

# The CAT (designation) is Out of the Bag: Two New Presumptions to Help Put it Back

By Robert D. Ingram and Ryan G. Prescott  
Moore, Ingram, Johnson and Steele

*This article discusses the limited application of the two new presumptions against a catastrophic designation, argues that the presumption will apply retroactively and discusses the practical effect the new presumptions will have on Georgia's Workers' Compensation system.*

## Introduction

Among the numerous bills passed by the Georgia legislature during the 2005 session was House Bill 327. With its unanimous passage, House Bill 327 created two new presumptions against designating a workers' compensation injury as catastrophic. The goal, of course, is too prevent an abuse of the catastrophic designation and limit its application to truly severe cases.

A "Catastrophic injury" is defined as: (1) Spinal cord injury involving severe paralysis of an arm, a leg, or the trunk; (2) Amputation of an arm, a hand, a foot, or a leg involving the effective loss of use of that appendage; (3) Severe brain or closed head injury (with listed factors); (4) Second or third degree burns over 25 percent of the body as a whole or third degree burns to 5 percent or more of the face or hands; (5) Total or industrial blindness; or (6) Any other injury of a nature and severity that prevents the employee from being able to perform his or her prior work and any work available in substantial numbers within the national economy for which such employee is otherwise qualified (added in 1995).

There is little debate over whether categories one thru five are appropriate, objective considerations for designating an injury as catastrophic. However, there is concern over whether the catch-all category 6 and partial reliance on Social Security disability standards will lead to abuses of the true goals of the catastrophic designation. According to the 2003

Report of the Governor's Workers' Compensation Review Commission prepared by Georgia Law Professor Thomas A. Eaton and Georgia Business School Professor David B. Mustard, 1,269 claims were designated as catastrophic from 1997 thru 2002 and nearly half (627) of those claims were filed under the catch-all category 6.1 As such, the new presumptions focus on controlling claims filed under category 6.

The new presumptions only apply to claims filed under category 6

The two presumptions are contained in subsections (A) and (B) within category 6. That suggests that courts will only enforce the presumptions in claims filed under the catch-all definition. Within the same sentence as the catch-all definition the first presumption reads, "if the injury has not already been accepted as a catastrophic injury by the employer and the authorized treating physician has released the employee to return to work with restrictions, there shall be a rebuttable presumption, during a period not to exceed 130 weeks from the date of injury, that the injury is not a catastrophic injury." O.C.G.A. § 34-9-200.1(g)(6)(A). Therefore, claimants released to work with restriction will have a more difficult time obtaining a catastrophic designation.

Some claimants' attorneys will inevitably advise their clients to wait until 131 weeks after their injury to file for a catastrophic designation and then argue that the presumption does not apply. The question is whether courts will interpret the 130 week time period to modify the time for obtaining a release to work or the time for when the presumption would apply. In either case, the 130 week period appears arbitrary. It makes no sense that a claimant released to work in week 130 is considered different

from a Claimant released to work in week 131. Unfortunately, however, the statute only guides the Board to consider "all relevant factors including, but not limited to, the number of hours for which an employee has been released." Id.

In addition to the returned-to-work presumption, once an employee who is designated as having a catastrophic injury under the catch-all definition has reached the age of eligibility for retirement benefits as defined in 42 U.S.C. Section 416(l), as amended March 2, 2004, there shall arise a rebuttable presumption that the injury is no longer a catastrophic injury; provided, however, that this presumption shall not arise upon reaching early retirement age as defined in 42 U.S.C. Section 416(1), as amended March 2, 2004. O.C.G.A. § 34-9-200.1(g)(6)(B). The most difficult task with regards to this presumption is figuring out the claimant's age of retirement by looking at the Federal Code.

After reading and re-reading the relevant statute, we think the Federal Code rescheduled the age of retirement based on an "age factor increase" that is established when the employee reaches the age of early retirement, which is determined by other factors that partially rely on other determinations. 42 U.S.C. § 416(l). Clear as mud. In most cases, the age of early retirement is 62 and therefore, employees who turned 62 prior to June 2002 have now reached the age of retirement. 42 U.S.C. § 416(l)(2). The other method is to ask whether the claimant is receiving retirement benefits, since that should be a good indicator.

Once again, this presumption will likely only apply to claimants that are currently designated catastrophic under category 6 since the presumption is contained in a subsection to category 6.

## Both presumptions should apply retroactively

Absent from the new statute is any indication on whether the presumption will apply retroactively. There is, of course, a prohibition against retroactive laws contained in Article I, Section I, Paragraph X of the Georgia Constitution of 1983. However, that prohibition only applies to those laws which affect or impair substantive rights under prior law which have vested at the time the subsequent law takes effect. Where an amendment to a statute changes procedure it does not impair vested substantive rights, and it is to be given retroactive effect. Therefore, the issue is whether the new presumptions affect substantive rights.

Claimants will argue that the new presumptions do affect substantive rights since the returned-to-work presumption potentially prevents a catastrophic designation if the authorized treating physician released the claimant to light-duty within 130 weeks and the retirement presumption potentially eliminates a catastrophic designation, and continuing benefits, once an employee reaches the age of retirement. However, there is no direct affect on a substantive right. Moreover, the legislative history suggests that the statute is procedural.

The preamble to House Bill 327 reads that its purpose is "to change a provision relating to the designation process for a catastrophic injury by creating a rebuttable presumption." (emphasis added) Thus, courts should view the new presumptions as procedural, relating to the designation process, and apply them retroactively to all claim regardless of the date of injury, date of catastrophic designation or date of filing for a catastrophic designation. However, even if courts find that the new presumptions partially affect a substantive right, the presumptions should still apply retroactively.

Interestingly, there is case law dicta supporting the position that in the workers' compensation forum, a new statute applies retroactively even when it arguably effects substantive

rights. In *Chatham County Dept. of Family and Children Seros. v. Williams*, 221 Ga. App. 366 (1996), the Court of Appeals addressed whether to retroactively apply a changed rule regarding the maximum time a family member could provide attendant care. In that case, the court stated that:

Administrative rules and regulations, like statutes, will generally not be applied retroactively unless they are purely procedural or clearly intended to be applied retroactively. An ongoing workers' compensation case provides a unique context for retroactive analysis, however, since once an employer's obligation to pay for a work-related injury is established, the case may continue for decades. During this time the Board will be promulgating and changing rules which define and redefine the scope of the employer's obligations and the worker's rights with respect to medical care; and it would not make sense to freeze those obligations and rights as they were at the time of the injury, when the need for medical care continues. Accordingly, workers' compensation statutes and rule which do not render compensable an injury which would not otherwise be compensable, but merely affect the scope of treatment required, will be applied to ongoing cases where the injury preceded the effective date of the law. .in determining the applicability of a new rule affecting the scope of treatment, courts will look to the dates of treatment rather than the date of the original injury.

Therefore, the peculiar nature of workers' compensation supports the argument to apply the new presumptions retroactively, rather than freeze the rules regarding the catastrophic designation process to the time of the injury or time of request for a catastrophic designation.

### The Effect the New Presumptions will have on the Workers Compensation System

In theory, the new presumptions will help to guard against the abuse of the catastrophic designation. It makes sense that employees who were released to return to work will have to

overcome a presumption to obtain a catastrophic designation under category 6 since the basis for the category 6 catastrophic designation is that the employee cannot work at any job available in substantial numbers. Moreover, it makes sense that an employee designated as catastrophic under category 6 must overcome a presumption to keep that designation once they reach the age of retirement since that employee would have likely discontinued working regardless of the injury.

Many employers believe the CAT has been out of the bag since the category 6, or catch-all definition, was enacted by the legislature in 1995. Whether the new presumptions will be interpreted consistent with their intent to help herd the CATs back into the bag is yet to be determined. **WC**

### Endnote

1. However, as the report concedes, the true amount of catastrophic designation for accidents occurring in any given year cannot be known until as many as seven years later.