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CLIENT BULLETIN

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Georgia Decision on "Diligent Job Search" for Workers' Comp Claimants Is a Big Win for Employers and Insurers

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A recent **decision** by the Georgia Court of Appeals shows that the "diligent job search" obligation of workers' compensation claimants really means what it says. The burden of proof is on the claimant to show diligence, and the court's decision means that employers and insurers may want to think hard about whether and when to voluntarily begin temporary total disability benefits.

Since ***Maloney v. Gordon Farms*** was decided in 1995, workers' compensation claimants in Georgia who are terminated for reasons unrelated to their injuries have been required to prove that there was a "change in condition" warranting TTD benefits. Claimants must prove 1) loss of earning power due to the compensable injury; 2) continued physical limitations attributable to that injury; and 3) a diligent but unsuccessful effort to secure suitable employment after the termination.

In last week's *Maughon* decision, the claimant was laid off while he had medical restrictions from a work-related injury, but for reasons unrelated to the injury or the restrictions. He showed that he searched for 110 jobs over a period of 144 days. Although the Administrative Law Judge at the State Board allowed the claimant to receive TTD benefits, the Appellate Division of the State Board drilled deep into the facts and data, concluding that there was no evidence of "follow-up with 22 potential employers" and that there were gaps including "periods of time lasting 27 and 18 consecutive days" (alternatively referenced as 18 and 11 consecutive days) during which no job search was made at all. Further, the Appellate Division found, it appeared that the jobs that the claimant "searched" for unsuccessfully were primarily heavy physical jobs, in contrast to his managerial/sales experience, such that they inferred that he seemed to be "attempting to avoid being hired in order to bolster his claim for indemnity benefits."

The Superior Court reversed the Board's Appellate Division, but the Georgia Court of Appeals reversed the Superior Court (effectively affirming what the Appellate Division of the Board had done), holding that the claimant's evidence was *insufficient* to prove he was "diligent" in searching for suitable work. Accordingly, he failed to establish the requisite "change in condition" justifying payment of TTD after his layoff.

At one time, there was a perception that some judges would find the claimant's job

search burden met if there were "any search for any number of jobs." More recently, it appears that the Appellate Division at the State Board is engaging in a more rigorous analysis. A few cases leading up to the current *Maughon* decision revealed that the Board requires evidence of an ongoing earnest and steadfast effort. In fact, the Board was found to have gone *too* far in ***R.R. Donnelley v. Ogletree***, when the Board, as interpreted by our Court of Appeals, required the claimant to prove factors "outside the claimant's control," such as obtaining in-person interviews or visits to potential employers (other than via the Web). The Georgia Court of Appeals reversed and said that such a showing was not required. Based on *R.R. Donnelley*, many of us awaited the *Maughon* decision with anticipation to see whether the *Maloney* burden was being heightened or eroded.

Maughon "hit the nail on the head" for employers and insurers, and in our opinion, for our system in Georgia. The decision allows the analysis of "diligence" to include a complete review of the evidence, and inferences may be drawn from the facts of each case. We now know that a job search requires more than a Department of Labor ledger, which is a relief to employers who have seen so-called "job searches" which were merely attempts to *document* a job search to secure TTD, rather than genuine efforts to seek employment. It mattered in this case that the claimant "did not look for a job every business day, that he failed to follow up with 22 potential employers, that he failed to look for work for periods of 18 and 11 consecutive business days (alternatively noted to include 27 consecutive business days), and that his job search concentrated on jobs involving physical labor."

If you have any questions about the *Maughon* decision or more generally about any workers' compensation issue, please contact any member of Constangy's **Workers' Compensation Practice Group** or the Constangy attorney of your choice.