LEVY SIBLEY FOREMAN & SPEIR, LLC

ATLANTA - ALBANY - AUGUSTA
COLUMBUS - MACON - SAVANNAH

REMINDER: LEGISLATIVE CHANGES GO INTO EFFECT JULY 1, 2019 AND GA COURT OF APPEALS ISSUES TWO NEW OPINIONS

June 28, 2019

Nathan C. Levy
nlevy@lsfslaw.com
229-854-4399

Phillip A. Sibley
psibley@lsfslaw.com
478-742-8300

Casey B. Foreman
cforeman@lsfslaw.com
229-449-7419

Kelly R. Speir
kspeir@lsfslaw.com
706-728-0896

John D. Blair
jblair@lsfslaw.com
229-854-7141

Brett C. Tyler
btyler@lsfslaw.com
706-987-2487

William R. Merchant
bmerchant@lsfslaw.com
706-442-0505

Austin M. Hammock
ahammock@lsfslaw.com
706-527-0901

Karen J. Gibson
kgibson@lsfslaw.com
478-960-5178

Of Counsel
R. Napier Murphy
nmurphy@lsfslaw.com
478-742-8300

James M. Elliott, Jr.
jelliott@lsfslaw.com
478-747-3399

(866) 995-8663 Toll Free
(877) 284 – 4034 FAX
www.lsfslaw.com

Legislative Update:

On July 1, 2019, Senate Bill 135 from the 2019 Georgia General Assembly legislative session will go into effect. SB 135 provides:

- A $100 increase in the maximum weekly Temporary Total Disability income benefits (from $575 to $675);
- A $67 increase in Temporary Partial Disability income benefits, (from $383 to $450); and

In addition to increasing income benefits, SB 135 would also create an exception to the 400-week cap on medical benefits for non-catastrophic injuries. The bill would allow compensation beyond 400 weeks **for prosthetic devices, spinal cord stimulators and certain durable medical equipment with finite lifespans**.

Of course, employer groups are strongly in favor of the 400-week cap on medical benefits for non-catastrophic injuries but have supported this exception for equipment clearly related to injuries which arose out of and in the course of employment.

Case Law Update:

***Kil v. Legend Brothers, LLC*, 2019 Ga. App. LEXIS 368**

Employee/Claimant Jay Kil worked as a manager for Employer restaurant Legend Café. Kil lived with the restaurant's owner, Willmore Lim. After returning home from work each day, Kil and Lim would review the restaurant's daily sales, receipts, accounts, and inventory.

After closing the restaurant in the early morning of May 19, 2016, they drove back to their home without taking a detour. Lim had in his possession the receipts from the restaurant and he and Kil planned to review the records at home as they normally did.

As they pulled into the garage, armed men ran up to the car in an attempt to rob them. As the men were fleeing, one of them shot Kil in the forearm. Kil spent over two weeks in the hospital and underwent multiple surgeries. Kil has not worked, or been able to work, since the shooting.

An application was filed for workers' compensation benefits and a hearing was held. The ALJ ruled in Kil's favor, concluding his injuries arose out of and in the course of his employment. The injury *occurred in the course of his employment* because Kil was in the "continuous employment" of his job as a manager at the time of the incident due to his obligations to meet with Lim at the home to review the day's receipts and inventory.

The ALJ further concluded that Kil's injury *arose out of his employment* because his position required him to go home at a very late hour after leaving the restaurant to review receipts with the owner, which allowed the robbers to accurately estimate his arrival home and put Kil at an increased risk of being shot during a robbery.

On appeal, the Board affirms the ALJ's award and the employer appealed to the superior court, which reversed the Board's award of benefits. The superior court concluded that Kil's injury did not arise out of his employment because he was injured as he arrived home from the restaurant, "an act which he would have had to do irrespective of the scope of his job duties." Further, the superior court held that the injury did not occur in the course of his employment because he was injured at home, at a time when he was not performing any work duties, and he was not a "traveling employee" or a "24-hour on call employee."

The Georgia Court of Appeals granted Kil's application for discretionary appeal. Firstly, the Court of Appeals found that the superior court erred in finding that Kil's injury did not occur in the course of his employment. While normally "the general rule is that an injury sustained while an employee is going to and from his place of employment does not arise from the course and scope of his employment," the Board found that the scope of Kil's "job responsibilities had not yet ended" for the day, and there was evidence in the record to support this conclusion. One of Kil's key job responsibilities was to spend time at the home he and Lim shared going over the restaurant's daily transactions with Lim, the restaurant's owner. Furthermore, Kil was with the owner of the company at the time of the injury and the two were in possession of the receipts that they were going to review as they usually did at home each day. Kim and Lim also did not take any personal detours on the way home on the night of the robbery.

Next, the Court of Appeals agreed that the superior court erred when it reversed the Board's determination that his injury arose out of his employment because it improperly substituted its own factual findings for those made by the State Board. "Factual questions concerning causation are properly left to the State Board to determine rather than to the superior court or the appellate courts, and the Board's findings must be affirmed if there is any evidence to support them." (Citation and punctuation omitted.) *Hughston Orthopedic Hosp. v. Wilson*, 306 Ga. App. 893, 895 (1) (2010). The peculiar circumstances of the robbery demonstrated that the perpetrators had specifically targeted Kil and Lim due to their connection to the restaurant and that, as a result of their job responsibilities, the perpetrators could therefore calculate the time that they arrived home (at a very late hour) and could expect them to have money in their possession when they returned home. In light of these findings, a reasonable person could see a causal connection between the circumstances of Kil's employment and the robbery. See *Sturgess v. OA Logistics Svcs., Inc.*, 336 Ga. App. 134, 136-139 (1) (2016); *Hulbert v. Domino's Pizza, Inc.*, 239 Ga. App. 370, 373 (2) (1999).

The Court of Appeals concluded that there was evidence supporting the Board's determinations that Kil's injury occurred within the course of his employment and that his injury arose out of his employment. Because the superior court improperly substituted itself as the fact-finder in lieu of the State Board, the superior court's decision was reversed.

***Ware County Board of Education v. Taft,* 2019 Ga. App. LEXIS 370**

Employee/claimant Taft worked for employer Ware County Board of Education ("BOE") as a custodian. He worked a school-year schedule of 220 days, but his pay was pro-rated and spread over a full calendar year to account for periods during which he did not work due to school breaks and holidays. On June 15, 2016, he slipped on waxed floors, injuring his right shoulder, and his injury was accepted by the parties as compensable.

Taft began receiving temporary total disability ("TTD") benefits of $207.61 per week, based on an average weekly wage ("AWW") of $311.39. He then sought additional TTD benefits contending that the

calculation of his average weekly wage was incorrect. Here, the issue presented is whether Taft's disability benefits should be calculated based upon the actual pro-rated pay he receives or should instead include the portion of his pay that he has worked to earn, but that is deferred from each pay period and paid out over a full year.

A hearing was held before an ALJ to determine Taft's correct AWW. The ALJ's opinion, now reversed, does not make a finding as to the dollar amounts of Taft's rates, but found that it should be based on the wages he actually was paid which equated to an AWW of $311.38 and TTD of $207.61 per week.

The Appellate Division accepted the ALJ's fact findings that Taft was a BOE employee, that there were 220 work days during the school year, that Taft's contract required that he be paid $9.20 per hour for a 40-hour work week, and that his total compensation was $16,192.00 disbursed in equal monthly installments of $1,349.33 throughout a 12-month year. The superior court found that the evidence supported this, and these amounts are not contested on appeal. In its appeal, the BOE argued that Taft's average weekly wage should be calculated based upon what he *actually was paid* during the 13 weeks immediately preceding the injury ($311.38 per week).

> OCGA § 34-9-260 (1) provides in pertinent part that:
> *If the injured employee shall have worked in the employment in which he was working at the time of the injury … during substantially the whole of 13 weeks immediately preceding the injury, his average weekly wage shall be one-thirteenth of the total amount of wages earned in such employment during the 13 weeks.*

In the 13 weeks prior to the accident, Taft actually worked a total of 59 days or, as he argues in his appellate brief, 11 weeks and 4 days. Therefore, as the Appellate Division determined, OCGA § 34-9-260 (1) applies because Taft had worked "substantially the whole of 13 weeks immediately preceding the injury."

Taft argued that the statutory language "total amount of wages earned" in OCGA § 34-9-260 (1) meant his earnings, for purposes of calculating average weekly wage. The Court of Appeals held that the evidence showed that Taft earned $334.03 gross weekly wages by working 40 hours at his contractual hourly rate of $9.20 for 59 days within the 13-week period, but that a portion of those earnings were withheld and instead later paid on a pro-rated basis over 12 months, so that Taft would not have pay gaps over the course of a year. "It would defy logic to say that Taft had not earned his contractual rate of pay once he had actually performed the work for which he was being paid — regardless of when that pay was received." Thus, the only "natural and reasonable way, as an ordinary speaker of the English language would" read the statutory term "wages earned" is to focus on when Taft earned the money under his contract regardless of when he received that money.

As our Supreme Court stated, "deprivation of future earnings … is measured by [an employee's] proved earning capacity. We think the fairest yardstick by which his compensation to cover his injury can be measured is what he was able to earn and was actually earning when the misfortune came upon him." *Fulton County Bd. of Educ. v. Thomas*, 299 Ga. 59, 63 (2) (2016). Taft "was actually earning" $334.03 average weekly gross pay when his injury occurred, even though a portion of those earnings was withheld for payment at later dates. As provided by the plain language of OCGA § 34-9-260 (1), Taft's average weekly wage, based on one-thirteenth of "the total amount of wages earned" during the relevant 13-week period, was $334.03.