Unraveling first-party mold claims

BY: TOM MARJERISON

The dramatic increase in the volume and cost of mold claims has caught the insurance industry by surprise. Despite medical evidence refuting a causal link between indoor mold and serious medical conditions, many insurers have declared that mold will bring ruination on the entire industry. Mold is not the “black asbestos,” but insurers do need to understand the complex coverage and liability issues posed by these claims.

Mold is everywhere, and for thousands of years people have been exposed to mold without serious side effects. Nevertheless, media coverage has created a perception that indoor mold is deadly. Unfortunately, this perception has fueled the plaintiff’s bar, and has infected the general public. As a result of media coverage and a concerted effort by the plaintiff’s bar to capitalize on these cases, the insurance industry is facing a tremendous increase in first-party and third-party mold litigation. Because of the lack of case law on this issue and anticipated changes in coverage forms, insurers need to keep abreast of new developments in this new field. To assist clients, Norman, Hanson & DeTroy held a seminar on mold on January 17, 2003 for Claims Managers, Examiners, and Senior Adjusters to assist insurers in predicting how the Maine courts will likely handle these claims and related issues.

First-party mold claims

The coverage issues presented in first-party mold claims are complex and uncertain. As a result of the hysteria surrounding mold claims, many routine water claims are blossoming into expensive mold remediation cases. On a case-by-case basis, the transformation of a $4,000 water claim into a $30,000 water and mold remediation claim is not overwhelming. However, insurers presented with thousands of claims following a water or ice event may see a significant impact on their loss ratio.

Despite the volume of small cases, the recent multi-million dollar verdicts in Texas, Florida, and California on routine mold claims has caused insurers the most concern. Although these cases present a primer on how not to handle a mold claim, it is important to carefully analyze the grounds for these verdicts. The $32.1 million award in Ballard v. Fire Insurance Exchange, Texas District Court No. 99-05252 (6/1/01), and the $18 million verdict, later reduced to $3 million, in Anderson v. Allstate Insurance Co., Civ-00-907 (E.D. Cal. 10/3/00) have attracted significant attention from the insurance industry and plaintiff’s bar. Nevertheless, the verdicts in these cases are based primarily on bad faith, rather than mold. Fortunately, the Maine courts have not adopted the tort of bad faith, and these decisions do not reflect Maine law. Under Maine law, insurers are unlikely to face multi-million dollar exposures for routine mold claims. Nevertheless, it is important for companies to follow strict protocols in adjusting their responses to mold claims.
claims to properly determine coverage, and to limit any extra-contractual liability.

Coverage for first-party mold claims

Court decisions on mold coverage are evolving on a daily basis, and it is often difficult for courts to interpret these coverages. In addition to new court decisions, the insurance industry is also in the process of adopting new endorsements and forms to deal with this issue. The Maine Bureau of Insurance recently approved new mold exclusion endorsements for homeowners' and commercial property policies. The adoption of new coverage forms and the evolving law on mold coverage will present insurers with a number of future challenges.

The first step in analyzing first-party coverage for property damage is to determine whether the mold “damage” constitutes “property damage” under the policy. The 1991 HO-3 form and most ISO standard policies state: “Property damage” means physical injury to, destruction of, or loss of use of tangible property.

Many mold claims do not result in physical injury to destruction of, or loss of use of tangible property. For instance, mold infestation of an HVAC system may pose health risks to occupants of a building, but the HVAC system itself is not damaged. In fact, mold in a metal vent is no different in character than mold damage to a sheet rock wall. Generally, mere diminution of the value of a building is not enough to constitute property damage. See State Farm Insurance Co. v. Waterford-Fair Oaks, Ltd., 2002 U.S. Dist. Lexis 3594 (N.D. Tex. 2002) (pollution exclusion applicable where exclusion specifically included “fungi”).

Other benefits

The “other” benefit language is essentially a catch-all provision, designed to capture unique employer pay- ments, if only in a limited way. The full scope of the definition will only be determined on a case by case basis.

What are “other benefits”?

Section 102(4)(H) refers to “fringe or other benefits,” but neither the statute nor the Board rules define what constitutes “other” benefit. At this point, it can only be said that “other benefits” are not precisely fringe benefits, and yet do not qualify for inclusion in regular pay. For example, in McAdam, the employee was a member of a labor union and received a one-time signing bonus after his union had successfully negotiated a collective bargaining agreement. Because the bonus was not related to work performance, the Court concluded that, by exclusion, it must be considered as an “other” benefit within the meaning of §102(4)(H).

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Post-injury fringe benefits

When individuals return to work after an injury and earn less than previously, benefits for partial incapacity are calculated on the difference between current earnings and the pre-injury average weekly wage. The differential will obviously be exaggerated if fringe benefits are included, but excluded from current earnings. The statute is silent on the treatment of post-injury fringe benefits, but after perceiving the obvious problem the Board adopted Chapter 1, §5(3)(A) of the WCB rules requiring the inclusion of post-injury fringe benefits “to the same extent” that they are included in the pre-injury average weekly wage.

In Coulombre v. Anthem Blue Cross/Blue Shield of Maine, 2002 ME 163 (November 1, 2002), the Law Court upheld the Board’s exercise of its rule-making authority, but held that the dollar value of post-injury fringe benefits in excess of pre-injury fringe benefits may not be added to the wage. As a result, post-injury fringe benefits may be included in the wage process only to the extent that they are less than or equal to pre-injury fringe benefits.

Coordination issues

Since a worker’s level of disability may fluctuate over time, pre-injury fringe benefits may or may not be included, depending on whether the resulting benefit level excess 2/3 of the state average weekly wage at the time of the injury. When compensation ben- efits are coordinated with other benefits under §221, and where the weekly compensa- tion rate is reduced as a result, the possibility for including fringe benefits arises. However, in Rici v. Mercy Hospital, 2002 ME 173 (December 13, 2002), the Court recently held that if weekly benefits are reduced to reflect the offset for old age social security benefits, and if the resulting benefit level is less than 2/3 of the state average weekly wage, fringe benefits cannot at that point be included in the average weekly wage. The Court examined the conflicting legislative policies behind §102(4)(H) and §221, and concluded that the Legislature did not intend that the statutory offset should be lost by including fringe benefits after coordination. A reduction in the benefit level due to statutory offsets will not permit the inclusion of fringe benefits.

Conclusion

The package of fringe benefits offered by an employer, most notably health insurance, has become an increasingly important component of the overall compensation package. Section 102(4)(H) of the Act reflects a legislative compromise to recognize the value of fringe benefits for those at the lower income level. As compensation packages become more innovative, we can anticipate further disputes in the effort to distinguish fringe benefits from regular pay. □
Workers’ compensation and fringe benefits: Ten years after

By Stephen W. Moriarty

In the late 1980s there was considerable ebb and flow within the workers’ compensation system over treatment of fringe benefits in calculating the average weekly wage. Different panels of the former Appellate Division split on the issue, and in Ashby v. Rust Engineering Company, 559 A.2d 774 (Me. 1989), the Law Court pushed open the door and held that employer payments to certain union-established benefit funds were part of the average weekly wage. In 1991 the Legislature ultimately intervened and placed Maine squarely among the majority of jurisdictions that do not permit fringe benefits to be included in the wage. Former 39 M.R.S.A. §2(2)(G), which took effect on October 17, 1991, excluded fringe benefits from the average weekly wage and specifically stated such items as “retirement, pension, health and welfare, life insurance, training, social security or other employee or dependent benefit plan.” At that point, therefore, fringe benefits had been clearly and firmly removed from the definition of the average weekly wage.

However, within less than a year the Legislature reversed direction and restored fringe benefits, in part. As we know, current §102(4)(H) provides that the value of employer-paid fringe or welfare, life insurance, training, services related to productivity or similar employment benefits may not be included as part of regular pay, but are part of regular earnings. As an example listed under §102(4)(H), the purchase of health, disability, or retirement insurance. §471, 675 A.2d 1173. Similarly, employee-authorized payroll deductions for purposes such as the purchase of health insurance are not fringe benefits, but are part of regular earnings.

Fringe benefits are defined in Chapter 1, §51 of the WCB rules as “any thing of value to an employee and dependent paid by the employer, which is not included in the average weekly wage.” Ciampi v. Hannaford Brothers Co., 681 A.2d 4 (Me. 1996). Legislative recognition of fringe benefits is limited, however, and the net effect of §102(4)(H) is to provide a slightly higher benefit level to workers at the lower end of the pay scale.

Significantly, §102(4)(H) applies retroactively to all dates of injury. Beauregard v. Maine Medical Center, 675 A.2d 110 (Me. 1996). If, however, the average weekly wage has been established for any date of injury preceding January 1, 1993, res judicata should be raised as a defense to any attempt to add fringe benefits. In all other cases, legislative recognition of the value of fringe benefits on the date of injury must be disclosed, regardless of whether an employee may ultimately qualify for total or partial incapacity. O’Neal v. City of Augusta, 1998 ME 48, 706 A.2d 1042 (Me. 1998).

What are fringe benefits?

The distinction between fringe benefits and regular earnings is clear in most cases. For example, vacation pay is not a fringe benefit but part of the average weekly wage itself. Nielsen v. Burnham & Morrill, Inc., 600 A.2d 1111 (Me. 1992), as annual bonuses or bonuses related to productivity or similar employment goals. McAdam v. United Parcel Service, 2001 ME 4, 763 A.2d 1173. Similarly, employer-assisted payroll deductions for purposes such as the purchase of health insurance are not fringe benefits, but are part of regular earnings.

With these vast numbers of people compensated by fringe benefits, is it reasonable to assume that the syndrome has become a matter of national concern. Newspaper and magazine articles, TV documentaries, as well as hundreds of internet sites, have dealt with the illness. Specialized clinics have been established, and drug companies, realizing the illness is chronic, market to the afflicted.

What causes fibromyalgia?

The scientific community has not reached a consensus either regarding its genesis, or even whether it truly exists as a physical syndrome. Patients diagnosed with fibromyalgia complain of diffuse muscle pain but upon physical examination show no evidence of inflammation. Subsequent laboratory tests, x-rays and tissue biopsies fail to show any muscle pathology. Basically, fibromyalgia patients have complaints of pain but no demonstrable physical symptoms. To diagnose fibromyalgia, the doctor uses criteria established by the American College of Rheumatology. The criteria consist of a doctor firmly pressing on 18 designated points where muscle, tendon, and ligament attach to bone. A patient who feels pain in 11 or more of those points is diagnosed with fibromyalgia. Not coincidentally, since fibromyalgia was officially recognized as a medical disorder, disability claims for social security and other health insurers have increased dramatically. In one study, it was shown that fibromyalgia-like symptoms accounted for 46 percent of the social security claims in one large city. Numerous articles, scientific and popular, have been written regarding whether or not fibromyalgia actually exists. However at this point, diagnosis of fibromyalgia is generally accepted in the scientific and medical community.

The question now being faced in the courts, among accident victims, their lawyers, and those defending the claims, is whether fibromyalgia can be medically diagnosed. In Maine, two cases in the Superior Court demonstrate conclusively that fibromyalgia is not recognized as a trauma-induced injury.

In the case of Trask v. Automobile Insurance Company, CV-94-379 (York), Justice Andrew Mead undertook a thoughtful analysis of his role as “gatekeeper” of evidence to be introduced at trial, including the plaintiff’s proffered testimony from three separate medical witnesses, that she was suffering from fibromyalgia caused by an automobile accident. Justice Mead used both Maine law and federal law in explaining his role as gatekeeper in evaluating the evidence to be presented. Using Maine Rule of Evidence 702, and Daubert v. Merrell Dow Pharmaceuticals, Inc., Justice Mead determined that a trial court must exercise discretion in determining what evidence will be submitted to the jury.

In Trask, doctors testifying for the plaintiff all stated that the plaintiff did not have fibromyalgia before the accident and was struck with it following the accident. None of the doctors could point to scientific evidence or any peer-reviewed article that accepted trauma as a cause of fibromyalgia. All of the doctors agreed that fibromyalgia’s cause is basically unknown in the medical community. No scientific or medical opinion was offered to show that science or medicine had concluded that fibromyalgia could be induced by trauma.

The plaintiff’s doctors essentially argued that the plaintiff did not have fibromyalgia before the accident, she had it afterwards, therefore the accident must have caused her fibromyalgia. Justice Mead rejected this argument as a logical fallacy referred to in Latin terms as post hoc ergo propter hoc [loosely translated – after this, therefore because of this]. The concept is also referred to as a temporal conundrum. There is no science in a physician testifying that an event and an occurrence took place in sequence and therefore are related. As Justice Mead stated, “there is no medical theory or science to this conclusion. It is simply based on human experience and common sense.” The doctors in Trask admitted that their concept of temporal congruity is an intuitive process, not a scientific or medical one. The court, rejecting the plaintiff’s doctors’ testimony as unreliable, excluded the plaintiff’s experts with...
Emily Bloch receives Caroline Duby Glassman Award

Attorney Emily Bloch has just received the 2002 Maine State Bar Association’s Caroline Duby Glassman Award. It is presented annually to an attorney for promoting greater understanding among the bench, the bar, and the public on the status of women attorneys, and for outstanding achievement in the advancement of women in the legal profession. Emily joined Norman Hanson & DeTroy in 1997. She was a member of the Edward T. Gignoux Inn of Court from 1995-96, served as counsel of the Women’s Law Section of the Maine Bar, 1996-98, and has served on the Board of Maine Businesses for Social Responsibility since 2000.

Emily Bloch is the twelfth attorney to receive this award, which honors the achievements of the first woman member of the Maine Supreme Judicial Court, Caroline Duby Glassman. Emily is a graduate of Connecticut College and Cornell University Law School. Her law practice concentrates on medical malpractice defense and general litigation. She lives in Falmouth with her husband and two children.

Nesses on trauma-caused fibromyalgia. Five years later, in York County Superior Court, another plaintiff prevailed on her claim of trauma-induced fibromyalgia. Justice Paul Fritzsche also analyzed the evidence pursuant to Daubert and the Maine Rules of Evidence. (As an aside, many plaintiffs’ attorneys are expanding the view that Daubert is not accepted in Maine and should not be the test for the admission of scientific and/or medical evidence. Both Frank and Schofield believe her claim of trauma-induced fibromyalgia.) Justice Fritzsche recognized the medical community still does not know the cause of fibromyalgia. Again the plaintiff’s attorneys argued that the plaintiff did not have fibromyalgia before the accident, but had it afterwards, therefore the accident must have caused it.

The court rejected this testimony as both simplistic and not scientifically based. The best the plaintiff’s expert could state is that he recognized more and more doctors believed that trauma could be one of the causes of fibromyalgia, but is not the only cause. Justice Fritzsche pointed out that as of 2002, if doctors are only at the point that they believe fibromyalgia could be caused by trauma rather than know it is caused by trauma, then the testimony and diagnosis are not reliable and could not be offered as evidence.

Justice Fritzsche did thoughtfully go on to state, however, that in five, ten or even twenty years, evidence of post-traumatic fibromyalgia may be routinely submitted to juries in proper cases and everyone may be bemused by the historical oddity that testimony regarding post-traumatic fibromyalgia was once excluded. He also observed that science could progress to the point in determining that post-traumatic fibromyalgia does not exist and cannot be scientifically proved. Clearly, in 2002, testimony regarding “post-traumatic” fibromyalgia is not reliable and should be excluded. The law in the Maine Superior Court regarding this issue is remarkably clear. With no scientific or medical evidence to bolster the plaintiffs’ attorneys’ claims that trauma can cause illness, judges will not allow such evidence. However, both plaintiffs’ attorneys and their doctors are becoming more ingenious in avoiding the label of fibromyalgia. Now the diagnosis may be myofascial pain or facet dysfunction or some other non-objective syndrome.

Cases of chronic pain following auto accidents require a lot of diligence, and a lot of work to determine whether the plaintiff’s basis for claims of disability are or are not caused by non-anatomically based pain syndromes. The label of post-traumatic fibromyalgia has been criticized by courts recognizing that these syndromes cannot be determined by science but are in fact “garbage pail” diagnoses based almost solely on subjective complaints of pain.

Although Ricci dealt with old age security benefits, the rationale of the decision is fully applicable to other types of benefits for which coordination is possible. This includes payments made pursuant to a wage continuation plan, as well as short-term or long-term disability benefits.

Post-injury fringe benefits

In Coulombe v. Anthem Blue Cross/Blue Shield of Maine, Inc., 2002 ME 163 (November 1, 2002), the value of employer-paid fringe benefits at the time of the injury was $121.97. The employee sustained post-injury work with a different employer and earned less money per week, but received increased fringe benefits from the new employer in the amount of $188.81. The pre-injury employer argued that the full value of the fringe benefits with the new employer should be considered when calculating entitlement to partial incapacity.

Chapter 1, §5(3)(A) of the WCB rules provides that fringe benefits received from a subsequent employer must be included in the calculation of the average weekly wage “to the same extent” that such benefits are included in the pre-injury average weekly wage. The presiding hearing officer interpreted the rule to permit consideration of post-injury fringe benefits to the extent of $121.97, but nothing further. In other words, the hearing officer ruled that post-injury fringe benefits in excess of pre-injury fringe benefits must be disregarded when calculating entitlement to partial.

The Court initially noted that the statute was silent on the appropriate treatment of post-injury fringe benefits, but observed that the Board had properly exercised its rule-making authority in enacting §5(3)(A) of the rules. However, without any further elaboration, the Court held that the hearing officer had correctly interpreted the rule by limiting consideration of post-injury fringe benefits.

As a result, under the language of the current rule, post-injury fringe benefits can be considered only to the extent that they do not exceed the value of pre-injury fringe benefits. In order for the full value of post-injury fringe benefits to be considered, the Board must either modify its rule or the Legislature must amend the statute.

Workers’ compensation – Law Court decisions

By Stephen W. Moriarty

Coordination of benefits

In Ricci v. Mercy Hospital, 2002 ME 173 (December 13, 2002), the employee’s average weekly wage was high enough that fringe benefits would have produced a benefit level greater than 2/3 of the state average weekly wage. As a result, the value of fringe benefits was excluded from the wage initially. At some point thereafter the employee began to receive social security disability benefits and worker’s compensation benefits. The employer took the 50% to which it was entitled by virtue of §221(3)(A)(1). Following the offset, the employee’s weekly entitlement was less than 2/3 of the average weekly wage, and she filed a petition to increase her weekly benefit level.

The presiding hearing officer granted the petition and ruled that because the benefit level had been reduced to less than 2/3 of the state average weekly wage, the employee was entitled to the inclusion of the fringe benefits in the calculation of the wage. The employer appealed, and the Law Court vacated the decision of the Board. While the Court recognized a legislative interest in including fringe benefits in the income of low wage earners, the Court was concerned that including the fringes in these circumstances negated the statutory offset to which the employee was entitled. The Court found no evidence of a legislative intent to permit workers’ compensation benefits to be combined with other benefits for which coordination is possible under §221, and ruled that fringe benefits cannot be included in the wage after coordination of benefits produces a level of entitlement below the threshold.

In Coulombe v. Anthem Blue Cross/Blue Shield of Maine, Inc., 2002 ME 163 (November 1, 2002), the value of employer-paid fringe benefits at the time of the injury was $121.97. The employee secured post-injury work with a different employer and earned less money per week, but received increased fringe benefits from the new employer in the amount of $188.81. The pre-injury employer argued that the full value of the fringe benefits with the new employer should be considered when calculating entitlement to partial incapacity.

A bill calling for the federal government to research and set standards on toxic mold stationed in the House of Representative committees last session, but the author of the U.S. Toxic Mold Safety and Protection Act is determined the bill will return in the first session of the 2003 Congress. John Conyers, Jr., D. Michigan, is a fervent advocate for government research into toxic mold’s effects on human health. Conyers’ strong stance was prompted by seeing his Detroit office manager and her daughter get sick from the stuff. The board said the worker was not made very ill by it. At the Melina Bill’s introduction last summer, 40,000 signers of a support petition had been received and 30 co-signers were on the bill. The Senate has not yet adopted its version of the bill on mold health research.
The Board of Bar Overseers has appointed attorney JOHN KING Chair of the Portland panel of the Fee Arbitration Commission. John has previously served for three years as a member of the commission. He will act as chair until December, 2005.

United States. Adrian will continue to serve the Baden-Württemberg office in the New England area.

Some children are lucky enough to learn the importance of giving of themselves early in life. SPENCER DUNZIK, son of our staff member RENEE DUNZIK, has been recognized as the YMAC youth volunteer of the year. Maine Representative Tom Allen acknowledged Spencer’s volunteerism at an awards ceremony in October.

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As of January 1, 2002, for nearly all civil cases filed in Superior Court, the procedure of alternative dispute resolution became mandatory, as prescribed by the Maine Supreme Judicial Court in Rule 16B of the Maine Rules of Civil Procedure.

A look at this requirement after a year may offer some insight on how ADR is serving the justice system.

The most often used ADR procedure is mediation, though non-binding arbitration and early neutral evaluation may be chosen.

After an answer to the complaint is filed, the parties choose whomever they wish as a third party neutral, and if they cannot agree, the court will designate a neutral with experience appropriate to the case. The conference date and neutral selection must be made within 60 days of the court’s scheduling order, and the mediation conference completed within 120 days.

Who should attend

Certain participants are required to attend.

In an insurance case, the defendant is ordinarily excused unless there are unusual issues which, with attendance, would make the case more likely to resolve. Others may include a management officer in a corporate party, a government agency designated representative, an adjuster from an insurer providing potentially applicable coverage, attorneys for all parties, and any essential non-parties, such as a lienholder, without whom the mediation is not likely to settle. However, if the neutral approves, a party or insurance adjuster may attend by telephone. All must have settlement authority to participate meaningfully in the mediation.

The conference’s only requirement is to conduct the ADR process that the parties have selected, and that the parties put in “serious effort” in their pursuit of agreement.

If the case is not settled, the neutral will help them agree on identifying, clarifying or limiting the related issues, stipulation and discovery-related questions.

How the mediation conference proceeds

Regardless of the type of case and type of defendant – corporate, government, insurance coverage – the process is similar. At the beginning of the conference, the plaintiff or its counsel lays out its best case. The defendant then offers its case as to whether it is a liability defense or a defense on damages. Following this, the parties separate and the mediator shuttles back and forth between them in an effort to bridge the gap on their positions and try to bring about a settlement.

Have participated in approximately 30 mediations to date, and the only issue addressed in all of them has been whether the case will settle, without agreement on discovery-related questions or stipulations.

Is mediation working?

When the Law Court passed Rule 16B of the Maine Rules of Civil Procedure, it did so with the prime purpose being to reduce the number of cases in the court system and resolve them earlier in the process.

Rule 16B imposes deadlines of scheduling the mediation conference within 60 days of the court’s scheduling order, and completing the mediation conferences within 120 days of the scheduling order. The mediation, therefore, must be held at or before the discovery period is half way over. As you can see, cases that settle at mediation are out of the court system within four months and do not languish for the entire discovery period, only to settle sometime before trial, eight months, ten months or even a year into the litigation process.

To the extent any cases are resolved by alternative dispute resolution under this Rule, it is a successful Rule from the court’s perspective. The case load in the system has been reduced by whatever number of cases that have settled at mediation, and they have settled earlier in the process.

Let us explore whether reduction of the caseload should be the main purpose of Maine’s court system.

What happens if mediation is unsuccessful?

Whether the case settles or not, at the end of the conference the mediator must file a report to the court, signed by
The court’s goal for early manda- 
tory ADR was to help it efficiently and success- 
fully in the majority of cases. “Suc- cess” meaning that a case actually re- solved at mediation, or in negotiations sufficiently soon thereafter to avoid any additional expense. The success rate soars when one party has something other than dollars that it can contribute to resolution.

A recent example was a suit by a very unhappy modular home puracher, who sued the manu- facturer, the seller/dealer/site prep, and the financing bank. Going into the mediation, the parties were far apart in their po- sitions, there was significant hostil- ity, and it appeared the mediation would serve no purpose other than for the par- ties to jump through the required hoop to move the case forward. A surprising settlement occurred because the bank was able to creatively rewrite the plaintiff’s financing. The bank paid no money in settlement, but likely obtained less of a return on its loan than it initially anticipated. The plaintiff obtained some- thing of value – less debt – and the other two parties contributed less money than otherwise would have been necessary.

A second recent example was a home buyer who sued the seller, the broker, and the Town in which the trans- action occurred. The Town was in- volved because there was a misunder- standing about the location and scope of a Town right-of-way, both of which were important to plaintiff buyer. Plaintiff claimed that the pricey property was worth far less than the market value, and the settlement turned out to be a good one. All defendants disagreed, be- lieved they had no liability and did not want to undo the transaction. Settle- ment prospects looked bleak approach- ing mediation. Because the Town made an accommodation regarding its use of the right of way, (which cost the Town no money, but was of benefit to the plaintiff), the other parties were able to settle with plaintiff for less than if the settlement was for cash only.

Many other cases involve non-cash components, for example, employment cases, business disputes, and cases con- cerning professionals, seem to enjoy a higher success rate at mediation than personal injury cases, where generally the resolution currency is money only. The higher success rate for non-PI cases than PI cases is ironic given the court’s apparent view that PI cases were most in need of the “fix” of early settlement attempts because they constitute a large percentage of the docket.

In the PI cases I have handled, the criticisms of the concept – too early and unnecessarily – are more often borne out. Despite claims professionals and coun- sel’s best efforts, it is sometimes simply too early to value a case. Even when the liability picture is clear enough to per- mit a reasonable evaluation of risk, a plaintiff’s medical condition may not have stabilized, there may have been insufficient time to obtain a fair assess- ment of permanent impairment or ob- tain a necessary independent medical evaluation. I have seen this problem addressed successfully by the court’s willingness to extend the ADR deadline whenever the request is reasonable. Some- times a modest extension still doesn’t solve the problem, and the system should have an option for parties to elect ADR later than currently required, perhaps with court approval to alleviate any con- cern that litigants will return to their old bad habits.

Many lawyers believe that manda- tory ADR is not necessary, that the court’s justice system is for the benefit of the citizenry (even insurance companies) and that we should be able to choose when to attempt ADR or elect not to use it at all, and that the court should not be so heavy-handed about forcing settle- ments. That battle may be lost, so in the meantime we have to make the system work to our benefit.

Sometimes it is not fair to ask a claims professional to be ready to ad- dress a case at the time the system de- mands it, due to the press of other busi- ness or the legitimate need for additional information. Sometimes, I have experienced, it seems worth the effort to do what it takes to be prepared to make a reasonable attempt at settle- ment whenever possible. None of us has a long enough track record with this system to produce meaningful statisti- cal data yet. My impression is that the benefit gained by wiping out some sig- nificant number of cases early on, justi- fies the effort to do what it takes to be prepared to evaluate a case sooner than we might like.

Alternative Dispute Resolution does, however, succeed sufficiently often to offset the additional costs and the effort to be ready for it, and likely reduces the total cost of all cases filed with the court.

Some shortcomings of required med- 
iation to the extent that a significant mi-
nority of cases are settling at mediation, the court’s purpose in reducing its workload is being accomplished. The court, in many cases, has thus become an extension of the claims handling process where the primary goal is to “move” cases. The adversarial process in the courtroom as a way of obtaining justice is being subjugated to the idea that settle- ment is the highest ideal in the judicial system. Jury trials have become increas- ingly unusual, even rare in civil cases, and are destined to decrease as more disputes are cut from the system though the re- quired mediation of Rule 16B. Judges will be able to concentrate more and more on “judicial mediation” as a way of settling controversies that cannot be re- solved through the original mediation process.

Coverage issues in declaratory judg- ment actions are not exempt from manda- tory ADR. Most DJ actions relate to a pending civil case likely subject to its own ADR requirement. Rarely is a cov- erage issue amenable to mediation out- side the resolution of the related civil case. It then makes sense to coordinate the ADR process in the underlying case. Thus a stronger claim to exempt the ADR re- quirement on the coverage issue may be made. If the DJ action is filed at nearly the same time as the civil action, an effort should be made to coordinate the two suits so that only one is necessary, and all representatives are present at the first mediation.

So a plaintiff must take the initia- tive in scheduling the ADR, the plaintiff in the underlying case often may not bring individuals connected to the cover- age issue into the process. In my experi- ence, the failure to communicate with all potentially interested parties has resulted in the ADR deadline being missed by the demand side involved in the coverage issues are aware of the scheduled mandatory declaratory judgment meeting. If all meet, then this initial ADR may satisfy any ADR requirement in a future declaratory judgment action.

Rule 16B likely needs tinkering to deal more efficiently with DJ actions concerning insurance coverage issues. Until then, many of the problems, costs, and time spent can be reduced by early communication with all potentially inter- ested parties.
all participants. If the case settles, the paperwork is exchanged, filed with the court, and the matter is concluded. Should it not settle, the case will then continue as it would have previously, to trial or to a later settlement.

However, because the mediation must proceed so early in the process, there is often discovery remaining that may affect the evaluation of the case. Just as before, a case can settle after mediation, in the ordinary course of events such as new discovery information, or a renewed evaluation of the risk of trial, or any of the other myriad reasons why cases settle.

Should the case not settle at mediation, nor through the end of discovery, it will make its way to a trial list, soon or later, depending on the county in which the case is filed. The trial list contains filing deadlines for all pretrial paperwork, and the court will schedule a pretrial management conference. Previously, the pretrial management conference would be held, the trial date set, and the trial would proceed. That procedure has been changing, however.

The next likely step, prior to the trial management conference, will be the court’s review of its trial list. It will then set up a new settlement conference with a Superior Court judge who is not assigned to try the case. Therefore all the participants in the original mediation conference will be forced into a court-run settlement conference (essentially a second mediation with more teeth), wherein the judge will try to convince the parties to settle. Only after withstanding this intense pressure can a case move forward to trial.

The court’s goal for early manda-

The court’s goal for early manda-

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The court’s goal for early manda-

The court’s goal for early manda-
**Briefs/Kudos**

**DAVE VERY** was a co-faculty member leading an all-day seminar in December on recent developments in insurance. Given by the National Business Institute and eligible for Continuing Legal Education credits, the seminar topics included first and third party coverage, environmental, fire, auto, homeowners, bad faith, and the Unfair Claims Practices Act, and punitive damages.

**JONATHAN BROGAN** has been appointed head of the new Insurance Practice Litigation Group at Norman, Hanson & DeTroy. Jonathon has also been elected to serve on the firm’s management committee.

The Cumberland County Bar Association recently named DAN CUMMINGS to the governing arm of the Association, the General Committee.

A seminar on Commercial Real Estate Acquisition Financing and Leasing was offered by the Maine Bar Association in Portland last October, and ROD ROYZAR served as a member of the faculty.

The firm marked with special enthusiasm two marriage last fall. Attorney DORIS VAN RIGALSKY, who practices primarily in our workers’ compensation group, was married to Roger Champagne, and is now known as DORIS V.R. CHAMPAGNE. The couple is living in Biddeford. Our indefatigable Assistant Administrator of fifteen years, LORRIE PETRILIN, was married to Shad Hall, and LORRI HALL and her husband make their home in Gray.

Paralegal MARGE PERKINS, who worked with Mark Lavite in medical malpractice matters, will be a seminar leader in Medical Records Management.

**DORIS V.R. CHAMPAGNE**. The practices primarily in our workers’ compensation recently named The Cumberland County Bar Association committee. The firm marked with special enthusiasm two marriage last fall. Attorney DORIS VAN RIGALSKY, who practices primarily in our workers’ compensation group, was married to Roger Champagne, and is now known as DORIS V.R. CHAMPAGNE. The couple is living in Biddeford. Our indefatigable Assistant Administrator of fifteen years, LORRIE PETRILIN, was married to Shad Hall, and LORRI HALL and her husband make their home in Gray.

Paralegal MARGE PERKINS, who works with Mark Lavite in medical malpractice matters, will be a seminar leader in Medical Records Management.

**The Board of Bar Overseers has appointed attorney JOHN KING Chair of the Portland panel of the Fee Arbitration Commission. John has previously served for three years as a member of the commission. He will act as chair until December, 2005.**

**Three NH&D Attorneys view the change in Court procedure**

**Mandatory alternative dispute resolution – the first year in Maine courts**

BY **MARK E. DUNLAP**

As of January 1, 2002, for nearly all civil cases filed in Superior Court, the procedure of alternative dispute resolution became mandatory, as prescribed by the Maine Supreme Judicial Court in Rule 16B of the Maine Rules of Civil Procedure.

A look at this requirement after a year may offer some insight on how ADR is serving the justice system.

The most often used ADR procedure is mediation, though non-binding arbitration and early neutral evaluation may be chosen. After an answer to the complaint is filed, the parties choose whomever they wish as a third party neutral, and if they cannot agree, the court will designate a neutral with experience appropriate to the case. The conference date and neutral selection must be made within 60 days of the court’s scheduling order, and the mediation conference completed within 120 days.

Who should attend?

Certain participants are required to attend. In an insurance case, the defendant is ordinarily excused unless there are unusual issues which, with attention, would make the case more likely to settle. Others may include a management officer in a corporate party, a government agency designated representative, an adjuster from an insurer providing potentially applicable coverage, attorneys for all parties, and any essential non-parties, such as a lienholder, without whom the mediation is not likely to settle. However, if the neutral approves, a party or insurance adjuster may attend by telephone. All must have settlement authority to participate meaningfully in the mediation.

The conference’s only requirement is to conduct the ADR process that the parties have selected, and that the parties put in “serious effort” in their pursuit of agreement.

If the case is not settled, the neutral will help them agree on identifying, clarifying or limiting the related issues, stipulation and discovery-related questions.

How the mediation conference proceeds

Regardless of the type of case and type of defendant – corporate, governmental, or insurance coverage – the process is similar. At the beginning of the conference, plaintiff or its counsel lays out its best case. The defendant then offers its case as to whether it is a liability defense or a defense on damages. Following this, the parties separate and the mediator shuttles back and forth between them in an effort to bridge the gap on their positions and try to bring about a settlement.

Have participated in approximately 30 mediations to date, and the only issue addressed in all of them has been whether the case will settle, without agreement on discovery-related questions or stipulations.

Is mediation working?

When the Law Court passed Rule 16B of the Maine Rules of Civil Procedure, it did so with the prime purpose being to reduce the number of cases in the court system and resolve them earlier in the process.

Rule 16B imposes deadlines of scheduling the mediation conference within 60 days of the court’s scheduling order, and completing the mediation conferences within 120 days of the scheduling order. The mediation, therefore, must be held at or before the discovery period is halfway over. As you can see, cases that settle at mediation are out of the court system within four months and do not languish for the entire discovery period, only to settle sometime before trial, eight months, ten months or even a year into the litigation process.

To the extent any cases are resolved by alternative dispute resolution under this Rule, it is a successful Rule from the court’s perspective. The case load in the system has been reduced by whatever number of cases that have settled at mediation, and they have settled earlier in the process.

Let us explore whether reduction of the caseload should be the main purpose of Maine’s court system.

What happens if mediation is unsuccessful?

Whether the case settles or not, at the end of the conference the mediator must file a report to the court, signed by
Five years later, in York County Superior Court, another plaintiff presented evidence that trauma could cause fibromyalgia. Again the plaintiff’s doctors argued that the plaintiff did not have fibromyalgia before the accident, but had it afterwards, therefore the accident must have caused it.

The court rejected this testimony as both simplistic and not scientifically based. The best the plaintiff’s expert could state is that he recognized more and more doctors believed that trauma could be one of the causes of fibromyalgia, but is not the only cause. Justice Fritzsche pointed out that as of 2002, if doctors are only at the point that they believe fibromyalgia could be caused by trauma rather than know it is caused by trauma, then the testimony and diagnosis are not reliable and could not be offered as evidence.

Justice Fritzsche did thoughtfully go on to state, however, that in five, ten or even twenty years, evidence of post-traumatic fibromyalgia may be routinely submitted to juries in proper cases and everyone may be bemoaned by the historical oddity that testimony regarding post-traumatic fibromyalgia was once excluded. He also observed that science could progress to the point in determining that post-traumatic fibromyalgia does not exist and cannot be scientifically proved. Clearly, in 2002, testimony regarding “post-traumatic” fibromyalgia is not reliable and should be excluded. The law in the Maine Superior Court regarding this issue is remarkably clear. With no scientific or medical evidence to bolster the plaintiff’s attorneys claims that trauma can cause illness, judges will not allow such evidence to be admitted. However, both plaintiff’s attorneys and their doctors are becoming more ingenious in avoiding the label of fibromyalgia. Now the diagnosis may be myofascial pain or facet dysfunction or some other non-objective syndrome.

Cases of chronic pain following auto accidents require a lot of diligence, and a lot of work to determine whether the plaintiff’s basis for claims of disability are or are not caused by non-anatomically based pain syndromes. The label of fibromyalgia has helped courts recognize that these syndromes cannot be determined by science but are in fact “garbage pail” diagnoses based almost solely on subjective complaints of pain.

### Emily Bloch receives Caroline Duby Glassman Award

Attorney Emily Bloch has just received the 2002 Maine State Bar Association’s Caroline Duby Glassman Award. It is presented annually to an attorney promoting greater understanding among the bench, the bar, and the public on the status of women attorneys, and for outstanding achievement in the advancement of women in the legal profession.

Emily joined Norman Hanson & DeTroy in 1997. She was a member of the Edward T. Gignoux Inn of Court from 1995-96, served as co-chair of the Women’s Law Section of the Maine Bar, 1996-98, and has served on the Board of Maine Businesses for Social Responsibility since 2000.

Emily Bloch is the twelfth attorney to receive this award, which honors the achievements of the first woman member of the Maine Supreme Judicial Court, Caroline Duby Glassman. Emily is a graduate of Connecticut College and Cornell University Law School. Her law practice concentrates on medical malpractice defense and general litigation. She lives in Falmouth with her husband and two children.

### Congress aware of mold threat

A bill calling for the federal government to research and set standards on toxic mold stagnated in the House of Representative committees last session, but the author of the U.S. Toxic Mold Safety and Protection Act is determined the bill will return in the first session of the 2003 Congress.

John Conyers, Jr., D. Michigan, is a fervent advocate for government research into toxic mold’s effects on human health. Conyers’ strong stance was prompted by seeing his Detroit office manager work in an office with mold and become very ill by it. At the Melina Bill’s introduction last summer, 40,000 signers of a support petition had been received and 30 co-signers were on the bill. The Senate has not yet adopted its version of the bill on mold health research.

### Chamber of Commerce

Although Ricci dealt with old age security benefits, the rationale of the decision is fully applicable to other types of benefits for which coordination is possible. This includes payments made pursuant to a wage continuation plan, as well as short-term or long-term disability benefits.

### Post-injury fringe benefits

In Coulombe v. Anthem Blue Cross/Blue Shield of Maine, Inc., 2002 ME 163 (November 1, 2002), the value of employer-paid fringe benefits at the time of the injury was $121.97. The employee secured post-injury work with a different employer and earned less money per week, but received increased fringe benefits from the new employer in the amount of $188.81. The pre-injury employer argued that the full value of the fringe benefits with the new employer should be considered in calculating the wage.

As a result, under the language of the current rule, post-injury fringe benefits can be considered only to the extent that they do not exceed the value of pre-injury fringe benefits. In order for the full value of post-injury fringe benefits to be considered, the Board must either modify its rule or the Legislature must amend the statute.
Workers’ compensation and fringe benefits:
Ten years after

BY STEPHEN W. MOREAULT

In the late 1980s there was considerable ebb and flow within the workers’ compensation system on the proper treatment of fringe benefits in calculating the average weekly wage. Different panels of the former Appellate Division split on the issue, and in Ashby v. Rust Engineering Company, 559 A.2d 774 (Me. 1989), the Law Court pushed open the door and held that employer payments toward benefits should be treated as part of the average weekly wage. In 1991 the Legislature ultimately intervened and placed Maine squarely among the majority of jurisdictions that do not permit fringe benefits to be included in the wage. Former 39 M.R.S.A. §2(2)(G), which took effect on October 17, 1991, excluded fringe benefits from the average weekly wage and stated such items as “retirement, pension, health and welfare, life insurance, training, social security or other employee or dependent benefit plan.” At that point, therefore, fringe benefits had been clearly and firmly removed from the definition of the average weekly wage.

However, within less than a year the Legislature reversed direction and restored fringe benefits in part. As we know, current §102(4)(H) provides that the value of employer-paid fringe or other benefits which were continued by the employer must be included in the average weekly wage “to the extent that the inclusion will not result in a weekly benefit amount that is greater than 2/3 of the state average weekly wage at the time of injury.” The re-introduction of fringe benefits was one of the more curious features of the Workers’ Compensation Act of 1992. Although the key objective of legislative reform was to achieve savings within the system and streamline the litigation process, the restoration of fringe benefits created greater complexity in claims administration. At the time the Legislature’s intent may seem more clear. It has been frequently held that the purpose of calculating the average weekly wage is “to arrive at an estimate of the employee’s future earning capacity as fairly as possible,” Frank v. Manpower Temporary Services, 687 A.2d 623, 625 (Me. 1996). With the escalation of the cost of health insurance and other benefits in recent years, the package of fringe benefits provided by an employer has become an increasingly important part of the “bar-gained-for” compensation in the employment relationship. As the Law Court ultimately observed, the legislative decision to include fringe benefits was based on the “practical reality that in some circumstances the money received in an employee’s weekly pay envelope will not accurately reflect the employee’s actual earning capacity.” Ciampi v. Hannaford Brothers Co., 681 A.2d 4, 8 (Me. 1996).

Legislative recognition of fringe benefits is limited, however, and the net effect of §102(4)(H) is to provide a slightly higher benefit level to workers at the lower end of the pay scale. Significantly, §102(4)(H) applies retroactively to all dates of injury, Beaulieu v. Maine Medical Center, 675 A.2d 110 (Me. 1996). If, however, the average weekly wage has been established for any date of injury preceding January 1, 1993, res judicata would be raised as a defense to any attempt to add fringe benefits. In all other cases, determination of the value of fringe benefits on the date of injury must be disclosed, regardless of whether an employee may ultimately qualify for total or partial incapacity. O’Neal v. City of Augusta, 1998 ME 48, 706 A.2d 1042 (Me. 1998).

What are fringe benefits?

The distinction between fringe benefits and regular earnings is clear in most cases. For example, vacation pay is not a fringe benefit but part of the average weekly wage itself. Nielsen v. Burnham & Morrill, Inc., 600 A.2d 1111 (Me. 1992), annual bonuses or bonuses related to productivity or similar employment goals. McAdam v. United Parcel Service, 2001 ME 4, 763 A.2d 1173. Similarly, employee-authorized payroll deductions for purposes such as the purchase of health insurance are not fringe benefits, but are part of regular earnings. Fletcher v. Huntingdon Brothers, Inc., 647 A.2d 800 (Me. 1994).

Fringe benefits are defined in Chapter 1, §5(1) of the WCB rules as “any thing of value to an employee and dependents paid by the employer, which is not included in the average weekly wage.” The Law Court has observed that “fringe benefits consist of something other than direct monetary payments to the employee,” and commonly such benefits “take the form of some benefit other than an immediate payment of cash, for example, employer contributions specifically earmarked for the purchase of health, disability, or retirement insurance.” McAdam, supra, ¶21, 1179. Where circumstances are not clear-cut, employees will argue that benefits should be included as part of the wage itself, as there is no statutory cap on the average weekly wage. As an example, in Clukey v. Piscataquis Sheriff’s Department, 1997 ME 124, 696 A.2d 428 the Law Court held that military meal and housing allowances were a part of regular military pay, based on military pay. Not coincidentally, since fibromyalgia was officially recognized as a medical disorder, disability claims for social security and other health insurers have increased dramatically. In one study, it was shown that fibromyalgia-like symptoms accounted for 46 percent of the social security claims in one large city. Numerous articles, scientific and popular, have been written regarding whether or not fibromyalgia actually exists. However, at this point, a diagnosis of fibromyalgia is generally accepted in the scientific and medical community.

The question now being faced in the courts, among accident victims, their lawyers, and those defending the claims, is whether fibromyalgia can be a scientifically induced injury. In Maine, two cases in the Superior Court demonstrate conclusively that fibromyalgia is not recognized as a trauma-induced injury.

In the case of Trask v. Automobile Insurance Company, CV-94-379 (York), Justice Andrew Mead undertook a thoughtful analysis of his role as “gatekeeper” of evidence to be introduced at trial, including the plaintiff’s proffered testimony from three separate medical witnesses, that she was suffering from fibromyalgia caused by an automobile accident. Justice Mead used both Maine law and federal law in explaining his role as gatekeeper in evaluating the evidence to be presented. Using Maine Rule of Evidence 702, and Daubert v. Merrell Dow Pharmaceuticals, Inc., Justice Mead determined that a trial court must exercise discretion in determining what evidence will be submitted to the jury. In Trask, doctors testifying for the plaintiff all stated that the plaintiff did not have fibromyalgia before the accident and that the accident brought about their condition. None of the doctors could point to scientific evidence or any peer-reviewed article that accepted trauma as a cause of fibromyalgia. All of the doctors agreed that fibromyalgia’s cause is basically unknown in the medical community. No scientific or medical opinion was offered to show that science or medicine had concluded that fibromyalgia could be induced by trauma.

The plaintiff’s doctors essentially argued that the plaintiff did not have fibromyalgia before the accident, he had it afterwards, therefore the accident must have caused her fibromyalgia. Justice Mead rejected this argument as a logical fallacy referred to in Latin terms as post hoc ergo propter hoc [loosely translated – after this, therefore because of this]. The concept is also referred to as a temporal congruity. There is no science in a physician testifying that an event and an occurrence took place in sequence and therefore are related. As Justice Mead stated, “there is no medical theory or science to this conclusion. It is simply based on human experience and common sense.” The doctors in Trask admitted that their concept of temporal congruity is an intuitive process, not a scientific or medical one. The court, rejecting the plaintiff’s doctors’ testimony as unreliable, excluded the plaintiff’s expert wit-
claims to properly determine coverage, and to limit any extra-contractual liability.

Coverage for first-party mold claims

Court decisions on mold coverage are evolving on a daily basis, and it is necessary for clients to stay current on these decisions. One such area is the evolving law on policies. The adoption of new endorsements and forms to deal with this issue. The Maine Bureau of Insurance recently approved new mold exclusion endorsements for homeowners' and commercial property policies. The adoption of new coverage forms and the evolving law on mold coverage will present insurers with a number of future challenges.

The first step in analyzing first-party coverage for property damage is to determine whether the mold “damage” constitutes “property damage” under the policy. The 1991 HO-3 form and most ISO standard policies state: “Property damage” means physical injury to, destruction of, or loss of use of tangible property. Many mold claims do not result in physical injury to, destruction of, or loss of use of tangible property. For instance, mold infestation of an HVAC system may pose health hazards to occupants of a building, but the HVAC system itself is not damaged. In fact, mold in a metal vent is no different in character than mold in the air. Generally, mere diminution of the value of a building is not enough to constitute property damage. See State Farm Insurance Co. v. Waterford-Fair Oaks, Ltd., 2002 U.S. Dist. Lexis 3594 (N.D. Tex. 2002) (pollution exclusion applicable where exclusion specifically included “fungi”).

Most policies contain standard exclusions for damages caused by mold. Nevertheless, the ensuing loss exception to the mold exclusion will often create coverage when a covered loss results in the growth of mold. The standard ensuing loss exclusion provides coverage where the excluded damage was caused by a covered cause of loss—i.e. water intrusion. If the growth of mold results from a covered water loss, then any mold remediation will likely fall within the ensuing loss exception to the mold exclusion.

In addition to the standard leaky roof cases, insurers are seeing an increasing number of mold claims resulting from improper ventilation resulting in mold growth. In assessing these claims, insurers must take into account not only the mold exclusion, but also the workmanship exclusion. The desire to construct energy efficient houses often conflicts with the need to provide proper ventilation to prevent the accumulation of moisture. As a result of a failure to provide sufficient ventilation constitutes faultily workmanship, and the resulting mold falls with the mold exclusion, but does not fit within the ensuing loss exception due to the lack of a covered cause of loss.

Pollution exclusion

Many insurers have also relied upon the pollution exclusion to deny mold claims. Although one court has held that mold constitutes a pollutant, reliance on this exclusion may be misplaced. See Lexington Insurance Co. v. Waterford-Fair Oaks, Ltd., 2002 U.S. Dist. Lexis 3594 (N.D. Tex. 2002) (pollution exclusion applicable where exclusion specifically included “fungi”).

Defining the clear language of the pollution exclusion, many courts have limited its impact. Various decisions have limited the exclusion to environmental pollution claims, and others have strictly defined the term “pollutant” to exclude lead paint, carbon monoxide, and other naturally-occurring substances. It is a fair argument that if lead paint is a pollutant, then discharged mold spores also do not constitute “discharge” of a “pollutant.”

There is a lack of case law on this issue in Maine, and the central issues to be decided are: 1) Whether mold is a “pollutant”; 2) Whether the growth and release of mold spores constitutes a “discharge”; and, 3) Whether the pollution exclusion applies to insured charges. A plain reading of the standard

What are “other benefits?”

Section 102(4)(H) refers to “fringe or other benefits,” but neither the statute nor the Board rules define what constitutes an “other benefit.” At this point, it can only be said that “other benefits” are not precisely fringe benefits, and yet do not qualify for inclusion in regular pay. For example, in McAdam, the employee was a member of a labor union and received a one-time signing bonus after his union had successfully negotiated a collective bargaining agreement. Because the bonus was not related to work performance, the Court concluded that, by exclusion, it must be considered as an “other” benefit within the meaning of §102(4)(H).

The “other” benefit language is essentially a catch-all provision, designed to capture unique employer payments, if only in a limited way. The full scope of the definition will only be determined on a case by case basis.

Post-injury fringe

When individuals return to work after an injury and earn less than previous benefits for partial incapacity are calculated on the difference between current earnings and the pre-injury average weekly wage. The differential will obviously be exaggerated if fringe benefits are included in the pre-injury average weekly wage. The Court examined the conflicting legislative policies behind §102(4)(H) and §221, and concluded that the Legislature did not intend that fringe benefits be included in the pre-injury average weekly wage.

In Coulombe v. Anthem Blue Cross/Blue Shield of Maine, 2002 ME 163 (November 1, 2002), the Law Court upheld the Board’s exercise of its rule-making authority, but held that the dollar value of post-injury fringes in excess of pre-injury fringes may not be added to the wage. As a result, post-injury fringes may be included in the wage comparison process only to the extent that they are less than or equal to pre-injury fringe.

Coordination issues

Since a worker’s level of disability may fluctuate over time, pre-injury fringe benefits may or may not be included, depending on whether the resulting benefit level exceeds 2/3 of the state average weekly wage at the time of the injury. When compensation benefits are coordinated with other benefits under §221, and where the weekly compensation rate is reduced as a result, the possibility for including fringe benefits arises. However, in Ricci v. Mercy Hospital, 2002 ME 173 (December 13, 2002), the Court recently held that if weekly benefits are reduced to reflect the offset for old age social security benefits, and if the resulting benefit level is less than 2/3 of the state average weekly wage, fringe benefits cannot at that point be included in the average weekly wage. The Court examined the conflicting legislative policies behind §102(4)(H) and §221, and concluded that the Legislature did not intend that statutory offsets will not permit the inclusion of fringe benefits.

Conclusion

The package of fringe benefits offered by an employer, most notably health insurance, has become an increasingly important component of the overall compensation package. Section 102(4)(H) of the Act reflects a legislative compromise to recognize the value of fringe benefits for those at the lower income level. As compensation packages become more innovative, we can anticipate further disputes in the effort to distinguish fringe benefits from regular pay.
insureds of the possible risks if mold is
insurers to warn their first-party
of the dangers of mold, it is prudent for
selling their services.
Despite the lack of medical evidence,
their insureds to dangerous conditions.
significant medical illnesses, insurers
ations between mold exposure and
scientific evidence supporting a causal rela-
claims will avoid these pitfalls.
liability for carriers. Nevertheless, a
cases present an unusual risk of tort
the medical issues presented in mold
but not recognized the tort of bad faith, but
in mold cases. The Maine courts have
damages represent the biggest danger
Extra-contractual and tort damages
involves handling by homeowners’ carriers. To
avoid these pitfalls, insurers need to
understand the unique coverage and
liability issues in mold claims and
should have a protocol for handling these
cases. The course of mold litigation
will be determined by future court
tings, and it will be those insurers not
prepared for these unique issues who
will be the victims of any future, ad-
verse decisions.

This is Part I of a two-part article
on the unique issues presented in mold
claims. In our next issue, we will
examine third-party mold litigation, and ef-
fective responses to those claims.

President signs
Insurance Bill into Law

A new law, the Terrorism Risk Pro-
tection Act, was signed by President Bush
in November, 2002, establishing a pro-
gram in which the federal government
would share with the insurance industry
the risk of loss from future terrorist at-
tacks.
The law creates an exclusive federal
cause of action, under applicable state
law, for all suits for property loss, per-
onal injury or death arising out of a
terrorist event. It will consolidate claims
into a single Federal district court as-
signed by the Judicial Panel on Multi-
district Litigation. While the program
will require a financial commitment from
insurers, it is expected to provide a critical
backstop to help defray the catastrophic
costs of future attacks. Insurers will again
have the opportunity to offer coverage to
their insureds without risking insolvency
from a future terrorist attack.

Companies providing commercial
property/casualty insurance are required
to participate in the program, however,
corporate policyholders have the choice
of declining the terrorism coverage.

Mold is not the next asbestos and
will not destroy the insurance industry.
The majority of mold cases attracting
media attention have been bad faith
cases based upon ineffective claims
handling by homeowners’ carriers. To
avoid these pitfalls, insurers need to
understand the unique coverage and
liability issues in mold claims and
should have a protocol for handling these
cases. The course of mold litigation
will be determined by future court
tings, and it will be those insurers not
prepared for these unique issues who
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examine third-party mold litigation, and ef-
fective responses to those claims.

The coverage issues presented in
first-party mold claims are complex
and uncertain. As a result of the hyster-
ics surrounding mold claims, many rou-
tine water claims are blossoming into
expensive mold remediation cases. On
a case-by-case basis, the transforma-
tion of a $4,000 water claim into a
$30,000 water and mold remediation
claim is not overwhelming. However,
insurers presented with thousands of
claims following a water or ice event
may see a significant impact on their
loss ratio.

Despite the volume of small cases,
the recent multi-million dollar verdicts
in Texas, Florida, and California on
routine mold claims has caused insur-
ers the most concern. Although these
cases present a primer on how not to
handle a mold claim, it is important to
carefully analyze the grounds for these
verdicts. The $32.1 million award in
Ballard v. Fire Insurance Exchange,
Texas District Court No. 99-05252 (6/1/
01), and the $18 million verdict, later
reduced to $3 million, in Anderson v.
Allstate Ins. Co., CIV-00-907 (E.D.
Cal. 10/3/00) have attracted significant
attention from the insurance industry
and plaintiff’s bar. Nevertheless, the
verdicts in these cases are based prima-
lly on bad faith, rather than mold.
Fortunately, the Maine courts have not
adopted the tort of bad faith, and these
decisions do not reflect Maine law.

Under Maine law, insurers are un-
likely to face multi-million dollar ex-
penses for routine mold claims. Nev-
evertheless, it is important for companies
to follow strict protocols in adjusting