INBRIEF

Current Developments in Maine Law

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Workers' Compensation: The Finality of PI Determinations

STEPHEN W. MORIARTY

By: Stephen W. Moriarty, Esq.

In cases in which injured workers are partially incapacitated, we are all aware of the fact that the duration of entitlement to benefits for partial will depend upon the level of whole person permanent impairment resulting from the injury. When the level of PI falls below the applicable threshold, entitlement is capped at the current level of 520 weeks.

However, if the level of PI exceeds the threshold, there is no durational limit and benefits can continue indefinitely. Unless the parties agree to the level of PI, the Board has full jurisdiction to establish the extent of PI through the customary dispute resolution process. However, as in all workers' compensation cases, an individual's medical circumstances may change following a Board determination of PI, and in an extremely important decision the Law Court recently ruled on whether or not an established percentage of PI can be subsequently modified. John King represented the employer before the Board and the Law Court.

The facts of *Bailey v. City of Lewiston,* 2017 ME 160 (July 20, 2017) were highly unusual. The employee sustained a respiratory injury in 2001 and began to receive ongoing benefits for partial incapacity in 2004. In response to the filing of a Petition to Determine the Extent

John H. King, Jr.

of Permanent Impairment, the Board found in 2007 that the level of PI resulting from the injury was 32%, well above the threshold and entitling the employee to unlimited benefits for partial. The decision was based upon the findings of a Section 312 examiner.

In the years following the 2007 decree the employee's condition improved dramatically, such that the same Section 312 examiner eventually found that the level of PI had decreased to 0%. The employer filed a Petition for Review and another Petition to Determine the Extent of Permanent Impairment based upon a change in medical circumstances. The ALJ modified the level of PI to 0%, and granted the Petition for Review and ordered a termination of benefits for partial, as the employee by that time had exceeded the 520 week durational limit.

The employee appealed to the Appellate Division, which vacated the decision of the ALJ on the grounds that the 2007 PI determination was final and could not be revised. The Law Court accepted the case for review at the request of the employer.

The case raised very interesting issues relating to the doctrine of "res judicata" in the context of a workers' compensation proceeding. Briefly, res judicata dictates that a final determination of an issue between the same parties may not be overturned or modified at a later point. However, in workers' compensation cases medical situations constantly change. Individuals often get worse but sometimes, as in Mr. Bailey's case, can get better as well. This presents an interesting dilemma. Notwithstanding the overwhelming evidence of a major improvement in the employee's medical circumstances, in *Bailey* the Court followed the principle of res judicata and ruled that a standard change of circumstances analysis cannot be applied to a final decision establishing the level of PI.

The Court framed the legal dispute in the following terms:

> The central issue on appeal was whether the doctrine of res judicata prevents a party from seeking to change the permanent impairment level associated with an employee's work-related injury after that level has been established by a prior decree.

Noting that the Act does not permit the Board to reopen or amend a final decision (except in limited circumstances which did not apply to this case), the Court endorsed the finality of Board determinations and ruled that res judicata prevented an effort to modify a decree establishing PI. As the Court held:

> We conclude that the doctrine of res judicata bars relitigation of the permanent impairment level established for an employee's work-related injury and therefore affirm the Appellate Division's decision.

Accordingly, although the City of Lewiston was not successful in lowering the extent of PI to 0% and terminating its obligation to pay partial, the appeal generated an opinion written in such a broad fashion as to preclude employees in the future from attempting to increase the level of PI following a decree as well.

Until now, injured workers and their legal representatives have frequently sought to increase the level of post-decree PI to account for changes in conditions or other factors such as psychological impairment in order to boost the overall level of PI above the prevailing threshold. The broad language of *Bailey* should prevent such attempts in the future.

Recognizing the full impact of the *Bailey* opinion, both the employee and the Maine Building Trades (which initially filed a "Friend of the Court" brief in support of the employee) filed a 17-page Motion for Reconsideration urging the Court to revise its decision in such a manner so as to limit the holding to apply only to cases in which an employer seeks to decrease the level of PI, but not to cases in which an employee seeks to increase the level of PI. In support of their argument, the employee and the Maine Building Trades argued that in the past the Board had allowed employees to increase PI determinations based upon a demonstrated change in circumstances. In a terse Order dated August 23, 2017 the Court denied the Motion to Reconsider, and accordingly the decision of July 20, 2017 became final without modification.

We anticipate that going forward employees may well attempt to argue that *Bailey* does not apply to cases in which an increased level of PI is sought, on the grounds that the facts in Bailey only involved circumstances in which the degree of PI decreased. It is highly unlikely that this argument will succeed with the ALJs, in light of the clarity of the Court's language and its explicit rejection of the Motion to Reconsider.

Accordingly, at this point the state of the law may be summarized as follows. When the Board has determined the extent of PI resulting from an injury, by decree, that determination cannot be revised at a later date based upon a subsequent worsening or improvement of the employee's condition. The same rationale would apply if the parties had agreed to PI at mediation, as agreements reached at mediation are binding and a Record of Mediation has the full force and effect of a Board decree. The *Bailey* decision gives employers the assurance that once the level of PI has been established by decree, it may not be altered or amended to a higher figure at a later date.

" THE BAILEY DECISION GIVES EMPLOYERS THE ASSURANCE THAT ONCE THE LEVEL OF PI HAS BEEN ESTABLISHED BY DECREE, IT MAY NOT BE ALTERED OR AMENDED TO A HIGHER FIGURE AT A LATER DATE. "

Damages for Medical Expenses: Review of the Judicial Split on Admission of Medical Services Billed vs. Paid

JESSICA S. SMITH

By: Jessica S. Smith, Esq.

There has been a longstanding discussion in the Maine legal community surrounding the recoverability and, therefore, the admissibility, of medical expenses billed by a provider versus those that are actually paid by the patient, her insurer, or the government. The argument stems from the fact that third-party payers such as Medicare and private insurers pay less than the expenses reflected in medical bills, either by contract or law. Plaintiffs argue to exclude evidence of the lesser amount actually paid, while defendants argue for its admission. In the right case, the difference can add up to hundreds of thousands of dollars in medical expenses that the jury gets to see and award as damages.

The Law Court has yet to decide whether the amount billed or the lesser amount paid is admissible as evidence of the reasonable value of the medical services rendered to the patient. The Superior Court has addressed the issue, but little consensus has been reached, leading to a split amongst the Justices. This article addresses the debate, the legal doctrines involved, and the various approaches taken by the Superior Court Justices.

The Debate

The courts and parties often look to the *Maine Jury Instruction Manual* for guidance on what is recoverable. Prior to 2004, the *Manual's* jury instruction stated, "The reasonable value, *not exceeding actual cost to the plaintiff,* of examination and care by doctors and other medical personnel..." *Eastman v. Eastern Maine Medical Center,* 2003 WL 26559786 (Me.Super.), 2. This jury instruction appeared to decide the question in favor of the defense, at the time, by making the amount actually paid, and not the higher amount billed, recoverable. However, in approximately 2004, the Manual was amended and now states, "Medical expenses includes the reasonable value of medical services…shown by the evidence to have been reasonably required and actually used in treatment…" Alexander, *Maine Jury Instructions Manual* §7-108 (2017 ed). This version of the instruction removed the limit on recovery and left open the question of how one proves and recovers the reasonable value of medical services rendered to the plaintiff. Whether reasonable value is proven best by the amount medical providers billed for their services or the reduced amount paid by the patient or third parties and accepted by the providers remains the debate.

The Collateral Source Rule

The Collateral Source Rule commonly is cited in this debate about admissible and recoverable medical expenses. As the argument goes, if medical bills were paid by someone other than the plaintiff or were a gift to the plaintiff, the Rule prohibits the admission of evidence of the payment so that the jury does not limit the award of damages. *Hoitt v. Hall,* 661 A.2d 669, 673 (Me. 1995). This is based on the reasoning that the intent of awarding damages is to make the Plaintiff whole for her injury, and any benefit to the plaintiff from a third party should not also benefit the defendant. In addition, in many instances, third-party payers of medical expenses are entitled to reimbursement from damage awards, thereby preventing a windfall double recovery by the plaintiff.

On the other hand, the argument against recovering the amount billed for medical services, when a lesser amount was accepted by the provider, is that the Collateral Source Rule is not implicated. When a provider accepts a negotiated rate or a regulated rate

from a third-party payer, the plaintiff is never liable for the higher amount originally billed. The lesser amount paid is in full satisfaction of the amount due for the medical services provided. Since the plaintiff never incurs liability to pay the higher amount billed, the plaintiff does not suffer any loss related to the difference in payment and the Rule is never implicated. The Supreme Court of California best summarized this reasoning:

> Having never incurred the full bill, plaintiff could not recover it in damages for economic loss. For this reason alone, the collateral source rule would be inapplicable... The rule does not speak to losses or liabilities the plaintiff did not incur and would not otherwise be entitled to recover. Certainly, the collateral source rule should not extend so far as to permit recovery for sums neither the plaintiff nor any collateral source will ever be obligated to pay…

Howell v. Hamilton Meats & Provisions, Inc., 257 P.3d 1130 (Cal.2011), reh'g denied (Nov. 2, 2011).

Since the amount paid is admissible, it can be considered by the jury as evidence of the reasonable value of the medical services provided to the plaintiff. The jury never knows the identity of the payer, the amount billed, or that there was a difference between the amounts billed and paid, so the rationale for the Collateral Source Rule does not apply. The jury is only aware of the amount the provider was willing to accept as payment in full for its medical services. The jury ultimately weighs that evidence and determines what the reasonable value of the medical service is and awards damages.

> " THE BEST EVIDENCE OF THE REASONABLE VALUE OF THE MEDICAL SERVICES RENDERED IS THE AMOUNT THE PROVIDERS ACCEPT IN FINAL PAYMENT. "

The Maine Health Security Act

When it comes to medical malpractice claims, the Legislature has considered the windfall a plaintiff may receive when the amount of medical expenses actually paid is not admitted in evidence and used by the jury to award damages. The Maine Health Security Act provides for an adjustment of the plaintiff's recovery if a third-party collateral source exercises its right to subrogation in order to recoup the cost of the medical expenses it has paid within thirty days of receiving notice of the plaintiff's verdict. 24 M.R.S.A. § 2906(2). If a third-party payer seeks to recover the money it paid for medical bills on the plaintiff's behalf, then the court will not reduce the plaintiff's damage recovery. However, if the third-party payer does not seek to recover from the plaintiff's damages award, then the court will reduce the damages awarded by the amount that has been paid or that is payable by a collateral source. 24 M.R.S.A. § 2906(2).

The Act does not expressly address the admissibility of medical expenses billed or paid during trial. The statute only enables a judge to reduce damages for medical expenses awarded by a jury.

The Split in the Superior Court

There have been a handful of orders from the Superior Court Justices deciding the admissibility of medical expenses, typically in the context of motions *in limine.* There are three, sometimes conflicting, outcomes the Justices have reached: (1) to admit only the actual amount paid and accepted by the provider; (2) to admit only the amount billed by the provider; (3) and lastly, to admit both, the amount billed and the amount actually paid and accepted by the provider.

Admitting Evidence only of the Amount Paid is the Best Result

Damages awarded for the expense of medical services are "compensatory" damages. The purpose is to put the plaintiff in the position she would have been if she never were injured. *Wendward Corp. v. Group Designs,* Inc., 428 A.2d 57, 61-62, (Me. 1981). "While the measure of damages should avoid a windfall to either party, it should compensate the Plaintiff as precisely as possible for the loss without recourse to speculation and conjecture." *Cote Corp. v. Thom's Transport Co.,* Inc., 2000 WL 762076, * 3 (D. Me) (citing *Wendward Corp. v. Group Designs, Inc.,* 428 A.2d 57, 61-62, (Me. 1981). By awarding money for an expense the plaintiff (or a third party source) never incurred or paid, it would leave the plaintiff better off than if the accident had never happened. Damages for medical services should precisely compensate the plaintiff for medical services costs.

The best evidence of the reasonable value of the medical services rendered is the amount the providers accept in final payment. The amount billed is typically an unusually inflated value because providers are looking to recoup funds lost from defaulting patients or compensate for lesser government or insurance payments. Therefore, the amount billed is not reliable evidence of the reasonable value of a provider's medical services.

Courts outside of Maine have decided that the amount paid and accepted by the provider is proper evidence of the reasonable value of the medical expenses recoverable by a plaintiff. Most notable in *Hanif v. Housing Authority of Yolo County,* reasonable value was found to be a "term of limitation, not of aggrandizement" noting that compensatory damages should compensate the plaintiff for actual injuries sustained and no more. 200 Cal.App3d 635, 641 (Cal.Ct.App. 1988).

Conclusion

When and how the Law Court will rule on this issue is unpredictable. Until then, the outcome in Superior Court will depend on which Justice is sitting on the bench.

Workers' Compensation: Recent Legislative Developments

By: Elizabeth M. Brogan, Esq.

ELIZABETH M. BROGAN

The first session of the 128th Maine Legislature produced a higher than expected number of proposals in the area of, or potentially affecting, workers' compensation. Five bills were enacted, with an effective date of Nov. 1, unless otherwise noted. The enacted legislation and a baker's dozen of failed, or carried over, bills are summarized below.

Bills Enacted:

LD 984 An Act to Separate Licenses for Property and Casualty and Workers' Compensation Adjusters: This law makes a common-sense change to the existing insurance adjuster licensing requirements in Title 24-A. As of Jan. 1, 2018, prospective workers' compensation adjusters will no longer need to take a 77-question property and casualty exam that includes just a handful of comp-specific questions. A workers' compensation exam is in the works, which should provide a more meaningful licensing process, and elimination of a barrier to recruitment of new workers' compensation adjusters. No one currently licensed will have to retest and current licensing exemptions will not be disturbed.

LD 612 An Act to Improve Vocational Rehabilitation Under the Maine Workers' Compensation Act of 1992: Petitions for review will no longer be permitted while an employee is participating in a board-ordered rehabilitation plan, unless there are actual earnings or the employee has reached the durational limit of benefits. With early bipartisan support, and the support of Workers' Compensation Board Executive Director Paul Sighinolfi, this bill initially sought to replace the rebuttable presumption in section 217 of the Act with a conclusive presumption that work is not available to an employee who is participating in *any* vocational rehabilitation plan, board-ordered or voluntary, and would have required a return to the total rate during rehabilitation, regardless of circumstance.

The law as passed eliminates the presumption language in section 217, sub-§8 altogether, but prohibits reduction of benefits during participation in a board-ordered plan, except upon an employee's return to work or increase in pay, or based upon other actual earnings, or upon reaching the durational limit of benefits under section 213. There is no requirement that benefits be returned to the total rate if an employee has already been reduced to a partial rate, but benefits may not be reduced further except under the limited circumstances above.

LD 848 An Act to Support Law Enforcement Officers and First Responders Diagnosed with PTSD: This law affects the mental injury caused by mental stress portion of the Act (section 201 sub-§3), but pertains only to law enforcement officers, firefighters and emergency medical responders. It creates a rebuttable presumption, for that class of employees, that post-traumatic stress disorder arose out of and in the course of employment, when the disorder is diagnosed by a psychiatrist or licensed psychologist who also determines that the work stress was extraordinary and unusual and that the work stress, and not some other source of stress, was the predominant cause of the disorder.

The presumption may be rebutted by clear and convincing evidence to the contrary. The law has a five-year sunset provision and the Workers' Compensation Board, in coordination with the Maine Municipal Association and the State of Maine, will track the law's impact and provide a report to the Legislature prior to Jan. 1, 2022, which will be the start of the session prior to the Oct. 1, 2022 "sunset" repeal.

LD 592 An Act to Enable MEMIC to Better Serve Maine Employers by Eliminating the High-Risk Program: This law eliminates the high-risk division mandated for MEMIC by Title 24-A but no longer deemed necessary by the company. The high-risk division accounted for a very small portion of MEMIC's business and the elimination of the program will allow for more flexibility in the use of retrospective rating plans.

LD 313 An Act to Amend the Laws Governing Prior Employees of the Workers' Compensation Board: This law applies to advocates and advocate attorneys who terminate employment with the board. The prohibition, in section 153-A, sub-§3(C),

for appearing before the board to defend against a workers' compensation claim, is changed from two years to just one year and will now only apply to advocates who stayed with the State for less than four years.

Bills not enacted, but proposed:

Of the 13 other proposed bills which could have significantly impacted workers' compensation, only one was carried over to the next session. **LD 1030, An Act to Require Nondiscrimination Policies in Providing Health Care Services** is a sweeping bill, involving not just workers' compensation but also auto and health insurance. Pushed by naturopathic doctors, this bill, if enacted, could limit the ability of the Workers' Compensation Board to have a medical fee schedule and insurers to use utilization review and PPOs. An amendment to remove the workers' compensation portion of the bill did not get a final committee vote in the first session, but the bill has now been carried over to the next session when that is considered likely to happen.

The "concept draft" of a bill to promote universal health care, which included a proposal to eliminate the medical treatment component of workers' compensation, will result in a task force to study the issue. The Task Force on Health Care Coverage will be privately funded, with no General Fund appropriations, and is authorized for two years. Enough money has been raised, mostly from health care providers and health care organizations, to allow the task force to begin its work through the current fiscal year, with additional fundraising needed for continuation into the 2018-19 fiscal year. The task force will include two as-yet-unnamed representatives from the employer community.

A bill which would have made it easier for more practitioners to use telehealth, and therefore at least tangentially impacted workers' compensation, was vetoed by Governor LePage.

Several bills resurfaced after multiple prior attempts before the Legislature, including a "tone-to-tone" bill on its third go-round, which would have created a presumption of compensability when an injury is sustained by a first responder after being "toned," but before traveling on a public road to an emergency, and two bills which would have significantly impacted the system by encroaching on the exclusivity of the workers' compensation remedy. One such bill would have created a separate cause of action for employees injured by "abusive conduct" or as a result of an "abusive work environment." Another would have created a new remedy for gun owners deprived of the right to carry firearms into locations which could include their workplace.

There was a bill to create a conclusive presumption for firefighters with certain types of cancers and a quartet of bills seeking presumptions for corrections employees, all of which failed.

A bill to require property and casualty insurers to also provide workers' compensation coverage for any domestic workers failed, as did a bill which would have divided the workers' compensation rating system between large and small employers, without regard to actual loss experiences.

The second session is right around the corner!

Elizabeth Brogan is the Executive Director of the Workers' Compensation Coordinating Council and the Maine Council of Self-Insurers and is the Administrator of the Maine Self-Insurance Guarantee Association.

Recent Decisions From The Law Court

By: Matthew T. Mehalic, Esq., CPCU

MATTHEW T. MEHALIC

Dog Bite Is Not An "Auto Accident"

In *Kelley v. N.E. Ins. Co.*, 2017 ME 166 (July 25, 2017), the Law Court addressed whether a dog bite sustained by an individual was covered under an automobile liability policy. The dog never left the vehicle it had been transported in. The door to the vehicle the dog was in was opened by an unknown person. The vehicle was not running, the driver of the vehicle was not present, the driver was not the owner of the car, but the driver was the owner of the dog. Kelley, the victim, was next to the vehicle and was bitten by the dog. Kelley filed suit against the dog owner, Snyder. North East Ins. Co. denied a defense to its insured, Snyder. Kelley entered a stipulated judgment with Snyder and Kelley proceeded to file a reach-and-apply action pursuant to 24-A M.R.S.A. § 2904 against North East.

The Superior Court granted summary judgment to North East finding that Snyder was not an "insured" under the policy and the bodily injury sustained from the dog bite did not arise from an "auto accident".

On appeal, the Law Court affirmed the Superior Court's decision in favor of North East. The Law Court rejected Kelley's argument that an "auto accident" included a dog bite that occurred in or near a car because the bite arose out of the use of a vehicle. The Court found that "auto accident" meant "an unintended and unforeseen injurious occurrence involving an automobile." *Id.* at ¶ 7. "Auto accident" did not encompass a dog bite that occurred in or around a car with no causal connection between the injury and the automobile. Rather, the only connection between the auto and the dog bite was that the auto was where the dog was when the bite occurred. Therefore, the North East automobile liability coverage did not apply. Snyder did not have a homeowners policy.

In reaching this holding, the Law Court distinguished its decision in *Union Mutual Fire Ins. Co. v. Commercial Union Ins. Co.*, 521 A.2d 308 (Me. 1987). In that decision the Court answered two certified questions from the United States District Court for the District of Maine. One of those questions answered was whether bodily injury arising out of a gunshot injury sustained when another individual was removing a shotgun from the back of a motor vehicle arose from "the ownership, maintenance or use of any auto" such that coverage would be supplied under an automobile liability policy. The Court in *Union Mutual Fire Ins. Co.* answered the question in the affirmative. The Court in *Kelley* held that the *Union Mutual Fire Ins. Co.* Court did not answer the question of whether the gunshot injury resulted from an "auto accident." Therefore, *Union Mutual Fire Ins. Co.* was not controlling and judgment in favor of North East was affirmed. Based on the distinction made by the Law Court, one can only conclude that if the current Law Court was presented with a fact pattern similar to that in *Union Mutual Fire Ins. Co.* that it would conclude that an automobile liability policy is not triggered.

> " BECAUSE THE COURT FOUND THAT THE MURDER WAS NOT CAUSED BY AN "ACCIDENT" THE COURT DID NOT REACH THIS SECOND ARGUMENT. "

Murder Is Not An Accident

In *Allocca v. York Ins. Co.* of Maine, 2017 ME 186 (August 29, 2017), the Law Court held that no uninsured/underinsured motorist coverage was afforded for a wrongful death claim. James D. Poliquin, Esq. of Norman, Hanson & DeTroy, LLC, represented one of the prevailing insurers in this decision.

The claim was brought by the personal representative of an estate and the beneficiaries. The decedent was mistaken for another individual, chased down on the highway in his vehicle by the perpetrator in another vehicle, rammed, shot at, forced off the road, and eventually murdered by the perpetrator while the decedent was in his car. The Law Court determined that the actions of the perpetrator and the murder of the decedent were not an "accident" as used in the grant of coverage in the UM policies.

The Superior Court had previously ruled in favor of the insurers finding that uninsured/underinsured motorist coverage only applied to "reasonable and proper use" of an uninsured or hit-and-run vehicle. Because the perpetrator's use of his vehicle was not a proper use no coverage was afforded.

One of the policies provided,

> We will pay damages for bodily injury which an insured person is legally entitled to recover from the owner or operator of an uninsured motor vehicle. Injury must be *caused by accident* and arise out of the ownership, maintenance or use of an uninsured motor vehicle.

Another policy provided,

> We will pay compensatory damages which an "insured" is legally entitled to recover from the owner or operator of an "uninsured motor vehicle" because of "bodily injury":
>
> 1. Sustained by an "insured"; and
> 2. *Caused by an accident.*

The final policy provided,

> We will pay damages for bodily injury an insured is legally entitled to collect from the owner or driver of an uninsured motor vehicle. The bodily injury must be *caused by accident* arising out of the operation or ownership of the uninsured motor vehicle.

All of the policies required that in order for there to be coverage, the injury or other loss be caused by an accident. The Court concluded that the murder of the decedent was held to be "the result of the assailant's deliberate and purposeful conduct." As a result, the incident did not invoke the coverage provided by the potentially applicable uninsured/underinsured motorist coverage. The Court drew on its recent decision in *Kelley v. N.E. Ins. Co.*, (discussed above), and held that an accident needed to be viewed as an unexpected event. "That the insured himself may have been unsuspecting does not transform the intentional act – something as heinous as the murder of Asti [decedent] – into an accident." *Id.* at ¶ 17.

Another issue on appeal was whether the murder arose from the "use" of a motor vehicle. Because the Court found that the murder was not caused by an "accident" the Court did not reach this second argument.

Workers' Compensation: Appellate Division Decisions

By: Stephen W. Moriarty, Esq.

Expert Medical Evidence.

It has long been established that the party filing a petition bears the burden of proof on all essential elements of a claim. If an injured worker files a Petition for Award, that individual must establish that he or she sustained a personal injury arising out of and occurring in the course of employment. Medical causation is a frequently disputed issue in litigated cases, and an employee at all times bears the burden of establishing a causal relationship between the injury and the claimed incapacity.

The Appellate Division recently had an opportunity to comment upon the nature and quality of the evidence necessary to meet that burden. In *Wickett v. University of Maine System*, Me. W.C.B. No. 17-27 (App. Div. 2017), the employee fell down a set of icy stairs at work and developed low back and abdominal pain. She was eventually diagnosed with a retroperitoneal mass, or an accumulation of fluid in the abdominal area. The employee filed both a Petition for Award and a Petition for Payment seeking payment for treatment rendered on account of the retroperitoneal mass, including surgery, as well as for the related incapacity.

During litigation before the presiding ALJ, the employee offered a report from the treating physician in which he stated that "I can only speculate" that a causal relationship existed between the injury and the development of the mass, and that the temporal relationship between the injury and the diagnosis "certainly make this a likely possibility." The ALJ found that the employee had met her burden of proof on the causation issue, and granted the pending petitions.

The employer appealed and the Division concisely summarized the key issue as follows:

> Except in cases where "causation is clear and obvious to a reasonable [person] who had no medical training", an employee must rely on the opinion of a qualified medical expert to meet his or her burden of proof on the issue of medical causation.

While recognizing that "slender evidence" may be sufficient, the Division cautioned that the supporting evidence cannot be mere speculation, surmise, or conjecture. Noting that the employee's physician expressed causation in terms of a "possibility", coupled with an acknowledgement that he could only speculate on a causal relationship, the Division found that the employee had not sustained her burden of proof.

With regard to the retroperitoneal mass, the Division commented as follows:

> The issue of medical causation in her case is not so straightforward that it is clear and obvious to someone with no medical training For that reason, it was incumbent upon Ms. Wickett to present competent medical evidence that demonstrated causation by at least a preponderance of the evidence. She failed to do so.

Describing the employee's evidence on causation as "speculative and inconclusive", the Division vacated the decision of the ALJ with respect to the cost of treatment for the retroperitoneal mass and also with regard to the award of disability benefits associated with that condition. The protection of the Act was awarded for the occurrence of the incident.

To summarize, a causal relationship between an injury and a disability condition must be established on a more likely than not basis in order to satisfy the burden.

PI and Burden of Production.

The Law Court held several years ago that whenever either party files a Petition to Determine Permanent Impairment the employer bears the burden of proof of establishing that the level of PI is below the prevailing statutory threshold, and that therefore the employee's entitlement to partial is capped. Presumably an employer will have generated a PI assessment before filing a Petition to Determine PI. In such circumstances, the employee bears a distinct and separate burden of production and must come forward with sufficient evidence to show that a genuine issue exists regarding the level of impairment resulting from the injury. If an employee meets the required burden of production, the ultimate burden of proof then shifts back to the employer. This burden-shifting process was illustrated in a recent decision of the Appellate Division.

In *Jensen v. S.D. Warren Co.*, Me. W.C.B. No. 17-26 (App. Div. 2017), the employee sustained an occupational injury in 2004 and in 2010 was awarded ongoing benefits for 100% partial per decree. Several years later both parties filed separate Petitions for Review and to Determine Permanent Impairment. Significantly, the parties were in agreement that the physical effects of

the injury produced 5% whole person PI. However, the employee argued that emotional consequences due to the injury raised the overall level of impairment above the prevailing threshold.

In attempting to meet his burden of production, the employee testified that he "was getting a little depressed because of his lack of function." A psychiatrist was appointed to serve as a Section 312 examiner, but declined to give an opinion on causation and did not suggest that possible depression may have an impact on the overall PI assessment. Notwithstanding the lack of firm evidence of a relationship between the injury and resulting emotional consequences, the presiding ALJ found that the employee had met his burden of production merely by suggesting that depression was causally related. The ALJ also found that the employer failed to prove that the depression did not contribute to the overall level of impairment. As a result, the employer's petitions were denied and the employee continued to receive benefits for partial pursuant to the 2010 decree.

> " THE DIVISION OBSERVED THAT EVIDENCE SUFFICIENT TO MEET THE BURDEN OF PRODUCTION MUST BE MORE THAN "MERE SPECULATION" AND MUST BE SUFFICIENTLY PROBATIVE TO DEFEAT THE EMPLOYER'S EFFORT TO ESTABLISH PI BELOW THE THRESHOLD."

On appeal the Appellate Division vacated the decision of the ALJ and held that the employee had failed to meet his burden of production. The Division observed that evidence sufficient to meet the burden of production must be more than "mere speculation" and must be sufficiently probative to defeat the employer's effort to establish PI below the threshold.

Of particular note, the Division held that a genuine issue regarding the extent of PI cannot be raised by producing evidence which merely raises a possibility that the overall level of PI exceeds the threshold. As the Division held:

> Mr. Jensen's testimony that he feels depressed due to the work injury does not provide an evidentiary basis for a finding that his permanent impairment level could be above the threshold.

Therefore, in the absence of any supporting medical evidence, the Division found that the employee failed to meet his burden of production and ruled that the ALJ should have established PI at 5%. The Division instructed the ALJ to modify his decision accordingly and ordered the employer to immediately terminate payment of benefits for partial, as more than 520 weeks had already been paid.

Voc Rehab Plan

The voc rehab provisions of Section 217 are somewhat under-utilized within the system, and therefore any appellate-level decision is useful in explaining how the system works.

In *Richards v. D.P. Industries, Inc.*, Me. W.C.B. No. 17-24 (App. Div. 2017), the employee sustained a compensable injury in 2001 which resulted in significant continuing work restrictions. In November 2014 a voc rehab plan was prepared by a representative of the Department of Labor's Division of Rehabilitation Services. The cost of the plan was presented as $8,918.00, and the employer did not agree to pay. As a result the employee filed a Petition to Determine Entitlement to Rehabilitation Services pursuant to §217(2) seeking payment of the specified amount. The Board assigned the matter to Hearing Officer Richard Dunn instead of an ALJ.

When the testimonial hearing was ultimately held, the employee stated that his actual expenses were $15,000.00, and submitted supporting documentary evidence. The Hearing Officer granted the petition but only to the extent of the requested amount of $8,918.00. The employee responded by filing both a Motion for Findings and a Motion to Reopen the Evidence. In response the Hearing Officer affirmed his initial decision and declined to re-open the matter.

The Appellate Division affirmed the decision of the Hearing Officer. The panel noted that the employee had requested payment of $8,918.00 in his petition, which in fact was the estimated cost of the voc rehab plan at the time of filing. The Division found no error in awarding the employee exactly the sum that had been claimed.

The Division also found that the intervening increase in the cost of the plan did not constitute newly discovered evidence sufficient to justify a re-opening of the evidence in accordance with Section 319. The panel observed that the employee might have filed his Petition to Determine Entitlement to Rehabilitation Services too soon, as the total cost of the plan had apparently not been fully developed at the time of filing. The premature filing of the petition was insufficient to justify a reopening of the evidence.

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

New Associate: Samuel G. Johnson

SAMUEL G. JOHNSON

We are pleased to announce Samuel G. Johnson joined the firm as an associate in September 2017. Sam is a Portland native who graduated Cheverus High School and attended Lawrence University in Appleton, Wisconsin, where he studied economics. He returned to Maine in 2012, at which time he managed a seasonal seafood restaurant and worked for a restoration company in Scarborough.

While attending the University of Maine School of Law, Sam served as the executive editor of the Maine Law Review and as a teaching assistant for two legal writing and civil procedure courses. He interned at the United States Attorney's Office in both the Appellate and Criminal divisions, and also assisted low-income Mainers with a variety of legal issues as a student attorney at the Cumberland Legal Aid Clinic. In 2016, Sam graduated with honors and was recognized with the Pro Bono Publico award, having logged 484 pro bono hours during his law school career.

In October 2016, Sam was admitted to practice in Maine. He received the Laurie A. Gibson Award for highest total essay score on the Maine Bar Exam. Prior to joining Norman, Hanson & DeTroy, Sam served as judicial law clerk for the Honorable Donald G. Alexander of the Maine Supreme Judicial Court.

Sam lives in Portland with his wife, Lydia, and their bulldog, Daisy. As a hockey player for both Cheverus and Lawrence University, Sam continues to enjoy ice time playing in a local men's league. During the warmer months, he also enjoys golfing.

2017 Fall Forum & Client Reception

November 17, 2017
Portland Regency Hotel • 20 Milk Street
Fall Forum 2-4
Client Reception 4-7

The forum will be followed by our client reception at the hotel, and we cordially invite all interested clients to join us. Please mark your calendars, and look for your invitation and topic announcements in the mail. ***We hope to see you there!***

NHD Attorneys Designated as "Lawyer of the Year"

Norman, Hanson & DeTroy is proud to announce that three of its 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

Stephen W. Moriarty
2018 Workers' Compensation Law - Employers

Jonathan W. Brogan
2018 Personal Injury Litigation – Defendants

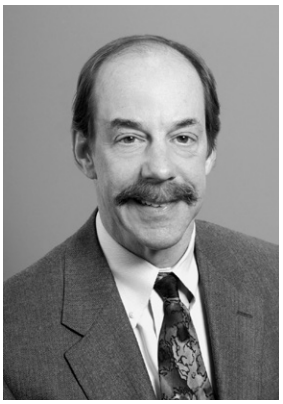
NHD Attorneys Listed in "Best Lawyers"

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.
Labor Law
Worker's Compensation Law – Employers

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

Paul F. Driscoll
Litigation – Real Estate
Real Estate Law



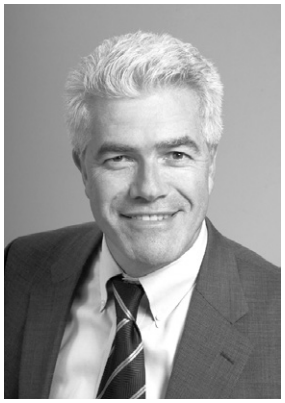
John W. Geismar
Tax Law

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

Stephen Hessert
Worker's Compensation Law – Employers

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

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



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

Thomas S. Marjerison
Personal Injury Litigation – Defendants

Stephen W. Moriarty
Worker's Compensation Law – Employers

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

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

Daniel P. Riley
Administrative/Regulatory Law
Governmental Relations Practice

Roderick R. Rovzar
Corporate Law
Real Estate Law

John R. Veilleux
Insurance Law
Personal Injury Litigation – Defendants

Kudos

DAN RILEY was elected to the Board of Directors of the National Association of State Lobbyists. The Association selects one individual from each state to become a member, and Dan has served for the past three years.

At its annual meeting in Montreal the American College of Trial Lawyers, the "Invitation Only" society of esteemed trial lawyers across the United States and Canada, appointed **MARK LAVOIE** as State Chair of its Maine Delegation. In keeping with his interest in teaching young lawyers, Mark also was appointed to ACTL's National Moot Court Competition Committee, which oversees and assists in judging the annual competition between law school teams throughout the country presented with mock appellate cases for competitive argument.

KELLY HOFFMAN was named by the U.S. Women's Masters Field Hockey Olympic Committee to one of its five training squads preparing for the International Hockey Federation Masters World Cup scheduled to start July 27, 2018 in Terrassa, Spain. More than 200 women vied for the spots on the training squad, and those named will train this fall with hopes to join the team representing the United States in Spain next summer. Kelly was a goalie for the John Hopkins University field hockey and lacrosse teams and established a school record for the number of saves. She has coached field hockey at the Waynflete School in Portland and is a field hockey official for Maine high school and middle school games.

Members of NHD's Workers' Compensation practice group were active participants in the annual Comp Summit Seminar in August. **BOB BOWER** was a panel member at a plenary session reviewing legal ethical issues in workers' compensation practice. **STEVE MORIARTY** was a presenter in a program tailored for those who are new to the workers' compensation system, and Steve and **LINDSEY SANDS** followed up as panel members reviewing key current issues for those who have substantial experience with the system. Finally, **Steve** represented the Maine Municipal Association in an oral argument before an *en banc* panel of the Appellate Division consisting of seven Administrative Law Judges.

Note: On September 24, 2017, our NHD Lewiston office relocated to the first floor at 217 Main Street in Lewiston.

Summer 2017 issue

Return Service Requested

Norman, Hanson & DeTroy, LLC
Two Canal Plaza
P.O. Box 4600
Portland, Maine 04112