NORMAN, HANSON & DETROY, LLC

newsletter

*Current developments in Maine law*

*Summer 2010*
*Vol. 23, No. 4*

# Social Media In The Courtroom

BY JONATHAN W. BROGAN

With the exploding advances in communication technology and social media on the internet, age old protections for witnesses and trials are now obsolete. It used to be a trial judge would warn the jury not to access newspapers, television or radio to hear reporting about the trial. Now, a careful trial lawyer must ask the presiding judge to inform the jury to avoid "any electronic media device" such as a telephone, a cell or smart phone, blackberry, PDA computer, the internet, any internet device, any text or instant messaging service, any internet chat room, blog or website such as Facebook, MySpace, You-Tube, Twitter or LinkedIn; or to communicate with anyone, in any form, about information about the case until a verdict is reached.

Judges typically inform jurors not to go to the scene or do any independent research. Now they must also inform jurors not to do any internet research about a case or use internet maps or Google Earth or any other program or device to search for or view any places discussed in the testimony. Also judges should warn the juries not to research any information about the case, the law, or the people involved including the parties, the witnesses, the lawyers, the experts or the judge. Even a reasonably inquisitive juror could easily research testimony by an expert witness, in other cases, on the internet. Such independent research threatens the foundation of American jurisprudence; sworn testimony heard by jurors in court.

JONATHAN W. BROGAN

Needless to say the social media has changed the way all of us communicate with each other and the way news is reported around the world. Print newspapers are struggling to survive. Television stations regularly refer to Twitter, MySpace, Facebook, or LinkedIn for additional sources of information. We are now locked into a 24/7 news cycle and real time reporting from trials has already interfered with the conduct of trials.

Several Federal Courts have allowed bloggers to post live commen-

## INSIDE

*Social Media In The Courtroom* 1

*Workers' Compensation – Law Court Decisions And Legislative Amendments* 3

*Maine's New Uniform Durable Power Of Attorney Act* 6

*Recent Law Court Decisions* 8

*Kudos* 11

*NHD Earns Top Rankings from Chambers USA* 12

*More Changes Regarding Construction Workers To The Maine Workers' Compensation Act* 13

*The Scope of Compensable "Medical and Other Services" under §206* 14

tary on high profile cases, including the recent perjury trial of Louis "Scooter" Libby. "Real time tweeting" has been sanctioned by several United States District Courts and there even has been a live access feed permitted in a recent trial.

With this kind of "real time" access, the possibility of witness and/or juror misconduct is increased. For many years, judges have entered sequestration orders forbidding certain witnesses from listening to courtroom testimony before that witness actually testifies. The idea behind that sequestration order is to allow the witness to present testimony without it having been tainted by previous testimony in the case. (See MRE 615.) However, live blogging and/or tweeting can defeat a sequestration order that is not carefully crafted.

Recently, the United States District Court for the District of Montana, in the case of *United States v. W.R. Grace*, permitted live "tweeting" by students from the University of Montana School of Journalism and Law School. The presiding justice approved the use of live "tweeting" in the courtroom and in fact followed it on his own computer while the trial was ongoing. He felt that the tweeting was useful in allowing the public at large to follow a very high profile trial and therefore protected the public's right to know. However, the limitations of the Court's powers, and its nonspecific sequestration order, became evident.

The government had charged W.R. Grace, and several of its employees with federal crimes including conspiracy. The conspiracy alleged was that Grace knew that land it had mined was contaminated and did not report the contamination to the EPA (as was required) or to potential buyers of the land after mining had ceased. The key government witness, a self professed "whistleblower", began his testimony after the testimony of the alleged victims of Grace's conspiracy, the new owners of the contaminated land. The whistleblower testified to telling his boss at WR Grace that the site they were selling was contaminated and should not be sold. He also testified that his boss told him not to worry, it was a case of "caveat emptor". Grace's lawyers pounced on the witness' testimony and painstakingly demonstrated that none of the information he had provided before trial contained this crucial "caveat emptor" language nor other specific testimony detrimental to Grace.

Grace's counsel followed up on this issue and got the crucial witness to admit that he had changed his testimony after reading, online, the testimony of other witnesses at the trial and adopting statements made by them during the trial. The trial judge was faced with an unenviable dilemma. First, he had authorized the live blogging. Next, he had entered a sequestration order which had not clearly been violated by the witness since it did not specifically restrict him from reading "tweets" and blogs. The defense requested a mistrial. The Court declined the defense's request but specifically instructed the jury that it could not rely upon the testimony of the witness in deciding the defendants' guilt or innocence. The trial judge also instructed the jury that it must consider all of the key witness' testimony with "skepticism". In fact, the judge went so far as to point out that he found the witness' testimony "highly suspicious" and that there appeared to be a "strong circumstantial case for perjury". He also noted that the witness' following of the trial's proceedings through blogging and other media cast doubt upon his credibility.

As the *Grace* case specifically points out, sequestration orders must include specific references to the new social media. In that case, the failure to specifically bar witnesses from reading tweets or blogs out of the courtroom led to the Court's extraordinary instructions about a key witness and may have helped lead to the acquittal of W.R. Grace. With the advent of extensive social media and its everyday use, the lawyers and judges must insure that jurors are instructed not to use social media to augment the testimony they are receiving in Court.

To some extent there always has to be a trust relationship between the Court, the jury and witnesses. Otherwise, jurors and witnesses would always be sequestered throughout a trial. Clearly this is impossible. However, more specific information instructing jurors and witnesses under a sequestration order about what they can and cannot access during the trial is more likely to result in a trial untainted by juror or witness malfeasance, and more likely to bring about a verdict based solely on the evidence presented at trial and the law as given to the jurors by the Court. □

NORMAN, HANSON & DETROY, LLC

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.

Stephen W. Moriarty, Editor
Lorri A. Hall, Managing Editor

Norman, Hanson & DeTroy, LLC
P.O. Box 4600, Portland, ME 04112
Telephone (207) 774-7000
FAX (207) 775-0806
E-mail address: 1stinitiallastname@nhdlaw.com
Website: www.nhdlaw.com

# Workers' Compensation – Law Court Decisions And Legislative Amendments

By Stephen W. Moriarty

STEPHEN W. MORIARTY

## Stacking of PI

Everyone is familiar with the importance of establishing permanent impairment to determine the duration of a claimant's entitlement to benefits for partial incapacity. Claimants and their representatives have often argued that permanent impairment from prior injuries or conditions should be combined or "stacked" with the impairment resulting from the injury to arrive an overall figure. Eight years ago the debate reached a fever pitch when the Law Court held in *Kotch v. American Protective Services, Inc.*, 2002 ME 19, 788 A.2d 582 that PI from pre-existing non-occupational injuries could be combined with work-related PI to establish durational limits. The Legislature responded in short order by enacting §213(1-A) which limits those circumstances in which pre-injury PI can be considered with the additional impairment that results from an injury.

In a recent decision the Law Court had an opportunity to interpret the language of §213(1-A)(A), which applies to injuries occurring before January 1, 2002. In *Buckley v. S. D. Warren Company*, 2010 ME 53 (June 24, 2010) the claimant sustained several occupational injuries prior to January 1, 1992, including two left shoulder injuries in 1996 and a right shoulder injury in 2000. The presiding hearing officer found that the claimant had 7% PI related to the left shoulder and an additional 7% related to the right shoulder. However, the hearing officer refused to combine the two assessments essentially on the grounds that the injuries were unrelated to each other and that the impairment of the right shoulder was unrelated to that found in the left. Section 213(1-A)(A) allows PI to be stacked between "the work injury at issue in the determination" and any pre-existing physical condition which has been aggravated or accelerated by that injury.

The Court noted that the hearing officer found that the 2000 injury to the right shoulder was causally related to the earlier left shoulder injuries, because the claimant had favored his left shoulder and had over-relied upon the right shoulder after 1996. However, there apparently was no evidence that the subsequent occurrence of the 2000 right shoulder injury had aggravated or worsened the pre-existing left shoulder problem. Having found that the right shoulder injury was causally connected to the earlier left shoulder injury, the Court then concluded that the Legislature had intended that impairment resulting from both injuries should be combined. The Court's analysis is difficult to understand, as §213(1-A)(A) on its face requires more than a mere causal connection between two injuries before impairment may be combined. In effect, the Court treated the 1996 and 2000 injuries as a single injury, and found that the right shoulder problems were merely a consequence of the earlier left shoulder injury. Because the latter injury was causally related to the first, the Court wrote that "it follows that permanent impairment to both shoulders should be combined when deciding whether the threshold has been reached".

The Court cautioned that "we are not addressing multiple unrelated work injuries". If there had been no causal relationship between the left and right shoulder injuries, it appears that the Court would not have approved of the stacking of PI assessments. Still, given the fact that the hearing officer had found that the employee had sustained separate personal injuries, it is difficult to understand how a mere causal connection without evidence of an aggravation was sufficient to justify the stacking of the assessments.

## Pension offset entitlement

In a recent decision the Court clarified the sequence of steps that must be taken to properly apply the pension benefit offset under §221. In *Hanson v. S. D. Warren Company*, 2010 ME 51 (June 8, 2010), the claimant's average weekly wage was $1,679, and he was found to have an imputed earning capacity of $400 per week. He was awarded ongoing benefits for partial incapacity and his weekly compensation entitlement was above the maximum rate. He also received pension benefits, and the key issue was whether the pension benefit offset should be taken

before or after the employee's overall entitlement was reduced to the maximum rate.

The presiding hearing officer ruled that the employee's entitlement must first be reduced to the maximum benefit level, and that the pension offset must then be applied to calculate the actual weekly benefit amount. The employee appealed and argued that the hearing officer should have applied the pension offset first, before taking the maximum benefit level into account. The Court disagreed and affirmed the hearing officer's decision.

In reaching this decision the Court relied upon its analysis in an earlier case, *Ricci v. Mercy Hospital*, 2002 ME 173, 812 A.2d 250. In *Ricci*, the claimant's average weekly wage exclusive of fringe benefits produced a benefit level in excess of 2/3 of the State average weekly wage. Accordingly, the value of the weekly fringe benefits was excluded. The employee's benefits were then reduced to reflect 50% of the value of old-age social security benefits, and the claimant argued that at that point the fringe benefits should be added to the average weekly wage to produce a higher benefit level. The Court disagreed and held that the employee's entitlement to benefits must first be determined before any coordination of benefits was performed. Once benefits were coordinated in accordance with §221, the Court held it was inappropriate to add fringe benefits back into the equation at that point.

In *Hanson*, the Court found that the language of §221 was not ambiguous and that the plain meaning of the statute controlled. As it had done in *Ricci*, the Court held that the first sequential step is to determine the level of partial entitlement under §213. If the amount of the benefit exceeds the maximum rate, the weekly amount payable must then be reduced to the maximum rate. This procedure must be followed whether or not the opportunity for a pension offset exists. If a pension offset is available, the offset must be applied against the maximum rate, and the employee is entitled to receive the remainder in weekly compensation benefits. Because partial benefits cannot exceed the maximum rate pursuant to §213, the Court emphasized that it was essential to establish the actual entitlement under that section before the offset is taken. The same rationale would apply to any other available offset.

## Retirement presumption and coordination of benefits

One of the more important innovations of the Workers' Compensation Act of 1992 was the enactment of §223, which created the so-called "retirement presumption". Pursuant to this provision of the Act, an individual who terminates active employment and begins to receive nondisability pension or retirement benefits is presumed not to have a loss of wage earning capacity as the result of an occupational injury. The plain purpose of the statute is to reduce workers' compensation costs to employers by preventing retirees from supplementing retirement income with workers' compensation incapacity benefits. While the presumption is rebuttable, it may only be overcome if the retiree can show that he or she has a total physical inability to perform any work which would otherwise be suitable to his or her qualifications. The actual availability of such work within the marketplace is irrelevant. The required burden of proof is therefore much more stringent than the standard that ordinarily applies to establish basic entitlement to benefits for total or partial incapacity.

In the years since the adoption of §223 the Law Court has interpreted it in a manner consistent with legislative intent. For example, the Court has held that the termination of "active employment" does not require that a claimant must have regained full work capacity before the presumption may be triggered, and instead can be applied against a retiree who was working in light-duty status at the time of retirement. Furthermore, the Court has noted that the statute makes no distinction between voluntarily and involuntary retirement. In one case the Court approved the application of the presumption in a claim involving benefits for permanent and total loss of industrial use of the hands under §212(2)(G), thereby overturning an award of benefits of 800 weeks of presumed total incapacity.

The phrase "terminates active employment" is key to the applicability of the statute. Eleven years ago the Court held in *Pendexter v. Tilcon of Maine, Inc.*, 1999 ME 34, 724 A.2d 618 that the presumption applied to a claimant who fully retired and remained unemployed for approximately two years before returning to work for a new employer. Having found that the presumption was triggered by the initial retirement, the Court rejected the argument that it no longer applied once the employee eventually returned to work. However, the Court left one key issue unresolved:

> We do not address the situation of an employee who retired and went immediately to another job. Id. ¶10, 621.

That question has now been answered by the Court.

In *Damon v. S. D. Warren Company*, 2010 ME 24, 990 A.2d 1028, the employee was injured in 1991 but continued to work for S. D. Warren

until 2003 when, facing layoff, he accepted an early retirement option and received nondisability pension benefits. Prior to retirement, he began working weekends for another employer, and effective immediately upon retirement he transitioned to full-time status for the other employer. He earned less than his pre-injury average weekly wage working for the new employer. The hearing officer found that, given the continuing effects of the original occupational injury, the current employment accurately reflected the employee's wage earning capacity, and awarded benefits for partial. S. D. Warren asserted that the claimant was presumed to have no loss of earning capacity by virtue of the retirement, but the hearing officer disagreed. While the employee's partial benefits were coordinated pursuant to §221 to reflect his retirement income, the hearing officer refused to apply the retirement presumption. Because it was clear that the employee was receiving retirement benefits from the employer from whom workers' compensation benefits were sought, the key issue is whether he had terminated active employment within the meaning of §223.

The Court held that the evidence fully supported the hearing officer's finding that the employee did not actually terminate active employment by virtue of the fact that he immediately became employed by another employer. It reasoned that the "active employment" language of §223 did not apply solely to the former employer from whom workers' compensation benefits were being claimed. Because the employee continued to work steadily without a break in employment, the Court held that the plain language of the statute compelled a finding that he had not terminated active employment and that therefore the retirement presumption did not apply.

After having retired from S. D. Warren, the claimant continued to receive retiree health and life insurance from that company as part of the retirement package. The value of these fringe benefits was not considered in calculating the amount of partial entitlement, presumably for the reason that the 1991 average weekly wage was too high to permit the inclusion of fringe benefits under §102(4)(H). The hearing officer granted the employer an offset for the value of the retiree health and life insurance, but the Court vacated that portion of the decision.

The Court noted that the "primary purpose of benefit coordination is to avoid double recoveries and the stacking of benefits". Because the value of the fringe benefits was not considered in calculating entitlement to partial, the Court concluded that allowing an offset would not prevent a double recovery. The Court held that the use of the term "retirement plan" in the statute did not include the value of retiree health and life insurance premiums when such benefits had not been included in the average weekly wage. As a result, such benefits were not subject to coordination.

Because the claims involved a 1991 injury, the coordination of benefits language of former §62-B applied, as current §221 is not retroactive. However, there is nothing in the language of §221 to suggest that a different result would have been reached if that statute had been applied. It is important to note, however, that the Court clearly implied that if the health and life insurance fringe benefits had been used to calculate the claimant's incapacity benefits, an offset for their value would have been required, as otherwise a double recovery would result.

## Legislative amendments

In *Nichols v. S. D. Warren/Sappi*, 2007 ME 103, 928 A.2d 732, the Court held that under §221 an offset existed for a life insurance policy that included a permanent and total disability feature. The Legislature amended §221 by adding subsection (2)(B) which provides that a disability insurance policy within the meaning of the statute "does not include a life insurance policy that includes a disability feature". This change becomes effective on July 12, 2010.

Effective on the same date is an expansion of the exclusion of prisoners from the definition of the term "employee". In addition to the existing categories of individuals described in §102(11)(E), the amended statute provides that prisoners employed in a "community confinement monitoring program" are not to be considered employees. A community confinement monitoring program is essentially an alternative sentencing option defined in full detail by statute and limited to those with medium or minimum security classifications. Section 203(1) has also been amended to extend the forfeiture of benefits for incarceration to those participating in a community confinement monitoring program. □

# Maine's New Uniform Durable Power Of Attorney Act

By Kathryn M. Longley-Leahy

The use of a Durable Power of Attorney has long been utilized as an inexpensive method of providing for surrogate decision making not only for incapacity planning, but also for convenience. In recognition of the importance of the power of attorney, the Maine legislature has adopted the Uniform Power of Attorney Act which became effective on July 1, 2010. The new law seeks to re-enforce the effectiveness of a Durable Power of Attorney while simultaneously protecting the principal from financial abuse perpetrated through misuse of the powers provided the agent. Certain minimum fiduciary duties are imposed upon the agent who, by accepting the appointment, provides interested persons with the ability to seek judicial interpretation of the agent's authority or to review the agent's conduct. Protections are also provided to persons and institutions who are asked to accept and acknowledge an agent's authority without having actual knowledge that the Power of Attorney or the agent's authority is void, invalid or terminated, or that the agent is exceeding or improperly exercising the power. Since an agent authorized to act on behalf of the principal is likely to exercise the authority at times when the principal may not be able to monitor the agent's conduct, the new statute imposes minimum duties upon the agent and certain protections and safeguards for the principal that were not previously available under prior law.

Perhaps the most important change introduced by the new Act is the articulation of minimum mandatory duties imposed upon the agent and third parties asked to rely on the agent's authority. While Maine law has always imposed on agents acting under a Durable Power of Attorney the same standard of care applicable to a trustee, the Uniform Act sets forth certain minimum mandatory duties for agents, subject to the optional modification by the principal. Importantly, an agent is required to act in accordance with the principal's 'reasonable expectations' to the extent known by the agent, and to otherwise act as a fiduciary under the standard of care applicable to trustees. The trustee's fiduciary standard includes the duty to act prudently and loyally for the sole benefit of the principal, which, under the Maine Uniform Trust Code, also includes the duty to abstain from any act that would be for the fiduciary's own benefit without specific consent from the principal. Other duties imposed upon the agent include the duty to act with care, competence and diligence ordinarily exercised by agents in similar circumstances, the duty to keep a record of all receipts, disbursements and transactions made on behalf of the principal, the duty to cooperate with the principal's healthcare surrogate, and the duty to attempt to reserve the principal's estate plan to the extent actually known by the agent. While an agent is not required to disclose receipts, disbursements or transactions or to provide an accounting unless ordered by a Court or requested by the principal, a guardian, conservator, other fiduciary or the personal representative of the estate, in attempt to protect vulnerable or incapacitated principals against financial abuse, the Uniform Act adopted in Maine sets forth a broad category of persons who are authorized to petition the Court for a review of the agent's conduct. Almost anyone, including a guardian, conservator or other fiduciary acting for the principal, persons authorized to make healthcare decisions for the principal, the principal's spouse, registered domestic partner, parent or descendant, any potential heir of the principal, a person named as a beneficiary under a testamentary document or trust, a government agency having regulatory authority to protect the welfare of the principal, a principal caregiver or person demonstrating a sufficient interest in the principal's welfare, can seek an accounting of the agent's actions by petitioning the Probate Court to seek

KATHRYN M. LONGLEY-LEAHY

a review of the agent's conduct. Should an agent be found to have violated the fiduciary duty that is owed to the principal, the agent must restore the value of the principal's property misused and, additionally, reimburse the principal for attorney's fees and costs paid on the agent's behalf.

A major issue addressed by the Uniform Act relates to an arbitrary refusal of a third party to accept the Power of Attorney. The new Act adopts certain protections for those who honor the Power of Attorney while simultaneously imposing liability for those who refuse to accept the Power of Attorney arbitrarily. Under Maine's Uniform Act, a person who acts in good faith in accepting an acknowledged Power of Attorney, without actual knowledge that the Power of Attorney is void, invalid or terminated, or that the agent is exceeding or improperly exercising authority, may rely on the Power of Attorney as if it were genuine, valid and still in effect. Upon being presented with, and asked to accept, an acknowledged Power of Attorney, the third party has the option to request and rely upon, without further investigation, the agent's certification under penalty of perjury, of any factual matter concerning the principal, the agent or the Power of Attorney. The third party is also given authority under the new law to seek an opinion of counsel as to any matter of law concerning the Power of Attorney, at the principal's expense, if, within seven (7) business days of being presented with the Power of Attorney, the person making the request provides a written reason for the request. Five days after the requested verification is provided, the third party must then honor the Power of Attorney. While a third party presented with a Power of Attorney is not obligated to verify the Power of Attorney's existence or validity, the third party is authorized under the Uniform Act to request additional information if there is a good faith reason for doing so; however, if a third party neither accepts the Power of Attorney presented, nor requests information, that third party may be liable for damages.

The new Act provides a third party with a "safe harbor" for refusing to honor the Power of Attorney without penalty in certain circumstances such as where the third party has no authority to transaction business with the principal, where the transaction is inconsistent with federal law, or when the third party has a good faith belief that the principal is subject to physical or financial abuse, neglect, exploitation or abandonment by the agent or a person acting for or with the agent.

Prior to the July 1, 2010, there had been some confusion as to whether a properly exercised Power of Attorney that a named agent to "stand in the shoes" of the principal as a surrogate decision-maker survived the principal's incapacity, or whether a court-appointed fiduciary for the principal, most likely in the event of the principal's incapacity, would have the power to revoke or amend a previously executed Power of Attorney. The new Act clarifies this uncertainty by providing that a Power of Attorney is durable (i.e. survives the principal's incapacity) unless the document expressly provides that authority under the Power of Attorney is terminated by the incapacity of the principal. Further, effective July 1, 2010, the principal's choice of agent under a properly executed Power of Attorney survives a court-appointed fiduciary to manage some or all of the principal's property unless the agent's authority is limited, suspended or terminated by the Court. The new Act also eliminates confusion between the use of terms "agent" and "attorney-in-fact" as had been used somewhat interchangeably in reference to the surrogate power holder. The new Act makes it clear that the term "agent" is to be used in place of "attorney-in-fact."

A Power of Attorney executed in the State of Maine on or after July 1, 2010 is valid if its execution is signed and acknowledged by the principal or in the principal's 'conscious presence' by another individual directed by the principal to sign his or her name on the Power of Attorney. "Conscious presence" test is satisfied if the signing takes place within the range of the senses of the principal except as provided by statute other than under the Act. The Act also stipulates that a photocopy or electronically transmitted copy of an original Power of Attorney has the same affect as the original. Unlike prior law, the new Act specifically provides that the Power of Attorney will terminate when an action is filed for the termination or annulment of the agent's marriage to the principal or their legal separation, unless the Power of Attorney provides otherwise. In addition, the Power of Attorney will also terminate upon the termination or the commencement of termination of a registered domestic partnership other than by marriage between the principal and the agent.

An agent accepts the authority and responsibilities under a Power of Attorney upon exercising the authority or upon performing duties as an agent that is interpreted as an acceptance of appointment. Since an agent may be unaware that the principal has designated him or her as an agent in a Power of Attorney, it is often bene-

ficial if the agent were to sign the document as a means of accepting responsibility and agreeing to abide by the rules governing action under the Power of Attorney.

The newly adopted Uniform Act preserves the effectiveness of a Durable Power of Attorney as a low cost, flexible and private form of surrogate decision making while providing additional safeguards for the protection of the principal and the agent as well as persons who are acted to rely on the agent's authority. While the duties and responsibilities of the agent are significant, the additional protections against the potential for financial abuse of a principal by a named agent should be of comfort to a principal while of little consequence to the agent who is truly committed to acting in the best interest of the principal who has solicited the agent's assistance. □

# Recent Law Court Decisions

By David P. Very

DAVID P. VERY

## Maine Tort Claims Act

In a 4-3 split decision, the Law Court significantly expanded a governmental entity's immunity in cases involving the use of a vehicle in the *Estate of Shannon J. Fortier v. City of Lewiston*, 2010 ME 50 (June 3, 2010).

Lieutenant Colonel (ret.) Robert Meyer, a career Air Force pilot, was an employee of the City of Lewiston and ran Lewiston High School's Air Force Junior Reserve Officer Training Corp. program. He arranged to have three students participate in an orientation flight using an aircraft provided by Twin Cities Air Services and piloted by a Twin Cities' employee. Meyer allegedly had information that the pilot had performed reckless, unsafe maneuvers on other flights, and had made landings that he described as unusual. Notwithstanding this information, Meyer allowed the three students to board the flight and the aircraft crashed killing all aboard.

The estates of the three students filed suit against Twin Cities and the City of Lewiston arguing in part that Meyer acted negligently in failing to prevent the three students from getting on the plane given his experience as a former Air Force pilot and his knowledge of the pilot's unsafe flying. The City of Lewiston moved for summary judgment asserting that it was immune and, after the motion was denied, appealed to the Law Court.

The Maine Tort Claims Act (MTCA) states the general rule that all governmental entities shall be immune from suit on any and all tort claims seeking recovery of damages pursuant to certain exceptions. One of the exceptions to immunity states that a governmental entity is liable for its negligent acts or omissions in its ownership, maintenance or use of a variety of vehicles to include aircraft. The City argued that it was not "using" the Twin Cities aircraft within the meaning of the MTCA at the time of the crash. The Plaintiffs argued that a plain and common meaning should be applied to the word "use" and that the school's hiring of an independent contractor to perform orientation flights constituted use, albeit indirect use, of an aircraft within the meaning of the MTCA.

The Court's majority initially stated that an analysis of the MTCA "starts from the premise that immunity is the rule and exceptions to immunity are to be strictly construed." The Law Court further stated that the issue of whether Meyer should have prevented the three students from flying was irrelevant to the separate question of whether the City was "using" the aircraft in the first instance. Accordingly, the majority indicated that it would set aside any consideration of Meyer's action and examine exactly what the legislature meant when it said that a governmental entity is liable for its negligent acts or omissions in its use of any aircraft.

The majority indicated that the statute addresses three situations in which immunity is waived. In the first two instances, the governmental

entity exercises actual, physical control over the equipment, it either owns it or its employees maintain it. As a result, the Court indicated that it would make little sense for the legislature to specify two categories of potential liability requiring actual control of equipment and then make the "use" category so expansive as to include virtually any direct or indirect employment of equipment, regardless of ownership and regardless of whether the governmental entity had any control over how the equipment was maintained or operated. As a result, the majority of the Court interpreted the term "use" as a situation where a governmental entity has some measure of direct control over the equipment. Given that the City had no direct control over the Twin Cities' aircraft or its pilot, the majority of the Law Court found that the exception was not applicable and thus vacated the Superior Court's denial of the motion for summary judgment and remanded for entry of summary judgment in favor of the City of Lewiston.

The three justice minority stated that the majority of the Court ignored the plain meaning of the word "use" and substituted its own meaning of a commonly used word and equated it with "operation." As a result, the minority stated that the Court's interpretation would extend the cloak of immunity to virtually every instance in which the government contracts with third parties to provide transportation services.

## Underinsured Motorist Coverage

In *Beal v. Allstate Insurance Company*, 2010 ME 20 (March 11, 2010), the Law Court addressed the interplay of a high-low settlement agreement and an underinsured motorist insurance policy.

Patricia Beal, while a passenger in her parents' car, sustained injuries in a collision with a vehicle operated by Toby Prosky. At the time of the collision, Prosky had $100,000 of liability insurance through Allstate. Beal had underinsured motorist coverage through her parents' Maine Bonding policy in the amount of $100,000 and through her own policy, coincidentally with Allstate, in the amount of $50,000, for a total of $150,000 in UIM coverage. Beal brought suit only against Prosky and the parties agreed to submit the case to binding arbitration with a high-low provision that capped Beal's recovery from Prosky at the $100,000 liability limit of his Allstate policy. The arbitrator determined that Beal's damages totaled $135,000 and Allstate paid $100,000 to Beal pursuant to the terms of the high-low agreement. Beal and Prosky filed a stipulation of dismissal and the court dismissed Beal's suit with prejudice without reducing the arbitration award to a judgment.

All of the parties agreed that Beal's parents' Maine Bonding UIM coverage was primary and thus entitled to the full offset of the $100,000 tortfeasor policy. As a result, Beal brought suit solely against Allstate pursuant to her policy's UIM coverage to recover the remaining $35,000 awarded by the arbitrator. The Superior Court first entered a partial summary judgment in favor of Beal declaring that Allstate was collaterally estopped from relitigating the issue of total damages as determined by the arbitrator. The Court then later entered a summary judgment in favor of Allstate, denying Beal's claim for benefits because it concluded that after the high-low provision capped Beal's recovery from Prosky at $100,000, she was no longer "legally entitled to recover damages" pursuant to the terms of her UIM policy. Both parties appealed to the Law Court.

The Law Court first determined whether Allstate, in its role as Beal's UIM carrier, was bound by the arbitrator's determination of Beal's damages. The Court indicated that collateral estoppel prevents the relitigation of factual issues already decided if the identical issue was determined by a prior judgment, and the party sought to be bound had a fair opportunity and incentive to litigate the issue in the prior proceeding. Allstate first argued that applying collateral estoppel was not proper because the arbitration award was not reduced to a final judgment that was adopted or confirmed by the Court. The Law Court stated that the arbitration proceeding provided for both sides to present evidence, required advance notice of witnesses to be called and any documents or records intended to be introduced, and thus contained the elements of adjudication. On those facts, the Law Court concluded that the arbitrator's determination of damages was sufficiently analogous to a final judgment for the purposes of collateral estoppel.

The Law Court then addressed the question as to whether collateral estoppel would apply to Allstate, as Beal's insurer, which was not an actual party to the arbitration. The Court indicated that in order to assert collateral estoppel, the parties sought to be bound must either be a party, or in privity with a party, in the prior proceeding. The Court cited a previous decision in which it held that one employer could be collaterally estopped from relitigating the nature of an injury decided in a worker's compensation hearing involving another employer. The Court indicated that because the two employers had identical ownership and management, and were insured by the same

worker's compensation policy, there was sufficient identity of ownership, control and interest for the purposes of collateral estoppel. The Court indicated that in this case, Allstate, as Prosky's liability insurer, provided counsel for Prosky in the arbitration proceeding and that Allstate was the same company that insured Beal and that Allstate clearly was aware of the arbitration. The Court indicated that Allstate, as the liability carrier, had an incentive to keep Beal's damages at the lower end of the negotiated high-low agreement. The Court indicated that if allowed to relitigate the issue of damages, Allstate, as a UIM carrier, would have the same goal of keeping Beal's damages below $100,000. As a result, the Court indicated that Allstate, as Beal's UIM insurer, was in privity with Prosky and thus would be bound by the previous arbitration ruling as to damages.

The facts of this case are unique in that the same carrier insured the tortfeasor and provided the UIM coverage. Although left an open question by this decision, it does not appear that a UIM carrier, who did not participate in the prior proceeding or did not insure the tortfeasor in the prior proceeding, would be bound by the amount of damages determined in that prior proceeding. That would appear to be certainly the case if the UIM carrier didn't even have any notice of the prior proceeding.

Allstate then argued that because the insured has fully settled the claim pursuant to the high-low agreement, she was no longer "legally entitled to recover damages" from the tortfeasor for purposes of UIM coverage. The Law Court indicated that it had never had an occasion to decide this issue and further stated that there was a split of authority in other jurisdictions that have interpreted similar statutes and insurance policies. The Court indicated that some courts have construed "legally entitled to recover damages from a tortfeasor" strictly and literally such that an insured's settlement with or release of a tortfeasor cuts off the insured's further and legal entitlement to damages. Other courts have construed "legally entitled to recover" to allow an insured to claim UIM benefits after settling with a tortfeasor.

The Law Court noted that the legislative purpose of the UIM statute was to allow an injured insured the same recovery which would have been available had the tortfeasor been insured to the same extent as the injured party and that the Legislature indicated a strong public policy in favor of the just compensation of accident victims in enacting the UIM statute. As a result, the Court stated that it would construe the protections of the statute, and any limiting conditions in an insurance policy, liberally in favor of insureds and strictly against insurers. The Court therefore declined to adopt a strict construction of the phrase "legally entitled to recover damages from an underinsured" as used in the statute. The Law Court held that when an insured settles with an underinsured tortfeasor for the limits of the tortfeasor's liability insurance, the insured will remain "legally entitled to recover" damages from the tortfeasor for purposes of claiming UIM benefits, if the injured party's damages exceed the tortfeasor's policy limits and either (1) the UIM carrier consented to the settlement, or (2) there is no prejudice to the UIM carrier's subrogation rights resulting from its lack of consent to the settlement.

Finally, the Court addressed the "no consent to settlement clause" in the UIM policy. The Court indicated that if Allstate had consented to or approved the Beal settlement, it could be precluded from denying Beal's claim pursuant to its no consent to settlement clause. If Allstate did not consent to the settlement, then Beal would still be entitled to recover UIM benefits unless Allstate could demonstrate prejudice as a result of the loss of subrogation rights from the insured's failure to obtain the insured's consent before settling with the tortfeasor. The Court indicated that Allstate would have the burden of demonstrating prejudice by providing evidence of Prosky's financial situation as it relates to Allstate's subrogation rights. As that issue was not addressed by the parties, the Court remanded for further proceedings.

## Motions to Set Aside Defaults

The Maine courts have been historically tough when it comes to setting aside entries of default. That history was further enforced in the recent decision of *Richter v. Ercolini*, 2010 ME 38 (May 11, 2010).

In August of 2008, Richter filed a complaint against the Ercolinis concerning a boundary dispute between adjacent land parcels owned by the parties. The complaint and separate summons were served on the Ercolinis on August 29, 2008. The Ercolinis filed a *pro se* answer on September 24, 2008, not within the 20 days allowed pursuant to Maine Rules of Civil Procedure. Richter filed an affidavit and request for default and default judgment and the clerk of court entered the default on September 25, 2008.

On September 30, 2008, the Ercolinis moved to set aside the entry of default. The Court conducted a hearing on the motion. Jayne Ercolinis appeared at the hearing without counsel and indicated that she lived out of state and that she mailed her answer in what she believed to be a timely

manner. She also stated that her answer was filed late because she became ill during the 20-day answer period and her husband, who is dyslexic, was unable to assist in preparing an answer. The Court denied the motion concluding that the grounds for relief did not provide a good excuse for the late answer.

On appeal, the Law Court indicated that it would only review a judgment on a motion for relief from an entry of default for an abuse of discretion. The Court indicated that a movant must show good cause for setting aside an entry of default requiring a good excuse for untimeliness. The Law Court held that the Superior Court did not abuse its discretion by concluding that the Ercolinis had failed to establish a good excuse based on their assertions that they believed their answer was timely, that Mrs. Ercolini had become ill, and that her husband's dyslexia prevented his assistance.

This decision only highlights the importance of ensuring a timely answer to avoid an entry of default, as the Court is not inclined to even give the benefit of the doubt to a *pro se* defendant, let alone an insurance adjuster. □

# KUDOS

**TOM MARJERISON** was appointed as an Adjunct Professor at the University of Maine School of Law and taught Criminal Procedure – Investigation during the spring semester. Tom also recently taught at a section of an accident reconstruction course for police officers at the Maine Criminal Justice Academy.

**CHRIS TAINTOR** took part in a panel presentation at the summer meeting of the Maine State Bar Association in Bar Harbor. The subject was "Practice before Professional Licensing Boards". The presentation addressed strategies for responding to, investigating, and defending complaints against licensed professionals including physicians, dentists, nurses, and mental health clinicians.

**JON BROGAN** has been re-appointed to the Maine Supreme Judicial Court's Advisory Committee on the Rules of Evidence. Jon and **DORIS CHAMPAGNE** recently delivered a presentation to the Southern Maine Claims Association regarding Medicare reimbursement.

**JOHN VEILLEUX** was re-elected to the Casco Bay Hockey Board of Directors for a 5th term. John will serve as the coaching director for Casco Bay's approximately 150 youth hockey coaches.

**JEN RUSH** clinched 1st place in her age division in the 10k race at the Pineland Farms Trail Running Festival in late May. **STEVE MORIARTY** took 2nd place in his division in the 25k race. **STEVE** also finished 3rd in his division at the 50th running of the Mt. Washington Road Race in June.

**MARK LAVOIE** spoke at the summer meeting of the New England Orthopedic Society in Woodstock, Vermont on the subject of the defense and avoidance of malpractice litigation.

**DAVE HERZER** has been selected to join the Advisory Committee on the Maine Rules of Civil Procedure, a body that assesses the Rules and makes recommendations for improvements.

**CHRIS KNOX** and **KELLY HOFFMAN** spoke at a seminar in Portland sponsored by the National Business Institute in May. Kelly's presentation was on the topic of "Taxation Considerations", and Chris covered the subject of "LLC vs. A Corporation: What are the Principal Non-tax Differences". The seminar was attended by attorneys, CPAs, accountants, financial planners, and other tax professionals.

**STEVE MORIARTY** was re-elected in June for a 7th term as a member of the Cumberland Town Council.

**CHARLES C. "CHIP" HEDRICK** has been elected as Vice President of The Androscoggin County Fish & Game Association. Incorporated in 1941, the Association has more than 400 members and is dedicated to conservation, outdoor recreation, and safe and responsible enjoyment of shooting sports. □

# NHD Earns Top Rankings from Chambers USA

Norman Hanson DeTroy has once again been ranked among the nation's leading law firms in the 2010 edition of *Chambers USA: America's Leadings Lawyers for Business*. Chambers and Partners is a research organization that bases its rankings on an independent and objective analysis based on recommendations of clients and colleagues.

Chambers USA recognized the firm's excellence in the areas of insurance defense and medical malpractice stating "you get real bang for your buck with this firm."

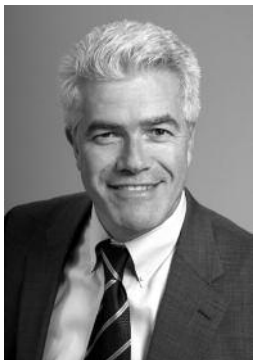
Key individuals recognized by Chambers are as follows:

Emily A. Bloch
Medical Malpractice & Insurance

Jonathan W. Brogan
Medical Malpractice & Insurance

Peter J. DeTroy
General Commercial

Theodore H. Kirchner
General Commercial



Mark G. Lavoie
Medical Malpractice & Insurance

Russell B. Pierce
General Commercial

James D. Poliquin
Medical Malpractice & Insurance

Christopher C. Taintor
Medical Malpractice & Insurance

# More Changes Regarding Construction Workers To The Maine Workers' Compensation Act

By Charles C. "Chip" Hedrick, Esq.

CHARLES C. "CHIP" HEDRICK

Readers of this article likely are aware that in January of this year Section 105-A of the Maine Workers' Compensation Act became effective. Section 105-A creates a presumption that a worker hired by a hiring agent to perform construction work is an employee of the hiring agent for whom the hiring agent must maintain workers' compensation insurance coverage. A hiring agent is someone who hires another to perform construction work on real estate owned or occupied by a third party. Construction work consists of construction, alteration, or remodeling of a structure and related landscaping and other site work. Surveying, engineering, examination, or inspection of, or delivery of materials to, the construction site are excluded from the definition of "construction work." The only other exceptions from the presumption of employee status are for persons who own and operate equipment weighing more than 7,000 pounds and for persons who meet a twelve part test to qualify as "construction subcontractors." These changes are discussed more fully in the spring 2010 edition of the Norman, Hanson & DeTroy, LLC, Newsletter.

The changes in this area of the law did not stop in January. Since then the legislature passed and the governor signed emergency legislation known as LD 1815 (now Public Law Chapter 569) which expressly permits a subcontractor to apply to the Maine Workers' Compensation Board for predetermination that the subcontractor meets the heavy equipment owner/operator exception or the construction subcontractor exception. Chapter 569 also provides that a predetermination made by the Board is valid for one year. In response to this legislation, the Board promulgated a new Application for Predetermination of Construction Subcontractor (Form WCB-264). The new Application is an improvement over the prior version. First, it has fewer questions and does not require the applicant to provide copies of tax returns. Second, the new Application requires only the signature of the applicant (i.e., the subcontractor). The prior version required the hiring agent to sign and certify the truthfulness and accuracy of the contents of the Application. That was problematic because much of the information on the Application came from the subcontractor, not the hiring agent. Third, consistent with Chapter 569, the new Application expressly states that if the predetermination is approved it is valid for one year. Fourth, the new Application states that it is "portable," which means that a construction subcontractor may submit it to any number of hiring agents. This change benefits construction subcontractors because it saves them from potentially needing to apply for a predetermination for each project on which they act as construction subcontractors. For example, a drywall company with an approved Application for Predetermination would not need to submit a new Application for each new project for which it was hired as a subcontractor, provided that the information in the approved Application remained unchanged and that the approval was not more than a year old.

The latest change in this area of the law came when the legislature passed and the governor signed LD 1565 (now Public Law Chapter 649), which became effective on July 12, 2010. Chapter 649 gives more teeth to the provisions of the Maine Workers' Compensation Act concerning construction workers. Chapter 649 allows the Executive Director (or the Executive Director's designee) to hold a hearing after giving three business days' notice to the affected hiring agent or construction subcontractor. If after the hearing the Executive Director determines that the hiring agent or construction subcontractor "knowingly failed" to provide workers' compensation insurance coverage as required by the Act, the Executive Director shall issue a stop-work order. The stop-work order takes effect immediately upon the conclusion of the hearing. The stop-work order remains effective until the Executive Director finds that the hiring agent or construction subcontractor has (1) provided workers' compensation insurance coverage as require by the Act and (2) paid any penalty assessed under Section 324(3) of the Act or entered into

a penalty payment agreement with the Board. The stop-work order applies to any successor firm, corporation, or partnership of the hiring agent or construction subcontractor. The language of Chapter 649 indicates that if a contractor or subcontractor that is served with a notice of hearing on a stop-work order races to an insurance agent and obtains workers' compensation coverage during the three business day period prior to the hearing, the contractor or subcontractor can avoid issuance of the stop-work order if it furnishes evidence of the coverage to the hearing officer and persuades the hearing officer that it will continue to maintain such coverage.

Chapter 649 provides that a payment or performance bond issued with respect to the construction project subject to a stop-work order "may not cover any exposure arising out of or during the shutdown of that project." Unlike the changes to the Act which became effective in January, and which impose on contractors and subcontractors the responsibility of ensuring that all of their subordinates either meet the heavy equipment owner/operator or construction subcontractor exceptions or are covered by workers' compensation insurance, Chapter 649 imposes on owners (even homeowners) and construction lenders the risk of having their construction project shut down because the general contractor or an important subcontractor did not maintain workers' compensation coverage as required by the Act.

The enactment of Chapter 649 demonstrates that the State is serious about enforcing the new workers' compensation provisions concerning construction workers. General contractors and subcontractors ignore these provisions at their peril. The prudent project owner, construction lender, general contractor, and subcontractor should require an approved Application for Predetermination of Independent Construction Subcontractor or proof of workers' compensation insurance coverage for each person performing construction work on a project. □

# The Scope of Compensable "Medical and Other Services" under §206

BY C. LINDSEY MORRILL

The needs of severely disabled individuals often far exceed standard medical and prescription care. The spectrum of care needed may range from wheelchairs, to extensive home remodeling, to housekeeping services. In the most serious of work injuries, the necessity of extensive care is not at issue. Rather, the issue becomes whether accommodations needed by disabled individuals are covered under the Maine Workers' Compensation Act and therefore payable by employers or insurers.

This question was recently addressed by the Workers' Compensation Board and ultimately the Maine Law Court. In the case of *Masalsky v. State of Maine (Dept. of Corrections)*, the Employee was involved in a motor vehicle accident arising out of and in the course of his employment. His injuries were extensive and totally disabling. Because of his injuries, Mr. Masalsky felt it necessary to complete substantial renovations to his home, including a modified bathroom and the construction of a new garage which would allow easy access to and from his home from his motor vehicle. Mr. Masalsky filed petitions alleging that these expenses constituted related medical expenses under 39-A M.R.S.A. §206. A Section 312 examination was requested, and the 312 physician did concur that these home renovations were reasonable, necessary, and causally related to the work injury. Given the findings of the 312 physician, Hearing Officer Mike Stovall approved the Mr. Masalsky's Petition for Payment of Medical and

C. LINDSEY MORRILL

Related Expenses and ordered the State of Maine to reimburse Mr. Masalsky over $60,000 worth of home improvement expenses.

The State, defended by Attorneys Robert Bower and the author, raised not only the issue of whether these expenses were reasonable, necessary, and causally related to the work injury, but also whether the expenses constituted

compensable medical expenses as defined under Section 206 of the Act. The Hearing Officer failed to address this argument in his initial findings, but instead he focused exclusively on whether the expenses were reasonable, necessary, and causally related. Due to the omission of this legal analysis, the State filed a Petition for Appellate Review with the Law Court. Instead of accepting this Petition, and thereby requiring briefs and oral arguments, the Law Court summarily vacated the decision of the Board and remanded the case back to the Hearing Officer for determination of whether the expenses constituted actual medical expenses subject to Section 206.

On remand, the Hearing Officer was once again faced with deciding the scope of compensable expenses under Section 206. By its very language, Section 206 authorizes medical treatment, surgical and hospital services, nursing, medicines, and surgical aids. All other claimed expenses are forced to fit within the vaguely defined "mechanical aids." The Law Court had previously only given us the broadest of parameters in interpreting this term. On one side, we had *Brawn v. Gloria's Country Inn*, 1997 ME 191, 698 A.2d 1067. In this case, the Law Court found that an adapted van for an employee who sustained an injury rendering her a quadriplegic was a mechanical appliance or apparatus under the definition of Section 206. On the other side of the spectrum, we had the Law Court's findings in *Cote v. Georgia Pacific Corp.*, 596 A.2d 1004 (Me. 1991). In that case, the Law Court found that Section 206 did not extend to housekeeping services.

The key distinction in these two Law Court precedential cases is whether the expense was "mechanical in nature." The State went back to the earliest definitions of the term 'mechanical' in order to establish that structure could not be deemed mechanical in nature. Principles from Archimedes and Galileo restrict the definition of mechanical devices as those able to manipulate or be affected by physical forces or mechanical advantages. Utilizing this classical definition, it was clear that a garage could not constitute a mechanical aid. Similarly, modifications to a bathroom were not mechanical in nature. This would contrast the compensability of vans, wheelchairs, or even railings which use mechanical advantages to manipulate force.

The Board was also presented with arguments with respect to the Legislature's plain language to demonstrative legislative intent that the only remedies under the Workers' Compensation Act related to diminished earnings and necessary medical treatment. Costs of everyday life, even if increased by the work injury (such as the cost of needed housekeeping or home modifications), were to be provided by wage replacement benefits. It was argued that medical expenses allowed under the Act should be construed narrowly so as to prevent the slippery slope of services and everyday needs of a disabled individual from becoming compensable under the guise of "medical treatment."

Additionally, the defense provided a multi-jurisdictional analysis of whether home modification constituted medical expenses in other states. Washington and North Dakota provide reimbursement for modified housing, but such allowance was provided in a distinct statutory provision with guidelines as to the extent of modifications allowed. Such express authority provided by the Legislature is absent in Maine. Without any express provisions allowing for reimbursement of modifications to structure, many jurisdictions have found that the Act provides no remedy for such expenses, even in the most sympathetic of cases.

On remand, Hearing Officer Stovall in a decision dated May 27, 2010 found the State's arguments persuasive. He determined that the garage and home modifications, although potentially reasonable and necessary, did not constitute compensable medical expenses under Section 206 of the Act. Accordingly, the bulk expenses associated with Mr. Masalsky's Petition for Payment of Medical and Related Expenses were denied. However, an exception was made with respect to a walk-in shower which the employee argued was necessary as his injury would not allow him to lift his leg into a standard bathtub. The Hearing Officer noted that any distinction between non-medical and medical hygiene needs was merely "diminutive" and that attempts to make the distinction "becomes unreasonable." As such, the expenses related to the costs of and installation of the walk-in shower were awarded.

As of the time of publication of this article, the issue remains open and pending before the Workers' Compensation Board. The employee has filed a Motion for Findings, which the employer has countered with its own Motion. It is anticipated that this matter will be appealed again to the Law Court for further clarification as to the appropriate scope compensable medical expenses. □

Norman, Hanson & DeTroy, LLC
415 Congress Street
P.O. Box 4600
Portland, Maine 04112

Return Service Requested

*Summer 2010 issue*