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## **UPDATE: GEORGIA** **WORKERS' COMPENSATION**

### **DISPELLING THE "AUTOMATIC" RIGHT TO A ONE-TIME** **CHANGE IN PHYSICIAN**

*Casey B. Foreman & A. Amanda Harper*  
**Workers' Compensation**

Pursuant to O.C.G.A. § 34-9-201 and Board Rule 201, an employee in a compensable claim "may make one change from one physician to another on the same panel without prior authorization of the Board." O.C.G.A. § 34-9-201 and Board Rule 201 allow for a similar one-time change when there is not a valid panel or the employer is enrolled in an WC/MCO. Employees and their attorneys have long argued that this one-time change is an absolute right regardless of any other evidence involved. The Court of Appeals recently addressed this issue in the case of *Hartford Cas. Ins. Co. v. Hawkins*, 2020 Ga. App. LEXIS 65 (Ct. App. Feb. 18, 2020).

In *Hawkins*, the employer authorized treatment with Dr. Eli Finkelstein who referred the employee to Dr. Angelo DiFelice for treatment of her right shoulder. Dr. Finkelstein concluded he had no further treatment to offer and any finding of disability would be at Dr. DiFelice's discretion. The employee subsequently underwent a functional capacity examination which showed a self-limiting effort and an independent medical examination (IME) with Dr. Paul Mefferd that concluded no further treatment was needed and released her to regular duty. The employer also secured surveillance of the employee. After reviewing all records, Dr. DiFelice likewise placed the employee at maximum medical improvement (MMI) with no further treatment needed and released her to regular duty. From there, the employee underwent a "claimant's IME" with Dr. Robert Karsch who recommended further treatment and placed work restrictions. The employee requested to utilize her one-time change to Dr. Karsch. The employer denied this request and all other treatment.

At the hearing, the Administrative Law Judge (ALJ) found the Claimant's work injury had resolved at the point Dr. DiFelice placed her at MMI/full duty. The ALJ denied income benefits beyond this date and denied the employee's request for a change in physician to Dr. Karsch.

The State Board's Appellate Division adopted the ALJ's award in its entirety upon appeal. However, the Superior Court reversed and awarded benefits by finding the employee is "statutorily entitled to a change in physician."

The Court of Appeals found that there was evidence in the record to support the State Board's conclusion that the on-the-job injury resolved and that the Superior Court erred by failing to apply the "any evidence" standard of review regarding that finding of fact. The Court of Appeals dispelled the notion that an employee is automatically entitled to a one-time change in physician. Instead, the Court of Appeals found the employee "has the burden of proving that the medical services she is seeking are directly related to a work-related injury." As the State Board found that the employee's work-related injury had resolved, it was appropriate to also find she was not entitled to additional treatment, including a one-time change to Dr. Karsch.

The *Hawkins* case establishes that an employee does not have an *absolute* right for a one-time change in physician under O.C.G.A. § 34-9-201 and Board Rule 201. If the original authorized treating physician concludes an employee has fully recovered from his or her work injury, an employer may deny an employee's request for a one-time change in physician. *Hawkins* answers a long-debated question with a favorable outcome for employers. As with any denial, employers should take multiple factors into consideration. Employer will have a stronger argument to deny a one-time change with evidence such as an invalid FCE, favorable IME and/or compelling surveillance. Additional consideration should also be given to the credibility of the authorized treating physician and the physician to whom the change is requested. Finally, the ALJ has broad discretion in determining whether additional medical treatment is required and the outcome may be different depending on the ALJ involved.

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## **NO MAJOR LEGISLATIVE CHANGES**

### ***Casey B. Foreman* Workers' Compensation**

Sponsored by a fraction of workers' compensation claimants' attorneys, House Bill 474 seeks to diminish the ability of all stakeholders to participate in rule-making related to workers compensation. As COVID-19 forced the Georgia House of Representatives to end session early, HB 474 did not progress past the House floor. HB 474 is considered dead for this session but may reappear in future sessions.

Two changes to the State Board of Workers' Compensation Rules took effect March 11, 2020. Rule 59 provides new procedure for adoption and amendment of Board rules. Rule 60 was amended to remove provisions regarding adoption and amendment of Board rules. These changes have no significant impact on the daily handling of claims for Employer and Insurers.

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Casey B. Foreman was born and raised in Jesup, Georgia. She earned a Bachelor of Arts degree, summa cum laude, with a Major in Psychology and a Minor in Criminal Justice from Mercer University in 2007 and earned her Juris Doctorate in 2010 from the University of Georgia School of Law. Casey is a member of the State Bar of Georgia and the Dougherty County Circuit Bar Association. Casey joined the firm as an associate in January 2011 and was named partner in January 2017. Casey's areas of practice focus primarily on workers' compensation defense and insurance defense. She currently resides in Albany, Georgia with her husband Christopher Foreman, Esq.