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### Healthcare Workers' Compensation Self Insurance Fund Workers' Compensation Seminar

#### Appropriate Conduct in Response to Threatened or Actual Litigation

October 28, 2011  
Frederick L. Fohrell

This presentation is designed to generally address certain of the particular issues that employers, claim adjusters, and attorneys encounter in response to actual or threatened workers' compensation litigation. It is imperative that employers, claim adjusters, and attorneys, be familiar with the statutes, case law, and administrative regulations governing workers' compensation. This presentation does not attempt to identify all issues surrounding response to workers' compensation claims but instead generally addresses only certain areas. Moreover, we have not attempted to exhaustively resolve or discuss issues in particular areas which are discussed below. Instead, the purpose is to introduce potential issues. This presentation does not contain an exhaustive discussion of applicable cases and references opinions which may change as additional orders and rulings are issued by either the Alabama Supreme Court or the Court of Civil Appeals. No specific decisions or opinions should be reached without a thorough review of all applicable statutes and cases. A complete discussion of all issues responsive to threatened or actual litigation would potentially fill volumes and require time well beyond the scope of this seminar. Nonetheless, the hope is that the

areas discussed below will be useful to employers, claim adjusters, and attorneys.

### I. Selection of Defense Counsel

In defending the workers' compensation claim, an issue, frequently encountered by both adjusters and attorneys, involves an employer's desire to select its own attorney rather than the attorney selected by its workers' compensation provider. The Alabama Supreme Court addressed this issue, in the limited context of defending under a reservation of rights, in L & S Roofing Supply Co., Inc. v. St. Paul Fire & Marine Ins. Co., 521 So.2d 1298 (1988). In L & S, the employer ("L & S") was insured by St. Paul Fire & Marine Insurance Company ("St. Paul") under certain policies which purported to insure L & S against claims resulting from bodily injury and property damage. Beaver Construction Company filed suit against L & S in Alabama state court on August 13, 1985 ("the underlying action"), alleging breach of certain express and implied warranties and fraudulent concealment in regard to the sale of materials. On October 1, 1985, the firm retained personally by L & S ("firm one") filed a Motion to Dismiss in the underlying action on its behalf. On October 24, 1985, the firm retained by St. Paul to defend L & S ("firm two") filed an Answer on behalf of L & S in the same suit.

On October 7, 1985, St. Paul sent L & S a letter stating it was reserving rights to disclaim coverage with respect to certain of the claims in the underlying action. In this reservation of rights' letter, St. Paul stated that "the amount sued for by Beaver Construction exceeded the limits of liability under the St. Paul policies issued to L & S." Id. The reservation of rights letter also stated that St. Paul was referring the defense of the underlying action to firm two, "who will protect your interests pursuant to the terms and conditions of the insurance policy issued to L & S by St. Paul." Id. The letter provided as follows with respect to the decision of L & S to retain independent counsel: "[i]t is also our understanding that you have obtained your own personal counsel to represent you in this matter. We ask that you make your attorney aware that the amount the plaintiff

is suing for is in excess of your policy limits." Id.

Upon notice of St. Paul's reservation of rights letter, L & S, through its attorneys, made demand on the attorneys hired by St. Paul to allow L & S to retain, at St. Paul's expense, independent counsel and to allow said independent counsel to control the underlying action. L & S, 521 So.2d at 1300. In response to this request, firm two advised firm one of St. Paul's position:

St. Paul will continue to retain this firm to provide a full defense for its insured in this lawsuit. As indicated before, we are quite willing to keep you informed of the progress of this litigation. If your firm wishes to take an active role in the litigation, your fees should be submitted to that person or company retaining your services.

Id. at 1300.

On March 5, 1986, L & S filed suit against St. Paul in state court seeking "declaratory and other equitable relief and alleg[ing] that it was a conflict of interest for St. Paul's lawyers to continue to control the underlying action since said lawyers were retained by St. Paul and St. Paul ha[d] a direct pecuniary interest in having the litigation resolved in a manner which relieve[d] St. Paul of any financial responsibility under the insurance policies it issued to L & S." L & S, 521 So.2d at 1301. St. Paul petitioned for removal of the action to federal court. The action was subsequently removed to the United States District Court. St. Paul then answered, denying that there "[was] a conflict of interest arising out of St. Paul's reservation of rights and the defense of the underlying action by the attorneys hired by St. Paul." Id.

The United States District Court then certified the cause to the Alabama Supreme Court "for determination of whether an insurer's election to defend its insured under a reservation of rights creates such a conflict of interest that the insured is entitled to engage counsel of its choice at the insurer's defense." L & S, 521 So.2d at 1298. L & S argued that "[a]t least fifty different courts in a dozen jurisdictions have addressed this precise issue and [v]irtually every court considering the question has held that the presence of a coverage issue presents a conflict sufficient to allow the insured to select his own defense counsel." Id. St. Paul devoted much of its brief to distinguishing

the cases cited by L & S from the present case and cited several decisions from other jurisdictions that it concluded supported its position. Id. One of the cases St. Paul relied upon was Tank v. State Farm Fire & Casualty Co., 715 P.2d 1133 (Wash.1986).

In Tank, one of the issues concerned the "nature of an insurance Company's duty of good faith toward its insured when the company defends under a reservation of rights." 715 P.2d at 1135. The Washington Supreme Court ultimately held that, "due to the potential conflicts of interest inherent in an insurer's conducting a defense of its insured under a reservation of rights, the insurer has an enhanced obligation of good faith toward its insured in conducting such a defense." L & S, 521 So.2d at 1303. The Washington Supreme Court set forth criteria that the insurer must meet in order to fulfill this enhanced obligation of good faith:

First, the company must thoroughly investigate the cause of the insured's accident and the nature and severity of the plaintiff's injuries. Second, it must retain competent defense counsel for the insured. Both retained defense counsel and the insurer must understand that only the insured is the client. Third, the company has the responsibility for fully informing the insured not only of the reservation-of-rights defense itself, but of all developments relevant to his policy coverage and the progress of this lawsuit. Information regarding progress of the lawsuit includes disclosure of all settlement offer made by the company. Finally, an insurance company must refrain from engaging in any action which would demonstrate a greater concern for the insurer's monetary interest than for the insured's financial risk.

L&S, 521 So.2d at 1301 (citing language from Tank). The above statement is not a complete recital of the entire Washington Court decision but, for purposes of this seminar, it serves to introduce counsel to the general nature of the potential issue and requirements placed upon counsel. If an attorney is involved in one of these type situations, we strongly recommend that the L&S decision, as well as the decision from the Washington Court, be reviewed in their entirety.

The Washington Supreme Court also stated that defense counsel retained by insurers to defend insureds under a reservation of rights must meet distinct criteria as well:

First, it is evident that such attorneys owe a duty of loyalty to their clients.

Rules of Professional Conduct 5.4 (c) prohibits a lawyer, employed by a party to represent a third party, from allowing the employer to influence his or her professional judgment. In a reservation-of-rights defense, RPC 5.4 (c) demand that counsel understand that he or she represents only the insured not the company. As stated by the court in Van Dyke v. White, 349 P.2d 430 (Wash. 1960), "[t]he standards of the legal profession require undeviating fidelity of the lawyer to his client. No exceptions can be tolerated ...

Second, defense counsel owes a duty of full and ongoing disclosure to the insured. This duty of disclosure has three aspects. First, potential conflicts of interest between insurer and insured must be fully disclosed and resolved in favor of the insured.... Second, all information relevant to the insured's defense, including a realistic and periodic assessment of the insured's chances to win or lose the pending lawsuit, must be communicated to the insured. Finally, all offers of settlement must be disclosed to the insured as those offers are presented. *In a reservation-of-rights defense, it is the insured who may pay any judgment or settlement. Therefore, it is the insured who must make the ultimate choice regarding settlement.* In order to make an informed decision in this regard, the insured must be fully apprised of all activity involving settlement, whether the settlement offers or rejections come from the injured party or the insurance company.

L & S, 521 So.2d at 1303 (citing language from Tank)

After consideration of the above, the Alabama Supreme Court held that the Washington approach was the better solution and adopted that view. L & S, 521 So.2d at 1304. The Court held that "[t]he standard set forth in Tank, supra, requiring an enhanced obligation of good faith coupled with the specific criteria that must be met by both the insurer as well as the defense counsel retained by the insurer, provides an adequate means for safeguarding the interests of the insured without, at the same time, engaging in the presumption that any and all defense counsel retained by the insurance industry to represent its insureds under a reservation of rights are conclusively unable to do so without consciously or unconsciously compromising the interest of the insureds." Id. As such, the Court answered the certified question in the negative, holding as follows:

The mere fact that the insurer chooses to defend its insured under a reservation of rights does not ipso facto constitute such a conflict of interest that the insured is entitled at the outset to engage defense counsel of its choice at the expense of the insurer. We hold that, if the insurer and the defense counsel retained by the insurer to represent its insured meet the specific criteria hereinabove adopted, the insurer has met its enhanced obligation of good faith, and the

defense provided by the insurer may proceed under a reservation of rights. It is only when those criteria have not been met in whole or in part that the insurer is entitled to retain defense counsel of its choice at the expense of the insurer.

Id., at 1304.

The enhanced obligation of good faith established in L & S remains the standard for both insurers and defense counsel retained by insurers to date. See generally Twin City Fire Insurance Co. et al. v. Colonial Life & Accident Insurance Co. et al., 839 So.2d 614 (Ala. 2002); Aetna Casualty & Surety Co. et al. v. Mitchell Brothers, Inc. et al., 814 So.2d 191 (Ala. 2001); Shelby Steel Fabricators, Inc. v. United States Fidelity and Guaranty Insurance Co., 569 So.2d 309 (Ala. 1990).

Counsel should take particular note of the Alabama Rules of Professional Conduct, which at Rule 5.4(c) provides:

A lawyer shall not permit a person who recommends, employees, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal service.

## **II. The First Report of Injury**

One of the initial forms completed by an employer, in response to a workers' compensation claim, is the document commonly referred to as the first report of injury. Section 25-5-4, Code of Alabama, states:

An employer shall keep a record of all injuries, fatal or otherwise, received by his or her employees arising out of and in the course of their employment and for which compensation is claimed or paid. Within 15 days after the occurrence of the injuries and knowledge thereof by the employer, a report of the same shall be made to the department on forms approved by the department. At the discretion of the director, reports received under this chapter may be destroyed after 12 years.

First reports of injury are frequently referenced by the appellate and trial courts. For example, in the recent case of Ex Parte El Reposo Nursing Home Group, Inc., 2011 WL4134769,

\*1 (Ala. Civ. App. 2011), the Court of Civil Appeals began by stating that the employer "filed an Employer's First Report of Injury indicating that Patterson had pulled her back assisting a patient." In another recent decision, Francis Powell Enterprises, Inc. v Andrews, 21So.3rd 726, 731 (Ala. Civ. App. 2009), the Court of Civil Appeals noted a trial court finding that prompt actual notice of an injury was provided "as noted in the Employer's First Report of Injury...."

Occasionally, an argument is presented that the first report of injury serves as an admission of some fact or conclusion of law. For example, in Ex Parte Dolgencorp, Inc., 13So.2d 888 (Ala. 2008), an employee contended that the average weekly wage should be determined by the amount which was placed on the first report of injury form. In essence, the employee attempted to use the first report of injury as evidence to support her position regarding the average weekly wage. In that particular case, the Alabama Supreme Court rejected the position of the employee, noting that the workers' compensation statutes set forth a specific manner of calculating the average weekly wage and that the use of the first report was not an option in that instance.

### **III. Discovery and Depositions**

As with other civil cases, each workers' compensation lawsuit will involve the pre-trial discovery process. This is a system under which each side is allowed to obtain information from the other, in advance of trial, in order to allow both sides to adequately evaluate the case and be prepared for a possible trial. Both sides are also allowed to obtain information from persons/entities who are not parties to the litigation; this would include, for example, subpoenas to medical providers. There are certain limitations on discovery in civil actions, as well as in workers' compensation cases in particular. For example, Section 25-5-81, Code of Alabama, provides the following restrictions on workers' compensation discovery.

Methods of discovery shall be determined and established in rules promulgated by this amendatory act and the rules established by the Alabama Rules of Civil Procedure with the limitations of pre-trial discovery as set forth below. Additionally, the following rules of discovery shall apply to workers' compensation cases:

- (1) Two depositions for each side shall be permitted without leave of court, however, any additional depositions shall not be permitted except with leave of court for good cause shown including, but not limited to, a claim by the employee for permanent total disability.
- (2) Notwithstanding the limitations in (1) above, each party may take the deposition of every other party.
- (3) No more than 25 interrogatory questions with each sub-part to be considered a question shall be permitted without leave of court for good cause shown.

Deposition testimony is frequently cited by trial and appellate courts. This is illustrated by recent cases from the Court of Civil Appeals. In Lewis v Alabama Power Company, 2011 WL4867653 (Ala. Civ. App. 2011), the court quoted extensively from a plaintiff's deposition. Citations were given not only to the answers but also to the specific questions asked by the attorneys. In Metals USA Plates and Shapes Southeast, Inc. v Conner, 2011WL3528436 (Ala. Civ. App. 2011), the court followed the same practice and again quoted extensively from actual questions and answers at the deposition. In Cascaden v Winn-Dixie Montgomery, LLC, 2011WL3375652 (Ala. Civ. App. 2011), the Court of Civil Appeals quoted extensively from a deposition where an employee was asked about previous statements he had provided in a written form. All of these cases illustrate the importance of a deposition. It is under oath, it is recorded, and it carries the obligation to state the truth. It is imperative that depositions be taken seriously with thorough and complete preparation.

#### **IV. Matters Involving Pre-Existing Conditions**

The Alabama Workers' Compensation Act contains a provision regarding pre-existing conditions, which provides as follows:

If the degree or duration of disability resulting from an accident is increased or prolonged because of a preexisting injury or infirmity, the employer shall be liable only for the disability that would have resulted from the accident had the earlier injury or infirmity not existed.

Section 25-5-58, Code of Alabama (1975). On its face, Section 25-5-58 seems to state that an

employee's disability benefits should be apportioned. However, Alabama's appellate courts have added certain caveats to §25-5-58 in interpreting the same. In Fort James Operation Co. v. Kirklewski, 893 So.2d 434, 444 (Ala. Civ. App. 2004), the Alabama Court of Civil Appeals held that "it is well settled that [§25-5-58] is not applicable where the earlier injury or infirmity relied upon by the employer was not so disabling as to prevent the employee from performing the normal duties of his employment." See also Georgia-Pacific, Corp. v. Medley, 621 So.2d 306 (Ala. Civ. App. 1993)(holding that "[a]s a general principle, a preexisting condition, as defined in Section 25-5-58, Code 1975, is not present for purposes of compensation if prior to the accident the employee was able to perform her duties").

The Alabama Court of Civil Appeals more recently interpreted Section 25-5-58 in Alamo v. PCH Hotels and Resorts, Inc., 987 So.2d 598 (Ala. Civ. App. 2007). Justice Moore, concurring specially in that decision, wrote as follows:

By importing the apportionment legal fiction into medical-causation discussions, some appellate opinions have fostered the misimpression that if an employee is working normally before and at the time of the accident, and hence has no preexisting condition, then, as a matter of law, any subsequent injury or disability must be considered to be caused by the accident. See, e.g., Tarver v. Diamond Rubber Products Co., 664 So.2d 207, 210 (Ala.Civ.App.1994); see also T. Moore, *supra* at § 7:24, nn. 44-49. However, based on my review of all of the pertinent cases, I believe Alabama actually has not adopted any rule of law to that effect. Rather, under Alabama law, the fact that an employee was asymptomatic and able to work normally before the accident, but became symptomatic and unable to work afterwards, is merely circumstantial evidence that will support a finding that the work-related accident caused the symptoms and disability. See Birmingham Post Co. v. McGinnis, 256 Ala. 473, 476, 55 So.2d 507, 509 (1951). Although a trial court may infer medical causation from the appearance of symptoms and the onset of disability following a work-related accident, it is not compelled to make such a finding, especially if that inference is undermined by other factors or evidence. See, e.g., Hammons v. Roses Stores, Inc., 547 So.2d 883 (Ala.Civ.App.1989) (when expert medical evidence indicated employee's back condition was degenerative in nature and had not been changed by work-related accident, trial court properly denied benefits); Mobile County v. Benson, 521 So.2d 992, 995-96 (Ala.Civ.App.1988) (reversing award of benefits when undisputed expert medical testimony established that employee's work-related fall did not have

any effect on his preexisting back condition); and Proctor v. R.R. Dawson Bridge Co., 757 So.2d 446 (Ala.Civ.App.1999) (evidence indicating that employee misrepresented preexisting condition and circumstances of alleged work-related heat exhaustion supported finding that subsequent disability was related solely to preexisting condition). In every case, even in cases where the employee is working normally before the accident, the issue of medical causation is a question of fact, not of law. See Goodyear Tire & Rubber Co. v. Snell, 821 So.2d 992, 997 (Ala.Civ.App.2001).

Id. at 604 (emphasis added).

As illustrated by Justice Moore's concurrence regarding working as a "normal man" prior to any alleged new event, Alabama's appellate decisions will continue to dictate the direction of the Act and take legislation, which is arguably clear on its face, in a multitude of directions. The purpose of reviewing the above recent decision is not to exhaustively review the interpretations, past and present, of Section 25-5-58 but instead to illustrate the fact that the courts in Alabama continue to re-write or re-interpret the pre-existing rules and a prudent practitioner must be aware of the potential arguments when the facts present a pre-existing medical issue.

#### **V. Do Not Rely Solely Upon the Workers' Compensation Statutes**

Workers' compensation is primarily a statutory creature. It has developed over many years and is the product of countless separate pieces of legislation. The history of Alabama's Workers' Compensation Act was generally discussed by the late Bob Lee who wrote as follows:

The Workers' Compensation Act was adopted in Alabama in 1919. Because the Alabama Act most closely resembled the Minnesota law, courts in Alabama often look to Minnesota courts for guidance in interpreting the statute.

In the ensuing years, benefit levels and awards have been modified by the Legislature. While numerous significant amendments have been added to the Workers' Compensation Act of Alabama, there are several outstanding features that should be highlighted. The medical benefit, which in 1919 was restricted in time and dollar amount, is now limited by neither. Now an employee with a covered injury is entitled to recover all reasonable medical expenses related to the injury. Furthermore, the addition of the retaliatory discharge provision in 1984 created a statutory exception to the employee-at-will rule.

Robert W. Lee and Steven W. Ford, Alabama Workers' Compensation Law and Handbook Section 2.01 (2<sup>nd</sup> ed. 2004).

The most recent significant amendments were passed in 1992 and 1994. As noted by Mr. Lee, "the 1992 Amendments made the most wide-reaching changes in the Workers' Compensation Act since its enactment in 1919." Lee & Ford, supra, Section 2.12. Subsequently, additional amendments occurred in 1994 and as recently as 2008.<sup>1</sup>

The practitioner should note that workers' compensation in Alabama is not simply a product of legislative enactment. It would be a mistake to simply review the statutory language without reading the case law interpreting and sometimes arguably rewriting, the legislative enactments. It would also be a mistake not to consider administrative regulations from the Department of Industrial Relations. In short, Alabama workers' compensation law continues to develop through legislative action, case law interpretation, and administrative regulation.

The prudent workers' compensation practitioner should not conclude any analysis with a mere review of the statutes. Rather, the prudent practitioner must also review the Alabama case law interpreting the Act. This is evidenced by the above discussion on the pre-existing condition statute. Notwithstanding the wording of the statute, the Courts in Alabama have historically supplied their own interpretation and analysis of the intent. As evidenced by the discussion set forth herein below, in some instances, the case law not only interprets the Act but arguably adds to and/or conflicts with the same.

Another example is seen in the case law interpreting the statutes on the scope of the act and the election of coverage. Section 25-5-50(a)(1975), Code of Alabama, sets forth the procedure by which employers considered exempt from the Alabama Workers' Compensation Act can elect

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<sup>1</sup> Interestingly, on August 1, 2008, the Alabama Legislature amended § 25-5-50, via Act 2008-395, p. 764, § 1, and removed employers who regularly employ less than five employees in any one business who are in "the business of constructing or assisting on-site in the construction of new single-family, detached residential dwellings," from the exemption of the Workers' Compensation Act.

coverage under the same.

An employer who regularly employs less than five employees in any one business; a farm-labor employer; an employer of a domestic employee; or a municipality having a population of less than 2,000 according to the most recent federal decennial census, may accept and become subject to this article and Article 4 of this chapter by filing written notice thereof with the Department of Industrial Relations, a copy thereof to be posted at the place of business of the employer; provided further, that an employer who has so elected to accept this article and Article 4 of this chapter may at any time withdraw the acceptance by giving like notice of withdrawal...

Section 25-5-50(a), Code of Alabama.

On its face, Section 25-5-50(a) indicates that in order to elect coverage under the Act, an employer must file the requisite notice with the Department of Industrial Relations and post the same at their place of business. However, Alabama's appellate courts have not required that employers perfectly comply with the requirements section forth in Section 25-5-50(a) in order to elect coverage under the Act. Rather, Alabama's appellate courts have adopted a "substance over form" approach when determining what constitutes election of coverage under the Act. In Smith v. Thrower Nursery, Inc., 360 So.2d 741, 743 (Ala. 1978), the Alabama Supreme Court held that "where an employer has clearly manifested his intent to elect coverage and the concerned parties have at all times acted as though coverage was in effect, these actions should control." The Court also held that "[w]hile a single act of taking out insurance or paying a claim may not be sufficient evidence of intent, a consistent pattern of behavior on the part of the employer, his employees, and the Department of Industrial Relations will suffice." Id. (relying upon 2 A A. Larson, The Law of Workmen's Compensation, Section 67.10 (1976) ("[W]hen the question is what will amount to affirmative election of coverage, most courts are less exacting as to formalities and will accept any realistic evidence of intent to accept coverage, such as actual payment of compensation or the taking out of workmen's compensation insurance")). Again, the purpose of this discussion is not to examine all of the past and present interpretations of Section 25-5-50(a) but instead to illustrate the manner in which the courts will often change or otherwise interpret the literal language of legislation.

Another source which the workers' compensation practitioner needs to consult is the Alabama Department of Industrial Relations' administrative code. The late Bob Lee gave the following history on these regulations:

In 1996, pursuant to language in Ala. Code § 25-5-293(k), which is part of the article of the Act establishing the ombudsman program, the Alabama Department of Industrial Relations (DIR) promulgated regulations entitled "Utilization Management and Bill Screening." These regulations are codified in Ala. Admin. Code § 480-5-5-.01 et seq. The regulations purport to govern physician referrals, second opinions, and the employee's use of emergency services. Chiropractic care, optometric care, physical therapy, occupational therapy, speech therapy, hospital care, dental services, and prescription medications are specifically regulated. An administrative procedure was established to decide disputes over medical necessity.

Lee & Ford, supra, Section 33.09.

Mr. Lee correctly notes that "[n]o appellate court has addressed the legality of these DIR regulations." Lee and Ford, supra, Section 33.09. Nevertheless, the Alabama Court of Civil Appeals has cited these regulations, in particular Alabama Department of Industrial Relations Administrative Code Section 480-5-5-.02, in recent decisions. See, e.g. James River Corp. v. Bolton, 14 So.3d 868 (Ala. Civ. App. 2008); Ex parte Alabama Power Co., 863 So.2d 1099 (Ala. Civ. App. 2003); and Ex parte Southeast Alabama Medical Center, 835 So.2d 1042 (Ala. Civ. App. 2002). The Court of Civil Appeals' recent reliance on the DIR regulations emphasizes the importance of consulting the same.

As with the above discussion on court interpretations of statutes, this material is not designed in any way to fully explore the Department of Industrial Relations administrative code. It is instead intended to illustrate that the workers' compensation laws are changed in many ways including statute, opinion, and administrative rule.

## **VI. Understand the Settlement Process and the Scope of the Settlement**

The complexities of workers' compensation law abound in the area of settlement. Depending on circumstances, various issues occur involving not only the workers' compensation claim but also potential other claims against not only the employer but possibly third parties to the settlement.

There is a unique body of law governing workers' compensation settlements. The courts have said that workers' compensation settlements have been statutorily removed from the "ambit of the principles applicable to the settlement and release of ordinary personal injury claims." Sager v. Royce Kershaw Co., 359 So.2d 398 (Ala. Civ. App. 1978). Thus, it is incumbent upon the parties to a workers' compensation action to be familiar with the issues surrounding settlement.

First, we will review the statutory authority to settle a workers' compensation claim, and review some of the case law discussing the statutory language. The practitioner should be aware that workers' compensation claims are often settled through court approval or sometimes through the use of a state ombudsman, as further discussed below. We will also address the settlement of particular issues/disputes, including future medical bills and retaliatory discharge claims. Hopefully, this will provide a starting point for the analysis of any settlement issue.

Section 25-5-56, Code of Alabama, contemplates settlement of workers' compensation actions, and provides as follows:

The interested parties may settle all matters of benefits, whether involving compensation, medical payments, or rehabilitation, and all questions arising under this article and Article 4 of this chapter between themselves, and every settlement shall be in amount the same as the amounts or benefits stipulated in this article. No settlement for an amount less than the amounts or benefits stipulated in this article shall be valid for any purpose, unless a judge of the court where the claim for compensation under this chapter is entitled to be made, or upon the written consent of the parties, a judge of the court determines that it is for the best interest of the employee or the employee's dependent to accept a lesser sum and approves the settlement. The court shall not approve any settlement unless and until it has first made inquiry into the bona fides of a claimant's claim and the liability of the defendant; and if deemed advisable, the court may hold a hearing thereon. Settlements made may be vacated for fraud, undue influence, or coercion, upon application made to the judge approving the settlement at any time not later than six months after the date of settlement. Upon settlements being approved, judgment shall be entered thereon and duly entered on the records of the court in the same manner and have the same effect as other judgments or as an award if the settlement is not for a lump sum. All moneys voluntarily paid by the employer or insurance carrier to an injured employee in advance of agreement or award shall be treated as advance payments on account of the compensation. In order to encourage advance payments, it is expressly provided that the payments shall not be construed as an admission of liability but shall be without prejudice. [Emphasis supplied.]

As part of a workers' compensation settlement, the parties may also agree that the employer will pay, and the employee will accept, a lump sum payment, in lieu of future periodic payments:

By agreement of the parties and with approval of the court, the amounts of compensation payable periodically, under this article and Article 4 of this chapter, may be commuted to one or more lump sum payments. No commutation shall be approved by the court unless the court is satisfied that it is in the best interest of the employee or the employee's dependent, in case of death, to receive the compensation in a lump sum rather than in periodic payments. In making the commutations, the lump sum payment shall, in the aggregate, amount to a sum equal to the present value of all future installments of compensation calculated on a six percent basis.

Section 25-5-83, Code of Alabama (emphasis supplied).<sup>2</sup>

The Alabama Court of Civil Appeals has derived the following principles from its review of those Code sections:

If workmen's compensation payments are voluntarily made without court approval by an employer to an injured employee in the same weekly amounts and for the same period of time as are provided for a particular injury by the statute, those advance payments would fully pay the compensation obligation of the employer to the employee for that injury. However, if the monies so voluntarily paid without court approval amounted to less than the total amount which should have been paid under the statute, the employer would be liable to the employee for the difference between those total figures, and the employee could institute a timely civil action for that balance.

Phillips v. Opp & Micolas Cotton Mills, Inc., 445 So.2d 927, 930 (Ala.Civ.App. 1984).

#### A. Judicial Approval of Settlements

The Alabama Court of Civil Appeals, interpreting the two statutes listed above, has in the past stated that an agreement "must be approved by the circuit judge" in two circumstances: "when the worker agrees to accept an amount less than provided for by statute, Section 25-5-56, and when the worker agrees to accept a lump sum payment in lieu of periodic payments of compensation.

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<sup>2</sup>Alabama Code Section 25-5-86 also provides for a lump sum settlement where an employer is in default in paying court-ordered benefits. In Crean v. Michelin North America, Inc., No. 2970435, 1999 WL 195770 (Ala. Civ. App., Apr. 9, 1999), the court discussed the requirements for a lump sum settlement under Section 25-5-86. The court found "a 'good cause' reason for delay in payment of benefits is not a defense for failure to timely pay benefits owed." Id. at \*2.

Section 25-5-83." Shaw v. Dover Furniture Mfg. Co., 700 So.2d 1382, 1384 (Ala. Civ. App. 1997).

Certainly, there will be some settlements which will not fall into those two categories. Even so, it is our recommendation that every workers' compensation settlement receive court approval because court approval imparts a degree of finality and gives the settlement "the same effect as other judgments or as an award if the settlement is not for a lump sum." Section 25-5-56, Code of Alabama.

Indeed, in at least one case, the Alabama Court of Civil Appeals has discussed the folly of settling a workers' compensation claim without court approval. See Phillips v. Opp & Micolos Cotton Mills, Inc., 445 So.2d 927, 930 (Ala.Civ.App. 1984). In Phillips, the employer voluntarily made disability payments to its injured employee, but never entered into a settlement agreement. Later, the employee commenced a workers' compensation action, contending that the payments were less than permitted by the Alabama Workers' Compensation Act. The Court of Civil Appeals found that the employee's action was permissible and suggested that court approval should have been sought:

This case is a clear example of the wisdom and prudence of obtaining court approval of workmen's compensation settlements when more than modest payment periods or amounts are required by the act. Had a settlement of the parties been approved by the court as is authorized by § 25-5-56, *supra*, the court's judgment as to this permanent partial disability could not have been vacated except for fraud, undue influence or coercion upon application made to the trial court within six months from the date of the entering of the judgment.

Id. at 931.

#### **B. Ombudsman Settlements**

The emergence of the Ombudsman Program of the Alabama Department of Industrial Relations may raise some issues on the finality of settlement. Ombudsmen are statutorily empowered to mediate workers' compensation disputes. Section 25-5-291(f)(1), Code of Alabama. One aim of such mediation is to arrive at a "mutual agreement" or "settlement" of the dispute.

Section 25-5-292(a). The statute provides that an agreement reached through Ombudsman mediation is under certain circumstances<sup>3</sup> "final" and irrevocable, but is subject to review by a Circuit Court within 60 days for such nebulous reasons as "fraud, newly discovered evidence, or other good cause." Section 25-5-292(b). Thus, the Ombudsman statute itself recognizes the primacy of the Circuit Courts.

However, the Alabama Court of Civil Appeals has held that judicial approval is not necessary for a settlement under the Ombudsman statute. See Stubbs v. Brookwood Medical Ctr., 767 So.2d 359 (Ala. Civ. App. 2001). In Stubbs, the plaintiff filed a complaint for workers' compensation benefits. The trial court dismissed the complaint because the plaintiff previously had entered into a settlement under the Ombudsman Program. The worker argued, however, that she could proceed, "because the settlement between her and the company was not approved by a court of competent jurisdiction." Id. at 361. The Court of Civil Appeals disagreed:

Section 25-5-292(a) allows a disputed claim to be settled at a benefit-review conference. That is what occurred in this case. Section 25-5-292(a) further allows either party the right to submit the settlement to a court for approval, and § 25-5-292(b) allows the submission within 60 days of entering the settlement. No provision of the Ombudsman Program requires court approval of such a settlement.

... Because the worker did not submit the settlement to the trial court within the 60 days allowed by § 25-5-292(b), the settlement became final. Section 25-5-292(a). Therefore, the trial court properly dismissed the worker's complaint for workers' compensation benefits.  
Id. at 362 (emphasis added).

The Alabama Supreme Court also reached a similar conclusion in Ex parte Ford, 782 So.2d

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<sup>3</sup>The pertinent language of § 25-5-290(f)(2) provides:

(f) In conducting benefit review conferences, the ombudsman:

(2) Shall inform all parties of their rights and responsibilities under this article, especially in cases in which either party is not represented by an attorney or other representative. An employee shall be advised, in writing which shall be notarized, of his or her right to be represented by counsel and of his or her right to have any settlement of his or her claim reviewed by a court of competent jurisdiction at any time within 60 days after the date of the settlement and at the end of 60 days it shall be final and irrevocable.

185 (Ala. 2000). In Ford, the trial court enforced a settlement agreement reached under the Ombudsman Program. On appeal, the worker argued that the trial court erred in enforcing the agreement without finding that the agreement was in her best interest. The Supreme Court concluded that "court approval of the settlement agreement was not required ...." Id. at 186. The Court further found that the trial court lacked jurisdiction to set aside the agreement, because the worker "did not submit the settlement agreement for court approval within 60 days after the date of the settlement agreement." Id. at 187. Thus, the arguable impact of Ford is that court approval of an Ombudsman settlement is "not required," but that a trial court may set aside such an agreement, if a motion to set aside is presented within 60 days.

Further, in Ex parte Winn-Dixie Montgomery, Inc., 865 So.2d 432 (Ala. Civ. App. 2003), the employer and employee negotiated a settlement agreement under the Ombudsman Program. The agreement provided for the closing of the employee's workers' compensation claims for compensation, vocational and future medical benefits. Within two weeks of the settlement, at the request of the employer, the settlement agreement was presented to the trial court for approval. The trial court refused to approve the settlement agreement, but did not issue an order explicitly explaining its reasoning in refusing to approve the settlement. Id. at 433. After the trial court set the matter for trial, the employer filed a motion to enforce the settlement agreement or, in the alternative, to dismiss the plaintiff's complaint. After the trial court denied the employer's motion, the employer petitioned the Alabama Court of Civil Appeals for a writ of mandamus directing the trial court to enter an order dismissing the employee's claims or enforcing the prior settlement agreement. The appellate court distinguished the facts of this case from those in Ex parte Ford, and denied the employer's motion and reasoned that the settlement agreement had been presented and refused by the trial court within sixty (60) days of the settlement date.

Finally, if a trial court approves a workers' compensation settlement that leaves the employee's future medical benefits open, we recommend that then any subsequent settlement closing

out such medical benefits be approved by the same court.<sup>4</sup>

### C. Particular Settlement Issues

#### 1. Release of "any and all" claims

One arguable way to release an employer from types of potential liability for a work-related injury is to include language in the settlement agreement pertaining to "any and all claims." In discussing a release of retaliatory discharge claims, the Alabama Supreme Court has made the following, broadly-worded statement:

a "settlement of any and all claims for compensation benefits due and rehabilitation or retraining benefits due" is "conclusive of any other claims," unless there is evidence of fraud ... or the claim in issue is expressly excepted from the settlement agreement.

Gates Rubber Co. v. Cantrell, 678 So.2d 754, 756 (Ala. 1996) (quoting Sanders v. Southern Risk Services, 603 So.2d 994 (Ala. 1992)).<sup>5</sup> As will be discussed below, the term "compensation benefits," as used by the Court, probably does not include payment of future medical benefits.

Even so, use of the phrase "any and all claims," as well as the phrase "or otherwise," is

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<sup>4</sup>Counsel, particularly in Jefferson County, should review a letter from presiding Jefferson County circuit judge, Hon. J. Scott Vowell, to the Director of the Alabama Department of Industrial Relations, regarding discovered instances of medical benefit closures being approved by Ombudsmen, where the original settlements were approved by the trial court.

<sup>5</sup>The exact language of the settlement agreement in Gates Rubber was as follows:

Upon payment of said sum by the defendant to the plaintiff, the plaintiff agrees to and does hereby release the defendant and its workmen's compensation insurance carrier from any and all liability now accrued or hereafter to accrue for compensation and vocational rehabilitation benefits under the workmen's compensation laws of the State of Alabama, or otherwise, due or arising out of [the plaintiff's work-related] injury of August 19, 1990, or any other accidental injury sustained by the plaintiff while employed by the defendant....

Gates Rubber Co. v. Cantrell, 678 So.2d 754, 754-55 (Ala. 1996)(emphasis in original). As will be discussed later, the Court did not reference, or emphasize, the words "or otherwise." Even so, given the state of flux surrounding the law on settlement agreements, this paper has one piece of advice on the use of the phrase "or otherwise": It can't hurt to use it if you represent the employer; on the other hand, if you represent the plaintiff you should be cautious of the use of this term and make sure that your client understands the full potential import.

recommended to attempt insulation of an employer and (if included in the agreement<sup>6</sup>) its insurer from almost any other type of claim arising from a work-related injury. For example, the settlement agreement in Finley v. Liberty Mut. Ins. Co., 456 So.2d 1065 (Ala. 1984), contained the following language:

That upon payment of said \$3,852.22 and after obtaining the approval of the Court, said employer and its insurance carrier shall without further formality stand forever released and discharged for any and all claims arising out of or in any way connected with the above-described accident, injuries, and/or disability and/or the treatment thereof, and/or any resulting or related reduced earning capacity, all irrespective of the extent in fact of any such injuries and/or past, present, and/or future disability, and/or reduced earning capacity to said employee, except that the employer will pay for future medical treatment directly and necessarily related to the treatment of injuries described above.

Id. at 1066 (emphasis supplied). After agreeing to the settlement, the plaintiff commenced a third-party action against the workers' compensation insurer, contending the insurer negligently inspected his work area. The plaintiff argued that the settlement agreement was inapplicable to his third-party claims, because the agreement was ambiguous. The Alabama Supreme Court disagreed.

We are unable from the facts of this case to find any reason that would justify a departure from the holding ... that the phrase "any and all claims" means precisely what it says, and, therefore, is unambiguous.

Id. at 1067. The Court thus affirmed a summary judgment in favor of the insurer.

The Court reached a similar conclusion in Brown v. Continental Cas. Ins. Co., 604 So.2d 351

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<sup>6</sup>It is suggested that any person or entity who desires to be released should be expressly included within the court-approved settlement, and pay some form of consideration for the release. In Pierce v. Orr, 540 So.2d 1364 (Ala. 1989), the Alabama Supreme Court held that

Henceforth, unnamed third-parties, referred to in the release as "any and all parties" or by words of like import, who have paid no part of the consideration and who are not the agents, principals, heirs, assigns of, or who do not otherwise occupy a privity relationship with, the named payors, must bear the burden of proving by substantial evidence that they are parties intended to be released, i.e., that their release was within the contemplation of the named parties to the release. This shift in the burden of proof, of course, does not preclude unnamed third-parties from timely interposing a defense to the extent of claiming credit for any amounts paid by named parties to the release.

Id. at 1367.

(Ala. 1992). In that case, the plaintiff executed a settlement releasing his rights to future benefits, and also containing the following language:

Plaintiff further agrees to forever release defendant, its insurance carrier and any agent of defendant or the carrier from any cause of action plaintiff has, or should have as a result of this employment-related injury including specifically any cause of action for payment of any benefits to which plaintiff could contend he was entitled under the workmen's compensation laws....

Id. at 352 (emphasis supplied). The plaintiff later commenced an action against his employer and its insurer for fraud and outrage, contending he was coerced into settling his claims for future medical benefits. The Court found that the general release of "any cause of action" protected the employer and insurer from the fraud and outrage claims:

In this case, the January 29, 1990, agreement unambiguously stated that Brown agreed to release Holderfield's and CNA from any cause of action resulting from his employment-related injury. The fraud and outrage claims arose out of the settlement agreement relating to future medical expense claims arising from a work-related injury, for which claims Brown was awarded \$17,500. The language of the release was unambiguous and was sufficient to release Holderfield's and CNA from Brown's claim.

Id. at 352 (emphasis in original).

## 2. Future Medical Expenses<sup>7</sup>

Prior to 1992, there was no statutory authority permitting a settlement of future medical expenses resulting from an on-the-job injury. The 1992 amendments to the Workers' Compensation Act contemplated such settlements:

The interested parties may settle all matters of benefits, whether involving compensation, medical benefits, or rehabilitation, and all questions arising under this Article and Article Four of this Chapter between themselves, and every settlement shall be in an amount the same as amounts or benefits stipulated in this Article. ...

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<sup>7</sup>This paper has not addressed issues relating to Medicare, Social Security, and the possible use of set aside arrangements when closing future medical benefits. Those issues should be separately examined and considered by counsel in any case where medical benefits are being considered for closure.

Section 25-5-56, Code of Alabama (emphasis supplied).<sup>8</sup>

While there certainly is no "magic language" for settling future medical expenses, the Alabama Supreme Court has reviewed such a release on at least one occasion. In Brown v. Continental Casualty Ins. Co., 604 So.2d 351 (Ala. 1992), the plaintiff settled his workers' compensation claim with an agreement containing the following language:

Plaintiff, Jerrid Lee Brown, agrees to waive and compromise his rights to any future medical benefits from this date forward upon payment from defendant of the sum of Seventeen Thousand Five Hundred and No/100 (\$17,500) Dollars in full release of any and all payment for future medical expenses.

Id. at 352. After the settlement was approved by the Circuit Court, the plaintiff claimed he was coerced into settling his future medical benefits, and instituted an action for fraud and outrage. The Supreme Court found the fraud and outrage claims were barred by a general release in the settlement,<sup>9</sup> and also noted that those claims "arose out of the settlement agreement relating to future medical expense claims arising from a work-related injury, for which claims Brown was awarded \$17,500." Id.

The language utilized by the parties in Brown is instructive, because it demonstrates that the parties focused upon future medical benefits, and specified an amount to settle claims for future medicals. It is further important to note that a general release of claims for "compensation" under the Workers' Compensation Act is, in our judgment, insufficient to release claims for future medical

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<sup>8</sup>For additional issues and related matters, counsel may wish to review the previously mentioned letter which has been issued from presiding Jefferson County circuit judge, Hon. J. Scott Vowell, to the Director of the Alabama Department of Industrial Relations.

<sup>9</sup>As previously discussed, the language of the general release was as follows:

Plaintiff further agrees to forever release defendant, its insurance carrier and any agent of defendant or the carrier from any cause of action plaintiff has, or should have as a result of this employment-related injury including specifically any cause of action for payment of any benefits to which plaintiff could contend he was entitled under the workmen's compensation laws....

benefits, because of the statutory definition of that term:

"Compensation" does not include medical and surgical treatment and attention, medicine, medical and surgical supplies, and crutches and apparatus furnished to an employee on account of an injury.

Section 25-5-1(1), Code of Alabama.

That statutory language was stressed by the Alabama Court of Civil Appeals in Central LP Gas, Inc. v. Walls, 656 So.2d 890 (Ala. Civ. App. 1995). In Walls, the plaintiff injured his foot in 1989, and settled his workers' compensation claim in 1991. In 1994, he sought payment for medical expenses associated with a back surgery, which arguably was related to his foot injury. The employer contended that the 1991 settlement, and court judgment, barred the claim for benefits in 1994. The court quoted Section 25-5-1(1), Code of Alabama, and made the following pronouncement:

Because the 1991 judgment released only claims for "compensation benefits," which phrase does not include medical expenses, and the present claim is for medical expenses, the 1991 judgment does not bar the present claim.

Id. at 894.

Indeed, the Court of Civil Appeals later approved of the following language preserving an employee's right to receive future medical benefits:

The [company] has heretofore paid to the [worker] temporary total in accordance with the Workmen's Compensation Act of the State of Alabama to a lump sum figure of \$4,470.60 which sum the [company] is willing to pay and the [worker] is willing to accept in full payment, satisfaction and accord of any and all claims for and on account of said alleged injury whether under the Workmen's Compensation Act of the State of Alabama, as last amended or otherwise, except that [the worker] shall continue to be entitled to such medical benefits as were provided to him by the Workmen's Compensation Act of the State of Alabama, as of February 23, 1972."

Waters v. Alabama Farmers Co-op., Inc., 681 So.2d 622, 623 (Ala.Civ.App. 1996) (emphasis supplied). The court found the foregoing language would not bar a claim for medical expenses, because such an agreement "specifically excludes medical expenses from the issues decided by the

agreement. By definition, medical expenses are not compensation pursuant to the statute." Id. at 624.

### 3. Rehabilitation Expenses

The Alabama Workers' Compensation Act provides for a myriad of benefits to which an injured employee may be entitled. One such benefit is rehabilitation expenses, including physical and vocational rehabilitation. See Section 25-5-77, Code of Alabama. It is important to note, however, that the Alabama Court of Civil Appeals arguably considers vocational rehabilitation benefits to be encompassed within general workers' compensation benefits, which may be relinquished by a general release.

In Dunlop Tire Corp. v. Farley, 660 So.2d 603 (Ala. Civ. App. 1995), the plaintiff executed a settlement agreement containing the following language:

The total sum of \$40,000.00 to the Plaintiff and \$22,500.00 to the Honorable J. Zach Higgs, Jr., and the annuity as above described [\$500 per month for life with a 20-year guarantee] being the amounts agreed upon by the parties hereto and approved and assessed by the Court herein and upon the payment of said sum, the Plaintiff shall be entitled to no further benefits for compensation under the Workmen's Compensation Laws of the State of Alabama from the Defendant arising out of the alleged accident and injury and disability made the basis of this cause, except for future medical expenses and physical rehabilitation that the Defendant may be required under the terms and provisions of § 25-5-77, Code of Alabama, as amended for which Defendant may be liable.

Id. at 603-04 (emphasis supplied). One year later, the plaintiff filed a motion to receive vocational rehabilitation, pursuant to Section 25-5-77(c), Code of Alabama. The Court of Civil Appeals found he was not entitled to such benefits:

It is clear to this court that the plain language of the trial court's judgment entry forecloses Farley from obtaining vocational rehabilitation benefits now. After Farley accepted the settlement offered to him by Dunlop, he was entitled to "no further benefits" from the company except for the payment of future medical expenses. The fact that Dunlop agreed to provide future necessary medical care to Farley pursuant to subsection (a) of § 25-5-77 did not obligate it to provide the other benefits found elsewhere in § 25-5-77, which Farley agreed to relinquish upon settlement of the case.

Id. at 604.

If a specific release of rehabilitation benefits is desired, however, the Alabama Supreme Court has approved certain language. In Sanders v. Southern Risk Services, 603 So.2d 994 (Ala. 1991), the plaintiff agreed to a settlement order containing the following language:

in the interest of settlement, the employer agrees to pay and the employee agrees to accept the sum of \$7500.00 in one lump sum in full settlement of any and all claims for compensation benefits due and rehabilitation or retraining benefits due under the Workmen's Compensation Act of the State of Alabama. The employer has paid all medical expenses incurred by the employee to date and shall be responsible for any medical or surgical expenses required by the Workmen's Compensation Act to be paid.

Id. at 995 (emphasis supplied). The Plaintiff later claimed that he was improperly denied rehabilitation benefits, but the Court rejected his argument, finding that "the signed order leaves no doubt that the settlement amount received by [Plaintiff] was compensation for future rehabilitation expenses and that [Plaintiff] would not be entitled to further expenses in that regard." Id.

#### 4. Retaliatory Discharge

The Alabama Supreme Court has made the following statement in a discussion on the release of retaliatory discharge claims:

a "settlement of any and all claims for compensation benefits due and rehabilitation or retraining benefits due" is "conclusive of any other claims," unless there is evidence of fraud ... or the claim in issue is expressly excepted from the settlement agreement.

Gates Rubber Co. v. Cantrell, 678 So.2d 754, 756 (Ala. 1996). Alabama appellate courts have applied variations of that holding in at least four cases. In the first of those cases, Sanders v. Southern Risk Services, 603 So.2d 994, 995 (Ala. 1992), the parties executed a settlement containing the following language:

The employee has received the sum of \$7451.91 in temporary total disability benefits (representing 48 weeks and 4 days in these benefits, which ended on November 7, 1989) and in the interest of settlement, the employer agrees to pay and the employee agrees to accept the sum of \$7500.00 in one lump sum in full settlement of any and all claims for compensation benefits due and rehabilitation or retraining benefits due

under the Workmen's Compensation Act of the State of Alabama. The employer has paid all medical expenses incurred by the employee to date and shall be responsible for any medical or surgical expenses required by the Workmen's Compensation Act to be paid.

This settlement is substantially in accordance with Ala.Code §§ 25-5-56 and 25-5-57 (1975), as amended. When payment hereunder has been made the employer shall be, and hereby is released from all claims on account of said injury, under said Act or otherwise. This settlement contains the whole agreement between the parties hereto.

After reviewing that language, the Court reached the following decision:

In light of the settlement agreement signed by all parties, which on its face releases Sherman of all other obligations to Sanders, except future medical expenses, and considering the doctor's reports, which tend to show that Sanders was suspected of "dragging his feet" with regard to returning to work, we conclude that the summary judgment was proper.

Id. at 996.

The Court was presented with a settlement agreement, that was very similar to the one found in Sanders, when it discussed Ex parte Aratex Services, 622 So.2d 367 (Ala. 1993). When all payments hereunder has [sic] been made [Aratex] shall be, and hereby is released from all claims on account of said injury, under said Act or otherwise.

Id. at 368 (emphasis supplied). Recognizing the similarities to Sanders, the Court reached the following decision:

In this case, there was no allegation of fraud and there is no evidence of fraud. Therefore, the settlement of Hunt's claim under the Worker's Compensation Act was "conclusive of any other claims" she might have had except those claims expressly reserved in the release. ... Hunt did not expressly reserve her claim for wrongful discharge; the only claim she reserved was a claim for "such future medical benefits as required by the Workmen's Compensation Act in effect on the date of [her] injury."

Id.

The Alabama Supreme Court once again confronted the issue in Gates Rubber Co. v.

Cantrell, 678 So.2d 754 (Ala. 1996), where the settlement agreed read as follows:

"[The] defendant agrees to pay and [the] plaintiff agrees to accept the lump sum of [t]wenty-[f]ive thousand and [n]o/100 (\$25,000.00) [d]ollars in full satisfaction of any and all claims by the plaintiff for compensation and vocational rehabilitation benefits under the workmen's compensation laws of the State of Alabama for [the plaintiff's work-related] accidental injury of August 19, 1990.... Upon payment of said sum by the defendant to the plaintiff, the plaintiff agrees to and does hereby release the defendant and its workmen's compensation insurance carrier from any and all liability now accrued or hereafter to accrue for compensation and vocational rehabilitation benefits under the workmen's compensation laws of the State of Alabama, or otherwise, due or arising out of [the plaintiff's work-related] injury of August 19, 1990, or any other accidental injury sustained by the plaintiff while employed by the defendant....

Id. at 754-55 (emphasis supplied). The Court relied upon Sanders, and reached the following conclusion:

As it would relate to this case, Sanders indicates that a "settlement of any and all claims for compensation benefits due and rehabilitation or retraining benefits due" is "conclusive of any other claims," unless there is evidence of fraud, 603 So.2d at 995, or the claim in issue is expressly excepted from the settlement agreement. 603 So.2d at 996.

The plaintiff does not distinguish the situation in his case from the situation dealt with in Sanders. This case contains no suggestion of fraud; and, as in Sanders, there was no express reservation of the retaliatory discharge claim. See also, Ex parte Aratex Services, Inc., 622 So.2d 367, 369 (Ala.1993) (discussing Sanders and the lack of such a reservation in Sanders and in Aratex).

We conclude that the trial court erred in denying Gates's motion [to dismiss].

Id. at 756.

The Alabama Court of Civil Appeals also has interpreted such language and found a release of retaliatory discharge claims. In Dow-United Technologies Composite Products, Inc. v. Webster, 701 So.2d 22 (Ala.Civ.App. 1997), the Court of Civil Appeals reviewed an agreement that released the employer from

any and all claims, demands, actions causes of action, or suits at law or in equity, of whatever kind or nature, for or because of any matter or thing done, or suffered to be done by anyone prior to and including the day hereof on account of all injuries to the person resulting, or to result, from [the worker's] alleged ... accident.

Id. at 24. The agreement also provided as follows:

This settlement Agreement is substantially in accordance with the Workmen's Compensation Laws of the State of Alabama, as amended, and when the payment provided for above has been made, [the company], and its workmen's compensation carrier ... shall be and hereby are released from all claims for compensation benefits and future vocational rehabilitation rights on account of said injuries under said Workmen's Compensation Act or otherwise.

Id. Conducting a well-reasoned analysis of Alabama Supreme Court precedent, the Court of Civil Appeals reached the following decision:

The Alabama Supreme Court recently reiterated the rule relating to the scope of releases in workmen's compensation settlements. *Gates Rubber Co. v. Cantrell*, 678 So.2d 754 (Ala.1996). In *Cantrell*, the company appealed from the trial court's denial of its motion for summary judgment in a retaliatory discharge action. *Cantrell*, 678 So.2d at 754-55. The company's motion was based upon an agreement executed by the worker in settlement of his workmen's compensation claims. Id. According to the court, " 'a settlement of any and all claims for compensation benefits due and rehabilitation or retraining benefits due' is 'conclusive of any other claims' unless there is evidence of fraud or the claim in issue is expressly excepted from the settlement agreement." Id. at 756 (quoting *Sanders v. Southern Risk Services*, 603 So.2d 994, 995-96 (Ala.1992)); see also *Ex parte Aratex Services, Inc.*, 622 So.2d 367, 369 (Ala.1993). As in both *Cantrell* and *Sanders*, the language of the settlement in this case indicates that the worker released the company from all claims for compensation and rehabilitation benefits. Accordingly, the release in this case does release the company from all claims, including claims of retaliatory discharge.

Id. It should be noted that neither the Alabama Supreme Court, nor the Court of Civil Appeals has stated the specific language that will release a claim for retaliatory discharge, although the holding of *Gates Rubber Co. v. Cantrell*, 678 So.2d 756, indicates that the "any and all claims" language is important. Even so, it must be stressed that every settlement listed above waives all claims under the Workers' Compensation Act "or otherwise." Thus, it is the recommendation of this paper that any attempt to release retaliatory discharge claims contain reference to "any and all claims" and to claims under the Act "or otherwise."

To our knowledge, the Alabama appellate courts have thus far declined to articulate specific

language which is sufficient to preserve a claim for retaliatory discharge. Even so, the Alabama Court of Civil Appeals has paraphrased a settlement which "stated that it applied only to the workers' compensation claim and did not apply to the employee's wrongful termination claim." Elliott v. Opelika Industries, Inc., 690 So.2d 375, 376 (Ala. Civ. App. 1996). In several other cases, the Court of Civil Appeals, without providing the exact language of the agreement, has noted that a claim for retaliatory discharge was preserved in a workers' compensation settlement. See Buzbee v. Alabama Waste Services, Inc., 709 So.2d 61 (Ala. Civ. App. 1998); Ward v. Russell Corp., 705 So.2d 385 (Ala. Civ. App. 1996); Golson v. Montgomery Coca-Cola Bottling Co., 680 So.2d 304 (Ala. Civ. App. 1996).

In one case, the Alabama Supreme Court stated that neither an employer, nor its attorneys, has "a duty to explain all of the potential legal consequences flowing from the settlement that might adversely affect [the employee's] interests." Ex parte Wal-Mart Stores, Inc., 725 So.2d 279, 286 (Ala. 1998). The same Court also stated that an attempt to overturn a settlement waiving retaliatory discharge claims, based on fraud, must be brought within six months of the settlement, pursuant to Section 25-5-56, Code of Alabama. Id. at 286.

**D. Section 25-5-57(a)(3)i, Code of Alabama**

Counsel for both plaintiff and defendant should be familiar with a particularly unique statute potentially governing the settlement or resolution of a workers' compensation claim. Section 25-5-57(a)(3)i, Code of Alabama, provides employees with a particular avenue for potentially re-opening a claim or setting aside a workers' compensation settlement. To do so, the statute indicates that the initial settlement must have been based upon a physical impairment rating; the employee must have returned to work at a wage greater than or equal to the pre-injury rate; and, must have subsequently lost his or her job under particular circumstances. Specifically, Section 25-5-57(a)(3)i provides:

i . RETURN TO WORK. -- If, on or after the date of maximum medical improvement, except for scheduled injuries as provided in Section 25-5-57(a)(3), an injured worker returns to work at a wage equal to or greater than the worker's

pre-injury wage, the worker's permanent partial disability rating shall be equal to his or her physical impairment and the court shall not consider any evidence of vocational disability. Notwithstanding the foregoing, if the employee has lost his or her employment under circumstances other than any of the following within a period of time not to exceed 300 weeks from the date of injury, an employee may petition a court within two years thereof for reconsideration of his or her permanent partial disability rating:

(i) The loss of employment is due to a labor dispute still in active progress in the establishment in which he or she is or was last employed. For the purposes of this section only, the term "labor dispute" includes any controversy concerning terms, tenure, or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee. This definition shall not relate to a dispute between an individual worker and his or her employer.

(ii) The loss of employment is voluntary, without good cause connected with such work.

(iii) The loss of employment is for a dishonest or criminal act committed in connection with his or her work, for sabotage, or an act endangering the safety of others.

(iv) The loss of employment is for actual or threatened misconduct committed in connection with his or her work after previous warning to the employee.

(v) The loss of employment is because a license, certificate, permit, bond, or surety which is necessary for the performance of such employment and which he or she is responsible to supply has been revoked, suspended, or otherwise become lost to him or her for a cause.

The burden of proof is on the employer to prove, by clear and convincing evidence, that an employee's loss of employment was due to one of the causes (i) through (v) above. At the hearing, the court may consider evidence as to the earnings the employee is or may be able to earn in his or her partially disabled condition, and may consider any evidence of vocational disability. The fact the employee had returned to work prior to his or her loss of employment shall not constitute a presumption of no vocational impairment. In making this evaluation, the court shall consider the permanent restriction, if any, imposed by the treating physician under Section 25-5-77; as well as all available reasonable accommodations that would enable the employee in his or her condition following the accident or onset of occupational disease to perform jobs that he or she in that condition otherwise would be unable to perform, and shall treat an employee able to perform with such accommodation as though he or she could perform without the accommodation. Nothing contained in this section shall be construed as having any effect upon any evidentiary issues or claims made in third party actions pursuant to Section 25-5-11. [Emphasis supplied.]

As a practical matter, employers may not desire to have particular settlements re-opened. If so, this paper advises that employers place specific language in the agreement waiving any rights provided by Section 25-5-57(a)(3)i . Although Alabama courts have to our knowledge yet to approve specific language for effecting the waiver of an employee's right to reopen under this section, in Steelcase, Inc. v. Richardson, 893 So.2d 413 (Ala. Civ. App. 2003), rev'd sub nom. Ex parte Steelcase, Inc., 893 So.2d 429 (Ala. 2004), the Alabama Court of Civil Appeals allowed an employee to reopen his case to reconsider the extent of his disability. Both the settlement agreement and subsequent Order provided that the employee "retain[ed] his rights under the provisions of Section 25-5-57(a)(3)i., Code of Alabama, 1975, as it applies to [his] accident and injury." Id. at 416. Thus, while Alabama courts have not approved specific language for the waiving of an employee's Section 25-5-57(a)(3)i rights, they have recognized that they can be retained as a condition of a settlement. One would have to reason that, if such rights are retainable, then they are also waivable by an employee. Of course, it should be noted that certain rights under the Workers' Compensation Act cannot be waived, if such a waiver would violate public policy. See McNair v. Dothan Marine, Inc., 656 So.2d 1217 (Ala. Civ. App. 1995)(insurance policy could not modify code section providing that notice to employer was notice to insurer); Kennedy v. Cochran, 475 So.2d 872 (Ala. Civ. App. 1985)(prospective releases of Workers' Compensation liability were void as against public policy). As with other portions of this material, we have only listed the above case as a sample in order to illustrate the potential issues. The case law continues to develop in this area and future litigation will likely occur as attempts are made to re-open current cases.

#### **E. Conclusions as to Settlement Agreements**

Based on the foregoing, this paper offers three minimal recommendations when drafting any settlement agreement. First, all parties (including provider, employer, and employee) should be cognizant of the effect of the specific terms in proposed agreements and orders. Employers can use specific language to foreclose a vast majority of benefits an employee is entitled to receive, as well

as possibly cut off other suits against the employer or its insurance carrier: Second, and related, the employee should be careful to spell out the particular benefits (including future medicals and rehabilitation benefits) which he or she wants to preserve. Because there are a myriad of benefits provided by the Workers' Compensation Act, as well as numerous provisions concerning distribution of those benefits, it is highly recommended that both employers and employees review the Act prior to settlement to ensure that any important benefits are not released. Third, notwithstanding the ombudsman program and the many advantages it provides in regard to mediation, we recommend that once the parties have reached an agreed-upon settlement, they should seek court approval, thus attempting to obtain a greater degree of finality to the proceedings. Moreover, for many reasons it is always good to let the trial judges know that you are resolving your cases and seeking their guidance.

## **VII. Understand Calculations**

### **A. Average Weekly Wage**

The first step in determining the amount of benefits owed is to correctly ascertain the average weekly wage. In general, the determination of average weekly wages is governed by two statutes. These are Sections 25-5-57(b) (1975) and 25-5-1(6) (1975). The first, Section 25-5-57(b), provides:

*(b) Computation of compensation; determination of average weekly earnings.* -- Compensation under this section shall be computed on the basis of the average weekly earnings. Average weekly earnings shall be based on the wages, as defined in Section 25-5-1(6) of the injured employee in the employment in which he or she was working at the time of the injury during the period of 52 weeks immediately preceding the date of the injury divided by 52, but if the injured employee lost more than seven consecutive calendar days during the period, although not in the same week, then the earnings for the remainder of the period, although not in the same week, then the earnings for the remainder of the 52 weeks shall be divided by the number of weeks remaining after the time so lost has been deducted. Where the employment prior to the injury extended over a period of less than 52 weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed, provided

results just and fair to both parties will thereby be obtained. Where by reason of the shortness of the time during which the employee has been in the employment of his or her employer or the casual nature or terms of the employment it is impracticable to compute the average weekly amount which during the 52 weeks prior to the injury was being earned by a person in the same grade, employed at the same work by the same employer, and if there is no person so employed, by a person in the same grade employed in the same class of employment in the same district. Whatever allowances of any character made to an employee in lieu of wages are specified as part of the wage contract shall be deemed a part of his or her earnings.

The second, Section 25-5-1(6), provides:

(6) WAGES OR WEEKLY WAGES. The terms shall in all cases be construed to mean 'average weekly earnings,' based on those earnings subject to federal income taxation and reportable on the Federal W-2 tax form which shall include voluntary contributions made by the employee to a tax-qualified retirement program, voluntary contributions to a Section 125 cafeteria program, and fringe benefits as defined herein. Average weekly earnings shall not include fringe benefits if and only if the employer continues the benefits during the period of time for which compensation is paid. 'Fringe benefits' shall mean only the employer's portion of health, life, and disability insurance premiums.

For many years, the computation of average weekly wages was very simple in Alabama. It usually consisted of determining the amount of gross wages paid to an employee during the 52 weeks prior to the date of the injury. This figure was comparable to the figure used in determining the amount of gross wages reportable on the employee's W-2 Income Tax form. Under this old system, both the employer and employee had a good idea of what the average weekly wage figure was. Since there was a general understanding of what constituted average weekly wages, there was relatively little litigation about average weekly wages.

Then, in 1986, the Alabama Supreme Court decided the case of National Paper Company v. Murray, 490 So. 2d 1238 (Ala. 1986). In this case, and some of the later cases, the Alabama Supreme Court held that the value of the employer provided "fringe benefits" should be added to the calculation as to the determination of average weekly wages. The Alabama Supreme Court never

said, precisely, what was, or was not, to be included in this new definition of "fringe benefits." The precise definition was left for a case by case determination course. This resulted, naturally, in a good bit of litigation on the question of the definition of "average weekly wages." Employees argued for a very expansive definition of "fringe benefits." Arguing that anything provided by an employer should be counted as a "fringe benefit" and, therefore, included in the new definition of average weekly wages. Employers tried, usually unsuccessfully, to narrow the scope of the definition of "fringe benefits." Many employers offer very generous fringe benefit packages. So, the rationale of the Murray case resulted in an increase in the amount of workers' compensation owed by employers with fringe benefits packages.

The situation was greatly clarified by the 1992 Amendments to the Workers' Compensation Law. The statutes quoted above are from the 1992 Amendments. Under the amended statute, "fringe benefits" only means the employer's portion of (1) health insurance premiums, (2) life insurance premiums, and (3) disability insurance premiums.

It should also be noted that "fringe benefits" are not counted as a part of average weekly wages if the employer continues the benefits during the time that the compensation is paid. In other words, if the employer continues to pay the employee's health, life and disability insurance premiums during the period of disability, no fringe benefits should be added to the gross wages in order to determine average weekly wages. As an illustration, in Wal Mart Stores v. Kennedy, 799 So. 2d 188 (Ala.Civ.App. 2001), the Court of Civil Appeals reversed the portion of a trial court order which included employer contributions to health and life insurance in determining the employee's average weekly wage. There, the court noted:

Because Wal Mart was continuing to pay Kennedy's fringe benefits during the period in which it was paying compensation, those benefits are not to be included in calculating Kennedy's average weekly wage.

Kennedy, 799 So. 2d at 194.

Another problem arises where "the employment" prior to the injury is less than 52 weeks. Sometimes employees receive a significant promotion during the 52 weeks prior to their injury. Some employees contend that their "employment," for purposes of determining their average weekly wage, should be limited to the job they were doing at the time of the injury, and should disregard the lower paying job that they were doing prior to the promotion. However, this argument was clearly rejected in the case of Johnson v. Cullman Medical Center, 615 So. 2d 621 (Ala.Civ.App. 1992). In this case, the employee was promoted to a staff nurse approximately two months prior to her injury. She contended that her average weekly wage should have been based only on her earnings at the higher paying staff nurse level. Since her total employment with the employer continued during the entire 52 week period, the court rejected the employee's contention. The court held that when the employee had worked for the employer for the entire 52 week period, then application of the average weekly wage formula was mandatory.

In Simpson v. Dallas Selma Community Action Agency, 637 So. 2d 1360 (Ala.Civ.App. 1994), the trial court held that it would be "unfair" to base the employee's award upon her actual earnings because the employee only worked part-time prior to the accident. Therefore, the trial court figured the award based upon what the employee would have earned if she had worked a 40 hour week. The Court of Civil Appeals reversed this decision and said that the plain language of the statute required that the employee be paid based upon the amount of pay that she actually earned. In the Simpson case, the court noted that when the employee had worked a full 52 weeks prior to the injury, then the statutory formula for computing average weekly wages is mandatory.

When the employment prior to the injury is less than 52 weeks, the Code of Alabama provides two alternatives for determining the average weekly wage. The first method is to simply divide the amount of the earnings by the number of weeks that were actually worked. This method "shall be followed" provided that the results are "just fair" to both parties. It is, generally speaking, discretionary with the trial court to determine whether or not this method results in results which are

"just and fair." If the trial court determines that the results are not "just and fair," then the average weekly earnings of a comparable employee may be used to compute the average weekly wage of the injured employee.

In considering these three methods of computation of the average weekly wage, the Alabama Court of Civil Appeals held the following in the case of Collins v. Westmoreland, 600 So.2d 253 (Ala.Civ.App. 1991).

It is mandatory that the first method be applied in determining the average weekly earnings of an injured employee where the employee has worked in the same employment for fifty-two weeks. *Ordin Exterminating Co. v. Williams*, 389 So.2d 935 (Ala.Civ.App. 1980); *Odell v. Myers*, 62 Ala.App. 558, 295 So.2d 413 (Ala.Civ.App. 1974). In the instant case the trial court determined that the employee worked for the employer for four months prior to the injury, rather than fifty-two weeks. Since there was approximately a four-and-one-half-month period of time during the preceding fifty-two weeks in which the employee was not employed by the employer, we find that this was not error on the part of the trial court; therefore, we find that the trial court did not err in not using the first method enumerated under Section 25-5-57(b).

It has been held that the second method of dividing the employee's earnings by the number of weeks and parts of weeks employed is not mandatory but that it allows the trial court to determine if its use will provide just and fair results. However, this is not an optional method and should be used unless the trial court determines a valid reason that its use will not produce fair and just results. *Odell*, 52 Ala.App. 558, 295 So.2d 413.

Collins, 600 So. 2d at 255. In Collins, the Court of Civil Appeals held that the trial court committed error by not using the second method of computation described above, where the employee had worked for approximately 4-1/2 months before the accident. It was noted that the trial court indicated that a wage statement showed an average weekly wage of \$180.30 but the trial court's order showed weekly earnings of \$300.00. This finding of the trial court was "unsupported by the evidence, because that figure represents the maximum possible earnings rather than the average."

A recent decision, Ex parte Dolgencorp, Inc., 2008 WL 4757045 (Ala. 2008), illustrates not

only a determination as to the average weekly wage but also an assessment of the potential relevance of the First Report of Injury. The plaintiff sued her employer for workers' compensation benefits. Prior to the initiation of litigation, the defendant employer completed a First Report of Injury for the plaintiff's alleged accident. Therein, the defendant listed the plaintiff's average weekly wage as \$425. The trial court used the \$425 wage cited in the First Report of Injury as the basis for computing the plaintiff's benefits. The defendant appealed to the Court of Civil Appeals, challenging only the trial court's finding of average weekly earnings of \$425. The Court of Civil Appeals affirmed the decision of the trial court without an opinion. The defendant employer then petitioned the Alabama Supreme Court for certiorari review. The Supreme Court granted the defendant's petition.

The plaintiff then argued that the "defendant employer's insertion of \$425 as the average weekly salary on the Employer's First report of Injury was an admission against interest that supported the trial court's finding even where other evidence might support a contrary finding." The Supreme Court disagreed, noting that "it was incorrect to say that \$425 was the average weekly wage for the period of her total employment when the overwhelming evidence presented to the trial court in the form of payroll records shows otherwise." The Supreme Court reversed and remanded. For future reference, an argument can certainly be made that the Alabama Supreme Court will likely follow the reasoning set forth above in Ex parte Dolgencorp., Inc.

#### **B. Specific Calculation Methods**

Although calculations are typically performed by the adjuster and/or legal counsel, it is useful for an employer to generally be familiar with the calculation of the proper amount of workers' compensation benefits. There are particular calculations for temporary total disability, temporary partial disability, permanent partial disability, and permanent total disability. Moreover, the method of calculating the amount owed will vary depending upon numerous other factors including whether the injury is scheduled or unscheduled. There are also separate calculation methods for cases

involving death benefits. It is beyond the scope of this presentation, which is designed only to introduce topics in workers' compensation, to specifically address the manner of each and every calculation. This information is available through review of the statutes and the case law. It would easily fill an another entire hour of seminar time simply to go through the separate and distinct calculation methods for each unique injury scenario.<sup>10</sup>

#### VIII. Be Familiar with the use of Case Nurses

Issues continue to develop involving the interplay between employers, employees, providers, and case manager nurses. In 1997, the Court of Civil Appeals reviewed a matter in which an employee sued, among others, the workers' compensation carrier and the medical case manager for alleged fraudulent suppression. Reed v. AETNA Casualty & Surety Company, et al., 692 So.2d 863 (Ala.Civ.App. 1997). In that case, the carrier employed a medical case manager entity which in turn employed a registered nurse. The Court began by noting that the alleged intentional tort was not barred by exclusivity.

The Workers' Compensation Act generally provides the exclusive remedy for an injured workers' claims against the worker's employer, the employer's workers' compensation insurance carrier, and the carrier's agents; however, the exclusivity provisions of the Act allow actions for intentional tortious conduct, such as intentional fraud, Lowman v. Piedmont Executive Shirt Manufacturing Co., 547 So.2d 90 (Ala.1989). The Lowman court held:

[I]n regard to a fraud claim against an employer, a fellow employee, or an employer's insurer, in order to present a claim to the jury, the plaintiff must present evidence that, if accepted and believed by the jury, would qualify as *clear and convincing proof of fraud*.

Id. at 864. The Court then reviewed the accusations which included claims that the nurse took her instructions from the carrier, was not acting with normal professional obligations, and had an

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<sup>10</sup>In fact, we have presented seminar presentations in which an entire hour or longer was devoted simply to the correct methods of calculating benefits.

allegiance to the carrier. Moreover, there were accusations that the carrier was overriding the doctor's treatment plan and that the carrier, the medical management entity, and the provider had an agreement to place the plaintiff at MMI after a certain number of sessions of treatments regardless of the plaintiff's condition. The Court found that there was not sufficient evidence to establish these facts and therefore affirmed a summary judgment. Perhaps most interesting was a concurrence by Judge Monroe where he cautioned against the following scenario which might generally be occurring in the industry in other instances:

My objection to this practice is not so much that the insurance carriers are employing these nurses, but that the nurses are usually not forthcoming in revealing the existence, nature, and purpose of their employment. Thus, injured employees are presented with nurses, who appear to be assisting them, when in actuality the nurses might very well testify in court using information gained through the employees' trust in them. In my opinion, insurance carriers and nurses involved in this practice are treading perilously close to misrepresentation and suppression, if they have not crossed the line already.

Id. at 865 (J. Monroe, concurring specially). While the above language did not relate to the facts specifically before the Court, and was part of the concurrence rather than the main opinion, it certainly raises questions which might be further explored in future fact situations if applicable.

Another interesting decision is International Rehabilitation Associates v. Adams, 613 So.2d 1207 (Ala. 1993). The plaintiff, a workers' compensation recipient, filed an action against, among others, a rehabilitation company hired by the workers' compensation provider. The case opinion notes that the allegations included negligence in the performance of professional duties, wantonness, fraud, and intentional interference with a business relationship. The trial court directed a verdict as to the interference and wantonness claims. However, the trial court allowed the negligence and fraud claims to be submitted to the jury. The result was a verdict in favor of the plaintiff in the amount of \$80,000.00 in compensatory damages and \$75,000.00 in punitive damages. On appeal, the Supreme Court of Alabama upheld the verdict below. Of note, the appeal focused on the evidence

below which included references to written materials which had been given to the plaintiff.

#### **IX. Be Familiar with Medical Benefit Issues**

Additional interesting issues continue to occur and emerge in the context of the provision of medical benefits under the workers' compensation laws. Section 25-5-77, Code of Alabama, sets forth the basic employer obligations in regard to employee medical treatment in the context of workers' compensation. In pertinent part, the statute begins with the following:

In addition to the compensation provided in this article and Article 4 of this chapter, the employer, where applicable, shall pay the actual cost of the repair, refitting, or replacement of artificial members damaged as the result of an accident arising out of and in the course of employment, and the employer, except as otherwise provided in this amendatory act, shall pay an amount not to exceed the prevailing rate or maximum schedule of fees as established herein of reasonably necessary medical and surgical treatment and attention, physical rehabilitation, medicine, medical and surgical supplies, crutches, artificial members, and other apparatus as the result of an accident arising out of and in the course of the employment, as may be obtained by the injured employee or, in case of death, obtained during the period occurring between the time of the injury and the employee's death therefrom....

Section 25-5-77(a). In addition, the aforesaid section continues by providing certain employee rights in the event that an employee is dissatisfied with an initial treating physician, by stating, in further part:

If the employee is dissatisfied with the initial treating physician selected by the employer and if further treatment is required, the employee may so advise the employer, and the employee shall be entitled to select a second physician from panel or list of four physicians selected by the employer.

Section 25-5-77(a). The above quotations are excerpts<sup>11</sup> designed to illustrate the basic medical procedure. In general, the procedure is that an employer will select the initial authorized physician,

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<sup>11</sup> Section 25-5-77, *Code of Alabama*, along with other sections in the workers' compensation statutes, provides additional provisions regarding medical care and should be consulted in its entirety before making any particular decision in a given factual situation.

who may refer the employee to other providers. If the employee is dissatisfied with the initial selection, he may petition for a panel of four alternative physicians. These principles were outlined in Hazel's Family Restaurants, Inc. v. Simmons, 781 So.2d 981(Ala. Civ. App. 2000), where the Court repeated the following general principle of law:

Under Alabama Workers' Compensation laws, the employer selects the treating physician. If the employee is dissatisfied with that physician, the employer must provide the employee with a list of four other physicians from which the employee can choose another treating physician. (citation omitted).

This Court has explained that the purpose behind the law is to strike a balance between the value of allowing the patient to choose his own doctor and the value of "achieving the maximum standards of rehabilitation by permitting the compensation system to exercise continuous control of the nature and quality of medical services from the moment of injury." As Professor Larson explained: " 'If the injured employee has completely unlimited free choice of his doctor, in some cases he may select a doctor, because of personal relationship or acquaintance, who is not qualified to deal with the particular kind of case, or who at any rate is incapable of providing service of the quality required for the optimum rehabilitation process.' ...

Hazel, at 983.

There are exceptions to the above general rules of law. For example, as noted in Hazel, the law provides for four instances where the employee is justified in incurring medical expenses without first obtaining the employer's authorization:

(1) Where the employer has neglected or refused to provide the necessary medical care; (2) Where the employer has consented to the selection by the employee; (3) Where notice of and request for alternative care would be futile; and (4) Where other circumstances exist which justify the selection of alternative care by the employee.

Hazel, 781 So.2d at 983. In Hazel, the trial court had entered an order requiring the employer to pay for previous unauthorized bills of the employee. The Court of Civil Appeals reversed and remanded, ordering the trial court to determine whether one of the four exceptions for unauthorized care applied.

The exceptions to the general rule that the employee must first obtain authorization for medical services were further discussed in International Paper Company v. Melton, 866 So.2d 1158 (Ala.Civ.App. 2003). There, the employee sought workers' compensation benefits for neck, back, and bilateral carpal tunnel syndrome injuries. The employer had apparently provided authorized medical care for the neck and back claims, but denied liability as to the carpal tunnel claim. The employee filed suit seeking, among other items, reimbursement for out-of-pocket medical expenses associated with unauthorized carpal tunnel treatment. The Court found that the employer was liable for the carpal tunnel injuries and ordered the employer to pay for previous unauthorized treatment for carpal tunnel:

The Workers' Compensation Act provides that an employer is not liable for medical or surgical treatment provided by a physician who has not been authorized by the employer to provide such treatment, *see* § 25-5-77, Ala. Code 1975; however, the four exceptions to this general rule (noted by the trial court, citing City of Auburn v. Brown, 638 So.2d 1339 (Ala.Civ.App. 1993)) were first recognized in United States v. Bear Brothers, Inc., 355 So.2d 1133, 1138 n.2 (Ala.Civ.App. 1978). We agree with Melton that this medical treatment for his carpal tunnel syndrome fell within exceptions (1), (3), and/or (4) recognized in City of Auburn. In the present case, International Paper did not consider Melton's carpal tunnel syndrome to be work related, and, therefore, never authorized any medical treatment for Melton's carpal tunnel syndrome, not even diagnostic procedures. Based on the facts of this case and the authorities cited, we cannot conclude that the trial court erred in ordering International Paper to pay for past medical treatment by unauthorized physicians for Melton's carpal tunnel syndrome.

In another decision illustrating the problems and issues surrounding exceptions to the general rule, Ex parte Gulf State Steel, Inc., 772 So. 2d 1122 (Ala. 2000), the Alabama Supreme Court reversed a trial court order where the trial judge had ordered the employer to pay for unauthorized psychotherapy sessions obtained by the plaintiff. The Supreme Court noted that the records contained no evidence that the employer was notified of the psychotherapy sessions and that, in addition, there was no evidence to show that the employer would have denied authorization had it known of the psychotherapy treatment. Under those circumstances, the Supreme Court noted that

the employee "failed to show that any of the exceptions to the notice requirement apply to his case."  
Id at 1124.

A recent decision, Flour Enterprises, Inc. v. Lawshe, 2009 WL 350882 (Ala. Civ. App. 2009), further showed the emerging issues surrounding the selection of an authorized treating physician. The court was presented with the question of whether an employer who refuses medical treatment may later require an injured employee to change positions to an employer selected physician after the employee succeeds in proving that the injury is compensable. Reviewing the specific facts before it, the court concluded that the claimant was permitted to continue to use her doctor for treatment of the work-related injury, subject to the employer's right to object to any treatment found to be unnecessary or unreasonable.

#### **A. Authorized Physician-Treatment Conflicts**

For those who are new to workers' compensation medical issues, it would be prudent for you to be aware of a decision mentioned above, City of Auburn v. Brown, 638 So.2d 1339 (Ala.Civ.App. 1993). In that case, two physicians were authorized but only one recommended surgery. The Court said that it was the plaintiff's decision to decide which course of treatment would be undertaken. The Court stated: "We hold that, as a general rule, the employer may not dictate to the employee that he may not have the medical treatment recommended by his authorized, treating physician."

In a later decision, Waffle House v. Howard, 794 So.2d 1123 (Ala.Civ.App. 2000), the Court of Civil Appeals added the following statement:

Generally, an employer may not dictate to the employee whether he may have medical treatment recommended by the treating physician. City of Auburn v. Brown, 638 So.2d 1339 (Ala.Civ.App. 1993). Further, when an employer authorizes treatment for an employee by one physician and the employee is satisfied with the treatment provided by that physician, the employer loses its authority to withdraw its authorization for treatment by that physician (citations omitted).

Waffle House, at 1130.

Subsequently, in Southeast Alabama Medical Center, 835 So.2d 1042 (Ala.Civ.App. 2002), the Court of Civil Appeals arguably may have somewhat restricted the ruling in City of Auburn, supra. For example, the Southeast Alabama Medical Center opinion states:

*City of Auburn* stands for the proposition that when two qualified physicians, each of whom is authorized by the employer, recommend two different treatments, each of which can be considered a reasonably necessary treatment for the employee's condition, an employer cannot dictate which physician, and thereby which treatment, must be chosen. The choice between physicians in this circumstance belongs to the patient.

Southeast Alabama Medical Center, at 1048.

A recent decision, Ex Parte Massey Chevrolet, 2009 WL 153330 (Ala.Civ.App. 2009) also raises emerging issues as to authority of the authorized physician. In that case, the employer authorized Dr. Peterson, an orthopaedic. Dr. Peterson referred the claimant to Dr. Nichols for pain management. Dr. Nichols had a file note scheduling the claimant for a cervical discogram with Dr. Aprill. Instead of performing a discogram, Dr. Aprill administered injections and denervation procedures. While Dr. Aprill was treating the claimant, Dr. Nichols continued to prescribe various medications. The court noted that Dr. Peterson did not refer the claimant to Dr. Aprill to pain management; instead, that referral had been made to Dr. Nichols. Therefore, the court found that:

Dr. Peterson, Aderhold's original treating physician, referred Aderhold to Dr. Nichols for the specific purpose of providing Aderhold pain-management treatment. Accordingly, Dr. Nichols was implicitly authorized to control Aderhold's pain-management treatment.

...

Because Dr. Nichols had been implicitly authorized to provide pain management to Aderhold, Dr. Aprill's pain management treatment was in turn implicitly authorized *insofar as that treatment was recommended by Dr. Nichols*. As noted, however, it is unclear precisely when Dr. Nichols withdrew his

recommendation of Dr. Aprill's pain-management treatment.

...

We hold that the pain-management treatment provided by Dr. Aprill to Aderhold was authorized only insofar as that treatment was recommended by Dr. Nichols, the authorized physician in charge of Aderhold's pain-management treatment. Accordingly, we reverse the judgment of the trial court, and we remand the case for the trial court to determine which of Dr. Aprill's pain-management treatments were in fact recommended by Dr. Nichols.

Id.

#### **B. Authorized Physician Referrals**

As noted above, the initial authorized physician generally may refer the employee to another authorized physician. This referral by the physician generally does not appear to remove his or her authorization to treat the employee following the referral. This principle was illustrated in Waffle House v. Howard, 794 So.2d 1123 (Ala. Civ. App. 2000); cert den (Ala. 2001).

In Waffle House, the employer apparently argued (among other things) that the trial court erred in requiring it to pay for a previously authorized pain doctor after he referred the employee to another physician. The pain doctor testified "that it was never his intention to release Howard from his care or treatment regimen." 794 So.2d at 1129. The trial court summarized its view of the issue as follows:

Can the employer or its carrier refuse to let an injured employee return to a previous authorized physician when that physician, with no intent to discharge the employee from his care, refers the employee to an additional approved physician? ... [T]he employee cannot. The purpose of the medical provisions of the act is to assure healing for the employee with physicians approved by the employer. ... Surely a referral (for example) to a physician for a nerve conduction study or to a radiologist for x-ray and MRI studies are not grounds for the employer de-certifying the approved treating physician ... Medicine today is a team effort.

Id. at 1129-1130. The court also relied upon earlier decisions and added the following:

Generally, an employer may not dictate to the employee whether he may have medical treatment recommended by the treating physician. *City of Auburn v. Brown*, 638 So.2d 1339 (Ala. Civ. App. 1993). Further, when an employer authorizes treatment for an employee by one physician and the employee is satisfied with the treatment provided by that physician, the employer loses its authority to withdraw its authorization for treatment by that physician (*citations omitted*).

Id. at 1130.

### C. Panel Requests - Effect on Initial Authorized Physician

Another issue which has developed in the context of authorization is that of what happens to the initial authorized physician after the plaintiff requests a panel of four physicians, pursuant to Section 25-5-77(a) Code of Alabama. This question was recently addressed in Ex parte Wal-Mart Stores, Inc., 794 So.2d 1085 (Ala. 2001). The plaintiff had an initial authorized physician in Alabama who did not recommend surgery. The plaintiff then moved to Tennessee and obtained a new authorized physician who recommended surgery. The plaintiff returned to Alabama, indicated she was dissatisfied with her initial authorized Alabama physician, and requested a panel of four physicians from which to select another authorized physician. The new and third physician did not recommend surgery. Nevertheless, the plaintiff then requested surgery based on the recommendation of the Tennessee doctor. The court addressed the issue as follows:

We must determine whether ... the employee is allowed to select an authorized treating physician from a four-physician panel, pursuant to ... §25-5-77(a), and then, having become dissatisfied with that physician, return to a previously authorized physician for treatment at the employer's expense.

Ex parte Wal-Mart Stores, Inc., 794 So.2d at 1087. The plaintiff contended that, under the authority of City of Auburn v. Brown, supra, that she was entitled to follow the recommendation of the Tennessee doctor, who was at least authorized at one time. However, the court quoted language from City of Auburn v. Brown, emphasizing that the law from that case was a general rule:

The Court of Civil Appeals [in *City of Auburn v. Brown*] refused to allow the employer to dictate the procedures the physician will

perform: "In the instant case, Brown went to an authorized physician, accepted and agreed to his recommended course of treatment; however, the employer refused to approve the necessary surgery. We hold that, as a *general rule*, the employer may not dictate to the employee that he may not have the medical *treatment recommended by his authorized, treating physician.*" *Id.* p. 1341. (Emphasis added.) In other words, Brown's employer was not allowed to refuse to approve the surgery recommended by Brown's authorized treating physician. The fact situation in the case *sub judice* does not fall within that general rule."

Ex parte Wal-Mart Stores, Inc. 794 So.2d at 1088. Therefore, after noting that City of Auburn was only a general rule, the Supreme Court indicated that the panel selection was now the plaintiff's only authorized treating physician and that the trial court should not have ordered that Wal-Mart pay for treatment recommended by a physician authorized before the panel request occurred.

#### **D. Panel Request - Separate Medical Specialty Areas**

In Ex Parte Brookwood Medical Center, Inc., 2004 WL 1009710 (Ala.Civ.App. 2004), the Court of Civil Appeals rejected an argument that an injured worker was entitled to a panel of four physicians from each specialty area; in particular, the employee's request for a second panel of four, directed to pain management doctors. The case arose out of the following factual situation.

In July 2002, the employee suffered a work-related injury to her back which resulted in, among other things, a herniation of one the employee's vertebral disks. The employee initially underwent treatment for that injury by Dr. Carter Morris, a physician chosen by the employer. Dr. Morris recommended and later performed a lumbar microdiscectomy in March 2003, and referred the employee to physical therapy.

In August 2003, Dr. Morris referred the employee (with the employer's consent) to Dr. Matthew Berke for further treatment with pain management, and subsequently released the employee to return to light-duty work. Soon after Dr. Morris released the employee to return to work, the employee notified the employer of her dissatisfaction with Dr. Morris as her authorized treating physician, whereupon the employer supplied the employee with a panel of four physicians. The

employee chose Dr. Martin Jones to be her authorized treating physician. Dr. Jones, like Dr. Morris, referred the employee to Dr. Berke for further treatment. Dr. Berke referred the employee in October 2003, to Dr. Ronald Moon for further pain management treatment. However, the employee failed to keep a scheduled appointment with Dr. Moon. Counsel for the employee then requested that the employer provide a second panel of four physicians, consisting of pain management doctors. Although the employer's counsel did not believe the employee was entitled to such a second panel of physicians, the employer nominated another physician in lieu of Dr. Moon. However, the employee rejected the alternate physician as well.

On October 27, 2003, the employee filed a motion contending that she was entitled to a panel of pain management doctors from whom to choose one to treat her at the employer's expense. The employer opposed the employee's motion, but the trial court entered an order granting the employee's request. The trial court expressly held that "as an injured worker progresses with medical treatment for an injury through different areas of medical specialty, the worker is entitled to a panel of doctors from which to choose a replacement from each medical specialty." (Emphasis in original). The employer filed a petition for a writ of mandamus with the Alabama Court of Civil Appeals, seeking an order compelling the trial court to vacate its order directing the employer to provide the employee with a list of four pain management physicians.

The Alabama Court of Civil Appeals directed the trial court to rescind its order which would have required the defendant to provide the plaintiff's second requested panel (seeking a pain management physician).

#### **E. Attendant Care**

In Osorio v. K&D Erectors, Inc., 2003 WL 2007812 (Ala.Civ.App. 2003), rehearing denied (Ala.Civ.App. 2003), the Court of Civil Appeals reviewed a case in which a plaintiff argued that his family was entitled to receive \$400.00 per week in attendant care expenses as reimbursement for caring for him. It was undisputed that the plaintiff was permanently and totally disabled as a result

of a "severe closed-head injury."

The Court of Civil Appeals issued an initial opinion denying the relief sought by the plaintiff. The Court began by citing Section 25-5-77(a), Code of Alabama, and noting that the Act itself did not provide for payment of attendant care expenses to an employee's family for assistance with the employee's daily living. The Court then cited a prior decision, Ex Parte City of Guntersville, 728 So.2d 611 (Ala. 1998), wherein the Supreme Court had held that an employer was not liable for the full purchase price of a van for a paraplegic; the employer had agreed to install a wheel chair lift but not pay the full purchase price. In Guntersville, the Court stated:

Our workers' compensation system was designed to provide limited, but guaranteed, benefits to employees injured on the job. In addition to those benefits, employers are required to pay for medical and rehabilitative treatment. However, we hold that those benefits do not include the purchase price of a motor vehicle. Put simply, a motor vehicle is not a device that, in and of itself, can serve to improve a disabled claimant's condition. Its only use is to improve the claimant's independent functioning. While human concern would cause one to wish that a disabled person would reach the maximum possible level of independent functioning, we believe that allowing reimbursement for such costs as are claimed in this case would stretch the workers' compensation statute beyond its intended meaning.

Guntersville, 728 So.2d at 616-617. Relying on this earlier decision, the Osorio Court held that the Act did not require an employer to provide attendant care expenses to the family of a permanently and totally disabled employee for assisting him in daily functioning. The Court stated: "like the van in Ex Parte City of Guntersville, the attendant care provided by Osorio's family, while it aids his independent functioning, will not serve to improve his physical or mental condition." Interestingly, the Court also noted that the Alabama legislature might consider statutory changes such as a provision in Minnesota which specifically provides for the payment of nursing services provided by family members of a permanently and totally disabled employee.

The plaintiff applied for rehearing which was denied. However, several members of the

Court of Civil Appeals made comments clarifying their respective positions. For example, Judge Crawley wrote: "I concur with the Court's decision to overrule the application for rehearing in this case because Salvador Osorio failed to establish by the testimony of an authorized treating physician that the attendant care he was receiving was reasonably necessary medical treatment or attention." Judge Thompson noted that he was not unsympathetic to the plaintiff's situation; however, he noted that the employer had moved to strike a portion of the plaintiff's rehearing argument because it was based on a new argument (not asserted below) arising out of the Alabama Department of Industrial Relations Administrative Code. Judge Murdock stated: "On the basis of the particular record presented in this case, however, I remain of the opinion that the result reached by this Court on original submission was correct." Judge Yates dissented stating: "Under the expansive definition of 'medical' attention afforded by a 'provider' and based on Rule 480-5-5-.03, Ala. Admin. Code, I conclude that the attendant-care services provided by a family member who assists an injured employee (in this case, an employee who is blind, partially deaf, brain-damaged, and partially paralyzed as the result of an on-the-job accident) with eating, bathing, dressing, grooming, and using the toilet are covered by the Act." Therefore, based on these varying opinions, and despite the ultimate ruling, we may see this case distinguished or otherwise modified in the future.

#### **F. The Pendente Lite Motion**

In Ex Parte Steve Cagle Trucking Company, 989 So.2d 560 (Ala.Civ.App. 2008), the plaintiff, with his initial complaint, sought a pendente lite hearing to determine, among other things, if a certain physician was authorized. The court held a hearing without the employer (which claimed it did not get notice) present. The court ordered the employer to authorize treatment by the doctor and treated the initial motion as one seeking to compel the employer to provide medical treatment. The employer filed a petition for mandamus, arguing that the trial court had exceeded its authority. Citing Ex Parte Publix Supermarkets, Inc., 963 So.2d 654 (Ala.Civ.App. 2007), the Ex Parte Steve Cagle court reversed the trial court because there had not yet been an evidentiary hearing to resolve

disputes as to compensability.

### G. The Post Settlement Motion or Petition

In James River Corporation v. Bolton, 2008 WL 400367 (Ala.Civ.App. 2008), the Court of Appeals reviewed a trial court's order following a petition of the employee to enforce a settlement agreement which left medical benefits open. There were many issues but one focused on contempt and an award of attorneys' fees. In short, the trial court found the employer in contempt and awarded an attorney fee of \$7,760.00. On appeal, the Court of Civil Appeals discussed the law and the facts in contempt proceedings. The following is an excerpt in the case and serves to illustrate the potential issues. The case has extensive discussion and should be reviewed in its entirety before making any decision as to whether any conduct would likely constitute or not constitute contempt.

Based on its finding that JRC failed to follow the notice requirements provided for in precertification review, the trial court concluded in its November 15, 2006, order that JRC "willfully and contumaciously failed to comply with [its] orders."

"Rule 70A, Ala. R. Civ. P., governs contempt proceedings that arise out of civil actions. Civil contempt is defined by that rule as the 'willful, continuing failure or refusal of any person to comply with a court's lawful writ, subpoena, process, order, rule, or command that by its nature is still capable of being complied with.' Rule 70A(a)(2)(D), Ala. R. Civ. P. (emphasis added). Our Supreme Court, in *Travelers Indemnity Co. of Illinois v. Griner*, 809 So.2d 808, 814 (Ala. 2001), characterized its decision 10 years earlier in *Ex parte Cowgill*, 587 So.2d 1002 (Ala. 1991), as holding 'that the [trial] court, in the exercise of its equitable powers, could hold a party in contempt upon a finding that "the employer willfully and contumaciously refused" 'to follow the trial court's order.'

Overnite Transp. Co. v. McDuffie, 933 So.2d at 1099-1100.

...

Given the construction of the rules governing the utilization-review process, we cannot say that the actions of JRC and Sedgwick CMS, on behalf of JRC, were unreasonable. Although we are constrained to interpret the rules set forth in Chapter 480-5-5 as written, we note that the facts of this case demonstrate a need to revisit the rules governing utilization review in order to address the issue of notification to providers of their right to appeal adverse decisions on

behalf of the employee.

The record does not support a conclusion that JRC willfully and contumaciously refused to follow the trial court's orders when it initiated the utilization-review process. The trial court abused its discretion in holding JRC in contempt based on the application of rules pertaining only to precertification review. Therefore, we reverse the trial court's judgment insofar as it found JRC in contempt.

Regarding the trial court's award of an attorney fee in favor of Bolton, the trial court's attorney-fee award was based on its finding of willful and contumacious conduct on the part of JRC. Because the trial court's finding of contempt served as the basis for its award of an attorney fee and because we are reversing the trial court's finding of contempt, we must also reverse its award of an attorney fee in favor of Bolton.

James River Corporation, at \*7, \*8.

#### H. "Other Apparatus" Under Section 25-5-77(a).

Issues continue to emerge as to what constitutes "other apparatus" under Section 25-5-77(a), Code of Alabama. Recently, the Alabama Supreme Court again revisited the issue in the context of a motorized scooter and a lift. In Ex Parte Mitchell, 989 So.2d 1083 (Ala. 2008), the court wrote:

In this case, this Court is asked to clarify the standard to be used in determining what constitutes an "other apparatus" under § 25-5-77(a). We do so by incorporating the principles discussed above into a functional standard that is consistent with legislative intent and that strikes a balance between the competing interests of employees and employers. Thus, in order to constitute "other apparatus" and be compensable as a medical benefit under § 25-5-77(a), the item must be: (a) reasonably necessary and (b) intended to improve the injured employee's condition, to prevent the further deterioration of the employee's condition, or to relieve the employee from the effect of his condition by restoring the employee to a basic level of appearance or functioning. The determination of what constitutes a reasonably necessary "other apparatus" should be made on a case-by-case basis. For example, a wheelchair may restore an otherwise healthy employee to a level of basic functioning; however, an employee who suffers from a condition that, in addition to requiring a wheelchair, has also weakened the employee's upper body to the point that the employee cannot operate a wheelchair, may require a scooter to return that employee to a similar level of basic functioning.

We now turn specifically to Mitchell's request for a scooter and a lift. The function of the lift is solely to facilitate access to transportation in connection with a motor vehicle. As stated above, the basis for this Court's holding in *Ex parte City of Guntersville* was that the legislature had specifically provided for transportation costs in 25-5-77(f), and a lift can serve no function other than as an attachment to a mode of transportation to facilitate the injured employee's transportation. The lift itself cannot improve Mitchell's condition, prevent the further deterioration of his condition, or relieve him from the effect of his condition by restoring him to a basic level of appearance or functioning. Therefore, we conclude as a matter of law that a lift cannot, pursuant to the standard announced today, be considered "other apparatus" under § 25-5-77(a). Therefore, we affirm the judgment of the Court of Civil Appeals as to the lift. However, a scooter *could* be considered "other apparatus" reasonably necessary to return Mitchell to a level of basic functioning pursuant to the new standard and could therefore be compensable under § 25-5-77(a). Accordingly, we reverse the judgment of the Court of Civil Appeals as to the scooter and remand the case to that court for it in turn to remand the case for the trial court to conduct further proceedings to determine whether Mitchell is entitled to a scooter, as "other apparatus," \*1093 pursuant to the standard set forth above. Because this Court has announced a new standard in this case, the trial court is free to exercise its discretion and conduct further proceedings, including taking additional evidence, in making its determination.

Id. at 1092, 1093.

#### **VIII. Lawyers Need to Consider Subrogation, Reimbursement, and Third Party Actions**

Each workers' compensation claim should be carefully assessed to determine whether there is a potential lawsuit against a person or entity other than the employer. These cases are typically referred to as third party actions. Section 25-5-11(a), Code of Alabama, initially provides, in part, that:

If the injury or death for which compensation is payable under Articles 3 or 4 of this chapter was caused under circumstances also creating a legal liability for damages on the part of any party other than the employer, whether or not the party is subject to this chapter, the employee, or his or her dependents in case of death, may proceed against the employer to recover compensation under this chapter or may agree with the employer upon the compensation payable under this chapter, and at the same time, may bring an action against the other party to recover damages for the injury or death, and the amount

of the damages shall be ascertained and determined without regard to this chapter.

Obviously, any such third party action would have to be evaluated on its own merits. Moreover, there may be particular defenses available to certain third parties. For example, co-employees of the injured plaintiff will have certain particular defenses. On the other hand, in cases such as automobile wrecks, there typically may be a third party tortfeasor with insurance which will benefit both the injured claimant and the workers' compensation provider/employer seeking reimbursement and/or subrogation rights. Section 25-5-11(a) further provides for assertion of such a claim by the employer:

If the injured employee, or in case of death, his or her dependents, recovers damages against the other party, the amount of the damages recovered and collected shall be credited upon the liability of the employer for compensation. If the damages recovered and collected are in excess of the compensation payable under this chapter, there shall be no further liability on the employer to pay compensation on account of the injury or death. To the extent of the recovery of damages against the other party, the employer shall be entitled to reimbursement for the amount of compensation theretofore paid on account of injury or death. If the employee who recovers damages is receiving or entitled to receive compensation for permanent total disability, then the employer shall be entitled to reimbursement for the amount of compensation theretofore paid, and the employer's obligation to pay further compensation for permanent total disability shall be suspended for the number of weeks which equals the quotient of the total damage recovery, less the amount of any reimbursement for compensation already paid, divided by the amount of the weekly benefit for permanent total disability which the employee was receiving or to which the employee was entitled.

The above statutes, third party claims, and subrogation/reimbursement issues have created numerous issues for employees and employers. These questions range from the amount of a legal fee awarded to the attorney handling the third party case to the amount of a future credit if the third party recovery exceeds amounts already expended by the workers' compensation provider/employer. There are also questions to be addressed concerning duties and obligations of counsel who become aware of a subrogation or reimbursement claim.

One of the more interesting aspects of reimbursement under Section 25-5-11 was discussed in Trott v. Brinks, Inc., 2007 WL 1300734 (Ala. 2007). After reviewing the particular language in Section 25-5-11(a) the Alabama Supreme Court held that an employer was not entitled to be reimbursed for medical benefits from amounts recovered from a third party in a wrongful death action filed by the employee-decedent's personal representative. The reasoning of the court was based upon the language in Section 25-5-11.

The statute clearly states that "the employer shall be entitled to subrogation for medical and vocational benefits expended by the employer on behalf of the employee." However, the court reasoned that the statute allowed the employer to recover "reimbursement" in reference to compensation paid for injury and death but in contrast allowed only "subrogation" for medical and vocational benefits expended. Essentially, the court interpreted reimbursement to be a very broad term but subrogation to be a limited term. The case should be studied in detail for specific arguments but illustrates some of the difficulties which occur in resolving disputes under Section 25-5-11.

### **Conclusion**

\_\_\_\_\_ As previously noted, this presentation is designed to generally introduce only some of the issues that employers, claims adjusters, and attorneys confront in response to workers' compensation claims. This material is not intended to address every provision of the law, nor every opinion, associated with workers' compensation litigation. The statutes and relevant cases should be reviewed in their entirety prior to making any decision in a particular case. No specific decision should be made without consultation with experienced legal counsel in the particular matter. Moreover, the workers' compensation case law in Alabama often changes; many of the holdings in the cases cited herein may change with further notice. This material is simply intended to serve as an introduction to a few of the issues that continue to develop and emerge in the area of Alabama Workers' Compensation.

