" of the teleworking set-up was a deciding factor in Howard.

To that end, a handful of employers in Georgia anticipated problematic legal issues and designed specific teleworking agreements. Configurations can include a designated work area in the employee's house, with pictures provided to the employer or even an in-home inspection by the employer. Agreements can set forth designated work and break hours, and warn of software that can track a mouse or keypad remaining idle for a certain period of time. Other agreements go as far as to define what will not be considered work time, such as running personal errands or tasks that require an employee to "punch out;" and production output standards.

COVID-19 pushed many employers into teleworking without these protections in place, so we expect to see a number of teleworking injury claims filed in the near future. The challenges in defending these claims include a lack of witnesses, lack of control over the employee's work habits, and the unknown work environments that the aforementioned teleworking agreements seek to avoid. Willful misconduct is difficult to measure with teleworkers. When one is at home, O.C.G.A. § 34-9-17 will be difficult to apply and monitor.

The Georgia Workers' Compensation Act does not contemplate a section of its code to be designated for teleworkers; however, with the thousands of employees forced into teleworking as a result of COVID-19, litigation is coming down the pipeline. Employers pushed into teleworking can rest assured that it is not too late to follow up with employees working from home and design a telework agreement right now that fits their workforces. Regardless, teleworking is here to stay, and COVID-19 is the catalyst for those who were slow to start. There is nothing like "learning-as-you-go." Indeed, here we are.

Light Duty Work

One positive development from the COVID-19 surge in teleworking is how normalized the teleworking set up will become. One prediction for the future revolves around light duty releases, including claimants who can otherwise work, but need to take medications that cause drowsiness. Instead of driving to work just to fall asleep on the job, the claimant can be set up to safely work from home. Certain employees and job positions will be better suited to teleworking on light duty than others.

Monitoring productivity will be important to ensure

work is being performed and completed properly for light-duty work-from-home claimants. Additionally, teleworking on light duty could be a great transitional tool for the 15-day trial period in O.C.G.A. §34-9-240, and to slowly bring injured workers back into the facility. An electronic system or even work that can be taken home and uploaded means the possibilities for light duty accommodations are endless.

Presently, there is no case law discussing the refusal of a light duty position based on the fear of catching a pandemic disease in Georgia. We can anticipate the possibility that such a case will be heard in the near future.

Videoconferencing Mediations and Depositions

For years, scheduling a mediation meant the gathering of at least two attorneys, a claimant, and a mediator together in the same place. Distances were travelled. Friends and co-workers were affected. With COVID-19, this is no longer the case. The use of videoconference mediations has increased significantly. One month into social distancing, I received more requests for videoconference mediations than I have actually performed over the course of my entire career.

Sometimes negotiations are tense, so the possibility of leaving as soon as the fight-or-flight instinct arises could mean more failed mediations. The option of "hanging up" on the mediation defeats the purpose of trying to come together to negotiate a settlement or agree on a new doctor. When in person, leverage can be gained and assessed. Over video, meaning can be lost in translation. For claimants seeking closure, a video conference may not satisfy. This is not to say video-mediations are inherently ineffective or will never happen after COVID-19. If the attorneys and mediator have a good working relationship with each other, it is likely that these conferences will become slightly more common, but realistically, nothing beats a face-to-face meeting.

The same goes for video conference-style depositions. A number of governing court reporting bodies only recently gave court reporters the ability to swear in a witness over video, and were forced to do so solely for the purposes of COVID-19 social distancing. It will be considerably difficult for a plaintiff's attorney to control and prepare a witness if they are not in the same room together. Solidarity is an effective tool, and oftentimes is the only way a deposition is completed. Controlling the witness and objecting in time to prevent an answer on the record may be difficult for the attorney defending the deposition, especially where the connection is not perfect. Interpreters have a difficult time working through telephonic and video-depositions, and oftentimes rely on in-person interactions. The awkward interruptions that occur over videoconference and telephonic conversations could break the flow of the deposition to the detriment of both parties, the court reporter and the interpreter.

The problem with unseen parties being present during the deposition is a real concern, as is the option for a deponent to "read" answers. The attorneys would lose the ability to review and question the information the deponent is using. Finally, while court reporters are well-trained professionals, the possibility of stenographic errors arises, for example, when a connection is lost and not all of the parties are aware of the "short-circuit." Some people keep talking, not knowing they have been cut-off. As a result, there will likely be more video-depositions once COVID-19 over, but there is no replacement for taking depositions "the old fashioned way."

Overall, the immediate and permanent changes resulting from COVID-19 on how we "do" comp are the ones that were already in the works. Embracing the world of electronic working and medicine is just the beginning. The future is wide open, and we are already on the train. The ideal situation is that the changes we are seeing now will serve to improve our system, instead of burdening it with impractical methods meant for emergency situations like COVID-19.

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