THE "104" STRATEGY

(OR, HOW TO USE AN EMPLOYER'S FAVORITE WEAPON AGAINST THE EMPLOYER)

In order to understand the evolution of the strategy designed to minimize the impact of the mechanical reduction of temporary total disability benefits to temporary partial disability benefits triggered by a WC-104, it is necessary to understand the origin of the 1992 amendment to O.C.G.A. Title 34-9-104(a)(2).

LEGISLATIVE HISTORY OF O.C.G.A. TITLE 34-9-104(a)(2)

Representatives of injured workers generally agree that O.C.G.A. Title 34-9-104(a)(2) is - by far - the most mean spirited provision that was included in the so-called workers' compensation "reform" legislation enacted in 1992. It is important to understand the political climate in 1990 and 1991 which created the momentum which led to the all out political war in the 1992 General Assembly. In 1990, workers' compensation insurance premiums had hit an all time high in Georgia. Out of $922,244,367 in net earned premium, the insurance industry claimed to have sustained $824,346,091 in total developed losses in Georgia. In response to a perceived "crisis, in 1991 the General Assembly created the Joint Task Force on Workers' Compensation. The Task Force held public hearings throughout the State of Georgia beginning on October 15, 1991, in Atlanta and concluding in Dalton on November 26, 1991. In December of that year, the 14 members of the Task Force met and unsuccessfully attempted to arrive at a consensus over what should be included in legislation to be introduced in 1992. Both "sides" - labor and management - proposed lists of issues of "priority"

concerns. Both sides also compiled lists of "secondary" concerns. In the legislation that actually passed the General Assembly in 1992, none of labor's "priority" concerns were included; but each of management's six priority issues were included in the legislation which ultimately passed. One "priority concern" formed the basis for present O.C.G.A. §34-9-104(a)(2). In the 1991 final report of the Joint Workers' Compensation Task Force the following appears:

> "Limit the duration of indemnity benefits for temporary total disability to 400 weeks for disability ratings of 25% or less. For those of more than 25%, limit duration of benefits until the employee is released to return to work, with or without restrictions, or until the impairment drops to 25% or less, whichever occurs first. *Reduce benefits to the level for temporary partial disability benefits after the employee has been released to work with restrictions, even if there is no suitable employment available."* (Emphasis supplied).

The best - and most accurate - account of the political machinations involved in the "reform" legislation which passed in 1992 may be found in Volume 9, 285, Georgia State University Law Review. At p. 290 of the Law Review article, the following explanation and footnote appears:

> "The Act allows an employer, after giving the employee adequate information and notice, to unilaterally convert an employee's benefits from temporary total disability to temporary partial disability payments when, for fifty-two consecutive weeks or an aggregate seventy-eight weeks, the employee has not worked despite being released to work with limitations or restrictions.[39] (Emphasis supplied).
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> 39. O.C.G.A. §34-9-104(a)(2) (1992). This unilateral control gives employers much more control of the possibility of employees' benefits being reduced from total to partial levels, a possibility that employers believe can provide an incentive for the employee to return to work." (Emphasis supplied).

So, there you have it. O.C.G.A. §34-9-104(a)(2), ostensibly intended to provide "...an incentive for the employee to return to work" is, in fact, actually about "control." In 1994, however, the Legislature amended O.C.G.A. §34-9-240 to create "the trial work period." O.C.G.A. §34-9-240(b). Seemingly, the 1994 amendment to O.C.G.A. Title 34-9-240 created the best method by which an employer could return an injured employee to suitable work and thereby should have resulted in the legislative elimination of O.C.G.A. Title 34-9-104(a)(2). Unfortunately, that did not occur because employers and insurers had already discovered that "104" was providing a wonderful tool to force premature, inadequate or inappropriate settlements.

RESPONSES TO RECEIPT OF WC-104

Experience teaches that many injured workers do not hire or even talk to an attorney until they have received a WC-104 or a WC-240. If it is receipt of a WC-104 that has brought the injured worker to your office, you must first scrutinize the form very carefully to determine if the form has been completed and served correctly. After examining the WC-104, several possible courses of action will occur to you.

It is not the purpose of this paper to create a "laundry list" of the many factors that should be considered in determining whether a WC-104 is valid. The sole purpose of this paper is to present an alternative strategy that might ultimately be more effective than simply exploiting an incorrectly completed/served WC-104. Begin with this fact of life: If the WC-104 is valid, your client's temporary total benefits will be automatically converted/reduced to

temporary partial after the elapse of 52 continuous weeks or 78 aggregate weeks of being released with restrictions. If you determine that the WC-104 is invalid, several courses of action are available to you.

- You could sit back and do nothing. If you adopt this strategy, you will "jump" the employer/insurer when "the drop" to TPD occurs. If you employ this strategy, the employer/insurer will either press on with the reduction and risk the assessment of attorney's fees and civil penalties or will be forced "to start over" and do it right for the second - or third - or fourth time. If you wait to invalidate the WC-104, you will usually accomplish nothing more than buying yourself another 52 weeks of TTD - or possibly more. But, a lot can happen in 52 weeks. Your client may take a turn for the worse or other circumstances might develop that would give you ample time and reason to alter your strategy. If you explain to the adjuster why the WC-104 is invalid and if the case is in a posture appropriate for settlement, that may be a good time to pursue that outcome.
- You can be "proactive." Instead of waiting, you could notify the adjuster immediately that the WC-104 is invalid. Give the adjuster a deadline by which the WC-104 must have been withdrawn; otherwise, you will file a WC-14 to obtain a judicial determination of the invalidity of the WC-104 and will request assessed attorney's fees, etc.

But the "bottom line" remains this: Whether you do something or not, so long as you allow the employer/insurer to control both the pace and

the certainty of "the drop," you will ultimately lose both the battle and the war.

The Truth About "104"

By now, you have realized that a WC-104 is usually the equivalent of a DOL 800. Rather than demonstrate the common courtesy of advising an employee that an employer is unable (or unwilling) to offer suitable employment, the WC-104 has become an unofficial separation notice.

O.C.G.A. Title 34-9-104(a)(2) is About "Control."

In this writer's experience, many employers and insurers actually admit that they use a WC-104 as a device to force a favorable settlement. Injured workers and their attorneys know that as the 52 week clock runs down that insolvency is on the horizon. It is not a coincidence that many WC-104's are soon followed by letters from adjusters in which the injured employee is reminded that "the drop" will occur in _____ weeks and this 'might be a good time to discuss settlement.' Your clients can look at their monthly financial obligations and easily deduce that once "the drop" has occurred, those bills cannot be paid. The client certainly realizes that even though he might potentially be able to draw TPD for the remainder of the 350 weeks, he will still not be able to meet his obligations as they arise. Therefore, the adjuster will be able to force a settlement for a fraction of what the total pay out of the remainder of the 350 weeks would be.

Example of the Mechanical Reduction of "104"

Assume that your client earned an average weekly wage of $600.00, sustained a work injury (post 7/1/01) and began being paid $400.00 per week in

TTD benefits. After a period of time, your client's treating physician issues a release with restrictions for the employee to return to work. The employer could, but chooses not to offer work within the physician imposed restrictions. But, of course, the employer does send a WC-104 advising your client that 52 weeks from the date of the report releasing your client with restrictions, your client's TTD will automatically be converted/reduced to TPD of $268.00 per week - *even if the employer of injury has not offered suitable work.* The employee justifiably expects that a job offer from the "employer of injury" will be forthcoming so the employer knows that the employee is not likely to go looking for work elsewhere. The employer knows that it has 52 weeks in which to either get the employee released without restrictions or to get the claim settled before "the drop" occurs. While paying temporary total disability to an employee that the employer has chosen not to re-employ, the employer is likely to assign surveillance which, if productive, will further depress - if not completely eliminate - any settlement value. If the surveillance produces nothing, the employer/insurer will still be able to send a letter to the employee or his attorney containing a reminder that "the drop" from TTD to TPD is about to occur. There is simply no question that employers and insurers place great value upon "104" solely for its settlement leverage. "104" has a "double whammy." In the first place, every injured worker knows that "the drop" is going to occur and when. By putting "the squeeze" on the injured employee, the employer not only manages to get the case settled quickly and cheaply; but also, escapes its societal duty to offer suitable employment.

OBJECTIVE OF THE "104 STRATEGY"

104 is yet another mechanism that employers and insurers have added to their already impressive arsenal of "control" weapons; e.g., panel of physicians, etc. The objective of the employee driven "104 strategy" is to reduce as much as possible the control the employer/insurer can impose by its strategic use of the WC-104.

You cannot prevent the treating doctor - usually a panel physician - from issuing a release to return to work with restrictions as quickly or as early in the recovery process as the physician can without committing malpractice. And, you cannot prevent an employer/insurer from filing and serving a WC-104 - whether or not correctly completed - after receiving the physician's report which contains the work restrictions. But, you certainly can prevent the manipulation of your client that now routinely follows filing and service of a WC-104.

Here's how the WC-104 strategy works: After receiving the WC-104, analyze the current and probable future factual legal situation carefully. Can the claim be designated catastrophic? If so, do not implement the strategy unless circumstances change; i.e., you have lost the "CAT." Is the WC-104 defective? Decide whether to mount an attack upon receipt of the 104 or sit back and exploit the error when the employer/insurer converts TTD to TPD. Are there other issues currently pending that you could increase the probability of succeeding upon by joining for hearing the issue of the defective WC-104? Would you want to assert the defective WC-104 as a "counter claim" to an employer's WC-14 to

increase the employer's risk of proceeding with litigation? Obviously, the possibilities are endless. You have to weigh all of them in deciding the correct offensive/defensive strategy. After you have analyzed your situation carefully, you may conclude that:

- No job offer is likely to be made;
- Your client's medical condition is not likely to improve/worsen significantly;
- Your client's financial situation will only worsen after "the drop";
- Your client could and does want to return to work somewhere;
- Ultimately settlement would be in your client's best interest.

If you conclude that each of these factors is currently present in the claim, you are now ready to consider implementing "the 104 strategy":

Steps in the Process

The first step is to draft and send a letter by certified, return receipt mail to the employer with a courtesy copy to the insurance adjuster. If there is a defense attorney, you should send the original of the letter to him/her. In your letter, acknowledge receipt of the WC-104. Do not comment upon factors that might render the WC-104 invalid as you will want to hold in reserve the opportunity to challenge the WC-104 in the event that you must subsequently change your strategy. Advise that your client wants to return to work within his restrictions for the employer of injury as soon as possible. You might even want to propose reasonable accommodations to a specific job. Advise the employer that if suitable work with the employer of injury has not been offered within 90 days (or

more, if necessary) that the employee will seek suitable work elsewhere.[1] Advise that if suitable work is found by your client which pays less than his pre-injury average weekly wage that you will be providing your client's check stubs for purpose of calculation of temporary partial disability benefits.[2] You might wonder why you must be so careful to give the employer ample opportunity to offer suitable employment. If you don't and your client finds a job that pays less than his pre-injury average weekly wage, you can be certain that the employer will refuse to pay temporary partial disability benefits by relying upon Wal-Mart Stores, Inc. v. Harris, 234 Ga. App. 401, 506 SE2d 908 (1998). However, if you have offered the employer the opportunity to provide suitable work and the employer fails to do so within a reasonable time, your client then will be entitled to receive temporary partial disability. See St. Paul Fire & Marine Insurance Co. v. White, 103 Ga. App. 607, 120 SE2d 144 (1961). Usually, if the employer has a job available or can create one, the job will be offered within the 90-day period. If not, you have effectively forced the employer to admit tacitly that it either has no suitable work or chooses not to offer it. You will then meet with your client and explain carefully how a good faith, sincere job search must be conducted and documented. Be sure to advise your client to be completely truthful about his injury and work restrictions in order to avoid a "Rycroft" situation. If your client finds suitable work, he must explain to his physician the physical

[1] Why 90 days? Your client will probably have a "return appointment" with his treating physician within the next month or so and 90 days will give ample time to an employer to submit a job analysis to the treating physician for approval following your client's next appointment with his doctor and then to submit to you a WC-240. See Board Rule 240.

[2] You should provide evidence of your client's earnings without being asked or forced to. See, e.g., Neil v. Ins. Co. of N.Am., 134 Ga. App. 854, 216 SE2d 626 (1975); Hopper v. Continental Ins. Co., 121 Ga. App. 850, 176 SE2d 109 (1970).

requirements of the job so that the doctor will document in his report that he approves your client taking the subsequent job. Next, send a letter to the employer announcing that the employee has found suitable work, the physical requirements of the job have been explained to the treating physician and that the job is within the employee's work restrictions.[3] In the second letter, advise the employer that you will be sending or faxing copies of check stubs every week from the subsequent employer to the employer of injury or adjuster. Whoever is adjusting the claim and is being forced to calculate and pay temporary partial disability benefits every week will soon tire of the process. The adjuster will soon consider the time spent without an equivalent opportunity to exert counter measures to be nothing short of a nuisance. If checks are not issued timely, do not hesitate to demand the 15% penalty due pursuant to O.C.G.A. Title 34-9-221(e). While you might get tired of faxing or mailing the check stubs to the adjuster, from experience, I can assure you that the adjuster is going to get even more tired of the process and will quickly look for a way to avoid the continuing hassle.

How long this goes on will be up to you and your client. By implementing this strategy, you have effectively rendered harmless the most effective tactics that can be employed by an adjuster following a release with restrictions while your client is receiving temporary total disability benefits:

[3] If you client fails to find suitable work, the job search logs establish a good faith, sincere Maloney job search that can be used in a hearing to restore your client to temporary total disability. See O.C.G.A. Title 34-9-104(a)(2).

First, the employer/insurer's hope to be able to force your client to settle quickly and cheaply will fail since the employee is being paid his salary from the subsequent employment and is also being paid TPD (tax free, of course). Example: With a pre-injury average weekly wage of $600.00, employee finds a job that pays $300.00 "gross" a week. Being short $300.00, he will be entitled to $200.00 in TPD. If you implement the strategy in the first 18 months of the claim (and most likely much sooner, if possible) the employer/insurer in this example will be "on the hook" for a minimum of $54,400.00 in TPD benefits.

Secondly, the predictable assignment of surveillance is usually a waste of time and money when you have already advised the adjuster that your client has returned to work for a subsequent employer and is being paid temporary partial disability. What is the adjuster going to do with surveillance - accuse your client of working? The only product of surveillance that might pose a genuine threat would be if your client was dramatically exceeding his work restrictions at the new job. Even then, however, the only thing the employer would be able to prove was that the employee was no longer disabled and was entitled to no further temporary partial disability benefits.

Third, the well-known settlement tactic of offering an unpleasant or demeaning job or a work shift that is inconvenient to your client (see, for example, McDaniel v. Roper Corp., 149 Ga. App. 864, 256 SE2d 146 (1979) is negated when your client takes a suitable job of his choosing after having first offered the employer the opportunity to provide suitable employment.

Fourth, every payment of TPD extends the O.C.G.A. Title 34-9-104(b) two-year change in condition period. Returning to our example where the employee obtains suitable work with a subsequent employer within 18 months of the original work injury, it should be obvious that 272 weeks of TPD alone not only provides ample time to be creative; but also extends out the two year change in condition statute of limitation 376 weeks; that is, over 7 years.

"RISKS" ARE MINIMAL AND MANAGEABLE

There are only two risks of any significance to implementation of "the 104 strategy." The first risk is the reality - or merely the allegation - that your client will experience an aggravation of the work injury sufficient to constitute a "new injury." The employer of injury can be expected to allege an aggravation amounting to a "new injury" if there is any basis for doing so. The other "risk" - merely a consideration, in reality - is the consequences of the dismissal of your client by the subsequent employer if your client is physically unable to perform the subsequent job or if your client must quit the subsequent employment for reasons related to the work injury.

The "risk" most likely to occur - and to present a problem - is the allegation that your client has experienced an aggravation amounting to a new injury. This allegation is likely to result from any one of the following occurrences:

- Your client makes an appointment to return to the treating physician after months of absence or after several missed routine follow-up appointments; or

- Any reference that appears in the medical reports from the treating physician that suggests the possibility of an aggravation having occurred as a result of longer hours, changed or different work duties, etc.

You can reduce this risk by carefully advising your client to stay well within his work restrictions and to avoid performing any work activity that could be the cause of a "new injury." Your best course is to be aware that there is not only a legal; but also a philosophical difference between a two insurer fight where the employee has returned to work for the same employer followed by a coverage change and the situation where there is a complete change in employer. See, e.g., Guarantee Mutual Insurance Co. v. Wagner, 232 Ga. App. 328, 499 SE2d 925 (1998); Waycross Molded Products, Inc. v. McKelvin, 234 Ga. App. 46, 505 SE2d 826 (1998); Zurich Insurance Co. v. Cheshire, 178 Ga. App. 539, 343 SE2d 753 (1986) (return to work - same employer but coverage change). Compare Certain v. United States Fidelity & Guarantee Co., 153 Ga. App. 571, 266 SE2d 263 (1980); Beers Construction Co. v. Stephens, 162 Ga. App. 87, 290 SE2d 181 (1982); Slattery Associates v. Hufstetler, 161 Ga. App. 389, 288 SE2d 654 (1982) (return to work - different employer).

In the event that the employer of injury suspends TPD by WC-2 (O.C.G.A. Title 34-9-221(c)) and then controverts further payment of such benefits on the basis of an alleged new injury per O.C.G.A. Title 34-9-221(d), you are actually in a much better tactical position than you would have been on an original "all issues" claim. Remember that the issue whether a "new injury" has occurred is

uniquely a question of fact for the ALJ. Your client enters the arena with enhanced credibility (and probably sympathy) because he made the effort to find subsequent suitable employment after having received the WC-104 from the employer of injury. It is not difficult to portray that employer to be completely heartless by adducing evidence that the employer of injury first failed to offer suitable employment, then attempted to squeeze the employee by filing the WC-102 and then, after your client had found suitable subsequent employment, the employer of injury attempted to shift to the subsequent employer financial and medical responsibility for the claim.

Remember this, too: The subsequent employer will be your client's ally in any two employer fight where your client insists that he is still able to perform the subsequent suitable employment and did not experience a "new injury.' However, if your client contends that he is now unable to work at all, contending nothing more than a gradual deterioration, the subsequent employer is still an ally, but you should be prepared to marshal evidence of your client's work duties at the subsequent employer very carefully to demonstrate that neither the work activity, increased hours or any other "changed circumstances" between the subsequent employer and the original employer of injury can be implicated as the cause of new or additional complaints. See in this connection, Slattery Associates v. Hufstetler, supra. Not only are the subsequent employer and the co-employees at the subsequent employer likely to be valuable allies; but also, an ALJ is authorized to issue an interlocutory order when there is a fight between either two employers or merely between two insurers where coverage has

changed following a return to work for the same employer. See O.C.G.A. Title 34-9-102(c) and Board Rule 102(e)(1). In two employer fights, you will also have a better chance than normal to obtain assessed attorney's fees.

The other "risk" which should be mentioned is the loss of the subsequent employment. From experience, two scenarios appear to be most likely to occur. In the first scenario, the employee takes a subsequent job, cannot perform it due to the work injury and then "quits" or is even terminated by the subsequent employer specifically for reasons related to the work injury, Under these facts, your client still has to perform a Maloney job search in order to obtain reinstatement of temporary total disability. See Gilbert/Robinson, Inc. v. Myers, 214 Ga. App. 510, 448 SE2d 246 (1994).

In the second scenario, if your client has been receiving temporary partial disability and then loses the subsequent employment - whether or not the loss of the subsequent employment is "related" to the original work injury, temporary partial disability benefits must continue to be paid unless the employer can prove that either a "new injury" has occurred or - more likely - that your client no longer experiences a diminished work capacity. If the employer of injury has been paid temporary partial disability, suspension of benefits must occur by WC-2 accompanied by a WC-3 controverting further payment of TPD. See O.C.G.A. Title 34-9-221(c, d). See, also, Georgia-Pacific Corp. v. Wilson, 240 Ga. App. 123, 522 SE2d 700 (1999); White v. Nantucket Industries, Inc., 214 Ga. App. 542, 448 SE2d 278 (1994).

SUMMARY

"The 104 strategy" is designed to protect your client from being victimized by the "squeeze play." By controlling the pace of the claim, ultimately you can prevent the adjuster from forcing an inappropriate, inadequate or premature settlement. When you prevent an inappropriate, inadequate or premature settlement, you preserve your client's right to future medical care, to future income benefits and you continuously extend the two year change in condition statute of limitations with each payment of TPD that is made. You also preserve the possibility that a change in your client's situation/condition could result in the claim being designated catastrophic. By implementing "the 104 strategy" you enable your client to settle his case when you and he deems it to be appropriate and for an amount significantly more than you would have recovered had your client been forced to settle shortly before or shortly after "the drop."