

New OSHA Regulations recognize serious workplace disorders

Ergonomics standard addresses gradual injuries

BY ROBERT W. BOWER, JR

Nearly 600,000 workers in general industry every year report musculoskeletal disorders, or MSDs, that are serious enough to require time off from work, and an even larger number of these gradual injuries occur without lost time. The Occupational Safety and Health Administration states that these disorders have been the largest single job-related injury and illness problem in the U.S. for the last ten years, with ballooning costs to employers in the billions.

OSHA has created a new ergonomics standard for general industry employers that is intended to reduce the number and severity of MSDs caused by the worker's exposure to risk factors – risk factors that may include repetition, force, contact stress, awkward postures, and vibration. The principle behind ergonomics is that by fitting the job to the worker, such as adjusting a workstation, rotating jobs, or using mechanical assists, musculoskeletal disorders can be greatly reduced. An employee who suffers a disorder of the muscles, nerves, tendons, ligaments, joints, cartilage, blood vessels or spine because of these risk factors must report it to his or her employer. The new OSHA ergonomic regulations do not address workplace injuries caused by accidents, and pertain only to “gradual injuries.”

All employers with one or more

employees are covered by the standard, except the construction, maritime, agriculture and railroad industries. The OSHA standard requires employers to give employees information about musculoskeletal disorders and their prevention, to develop programs to prevent MSDs, and to provide wage continuation and accommodation for workers who are under light duty restrictions, or are unable to work.

Effective dates

The standard went into effect January 16, 2001, although employers have



ROBERT W. BOWER, JR.

until October 15, 2001 to provide workers with MSD information and receive and respond to employee injury reports. The requirement date of providing wages and accommodations to workers with MSD will be January 16, 2002.

Employee notification

All current and new employees must be given basic information on common musculoskeletal disorders and their symptoms, the known causes of MSDs, employee reporting requirements, and a general description of the OSHA standard. The employer also must make a summary of these new regulations available to employees in the workplace for their review. OSHA has prepared for the employer's distribution a brief summary of MSDs, and of the new ergo-

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nomic standard, available at www.OSHA.gov. Many other materials, publications and training courses are also available through Regional Offices of OSHA and its web page.

Basic features of the new standard

When an employee reports an alleged MSD, the employer must respond promptly. Workers may experience less strength for gripping, less range of motion, loss of muscle function and inability to do everyday tasks. To qualify, the physical hurt must occur in the neck, shoulder, elbow, forearm, wrist, hand, abdomen (hernia only), back, knee, ankle, and foot. The employer must determine whether the situation constitutes an MSD incident – one that is work-related AND requires medical treatment beyond first aid, restricted duty, or in which symptoms last more than seven consecutive days after the employee reports them.

If it is decided that the employee has suffered an MSD incident, then it must be determined whether the *job* causing it meets OSHA's definition of "action trigger." The action trigger is met if the job in question routinely involves exposure to one or more of the relevant risk factors: repetition, force, awkward postures, contact stress, and vibration. The employer must provide the employee the opportunity, at no cost, to see a health care professional who would evaluate the problem, and if necessary require work restrictions.

If the employee's job is contributing to the MSD, the employer must conduct a job analysis to determine the hazards, and if found, put in place control measures to reduce them.

Should the job causing the MSD meet the action trigger, the employer has two options. If only one MSD incident has been reported regarding that job, and no more than two in the preceding 18 months, the employer may use OSHA'S "quick fix" options and resolve the ergonomic problem within 90 days of deciding the job meets the action trigger.

If the quick fix option is unavailable, or it fails to remedy the job problem within 90 days, then the employer must develop and implement a company-wide ergonomics program, one that meets the new regulatory OSHA standard. To establish a program, OSHA requires that it contain these elements: Management leadership, employee participation, MSD management, job hazard analysis, hazard reduction and control measures, and employee training. Specifics of the OSHA standard are detailed in the clear and concise Regulatory Text of November, 2000.

The Standard's MSD management

Looking ahead at a core aspect of the new regulation, beginning on January 16, 2002, an employee with an MSD occurring on a job that meets the required trigger must receive MSD management. The employer is to provide:

1. access to a health care professional at no cost,
2. work accommodations for any work restrictions,
3. leave of absence if necessary,
4. evaluation and follow up, and
5. a work restriction protection.

Work restriction protection means: 1) continued full pay for employees on light duty, continued employment status and all company benefits; 2) 90%

pay for employees out of work due to an MSD incident and continuation of employment benefits. The employee's work restriction protection ends at the earliest (1) date the employee can return to work at his/her regular job without endangering his/her recovery; (2) date that the health professional determines the employee can never go back to the regular job, (3) date after 90 calendar days.

Practical outcome and effects

Employers have approximately eight months to become familiar with the new ergonomic program standards, and to carry them out. After October 15, 2001, OSHA will begin enforcing the workplace regulations. Currently the agency is crafting an enforcement mechanism to trip up employers who do not comply.

This standard is final, and will go into effect unless one or more of the following scenarios occur: (1) someone files a petition with a federal court, and the court issues an injunction, (2) someone files a request with OSHA to stay the rule until a federal lawsuit is decided regarding the standard; (3) Congress overturns the standard under the Congressional Review Act. Under this law, the House and Senate must disapprove the regulations and the President sign the disapproval before it would be nullified; and (4) a new presidential administration proposes to revoke or modify the standard. Some or all of these eventualities may occur before October 15th of this year.

The practical effects of the new OSHA regulations, should they go into effect, will be that employers have significant burdens to create ergonomic controls and hazard reductions to all jobs requiring high degrees of force and body movements. Also, employers will be required to pay workers up to 90 days pay under circumstances not totally covered by workers' compensation. Although the "work restriction protection" is offsettable by workers' comp, the amount owed will exceed comp benefits

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newsletter

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allowed by state law during the first 90 days of disability.

The OSHA standard creates many ambiguities and problems of definition. It remains to be seen if OSHA can create a streamlined way to deal with each and every MSD incident that occurs, or whether the standard will be largely self-regulated by employers. The

agency's current enforcement mechanism appears ill-suited to the task of adjudicating large numbers of disputes regarding the definitions in the standard.

Although the regulations are enforceable only after October 15th, employers should be aware that OSHA, under the "general duty clause" of the

agency's statute, has required ergonomics programs in other enforcement actions. Large employers especially should recognize that establishing a company ergonomics program now is prudent business practice, regardless of whether the new OSHA standards become the law of the land. □

Arson: Two important decisions clarify a federal law and evidence of fraud

BY ANNE H. JORDAN

The U.S. Supreme Court has decided that when arson is perpetrated against a residence that is owner-occupied, it cannot serve as grounds for prosecution of a federal crime. In *Jones v. United States*, 529 U.S. 848, 120 S.Ct. 1904, (2000), the defendant, Dewey Jones, tossed a Molotov cocktail through a window into his cousin's home in Fort Wayne, Indiana. The home was owned and occupied by his cousin and his family, but fortunately, no one was injured in the fire. The blaze damaged the house severely.

A federal grand jury returned a three-count indictment, charging Jones with making an illegal destructive device, using a destructive device in a crime of violence, and arson {18 U.S. §Code 844(1)}. Jones was tried and convicted. He appealed to the Seventh Circuit Court, which upheld his conviction and his sentence of 35 years and restitution to the insurance company of \$77,396.

Jones then appealed to the U.S. Supreme Court, arguing that because his cousin's residence was not "used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce," his conviction was illegal.

A unanimous Supreme Court sided with Jones and reversed his arson con-

viction. (Jones did not appeal his other convictions.) In so doing, the Court looked at the language of 18 U.S.C. §844(1) and found that because an owner-occupied residence is not used for any commercial purpose, it did not qualify under the statute and was not subject to federal prosecution. The language of §844(1) states:

Whoever maliciously damages or destroys or attempts to damage or destroy, by means of a fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce, shall be imprisoned for not less than five years and not more than 20 years, fined under this title, or both.

At trial, the government's evidence proved that the destroyed home was

1. used as collateral to obtain and secure a mortgage from an Oklahoma lender who in turn used it as security for a loan;

2. used to obtain from a Wisconsin casualty insurer a policy that safeguarded the interests of the homeowner and mortgagee, and

3. used to receive natural gas from sources outside Indiana.

The government argued that because the homeowners used the home for interstate commerce purposes, the federal arson law applied.

The U.S. Supreme Court disagreed. It held that the "use in commerce" requirement under §844(1) is most sensibly read to mean active employment for commercial purposes, and not merely a passive or past connection to commerce. Since it was not shown that the residence served as a home office, or was the site of any commercial undertaking, its only "active employment" was for the family's everyday living. The Court was reluctant to expand the meaning of the "use in commerce" requirement, because to do so would make arson against any home in the country subject to federal arson prosecution. This is better left, the Court declared, to state prosecutions.

Interestingly, the Court distinguished the *Jones* decision from its earlier one, *Russell v. United States*, 471 U.S. 858, 862 (1985). In *Russell*, the defendant was convicted under the identical statute for arson after he tried unsuccessfully to set fire to a two-unit apartment building he owned. Evidence at trial demonstrated that he earned rental income, and treated it as a business property for tax purposes. Because *Russell* received rental in-

come, the property was being used in an activity affecting commerce and came within the meaning of §844(1).

The U.S. Supreme Court decision in *Jones* points the way to another insurer's question in investigating suspected arson, "What is the function of the building itself, and after determining it, does the function affect interstate commerce?"

New test for materiality in fraud

In a different kind of case, the Eighth Circuit Court of Appeals recently ruled that an insured's concealment from his insurer of his suspicion of arson by his wife was a material misrepresentation.

George and Retta Willis filed a proof of loss after their home in Arkansas burned down. State Farm Fire and Casualty refused to pay the claim, asserting that the fire was the result of arson to which one or both of the Willises were a party. The insurer also alleged that one or both had knowingly misrepresented material facts on their proof of loss and during the insurer's investigation of the fire.

The couple sued State Farm, and at trial, the insurer presented the separate defenses of arson and material misrepresentation. The jury could not decide whether State Farm's arson defense had merit, but found that the Willises *had* knowingly misrepresented material facts with the intent of perpetrating a fraud on their insurer.

At trial, State Farm offered evidence of misstatements the Willises had made during the investigation. First, Mr. Willis told the investigator that he did not think Mrs. Willis played any role in setting the fire. The insurer produced a friend of Mr. Willis, who testified that Willis had told her he thought his wife may have started the fire because he had seen her moving personal items out of the house shortly

before it started. The carrier argued that Mr. Willis lied to its investigator about a material fact when he denied any belief that his wife started the fire. State Farm also argued that Mr. Willis had concealed an obviously important fact – that he had seen his wife moving items out of the house before the fire. The court found the friend's testimony inadequate to prove material misstatements because it was "too vague."

On appeal, the Eighth Circuit in *George and Retta Willis v. State Farm Fire and Casualty Co.*, 219 F.3d 715, (8th Cir. 2000), reversed, and found that Mr. Willis's statement *was* a material misrepresentation: it pertained to facts relevant to the company's right to decide upon its obligations and to protect itself against false claims. The Court ruled that a misrepresentation may be material even if it does "not ultimately prove to be significant to the disposition of the claims," so long as it was reasonably related to the insurer's investigation at the time. The Court also determined that the information was relevant, for if it had come to light earlier in the investigation, the direction taken and the resources State Farm spent may have been different and more effective.

There is now a new test of materiality of a statement made during an investigation. It is to be evaluated **at the time the statement was made**, not in light of facts later revealed. The Court in *Willis* also held that an insurer is not required to show it actually relied on the misstatement(s), because reliance is not an element of an insurer's

defense of fraud, or of the insured's false swearing.

The Eighth Circuit also addressed State Farm's other trial evidence of material misrepresentations. Mrs. Willis claimed she had lost \$10,000 in cash in the fire, stored in the room where she was sleeping when the fire awoke her. She stated she did not have time to retrieve the cash, but the insurer showed that her testimony about the existence of the cash was questionable, since she found time to save her fire insurance policy before she fled.

On appeal, the Willises argued that the \$10,000 cash loss in the fire was immaterial, as her policy did not provide coverage for more than \$200 in lost cash. Even if none of the \$10,000 was included in their claim, the couple argued, the wife's statement concerning its loss could not be considered material as their declared losses exceeded the policy limit.

The Court held that Mrs. Willis's assertion she had lost \$10,000 was a material misstatement of her financial condition, as well as an attempt to quiet suspicion she had set the fire, reasoning that no one would deliberately let burn \$10,000 in uninsured cash. Mrs. Willis's statement about the cash was material, not because of the falsehood as to the amount of the claim, but because it could have hindered the insurer's investigation.

The newest standard of materiality in a fire investigation is that a misrepresentation may be material, so long as it was reasonably relevant to the investigation at the time, but it need not prove to be significant to the claim's disposition. It is unjust, the Court said, to allow an insured to misrepresent facts that might lead to a valid defense to the claim, then allow the insured to escape the consequences of falsehood because he or she lied so well that the insurer could not establish fraud. □



Three significant decisions from the Law Court

BY DAVID P. VERY

Maine Tort Claims Act

In *Beaucage v. City of Rockland*, 2000 ME 184 (October 27, 2000), the Law Court addressed the question of what constitutes “good cause” for a claimant’s failure to make a timely notice of claim as required by the Maine Tort Claims Act. The act states that a claimant must provide notice to a governmental entity within 180 days, unless the claimant shows good cause why notice could not have been served within the time limit.

Dana Rolerson, Jr. was driving his vehicle in the City of Rockland when one of his passengers threw a beer bottle at a van. The van driver called the police and informed them that the Rolerson vehicle was at a convenience store. Rockland Police officers were dispatched to the store and questioned Mr. Rolerson. The officers concluded that Rolerson, while he had been drinking, was not legally under the influence of alcohol. Consequently, Rolerson was not in any way detained. Shortly afterwards, Rolerson picked up William Beaucage. While Beaucage was a passenger, the vehicle left the road at a high rate of speed and crashed. Beaucage was killed. Rolerson was charged with the crime of manslaughter, to which he eventually pled guilty.

Beaucage’s estate filed suit against the City, claiming it was negligent because its police officers knew, or should have known, that Rolerson was driving under the influence of alcohol, and that “using prudent and proper police procedures, they should have detained Rolerson and/or impounded his vehicle.”

The City of Rockland moved to dismiss the Beaucage complaint on the basis of the estate’s failure to serve a notice of claim on the City within the requisite 180 days. Beaucage responded with an affidavit of a reporter for the *Bangor Daily News*, asserting that it was

not public knowledge that Rolerson’s vehicle had been stopped prior to the accident. The estate argued that because the public did not know about the earlier police stop, it had good cause as to why it did not serve timely notice on the City. The Superior Court denied the City’s motion to dismiss, finding good cause for the late filing on the basis that “the sheriff’s department, state police, DA and defense attorneys under confidentiality statutes and constitutional particulars stopped all dissemination of information until Rolerson pled guilty.”

The City immediately appealed. A governmental entity is entitled to an immediate appeal based on denial of a motion to dismiss for failure to comply with the Maine Tort Claims Act.

The Law Court reiterated that in order to demonstrate “good cause,” a plaintiff is required to show that he was unable to file a claim or was prevented from learning information forming the basis of his or her complaint. The Court stated that the difficulty in learning the facts underlying the claim is not enough for a plaintiff to meet its burden of showing good cause. A plaintiff is expected to try to obtain information on his own.

The Court noted that a city police officer’s affidavit, filed in support of the motion to dismiss, indicated that Rolerson’s earlier encounter with the police related to a separate incident which never gave rise to any criminal charges. No evidence existed that the estate was denied access to information regarding the earlier incident or that the estate would have been denied access to such information if it tried to obtain it. The Law Court found that those facts were sufficient to generate an issue of fact on the question of good cause. The Court remanded the action to the Superior Court, indicating the burden was on the plaintiff to show that it was unable to file a claim, or was

meaningfully prevented from learning the information to form the basis of the claim.

“Implied” defamation

Can a true statement give rise to a defamation action under certain circumstances? That question was answered in *Schoff v. York County*, 2000 ME 205 (November 29, 2000).

Joyce Schoff is the mother of Steven Schoff. Steven had been indicted for murder and was being held at the York County Jail. On a visit to her son, Ms. Schoff brought a pair of new sneakers in a shoe box which she handed to a corrections officer, who took them into another room and searched them. The officer found three hacksaw blades and a tube of glue hidden in the shoes. Schoff was then taken to an interview room where she denied any knowledge of the hacksaw blades. Officers followed her home and conducted a consensual search of her home, but nothing was seized. No charges were brought against her.

The administrator of the York County Jail later spoke to a reporter with the *Portland Press Herald* about the incident. The following day, the *Herald* published an article containing the information the administrator had given the reporter. It stated that Schoff went to the jail to deliver a pair of high top sneakers, the jail officers made a routine inspection of them and found three hacksaw blades concealed under the insoles, two of which were 12 to 14 inches in length, and a third blade that was half that length; that the glue underneath the insoles was wet; that Schoff had been advised of her right to speak with an attorney, but waived that right and was questioned by deputies; that she told the deputies that she knew nothing about the blades; and that several of Schoff’s relatives were being questioned by the police to determine who put

the blades in the shoes. The article quoted the administrator as saying that Schoff “appeared to have no knowledge.”

Ms. Schoff filed a defamation suit against the administrator and the county, alleging the administrator’s statement to the reporter falsely imputed that she tried to break her son out of jail. The defendants filed a motion for summary judgment which the Superior Court granted, and Ms. Schoff appealed.

The Law Court reiterated that in order to prove defamation, a plaintiff must establish that: (1) the defendant made a false and defamatory statement concerning the plaintiff; (2) the statement was an unprivileged publication to a third party; (3) the defendant was at least negligent in making the statement; and (4) the publication caused special harm, or the statement was such that special harm need not be shown.

It is not enough, stated the Law Court, for Schoff to prove that the administrator made a defamatory statement. She must also prove that the statement was false or carried a false implication. While it is generally accepted that there is no liability for a true statement, a true, but incomplete statement can form the basis for liability in a defamation action when those statements falsely impute criminal conduct to the plaintiff. True statements, the Law Court held, can form the basis of liability for defamation when the omission of additional information renders the true statement false and defamatory. Such claims are limited to situations where there is a material omission of facts, or where a series of facts are juxtaposed so as to “imply” defamatory conduct by the plaintiff. Thus, even if a statement about the plaintiff is true, if it is a partial truth, and is capable of carrying a defamatory meaning to those who heard it by falsely implying the plaintiff was dishonest or committed a criminal act, it will constitute an “implied defamation.”

The Law Court found that the jail administrator had not omitted material facts. Indeed, the administrator had ne-

gated any false implications by stating that Schoff had denied knowledge of the hidden hacksaw blades and by stating that she did not appear to have any knowledge. The Law Court, therefore, affirmed the summary judgment in favor of the defendant.

What constitutes a fiduciary relationship

In 1992, Laurel Stewart sought to purchase her first house. She agreed to buy it with a loan from the Machias Savings Bank, and understood that the bank’s loan would be guaranteed by the Farmer’s Home Administration if the dwelling met FHA standards. The FHA requires the bank to provide a written guarantee that the dwelling is structurally sound; that the heating, plumbing, and electrical systems work; and that the dwelling meets FHA’s thermal standards.

When Stewart agreed to purchase the house, she negotiated for certain improvements, but knowingly waived the right to make the sale contingent on a satisfactory inspection. She did not seek an independent inspection because she knew the bank was getting one and she did not want to pay twice. The bank requested a construction consultant to determine whether the house complied with FHA standards. The consultant sent the bank a letter explaining that he could not inspect the house for the

\$200 fee the bank offered. He suggested the bank agree to allow the seller, who was a contractor, to conduct the inspection as “a way around” the inspection problem. The bank consulted with Stewart who agreed to allow the seller to perform the inspection himself.

Stewart did not see the letter from the consultant to the bank. Surprisingly, the seller’s inspection report disclosed no defects in the house.

After the purchase, Stewart discovered multiple structural defects and she filed suit against the bank alleging breach of a fiduciary duty, negligence, punitive damages, and unfair trade practices. The Superior Court granted summary judg-

ment in favor of the bank on the negligence and punitive damage claims, and later granted a motion in limine excluding the unfair trade practices claim as Stewart had failed to provide proper notice of the claim to the bank. As a result, the only matter tried was the breach of fiduciary duty. The Superior Court denied the bank’s motion for judgment on that claim, and at trial the jury returned a verdict in favor of Stewart. The bank appealed.

In *Stewart v. Machias Savings Bank*, 2000 ME 207 (November 30, 2000), the bank contended that the Superior Court erred when it denied the bank’s motion for a judgment as a matter of law, because the plaintiff failed to establish the existence of a fiduciary duty. The Law Court stated that the salient elements of a fiduciary relationship are (1) the actual placing of trust or confidence by one party in another, and (2) a great disparity of position and influence between the parties at issue. Standing alone, a creditor-debtor relationship does not establish the existence of a confidential or fiduciary relationship. To demonstrate the necessary disparity of position and influence in a bank-borrower relationship, the Court held, a party must demonstrate “diminished emotional or physical capacity or the letting down of all guards and bars.”

The Law Court concluded that the evidence presented to the jury was inadequate to show that Stewart was of a diminished emotional or physical capacity at the time she arranged for the purchase of her house, or that she let down all guards and bars. There was no indication that Stewart was in such a vulnerable position that she allowed the bank to exercise great control over her transactions. The Court determined that, although a jury reasonably could have concluded that Stewart placed trust and confidence in the bank, no reasonable view of the evidence supported a conclusion that there was a great disparity of position and influence between Stewart and the bank. As a result, the Law Court concluded that the bank owed no fiduciary duty to Stewart, and vacated the judgment in favor of the plaintiff. □



David Norman, Founder, takes new road

Though much is taken, much abides; and though
We are not now that strength which in old days
Moved Heaven and earth; that which we are, we are;
One equal temper of heroic hearts,
Made weak by time and fate but strong in will
To strive, to seek, to find, and not to yield.

Alfred Lord Tennyson, "Ulysses"

David Norman has retired from Norman, Hanson & DeTroy effective January 1, 2001, but fortunately his wisdom will be available to us in his role as "of counsel." Our feelings are mixed; happiness for him and his wife, Judy, that together they can pursue their many and varied interests with health and faculties (in David's case that is subject to some debate) intact, and sadness at the leave-taking of someone who represents the essence of what is best in our profession. His thoughtfulness, decency, wisdom and humor have sustained all of us who have been privileged to work with him for all or some of these past 25 years.

David is a local boy; he was born and raised in Yarmouth. He attended North Yarmouth Academy (this was before Yarmouth had its own public high school), graduating in 1958 then matriculating at Colby College, from which he graduated in 1962. Some of his lifelong interests were evident even then. He has had an abiding interest in baseball and has tortured himself like all good New Englanders by his deep attachment to the Boston Red Sox. In his typical self-deprecating way, he characterized his personal athletic prowess as having reached its pinnacle as a 12-year old outfielder (All-Star, he reluctantly acknowledges) for the Yarmouth Lions Little League team. At Colby, his love of theatre and penchant for drama (frequently a good barometer of latent courtroom skills) led to his involvement with Powder and Wig, the Colby drama troupe. He had starring roles in George Bernard Shaw's "Man and Superman" and "Guys and Dolls" (the latter as

Nathan Detroit). David then attended Boston University Law School and graduated in May of 1965. He began his legal career in July that year with Maine's pre-eminent insurance defense firm of Mahoney, Thomes, Desmond & Mahoney, which over the next ten years metamorphosed into Mahoney, Robinson, Mahoney & Norman. During his early years in practice, David also served with distinction in the local Coast Guard Reserve station.

David's bent toward the law, and specifically the insurance defense practice, was not only an evolution of his competitiveness and theatrical interests, but also was connected to his father's vocation. Bill Norman was the claims manager for Commercial Union for the State of Maine for many years and was recognized as pre-eminent in a group of other luminaries such as Jack Cross, Tom Flanagan, Ralph Bunten and Jim Murray. Among the people Bill trained who became the next generation of leaders in claims supervision were John McCallum, Howard Whittum, Norm Lavoie (father of our own Mark Lavoie), Ray Spencer, and many others. David was a good fit for these men who wanted their claims handled with equal measures of judgment and advocacy, and he quickly earned a reputation in the Bar as a first-rate litigator, an erudite observer of the human condition, and a lawyer of unquestionable integrity and decency.

Those qualities served him well when he and Bob Hanson left Mahoney, Robinson, Mahoney & Norman to start their own firm in 1975. They left with no files, no clients, one phone, and opened shop in a large un-partitioned



DAVID NORMAN

back room at 102 Exchange Street in Portland, long before that address and the rest of Exchange Street had become the fashionable addresses of today. As the "senior partner," David had the only "view" - a narrow window which overlooked an adjacent airshaft. Over the next 25 years he became the understated, dignified and supportive presence who welcomed and mentored the dozens of lawyers who came to work at Norman & Hanson. He was regarded by all with equal measures of respect and affection.

During the years at Norman, Hanson & DeTroy he and Judy raised their four sons (Joshua, Adam, Jed and Michael) on their farm in North Yarmouth. David was not simply a gentleman farmer; this was a working farm with livestock, fields and fencing to which they had to attend. He also managed to pursue his other interests in duck hunting, fly fishing, reading good literature (a particular bent towards 20th century British novelists), and an unwavering and quixotic belief that the Boston Red Sox would eventu-

ally win the World Series. His ability to maintain those interests and to maintain a practice and reputation as a pre-eminent trial lawyer served as a model for younger lawyers at NH&D.

David will not leave without a trace. He will continue to provide counsel, particularly in medical malpractice cases where he has concentrated for the past 15 years. However, his time at NH&D will

be reduced and for that we are the lesser. We are sustained by his enduring friendship and the legacy of decency, strong advocacy and high ethical purpose that he and Bob Hanson created and sustained over the years. We are also comforted by the recognition that he has many miles to go in his life's journey, much as another classic New Englander's ruminations on the autumn of his years:

The woods are lovely, dark and deep
But I have promises to keep,
And miles to go before I sleep,
And miles to go before I sleep.

Robert Frost, "Stopping by Woods on a Snowy Evening"

Peter J. DeTroy

Briefs/Kudos

JON BROGAN has been included in the current edition of Who's Who in America. Incidentally, in the golf category, Jon last season won the championship of the Purpoodock Club in Cape Elizabeth for the third consecutive time.

At the annual meeting last fall of the Manufactured Housing Association, **ADRIAN KENDALL** of the commercial group was a presenter on warranty laws under the UCC and other liability issues. Adrian was also a guest speaker at the University of Maine School of Law on issues in the international practice of law, sponsored by the Maine State Bar Association.

MARK DUNLAP of the litigation group has for the last nine years helped steer and develop soccer for youth in the Town of Yarmouth. The Yarmouth Colts, a travel soccer club, began with one team of 14 boys and now comprises 11 teams of about 170 enthusiastic boys and girls. Girls make up five teams of ages 9 to 14, and the boys have six teams. In those years Mark has chaperoned three trips of a Yarmouth Colts team to Ireland. Regretfully Mark has now passed his leadership baton on the board of directors to another champion of sports for youth.

Over in the commercial group, **PAUL DRISCOLL** in November presented a day-long seminar in Portland for the National Business Institute: How to Finance a Small Business.

RUSS PIERCE reports that he has been re-elected to the Board of Directors of the Center for Community Dental Health. As its Secretary, Russ assists the Center with its five dental clinics in the state in Farmington, Lewiston-Auburn, Saco, Sanford, and Portland. The Agency is sponsored by the United Way to serve low-income families with dental needs.

JOHN KING was appointed to the Fee Arbitration Commission of the Board of Overseers of the Bar for a three year term, commencing January 1, 2001.

Attorney **AARON BALTES** and his wife Kathy were delighted to welcome firstborn Eleanor Bea Baltes into their family in October. Baby Ellie Bea is now permitting her parents a few complete nights of sleep each week.

DAVE HERZER was appointed President of the Northern New England Defense Council Association for 2000-2001. The organization comprises defense attorneys from Maine, Vermont, and New Hampshire.

TOM MARJERISON and his wife Kirsten celebrated the arrival of their first child, Samuel Thomas, born on November 30, weighing in at a robust 9 lbs. 11 oz.

Last October Maine Credit Unions marked International Credit Union Day with a host of activities that contributed to their communities. Medical Services Federal Credit Union was one of the sponsors of the annual Maine Children's Cancer Program Walk, helping to raise a new record of \$117,000. The smallest CU in the state, Semiconductor of Maine FCU, participated by holding raffles that contributed generously to the Campaign for Ending Hunger. Dan Clarke, its president, observed, "We take this time to show our 1412 member-owners that we really are different from for-profit financial institutions." □

Two NH&D Attorneys elected members of the Firm

ANNE H. JORDAN, who joined the litigation group in 1997, is now a member of the firm as of January first. On her arrival, Anne brought to us seven years of litigation experience with another Portland law firm, as well as extensive jury trial experience. She previously spent six years as an assistant and then Deputy District Attorney in York County, specializing in felony matters and arson and fraud prosecutions. Anne is a graduate of the National Fire Academy's Fire and Arson Investigation course, and ATF's Advanced Investigation of Arson for Profit course. Her practice focuses on insurance liability matters, insurance fraud and fire law.

Born in Portland, Anne graduated from Kennebunk High School and earned her BA from the University of Southern Maine, *summa cum laude*, where she majored in political science. She was selected as the Outstanding Senior Woman in 1981. At the University of Maine School of Law, she served on the Moot Court Board, and was awarded her J.D. in 1984. During law school, Anne worked as a student prosecutor in the Cumberland County District Attorney's office.

As a member of the American Bar Association's Tort and Insurance Practice Section, she published and lectured on "Informant, Snitches, Surveillance and Rewards: Staying Clean When Playing with Dirt," at the ABA's National Institute on Litigating the Civil Arson Case. Anne's professional activities are extensive and varied. She is Chair of the Governor's Advisory Board on Executive Clemency, a member of the Maine Bar Association's Breast Cancer Awareness Project, and serves on the Task Force for Fire Safety for Children. The latter group trains people in communities to identify children who are likely fire setters. She is also President of the Campfire Boys and Girls of Maine this year.

Anne is an active member of the ABA's Tort and Insurance Section, the



ANNE H. JORDAN

International Association of Arson Investigators, and the Maine and Cumberland County Bar Associations.

Anne and her husband Jeff, the City Manager of South Portland, live in South Portland with their son Rob, soon-to-be-ten, and six-year-old Katie. She teaches Sunday School to a class of first and second graders, and loves to ski. She shyly admits having recently taken up golf with the family.

Attorney DAVID L. HERZER has been elected a member of the firm effective January first. David joined the firm in 1992 after passing the bar, and after spending the summers of 1991 and 1992 at NH&D as an intern. He specializes in insurance defense litigation, particularly construction defense matters, personal injury and other civil cases.

A native of Vermilion, Ohio on the shores of Lake Erie, David wanted to be anything but a lawyer like his father, but dutifully helped out at his father's firm. When he was given some investigative legal assistant assignments, however, David became wildly enthusiastic about the law. He majored in English Literature at the University of Pennsylvania, and spent a year at King's College, University of London. It was a backpacking trip through the mountains of New England

that introduced him to the beauty of New England, and he enrolled in the University of Maine School of Law. David distinguished himself as an oralist, winning awards and a national Moot Court competition on environmental issues. He earned his J.D., *cum laude*, in 1992.

Following David's work with the Volunteer Lawyers Project, which provides free legal services for limited-income individuals, several clients continue to seek his advice, and David provides it pro bono. He is president of the Northern New England Defense Counsel; a state and local defense organization representative to the Defense Research Institute; and a member of the Cumberland County Bar Association, the Maine State Bar Association, and the American Bar Association. He is admitted to practice in the federal court, District, First Circuit, and Supreme Court.

David has written frequently for the NH&D Newsletter on electronic mail evidence, slander and libel under Maine law, defamation claims, and employer provision of home computers.



DAVID L. HERZER

Outside the profession of law, David pursues his passion for scuba diving and, as a certified diver, seizes every chance he can get in the summer for underwater exploration. Occasionally he has the chance to scuba dive in the blue-green Caribbean. His other enthusiasms outside the office include backpacking, snow skiing, and sport shooting. He and his wife Angela live in Portland. □

Workers' compensation - Law Court and Board decisions

BY STEPHEN W. MORIARTY

Benefits for partial

In a brief *per curiam* opinion, the Court held in *Stilson v. Dexter Shoe Company*, 2000 ME 208 (December 5, 2000) that Sections 212, 213, and 214 do not apply to a 1988 date of injury. These three sections are among eight sections of the Workers' Compensation Act of 1992 which were to be applied prospectively only.

At hearing, there was evidence of work available within the employee's community, although the employee did not have a driver's license. The hearing officer awarded 100% partial disability benefits on the grounds that the lack of a license made the positions unavailable to the employee. The six justices who heard the appeal divided evenly on the issue, resulting in an automatic affirmation of the award of 100% partial benefits.

Cap on partial benefits

As originally enacted, §213 established a 260-week cap on entitlement to benefits for partial incapacity. In accordance with §213(4), the Board extended the period to 312 weeks effective January 1, 1999, and extended it yet again to 364 weeks effective January 1, 2000. In an important recent decision, the Law Court addressed the issue of whether a claimant may be entitled to additional benefits based upon the extensions of the cap.

In *Abbott v. S.A.D. No. 53*, 2000 ME 201 (November 13, 2000), the employee had been injured on September 2, 1993 and shortly thereafter the employer voluntarily paid ongoing benefits for total incapacity. In October 1998, the employer stopped paying compensation on the grounds that the 260-week limit had been reached, but failed to file a

certificate of discontinuance pursuant to §205(9)(B)(1). The employee filed a Petition for Review and a Request for Provisional Order, and the Board ordered the employer to resume payments of compensation, pending hearing on the Petition for Review. As a result, the employee was actually receiving benefits on the effective date of the extension of the cap to 312 weeks. The employer then filed a certificate of discontinuance based in part upon the grounds that more than 260 weeks of compensation had been paid. The hearing officer refused to issue a second provisional order. The hearing officer ultimately concluded that the employee's entitlement to compensation ended after 260 weeks of benefits had been paid, and denied the employee's Petition for Review.

The Law Court affirmed the decision and noted that the Board could have extended benefits for partial as of January 1, 1998 but did not do so. The Court rejected the employee's argument that the 52-week extension beginning on January 1, 1999 applied retroactively to all dates of injury, finding that such a result would be inconsistent with legislative intent. As the Court held:

"Because the 260-week limitation expired during the preceding year before the Board determined that the 260-week limitation was to be extended, Abbott is not entitled to the 52-week extension

for the new extension-period beginning January 1, 1999." Because the 260-week period had expired before January 1, 1999, it made no difference that the employee was actually receiving benefits on that date.

The Court's opinion obviously

hinged upon the fact that the entitlement to benefits for partial had expired before the first extension was approved by the Board. By implication, *Abbott* suggests that employees who had been paid less than 260 weeks of benefits before January 1, 1999 may be entitled to receive benefits for the additional 52-week period and perhaps beyond. However, this precise issue was not presented before the Court and remains unresolved.

Vocational rehabilitation and work search

In a recent decision, the Law Court clarified the interrelationship between the pursuit of vocational rehabilitation and the simultaneous entitlement to incapacity benefits. In *Johnson v. Shaw's Distribution Center*, 2000 ME 191 (October 31, 2000), the employee had a bachelor's degree in psychology and had been injured in 1993 and 1995 while working full-time as a warehouse laborer. At the employee's request, the Rehabilitation Assistant Administrator had ordered an evaluation pursuant to §217, and the vocational rehabilitation specialist recommended that the employee pursue studies in psychology at the graduate level. The Administrator then issued a decision approving rehabilitation consisting of full-time studies at the University of Southern Maine to obtain a master's degree in psychology.

After approval of the plan was ordered, the employee filed petitions for award for his two injuries, and ongoing benefits for partial incapacity were ordered based on a presumed earning capacity in the amount of \$210 per week. The employee appealed to the Law Court, arguing that the hearing officer incorrectly concluded that full-



time work was available to him in light of the ongoing graduate studies. In effect, the employee sought a determination that participation in a rehabilitation plan satisfied the “work search” requirement, thus entitling him to total incapacity benefits.

The Court held at the outset that the hearing officer was not bound or constrained by the findings of the Rehabilitation Assistant Administrator, and noted that the two officials play fundamentally different roles within the broader workers’ compensation system. The Court then held that there is nothing in the Act to compel a hearing officer to conclude that work is unavailable to a claimant during the period of enrollment in a vocational rehabilitation plan. The Court correctly perceived that the employee was seeking full disability benefits for the time spent in pursuing a course of study, and concluded that the Legislature intended that “the employer should not bear the burden of subsidizing lost income resulting from enrollment in vocational rehabilitation.”

Johnson underscores the continuing viability of the “work search” rule and other traditional methods of assessing availability of work. The Court unequivocally rejected the argument that the pursuit of vocational rehabilitation will automatically entitle a partially disabled individual to an award of total incapacity benefits.

Attorney’s fees for medical reimbursement

As the result of three occupational injuries, an employee underwent surgical care and later hired an attorney to represent her in connection with her claim. Among the unresolved issues was the question of payment of medical fees to the two physicians who had performed the surgery. As a result of the attorney’s efforts, the employer voluntarily paid medical fees to the surgeons. The attorney then filed a Motion for Award of Fees seeking a percentage of the sums paid to the physicians.



STEPHEN W. MORIARTY

The presiding hearing officer granted the motion and ordered the surgeons to pay fees and costs to the employee’s attorney. One of the physicians, as a party-in-interest, filed a Petition for Appellate Review with the Law Court.

In *Doucette v. Pathways, Inc. and Keith B. Quattrocchi*, 2000 ME 164, 759 A.2d 718, the Court vacated the decision of the Board. The Court held that the hearing officer, in ordering the payment of fees, erroneously relied upon the so-called “common fund doctrine,” as no judgment or settlement fund existed which was subject to the claims of potentially entitled parties. More importantly, the Court held that the authority of the Board is strictly limited by statute, and that §209 of the Act does not provide that attorney’s fees may be awarded from the medical fees paid to a health care provider. The Court determined that §325 does not require a provider or any other third party to pay a portion of an employee’s attorney’s fees, and accordingly found that the Board had no authority under the Act to order the health care providers to pay a fee.

Doucette does not necessarily mean that Petitions for Payment of Medical and Related Expenses will no longer be filed. In disputes concerning payment of medical bills, it is possible that some health care providers may file petitions on their own behalf to recover fees for services rendered. In

many cases, however, health care providers will not have the time or inclination to pursue such claims through the formal hearing process. It is more likely that health care providers may privately reach agreement with attorneys for payment of fees in the event medical expenses are recovered.

Statute of limitations

Earlier this year, the Court decided in *Moreau v. S. D. Warren Co.*, 2000 ME 62, 748 A.2d 1001 that providing in-house medical care did not extend the ten-year statute of limitations set forth in former §95. Recently, the Court addressed the same issue with regard to the two-year statute of limitations. In *Joyce v. S. D. Warren Co.*, 2000 ME 163, 759 A.2d 712, the employee’s injury was also covered by former §95 and the Court extended the rationale of *Moreau* to the two-year statute of limitations. As the Court held: “In-house medical treatment is not a payment sufficient to toll the two-year statute of limitations.” Accordingly, for claims governed by former §95, the providing of in-house medical treatment for an injury will not constitute a payment of benefits which prevents the two-year limitation period from expiring.

The same result would have been reached for an injury occurring on or after January 1, 1993. Current §306 sets forth an initial two-year and an ultimate six-year statute of limitations, and subsections (2) and (6) use fundamentally the same “payment of benefits” language as former §95. There is nothing in the language of §306 which suggests that the Court would treat the provision of in-house care in a different manner for a more recent injury.

The *Joyce* Court also commented on the preparation and filing requirements of a first report and its impact on the statute of limitations. Pursuant to former §95, an employer was required to file a first report if an employee had lost a day of work, but was only required to complete a first report for an

injury causing no lost time but requiring the services of a health care provider. In *Joyce* the employee had not lost time from work, and although she had received treatment at the employer's in-house medical facility, the employer did not complete a first report. The Court observed that former §95 provided that the two-year statute of limitations would not begin to run until the

first report had been filed, and held that the statute of limitations continues to run for an injury which does not require the filing of a first report.

Current §303 provides that a first report need not be filed until a day is lost from work, and that a report must be prepared and a copy sent to the employee for an injury requiring the services of a health care provider. Under §306(1) the two-year statute of limita-

tions will not begin to run until a first report is filed. Therefore, for an injury governed by §§303 and 306, the statute of limitations will begin to run immediately following an injury and will expire if no duty to file a first report arises within the following two years. □

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