

CONCURRENT SIMILAR EMPLOYMENT

The doctrine of concurrent similar employment is not found in the statute which sets forth the method of calculating disability benefits, O.C.G.A. '34-9-260. It is instead a creation of the State Board of Worker's Compensation through Board Rule 260. It is the State Board's recognition that the effects of a work-related injury may extend beyond that job on which the claimant was working at the time of injury. Board Rule 260 (c) provides that the wages of an employees concurrent similar employment shall be included in the calculation of average weekly wage.

In those instances where the employee is entitled to the maximum compensation rate, inclusion of the wages of the similar employment will make no difference in the amount of compensation to be paid. It may, however, make a very large difference in the duration of income benefits since the average weekly wage is higher and may result in an entitlement to temporary partial disability benefits as long as the work restrictions continue. (Remember, if there are no restrictions, there is no entitlement to TPD regardless of the income differential.) If you have included the wages from the other employ in the average weekly wage, you may suspend benefits based on an actual return to work if the employee returns to the other job regardless of his actions pertaining to his employment on your job. If however, you have not included the other wages in the computation of the average weekly wage, you may not so suspend benefits since, by your calculation, you have admitted/contended that the employ while concurrent, was dissimilar. Therefore, if the determination of whether concurrent employment is similar or dissimilar, you should consider: 1) what effect the wages will have on the compensation rate (i.e. whether the claimant is already eligible for the maximum amount); 2) the likelihood of the claimant becoming entitled to long-term entitlement to TPD; 3) whether the claimant will likely be able to return to the other job but not yours; and 4) whether the calculation could result in a windfall to the claimant on PPD benefits which would not be recoverable elsewhere.

Careful consideration should be given to exactly what employment would constitute concurrent similar employment. You should weigh not only the job titles but also their relative duties for any similarities. Be mindful of the fact that the State Board will likely want to broadly construe or emphasize the similarities (with the resulting de-emphasizing of differences) in order to afford higher income benefits to a legitimately injured employee.

ILLUSTRATIVE EXAMPLES

Owens-Illinois, Inc. v. Lewis, 150 Ga. App. 640, 258 SE 2d 293 (1979). Court held that claimant's work as a machinist was not similar to his supervisory work in his water purification business. Since this was not concurrent similar employ, the fact that the claimant performed this while on TTD would not authorize employer to suspend benefits.

Employer's Insurance of Wausau et al. v. Brown et al, 147 Ga. App. 866, 250 SE 2d 575 (1978). Employee killed while working for independent contractor cutting trees with chainsaw for pulpwood. Other employ was as a "slasher operator" cutting up whole trees. Court found that concurrent employ was similar in that both involved risk, required skill and both used in the pulpwood industry.

St. Paul Fire & Marine Insurance Company et al. v. Walters, 141 Ga. App. 579, 234 SE 2d 157 (1977). Claimant was employed part-time as retail sales clerk by family store having only two employees. Injured while doing full-time job as a clerk for a hospital. Court held that since both jobs involved handling of money, giving receipts, keeping records and meeting the public, employment was similar. Court declined to find employment dissimilar based simply on the fact that the part-time work was not covered under the WC act.

Disclaimer: The reader is cautioned to use extreme care in applying the legal principles discussed in these articles. Competent legal advice should always be obtained to properly apply the relevant law to the specific facts of any case.