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News

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.

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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.

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Norman Hanson & DeTroy Attorneys Receive Honors from Best Lawyers

Norman, Hanson & DeTroy is proud to announce that sixteen of its attorneys have been named to the 2018 edition of *The Best Lawyers in America*, the oldest and most respected peer review publication in the legal provision.

First published in 1983, *Best Lawyers* is based on an exhaustive annual peer-review survey comprising of nearly 4 million confidential evaluations by some of the top attorneys in the country. The *Best Lawyers* list appears regularly in Corporate Counsel Magazine, and is published in collaboration with *U. S. News & World Report*. The following attorneys were honored by Best Lawyers for their work and expertise in the listed practice areas:

Robert W. Bower, Jr. – 2018
Labor Law – Union
Worker's Compensation Law – Employers

Jonathan W. Brogan – 2018
Medical Malpractice Law – Defendants
Personal Injury Litigation – Defendants

Paul F. Driscoll – 2018
Litigation – Real Estate
Real Estate Law

John W. Geismar – 2018
Tax Law

David L. Herzer, Jr. – 2018
Insurance Law
Personal Injury Litigation – Defendants
Professional Malpractice Law – Defendants

Stephen Hessert – 2018
Worker's Compensation Law – Employers

Kelly M. Hoffman – 2018
Litigation – Labor and Employment
Professional Malpractice Law – Defendants

John H. King, Jr. – 2018
Worker's Compensation Law – Employers

Mark G. Lavoie – 2018
Medical Malpractice Law – Defendants
Personal Injury Litigation – Defendants

Thomas S. Marjerison – 2018
Personal Injury Litigation – Defendants

Stephen W. Moriarty – 2018

Worker's Compensation Law – Employers

Russell B. Pierce – 2018
Appellate Practice
Commercial Litigation
Ethics and Professional Responsibility Law
Product Liability Litigation – Defendants
Professional Malpractice Law – Defendants

James D. Poliquin – 2018
Appellate Practice
Bet-the-Company Litigation
Commercial Litigation
Insurance Law
Personal Injury Litigation – Defendants

Daniel P. Riley – 2018
Administrative/Regulatory Law
Government Relations Practice

Roderick R. Rovzar – 2018
Corporate Law
Real Estate Law

John R. Veilleux – 2018
Insurance Law
Personal Injury Litigation – Defendants

In addition, three attorneys have been designated by *Best Lawyers* as the "Lawyer of the Year" for 2018 for the greater Portland area. We congratulate the following attorneys for having achieved this impressive recognition.

James D. Poliquin – 2018 Appellate Practice

Jonathan W. Brogan – 2018 Personal Injury Litigation – Defendants

Stephen W. Moriarty – 2018 Workers' Compensation Law – Employers

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 "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).

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 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 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 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

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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.

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.
- 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.

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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:

- 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

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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."