Portland Office: (207) 774-7000
Lewiston Office: (207) 777-5200

Experienced. Efficient. Effective.

# News

## WC Law Court Recognizes Credit for Social Security Retirement Benefits Paid in the Past

It has been recognized in several Law Court decisions that, generally speaking, there is no right to recover an overpayment of workers' compensation benefits by taking an offset or by claiming reimbursement. However, in a significant new decision, the Court has held that an employer is entitled to a credit for the value of Social Security retirement benefits paid in the past at the same time in which an injured worker also received workers' compensation incapacity benefits.

In *Urrutia v. Interstate Brands International*, 2018 ME 24 the employer voluntarily initiated payment of benefits for total incapacity at a point when, unknown to the employer, the employee was already receiving Social Security retirement benefits. He continued to receive workers' compensation benefits unreduced by the Section 221 offset until the employer eventually learned of the Social Security entitlement. At that point the employer reduced its ongoing payments pursuant to Section 221, but by that time the employee had received over $24,000.00 in workers' compensation benefits to which he was not entitled pursuant to Section 221. The employer sought a credit for the amount of the overpayment, and the ALJ granted the request. However, on appeal the Appellate Division reversed and essentially held that the employer was not entitled to a retroactive credit for benefits overpaid, notwithstanding the language of Section 221 indicating that benefits must be reduced when Social Security retirement payments are received. The employer then appealed to the Law Court.

In a 5-2 decision, the Court analyzed the language of Section 221 in detail and found that it "unambiguously entitles an employer to a credit based on an employee's past receipt of Social Security retirement benefits". The Court cited the statutory injunction that incapacity benefits "must be reduced" to reflect the receipt of Social Security retirement income and that the credit is triggered when an injured worker is receiving "or has received" Social Security retirement payments. The majority ruled that a refusal to recognize a credit would allow the employee to retain a double recovery of benefits in violation of the express intent of Section 221. Therefore, the Court vacated the decision of the Appellate Division and ruled that "Interstate is entitled to a credit [in excess of $24,000.00] for incapacity benefit overpayments made to Urrutia during the same period when he received Social Security retirement benefits".

The Court remanded the matter to the ALJ to determine "the specific terms of the credit and resulting payment holiday" to which the employer was entitled.

Steve Moriarty represented the employer on appeal.

## WC Appellate Division Decision issued on January 17, 2018 – Multiple

## Gradual Injuries to Same Area

It had been determined by the Board that the employee sustained a gradual occupational injury to his right elbow on October 29, 2000. Several years later the employee filed a Petition for Award alleging a second gradual injury to the same portion of the body occurring on May 8, 2009. There was conflicting medical evidence as to whether or not a second injury had been sustained, and the ALJ found that the employee did not sustain his burden of proof.

In *White v. S.D. Warren Company*, Me. W.C.B. No. 18-02 (App. Div. 2018) the Appellate Division rejected the employee's appeal and found that the ALJ committed no error in weighing the contrasting medical opinions in finding that the employee had not established a new gradual injury to the same portion of the body. The existence of contrary medical opinion did not compel the hearing officer to find in the employee's favor, and the ALJ's decision fell within the range of her "sound discretion" and was not arbitrary or capricious.

## WC Appellate Division Decision issued on January 16, 2018 – Record of Mediation

When parties reach agreement at mediation and the issues agreed to are reflected in the record, the record is fully binding upon the parties and has the effect of a final Board determination. However, when no agreements are reached and the mediation is considered unresolved, the record itself has no res judicata effect.

In *Karimova v. Nordyx*, Me. W.C.B. No. 18-01 (App. Div. 2018), the Board granted a Petition for Award alleging a September 11, 2006 personal injury which had not been identified or included within a prior record of mediation. The employer claimed that the injured worker was prevented by res judicata from raising the claim on the grounds that it could have been asserted at mediation. The Appellate Division disagreed and ruled that the doctrine of res judicata applies only when a final judgment is rendered, but that unsuccessful or unresolved mediations which result in records that merely list the issues in dispute cannot be given res judicata effect. Accordingly, the Division ruled that the employee was not prevented from pursuing her claim for the September 11, 2006 injury simply because it had not been raised at a previous mediation.

## David Herzer will chair the Maine Professional Ethics Commission again for 2018

The Professional Ethics Commission is comprised of eight attorneys who meet monthly to volunteer their time and expertise to render formal and informal written advisory opinions to the Court, Board, Grievance Commission, Bar Counsel, and members of the Maine bar involving the interpretation and application of the Maine Rules of Professional Conduct applicable to lawyers. Dave has been an active member of the Commission since 2010 and was the Chair for 2017.

NORMAN HANSON DETROY

Portland Office: (207) 774-7000
Lewiston Office: (207) 777-5200

Experienced. Efficient. Effective.

# WC Appellate Division Decision issued on December 29, 2017 – Challenge to Section 201(3) Rejected

In its final decision of 2017 an *en banc* panel of the Appellate Division consisting of seven ALJs unanimously denied an appeal brought by an employee in a case in which a claim of a gradual mental injury had been denied. In *Henderson v. Town of Winslow*, Me. W.C.B. No. 17-46 (App. Div. 2017), the claimant had a pre-existing emotional condition resulting from an occupational event which was barred by the statute of limitations, but asserted a new gradual emotional injury related to interpersonal events at work. The ALJ denied the gradual stress injury claim on the grounds that the employee failed to meet the demanding burden of proof under Section 201(3).

Following the close of the evidence in the underlying litigation, the employee argued for the first time in her position paper that applying Section 201(3) would violate the equal protection clauses of both the United States and Maine Constitutions, and would also violate the Americans with Disabilities Act. The argument was made in a brief portion of an otherwise lengthy position paper and was asserted without substantial legal analysis and supporting authority. In denying the Petition for Award the ALJ did not comment upon the issues which were raised for the first time following the close of the evidence.

The employee filed a Motion for Findings of Fact, but in her proposed findings she did not raise either the constitutional or the ADA issues. Similarly, when the employee appealed to the Appellate Division she did not cite these arguments as among the issues to be addressed on appeal. Ultimately the employee argued before the Appellate Division that the ALJ committed reversible error in failing to address or act upon the alleged constitutional issues in the application of Section 201(3).

In denying the employee's appeal the Appellate Division observed that long-established legal procedure prevents a party from raising issues for the first time on appeal, even though they may arguably be of constitutional significance. In effect, the Division ruled that the employee had waived her arguments by failing to raise them in a timely fashion and by doing so only in a brief and insubstantial manner without focused and developed legal argumentation.

> Therefore, we conclude that Ms. Henderson forfeited consideration of her equal protection and ADA arguments both by raising them belatedly, doing so in a perfunctory manner, as well as by failing to seek additional findings or conclusions regarding them.

Accordingly, the Division did not address the merits (or lack thereof) of the employee's constitutional objections to Section 201(3).

The Division also rejected the employee's argument that the burden of proof by clear and convincing evidence required by Section 201(3) should not be applied when a pre-existing condition is present. The Division found that Section 201(3) applies equally to new stress injuries as well as to those which may be an aggravation or exacerbation of a prior condition. Therefore, apart from any arguable constitutional issues, the Appellate Division upheld the clear and convincing evidence standard mandated by Section 201(3) for all types of gradual emotional injuries.

Steve Moriarty represented the employer in litigation before the Board and on appeal.

Portland Office: (207) 774-7000
Lewiston Office: (207) 777-5200

Experienced. Efficient. Effective.

## Law Court Decision issued on December 12, 2017 – Employment Status

In its second workers' compensation opinion of the year, the Law Court has addressed determination of employment status in a unique factual context. In *Huff v. Regional Transportation Program*, 2017 ME 229 (December 12, 2017), the petitioner volunteered as a driver for a non-profit agency which provided transportation services to disabled and low-income clients. At the onset of the relationship the claimant signed a Memorandum of Understanding which expressly specified that volunteer drivers were not considered to be employees and that no employee-employer relationship was deemed to exist between the parties. The petitioner received no income from Regional Transportation Program but was paid mileage reimbursement for the use of his personal vehicle at the rate of $.41 per mile. According to the petitioner he was able to retain approximately one-half of the mileage reimbursement as income after paying for gas and vehicle maintenance services.

The petitioner was severely injured in an August 2012 motor vehicle accident and filed a Petition for Award. By agreement of the parties the issue of employment status was tried separately, and the ALJ found that the petitioner was not an employee within the meaning of the Act. The Appellate Division affirmed and the Law Court granted Mr. Huff's Petition for Appellate Review. On appeal the Court recognized that payment of income in exchange for services rendered is necessary to the existence of an employment relationship, and framed the controlling issue as follows:

> Whether a mileage reimbursement to a "volunteer" can constitute remuneration when it is significant enough to exceed the volunteer's immediate expenditures.

The petitioner argued that the rate of mileage reimbursement was sufficiently high to constitute the payment of income necessary to establish an employment relationship.

The Court rejected the petitioner's argument and agreed with the Appellate Division that there was no payment of income even though the petitioner was able to operate his vehicle at a cost less than the mileage reimbursement rate. The Court ruled that the statutory definition of "employee" clearly requires that a worker must receive remuneration in return for services in order to be entitled to compensation benefits under the Act, but that the mileage reimbursement does not qualify as income. Therefore, because the petitioner was not an "employee" within the scope of the Act, the Court affirmed the denial of the Petition for Award.

## NHD Ranked in the 2018 Edition of U.S. News – Best Lawyers

Norman, Hanson & DeTroy is honored to be ranked in the 2018 edition of U.S. News – Best Lawyers. The Firm has been recognized for the following practice areas:

**Metropolitan Tier 1**

Portland Office: (207) 774-7000
Lewiston Office: (207) 777-5200

Experienced. Efficient. Effective.

**Portland-ME**

Appellate Practice
Commercial Litigation
Insurance Law
Labor Law – Union
Litigation – Real Estate
Medical Malpractice Law – Defendants
Personal Injury Litigation – Defendants
Professional Malpractice Law – Defendants

Real Estate Law
Workers' Compensation Law – Employers

**Metropolitan Tier 2**
**Augusta-ME**

Tax Law

**Portland-ME**

Administrative / Regulatory Law
Government Relations Practice
Product Liability Litigation – Defendants

**Metropolitan Tier 3**
**Portland-ME**

Corporate Law

# WC Appellate Division Decision issued on November 13, 2017 – Scope of Bailey Decision

In *Bailey v. City of Lewiston*, 2017 ME 160, 168 A.3d 762, the Law Court ruled that after a PI determination has been made by the Board, an employer cannot seek to lower the assessment in a subsequent proceeding based upon a change in medical condition. However, in its opinion the Court in the broadest possible language ruled that once the level of PI has been determined by the Board the issue can never be relitigated by the parties. Thus, the Court held that the doctrine of res judicata prevents an employee from seeking to increase a prior PI determination and prevents an employer from seeking to decrease the assessed level.

Occasionally in written opinions appellate courts make comments which, strictly speaking, are not necessary to support the decision in the particular case under appeal. An extraneous comment by an appellate court is referred to by the latin phrase *obiter dictum* (plural: *dicta*), and the term describes an assertion or statement by a court which is essentially superfluous. Statements which are *dicta* are generally not considered to be binding or to have

precedential effect. After the Court issued its decision in *Bailey*, there was uncertainty within the legal community as to whether the ruling would apply to employee attempts to increase PI, for the reason that the case only involved an attempt to decrease PI.

The issue has now been put the rest by the Appellate Division. In *Somers v. S.D. Warren Company*, Me. W.C.B. No. 17-38 (App. Div. 2017), a Board decree had established the level of PI resulting from the injury at 7%. As the durational limit approached, the employer filed a Petition for Review seeking to terminate benefits, and the employee responded by arguing that there had been a subsequent worsening of the medical condition justifying an increase in the rating. The case was litigated before the *Bailey* opinion issued. The ALJ found that there was no comparative evidence of a change and granted the employer's Petition for Review, allowing the termination of benefits. The employee appealed.

The case was briefed and argued before the Appellate Division before the *Bailey* decision was released and the Division then requested the parties to submit additional briefs. At this stage the employee argued that the language of *Bailey* preventing an attempt to increase PI was *obiter dictum*. The Division affirmed the ALJ and rejected the employee's contention. As the Division ruled:

> The issue in *Bailey*, as framed by the Court, was whether the Workers' Compensation Act allows the board to revise a previously established impairment rating. It answered that question in the negative without distinguishing between upward and downward revisions. Therefore, pursuant to *Bailey*, the ALJ did not err when declining to revise the 7% impairment rating assigned to Ms. Somers' knee in the 2008 decree.

Any doubt about the scope of the *Bailey* decision has now been resolved, and the attempt to limit *Bailey* solely to petitions seeking to decrease the PI level has been rejected.

---

## WC Appellate Division Decision issued on November 3, 2017 – Challenging PI Determination

Shortly after the Law Court's landmark decision in *Bailey v. City of Lewiston*, 2017 ME 160 (July 20, 2017), the Appellate Division has had an opportunity to apply the holding of that decision in a claim involving an attempt to revise a prior PI determination. The *Bailey* decision is extremely significant, as the Court held that there may not be a redetermination of PI once a percentage has been established by Board decree.

In *Puiia v. Newpage Corp.*, Me. W.C.B. No. 17-36 (App. Div. 2017), the employee sustained separate respiratory injuries in 2001 and 2004 and also a gradual orthopedic injury to several portions of the body in 2005. In a 2008 decree the employee was awarded ongoing benefits for partial incapacity based upon the two respiratory injuries.

The employee then filed Petitions to Determine the Extent of Permanent Impairment for the three injuries, and the parties entered into a Consent Decree establishing 19% PI due to the combined effects of all dates of injury. The Consent Decree did not recite individual impairment assessments pertinent to each date of injury.

The recent litigation began when the employer filed Petitions to Determine the Extent of Permanent Impairment with respect to the two respiratory injuries, requesting the Board to assign a PI assessment to the injuries individually.

The presiding ALJ denied the petitions on the grounds that the res judicata effect of the 2010 Consent Decree prevented the Board from further intervening to assign specific percentages on a per-injury basis. The ALJ also found that the medical evidence was insufficient to assign individual PI ratings.

Although litigation in the case began long before the *Bailey* decision was issued, the outcome was heavily influenced by that opinion.

The Appellate Division affirmed the decision of the ALJ, and specifically relied upon the *Bailey* decision. The Division found that the 2010 Consent Decree was a valid and final adjudication of the PI issue, and that *Bailey* prevented the employer from seeking individual assessments post-decree. The panel found that res judicata precluded the employer from re-opening the issue after there had been a valid and final Board determination. As a result, the employer could not obtain an allocation of the percentage of impairment attributable to each of the injuries individually.

## WC Appellate Division Decision issued on October 30, 2017 – Work Search and Changed Circumstances

It has long been recognized that when the amount of entitlement to benefits for incapacity has been established by Board decree, that determination may later be revised based upon evidence of a change of economic circumstances. A recent decision of the Appellate Division addressed the issue of whether work search evidence, without more, can be sufficient to permit an ALJ to increase the level of entitlement.

In *Pelletier v. Pelletier, Inc.*, Me. W.C.B. No. 17-34 (App. Div. 2017), the employee sustained an undisputed shoulder injury on January 16, 2012, and was initially awarded ongoing benefits for partial incapacity based upon an imputed earning capacity. Later, the employee filed a Petition for Review seeking an increase in benefits to 100% partial based upon extensive work search evidence. The ALJ ruled that such evidence was inadequate to overcome the res judicata effect to be given to the prior Decree, and ruled that work search evidence alone cannot be sufficient to establish a change of circumstances justifying an increase in the level of benefits.

On appeal the Appellate Division vacated the decision of the ALJ and remanded the matter for further findings. In particular, the Division found that prior case law did not support the proposition that work search evidence alone was insufficient to establish changed circumstances. As the Division held:

> Prohibiting an injured employee who is receiving partial incapacity benefits…from seeking an increase in benefits after engaging in an extensive work search would thwart the purpose of the Act to encourage employees to look for post-injury employment.

Noting that the extent of incapacity is dynamic and subject to change, the employee was entitled to an adjudication of his current disability based upon the results of having searched for work. The Division instructed the ALJ on remand to determine whether the work search evidence offered constituted a significant change in circumstances, thereby justifying an increase in the level of entitlement.

The *Pelletier* decision is significant as it gives an injured worker a second opportunity to establish entitlement to 100% partial based only upon additional and more thorough work search activities even though there has been no

other medical or economic change of circumstances.