

## GEORGIA BOARD RULE 205 IS HUMBLLED

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The Court of Appeals delivered a much awaited decision on July 12, 2010, when it ruled that an employer's failure to timely respond to a WC-205 did not preclude it from disputing the compensability of the surgical procedure which was recommended pursuant to the WC-205. The Court of Appeals held that the State Board exceeded its rule-making authority when it issued Rule 205 because the rule in effect establishes a rebuttable or even conclusive presumption of compensability, contrary to the burden of proof under the Act. However, the Court of Appeals cautioned employers that when compensability of treatment is not at issue, the Board may assess civil penalties and assesses attorney fees for failure to timely respond to a 205 request for pre-authorization.

In *Selective HR Solutions, Inc. v. Mulligan*, the Claimant sustained a compensable injury to her back in September of 2005, for which she treated with Dr. Banit, and returned to work. 2010 WL 2721879 (July 12, 2010). Subsequently, in May of 2007, the Claimant reinjured her back in a fall at home, for which she sought medical treatment from her family doctor. The Claimant then returned to Dr. Banit, who on October 26, 2007, sent a form WC-205 to the insurer requesting advanced authorization for the surgery. <sup>1</sup>The Employer/Insurer would surely contend the procedure was not compensable and related to the subsequent non-occupational injury, however, they did not reply to the 205 within 5 business days. Well beyond the deadline in Rule 205, on December 7, 2007, the insurance company faxed a note to Dr. Banit declining authorization. And replied to the 205, a full 46 days after the 205, on December 11, 2007, refusing to authorize surgery, Dr. Banit proceeded with the surgery approximately three days later regardless, likely believing the denial after 46 days was insufficient to revive pre-authorization.

The Superior Court eventually reversed the State Board's Appellate Division's, and found that the December 7, 2007, surgery was compensable pursuant to Rule 205 and its pre-authorization language.

The Court of Appeals explained that "the Board's power is limited to making rules which are administrative or procedural." It is well settled that a rule that has the effect of shifting the burden of proof is "substantive as affecting the issue to be decided." In its analysis of the issue, the court found that "Rule 205, on its face, es-

<sup>1</sup> Board Rule 205 (b)(3) provides, in pertinent part, "The insurer/self-insurer shall respond by completing Section 3 of the WC-205 within five (5) business days of receipt of this form. ... If the insurer/self-insurer fail to respond to the WC-205 request within the five business day period, the treatment or testing stands pre-approved." Board Rule 205 (b)(4) goes on to state "Where the employer fails to comply with Rule 205 (b)(3), the employer shall pay, in accordance with the Chapter, for the treatment/test requested."

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establishes a rebuttable presumption of compensability in favor of the claimant upon an ATP's request for advance authorization to provide medical care in that the injury is presumed compensable unless the insurer denies authorization and controverts the treatment." Moreover, the employer's failure to respond under BR 205 amounts to a conclusive presumption of compensability. For these reasons, the Court of Appeals held that Rule 205, in so far as it precludes an Employer from contesting the compensability of treatment, is "invalid as substantive rule making which impermissibly shifts the Claimant's burden of proof to show that an injury is work related and invades the province of the [Georgia] Legislature." In other words, the Court of Appeals held that the employer does not lose its ability to challenge the compensability of a medical procedure or treatment simply because it failed to comply with the procedural requirements of Board Rule 205.

Although this decision is a WIN for employers and insurers, Constangy recommends complying with all procedural and administrative rules set forth by the State Board of Workers' Compensation, including Rule 205, to avoid the possibility of needless litigation or assessed attorney fees. We anticipate the Rule will be amended. Please feel free to direct any questions you may have to any Constangy workers' compensation attorney.

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