News

Update on Federal Disability Discrimination Law

By Christopher C. Taintor, Esq.

Disability discrimination has been a fertile area of litigation for several years. The United States Equal Employment Opportunity Commission reports that in fiscal year 2016, it received more than 28,000 charges which included some allegation of discrimination on the basis of disability – roughly double the number reported in 2005. Although only a fraction of those administrative charges end up in court, the number of lawsuits filed is large, and likely has been fueled by the 2009 amendments to the Americans with Disabilities Act, which were enacted with the avowed purpose of lowering barriers to recovery.

The first half of this year has been no exception. In the past few months federal courts of appeals, where most disability discrimination law is made, have decided several cases touching on significant and frequently-litigated issues. The issue that has received perhaps the most attention is this: how do employers and courts identify a job's "essential functions"? The question is particularly important because the law is settled on one key point – no employer is required to "accommodate" a disabled employee by relieving her of the need to perform a job's essential functions. Stated another way, an accommodation that involves changing a job's essential functions is, per se, not "reasonable." Therefore, if an employer can persuade a court that the function its employee asks to have modified is "essential," it will be entitled to judgment as a matter of law and able to avoid a trial. It is no surprise, then, that this is an issue that gets aggressively litigated.

This article first summarizes the recent "essential function" cases that have been decided in the courts of appeals. Next, it discusses a new First Circuit decision dealing with the question of when a lengthy period of leave is a "reasonable accommodation." Finally, it describes a new federal district court decision that may open the door to expanding employment protections to some transgender individuals under the ADA.

1. **"Essential Function" Cases**

In *Mason v. United Parcel Service Co.*, 674 Fed. Appx. 943 (6th Cir., Jan. 10, 2017), the plaintiff had lifting restrictions as the result of an injury she sustained while working for UPS. Because the restrictions were permanent, she requested accommodations which would have relieved her of the need to lift "heavy" packages, as well as the need to lift any packages above her shoulders or lower them to foot level. All those tasks were identified as essential parts of her position in the company's job description. The court rejected the argument that the plaintiff should be relieved of the various lifting requirements because, it said, "that would essentially transform the position into another one by eliminating essential functions of the job as it exists." The *Mason* court then analyzed and rejected the plaintiff's contention that she should be allowed to rely on her co-employees to assist with the lifting she could not do herself. Because the package center where she worked was "leanly staffed" and "require[d] all employees to perform their functions," the court concluded that shifting Mason's duties to others would "significantly disrupt" operations.

Later the same month the Sixth Circuit decided another case, *Williams v. AT&T Mobility Services, LLC*, 847 F.3d 384 (6th Cir. 2017), where it again considered the effect that a requested accommodation might have on a disabled employee's co-workers. The plaintiff was a Customer Sales Representative (CSR) who suffered from depression and anxiety. CSRs worked eight-hour shifts, typically handling 40 to 50 calls per shift. The plaintiff sometimes needed to

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"log out" and take time to compose herself after very stressful calls. To deal with that stress she requested accommodation in the form of leave from work for treatment, flexible scheduling, and additional breaks during her shifts. The evidence established, though, that "[i]f a CSR is not logged in to her workstation, any calls that would have otherwise gone to her are rerouted to another CSR," and that the consequences of her unscheduled absences included "potential increases in customer wait times and decreases in the quality and speed of customer service," as well as "increased workplace tensions and decreased morale among the CSRs." Because, the court reasoned, "[r]egular, in-person attendance is an essential function . . . of most jobs, especially the interactive ones," the accommodations the plaintiff had requested were not reasonable.

Stevens v. Rite Aid Corporation, 851 F.3d 224 (2d Cir. 2017), involved a pharmacist who asked to be accommodated because of his "needle phobia." Rite Aid had made a business decision in 2011 to start requiring pharmacists to perform immunizations. Stevens argued that he could be accommodated by either hiring a nurse or assigning him to a "dual pharmacist" store, so that all immunizations could be performed by a colleague. The court reasoned, however, that "[t]hose steps would be exemptions that would have involved other employees performing Stevens' essential immunization duties." Because "[a] reasonable accommodation can never involve the elimination of an essential function of a job," the court of appeals held that Rite Aid was not required to grant the plaintiff those exemptions.

In another Sixth Circuit case, *Green v. BakeMark, USA, LLC* , 2017 WL 1147168 (6th Cir. March 27, 2017), the plaintiff was an "operations manager" with supervisory responsibilities, who historically had worked a minimum of 50 hours per week in that position. After suffering an on-the-job injury he asked to be accommodated with a part-time (20 hour a week) schedule. The trial court granted the employer summary judgment, and the court of appeals affirmed. After observing that "Green's own experience working long hours as an operations manager belies any claim that he could perform the essential functions of the position working four hours a day, five days a week," the court noted that "the written job description for operations manager emphasizes the position's full-time nature by stressing the 'supervisory responsibilities' inherent in the position, including 'closely interacting with department associates,'" and found it "difficult to fathom how Green could adequately fulfill his supervisory role if he were there to supervise and interact with the associates only part-time." At best, the court reasoned, "Green's proposed accommodation would have allowed him to perform only some functions of his position, some of the time." Because "the ADA requires more," the court affirmed the entry of summary judgment in the employer's favor.

2. The First Circuit Takes Up the Issue of Extended Leave

Although all federal appellate decisions interpreting the ADA are significant, cases decided by the Court of Appeals for the First Circuit, which includes Maine, directly control cases brought here. Most of the cases handed down by the First Circuit so far this year have broken little ground. One case, however, is worth noting because it deals with the recurring challenge employers face when they are asked to honor requests for extended leave from work.

In *Echevarria v. AstaZeneca Pharm*., LP, 856 F.3d 119 (1st Cir 2017), one of the questions presented was whether the plaintiff, who had taken a lengthy period of leave due to depression and anxiety, was entitled to another 12 months as an accommodation. The First Circuit held that the requested accommodation was not "facially reasonable." In its analysis of this issue the court quoted at length from a recent decision that had been authored by Justice Neil Gorsuch (the newest member of the Supreme Court) when he was sitting on the Tenth Circuit Court of Appeals, which the court said "nicely captured the dilemma that lengthy leave requests pose for employers." In that case Justice Gorsuch had explained that although leaves of absence can be "reasonable accommodations" in some circumstances, lengthy periods of leave typically do not qualify because "reasonable accommodations – typically things like adding ramps or allowing more flexible working hours – are all about enabling employees to work, not to not work" (and it was not at all clear that the leave requested in *Echevarria* would actually be "effective" to get the plaintiff back to work).

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The First Circuit went on to observe in *Echevarria* that "[c]ompliance with a request for a lengthy period of leave imposes obvious burdens on an employer, not the least of which entails somehow covering the absent employee's job responsibilities during the employee's extended leave." The court said that an employee's "facial-reasonableness showing must take these obvious burdens into account." Because the plaintiff had not satisfactorily explained how her employer should be expected to deal with the burdens imposed by her extended absence, the summary judgment entered for her employer was affirmed.

3. New Development: Gender Dysphoria as a Protected Disability

Finally, in *Blatt v. Cabela's Retail, Inc.,* 2017 WL 2178123 (E.D. Pa. May 18, 2017), a court for the first time has ruled that a transgender employee may proceed with a discrimination claim under the ADA. Courts applying Title VII previously have said that sex discrimination laws prohibit anti-transgender discrimination in the workplace. *Blatt* is unique because it says that a transgender employee with gender dysphoria may also be protected by the ADA.

The *Blatt* decision is brief and to the point. Kate Lynn Blatt, a transgender woman, sued Cabela's, claiming that while working there she was subjected to discrimination – she was not permitted to wear a name tag with her female name, or use the women's restroom – and that she was harassed by co-workers. Cabela's moved to dismiss her ADA claims on the ground that Section 12211 of the ADA excludes from coverage "gender identity disorders not resulting from physical impairments." In response, Blatt argued that the ADA's exclusion of gender identity disorders violated her Constitutional right to equal protection of the laws. The judge ruled that the ADA can, in fact, cover gender dysphoria, a condition "which goes beyond merely identifying with a different gender and is characterized by clinically significant stress and other impairments that may be disabling." Because Blatt sufficiently alleged that gender dysphoria "substantially limited" her "major life activities" – including interacting with others, and social and occupational functioning – the court denied the employer's motion to dismiss and allowed the ADA claim to go forward.

Although *Blatt* has been described in the press as a "landmark" advance for transgender workers, it may not have very broad practical implications. The court did not question the assumption that the ADA protects only gender dysphoria, and not transgenderism generally. Furthermore, since transgender individuals have already found protection from employment discrimination under Title VII, the more limited safeguards recognized in *Blatt* may not add much. At the very least, though, the decision is yet another indication that the protections afforded by the ADA will continue to evolve, and that litigation under the Act will continue to grow.

E-Discovery: Traps for the Unwary

By Jonathan W. Brogan, Esq.

We all live in an information exploded age. E–mail, social media, computer files and records, satellite tracking systems, and video are a daily part of all of our lives. Because they are a part of all of our lives, they have now become an integral part of the discovery process and a potential tool for plaintiffs' attorneys with weak cases to try to trap unwary small businesses and even potential defendants in simple automobile or premises liability cases.

More and more potential defendants in litigated matters are receiving, along with a notice of claim, a letter from a plaintiff's attorney asking that a "litigation hold" be placed on all of their electronic information and files. This article

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will deal with some of the state and federal rules associated with the production of these documents, the potential penalties for not protecting these documents, and the practicalities of electronic discovery in Maine.

The Maine Rules of Civil Procedure and the Federal Rules of Civil Procedure differ substantially, now, on the issue of what is "discoverable". Under the Federal Rules of Civil Procedure, Fed.R.Civ.P. 26(b)(1), the scope of discovery is:

> Parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the party's relative access to the relevant information, the party's resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

This discovery rule, adopted in 2015, changed what had been the scope of discovery for more than 40 years.

In Maine, however, the old scope of discovery still exists. Maine Rule of Civil Procedure 26(b)(1) states that:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter . . . and appears reasonably calculated to lead to the discovery of admissible evidence.

Under the Federal Rules, if substantial electronic information is sought, an e-discovery order is usually entered and the division of costs associated with the discovery is evaluated. Unfortunately, in Maine, given the limited resources of our courts, it is a much less regulated process.

Litigation holds are often used in significant products liability or other commercial cases involving large corporations with legal departments and guidelines regarding litigation holds. This article will not address those situations. The article is focused on local businesses and events that may result in litigation. What does the small company do when it receives the boilerplate "litigation hold" letter? Also, what does a non-commercial driver involved in an automobile accident, for which he has insurance, do when he receives the same litigation hold letter?

Under the Federal Rules, the issue of proportionality is important. Although the State Rules have not adopted proportionality, yet, but clearly that issue may be brought to the attention of the Superior Court Judge and the issue of the relevance of the potential plaintiff's attorney's request for extensive personal information on handheld devices or home computers can be addressed. The best way to address it is to first try to protect as much information as possible, document what was done to protect it and do it immediately. Once that information is protected and available, then whether or not it will ever be produced is easier to evaluate.

But what happens when the potential defendant is contacted years after an accident? Maine has a 6 year statute of limitations. Many times the person is not contacted about potential litigation in an accident until years later. As most know, many electronic devices have automatic purging and/or the people who own those devices do their own deletions. That issue is dealt with by both the Federal Rules and the State Rules under Rule 37 and typically it must be shown that there was some intent to deprive the other side of information before any sanctions result.

The more difficult issue is once a person is put on notice what sources of information should be protected. Typically a litigation hold letter is general by nature and is attempting to put as wide a hold on electronic documents as possible. One thinks immediately of cell phone records, computer records, video records (surveillance or otherwise), and social media postings as information that should be requested or segregated so as to protect them from routine or inadvertent destruction. But, in many cases, there are other forms of information that small business owners forget may be the focus of the plaintiff's later motions for sanctions. For instance, many businesses that use motor

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vehicles have satellite tracking systems. Satellite tracking systems have become more and more sophisticated and offer the subscribers a wealth of information about the vehicles that are being tracked. That information includes the vehicles' locations, their average speeds, whether someone is abusing the vehicle by speeding or otherwise, and specific information at or near the time that a motor vehicle accident has occurred. Small businesses use this information to help them control costs and work with their employees to be safe. Plaintiffs' attorneys use this information to try to extract potential damaging data about the driver's lack of care and the owner's failure to monitor its driver.

Once one determines a satellite tracking system exists, gather all the information available and store it safely. Many times the satellite tracking data is stored in the cloud and destroyed after a period of time (typically one year) to allow other information to be stored. If a small business using a satellite tracking system is not aware of the numerous sources of information that might be available to a plaintiff's attorney, it may simply overlook this electronic data. If it does, a later sanctions request may mean that the jury is instructed that information was destroyed that may have been damaging to the liability defense of the defendant. Needless to say any jury hearing that information was "destroyed" will begin to think that the defendant had something to hide and that the information would have hurt the defense and helped the plaintiff.

Social media is even more difficult to control. Potential defendants have an ability to destroy any defenses in a case with their Facebook postings or tweets. Many times they believe they are protecting themselves by going on social media and explaining "their side of the story". It must be impressed upon potential defendants that they need to stay off social media and not discuss potential litigation or their defenses. If a "litigation hold" letter is sent to a defendant, then their social media information should be segregated and the defendant should be told that neither he nor any of his employees should be on social media discussing this potential matter or anything about it. If contacted about it, they should simply not respond. If someone makes an accusation that they believe they need to defend, they should abstain.

There are numerous vendors who may be of help in protecting potential electronic information for discovery. They are expensive but can be extremely helpful especially when the information sought is "metadata" or other information that is typically beyond the expertise of insurance professionals, lawyers, or defendants. An analysis of when an electronic discovery vendor is useful should be made between the insurance professional and their attorneys.

In conclusion, the most important thing for potential defendants and insurance professionals to do when confronted with a "litigation hold" letter is to react and respond. Identify the information that may be available, segregate that information immediately, request any information (including cell phone information or other information from outside agencies) as soon as possible and store that information. If there is video, surveillance or otherwise, immediately segregate it. When investigating an accident, identify what video sources are available, whether there were cameras on the motor vehicles or at the area where the alleged slip and fall or other accident took place, and protect it.

If the motor vehicles involved have satellite tracking systems, find out what the satellite tracking systems provide, contact the satellite tracking system providers and get that information and save it.

Computer information should be saved and protected and stored. Find out from the potential defendant what routine destruction systems they have on their computers so that information is not destroyed unwittingly.

Most importantly, if the "litigation hold" letter received is prior to the start of litigation, ask the requesting lawyer to provide more specific requests than are typical. Many times plaintiffs' attorneys imagine they have asked for information that no reasonable person would see within a request. They then use that request to try to elicit

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sanction orders from the court. Though they are typically unsuccessful, it is easier to simply ask the plaintiffs' lawyers what they are looking for and determine if that request is a reasonable request. E-discovery is a trap for the unwary. Reasonable reaction, and documentation, as a response to a "litigation hold" letter will help prevent sanctions later.

WC Law Court decision issued on July 20, 2017 – Res Judicata and Permanent Impairment

It has long been established that when an issue is litigated to a final conclusion before the Workers' Compensation Board, the matter may not be re-litigated in a subsequent proceeding. This doctrine is known as res judicata, which literally means "thing adjudged", and although the concept arose in courts of general jurisdiction it has been found by the Law Court to be fully applicable to workers' compensation proceedings. A recent decision of the Court addressed the application of res judicata to permanent impairment determinations.

In *Bailey v. City of Lewiston*, 2017 ME 160 (July 20, 2017), the employee sustained an occupational respiratory injury in 2001 and by decree was awarded ongoing benefits for partial incapacity. Ultimately the employee sought a Board determination of PI, and relying upon the opinion of a Section 312 examiner the Board established the level of PI at 32%. Benefits for partial continued without durational limit because the extent of impairment exceeded the applicable threshold.

Several years after PI had been established, the employer filed both a Petition for Review and another Petition to Determine the Extent of Permanent Impairment based upon a significant change in medical circumstances. Specifically, the same Section 312 physician found that the employee's medical condition had improved dramatically from the time of the first exam such that the level of PI had improved to 0%. The ALJ found that the issue of PI was not barred by res judicata and granted the employer's petitions. Because the level of PI was 0% and because partial benefits in excess of the durational limit had been paid by the time of the decree, payment of benefits ceased.

On appeal the Appellate Division reversed the decision of the ALJ and found that the initial PI determination was final and could not be re-evaluated. The employer then appealed to the Law Court.

In its decision the Court distinguished Board determinations on the nature and extent of incapacity from Board findings of the level of PI resulting from an injury. Regarding disability determinations, the Court recognized that the degree of incapacity may fluctuate and that parties may establish a change in the level of incapacity by comparative medical or economic evidence. However, the function of PI under the Act is to determine whether or not an injured worker's entitlement to partial is either capped or not, and the Court ruled that the purpose of the statute would be circumvented if a party could seek a modification of a PI determination in order to alter the durational length of entitlement to partial. As the Court held: "…the workers' compensation statute provides no opportunity for a redetermination of a hearing officer's or ALJ's findings regarding permanent impairment or MMI".

The Court's decision is broad enough to preclude an employee from seeking an increase in the level of PI after the Board had previously ruled upon the issue. Therefore, although res judicata will not prevent the parties from relitigating the extent of disability based upon changed circumstances, once PI has been established by the Board the matter is considered to have been finally determined and cannot be re-opened.

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Ransomware: How to React When Prevention Fails

A variant of "Petya" is just the latest massive ransomware cyberattack currently crippling businesses and government offices across Europe and the United States. The particular focus on the Ukraine again points to Russia as the likely source, but the true identity of the actors is still unknown.

The increased sophistication and frequency of these threats are a timely reminder that a well-thought-out response plan can help minimize damage and preserve companies' reputations. Here are key steps to consider when it's too late for stress tests, policy reviews and software patches, and all other preventive measures have failed:

Immediate Action

1. **Implement**. Implement the company security incident response and business continuity plan, making sure that individuals in decision making authority chain are available and kept updated.
2. **Quarantine.** Isolate the infected computer or systems as soon as ransomware is detected to prevent it from attacking network or share drives.
3. **Secure Backup Data**. Immediately secure backup data or systems by taking them offline. Ensure backups are free of malware.
4. **Secure Unencrypted Data**. Secure any partial portions of the ransomed data that might exist.
5. **Reset Passwords**. Change account and network passwords after the corrupted system has been isolated from the network. Remember to also change system passwords once the malware is removed from the system.
6. **Stop the Loading; Assess**. Registry values and files should be deleted to stop the program from loading. determine which stakeholders and interests could be implicated, and evaluate the prospects for quick remediation.
7. **Insurance**. Identify any potentially responsive insurance coverages for carrier notification.
8. **Report**. Contact law enforcement. In the United States, the recommended contact is the local Federal Bureau of Investigation (FBI) or U.S. Secret Service field office.

To Pay or Not to Pay.

The decision of whether or not to pay the ransom is a decision fraught with its own risks that require evaluation of all realistic options to protect shareholders, employees, and customers.

Generally speaking, our advice is not to pay the ransom, but victims will want to evaluate a number of factors, including the technical feasibility, timeliness, and cost of restarting systems from backup, the possibility of preventing sensitive company and customer data from being being further compromised, and the ability to tell customers that the company did attempt to protect their data by paying the ransom.

If you are a ransomware victim, you'll want to also consider the following factors:

- First and foremost: Paying a ransom does not guarantee that you will regain access to your data. Many victims are never provided with decryption keys after paying a ransom for the simple reason that once the payment has been received there's little incentive to release the keys.

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- Others are subject to additional payment demands during the same ransomware event once they've shown themselves willing to pay.
- By paying, you may be making yourself more of a target for cyber criminals.
- Although many ransomware events appear to be state or quasi-state action that are designed more to disrupt than to extort money, payment nonetheless encourages this criminal activity.
- If you do decide to pay, consider acceptable payment methods (i.e., paying through bitcoin and not through credit cards). In no event should payment come from an existing financial institution or bitcoin account.

Prevention and avoidance are still the best way to avoid the risks and costs of a malware intrusion, but a response plan has to be part of every company's cyberattack response toolbox.

NHD honored to be included among the top "Highly Recommended" law firms in the State of Maine

Norman Hanson & DeTroy is honored to be included among the top of the "Highly Recommended" law firms in the State of Maine in the 2017 edition of *Benchmark Litigation's* "The Guide to America's Leading Litigation Firms and Attorneys".

In addition, the following attorneys received individual recognition from *Benchmark Litigation*:

Local Litigation Stars
Jonathan W. Brogan – 2017
Mark G. Lavoie – 2017

Future Stars
David L. Herzer, Jr. – 2017
Thomas S. Marjerison – 2017

Top Litigator Under 40
Joshua D. Hadiaris – 2017
Jennifer A.W. Rush – 2017

NHD Recognized as a Top Firm by Chambers & Partners

Chambers & Partners USA 2017 has recognized Norman Hanson & DeTroy as a Top Firm for the category Litigation: General Commercial.

Additionally, Norman Hanson & DeTroy is proud to announce that the following attorneys received the "**Ranked Lawyer**" distinction in the Chambers & Partners publication:

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- Emily A. Bloch – Litigation: Medical Malpractice & Insurance
- Jonathan W. Brogan – Litigation: Medical Malpractice & Insurance
- Mark G. Lavoie – Litigation: Medical Malpractice & Insurance
- Russell B. Pierce – Litigation: General Commercial
- James D. Poliquin – Litigation: Medical Malpractice & Insurance
- Christopher C. Taintor – Litigation: Medical Malpractice & Insurance

Governor appoints Adrian Kendall to MRDA Board

Adrian Kendall, member in the NHD's Corporate and Commercial Law and Credit Union Law practice groups, has been appointed to serve on the Board of Trustees of the Maine Rural Development Authority.

The Maine Rural Development Authority focuses on the rural areas of Maine that have not experienced the same level of economic development success as other regions of the state, have experienced major economic losses such as plant closings and downsizings, or are economically distressed. Appointed by Governor Paul R. LePage and unanimously confirmed by the Maine State Senate, Kendall said: "The MRDA does such important work to create growth and preserve our Maine communities hit hardest by economic change, and its legislative charge allows it to step in where conventional lenders fear to tread. I'm particularly honored and excited by this opportunity to put my 25 years of experience to work and help the MRDA fulfill its special mission."

WC Appellate Division Decision issued on May 31, 2017 – Voc Rehab Plan

In *Richards v. D.P. Industries, Inc*., Me. W.C.B. No. 17-24 (App. Div. 2017), the employee sustained a compensable injury in 2001 which resulted in significant continuing work restrictions. Ultimately a vocational rehabilitation plan was prepared by a representative of the Department of Labor's Division of Rehabilitation Services in November 2014. The employer did not agree to pay for the cost of the plan, which were in the amount of $8,918.00. As a result, the employee filed a Petition to Determine Entitlement to Rehabilitation Services pursuant to §217(2) seeking payment of that amount.

However, in testimony before the Hearing Officer (the Petition was assigned to Hearing Officer Richard Dunn rather than an ALJ) the employee stated that his actual expenses were $15,000.00 and submitted documentary evidence in support. The Hearing Officer granted the Petition but only to the extent of the requested amount of $8,918.00. The employee filed a Motion for Findings and a Motion to Reopen the Evidence. The Hearing Officer affirmed his initial decision and declined to re-open the matter.

The Appellate Division affirmed every aspect of the Hearing Officer's decision. Noting that the employee had requested payment of $8,918.00 in his Petition, which was the estimated cost of the voc rehab plan at the time of filing, the Division found no error in awarding the employee exactly what had been claimed.

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The Division also approved the denial of the employee's Motion to Reopen the Evidence. Section 319 allows the Board to reopen the evidence in a proceeding "on the grounds of newly discovered evidence that by due diligence could not have been discovered prior to the time the payment scheme was initiated or prior to the hearing on which the award or decree was based". The panel observed that the employee might have filed his Petition to Determine Entitlement to Rehabilitation Services too soon, as the total cost of the plan had apparently not yet crystalized prior to the time of filing. Nevertheless, the statutory requirements of §319 had not been met, and the possible premature filing of the underlying Petition was not a basis to reopen the evidence.

Steve Hessert represented the employer at hearing and before the Division.

WC Appellate Division Decision issued on May 25, 2017 – Change in Economic Circumstances

When a determination of incapacity has been made by decree, either party may file a Petition for Review to establish a different level of entitlement, but to do so the moving party must show a change of circumstances since the prior decree either through comparative medical evidence or demonstrating a change in economic circumstances. In a recent decision the Appellate Division had an opportunity to comment upon the type of evidence required of an injured worker to sustain his or her burden of proof.

In *Belanger v. Miles Memorial Hospital*, Me. W.C.B. No. 17-23 (App. Div. 2017) the employee had sustained a compensable personal injury in 1999, and in a 2003 decree she was awarded ongoing benefits for partial incapacity based upon a presumed earning capacity of $800.00 per week. Several years later the employee filed her first Petition for Review, and in a 2012 decree the Board denied the claim on the grounds that the employee had failed to establish a change in either her medical or economic circumstances.

After a few more years had passed the employee tried once again and filed another Petition for Review, and although the ALJ concluded that a change in medical circumstances had not been demonstrated, the employee had nevertheless proven a change in her economic circumstances. As a result, the imputed earning capacity was reduced from $800.00 to $400.00 per week, and ongoing benefits for partial incapacity at a higher rate were ordered. The employer appealed.

The Division re-affirmed that the employee bore the burden of proof by showing a change in her economic circumstances in order to overcome the res judicata effect of the previous decree. The Division noted that the ALJ had found as a fact that since the prior decree the employee had performed a work search, had participated in vocational rehabilitation, and had been totally disabled for a closed period of time as the result of surgery. In addition, the ALJ found that the employee had not worked in her customary profession for 10 years, had lost a part-time job, and was now 65 years old. The Division affirmed the ALJ's decision and found that it was adequately supported by the record, was not irrational, and did not misapply the law.

It is interesting to note that the mere passage of time (i.e., the employee was now age 65 and had not worked in her usual profession for 10 years) could be considered among other factors as evidence of a change in economic circumstances. Specifically, the Division held that "These types of factors are relevant to an employee's ability to earn, and thus to her economic circumstances". While age and the amount of time out of work may not be sufficient, without more, to carry the burden, they are now recognized as among the considerations to be weighed in assessing

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changed economic circumstances.

WC Appellate Division Decision issued on May 12, 2017 – Change in Economic Circumstances

It has long been recognized that in filing a Petition for Review, an employer must establish a comparative change in either medical or economic circumstances in order to justify a reduction in the level of entitlement. Comparative medical evidence is not necessary when an employer seeks to establish a change in economic circumstances. *Folsom v. New England Tel. & Tel. Co.*, 606 A.2d 1035 (Me. 1992).

In *Cortes v. LePage Bakeries, Inc.,* Me. W.C.B. No. 17-22 (App. Div. 2017), the employee sustained an undisputed occupational injury to her right knee and following surgery returned to work in full-time status with restrictions. However, her earnings were less than the pre-injury average weekly wage and the employer voluntarily paid partial at varying rates. However, the evidence showed that nearly $200.00 of the pre-injury average weekly wage consisted of overtime pay, which was no longer available to the employee following the return to work due to the employer's business decision to reduce or eliminate overtime altogether. The employer argued that compensation should not be based upon this portion of lost income as it resulted from a change in the employer's overtime policy, and was not related to any factor resulting from the injury.

The ALJ denied the Petition for Review on the grounds that the employer failed to show a change in economic circumstances. On appeal the Division side-stepped the economic circumstances issue and ruled that the employer was required to establish that employment opportunities were available to the employee in the labor market which paid earnings higher than those currently received by the employee. Relying upon a 1975 decision of the Law Court (*Fecteau v. Richvale Construction, Inc.*, 349 A.2d 162 (Me. 1975)), the Division ruled that the employee's earning capacity was established by her current earnings and that the employer offered no evidence to demonstrate the existence of higher-paying employment. The Division denied the employer's appeal.

Comment: It is certainly true that if an employer believes that current earnings do not accurately reflect wage earning capacity, it must introduce evidence to the contrary. However, the Division neglected to address the argument of changed economic circumstances, and that a comparison to pre-injury earnings was no longer justifiable in light of the decision to eliminate overtime for all. The impact of this decision creates some doubt that changed economic circumstances unrelated to an injury can be relied upon, without more, to support a reduction in the level of compensation.

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