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GA Supreme Court rules that employers and insurers may unilaterally suspend benefits when claimant returns to baseline condition

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EMC v McDuffie, S17G0028,

On appeal from McDuffie v. Ocmulgee EMC, 338 Ga. App. 200 (2016).

The Georgia Supreme Court ruled Monday that an employer could unilaterally terminate benefits to a worker who had aggravated his pre-existing conditions after healing to a point comparable to his condition before the workplace injury. The Court also ruled there is no requirement within the statutory scheme which required an employer in this position to first provide suitable work to the injured worker.

In *McDuffie*, prior to applying for work with EMC, the claimant suffered a right knee injury as a result of a work related accident which resulted in several surgeries, permanent restrictions, and thereafter a 20% PPD rating to the lower extremity. Thereafter he settled his claim with the prior employer in 2002, and remained unemployed until 2007 when he applied for work with EMC. When he applied for work with EMC as a meter reader he withheld information regarding his prior injury and resulting permanent restrictions, maintaining to EMC he was able to perform all the functions of the job for which he was applying. In 2009, he sustained a right knee injury while working for EMC, which was treated as compensable. After medical care began, EMC found out the claimant had misrepresented information on his job application, and terminated him for cause. They then suspended indemnity benefits, but continued to provide medical care.

In March 2011, the authorized treating physician, Dr. Pope, opined the claimant needed right knee surgery, and removed him from work for the surgery. Indemnity was commenced again. Thereafter in July 2011, Dr. Pope opined the claimant had returned to his pre-injury "baseline" condition and resulting pre-existing permanent restrictions. The employer and insurer suspended benefits unilaterally upon that opinion. The claimant requested a hearing on the issues of improper suspension of benefits both after his termination (contending he was terminated due to his work injury and as such had to be returned to work by the employer or benefits had to continue) and also challenging the suspension of benefits after the baseline condition was rendered (contending the termination was supersedeas to the baseline condition suspension, and that the baseline condition suspension was not proper). The ALJ, Appellate Division, and Superior Court all three ruled the suspensions were proper.

The Court of Appeals reversed in part, finding that the company could not terminate McDuffie's benefits due to the aggravation of his pre-existing condition ending without first "proving that suitable work was available for McDuffie." On appeal thereafter, Ocmulgee EMC asked the Supreme Court to determine whether employers could unilaterally terminate benefits, asking it to find the Court of Appeals ruling that a suitable job or suitable employment must first be provided to be in error. The Supreme Court accepted

this issue on appeal.

The Supreme Court first ruled the employer is not required to prove suitable work is available to the individual upon returning to baseline condition. This is, in a nutshell, because EMC terminated the claimant for reasons unrelated to his work injury, and in so doing the employee bears the burden of diligently seeking suitable work (*Maughon v. Brown Mechanical Contractors* , 728 S.E.2d 757 (2012)). Had the employer terminated the claimant for his inability to work due to a work injury, or, for sustaining the injury itself, it might have incurred such a burden pursuant to *Padgett v. Waffle House* 269 Ga. 105, 498 S.E.2d 499 (1998). But, the Court said, such issues are unrelated to the issue on whether or not benefits may be suspended due to a return to baseline condition.

It has long been the law pursuant to OCGA § 34-9-1(4) if a work injury aggravates a pre-existing condition, an employer's responsibility to pay medical and indemnity benefits ends when the aggravation ceases (i.e., the individual returns to "baseline" condition) . The problem has been the uncertainty surrounding the method of suspension – does the employer and insurer have to ask for a hearing to suspend based upon a change in condition or can they unilaterally suspend benefits? The Supreme Court says it is the latter as long as the authorized treating physician has stated the individual has indeed returned to his or her pre-injury state. While the Court declined to answer what precisely constitutes the "baseline condition," the Court did indicate that definition, for now, should be deferred to the medical expert(s) involved. Deference will be given to the authorized treating physician in all cases to determine what is the baseline condition, and thereafter whether or not the individual has returned to that state.

For claims professionals and defense practitioners, the following should be taken as practice points from this ruling:

- The authorized physician is the key practitioner in determining whether or not an individual in a compensable claim has returned to "baseline" or pre-injury state. All efforts should be made to get this practitioner the prior medical records for such individuals.

- Upon achieving baseline condition from the authorized treating physician, indemnity AND medical benefits can be suspended using the WC-2 and indicating in the "other" box on that form that the claimant has returned to pre-injury state. ***Be sure to attach the medical record for the suspension to the WC-2 and give 10 days notice of the same so there is no violation under Russell Morgan Landscape v. Velez-Ochoa* 556 S.E.2d 827 (2001).**

- We can expect even more resistance to getting timely medical releases from claimant practitioners in most instances in order to prevent suspensions. At the outset of each claim all requests for releases should be well documented, and if the releases have not been provided before the first hearing setting or within a reasonable amount of time, a conference call with an ALJ should be requested (or a Motion to Compel should be filed documenting the efforts).

- Employers should do all they can to implement a post-offer medical questionnaire in order to accelerate information about prior conditions.

- Even in claims which are not yet compensable, an effort to obtain a baseline condition opinion should be made in order to keep benefits to a finite period of time.

- If the authorized physician will not provide an opinion regarding baseline, using an IME and requesting a hearing to suspend benefits based upon a change in condition pursuant to the holding in *Big Lots v.Kiker* should be done.

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