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newsletter

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Law Court disqualifies medical examiners

Section 312 examiner system in jeopardy

BY STEPHEN W. MORIARTY

In a decision of major importance to the operation of the workers' compensation system, the Law Court has ruled in a split decision that a physician who has examined any employee at the request of an employer or insurer during the previous year is ineligible to serve as a §312 examiner. In ***Lydon v. Sprinkler Services***, 2004 ME 16 (February 12, 2004), the Board appointed a physician from the list of approved examiners, but the employee objected on the basis that the doctor had performed §207 (or employer-requested) exams within the previous 52-week period. The objection was overruled, and the Hearing Officer relied upon the examiner's opinion in denying a pending Petition for Award. Because the Court ruled that the physician was ineligible to serve, the Hearing Officer's decision was vacated and the matter was remanded for further proceedings.

This far-reaching decision turns upon a precise analysis of statutory language and elementary grammar; specifically, the use of the indefinite article "an" as opposed to the definite article "the." Section 312(2) sets forth three circumstances under which a healthcare provider will be ineligible to serve as a §312 examiner. First, an independent examiner "may not be the employee's treating healthcare provider." In similar language, the statute excludes anyone who may "have treated the employee with respect to the injury for which the claim is being made or the benefits are being paid." The Court noted the standard dictionary definition of the definite article "the" refers to a particular person, thing, or group, and that in the statutory context the use of the phrase "the employee" refers to the specific injured worker whose claim is at issue. In this case, the examiner appointed by the Board was not the employee's primary care provider and had never treated the employee for the injury.

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However, the statute contains a final disqualifying provision phrased in a critically different manner.

> A physician who has examined an employee at the request of an insurance company, employer or employee in accordance with §207 during the previous 52 weeks is not eligible to serve as an independent medical examiner.

In this last sentence of §312(2), the Legislature switched from the definite article "the" to the indefinite article "an," and the Court interpreted the reference to "an employee" to mean any employee, and not the particular employee whose claim was before the Board. The majority found the meaning of the language to be plain and unambiguous, and because the appointed physician had admittedly examined "an employee" at the request of an employer within the past year, he was ineligible to serve.

This statutory conundrum had been widely recognized for years, and in fact preceded the adoption of the Workers' Compensation Act of 1992.

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The predecessor to current §312 was former §92-A, which became effective on October 17, 1991. This section directed the former Medical Coordinator to develop an independent medical examiner system and to create a list of healthcare providers to serve as independent examiners. The opinions of the examiners were to be binding upon Workers' Compensation Commissioners in the absence of substantial evidence to the contrary. In every respect, former §92-A is the obvious predecessor to current §312. More to the point, §92-A(2) also excluded "the employee's" treating provider as an examiner as well as anyone else who may have treated "the employee" with respect to the injury. In addition, §92-A(2) precluded any physician who had examined "an employee" at the request of an employer or insurer from serving as an independent examiner.

The Workers' Compensation Commission recognized the inherent difficulties in a literal application of this last provision, and in 1992 adopted a rule disqualifying only those physicians who had examined "the employee" at the request of an employer or insurer during the previous year. See former W.C.C. Rule 10.15(B)(2). The intent of the rule was to blunt the impact of §92-A(2) and to increase the number of qualified and available examiners. The discrepancy between the language of the statute and the rule was widely recognized and intensely debated in 1992.

When the Legislature considered the Workers' Compensation Act of 1992, the problem could have been resolved by language clarifying either that an independent examiner must not have examined any employee at the request of an employer during the previous year, or that the examiner must not have examined the employee pursuant to an employer's request. Instead, when it adopted the Workers' Compensation Act of 1992, the Legislature essentially re-enacted the key provisions of former §92-A without change and perpetuated the confusion.

Section 312 authorizes the Board to adopt rules to implement the independent medical examiner system and "to effectuate the purposes of this section." In attempting to make the system operational, the Board was aware of the practical problems of excluding all providers who had conducted §207 exams in the recent past. Realizing that the elimination of these providers would greatly reduce the pool of available and willing independent examiners, the Board followed the lead of the former Commission and adopted a rule specifically providing that only a physician who had examined the employee at the request of an employer would be disqualified from serving as an examiner under §312. See WCB Rules, Chapter 4, §2(6)(B). The ***Lydon*** Court politely suggested that the use of the word "the" rather than "an" in the rule may have represented either "a scrivener's error or typographical error." Of course, it was nothing of the sort, as the Board had deliberately attempted to mitigate statutory language by rule in the same fashion as the former Commission. The Court ruled that because the rule contradicted the clear language of the statute, the Board had exceeded its rule-making authority and the rule was invalid.

Two justices dissented on the grounds that the statutory language is ambiguous and that the phrase "an employee" does not necessarily mean "any employee." The dissenters argued that the Court should have upheld the Board's interpretive rule by deferring to the Board's construction of the Act as the agency charged with the responsibility of supervising the administration of the statute. However, the dissenters would have disqualified the examiner based upon an appearance of excessive ties to management or industry in accordance with *Laskey v. S. D. Warren Company*, 2001 ME 103, 774 A.2d 358.

The impact of the ***Lydon*** decision will be immediate and substantial. Although §312(1) directs the Board to establish a list of at least 50 healthcare providers to serve as independent examiners, there are only 30 professionals on the current approved list. On February 18, 2004, the Board's Office of Medical/Rehabilitation Services announced that 19 of the physicians had been "temporarily disqualified from our list," and that all pending appointments had been canceled. The Office plans to reschedule all appointments, but this may take considerable time in light of the fact that there are only 11 remaining Board-approved examiners.

There is an unresolved issue concerning the scope of the disqualifying language. As noted, §312(2) also excludes "a physician who has examined an employee at the request of an …employee in accordance with §207…." Attorneys and advocates representing employees often schedule examinations with healthcare providers, some of whom are on the Board-approved list for §312 examiners. The ***Lydon*** Court's concerns about impartiality and absence of a conflict of interest should logically exclude any §312 examiner who has seen an employee at the re-

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newsletter

is published quarterly to inform you of recent developments in the law, particularly Maine law, and to address current topics of discussion in your daily business. These articles should not be construed as legal advice for a specific case. If you wish a copy of a court decision or statute mentioned in this issue, please e-mail, write or telephone us.

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quest of any employee within the previous year. The difficulty lies with the reference to §207, which is the provision requiring injured workers to submit to examinations at the request of employers. It will likely be argued that when an employee is examined at his or her own request or initiative, the exam does not fall within the scope of §207 and that therefore a §312 provider who examines employees generally cannot be disqualified. This precise issue was not before the Court, and can only be addressed when the proper factual circumstances arise.

The ability of the §312 examiner system to function as intended has now been seriously compromised, and it remains to be seen how the Board will respond. In the short run, the written reports of now-disqualified examiners may be admissible under §309, although they will not be entitled to §312 weight. Also, the parties may still agree upon an independent examiner not on the Board's list, and the disqualification provisions may not apply to a mutually acceptable examiner (although this is not explicitly clear). The long-term solution is in the hands of the Legislature, which is currently in session. In recent years, it has on several occasions clarified or amended the statute in response to Law Court decisions. If the policy goal of a diverse pool of "the most qualified and…highly experienced and competent [providers]…in the treatment of work-related injuries" is to be achieved, the disqualifying language of §312(2) must be revised. □

James K. Gooch: new associate

Jim joined the firm last October and has been working on litigation projects with the insurance defense group, as well as working with Bob Bower on employment issues.

Jim attended Allegheny College in Meadville, Pennsylvania, graduating *Magna Cum Laude* in 1995 with a joint degree in Philosophy and English and a minor in Political Science. He took a four-year hiatus from education, working as (among other things) a teacher, a corporate trainer, and a truck driver; and living in California, Utah and New Hampshire.

In 1999, he enrolled in law school at the University of Indiana at Bloomington with a Chancellor's fellowship. At Indiana, he earned a book award for his achievement in constitutional law, served as Director of the Environmental Law Research Group and spent a summer clerking for Judge David F. Hamilton of the United States District Court in Indianapolis. After his first year, Jim transferred from Indiana to the Yale Law School. At Yale, he worked on the board of the Yale Journal of International Law, serving as a Submissions Editor in his third year. He also volunteered as an assistant freshman football coach at a local high school. He graduated in 2002.

Following law school, Jim was honored to serve for a year as a law clerk to the Honorable D. Brock Hornby of the United States District Court in Portland. He took the bar exam while working for Justice Hornby and was admitted to the Maine Bar in October, 2003. He is proud to return to his family's roots in southern Maine.

In his spare time, Jim plays second row for the Portland Rugby Football Club, a competitor in Division II of the New England Rugby Football Union. He is an avid motorcyclist, skier and hiker and has recently developed a fondness for sea kayaking. In early 2004, his article on the ethnic and economic segregation of Connecticut public schools will be published by the Quinnipiac Law Review. He is a member of the Maine Civil Liberties Union and serves on the Board of Directors for the Young Lawyers Section of the Maine Bar Association.

JAMES K. GOOCH

Jim lives in Portland. □

Three recent decisions from the Law Court

By David P. Very

Law Court holds that insurer of rental car not liable for passenger's injuries

In 1994, Richard Ashe was injured in a single car accident while riding as a passenger in a car driven by Matthew Moore. The vehicle was owned and rented by Enterprise to Mr. Moore. The rental agreement between Moore and Enterprise stated that Enterprise did not provide bodily injury and property damage insurance coverage for the rental car, and that the renter's insurance applied. Moore had his own auto policy with a single injury limit of $20,000.

Ashe brought suit against Moore and Moore stipulated to his liability and consented to an entry of judgment against him. Moore's insurer agreed to pay Ashe the liability limits under Moore's policy and Ashe agreed not to pursue additional recovery from Moore's personal assets. Moore also assigned to Ashe his rights, if any, against Enterprise and the Travelers Insurance Company, Enterprise's insurer.

Moore did not appear at the damages hearing or otherwise contest Ashe's damages claims. The Court entered judgment in the amount of $319,618.29. Ashe then initiated an action against Enterprise and Travelers seeking recovery of the remainder of the judgment obtained against Moore. The Superior Court granted summary judgment in favor of Enterprise and the Travelers.

On appeal, in ***Ashe v. Enterprise Rent-a-Car, et al.,*** 2003 ME 147, 838 A.2d 1157, (December 17, 2003), the Law Court first noted that it is the general rule in Maine that an owner of a vehicle is not liable for the torts of vehicle operators who are not employees or agents. The Court noted that in 1929, the Maine legislature altered this common law rule by making the owner of a rental vehicle jointly and severally liable with the renter for damages caused by the renter's negligence. However, the Law Court also noted that the statute limited the exception by providing that it "shall not confer any right of action upon any passenger in any such rented vehicle as against the owner." The statute was subsequently amended to state, "This section does not give to a passenger in a rented vehicle a right of action against the owner."

Despite this limitation, Ashe contended that the common law rule and the statutory passenger exception were modified when the legislature enacted mandatory coverage for rental vehicles. By enacting mandatory coverage for rental cars, Ashe asserted, the legislature did not intend that passengers be excluded from accessing that coverage. Ashe argued that the intent of the legislature was to ensure that victims of the negligent operation of motor vehicles recover damages for their injuries.

The Law Court disagreed and stated that the statute requires owners of rental vehicles to maintain liability protection only for claims for which liability could arise under the law. The Court stated that the obligation to pay insurance is triggered by the liability of the insured to the claimant. The Court stated to rule otherwise would require it to invalidate a statute that specifically excludes recovery by a rental vehicle passenger from an owner. The Law Court thus rejected the Plaintiff's argument that the statute requiring mandatory insurance for rental vehicles authorized a passenger to recover from a rental vehicle owner.

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Ashe then argued that because Enterprise is required to provide a bond to the Secretary of State as proof of financial responsibility for its rental cars, he was entitled to recover his damages from the bond by virtue of the reach and apply statute. The Law Court, however, stated that unless Ashe can obtain a judgment against Enterprise, as opposed to the operator, he is not entitled to recover from the Travelers through the reach and apply statute. The Court specifically held that absent a finding that Enterprise is liable to Ashe, Travelers' contractual liability to Enterprise is not triggered by Ashe's claims.

The Law Court concluded that because the mandatory coverage provision does not create a right of action for a passenger against the rental car owner, and because such an action is otherwise not viable under the common law, no judgment can be entered for Ashe against Enterprise. Further, no obligation on the part of the Travelers is created under either the reach and apply statute or the bond. The Law Court therefore affirmed the judgment of the Superior Court.

Law Court rules no coverage for damages caused by witnessing a murder

On February 7, 1999, Douglas Mallar was a patron at the bar in the Bridge Street Pub. He observed the bartender engage in a verbal altercation with a customer. The customer, after having been removed from the pub, returned with a gun and shot the bartender dead. Mallar was sprayed with the bartender's blood.

Mallar filed an action against the pub claiming negligent infliction of emotional distress. He obtained a judgment in the amount of $300,000. He then filed an action against the pub's liability insurer. The insurer was granted a summary judgment by the Superior Court on the grounds that the insurance policy's assault and battery exclusion relieved the insurer from any duty to indemnify.

On appeal, in ***Mallar v. Penn-America Insurance Co.,*** 2003 ME 143, 837 A.2d 133, (December 9, 2003), Mallar argued that the tort of negligent infliction of emotional distress is an independent tort and that the proximate cause of his severe emotional distress was not the witnessing of a murder, but the behavior of the bartender when she breached her duty of care by negligently accosting and taunting the customer who later killed her. Penn-America contended that although Mallar may have been granted judgment on a negligent infliction of emotional distress claim, his damages arose from the murder, and therefore Penn-America's assault and battery exclusion applied. The exclusion included damages resulting from an assault and battery whether or not caused by, at the instigation of, or with the direct or indirect involvement of the insured or the insured's employees.

The Law Court, apparently using common sense, stated that although Mallar submitted that the bartender's taunting was a proximate cause of his emotional distress, it was the witnessing of the murder that was unquestionably the cause in fact. Thus, the Law Court upheld the finding of the Superior Court that Mallar's damages were proximately caused by the murder, rather than the bartender's actions, as a matter of law.

This decision, authored by Justice Dana, clearly demonstrates that the Law Court, despite the creative arguments of the plaintiff, has not lost its common sense, even in cases involving coverage.

Discretionary function immunity for emergency vehicles

On July 8, 1998, Deborah Hall, a deputy with the Cumberland County Sheriff's Department, received a radio dispatch to respond to a residence where a six-year old child was reported to be out of control. Hall had made previous responses to this residence that involved physical abuse and alcohol. Although there were no reports of any injuries at that point, only a behavioral problem, Hall was also told that a rescue unit was standing by. Hall initiated an emergency response to this call, based on her belief that there was a serious emergency involving a young child that required her immediate response before the rescue unit would respond.

In her emergency response, Hall used the vehicles blue lights and was passing vehicles at high rates of speed. It was disputed as to whether her siren was activated. While driving on busy Route 302 in Raymond, Hall collided with another vehicle killing Michelle and John Norton's two sons.

The Nortons filed suit and the Superior Court granted summary judgment to Hall, the sheriff's department, and the county, concluding that Hall's choice to engage in an emergency response was a discretionary function rendering the defendants immune from suit pursuant to the Maine Tort Claims Act.

On appeal, in ***Norton v. Hall, et al.,*** 2003 ME 118, 834 A.2d 928, (September 30, 2003), the Law Court reiterated that a law enforcement officer's decision to engage in a high speed chase or engage in an emergency response is a discretionary decision to which discretionary immunity applies. The Nortons contended that even if the initial decision by Hall to respond to the call as an emergency is an act protected by discretionary immunity, the operation of the vehicle itself is not protected. The Nortons relied on the section of the Maine Tort Claims Act that provides that a governmental entity is liable for property damage, bodily injury or death arising from its negligent acts or omissions in its ownership, maintenance or use of any motor vehicle. The Nortons argued that because the deaths resulted from Hall's operation of a police cruiser, they are entitled to recover. A divided Law Court disagreed.

First, the Law Court stated that the decision by Hall to respond to the emergency cannot be isolated from the response itself. The operation of the cruiser on the way to the emergency is an integral part of, and cannot be separated from, the initial decision to respond. If the actions taken by Hall in carrying out an emergency response was separated and placed in a different category from her decision to respond, the Court stated that discretionary function immunity would effectively be removed as a defense in any case involving the operation of a motor vehicle. The Court further noted that its decision did not render the exception for the operation of motor vehicles meaningless. The Court stated that not all operations of public safety vehicles involve discretionary acts and exceptions will still apply to the everyday non-discretionary operation of governmental motor vehicles, such as routine patrolling.

The Law Court also rejected the Nortons' argument that because there was evidence that Hall was not utilizing her siren at the time of the accident, protecting Hall with immunity would render the emergency vehicles statute requiring the use of a siren when it is

reasonably necessary to warn other drivers meaningless. The Court stated that even if Hall acted contrary to the statutory rules of the road for the operation of emergency vehicles, that statute does not strip her of the discretionary immunity provided under the Maine Tort Claims Act. The Court reiterated that immunity exists even when the official lacks the authority to do the act, or abused the discretion.

The three dissenting Justices agreed that the choice to engage in an emergency response is a discretionary function, but disagreed that discretionary immunity applies to the negligent operation of the vehicle in the course of the emergency response. The Chief Justice issued a concurring opinion stating that it is the majority of the Court's conclusion that it is the Legislature's current intent to cloak the emergency response, both the decision to respond, and the method of response, with sovereign immunity. The Chief Judge noted that it is within the Legislature's province to decide whether in the future those two concepts should be separated and whether one or both should not be shielded from liability or negligence.

This decision highlights and strengthens the formidable defense of discretionary immunity. The Court's opinion that an initial discretionary decision would cloak the performance of the act itself can be applied to numerous governmental tasks. This defense should always be considered when defending a governmental entity.

Reportedly, the plaintiff has filed a petition for a writ of certiorari asking the U.S. Supreme Court to consider this case. □

Maine Supreme Judicial Court amends civil procedure rules

By: Aaron K. Baltes

The Maine Supreme Judicial Court recently amended the Maine Rules of Civil Procedure governing summary judgment motions and shareholder derivative suits, effective January 1, 2004. The summary judgment amendments continue the policy of conforming summary judgment practice to the local rules of the United States District Court for the District of Maine. The amendments clarify how to respond to a statement of material facts submitted in support of a motion for summary judgment. The new rule is very specific and easy to follow, but represents a potential trap for the unsophisticated litigant. The Maine Supreme Judicial Court has made it clear in recent years that trial courts have wide discretion to disregard summary judgment materials that violate the requirements of the Maine Rules of Civil Procedure.

The amendments affecting shareholder derivative suits are designed to eliminate conflicts between the rules and the revised Maine Business Corporation Act, which the Legislature adopted effective July 1, 2003. The amended rules require the complaint in such lawsuits to allege with particularity that the plaintiff has made a written demand upon the corporation to take suitable action. The Act's new “universal demand” replaces and supersedes the former rule that excused a plaintiff from making a demand if he or she could prove that making a demand would have been futile. Further, the new rules clarify that the focus of the requirement that the plaintiff fairly and adequately represent the shareholders is on the interests of “the corporation” as a whole, and not “shareholders . . . similarly situated” to the plaintiff, as the former rule provided. This clarification is intended to better reflect the nature of a derivative action, where the plaintiff stands in the shoes of the corporation and not the shoes of other shareholders.

AARON K. BALTES

To review the exact language of these amendments, visit the *Resources* section of NH&D's website at http://www.nhdlaw.com and click on “State of Maine Judicial Branch.” □

Reunion of World War II Prisoners of War

By Adrian P. Kendall

Adrian P. Kendall represents the interests of the German General Consulate, Boston here in Maine. It was in that capacity that he was asked to help the residents of Houlton organize a prisoner of war reunion. During the late 1940's, Houlton was the site of a prisoner of war camp for German soldiers who were captured after the Normandy landings of 1944 and, at its height, some 3,000 prisoners were interned there. After the war ended, the prisoners were kept on for several years to assist in the harvesting of crops and logging operations before being returned to Europe and Germany. Some 60 years later, the older residents of Houlton, with fond memories of these young men who worked on the farms, wanted to organize a reunion. Their only problem was that they did not know how to find them. Over a course of some two years, Adrian Kendall worked with various German federal and charitable organizations, including the German Red Cross, to locate surviving former prisoners of war. In that process, he was able to locate more than a dozen of the former prisoners of war who were still alive and of that dozen, four returned to Houlton for the "reunion days" that were hosted there in mid September, 2003. As fate would have it, David C. Norman's father-in-law, Edward J. Knox, was a guard at the Houlton camp. Dave, his wife Judy, and the former Corporal Knox were also able to attend this reunion. The events included dedication of a permanent memorial at the site of the former prisoner of war camp and former Army Airfield. Present were Congressman Michael H. Michaud, from Maine's Second Congressional District, and Deputy German Consul General Günter Wehrmann as well as State Senators, representatives from U.S. Senator Collins' and Governor John E. Baldacci's offices, and Houlton Town Councilors. The reunion was featured on the television show, *Bill Green's Maine*. By far, the greatest tribute to the strong and positive sentiment was a community dinner held at a local museum featuring true down-home Aroostook County cooking. That event featured a turnout of over 300 people. These former enemies, through personal interaction, were able to realize that really they were not so different. It was striking to hear so many of the Houlton storytellers say how they realized that the German boys, most of them no more than 17 and 18 years old, really reminded them of their own sons and brothers who had been sent away to fight in World War II. □

Milton A. Bailey, (front) Presque Isle writer and U.S. Army Occupational Specialist in the Houlton camp during WWII, and Catherine Bell, (back) Head of Houlton's Aroostook County Historical and Art Museum, pose with Adrian Kendall and former German prisoners of war.

Left to Right - Gerhard Kleindt, Dr. Hans Georg Augustin, Adrian P. Kendall, Rudi Richter, Hans Kruger.

Workers' compensation – Law Court decisions

BY STEPHEN W. MORIARTY

Specific Loss Benefits

It has long been recognized that employers are responsible for the cost and consequences of reasonable medical treatment following a compensable personal injury. In ***Archer v. MDS Building, Inc.***, 2004 ME 17 (February 12, 2004), the employee lost his left thumb and index finger while using a miter saw in the course of his employment. The employee elected to have his left big toe amputated and re-attached to replace the missing thumb. He was awarded specific loss benefits for the amputation of the thumb and index finger, but his claim for specific loss benefits for amputation of the toe was denied.

Noting that actual amputation is required for specific loss benefit entitlement, the Court held that the toe had been amputated within the meaning of §212. Finding that the amputation of the toe was a reasonable medical treatment (even though elective) and directly related to the original injury, the Court held that the employee was entitled to benefits for amputation of the toe. Accordingly, whenever medical treatment for an occupational injury results in amputation of a designated portion of the body, the employer is responsible for specific loss benefits.

Permanent Impairment and Burden of Proof

Several years ago the Law Court held in *Abbott v. School Administrative District #53,* 2000 ME 201, 762 A.2d 546, that an employee bears the burden of proof in establishing a level of permanent impairment entitling him or her to indefinite benefits for partial under §213. In *Abbott*, the employee had filed a Petition for Review to challenge a unilateral suspension of benefits, and the Court applied the general rule that the burden of proof rests upon the moving party. However, recognizing that determination of permanent impairment may arise when either the employer or employee may be the moving party, the Court has now modified *Abbott* and has ruled that the employer bears the ultimate burden of proof.

In ***Farris v. Georgia Pacific Corp.,*** 2004 ME 14 (February 9, 2004), partial benefits had been awarded per decree, and the employer terminated benefits when the cap was reached. The employee filed a Petition for Review and a provisional order issued directing the resumption of payments pursuant to *Russell v. Russell's Appliance Service,* 2001 ME 32, 766 A.2d 67. At the hearing, no evidence was introduced establishing the level of permanent impairment resulting from the occupational injury. Concluding that the employee bore the burden of proof, the Hearing Officer ordered a termination of benefits as more than 364 weeks of compensation had been paid.

At the outset, the Court recognized that the shifting of the identity of the "moving party" in various proceedings created a "potential for mischief," and concluded that the burden of proof must be clearly defined and uniformly applied. In cases in which the level of permanent impairment is in dispute, the Court ruled that an employee must initially "affirmatively assert the existence of a level of permanent impairment that would entitle him to indefinite receipt of benefits." Additionally, an employee bears a burden of production and must offer "competent evidence to suggest that the employee's whole body permanent impairment may be above the threshold for purposes of obviating the durational cap pursuant to §213(1)."

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When such evidence has been presented, the ultimate burden of proof then shifts to the employer to establish "that it has paid the number of weekly benefits required to reach the cap, and that the level of permanent impairment is not above the statutory threshold." Because of uncertainties in the record concerning burden of proof matters, the Court vacated the decision of the Hearing Officer and remanded the case for further proceedings.

Notwithstanding ***Farris***, an employer need not necessarily wait indefinitely for an employee to assert a level of impairment above the cap and to offer evidence in support of that assertion. An employer may still obtain an impairment assessment and generate the issue before the Board by filing an appropriate petition. However, after ***Farris***, it is clear that an employer seeking to stop payment of partial benefits when the cap is reached will bear the burden of proof to establish that the level of impairment is below the threshold.

Hearing Officer Authority

The legal fallout continues from the Board's December 2002 refusal to

reappoint Hearing Officers Johnson and McCurry, whose terms of office expired on December 31, 2002. Several months ago, the Court held in *D'Amato v. S. D. Warren Company*, 2003 ME 116, 832 A.2d 794, that Hearing Officer Johnson had continuing *de facto* authority after January 1, 2003 to decide cases on which the evidence had closed prior to the expiration of her term. However, the limits of *de facto* authority are now apparent from the Court's most recent decision on the issue. In ***Little v. Knowlton Machine Company***, 2004 ME 3, 840 A.2d 97, Hearing Officer McCurry presided at a February 2003 hearing on a pending Petition for Award. The employer objected to the assignment of the case to Hearing Officer McCurry, but the then Chief Hearing Officer overruled the objection and suggested that the parties agree to arbitration under §314. The parties did not agree, and at the outset of the hearing the employer once again objected to Mr. McCurry's role as Hearing Officer. Ultimately, the Petition for Award was granted and ongoing benefits for total incapacity were awarded.

The only issue addressed by the Court was the authority of the Hearing Officer to act. The Court found that Hearing Officer McCurry did not have *de jure* authority to decide the case as his term had expired prior to the initial hearing and that the Board itself had expressed doubt about his continuing authority. Further, the Court held that there was no *de facto* authority and contrasted the case to *D'Amato*, in which the hearing had been held and the evidence had closed prior to the expiration of the term of office. The decree was vacated and the matter was remanded to the Board for further proceedings.

Retirement Offset

Section 221 provides that weekly wage loss benefits may be reduced to reflect pension or retirement benefits received by an employee from a plan established by the employer paying the wage loss benefits. A recent decision illustrated the complexities of applying the statute in the context of a corporate acquisition.

In ***Johnson v. Southern Container Corp.***, 2003 ME 141, 840 A.2d 706, the employee had worked for Weyerhaeuser for approximately twenty years before the company was purchased by Southern Container in 1994. The employee was injured while working for Southern Container in 1999, and following a layoff in 2001, she applied for and began to receive a retirement benefit from Weyerhaeuser. The Hearing Officer found that Southern Container was entitled to reduce its compensation obligation to the employee based upon the pension benefits received from Weyerhaeuser, and the employee appealed.

During litigation, Southern Container and Weyerhaeuser had been described as "successor companies," and the Hearing Officer had found that Southern Container had purchased the assets and liabilities of Weyerhaeuser. However, the Court found that there was insufficient evidence to establish that Southern Container was in fact a successor corporation, and had also noted that the record was devoid of any actual evidence establishing an asset and liability purchase. In other words, there was no evidence establishing that Southern Container either maintained the retirement pension that the employee received or had assumed responsibility for payment of the Weyerhaeuser pension. In the absence of such evidence, the Court concluded that, as a matter of law, the Hearing Officer erroneously awarded an offset to Southern Container to reflect the Weyerhaeuser pension.

Discrimination

Opinions dealing with the anti-discrimination provision of the Act are rare, but in 2003 there were two. Earlier in the year, the Court held in *Laskey v. Sappi Fine Paper*, 2003 ME 48, 820 A.2d 579, that a termination based upon an inability to continue to accommodate an injured employee was non-discriminatory. In ***Jandreau v. Shaw's Supermarkets, Inc.***, 2003 ME 134, 837 A.2d 142, the employee had been out of work for more than six months following a January 2000 lifting injury. The employer had a neutral policy requiring termination of employees who have been absent from work for six months, regardless of the reason. The Board granted a Petition to Remedy Discrimination, finding that the termination was rooted substantially and significantly in the employee's exercise of her rights under the Act.

The Court reversed the decision, and held that "neither the Act nor our decisions require an employer to keep an employee on the books indefinitely when the employee can no longer meet the requirements of a job." The Court found that the employer's six-month termination policy was reasonable and that the ultimate decision to terminate was based upon legitimate employment considerations.

In the same decision, the Court held that the reinstatement provisions of §218 do not automatically impose an obligation upon an employer to make appropriate accommodations and to reinstate injured workers. Instead, the section applies only when an employee has filed a petition requesting reinstatement. Therefore, while the Act clearly encourages employers to return injured employees to work, they are not automatically required to do so.

Specific Loss

Specific loss benefits may be awarded pursuant to §212(3) for the actual loss or amputation of portions of the body designated in the statute. With respect to the thumb and fingers, different amounts of compensation are to be awarded for the loss of each digit. If a person loses just one phalange, an employee is entitled to receive one half of the sum that would have been paid for loss of the entire thumb or finger. However, the statute provides that "loss of more than one phalange is considered as

the loss of the entire finger or thumb."

In ***McNally v. Douglas Brothers, Inc.***, 2003 ME 155, 838 A.2d 1176, the employee had lost the first phalange of three fingers, and 10% or less of the middle phalanges of each finger. The Hearing Officer had refused to award full benefits for the loss of each finger on the grounds that the statute required the entire loss of the second phalange. In construing the meaning of the statute, the Court found that the plain and ordinary meaning of the words compelled the conclusion that the loss of any portion of the second phalange, however small, entitled an employee to specific loss benefits for the loss of the entire finger or thumb.

Change of Circumstances

Three years ago the Court held in *Bernard v. Mead Publishing Paper Division,* 2001 ME 15, 765 A.2d 576, that in cases of entitlement to partial benefits for injuries preceding November 20, 1987, the required inflation adjustment must be applied to the difference between the pre-injury and post-injury wages. The Legislature responded by enacting §224, which provides that the pre-injury average weekly wage must first be adjusted for inflation before the differential with post-injury earnings is calculated. By its terms, this statutory enactment was to apply to all pending proceedings and to all other cases "notwithstanding any adverse order or decree."

In two opinions issued on the same day, the Court held that an employee is not automatically entitled to have benefits calculated pursuant to the §224 methodology. In ***Morrissette v. Kimberly-Clark Corp.***, 2003 ME 138, 837 A.2d 123, the employee had been injured in 1983 and 1992, and had been awarded benefits pursuant to a 1999 decree. In 2001, the employee lost her current job and filed a Petition for Restoration, and the petition was pending when §224 took effect.

In ***Grubb v. S. D. Warren Company***, 2003 ME 139, 837 A.2d 117, the employee had been injured in 1985 and 1986 and an award of benefits pursuant to a 2000 decree was later denied following the *Bernard* decision on the grounds that current earnings exceeded the unadjusted pre-injury average weekly wage. Following the effective date of §224, the employee filed a Petition for Restoration claiming benefits pursuant to the §224 formula, but did not otherwise show an intervening change in his circumstances.

The Court acknowledged that statutory modifications to entitlement to benefits may be retroactively applied to earlier dates of injury. However, the Court firmly adhered to the "change of circumstances" requirement, and held that a statutory revision may not alter a level of benefits established by decree unless changed circumstances can be shown. In ***Grubb***, the employee failed to show a change of circumstances following the effective date of §224, and therefore was not automatically entitled to have benefits calculated in accordance with the formula. By contrast, in ***Morrissette***, the employee had successfully shown a change of circumstances since a prior decree, and therefore was entitled to have her benefits calculated pursuant to §224.

In one sense, these decisions have limited application in that they focus primarily upon calculation of benefits for partial for pre-November 20, 1987 injuries. However, in a broader sense, the Court has underscored the requirement of the showing of a change of circumstances when additional benefits are claimed following a prior award or determination. In this broader sense, the decisions apply to all dates of injury. □

Briefs/Kudos

AARON BALTES was elected to the Board of Governors of the Maine State Bar Association. Aaron represents the Young Lawyers Section and is serving on the Board of Governors for a two year term effective January 1, 2004. This fifteen member Board of Governors is the policy-making body of the Maine State Bar Association. It meets ten times a year to review the association's activities and goals.

ANNE JORDAN received an award from the Maine Department of Agriculture in appreciation for her "assistance above and beyond the call of duty and for her dedication to the animals of the State of Maine." The award was in recognition of Anne's legal work in a case involving what is believed to be the largest seizure ever of abused animals and birds from a home in Maine. She represented the Bangor Humane Society and the Maine State Society for the Protection of Animals and further provided additional legal advice and assistance to the animal welfare agents and the local law enforcement investigators. **ANNE** also received another award late last fall from the Animal Welfare Advisory Council of Maine in recognition of her work over the last two years as chairperson of the council. The council has been working very hard over the past three years to bring a previously poorly run program into compliance, to train animal welfare agents and animal control officers, and to promote appropriate legislation for the protection of animals in Maine.

Also, congratulations are in order to **ANNE** who was approved in late February by the Maine Senate to serve on the Harness Racing Commission. Anne also serves as chairperson of the Executive Clemency Board for the State of Maine.

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Rolf-Dieter Schnelle has been appointed as the new German Consul General serving the northeast region. Based in Boston, Consul General Schnelle and his staff not only serve the needs of Germans who live in the area but also assist U.S. individuals and businesses that have interests, including trading interests with the Federal Republic of Germany. **ADRIAN KENDALL** has been actively representing the General Consulate in Maine for several years and most recently accompanied Consul General Schnelle and his American wife, Doris, on a tour that included meetings and presentations with the Maine School of Business in Orono, a meeting with Governor Baldacci, a speech and meetings at Bowdoin College, a speaking engagement at the Portland Country Club in conjunction with the World Affairs Council of Maine, and a lunch meeting with the Board of Directors of the Maine International Trade Center. We are pleased to welcome Consul General Schnelle and his wife Doris to their new posting and wish them a successful and enjoyable stay in New England.

Also, **ADRIAN** recently spoke to Greeley High School students as part of a panel on the importance and usefulness of foreign languages and career choices.

STEVE MORIARTY spoke at a seminar sponsored by Lorman Education Services in December. The title of the seminar was: Advanced Workers' Compensation in Maine.

In the summer of 2003, **DAVE NORMAN** and his wife, Judy, proudly welcomed their son, United States Marine Corps Sergeant Michael J. Norman, home from his dangerous tour of duty in Iraq, Kuwait, and Jabuti. Upon completion of his service in the Marine Corps, Michael enrolled at the University of Massachusetts, Boston campus where he is now finishing his freshman year. All of us would like to take this opportunity to thank Michael for his sacrifice and courage while serving our nation.

PATTE O'DONNELL and her husband, Jim, received great news the first week of this March. Their son, United States Army Sergeant Ryan P. O'Donnell, returned safely to the United States after completing his tour of duty in Iraq. The O'Donnell's just learned that Ryan has been recommended for and will receive a Bronze Star for outstanding acts of courage while serving in Iraq. Ryan is commended for saving the life of a comrade during a firefight that ensued in November, 2003 when his Humvee came under attack. Ryan was instrumental in defeating the attackers as well as in saving his comrade while subjecting himself to great personal risk. Again, thank you, Ryan, for distinguishing yourself and for representing our country so well.

EMILY BLOCH, a contributor in the Fall 2003 NH&D Newsletter, had the highlights of her article from that issue regarding the foreign object exception to the medical malpractice statute of limitations, re-printed in the well recognized national publication, Medical Malpractice Reports published by MatthewBender/Lexis publishers.

The firm welcomes **CATHY MOREAU** to the employment law group, **JAN LEE** to the workers' compensation group, and **JAN DEPONIO** to the commercial group. They recently joined the firm as legal secretaries. We are also pleased to announce that **KEIRSTEN TAYLOR** is the new part time library assistant.

Congratulations to our two new mothers! **KATE GAGNON** and her husband, Greg, are the proud parents of a lovely daughter, Cloe Marie Gagnon who was born in January. And **LORRI HALL** and her husband, Shad, welcomed their first child, Jake William Hall, born in February and already one of the Patriot's youngest fans. Newborns and parents are all healthy and well. □

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Return service requested

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