NORMAN, HANSON & DETROY, LLC

newsletter

Current developments in Maine law
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Governor endorses re-structuring of Workers' Compensation Board

BY STEPHEN W. MORIARTY

In late February Governor King's office submitted proposed legislation which would revise the structure and organization of the Board for the first time since the passage of the Workers' Compensation Act of 1992. Last year the Legislature commissioned a feasibility study of the administrative structure and governance of the Maine workers' compensation system, and an analysis of progress made by the Board in carrying out recommendations set forth in a 1997 study performed by Coopers & Lybrand. The study was undertaken by Berry, Dunn, McNeil & Parker (BDMP) and its report was submitted in mid-December, 2001. BDMP presented seventeen detailed recommendations to the Legislature, and the suggested changes ranged from organizational re-structuring to data collection and financial management. Some of BDMP's recommendations, although not all, now appear in the proposed legislation.

On March 22, 2002 a majority of the Labor Committee reported the bill out with an "ought not to pass" recommendation, while a minority recommended passage with amendments. As a practical matter, the Committee's action may end any further attempts at administrative reform during this session. Since the bill will likely become a framework for further attempts to re-structure the Board in the next administration, it may be helpful to become familiar with its key provisions. These comments on the bill will focus on the Governor's proposals for organizational change as well as new allocations of the Workers' Compensation Board's authority and responsibility. Fiscal matters, such as a proposed revised assessment mechanism and budgetary issues, will not be discussed.

Change of name

The name of the administrative entity assigned responsibility for management of the workers' compensation system is to be changed from the Workers' Compensation Board to the Workers' Compensation Agency. The objective of the change is to create a clear distinction between the actual administrative agency and the governing body of the agency, which will continue under the name Workers' Compensation Board. The Agency will essentially function as part of the executive branch, like other departments of state government. The Agency itself will continue its present operations without interruption or change.

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Workers' Compensation Board

The role of the Board is re-cast as the Agency's governing body, with "general policy-making and oversight responsibilities for the implementation of this Act." The Board is charged with the responsibility to "assume an active and forceful role in the administration of this Act to ensure that the system operates efficiently and with maximum benefit to both employers and employees." In this regard, the Board is required to recommend statutory changes to the Legislature each year, and may, in consultation with its Executive Director, appoint advisory committees as needed.

Significantly, the Board retains full authority to adopt rules on behalf of the Agency. In particular, only the Board

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may adopt a schedule to determine permanent impairment, and only the Board may revise the permanent impairment threshold and extend the period of entitlement to benefits for partial under §213. However, the Executive Director may propose rules to the Board and will preside over rule-making hearings unless the Board determines otherwise. On appellate matters, the Board will have the right to submit a statement to the Law Court supporting a Petition for Appellate Review, and may file a brief as a friend of the Court if an appeal has been accepted.

Board membership changes

The most controversial aspect of the proposed legislation concerns changes to membership of the Board. As proposed, the Board would consist of nine members appointed by the Governor; three as representatives of management, three as representatives of labor, and three as representatives of the public. The change to odd-numbered membership should eliminate the stalemate experienced in the past. An individual who once served as a labor or management representative may not later be appointed as a public member, and vice versa. The bill does not explain how nominees for the public member seats will be selected. A quorum of the Board will be five members, and action may be taken by majority vote when a quorum is present. A chair must be elected for an annual term, and may be a member of any one of the three groups.

Executive Director

The role of the Executive Director is substantially enhanced in the proposed legislation. Appointed by the Governor for a five year term following consultation with the Board, the Director has broad authority to appoint deputy directors, a general counsel, and a staff attorney for the worker advocate program, as well as the power to hire all personnel required to administer the Act. Significantly, the Executive Director may hire individuals "qualified by background and training" to serve as hearing officers for three year terms. In addition, the Director has full authority to administer the budget of the Workers' Compensation Agency.

In short, the Executive Director would fulfill all the functions of a chief executive and administrative officer of the Agency. Because the Director will be an appointee of the Governor rather than an employee of the Board, the Director will function with greater authority and independence than currently.

Hearing Officers

The BDMP report recognized that hearing officers must maintain independence and impartiality and should not be "unduly influenced by concerns regarding re-appointment." BDMP recommended either that the hearing officers be incorporated within the Department of Labor or assigned to a larger central panel of hearing officials which provide decision-making services to various state agencies.

However, the Governor's bill keeps the hearing officers within the Workers' Compensation Agency, but provides that they be appointed by the Executive Director. The concerns of the BDMP report regarding independence of the hearing officers have been addressed, as they will no longer be hired by the Board. The hearing officers retain their authority to hear and decide disputed claims, and to request Board review of decisions involving issues of significance to the system's operation. Hearing officers may be re-appointed at the discretion of the Executive Director and may be removed for good cause shown. □

Judge Jon David Levy appointed to Maine Supreme Judicial Court

With the appointment of District Court Judge Jon David Levy, the Maine Law Court now has its full complement of seven justices. The Court has had a vacancy since last fall, when Chief Justice Daniel Wathen resigned, and sitting Justice Leigh Saufley succeeded him.

Jon Levy has served the District Court since 1995 and was appointed chief judge of that court in January 2001. A graduate of the West Virginia College of Law, he moved in 1983 to Maine and worked in private practice until his District Court appointment. Justice Levy, in his testimony before the Senate Judiciary Committee, said that he believed judges needed especially to express themselves clearly in writing that can be understood by litigants and the public, as well as by other judges.

Justice Levy, who lives in York, served as chairman of the Maine Family Law Advisory Commission from 1996 to 2000. He is married and the father of two children.

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newsletter
is published quarterly to inform you of recent developments in the law, particularly Maine law, and to address current topics of discussion in your daily business. These articles should not be construed as legal advice for a specific case. If you wish a copy of a court decision or statute mentioned in this issue, please e-mail, write or telephone us.

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Don't let identity theft happen to you

By Adrian P. Kendall

Each and every day we release personal information about ourselves to complete strangers, whether it's writing a check at the supermarket, charging a hotel room, renting a car, buying goods online or applying for a credit card. Each transaction requires personal information: Bank and credit card account numbers, social security numbers, or your name, address and telephone numbers.

Sometimes we forget that the personal information we and our families provide to companies, marketers and government agencies can be used, not just to process an order or complete a transaction, but to also provide us with additional information about future products, services or promotion. More soberingly, this information may also be shared with others.

But the real threat, other than the inconvenience of mountains of junk mail and spam, comes from identity thieves. Identity theft is the fastest-growing white-collar crime in the United States today. Not surprisingly, it was also the top consumer complaint in the nation last year. It happens when someone, unknown to you, takes your personal identifying information, such as your social security number, birth date or mother's maiden name, and uses it to open new charge accounts, order merchandise or borrow money. What makes this crime even more worrisome is that often the illegal conduct isn't discovered until the bills or loans are not repaid. The really bad news arrives when a collection agency begins pursuing you to collect debts you may not know even existed.

Here are a few tips that will help you, as a consumer, manage your personal information wisely and minimize the possibility of identity theft.

• Before you reveal any personally identifying information, find out how this personal information will be used, and whether it will be shared with others.

• Inquire what the company's privacy policy is - can you choose to have your information kept confidential?

• Websites directed to children or that knowingly collect information from children under 13 must post a notice of their collection practices. Be sure to read the privacy policy on any website directed towards children.

• In your computer activities, use passwords to protect your credit card, bank and telephone accounts. When you choose your password, avoid using easily available information such as your mother's maiden name, your birth date or the last four digits of your social security number or telephone number. Other choices could be a series of consecutive numbers, or the name of a local sports team.

• Keep the number of cards that you carry and your identifying information to a minimum. If you must carry a variety of identifying information, keep it in more than one place.. That way if you lose your purse, briefcase, wallet or backpack, the person who finds it will not have access to all your personal and private data.

• Keep your papers containing personal information in a safe place. When throwing away receipts, copies of credit applications, insurance forms, physician statements, bank checks and statements, tear or shred them. Believe it or not, identity thieves will pick through trash and recycling bins in their attempts to capture valuable personal information.

ADRIAN P. KENDALL

• Consider ordering a copy of your credit report from each of the three major credit reporting agencies each year. Conducting such a review will ensure that the information they have about you is accurate and includes only activities or transactions that you have authorized.

• When shopping on line, be sure to use a secure browser to guard the security of your transactions. In submitting purchase information, look for the "padlock" icon on the browser status bar to be sure your information is secure during transmission.

Recently, there has been much discussion of "a heightened state of awareness" as the nation works together to fight the terrorist threat. Greater awareness of the importance and disclosure of personal information can help prevent the painful and costly results of identity theft.

The next NH&D Newsletter will feature advice on what to do when you discover that your identity has been stolen. □

Three recent Law Court decisions

By David P. Very

Evidence on proximate cause required to survive summary judgment

The question of whether a defendant's acts or omissions were the proximate cause of a plaintiff's injury is generally a question of fact. In a recent decision however, the Law Court highlighted the court's role as a gatekeeper, requiring the presentation of sufficient evidence to support a finding that the defendant's negligence was the proximate cause of the injuries in order to survive a summary judgment.

Alexander Millett owned an apartment building in Biddeford. To access the building's basement, one had to enter through a stairway off the first floor apartment's kitchen. Part of the basement was used for storage for the first floor apartment. Millett hired a company to line the chimney leading from the building's furnace located in the basement. The workers left a large amount of soot on the basement floor and this soot was frequently tracked up to the first floor apartment kitchen by its residents. Residents of the apartment allegedly informed Millett that the soot in the basement needed to be cleaned up.

Cheryl Houde, a resident of the first floor apartment, returned after being away visiting relatives. She found that soot had been tracked all over the kitchen floor as a result of an incident involving the tenant's son. She proceeded to clean it up. The next morning, she was sitting alone in the kitchen chair. She got up, took two steps, and slipped. Her leg broke in several places. She did not see any soot on the floor that morning and no one else testified that they had seen any soot after the accident. Houde believed that soot on the kitchen floor caused her fall because she found a smudge that looked like a soot stain on the knee of her pajamas that she was wearing when she fell. She concluded the stain must have been caused by some soot that she had missed when she had cleaned up the kitchen the night before.

The Superior Court granted summary judgment in favor of the defendant based on the rule of law set forth in *Nichols v. Marsden*, 483 A.2d 341 (Me. 1984). The *Nichols* rule states that a landlord is generally not liable for a defective condition in a part of the premises under the tenant's exclusive control. The Superior Court found that since the injury occurred in the kitchen, an area under the tenant's exclusive control, the defendant did not breach a duty to the tenant.

On appeal, in ***Houde v. Millett***, 2001 ME 183 (December 31, 2001), the Law Court first stated that its review of summary judgment is not limited to reviewing the reasoning of the Superior Court. The Law Court can affirm a summary judgment for reasons different from those relied on by the lower court. Thus, the Law Court decided the case not on whether the landlord had a duty to the tenant, but whether the plaintiff had established sufficient evidence that her injury was due to the negligence of the defendant.

The Law Court stated, "A defendant is entitled to a summary judgment if there is so little evidence tending to show that the defendant's acts or omissions were the proximate cause of the plaintiff's injuries that the jury would have to engage in conjecture or speculation in order to return a verdict for the plaintiff." The Court further noted, "The mere possibility of such causation is not enough, and when the matter remains one of pure speculation or conjecture, or even if the probabilities are evenly balanced, a defendant is entitled to a judgment."

The Law Court found that the evidence generated by the plaintiff established that it is "possible" that it was soot that the plaintiff slipped on. The Court held, however, absent some evidence more "directly establishing" that the soot caused her fall, a factfinder could not reasonably conclude without engaging in speculation, that it was the soot that caused her to slip. Because the Court held the plaintiff's evidence was insufficient to support a finding that defendant's negligence was the proximate cause of her injuries, it did not reach the issue of whether the *Nichols* rule would apply in this situation.

Jonathan Brogan of NH&D represented Defendant Alexander Millett.

Wrongful death cap increase not retroactive

The Wrongful Death Act's damages cap for the loss of comfort, society, companionship, and emotional distress was increased from $75,000 to $150,000, effective July 4, 1996. That cap was increased to $400,000, effective August 11, 2000. In ***Greenvall v. Maine Mutual Fire Insurance Co.***, 2001 ME 180 (December 22, 2001), the Law Court held that these increases cannot be retroactively applied and that the cap in effect at the time of the death is the applicable cap for those damages. Absent language to the contrary, the Law Court stated that language affecting procedural or remedial rights are applied retroactively, whereas legislation affecting substantive rights is applied prospectively. The Court found that increasing one's potential liability in a death action cannot be said to be purely procedural. Moreover, the statute does not in any way suggest a retroactive application. Therefore, for all wrongful deaths occurring prior to July 4, 1996, a cap of $75,000 will apply. For all deaths oc-

curring from July 4, 1996 until August 10, 2000, the $150,000 cap will apply. All actions based on the death of the decedent on or after August 11, 2000 will be governed by the $400,000 cap.

Underinsured motorist issues under Unfair Claims Settlement Practices Act

In ***Curtis v. Allstate Insurance Company***, 2002 ME 9 (January 17, 2002), the Law Court clarified its recent decisions regarding underinsured motorist issues and claims made under the Unfair Claims Settlement Practices Act.

On June 23, 1997, Tammy Curtis was injured and Loretta Rumney was killed as a result of a collision between a vehicle owned and operated by Curtis and a motor vehicle operated by Daniel Christensen. At the time of the accident, Christensen had liability insurance of $20,000 per person and $40,000 per accident. Curtis and Rumney were insured by Allstate Insurance Company with underinsured motorist coverage in the amount of $100,000 per person. It was conceded that both Curtis and Rumney sustained damages exceeding $100,000. There were other claimants in the Christensen vehicle. Allstate's policy provided that damages payable under the policy would be reduced by "all amounts paid by the owner or operator of the uninsured auto or anyone else responsible."

In September of 1997, the attorney representing Curtis and Rumney demanded that Allstate pay them each $100,000 in UM benefits. This letter was followed by another dated October 9, 1997, in which plaintiffs' counsel recognized a disagreement with Allstate as to the offset allowed and requested that Allstate pay the plaintiffs the undisputed amount. Allstate agreed to pay the plaintiffs $160,000, the undisputed portion of the coverage. A series of negotiations then began which finally resulted in Allstate paying the remaining $40,000 in return for an assignment of the plaintiffs' claims against the tortfeasor and the tortfeasor's insurance policy.

The plaintiffs had filed an action against Allstate claiming that the carrier had breached the contract and had violated various provisions of the Maine Unfair Claims Settlement Practices Act. Allstate was granted summary judgment on all claims and the plaintiffs appealed.

The plaintiffs first contended Allstate breached the insurance contract by not paying the full $100,000 amount to each claimant on demand. The Law Court noted the policy contained an offset provision for all amounts paid by the owner or operator of the underinsured auto or anyone else responsible. The policy also indicates when damages are payable to the insured:

> We are not obliged to make any payment for bodily injury, sickness, disease or death under this coverage which arises out of the use of an underinsured motor vehicle until after the limits of liability for all liability protection in effect and applicable at the time of the accident have been exhausted by payment of judgments or settlement.

The plaintiffs alleged that the Law Court's decision in *Greenvall v. Maine Mutual Fire Insurance Company*, 1998 ME 204, 715 A.2d 949, overrides this contract provision and that Allstate was improperly requiring settlement with the tortfeasor's insurer as a precondition to payment. In *Greenvall*, the Law Court held that an insured had the right to bring a direct action against his insurer pursuant to his UM coverage without first proceeding against the underinsured tortfeasor, and that a judgment against the tortfeasor was not a condition precedent to recovery under UM coverage.

The Court clarified that in *Greenvall*, the insured's estate had received a $100,000 payment from the tortfeasor's insurance company, which represented the full limits of the tortfeasor's policy, prior to suit against the UM carrier. In *Greenvall*, the Court held that "obtaining a judgment against the tortfeasor is not the insured's sole means of establishing legal entitlement to recover for purposes of uninsured motorist coverage." The UM carrier's obligation to pay was triggered by the exhaustion of the liability carrier's limits through settlement. The Court held that its prior decision in *Greenvall* does not invalidate a contract provision, such as the provision in the Allstate policy, that states that payment of damages is triggered upon the exhaustion of the tortfeasor's liability limits by settlement or judgment. Therefore, because the time-of-payment provision is triggered only when the tortfeasor's liability limits have been exhausted, the Law Court held that Allstate did not breach the insurance policy by refusing to pay the amounts in dispute upon demand.

The Court then addressed plaintiffs' contention that Allstate had violated the provisions of the Maine Unfair Claims Settlement Practices Act. The plaintiffs first alleged that the insurer knowingly misrepresented its obligations under the insurance contract by refusing to immediately pay the disputed $40,000. The Law Court stated that to establish a knowing misrepresentation, "a plaintiff must provide evidence demonstrating something more than a mere dispute between the insurer and the insured as to the meaning of certain policy language." To survive summary judgment, "the insured must generate an issue of fact that the insurer knew the policy said and meant one thing, but told the insured something else."

The plaintiffs argued that the Law Court's decision in *Saucier v. Allstate Insurance Company*, 1999 ME 197, 742 A.2d 482, was dispositive of the conflict between the parties regarding the

$40,000 in disputed funds. The Court reiterated that in *Saucier*, it held that the insurance policy in that case was properly interpreted to permit Allstate to offset only those amounts paid to its insured by the other insurance carrier. It clarified that it did not reach the question presented in this case regarding a UM carrier's responsibility where the tortfeasor has paid no amounts to the insured. The Court stated that Allstate's contract does permit it to delay payment of disputed amounts until the liability limits of the other policy have been exhausted by settlement, judgment or become subject to a subrogation and cooperation agreement with the insured.

The plaintiffs further claimed that Allstate failed to effectuate a prompt, fair and equitable settlement of the claim submitted in which liability had become reasonably clear. Once again, the Law Court stated that the basis for Allstate not immediately offering the entire $20,000 per person to the claimants was that a settlement was pending with the tortfeasor's carrier, which would allow Allstate to offset from its liability limits the amounts received by the plaintiffs. The Court held that this was a reasonable basis for contesting liability.

The Law Court therefore affirmed the summary judgment in favor of Allstate on all claims.

The Curtis decision does highlight that a UM carrier may be required to pay the undisputed amount of the policy pending the determination of the offset where liability and damages are clear, or face a potential claim under the Unfair Claims Settlement Practices Act. On the other hand, this decision also makes it clear that an insurer will not be liable under the Act based on a reasonable dispute with its insured. □

What insurers should know about the Fair Credit Reporting Act

By Adrian P. Kendall

To underwrite its private insurance policies and screen high-risk applicants, an insurer may use an individual's consumer reports or credit reports. This is wholly permissible, as long as the insurance company complies with the requirements of the Fair Credit Reporting Act. The FRCA is designed to protect the privacy of consumer report information, and to guarantee that the information that reporting agencies provide is as accurate and current as possible. Consumer reports may include information on an applicant's credit history, as well as the individual's medical conditions, driving record, criminal activity, and hazardous sports.

The Adverse Action Notice

When the insurer takes an adverse action, such as a decision to deny insurance coverage, increase rates, or terminate a policy, and that action is based solely or partly on information provided in a consumer or credit report, then Section 615(a) of the Fair Credit Reporting Act requires that the consumer be given a notice of the adverse action. The notice should be provided to new applicants, as well as current policy holders.

The notice must include the following:

• The name, address and telephone number of the credit reporting agency that supplied the consumer report, including the toll-free telephone number for credit bureaus that maintain files nationwide;

• A statement that the credit reporting agency supplying the report did not make the decision to take adverse action and cannot give specific reasons for it; and

• Notice of the individual's right to dispute the accuracy or completeness of any information the reporting agency furnished, and the consumer's right to a free report from the agency upon request within 60 days.

Disclosure of this information in the adverse action notice is important, because it is entirely possible that the consumer report contained information that was inaccurate or incomplete. For this reason notice is therefore required even if the information in the report was not the main reason for the insurer's denial of coverage or rate increase. Even if that report played only a small part in the overall decision, the applicant or policy holder still must be given an adverse action notice.

As you would expect, there are legal consequences for insurers who fail to get an applicant's permission before requesting a consumer report, or who fail to provide the required disclosure notices. The FRCA allows individuals to sue insurers for damages in federal court. A person who successfully sues is entitled to recover court costs and reasonable legal fees. The law also allows individuals to seek punitive damages for deliberate violations. In addition, the Federal Trade Commission, or other federal or state agencies may sue insurers for noncompliance.

While providing written adverse action notices are not strictly speaking required, it is only prudent for insurers to provide them, and to keep copies to show compliance with the FCRA. □

Insurance coverage for terrorism exclusions – update

By James D. Poliquin

Insurance regulators in the majority of states, including Maine, have now approved a limited exclusion of coverage for damages and/or liabilities arising out of "terrorism." Although different forms have been developed for different coverage lines, basic definitions and thresholds in the approved forms employ the same general approach.

In Maine, the approved policy forms for each of the coverage lines exclude injury or damage arising directly or indirectly from terrorism. Also excluded are the costs of actions taken to hinder or defend against an actual or expected incident of terrorism, regardless of any other cause or event that contributes to the injury or damage.

The term "terrorism" is separately defined, and would apply only if certain damage or injury thresholds are met, or the terrorism is of a particular nature. The property damage threshold is $25 million, and forms may differ as to whether this must be $25 million in insured damage or $25 million in damage to property regardless of whether or not it is insured. Business interruption losses are included in calculating this figure.

A separate threshold applicable to bodily injury coverage requires 50 or more persons to sustain serious physical injury or death. The term "serious physical injury" is defined in some forms, but not in others. One trigger in the terrorism definition is that the incident involve nuclear, pathogenic, poisonous, or biological or chemical materials. Significantly, the triggers that render an event as one of terrorism so as to activate the exclusion are stated in the alternative. In other words, if the incident involves nuclear, pathogenic, poisonous, biological or chemical materials, the property damage and injury thresholds need not be met for an event to constitute "terrorism." Certain types of terrorist activity would qualify as terrorism for purposes of applying the exclusion regardless of the damage or injury thresholds.

If a threshold of $25 million is met, such as the $25 million in damages, the exclusion is activated and there would be no coverage. These thresholds are not caps on exposure; they are triggers to apply the exclusion of all coverage.

A Senate bill remains pending in Congress that addresses the unavailability (shortfall) of reinsurance for terrorism risks. The development of a federal reinsurance plan for terrorism incidents probably would eliminate the need for state-authorized terrorism exclusions in policies. Action on this issue by Congress is expected within the next few months. □

Abandoned property – what should you do?

Have you ever been confronted with the question of what to do with abandoned property? If so, you may want to become familiar with Maine's Uniform Unclaimed Property Act, 33 M.R.S.A. § 1951-1980, which is administered by the State Treasurer's Office. Unclaimed assets, such as savings and checking accounts, contents of safety deposit boxes, life insurance policies, undistributed stock dividends and any kind of tangible property, must be transferred to the State Treasurer's Office after a specific length of inactivity, usually five years. Currently, the State Treasurer's Office has on file more than 75,000 accounts with a value close to $50 million. Under the Act, the State Treasurer must safeguard the assets forever or until the rightful owner claims them. Each year, the State Treasurer returns an average of $2.7 million worth of unclaimed property to their owners.

If you are the holder of abandoned property, the first thing you should do is send a certified notice to the owner informing them that they must claim their property or that you will proceed under the Uniform Unclaimed Property Act. If you do not hear from the owner within the time period prescribed in the Act, you must then make a report of the property for the Treasurer, describing the property and approximating the value of each property item. The Treasurer's Office then has the option of receiving the property and holding it for the owner, or declining to receive the property if its value is less than the expenses of notice and sale. If the Treasurer's Office declines to receive the property, you may then sell it and take out your reasonable expenses for storage and sale. Any remainder must be remitted to the State Treasurer.

There are different requirements for landlords holding property abandoned by a tenant. A separate statute also applies to common carriers and abandoned perishable goods. If you have questions about a matter of abandoned property, contact Norman, Hanson & DeTroy to learn your rights under Maine law.

Aaron K. Baltes

Workers' compensation – Law Court decisions

By Stephen W. Moriarty

Stacking permanent impairment

In early February the Law Court issued an opinion which will have a major adverse impact upon the duration of an employer's responsibility for payment of benefits for partial incapacity under §213. The key issue was whether permanent impairment from both occupational and non-occupational causes can be combined for purposes of the §213(1) permanent impairment threshold. In ***Kotch v. American Protective Services, Inc.***, 2002 ME 19, 788 A.2d 582, the Court held that the "whole body" approach to permanent impairment required that the cumulative effect of impairment from all sources must be considered in order to provide indefinite benefits for those individuals with "serious whole body disabilities."

In Kotch two separate cases were consolidated on appeal. In the first case, the employee had sustained a 10% whole body PI attributable to a 1994 back injury. The employee had previously injured his left knee in a military accident, but the occupational injury did not aggravate or accelerate the prior problem. However, the Hearing Officer considered the impairment from the pre-existing injury and established the degree of whole body impairment at 20%. In the second case, the employee had a 10% impairment due to a 1996 hip injury, but also had additional impairment attributable to a series of prior injuries. The 1996 injury did not combine with or aggravate any of the prior problems, but the Hearing Officer established permanent impairment at 17% based upon all sources. The employers then appealed to the Law Court.

In *Churchill v. Central Aroostook Association for Retarded Citizens*, Inc.,1999 ME 192, 742 A.2d 475, the Law Court had held that if a work injury significantly aggravates a pre-existing condition, and if there is some percentage of impairment attributable to the prior condition, the impairment from the two sources may be combined. However, the Court had never decided that impairment from miscellaneous pre-existing conditions not aggravated by a work injury could be stacked. On appeal in Kotch the employers argued that §213 allows consideration only of permanent impairment "resulting from the personal injury" in determining the duration of entitlement to partial.

In an opinion noteworthy for lack of analysis, the Court disregarded the plain language of §213 and held that "it is irrelevant to the overall disability of the employee whether the two injuries are to separate body parts, or the result of unrelated causes." In the Court's view, the concept of "whole body" impairment necessarily requires the consideration of non-occupational or pre-existing impairment to determine whether the disability is serious enough to qualify for lifetime entitlement. Remarkably, the Court found that it would defeat legislative intent to limit the determination of permanent impairment only to that degree actually caused by an occupational injury.

In the short run, the impact will be immediate and expensive. Those employees with minor levels of occupational permanent impairment will be entitled to lifetime benefits for partial if they have a sufficient level of pre-existing impairment to place them above the threshold. As a result, exposure for payment of benefits for partial will increase astronomically, as will potential settlement value. There may also be some unintended consequences, such as reluctance on the part of employers to hire individuals with known or obvious levels of existing impairment.

In the longer run, once sufficient data of permanent impairment levels has been generated, the Board will be compelled to increase the impairment threshold pursuant to §213(2). The statute mandates that only 25% of all injuries should exceed the threshold. It may be safely anticipated that there will be strong disagreement within the Board concerning the impairment threshold when new impairment data eventually emerges.

The Kotch decision creates serious difficulties for those adjusting workers' compensation claims. The 15 chapters of the 4th Edition of the AMA Guides set forth the methods for determining impairment for a broad variety of organic systems, including the skin, the blood, the endocrine organs, the digestive system, and the cardiovascular system. Because the existence of pre-injury impairment to an unrelated portion of the body may be unknown, it will be difficult to forecast exposure and properly reserve a claim. In addition, it will be increasingly expensive to assess permanent impairment if multiple anatomic structures are involved. For example, an orthopedic surgeon is probably unqualified to assess respiratory or cardiovascular impairment, and separate evaluations may be required for all organic systems involved.

It is possible that the Legislature may respond with an amendment to the Act limiting the type or source of impairment that may be considered for purposes of the §213 cap. In the meantime, employers should routinely propound additional discovery questions in accordance with Chapter 12, §15(1) of the WCB Rules. Specifically, employees should be asked to provide complete information on the full extent of any known permanent impairment, together with the names and addresses of treating physicians. In the absence of such dis-

closure, it will be impossible to properly set reserves or to price a case for settlement.

Inflation adjustments

Last year we witnessed a prompt legislative response to a Law Court decision addressing entitlement to inflation adjustment pursuant to former §55(A). In *Bernard v. Mead Publishing Paper Div.*, 2001 ME 15, 765 A.2d 581, the Court held that the required annual inflation adjustment must be applied to the compensation rate and not to the pre-injury average weekly wage. The Legislature responded by enacting §224, which took effect September 21, 2001. The new statute requires that the inflation adjustment for older injuries must be applied to the pre-injury average weekly wage, and not to the smaller compensation rate.

The legislation also provided that the new statute was to apply retroactively to all dates of injury, even if there had been prior adverse decrees. At the time of the statute's effective date there were a number of inflation adjustment claims pending before the Board, but the statute did not specify whether it was to apply to pending proceedings.

In most instances, an amendment to a statute will not apply to a pending matter unless the Legislature clearly expresses such an intent. In ***Bernier v. Data General Corporation***, 2002 ME 2, 787 A.2d 144, the employer argued that §224 was vague and non-specific, but the Court disagreed. The Court held that the enacting language of the statute was "sufficiently broad to demonstrate a legislative intent to apply §224 to pending proceedings," and remanded the matter to the Board.

Weight of §312 exam

The §312 examination process plays an increasingly significant role in compensation litigation, and in a recent decision the Law Court described the circumstances under which a Hearing Officer may reject the findings of an examiner. In ***Dubois v. Madison Paper Company***, 2002 ME 1 (January 4, 2002), the employee had originally injured his right arm and head in 1980, but had returned to regular duty. In early 1999 he underwent surgical treatment for cervical arthritis and degenerative disc disease and sought benefits for the incapacity that followed. The treating physicians implicated that 1980 injury, but a §312 examiner determined that no causal relationship existed. The examiner had concluded that there were pre-existing degenerative changes in the neck, although apparently there were no prior medical records supporting this conclusion.

The Hearing Officer rejected the opinion of the §312 examiner, and found that the treating physicians more thoroughly understood the mechanism of the original injury. The Hearing Officer also found that the opinion regarding a pre-existing condition was unsupported.

Section 312 provides that the findings from an examiner must be adopted "unless there is clear and convincing evidence to the contrary." In its opinion, the Law Court held that the critical issue was "whether the Hearing Officer could have been reasonably persuaded by the contrary medical evidence that it was highly probable that the record did not support the IME's medical findings." After examining the evidence, the Court held that there was sufficient competent evidence to support the Hearing Officer's conclusion that it was highly probable that the §312 examiner's findings lacked necessary support.

The Dubois opinion reinforces the historical discretionary authority given to Hearing Officers to weigh conflicting medical evidence. However, it still must be shown to a high level of probability that a §312 examiner's findings are not supported by the record before those findings may be rejected.

Retroactivity of §201(5)

Section 201(5) provides that benefits may not be awarded on the basis of a non-occupational injury, which is not causally connected or related to a compensable occupational injury. In ***Bernier v. Data General Corporation***, 2002 ME 2, 787 A.2d 144, the employee had sustained an initial non-occupational injury in 1980 and a subsequent work-related injury in 1998. The Hearing Officer awarded full benefits based on a finding that the occupational injury was a contributing factor in the overall disability, and did not reduce the level of benefits to count for the effects of the non-occupational injury.

The Law Court reversed on appeal and held that §201(5) is fully retroactive. The Court vacated the decision of the Hearing Officer and held that benefits should not have been awarded for that portion of the disability attributable to the non-occupational injury.

In some cases it may be difficult to precisely determine the proportionate share of responsibility to be borne by different injuries. The Court noted that where precise allocation is impossible, it is appropriate to divide responsibility on a per-injury basis. In addition, the Court held that a Hearing Officer may rely upon permanent impairment assessments rendered against each injury to determine the appropriate degree of responsibility. □

On March 25, 2002 a new law was introduced to the Maine Legislature that would reverse Kotch v. American Protective Services, and modify the Workers' Compensation Act of 1992. The Joint Standing Committee on Labor held a lengthy public hearing, receiving comments from many representatives of business, labor, and the insurance community. The Legislature, as of press time, has not agreed to statutory changes that would reverse Kotch. For updates please see our website, www.nhdlaw.com.

Family and Medical Leave Act – U.S. Supreme Court rejects individual notice requirement

By Anne M. Carney

The Family and Medical Leave Act became effective in 1993. The FMLA guarantees qualified employees twelve weeks of unpaid leave each year if the employee has a serious health problem, must care for a family member with a serious health problem, or upon the birth or adoption of a child. Congress also authorized the Secretary of Labor to develop regulations necessary to enforce the FMLA. Among the regulations adopted by the Secretary of Labor was a requirement that an employer provide notice to an employee that time away from work will be deducted from the employee's twelve weeks of leave. This regulation is sometimes referred to as the "designation" rule. 29 CFR §825.208(a) (2001). The Secretary of Labor also enacted a regulation that gives an employee an extra twelve weeks of leave if the employer does not give notice. 29 CFR §825.700(a) (2001).

These regulations were the subject of ***Ragsdale v. Wolverine World Wide, Inc.***, a United States Supreme Court decision issued on March 19, 2002. In a five to four decision, the U.S. Supreme Court declared the designation rule invalid because it contradicted the provisions of the FMLA itself.

The Court was most concerned with the penalty aspect of the designation rule, which entitled an employee to an additional twelve weeks of leave if the employer failed to designate time off from work as FMLA leave. The Court called the remedy provided by the designation rule "incompatible with the FMLA's comprehensive remedial mechanism." The FMLA permits an employee to recover compensation and benefits lost "as a direct result of the violation, that is, tailoring the remedy to the harm suffered by the employee." In contrast, the designation rule entitled an employee to twelve additional weeks of leave regardless of whether the employee suffered any harm as a direct result of the violation. In the case of Plaintiff Ragsdale, she lost no FMLA benefits as a result of Wolverine's failure to designate. It was undisputed that Ragsdale could not have returned to work at the end of twelve weeks, regardless of whether Wolverine had given her notice, due to the severity of her health condition. The Court determined that the Secretary of Labor's designation rule contradicted the remedial provisions of the FMLA because it "relieve[d] employees of the burden of proving any real impairment of their rights and resulting prejudice."

The Secretary of Labor argued that the designation rule was acceptable because it was "easier to administer" than a rule requiring an employee to prove actual damage flowing from the failure to give notice. This argument actually illustrates the conflict between the regulation and the statute, according to the Court, because "the remedy created by Congress requires the retrospective, case-by-case examination the Secretary now seeks to eliminate." It also conflicts with the FMLA's $100 minimum fine, a penalty specifically imposed upon employers who fail to give the general notice required by the FMLA.

ANNE M. CARNEY

The Court concluded its opinion by focusing on the broader implication of the Secretary of Labor's regulation. The twelve work weeks of leave guaranteed by the FMLA is the central provision of legislation that is extremely significant for both employers and employees throughout the United States. The twelve week figure "was the result of compromise between groups with marked but divergent interests in the contested provision." The U.S. Supreme Court found that this compromise was entitled to respect by both the Court and the administrative agency charged with enforcing the FMLA. For this reason, the designation rule, which potentially extended the twelve week leave requirement indefinitely, could not stand.

Although Maine employers are now relieved of the burden of designating time off as FMLA-qualified leave, clear communication with any employee about time off is still recommended. Employers should tell any employee who requests time off (1) how long a leave of absence will last and (2) whether the employee will be returned to his or her previous job. A straightforward approach to whether and when employment will be terminated also tends to minimize employer exposure to liability. □

Briefs/Kudos

DAN CUMMINGS of the corporate group has been named to the Board of Directors for Project Opportunity, Inc. The mission of the non-profit organization is two-fold: to motivate high school students in the Bethel area of Maine to reach for higher education, and to provide scholarship monies for college and technical training.

In Dan's hometown of South Portland, he has also been asked to serve on the Board of Trustees for the First Congregational Church, United Church of Christ.

The University of Southern Maine seeks to fill the important post of Dean of the College of Arts and Sciences, the largest entity in the University. A choice must be made from applicants from throughout the country, and the University has set up a panel of community representatives to provide recommendations to the University Search Committee. **ADRIAN KENDALL** has been appointed to the panel of seven to meet with the applicants, and offer its favorable references to the Search Committee.

CHRIS TAINTOR has been elected to the Board of Directors of the Maine Bar Foundation. The Foundation is the philanthropic arm of the private bar in Maine, established to increase access to justice for indigent and vulnerable individuals, and to support, encourage, and carry out the legal profession's commitment to law-related public service. Chris has also received from the Maine Judicial Branch of the Foundation the 2001 Outstanding Volunteer Award. The award recognizes pro bono work performed as a guardian ad litem for children of indigent parents in cases involving contested custody.

The efforts of Maine Credit Unions in the Campaign for Ending Hunger in 2001 came to $170,356, some $40,000 more than last year. Grants of up to $3,000 were awarded to 90 hunger organizations in Maine, and members of Dexter Regional Federal Credit Union made the highest total contributions: $8,410.

Maine credit unions and huggable, fuzzy bears have been in league for seven years now, and their BearHugs for Children Program offers teddy bears to children suffering from traumatic events. The recent drive collected over 1,300 bears of all sizes, and are being distributed to children by hospitals, and law enforcement and emergency agencies.

ROD ROVZAR and **ADRIAN KENDALL** attended the annual Governmental Affairs Conference of the Credit Union National Association held in Washington, D.C. Their schedule was packed with meetings with clients, regulators, senators and congressmen, and they discussed with National Credit Union Administration officials regulatory issues of importance to Maine's credit unions. The conference plays host to credit union delegations from across the country and around the world.

AARON BALTES is serving as Chair-Elect of the Maine State Bar Association's Young Lawyers Section until the end of 2002, when he will assume the Chair.

ANNE CARNEY and **BOB BOWER** in March participated in an in-depth workshop on Technology in Local Government for members statewide of the Maine Municipal Association. The focus of Anne and Bob's program was Cyber Risks – local government and employees' use of the Internet and e-mail, and their risks of liability. They presented a roundup of new state laws on Internet websites, examined potential liabilities arising out of municipal websites, and the legal hazards of employees' misuse of computers. The NH&D team offered recommended employer policies for use of telephones, computers and the Internet.

DAVE VERY was busy this winter offering three speeches in one month. He addressed the Maine Claims Managers Council on Maine's new mandatory ADR procedures, spoke at a National Business Institute Seminar on "Uninsured and Underinsured Motorist Law in Maine," and, to underscore his enthusiasm for the profession, offered to students at Portland's King Middle School his reasons for choosing law as a career.

Medical Marijuana

Eight states, including Maine, have laws that allow patients to use marijuana in limited circumstances. The Legislature has quietly expanded the amount of marijuana that ill persons with certain medical conditions may legally possess, and Gvernor King signed the bill April 1, 2002. A patient, under a doctor's written advice, may now possess 2.5 ounces and six plants, three of which can be mature. Maine legislators became the first in the country to expand a medical marijuana law.

Distribution of marijuana is still considered illegal under federal law, however. The U.S. Supreme Court's decision in ***U.S. v. Oakland Cannabis Buyers' Cooperative***, 532 U.S. 483 (2001), held that possession and distribution of marijuana for medical use violates federal law. Drug Enforcement Administration chief Asa Hutchinson has said the agency is working to develop federal enforcement policies that will take into account the differences in federal and state laws.

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