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News

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.

WC Appellate Division Decision issued on May 9, 2017 – The Ambiguous Section 312 Opinion

The Appellate Division recently had an opportunity to comment upon the proper treatment of an opinion of a Section 312 examiner when that opinion is ambiguous. The issue arose in a somewhat unusual procedural context.

In *Levesque v. Daigle Oil Company*, Me. W.C.B. No. 17-21 (App. Div. 2017), the claimant was concurrently employed by Daigle Oil Company and Louis J. Paradis, Inc. when she sustained a traumatic occupational injury to her right knee in March 2011. She was working for Daigle at the time. Initially there was minimal lost time from work, but eventually the employee underwent an arthroscopy in 2013 and a total knee replacement in 2014. The employee filed Petitions for Award and Payment against Daigle, and Daigle in turn filed the same petitions against Paradis in the name of the employee alleging a gradual injury to the same knee occurring in 2012. The petitions generated the issue of apportionment, and all matters were consolidated for hearing and decision.

A Section 312 examiner was appointed and in a written report the physician stated that the post-2011 work for Paradis did not aggravate the pre-existing knee condition in a significant manner. However, in a deposition the physician suggested that post-2011 work at Paradis increased the employee's symptoms in a minor way and expressed the degree of contribution at a 20% level. He also testified that the extent of contribution could be classified as "significant". The ALJ found the overall opinion to be ambiguous and ruled that Daigle had not established the occurrence of a gradual injury for which Paradis was responsible.

The Appellate Division agreed that the Section 312 examiner had never explicitly found that the work for Paradis caused a gradual injury to the knee in 2012, and ruled that the ALJ was not compelled to find that there had been a new or separate injury. While recognizing the weight to be given to the conclusions of a Section 312 examiner, the Division held that where inconsistencies exist either within an examiner's report or between an examiner's report and deposition testimony an ALJ must "consider the larger context in which those statements are offered to construe the intent of the examining physician". The Division held that an ALJ is not required to adopt an examiner's opinions when they are unclear or susceptible of different interpretations. For related decisions, see *Thurlow v. Rite Aid*, Me. W.C.B. No. 16-23 (App. Div. 2016) and *Oriol v. Portland Housing Authority*, Me. W.C.B. No. 14-35 (App. Div. 2014).

Changes in expert witness discovery: M.R. Civ. P. 26(b)(4)(C) produces more efficient and effective collaboration

Most of us are accustomed to telling our experts to be careful because anything they put in writing can be discovered by the other side. This is because former versions of both the Federal and Maine Rules of Civil Procedure required the disclosure of "the data or other information considered by the witness in forming the opinions." Fed. R. Civ. P. 26(a)(2)(B) (2009); M.R. Civ. P. 26(b)(4)(A)(i) (2013). Courts interpreted this provision very broadly and it was generally accepted that anything in the expert's file was discoverable.

Accordingly, we have been very cautious with our communications and have picked up the phone or met with our expert in person to discuss anything of substance, instead of communicating in writing. (In reality, this practice did not truly protect the communication from disclosure, but it did make it more difficult to discover.) Limiting the exchange of information often compromised the quality of the expert's opinion or led to unwelcome surprises when the expert testified. Some cases required two experts – a consulting expert with whom the attorney engaged in open communications and a retained expert, whose opinion was designated for testimony once the attorney had developed a theory of the case through communications with the consulting expert.

I.Rule changes allow freer discussions.

In 2010, the federal Committee on Rules of Practice and Procedure formally recognized the gamesmanship and

inefficient expenditure of resources that the language of Rule 26 produced. Effective December 1, 2010, the Federal Rules provided explicit protection against the discovery of draft expert witness reports, "regardless of the form in which the draft is recorded." Fed. R. Civ. P. 26(b)(4)(B). Explicit protection was also provided against the discovery of communications between counsel and the retained expert, "regardless of the form of the communication," with three exceptions. Fed. R. Civ. P. 26(b)(4)(C). Communications relating to the expert's compensation; facts or data provided by the attorney and considered by the expert in forming her opinion; and assumptions provided by the attorney and relied on by the expert in forming her opinion were still discoverable. Fed. R. Civ. P. 26(b)(4)(C)(i)-(iii). Effective September 1, 2014, the Maine Civil Rules of Procedure were amended to adopt similar changes, with some important differences.

II.Differences between the federal rule and the Maine rule.

The Federal Rules of Civil Procedure require that the disclosure of any retained or specially employed expert be accompanied by a report prepared by the expert. Fed. R. Civ. P. 26(a)(2)(B). Maine's rules do not impose this requirement. Thus, while the federal rules protect against the discovery of "drafts of any report or disclosure required under Rule 26(a)(2)," *see* Fed. R. Civ. P. 26(b)(4)(B), the Maine rules protect against the discovery of "drafts of Rule 26(b)(4) disclosures ordered by the court and reports to the attorney." M.R. Civ. P. 26(b)(4)(C). "Reports to the attorney" is broader in meaning than the federal counterpart and arguably includes any communication from the expert with information or opinions for the attorney to consider. Thus, if M.R. Civ. P. 26(b)(4)(C) had existed at the time the Law Court decided *Boccaleri v. Maine Medical Center*, 534 A.2d 671 (Me. 1987), the letter from the defendant's pathology expert to the defendant's attorney outlining his observations and opinions concerning a biopsy slide, the report issued by the defendant's pathologist, and the applicable standard of may have been protected instead of produced.

A second difference between the federal rule and the Maine rule is that the federal rule characterizes drafts of reports and attorney-expert communications as work-product, protected by Fed. R. Civ. P. 26(b)(3)(A) and (B). Accordingly, the information is discoverable if it is "otherwise discoverable under Rule 26(b)(1)" and the party seeking the discovery "shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means." Fed. R. Civ. P. 26(b)(3)(A)(i) and (ii).

In contrast, M.R. Civ. P. 26(b)(4)(C) does not characterize the protected information as work-product, and it imposes a stricter standard for the discovery of the protected information. Pursuant to the rule, communications that do not meet one of the three exceptions can only be discovered "as provided in Rule 35(b)," which is the rule regarding the physician and mental examination of persons, or if the party seeking the discovery shows "exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means." Notably, this is the same standard that must be met to discover the facts known, or opinions held by, a non-testifying, or "consulting," expert. M.R. Civ. P. 26(b)(4)(B).

III.Developments in the interpretation of the new rule.

It will take years for Maine courts to develop case law on M.R. Civ. P. 26(b)(4)(C) in a volume that results in meaningful guidance. In the meantime, guidance from the federal courts is helpful, so long as the differences between the rules are recognized.

- **The term "considered" will still be given an expansive meaning.** In general, any facts or data that are provided by the attorney and received and reviewed by the expert must be disclosed. This broad definition of "considered" was in place before the amendment to Fed. R. Civ. P. 26 and remains in place currently. *Yeda Research and Development Co. v. Abbott GmbH& Co.*, 292 F.R.D. 97 (D.D.C. 2013) ("Because the word 'considered' is unchanged, cases interpreting its meaning remain valid."); *United States v. Dish Network*,

L.L.C., No. 09-3073, 2013 WL 5575864 (C.D. Ill. Oct. 9, 2013).

- **If there are any "factual ingredients" in the communication, it will not be protected**. According to the 2010 Advisory Comments to Fed. R. Civ. P. 26, "The intention is that 'facts or data' be interpreted broadly to require disclosure of any material considered by the expert, from whatever source, that contains factual ingredients." There is some case law interpreting the scope of the term "facts or data," but we can expect to see more. *See D.G. ex rel. G. v. Henry*, No. 08-74, 2011 WL 1344200 (N.D. Okla. Apr. 8, 2011) (notations or highlights do not constitute facts or data, statutes and policies provided to the expert constitute facts or data, and summaries that contain factual ingredients must be produced). Yet, if the expert and attorney collaborate to prepare a summary of the "facts and data," that work-product may be protected. *Davita Healthcare Partners, Inc. v. United States*, 128 Fed. Cl. 584, 591 (Ct. Fed. Cl. 2016) (holding that the expert's spreadsheets, graphs and analyses did not have to be produced simply because they contained "facts and data" – "These formulations, however, are interpretations of data that reflect counsel's mental impressions and result from the expert's and counsel's collaborative efforts to organize, marshal, and present data. This selective presentation of data is separate and distinct from the underlying facts and data themselves.").
- **Communications between the expert and individuals other than the attorney will not be protected**. *See Fialkowski v. Perry*, No. 11-5139, 2012 WL 2527020 (E.D. Pa. June 29, 2012) (ordering the production of spreadsheets and document analysis prepared by the Plaintiff from her QuickBooks records and tax returns); *In re Application of Republic of Ecuador,* 280 F.R.D. 506, 514–16 (N.D. Cal. 2012) (communications between non-attorney employees of corporation and its expert witness are not protected, nor are those between testifying and non-testifying experts). These holdings prioritize full disclosure over the protection of work-product. Documents and information that would be protected as work-product, such as documents prepared in anticipation by a non-attorney representative, lose that protection once provided to the expert.
- **Expert work-product, such as notes and calculations, *may* be protected.** In *Dongguk Univ. v. Yale Univ.*, No. 3:08-cv-00441, 2011 WL 1935865, *1 (D. Conn. May 19, 2011), the United States District Court of Connecticut concluded that an expert's notes did not constitute a draft of a report, nor were they intended to be communications between the expert and the attorney. Thus, they were not protected. The Ninth Circuit has also refused to provide blanket protection to an expert's work-product. In *Republic of Ecuador v. Mackay*, 742 F.3d 860 (9th Cir. 2014), the court concluded that the "driving purpose" of the 2010 amendments was to protect attorney opinion work product from discovery. *Id*. at 870. Accordingly, the rule "does not provide presumptive protection for all testifying expert materials as trial preparation materials." *Id*. at 871. *See also Republic of Ecuador v. Hinchee,* 741 F.3d 1185, 1195 (11th Cir. 2013).

On the other hand, the District of Colorado concluded that pages of calculations, described by the court as "working notes," were protected because Rule 26(b)(4)(B) protects against the disclosure of draft reports "regardless of the form in which the draft is recorded." *Etherton v. Owners Ins. Co.*, No. 10-cv-00892, 2011 WL 684592, *2 (D. Colo. Feb. 18, 2011); *see also Int'l Aloe Science Council, Inc. v. Fruit of the Earth, Inc.,* No. 11-2255, 2012 WL 1900536 (D. Md. May 23, 2012) (protecting notes that were created by the party's expert for the purpose of assisting the attorney prepare to depose the adversary's expert); *Davita Healthcare Partners, Inc. v. United States*, 128 Fed. Cl. 584, 591 (Ct. Fed. Cl. 2016) (protecting drafts of spreadsheets, graphs, and charts that were prepared for inclusion with draft expert reports); *United States v. Veolia Env't N. Am. Operations, Inc.*, No. 13–mc–03, 2014 WL 5511398 (D. Del. Oct. 31, 2014) (protecting emails between a testifying expert and counsel who were collaborating on the creation of a valuation report). As the *Davita* court explained, "documents reflecting [the expert's] preliminary analysis are work product whether viewed as a 'preliminary expert opinion' or as a communication from expert to counsel reflecting their joint effort to develop strategy." 128 Fed. Cl. at 591.

The fact that M.R. Civ. P. 26(b)(4)(C) protects against the disclosure of "reports to the attorney," regardless of whether the report to the attorney includes any attorney opinion work product, suggests that greater protection may

be afforded to "working notes" in Maine than in some of the federal cases cited above. The expert could, for instance, include all of his or her working notes in a report to counsel, theoretically invoking the protection of the rule. On the other hand, the advisory committee's notes suggest that the content of the documents might still be discoverable: "The facts observed, the information learned, and the opinions reached by the expert are not protected from discovery simply because they are shared with the attorney." M.R. Civ. P. 26 Advisory Note – June 2014. The circumstances under which expert work product is protected under M.R. Civ. P. 26(b)(4)(C) requires further clarification.

IV.Practical implications for communications with experts.

The goal of M.R. Civ. P. 26(b)(4)(C) is to enable freer communications between attorneys and experts, thereby reducing the costs of litigation and producing higher quality expert testimony. There is a concern, however, that placing limits on expert witness discovery will stifle effective cross-examination. The legitimacy of this concern will be revealed as Maine courts interpret and apply M.R. Civ. P. 26(b)(4)(C). In the meantime, litigants should employ the following practices in order to safeguard against waiving the protections afforded by the rule:

- Advise your expert that her notes may be discoverable but that the risk of production can be lessened by containing them within a report to counsel. If, for example, an expert wants to create a summary of the evidence, that should be done in a report format.
- When communicating with your expert, clearly separate the communications that contain facts and data from the communications that contain mental impressions or your theory of the case. If you send a letter to your expert enclosing medical records for review and also have a question you need your expert to answer, send your question in a separate letter.
- Discuss the different standards in M.R. Civ. P. 26(b)(4)(C) with your expert. Facts and data that have been provided by the attorney must be disclosed if they are "considered" by the expert, which is a very broad standard. Assumptions provided by the attorney need only be disclosed if they were "relied on." Your expert should be able to differentiate between those standards.
- Limit your expert's communications with anyone other than you.
- Send summaries of facts and data only if the underlying facts and data has been provided. You may be able to argue that the summary reflects your mental impressions and is protected by the rule. That argument will not succeed, however, if the facts and data have not been provided outside of your summary.

In closing, the new rule should allow parties to focus on the expert's opinions and the support for those opinions. If the expert's opinions are supported by the facts and the standards of his or her profession, then the expert's opinion should carry weight, regardless of whether the retaining attorney's theory of the case was presented to the expert along the way.

Medical Information Privacy in the Workplace

By: Katlyn M. Davidson, Esq.

Whether and to what extent insurers and employers can share medical information regarding an employee's workers' compensation claim is a question which the Maine Workers' Compensation Act provides little guidance. Sharing such medical information can be important both for insurers to keep their insureds informed of the status of

a claim and for employers to be aware of an employee's restrictions to help facilitate a successful return to work. However, there are other employment related laws that prohibit or significantly restrict the sharing of medical information in the workplace that insurers and employers should keep in mind when it comes to managing workers' compensation claims.

The starting place for any discussion regarding medical information privacy is the Health Insurance Portability and Accountability Act of 1996, commonly referred to as "HIPAA." Enacted in 1996, the primary purpose of HIPAA is to protect the privacy and security of individuals' protected health information by imposing various restrictions on when and how such health information can be disclosed. Protected health information is generally information in any format (oral, written, or electronic) that relates to a medical condition, treatment or payment for health care. HIPAA applies to covered entities, which are generally identified as health care providers, health plans and healthcare clearing houses. HIPAA also applies to business associates of a covered entity. An entity is considered a "business associate" if a covered entity discloses protected health information to that entity so that the entity can perform or assist in certain services on behalf of the covered entity. Examples of such services include but are not limited to, claims processing and administration, billing or benefit management, data analysis, data storage, etc.

Generally HIPAA does not apply to an employer unless the employer is considered to be a covered entity or a business associate. Employers, however, are still likely impacted by the requirements of HIPAA in so far as they need to obtain necessary medical information about an employee from a covered entity.

With respect to workers' compensation, HIPAA specifically excludes workers' compensation from the usual requirements of HIPAA. The corresponding federal regulations provide that covered entities may use or disclose protected health information in cases where the law requires such disclosures and the use or disclosure complies with and is limited to the relevant requirements of such law. 45 C.F.R. § 164.512(a)(1). The federal regulation goes on to specifically identify workers' compensation matters as an exclusion from HIPAA. Subsection 164.512(l) provides: "A covered entity may disclose protected health information as authorized by and to the extent necessary to comply with laws relating to workers' compensation or other similar programs, established by law, that provide benefits for work-related injuries or illness without regard to fault."

The Maine Workers' Compensation Act also provides that an authorization from an employee is not required for an employer to obtain medical information from health care providers "if the information pertains to treatment of an injury or disease that is claimed to be compensable under this Act." 39-A M.R.S.A. § 208(1). The Act also creates an affirmative obligation on health care providers to produce medical information on certain prescribed Board forms to an employer. For example, section 208(2)(A) provides that, for lost time claims, a healthcare provider must forward to the employer, within 5 business days of treatment, a diagnostic medical report that includes information about an employee's work capacity, likely duration of incapacity, return to work suitability and treatment required. Section 208(2)(B) further provides that a health care provider shall forward every 30 days a diagnostic medical report if ongoing treatment is provided. An employer also "may request, at any time, medical information concerning the condition of the employee for which compensation is sought. The health care provider shall respond within 10 business days from receipt of the request."

It would seem, therefore, that between the HIPAA exclusion for workers' compensation matters and the relevant provisions in the Maine Workers' Compensation Act an employer and insurer need not worry about any duties or obligations with respect to the medical information that is obtained through a workers' compensation claim. However, there are other significant employment laws to be aware of which restrict what an employer can do with this medical information.

The Americans with Disabilities Act ("ADA"), which generally prohibits discrimination against a qualified individual with a disability because of the disability and also creates a duty for employers to provide reasonable

accommodations, limits when an employer can inquire about a disability and who can be aware of medical information obtained from any such inquiry. With respect to its employees, the ADA provides that an employer may make disability related inquiries or request a medical exam only if the inquiry or request for a medical exam is "job-related and consistent with business necessity." 42 U.S.C. § 12112(d)(4)A). This requirement is considered by the EEOC to apply to all employees and not just employees with disabilities. An inquiry or exam is considered to be job related and consistent with business necessary when an employer has a reasonable belief, based on objective evidence, that: (1) an employee's ability to perform essential job functions will be impaired by a medical condition; or, (2) an employee will pose a direct threat due to a medical condition. A direct threat is defined as a "significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation." 29 C.F.R. § 1630.2(r).

When an employer has acquired medical information through a permitted disability related inquiry or medical exam, the ADA also imposes limits on an employer's ability to share such medical information. The employer must be sure to keep such information confidential on separate forms and in a separate file from an employee's general personnel file. 29 C.F.R. § 1630.14(c). Further, an employer is restricted as to who can be aware of such medical information. Supervisors and managers can know about an employee's necessary restrictions and necessary accommodations only. First aid and safety personnel may be informed when appropriate about a disability if the disability might require emergency treatment. *See* 42 U.S.C. §§ 12112(d)(3)(B)(i) and (ii).

In 2011, the U.S. District Court of Maine took on the issue of an alleged violation of medical privacy under the ADA. In *Blanco v. Bath Iron Works*, 802 F. Supp. 2d 214 (D. Me., 2011), the employee had failed to disclose a medical condition (ADHD) on his pre-employment medical questionnaire when he became employed. This did not come to light until later on after the employee had been working for the employer and had a job transfer. In the new position, the employee felt that the job aggravated his ADHD and he was struggling with job performance. The employee requested an accommodation and was sent to meet with the employer's in-house doctor. During this meeting, the doctor reviewed the employee's pre-employment medical questionnaire and discovered that the employee had not disclosed his ADHD condition at that time. The doctor disclosed this omission to the employer's Labor Relations Department and the employee was subsequently terminated. The employee challenged this disclosure, arguing that it violated the confidentiality provisions of the ADA. The presiding judge agreed, determining that the exceptions for sharing confidential medical information did not apply to this situation. Instead, the judge found that the purpose of the disclosure was to reveal the alleged lie by the employee and not to advise of necessary restrictions or accommodations.

Questions have been raised about how the ADA interacts with workers' compensation laws. The EEOC published enforcement guidance on this issue in 1996**.** Although this guidance is not considered to be law or binding legal precedent, the EEOC expressed its opinion that the ADA does not prohibit an employer or its agent from asking disability related questions or requesting medical exams. The EEOC provided that any such inquiries or exams must be consistent with state law and limited in scope to the occupational injury. Further, the EEOC cautioned that an employer should avoid excessive or "far-ranging" questions and medical exams.

The Maine Human Rights Act is another major body of law for insurers and employers to be aware of with regards to obtaining and retaining medical information about employees. The Maine Human Rights Act provides that it is unlawful for an employer, prior to employment, to elicit or attempt to elicit information directly or indirectly pertaining to physical or mental disability (among other protected classes). The Act further provides that it is unlawful discrimination for an employer to make or keep a record of physical or mental disability except when an employer requires a physical or mental exam prior to employment. In that case, a privileged record of the exam is allowed if made and kept in compliance with the Act. *See* 5 M.R.S.A. §§ 4572(1)(D)(1) and (2). The Maine Human Rights Act also requires employers to keep records regarding physical or mental disability confidential and

maintained on separate forms and in separate files. 5 M.R.S.A. § 4573(2).

Similar to the ADA, the Maine Human Rights Act's corresponding rules prohibit an employer from requiring a medical exam or from making inquiries about an individual's physical or mental disability or about the nature or severity of any disability. Chapter three of the Rules do provide some exceptions, however, which permit an employer to request a medical exam or make an inquiry of an employee if it is job-related and consistent with business necessity. Again, any information obtained from a permissible exam or inquiry must be kept confidential and maintained separately. The Rules also limit who within the employer can receive this medical information. Supervisors and managers may be informed about necessary restrictions on the work or duties of the employee and necessary accommodations. First aid and safety personnel may also be informed if the employee's disability might require emergency treatment.

Another major employment law to consider is the Family and Medical Leave Act ("FMLA"), which provides eligible employees with the right to unpaid, protected leave for specified family and medical reasons. When the leave is due to an employee's own health condition, an employer is quite restricted in the medical information that it can obtain. First, there is no exclusion under HIPAA for medical information obtained through administration of the FMLA. Generally, an employee provides certification of the medical condition on prescribed forms that are quite vague about the nature of the employee's condition. An employer can only follow up for further information when clarification or authentication of a certification is needed and after an employee has been provided with an opportunity to cure a defect in the certification. Even then, the federal regulations provide that clarification or authentication can only be requested by a healthcare provider, human resources professional, leave administrator or management official. *See* 29 C.F.R. § 825.307(a). The same regulation provides that "under no circumstances" may a supervisor contact the employee's healthcare provider.

The FMLA does, however, contemplate an employee taking leave under the FMLA for a workers' compensation injury. In that case, the federal regulations provide that if FMLA leave runs concurrent with a workers' compensation absence and the provisions of the workers' compensation statute permit an employer to request additional medical information from the employee's workers' compensation health provider, then the FMLA does not prevent an employer from following the workers' compensation provisions. 29 C.F.R. § 825.306(c). Similar to the ADA and the MHRA, the FMLA also imposes confidentiality and recordkeeping requirements for medical information.

Finally, the Genetic Information and Nondiscrimination Act of 2008, 42 U.S.C. § 2000ff *et seq.*, prohibits employers from using genetic information to make employment decisions. The Act also prohibits employers from intentionally acquiring genetic information and any genetic information that the Employer does possess must be kept confidential. Further, the scope of what is considered to be genetic information is quite broad and includes genetic tests of the individual and family members and family medical history.

In sum, while both HIPAA and the Maine Workers' Compensation Act do not really restrict an employer or insurer's ability to obtain medical information when it relates to a workers' compensation claim, employers and insurers should still remain cognizant of other area of law that do restrict an employer's ability to obtain and share medical information. While it is certainly desirable to keep the insured informed of the latest medical information regarding a workers' compensation claimant, it is important to always consider who is on the receiving end of that email correspondence or who is participating in the conference call or team meeting in order to ensure that confidential medical information is not being shared with those who are restricted from access to such information.

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Reptile II: It Depends

By Jonathan W. Brogan, Esq.

As those of you who read my earlier article regarding reptile theory and its pervasive use by the plaintiff's bar understand that this theory, though not scientifically valid, is dangerous to defendants in cases involving safety and reasonable care. Cases that involve medical malpractice, trucking and/or auto accidents, and products liability matters can be open to "reptiling" and its powerful psychological message.

As has become clear as more and more plaintiff attorneys employ reptile theory, it is most effective in discovery in destroying legitimate liability defenses to complicated issues of liability and safety. Reptile theory is a psychologically specific tactic employed to get a witness to admit to general safety theories and then tie that witness down to more and more precise safety theories until they are so flummoxed that they admit that the specific result in your case was the result of a failure to follow eminently reasonable safety rules and that the claimed damages could have been easily prevented by simply following a more prudent and safe course.

Reptile theory consists of the plaintiff's counsel presenting the defendant witness a series of general safety questions to which almost any person would agree. For instance, "any person who is driving a motor vehicle beyond the posted speed limit puts other drivers on the road in danger?" Or, "it would be wrong to needlessly endanger someone, correct?" "Everyone must try to avoid increasing dangers for others, right?" From these general questions, a witness is then tricked into placing themselves, and maybe the company they represent, into absolute inflexible stances that admit the actual circumstances of the case and negate the witness' judgment.

The plaintiff's attorney goes from "safety is your top priority, right?" to "if you see (a), (b) and (c), the safest thing to do would be (x), correct?" And "if you didn't do (x) then someone will be in danger, right?" As many have seen, these reptile questions can present unsuspecting defendants, or safety managers, with insoluble psychological decisions.

Most people want to be agreeable, even in testifying at deposition. They want the opposite side to like them and to, hopefully, ask them less difficult questions as a result of liking them. So, when presented with general safety questions like "you have a duty to put safety first?" or "safety is your first priority, right?" they want to agree because what reasonable person wouldn't agree. But, a simple way of dealing with these broad general questions is to understand where they are leading. The plaintiff's attorney is trying to lead the witness to more specific safety questions about the unique circumstances in the ongoing case. Once the broad base is established, then the safety principle is drilled down to the actual claim being made. It is ingenious, and insidious.

There are a variety of fascinating and intricate psychological factors at work in reptile theory. Numerous psychologists have studied reptile theory and its use of psychology to get agreement to things that witnesses know not to be as simple as they are being presented. They key in managing the reptile inquiry is to respond to it at each level of questioning. When the general safety questions start, the answers must also be general, not specific. A witness must be prepared that he does not have to agree with everything that the plaintiff's attorney says even if it sounds perfectly reasonable. When presented with a general safety agreement such as safety is priority number one, the witness must respond by questioning the question and asking such questions as safety in what regard or blunting the request by simply saying safety is important but there are a variety of issues in each situation that may go into an issue of safety. Or simply "In general, yes, safety is an important priority."

Once the general safety questions are parried and answered correctly, then the more specific questions can be dealt with head on. Many times the plaintiff's attorney will go from these general safety questions to a specific safety question and ask whether, in every situation, one must do something in order to be "safe." The response to that

question necessarily has to be “it depends.” Because in almost every situation it does depend on specific circumstances, the whole picture and the complete safety situation that the person is involved. For instance if a person is accused of speeding but they are exceeding the speed limit by some small amount, they are not necessarily responsible for an accident where someone cuts in front of them while they have the right of way. Certainly it would have been better had the person been driving at the speed limit, for the defense of the case, but the actual accident was caused by the other driver who failed to yield the right of way and pulled out in front of a visible vehicle. The plaintiff’s attorney wants to go from the general safety rule that speeding is unsafe to the specific issue of the person speeding being a significant contributing cause to the accident, even though what really caused the accident was the other driver’s inattention and failure to follow the rules of the road. A driver who is entering into a roadway without the right of way must yield to oncoming traffic, whether it is speeding or not.

Traditionally witnesses have been reminded that at deposition “answer the question and don’t argue with the other attorney.” Reptile practitioners know this and exploit those instructions. A witness should be instructed to listen to the question and answer what is asked but if the answer is “it depends,” or the question itself has a premise that is false, the witness must push back against the reptile plaintiff’s attorney’s simple misdirection.

Understanding “reptile” questions, and proper responses, is difficult. First, witnesses have to be aware of reptile theory and how it is used. We have several articles regarding reptile theory, and we use those to help prepare witnesses. Next, once the witness understands what might be coming towards them, the specific questions that might be asked in a deposition need to be rehearsed with the witness and the witness needs to be helped to avoid falling in the traps of general to specific safety absolutes. Additionally witnesses have to be warned and told that they are not there to agree, they are there simply to provide truthful and accurate testimony to factual questions. Questions that present large safety philosophies are always leading to questions regarding the safety practices in the case at hand. Telling the plaintiff’s attorney he is incorrect or that the answer to his question depends on the situation, immediately disengages the reptile theory. It is clear that in depositions where reptile theory has been disengaged through honest answers and a good understanding of the actual facts, not the facts invented by the other side, it is ineffective.

Reptile theory was designed to maximize settlements. Traditional witness preparation, where the witness is instructed to “answer the question” and not engage with the other attorney, simply plays into reptile theory and its insidious psychological trap.

Witnesses must be familiar with reptile theory, how it is presented, and when the trap is being laid. Once aware that there is a trap, then one will be able to avoid it. The best reptile defense is to simply point out that each situation is different and “it depends.”

Elizabeth M. Brogan Returns to Firm as “Of Counsel”

We are pleased to announce that Elizabeth Brogan has rejoined the firm, “of counsel,” and will be working with the Governmental Relations and Workers’ Compensation practice groups, representing the interests of the employer and self-insured employer community before the Maine Legislature. Elizabeth initially joined the firm in 1987, fresh from a year as a visiting student at the University of Maine Law School and from Boston College Law School, where she graduated cum laude. She also graduated from McGill University, in Montreal, with honors. Elizabeth primarily worked in the Workers’ Compensation group, becoming one of our first female partners in 1995.

Since leaving the firm in 1997, Ms. Brogan served as longtime editor of her town's community newspaper, as a literacy volunteer at Portland Adult Education, and as a claims consultant to the Workers' Compensation Supplemental Benefit Fund, while raising two children with her husband, and fellow Norman, Hanson & DeTroy attorney, Jonathan Brogan. Most recently, in June, 2016, Ms. Brogan became Executive Director of both the Workers' Compensation Coordinating Council and Maine Council of Self-Insurers, as well as Administrator of the Maine Self-Insurance Guarantee Association. She is currently serving as a member of the Maine Workers' Compensation Board Rules Taskforce.

Elizabeth resides in Cape Elizabeth with her husband, two miniature poodles and the occasionally visiting son or daughter.

NHD ranked in the 2017 Edition of U.S. News – Best Lawyers

Norman, Hanson & DeTroy is honored to be ranked in the 2017 edition of U.S. News – Best Lawyers. The Firm has been recognized for the following practice areas:

Metropolitan Tier 1

Portland-ME

- Appellate Practice
- Arbitration
- Commercial Litigation
- Criminal Defense: Non-White-Collar
- Criminal Defense: White-Collar
- Insurance Law
- Labor Law – Union
- Litigation – Real Estate
- Mediation
- Medical Malpractice Law – Defendants
- Personal Injury Litigation – Defendants
- Personal Injury Litigation – Plaintiffs
- Professional Malpractice Law – Defendants
- Workers' Compensation Law – Employers

Metropolitan Tier 2

Augusta-ME

- Tax Law

Portland-ME

- Administrative / Regulatory Law

- Government Relations Practice
- Product Liability Litigation – Defendants
- Real Estate Law

Metropolitan Tier 3

Portland-ME

- Corporate Law

Matthew Mehalic Awarded Professional Insurance Designation

Matthew Mehalic has been awarded the professional insurance designation Chartered Property Casualty Underwriter (CPCU®) by The Institutes.

This announcement was made by Peter L. Miller, CPCU, president and chief executive officer. The Institutes are an educational organization that confers the CPCU designation on persons who complete eight rigorous courses and examinations and meet its ethics and experience requirements. All CPCUs are required to maintain and to improve their professional knowledge, skills and competences through their commitment to The Institutes' CPCU Code of Professional Conduct.

Matthew is a member attorney at Norman, Hanson & DeTroy, LLC, and focuses his practice on insurance related matters, including coverage analysis, first-party claim analysis, and civil litigation defense. He also works with state agencies on behalf of insurers. Matthew began his pursuit of the CPCU designation approximately two years ago to increase his knowledge of the insurance industry and better serve his clients. His achievement of the CPCU designation at this stage of his career illustrates his dedication to his profession and his desire to serve his clients to the best of his ability. Matthew is now the only practicing insurance defense attorney in the State of Maine with a CPCU designation. Norman, Hanson & DeTroy congratulates Matthew on this achievement.

Pitfalls in Using Nonprofits as a Return to Work Option

By Lindsey M. Sands

A key method to reduce exposure on any claim following a work-related injury is to be able to provide the injured employee with accommodated work. This option, when feasible, benefits all involved. It allows employers to limit indemnity costs associated with any injury while getting necessary work done. It also provides earnings to employees all while assisting in faster recoveries with less risk of deconditioning and psychological setbacks which are common for employees who are out of work indefinitely. However, often an employer does not have the ability to bring back a worker to perform necessary work within the employer's organization. For such cases, a crop of third party services have emerged which provides "transitional employment programs" in which employees are placed in

either jobs which are not open to the general public or volunteer programs. In both cases, the employer pays the employee to simply keep them acquainted with work experience and in touch with the daily work routine.

These services can still benefit both employers and employees. However, there are risks involved in using such services in the context of litigation as a means to limit an employee's entitlement to workers' compensation benefits. The potential risk was recently highlighted by a case before the Appellate Division, Sylvester v. Marco Petroleum Industries, App. Div. Dec. No. 16-16. Mr. Sylvester was receiving total incapacity benefits per Decree when the employer offered to pay the employee $7.50 per hour to volunteer at Threads of Hope, a non-profit organization under the auspices of Catholic Charities of Maine. Mr. Sylvester accepted this offer and began to volunteer approximately six hours per week. The employer then filed a Petition for Review and Reduce Benefits pursuant to §205(9)(B)(2). After filing the Petition, the Employer reduced benefits based on receipt of the wages the employee was paid for volunteering at the non-profit. Mr. Sylvester then filed a Petition for Penalties with the Abuse Investigation Unit ("AIU") contesting the reduction of benefits and arguing that his income did not represent genuine wages. The employee specifically requested imposition of a fine in the amount of $200 per day pursuant to 39-A M.R.S.A. §324(2) for each day the employer/insurer was not paying him benefits reflecting total incapacity as set forth under the Decree.

The employee requested that the AIU Hearing Officer "take some testimony on this case or, based upon the written submissions, conclude that this is not a real job at all." According to Board Rules, the AIU will not allow testimony on a penalty proceeding absent "extraordinary circumstances." Citing this rule, the AIU Hearing Officer decided the case based upon written submissions and declined to impose a fine under §324(2). He found that the employer's unilateral reduction was proper "based on his earnings at Threads of Hope." The AIU Hearing Officer subsequently declined to issue further findings and the appeal to the Appellate Division followed. The Appellate Division vacated the underlying decision and remanded the matter back to the AIU for other evidentiary hearing, or an order staying the proceedings, until the Administrative Law Judge had decided the employer's pending Petition for Review.

As the Appellate Division pounced on a procedural error of the AIU Hearing Officer only, the case does not give guidance as to whether the employer's reduction of benefits based on Mr. Sylvester's "earnings" was appropriate or not. This case should, however, serve as a reminder to employers as to the risks and potential for litigation when using nonprofit providers as de facto return to work options. Litigation is ripe if the return to work offer is merely a sham with no genuine work being performed.

The Law Court further limited the use of these transitional work assignments in the case of Avramovic v. RC Moore Transportation, 2008 ME 140. In Avramovic, an employer used a vendor to basically create a job for the injured worker. When the injured worker refused the job, the employer argued in favor of forfeiture of benefits for "refusal of a bona fide offer of reasonable employment." The Hearing Officer (now referred to as an Administrative Law Judge) found that forfeiture was not appropriate as the record included "very little evidence offered" about the job or what the employee would be doing. He further found that the employer did not prove that "the position offered is one that is actually available in the competitive labor market." An appeal followed and the Law Court upheld this finding. Avramovic establishes that created jobs and/or assignments which provide no benefit to the employer will not be considered the equivalent of real work for purposes of the forfeiture provision under 39-A MRSA §214(1)(A).

This does not mean that any such program should be viewed as useless. As noted above, there are certainly benefits both mental and physical to providing these accommodated work options. However, the employee's participation (or lack thereof) should not be used as the sole basis for pushing litigation. Moreover, such programs should be considered only when there is no viable return to profitable work with the employer.

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Eyewitnesses Seldom Are

By Jonathan W. Brogan, Esq.

At trial no evidence is more compelling than that of an eyewitness. A person who was at the scene watching the events, hearing the cries of the injured and the crunching of metal, helping victims, guiding rescue worker is powerful and usually very convincing before any jury. Any experienced trial lawyer knows a credible and convincing eyewitness can establish or destroy a case.

Recently, I represented a client who was involved in an automobile accident on a major thoroughfare between Maine and New Hampshire. At the time he was traveling southbound from Wells, Maine, returning to his home in New Hampshire. Traveling in the opposite direction was a 103 year old gentleman who had just left his daughter's home in southern York County and was traveling northbound towards his home in Sanford, Maine. In front of him was a vehicle that was trying to make a left-hand turn. The older gentleman was driving a 4-door sedan. My client was driving a 4-door pickup. The older gentleman rear ended the woman making a left-hand turn causing a chain reaction accident which ended up involving, finally, four vehicles.

There were three independent eyewitnesses on the side of the road eating a piece of pizza at the convenience store that the turning woman was trying to enter. Unfortunately the older gentleman died as a result of the accident without making a statement about which way he was traveling. However, the testimony of my client was taken and he and his front seat passenger stated, truthfully, that they were traveling southbound. The family of the older gentleman testified that he had immediately left their home just before the accident and that his trip, if he was traveling as he should have been, could only have taken him northbound. The eyewitnesses testified that, in fact, all the vehicles were traveling in opposite directions to where they should have been.

At the deposition of the main eyewitness, a motorcyclist who was eating a piece of pizza at the side of the road, he was completely convinced that the truck driven by my client was traveling northbound. Despite being presented with undeniable evidence that he was incorrect, his memory was firm and his testimony was, in his mind, unshakable. Unfortunately, this is not an unusual event. Recently in a trial that I was defending, an eyewitness testified that the ambulance driven by my client was traveling without siren or emergency lights. At the trial, we presented the testimony of the driver, two EMTs, and the patient in the ambulance involved in the accident. All testified that the lights were activated and the siren was working. The "eyewitness" stuck to her story despite conclusive proof that she was incorrect.

Justice Felix Frankfurter once said, "Identification testimony, even when uncontradicted, is proverbially untrustworthy." The criminal courts have long dealt with this issue and in fact the United States Supreme Court requires trial judges to assess the reliability of any eyewitness identification by applying a five factor test. Criminal defendants have been allowed to call expert witnesses to educate jurors on the scientifically proven perceptional difficulties of humans, especially under extreme stress.

Despite the known, and proven, fact that eyewitness testimony is intrinsically unreliable, most people, especially jurors, rely on eyewitness testimony at trial. The lawyer who is presenting that eyewitness testimony feels much more confident than the person having to cross examine that testimony even when it is patently unreliable. A famous jurist once wrote:

> The basic findings are: accuracy of recollection decreases at a geometric rather than an arithmetic rate (so the passage of time has a highly distorting effect on recollection); accuracy of recollection is not highly correlated with the recollector's confidence; and memory is highly susceptible – people are

> easily reminded of events that never happened, and having been 'reminded' may thereafter hold the false recollection as tenaciously as they hold the true one.

All of us are familiar with the difficulties that Brian Williams encountered in 2015 when talking about his "memory" problems. Though it made Mr. Williams the source of much derision, his same testimony, presented at trial, without refutation, would have been powerful and dispositive.

Scientifically, memory is a three stage process. First, there is perception. Perception, especially perception that takes place for a short time in an unfamiliar location in a moment of great stress, is highly suspect.

Once a perception is formed, every person then retains that perception in their memory. Unlike a photograph or a recording, a person's memory is not fixed at the time of the perception. In fact, memory is a malleable process subject to subsequent information and misinformation. In other words, a person who has a memory and begins to retain it, may have that memory changed by subsequent events, including interviews and suggestions. It has been shown through numerous tests that scientists can introduce misinformation to their subjects, destroying their memories, and creating, even in the strongest minded person, erroneous memories.

Time is also the enemy of eyewitness testimony. The further from the actual event, the less likely the person who perceived it will remember it accurately. However, anyone experienced with the trial process understands that people cling to their memories.

Permanent memories, which have been formed for years, are much more susceptible to memory illusions than recent memories. Memory illusions are the result of a human being's need to make sense of events. For instance, in the automobile accident case with the two vehicles traveling in opposite directions, the motorcyclist eyewitness was very influenced by the fact that the driver of the sedan that struck the turning vehicle was very elderly. It was clear he was trying to protect that gentleman and make his memory fit his belief that the older gentleman could not have caused the accident. The same was true with the ambulance case in which the eyewitness, who worked at a local bus station, saw emergency vehicles traveling through this very busy intersection near the hospital on many occasions and believed they did so without due regard for other vehicles. She also believed that this ambulance, which because of the grave nature of the condition the patient within the ambulance, was ordered to leave the scene of the accident and go to the hospital, had obviously not been operating as it should have under the law. Therefore, at many trials we are confronted with witnesses who testify, honestly, as to what they thought happened even though it didn't.

Finally, the third stage of memory is retrieval. Each time a person is asked to remember an event, that event is retrieved and organized based upon the present situation of the eyewitness. If the eyewitness has to reconstruct the memory each and every time, the possibility of distortion is huge. Needless to say the same memory issues that can confront an eyewitness also confront jurors when they are evaluating the testimony of witnesses who are testifying at trial. The underlying biases and prejudices of jurors are meant to be discovered during voir dire, but jurors tend to believe fact witnesses who testify to what they saw, heard or felt in compelling detail even if that testimony has been shown to be incredible or lacking in truth.

Hundreds of criminal defendants have been convicted of crimes based on eyewitness testimony. It is only later that DNA testing shows that that eyewitness testimony was completely unreliable. In those situations, corroborating evidence is needed to break the jury from the belief that eyewitness testimony is infallible and must be believed at all times.

The best response to any eyewitness testimony that is irrational is to establish the basic underlying facts through

corroboration. It is fascinating that even with the actual facts being established through corroboration that witnesses and their attorneys will still cling to the belief that a jury will reject the facts and accept the perception of an eyewitness, however tainted. More than once a trial has ended with the lawyer who had the better case finding that the jury did not believe his client because they believed the disputed and disproved eyewitness testimony. This is especially true in very emotional cases such as those involving the death of a highly susceptible victim (a child or an older person), a person claiming abuse at the hands of another or one claiming discrimination. It is important to remember that those kinds of highly stressful and difficult cases create in jurors the belief that they may have to "stand up" for the victim and therefore believe what they want to believe to do so.

In especially difficult eyewitness cases, behavioral and psychological experts can be employed to explain to jurors that humans are very prone to misperception of stressful events and that they overwrite their recollections of events with misinformation and are not "lying" when presenting these perceptions at trial. Obviously if a juror can be convinced by corroborating evidence and expert testimony that a sincere eyewitness is "sincerely" incorrect in their perception then that testimony is nullified.

W.C. Field famously said "there's a sucker born every minute". Someone once observed it is important to "tell them what they want and then give them what you tell them." In a trial situation, credibility is always crucial. An eyewitness, who will come into court, raise his or her hand, and relate what they claim they saw, is always difficult to refute. However, eyewitness testimony is highly unreliable and if it is the centerpiece of the opposition's argument, it must be refuted through corroborating evidence and, possibly, expert testimony regarding the unreliability of a person's memory. Though many don't want to believe it, most have had a Brian Williams moment. Nothing is more embarrassing then for someone's "recollection" to be pointed out to be wholly or partially false. Luckily most of us don't have network news shows and dozens of reporters recording our every move. However, reminding a juror of "Brian Williams moments" as well as the frailty of their own memory (how many of us have forgotten where are glasses are when they are still right on top of our head?) can be highly effective in helping jurors recognize that people make up stories for any number of reasons.

The criminal courts have recognized this problem and have instructions to deal with eyewitness testimony. In civil cases, however, the law still assumes that jurors and judges can tell fact from fiction. As we all know, that is not correct. Jurors need to be told, either through other testimony, expert testimony, and in instructions from the judge that their daily experiences may not be the best preparation to evaluate the truth of eyewitness or memory based testimony and that the human memory is open to error at each of three stages or memory. Despite the jurors' belief, eyewitness testimony is often the worst kind of testimony, not the best.