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News

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.

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.

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.

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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.

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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.

WC Appellate Division Decision issued on October 11, 2017 – Average Weekly Wage and Employment Status

Incapacity benefits are based upon the pre-injury average weekly wage, which in most cases is the average of the employee's earnings received during the 52-week period preceding the injury. In the vast majority of cases earnings received during this period are simply averaged together and the resulting figure is deemed to reflect what the employee's earning capacity would have been if the work-related injury had never occurred. In some instances there

may have been changes in the nature or type of an injured worker's employment during this one year period. However, in a recent decision the Appellate Division ruled that not every change in pre-injury employment status will preclude the use of the standard averaging method.

In *Winslow v. Aroostook Medical Center*, Me. W.C.B. No. 17-33 (App. Div. 2017), the employee had worked full-time as a registered nurse for the employer for many years prior to an undisputed right shoulder injury occurring on August 18, 2014. At some point in the spring and summer of 2014 the employee took a maternity leave, and when she returned from leave in July 2014 she chose to work on a part-time basis. However, there were no changes in her duties or responsibilities as a registered nurse. Thus, she was working on a part-time basis when injured.

In calculating the pre-injury AWW, the ALJ averaged all sums earned during the 52-week period preceding the injury, and awarded benefits for partial at varying rates until the employee ultimately returned to full-time status in March 2016. The employer argued that shortly before the injury the employee had established a new earning capacity when she switched to part-time status, and that earnings of comparable part-time employees should have been considered in arriving at the wage. On appeal the employer relied upon the Law Court's decision in *Fowler v. First National Stores, Inc*., 416 A.2d 1258 (Me. 1980), in which the employee had been promoted from a part-time clerk to a full-time produce manager one week before she was injured, and in which the Court held that because the employee acquired a new occupation no consideration should have been given to her earnings when working as a part-time clerk.

The Appellate Division rejected the argument and found that the claimant did not acquire a new occupation with different responsibilities when she returned to work from maternity leave. On the contrary, there had merely been a reduction in hours without a corresponding change of duties or assignments. The Division affirmed the ALJ's finding that averaging all earnings during the one year period preceding the injury was a fair and reasonable means of calculating the employee's future earning capacity, and that the ALJ committed no error in considering all earnings.

In summary, the *Winslow* decision holds that, where there has been consistent employment with the same employer for 52 weeks or more, there must be more than a simple switch from full-time to part-time status prior to an injury before an ALJ may resort to earnings of comparable employees to determine the average weekly wage.

WC Appellate Division Decision issued on October 11, 2017 – Rejection of Offer of Reasonable Employment

Section 214(1)(A) provides employers with a strong mechanism for controlling costs in compensation claims. Specifically, if an employer extends an offer of reasonable employment to an injured employee who is out of work due to an injury, and if the employee refuses that offer without good cause, the employee "is no longer entitled to any wage loss benefits under this Act during the period of refusal". In essence, an employee who rejects a reasonable reinstatement offer forfeits entitlement to incapacity benefits for as long as the refusal continues.

The length of the period of refusal is highly fact-specific to the circumstances surrounding a particular claim, and in a recent decision the Appellate Division took a very conservative position in assessing when a period of refusal may have ended. In *Johnson v. Maine Department of Transportation*, Me. W.C.B. No. 17-32 (App. Div. 2017), the employee had sustained an undisputed back injury in 2010 and had been accommodated for several years until his condition progressed to the point that he was no longer able to continue within current restrictions. As a result, he

was placed out of work. However, in short order the State identified a clerical position consistent with the restrictions and extended a reinstatement offer. The employee rejected the offer on the grounds that he felt the position was beyond his ability to perform.

Shortly after the rejection the State filled the position in order to meet its employment needs. A few weeks later the employee obtained a report from his physician supporting his decision not to accept the offer. The employee then found a full-time job on his own but earned substantially less than he would have if the State's offer had been accepted, and filed a Petition for Review seeking ongoing benefits for partial to reflect the differential.

The ALJ found that the State had made a bona fide offer of reasonable employment which had been rejected without good and reasonable cause. The ALJ was not persuaded by the opinion of the physician to the effect that the position was beyond the employee's capacity to perform. The ALJ further found that the period of refusal was not ended by either the retraction of the job offer or by the employee's having obtained a position with a new employer. Accordingly, the Petition for Review was denied and no ongoing benefits were awarded.

On appeal the Appellate Division accepted all of the factual findings made by the ALJ and agreed that the State had met its burden of proof in showing that the employee had refused a genuine offer of reasonable employment. With regard to the duration of the refusal, the Division found that the filling of the offered position did not establish that the State was no longer willing or able to accommodate the employee. In addition, the Division found that obtaining new employment with a different employer did not end the period of refusal, and that such a result would be contrary to legislative intent by allowing an individual to "avoid forfeiture by obtaining underemployment at a substantially reduced wage". The employee's appeal was denied, and the decision of the ALJ was affirmed.

In summary, an ALJ may properly reject the opinion of a physician on the suitability of an offered position. Similarly, developments such as filling a position with another individual and an employee's obtaining new employment elsewhere do not mark the end of the period of forfeiture following rejection of an offer of reasonable employment. When the period of unjustified refusal has not ended, an employee is not entitled to receive ongoing benefits for any degree of incapacity.

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