NORMAN, HANSON & DETROY

newsletter

Current developments in Maine law
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Employment-related claims: Checking different policies for liability coverage

BY JAMES D. POLIQUIN

The number of employment-related claims has grown tremendously the past few years, and over the next decade will probably multiply to an ever greater extent. Claims may involve wrongful termination, discrimination, sexual harassment, or other prohibited conduct, and may be filed against various co-workers and company officers or directors as well as the employer.

While some companies now have an employers practices insurance policy developed to cover employment claims, both insureds and insurers should look to all of the policy coverage possibilities. Four other policies that should be examined for coverage are the standard commercial general liability policy - with or without specific endorsements excluding employment-related practices, homeowners insurance policies issued to individual defendants, directors and officers policies (D & O policies), and Part II of worker's compensation policies.

Here are some highlights of these major coverage possibilities for an employment claim.

(1) Commercial general liability policies — This coverage usually is provided through form CG 00 01, which provides coverage for "bodily injury" and "property damage" under Coverage A and coverage for "personal injury" under Coverage B. Since the Law Court has held that a mere allegation of emotional distress gives rise to a possibility of "bodily injury" requiring a defense, most civil complaints will trigger a duty to defend under Coverage A. The Law Court also has held that the term "accident" in the definition of "occurrence" essentially duplicates the exclusion for intended or expected injury, which requires a subjective intent to cause actual "bodily injury." Therefore, the exclusion for intended or expected damage will not, except in the rarest circumstances, allow an insurer to avoid a defense of a claim for wrongful termination, discrimination or sexual harassment. The Law Court has required a defense by a commercial general liability insurer for both wrongful termination and sexual harassment claims. See *Maine State Academy of Hair Design v. Commercial Union*, 699 A.2d 1153, (Me. 1997); *Maine Bonding & Casualty v. Douglas Dynamics*, 594 A.2d 1079 (Me. 1991).

Insurers may not be able to rely upon exclusion (e) for claims of "bodily injury" to an employee arising out of and in the scope of employment because the Law Court has expressed a willingness to read any complaint broadly and entertain factual possibilities outside that exclusion, even though the complaint does not make those factual allegations. The phrase "arising out of and in the scope of employment" can be quite limiting, and only a complaint with very specific and limited allegations would be considered to be entirely within that exclusion as a matter of law, thereby allowing a denial of a defense.

Many, if not most, insurers currently endorse the CGL policy with the employment-related practices exclusion, CG 21 47, which is substantially broader than exclusion (e). It is broader in these respects: (1) it applies to "any person" rather than someone who is an actual employee at the time of the conduct; (2) it specifically lists almost all the standard grounds for employment-related claims as excluded, leaving no doubt as to its intent; (3) it is not limited by the phrase "arising out of and in the scope of employment"; and (4) it applies to the "personal injury" coverage and not only the "bodily injury" coverage.

Many employment-related claims also contain sufficient allegations to trigger the personal injury coverage under Coverage B. The term "personal injury"

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includes defamation and invasion of privacy, torts not uncommon in employment disputes. The "personal injury" coverage under Coverage B does not have a counterpart to exclusion (e) for personal injury to an employee. Without the employment-related practices exclusionary endorsement, an insurer may be required to defend an employment-related claim even if the complaint was sufficiently clear to allow a denial of a defense under Coverage A for bodily injury.

(2) Homeowners policies — An officer, director or co-employee of the claimant may be named as a defendant in an employment-related claim. Any suit that names an individual defendant generates the issue of whether that defendant is entitled to a defense under a homeowners policy. All homeowners policies contain an exclusion for bodily injury arising out of a business pursuit, which is defined to include one's trade, occupation or profession. While at first blush it is tempting to conclude that any "employment-related" claim by definition should be outside homeowners coverage, the simple fact that the event giving rise to the claim occurred at the physical location of the place of employment may not be enough, standing alone, to trigger the business pursuit exclusion. The fact that one employee may be harassing another employee at work does not mean that harassment is any more connected to the business pursuit of that employee than if the tortious conduct occurred at some other location.

Although generally a homeowners insurer of an officer or director will have a stronger case than an insurer of a mere co-employee for application of the business pursuit exclusion, each claim needs to be examined closely to determine whether a sufficient possibility exists that the claim is not necessarily connected to the individual's business pursuits. For example, an officer's or supervisor's failure to discipline lower level employees who are harassing a co-employee is a claim clearly within the business pursuit exclusion because the duty allegedly violated arises solely because of the insured's employment position. In contrast, an act of an officer that defames, harasses, or invades the privacy of a lower level employee may not compel a finding that the conduct was connected to a job-related function. Finally, as is the case with the CGL coverage, it is unlikely that the exclusion for intended or expected injury in a homeowners policy will give an insurer a basis to deny a defense.

(3) Directors and Officers coverage — D & O policies provide reimbursement/indemnity coverage for losses in connection with a claim against directors and officers for their wrongful acts in that capacity. Standard D & O policies differ from CGL policies in that they usually contain no up-front duty to defend, and an allocation between covered and uncovered claims usually is appropriate. Significantly, the named insured organization is not covered for its own exposure or liability to a claimant, but only for its obligation to indemnify a director or officer for a covered loss. Finally, almost all D & O policies contain exclusions for claims for bodily injury, property damage and personal injury. In short, a typical D & O policy has far less potential application to employment-related claims than a commercial general liability policy.

(4) Workers' compensation policies — The standard workers' compensation policy provides for actual workers' compensation coverage under Part I and coverage for other employer liability under Part II. As a practical matter, the broad scope of employer immunity in Maine renders the Part II coverage generally inapplicable. The Part II coverage under standard policies also contains an express exclusion for claims based on discrimination, harassment, etc. The Law Court's decision in *Bond Builders v. Commercial Union*, 670 A.2d 1388 (Me. 1996), renders it even less likely that an insurer issuing a workers' compensation policy could be called upon to defend a claim brought by an employee. In *Bond Builders*, the Law Court suggests that the existence of a valid affirmative defense of employer immunity actually eliminates the insurer's duty to defend a claim for bodily injury an employee may bring against an employer. This appears inconsistent with the holding in other cases that the frivolousness of a claim, i.e., the availability of a good defense, has nothing to do with the duty to defend. However, the presence of an express exclusion for harassment and discrimination claims in the Part II coverage renders it extremely unlikely that a workers' compensation insurer would be obligated to defend those types of employment-related claims.

(5) Employment practices coverage — Several insurers have developed specialized coverage specifically for employment-related claims. Some insurers endorse this coverage onto general liability coverage, and other insurers have a free-standing policy. These coverages are not uniform, but generally insure against discrimination, sexual harassment and wrongful termination. Unlike D & O policies, coverage is provided for the corporation itself. Most policies contain a duty to defend, but the coverage may be issued on a claims-made basis with defense costs included in the limit of liability.

Employment practice policies also contain exclusions to avoid an overlap with CGL coverage and to make clear that the intent is not to cover benefit claims such as workers' compensation, unemployment compensation or disability. These coverages often have lower limits of liability or significant deductible and should be examined closely to determine if certain types of employment-related claims are excluded. □

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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 write or telephone us.

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Investigating the sexual harassment complaint: a few recommendations

By Adrian P. Kendall

When it comes to assessing an employer's response to a charge of sexual harassment, judges and juries are becoming more sophisticated. Increasingly, employers are being penalized in these types of cases for failing to respond to complaints swiftly and in an organized and committed manner.

In October, 1997, the American Bar Association's National Institute on Sexual Harassment held a conference and offered its findings on a number of employment law related topics. While many of their recommendations can be met by a solid application of common sense, these tips for investigating a sexual harassment complaint should be helpful.

1. Make sure that any response to a complaint follows all procedures under your company's anti-harassment policy.

2. Interview all relevant parties. A statement of no knowledge of an incident by a co-worker may prove just as useful as a detailed account, especially when obtained shortly after the complained of conduct.

3. Treat all complaints seriously and the same. Do not apply a "sliding scale" to your response to a complaint based on your prior experience with or the reputation of the individuals involved. This includes both the alleged victim and the harasser.

4. A poor investigation may be worse than no investigation at all. Plaintiffs may point to a summary or half-hearted investigation as evidence of an employer's failure to take a complaint seriously, effectively condoning the complained of conduct.

5. If the charge of harassment involves a highly-placed or high profile member of your organization, it may be wise to consider employing an outside investigator who will be objective and unaffected by pressures within the organization.

6. If an independent investigator is employed, make sure that he or she is not vulnerable to later attack as little more than a symbolic figurehead. Achieve this by stressing the investigator's independence and urging him or her to become informed of all aspects of the charge as well as the organization and its culture.

7. Make sure that the person who conducts the investigation has the skills and personal attributes necessary to perform an investigation that will appear credible to a judge or jury. Your company's human resource professional may not necessarily be the best person for the job.

Fact finders in cases are looking at the quality of the investigation performed, and not just whether one was performed at all. These recommendations apply equally to any claim which requires an investigation and response; they need not be limited to instances of alleged sexual harassment or discrimination. □

Employers alert to recent changes in Maine employment laws

As many employers have already experienced, employment law related claims are on a startling growth trend. Recent changes to existing Maine statutes are likely to fuel that trend, particularly where incentives such as the availability of attorney fees are provided. While nothing can guarantee that a claim will not be brought against you or your company, being alert to compliance with state and federal laws will ensure your ability to defeat the meritless claim.

Three recent statutory changes concern an employer's duty to provide written reasons for termination on request; an employer's duty to make the employee's file available on request; and an expansion of the Family Medical Leave Requirements Act.

Written reasons for termination. On an employee's request, the employer must provide in writing reasons for the employee's termination, furnished within 15 days of the request. While the prior law permitted a penalty of $50 to $500 for a violation, the new law allows an employee to file suit against the employer for "equitable relief." The court may also award the employee the attorney's fees incurred in bringing the action.

Employee access to personnel file. Maine law permits an employee to review his or her personnel file that the employer maintains. Changes to this pre-existing law authorize the employee to file a lawsuit against an employer who fails to comply, and also permits the employee an award of attorney's fees.

Maine Family Medical Leave Requirements Act. This Act was amended to reduce the number of employees to 15 that an employer must have to be subject to the Act. New definitions of "serious health condition" and "health care provider" also broaden an employer's compliance with an employee's medical leave. See the *Summer, 1997* issue of the NH&D Newsletter for further details, or call us for current FMLA material. □

Adrian P. Kendall

First Circuit Court rules diabetics protected under Americans with Disabilities Act

By John M. Wallach

A major decision by the First Circuit Court of Appeals, which includes Maine in its jurisdiction, addresses the extent to which individuals with a disability controlled by medication are within coverage of the Americans with Disabilities Act (ADA). The case involved a Maine resident, Glen Arnold, who has type I insulin-dependent diabetes mellitus, which he had successfully controlled for 23 years. He was required to monitor his blood glucose levels throughout the day and give himself injections of insulin 2-4 times daily. His physician had stated that Mr. Arnold would die in the absence of insulin injections.

In October, 1995, Mr. Arnold contacted United Parcel Services (UPS) and applied for a position of cover mechanic. The position called for covering the shifts of night time mechanics in four locations: Wells, Maine; Dover, Laconia and Twin Mountain, New Hampshire. Mr. Arnold had worked as an auto mechanic for six years and had an Associate Degree in automotive technology.

Mr. Arnold met with various UPS personnel and was told that the job was his if he wanted it. A start date was agreed upon and Mr. Arnold was advised he would have to pass a driving test and submit to a Department of Transportation (DOT) physical. He was sent to a local health care facility for the examination and the physician informed him that DOT regulations preclude insulin dependent diabetics from obtaining DOT certification. When he returned to UPS, he was informed that UPS could not hire him because he could not obtain DOT certification. He was offered an alternative position as a package preloader for less pay. Mr. Arnold did not respond to this alternate job offer.

Mr. Arnold filed a law suit in the Federal District Court of Maine under the ADA. After discovery was completed, UPS filed a motion for summary judgment claiming that since Mr. Arnold's diabetes was effectively controlled by insulin injections, he was not disabled as that term is defined within the ADA. The District Court granted the motion for summary judgment on the basis that as a matter of law, Mr. Arnold was not disabled within the meaning of the ADA because his insulin dependent diabetic condition did not substantially limit one or more of his major life activities. The Court's analysis was based on analyzing Mr. Arnold's diabetic condition *after* he took corrective medication rather than analyzing his condition without the use of medication.

In Mr. Arnold's appeal to the First Circuit he took the position that the key question in dispute is whether a court, in determining whether Mr. Arnold is "an individual with a disability," should consider his untreated medical condition or his condition after treatment with medications. The Court noted that the ADA is to protect individuals with disabilities, and that the statute defines disabilities to mean: 1) physical or mental impairment that substantially limits one or more of the major life activities of an individual, 2) a record of such impairment, or 3) being regarded as having such an impairment. An individual must meet one of these prongs in order to recover under the ADA, and if an individual is not disabled within the meaning of at least one of these prongs, the ADA does not protect that person against discrimination.

Does the ADA's reference to an "impairment" mean an impairment without treatment or an impairment after treatment? The Court noted that the plain language of the statute was not crystal clear on the issue of the role of medications in determining the essential threshold issue. Consequently, the Court looked extensively into the legislative history of the ADA as well as the Equal Employment Opportunity Commission (EEOC) regulations on the issue. The Court concluded that Congress intended the statutory definition of disability as an impairment that substantially limits a major life activity *refers to a medical condition*, regardless of whether the impairment is controlled by medication.

The Court pointed out that Mr. Arnold's diabetes made him exactly the type of person the ADA was designed to protect. He would have been hired by UPS but for his inability to get a commercial vehicle license, prevented only because he had diabetes. Mr. Arnold claimed that with the medication he can perform all the duties of his job, notwithstanding his impairment, and that he should not be discriminated against because of his impairment.

The Court was very specific in concluding that the ADA protected Mr. Arnold from discrimination, as his disability is based on an underlying medical condition, and the protection of the Act was applicable to him regardless of whether the limitations were corrected through medication. The Court declared that its

holding in this case, *Arnold v. United Parcel Service* (2/20/98, No. 97-1781), was based on the facts of this suit and is limited to the condition presented. It ventured no opinion as to whether the same conclusion would be reached if other medical conditions or other facts were presented.

The First Circuit did not address whether or not the DOT regulation excluding insulin users from certification is a violation of the ADA, and whether UPS could be insulated from a lawsuit by arguing it was simply following the federal regulation. The appeals court elected instead to focus on the larger issue of whether an insulin-dependent employee with a history of a successfully controlled diabetic condition is deemed to be "disabled" within the definitions in the ADA. By returning the case to District Court, the First Circuit Court resolved at least one major issue; presumably the DOT certification question would be addressed in that proceeding.

The consequence of this particular decision is clear: an individual with diabetes mellitus that is under control with medication cannot be discriminated against because of that medical condition. However, other medical conditions such as epilepsy and various allergies can arguably be controlled with medication, and the Court left open that whole area for later consideration. The Court also did not address various psychiatric conditions such as depression or schizophrenia, which the medical community believes can be successfully controlled in many instances by medication.

The ADA is still in its infancy in its interpretation through case law, and it is only through development of an extensive body of case law that employers will be in a position to confidently predict the outcome of employment decisions about individuals with disabilities.

If anyone wishes a copy of the decision or has questions, please call or email me at jwallach@nhdlaw.com. □

Briefs/Kudos

A new Superintendant of Insurance, Allesandro A. Iuppa, has been appointed by Governor Angus King to fill an unexpired term. Mr. Iuppa will be eligible for reappointment in June, 1998. The Bureau of Insurance, with 70 employees, is the largest in the Department of Professional and Financial Regulation, and serves a crucial role in preserving industry soundness and enforcing consumer protection.

JIM POLIQUIN was a featured speaker at a February seminar in Portland on recent developments in insurance law, with a focus on the duty to defend, ripeness of a declaratory judgment action, and the aftermath of a wrongful refusal to defend.

A vital seminar on workers' compensation litigation will be held April 29, 1998 at the Augusta Civic Center. STEVE HESSERT, Chair of the Workers' Compensation Section of the Maine State Bar Association, is program chairperson.

JOHN WALLACH will be taking part in a seminar for employers to be held in Portland on June 24, 1998, with John focussing intensively on employees with cumulative trauma disorders - those injuries involving repetitive motion. CTDs are estimated to cost business and industry between $13 and $40 billion annually. Discussion will include proven strategies for back to work at maximum productivity, recognition of fraudulent claims, cost/benefits of correct equipment, and development of policies to help eliminate cumulative trauma disorders. Guest commentator will be Dr. Douglas Pavlak, specialist in physical medicine and rehabilition. If you would like to attend, e-mail John, (at jwallach@nhdlaw.com,) telephone or write him.

Governor Angus King has appointed Judge Leigh Saufley of the Maine Superior Court to the Maine Supreme Judicial Court to fill the vacancy of retired Justice Caroline Glassman.

The Senate has confirmed the appointment of Maine Supreme Judicial Court Justice Kermit Lipez to the U.S. First Circuit Court of Appeals. The 1st Circuit serves Maine, Massachusetts, Rhode Island, New Hampshire and Puerto Rico. Justice Lipez has served three years on the Law Court and seven years on the Superior Court.

MARK LAVOIE moderated a panel presentation in March to the Southern Maine Claims Association, in which a group of personal injury attorneys discussed with the audience problems in their relations with claims adjusters, and barriers to the speedy resolution of claims.

As a volunteer for the Volunteer Lawyer Project, attorney CHRIS TAINTOR reports that he is pleased to see changes in the Maine's court structure that will ease the burdens of families and others struggling with legal problems. Regionalization of court cases throughout the state began March 1, and in early May, a case management program will be put in place.

MARK LAVOIE was appointed Chair of the Maine Trial Lawyers Association's Judicial Liaison Committee. The committee will work with Maine's judiciary on issues of common concern to the bench. Mark was also elected to the post of second vice-president of the Maine Bar Association. □

Two significant Law Court decisions

By David P. Very

Private landowner's liability for slip and fall on public sidewalk

Despite a landowner's responsibility for snow and ice removal on its abutting public sidewalk as required by city ordinance, the Law Court recently held that the landowner is not liable for injuries from a fall on the icy sidewalk.

In *Denman v. Peoples Heritage Bank*, 1998 ME. 12, (704 A.2d 411), the plaintiff was injured when she slipped and fell on snow and ice on a public sidewalk abutting the property of Peoples Heritage Bank on Forest Avenue in Portland. Pursuant to Portland ordinance, the bank was responsible for snow and ice removal from the public sidewalk. Peoples had contracted with Fox Enterprises to maintain the building, and to shovel and clean the sidewalk. On the day in question, Fox had not shoveled or sanded before the plaintiff's fall. The Superior Court granted summary judgment to defendants Peoples and Fox, and the plaintiff appealed.

In her appeal, plaintiff argued that because defendants had maintained the sidewalk, a genuine issue of material fact existed concerning their possession of the sidewalk. The Law Court stated that there was no evidence to support a finding that the defendants intended to control the public sidewalk; to the contrary, defendants' actions were involuntary and undertaken in compliance with applicable law. The Court noted that the public duty imposed on defendants by municipal ordinance does not give rise to a duty that the plaintiff can enforce. The mere fact that Peoples hired Fox to remove snow and ice in compliance with the ordinance did not establish a genuine issue of fact concerning an intention to control and possess the public sidewalk. The Law Court held that "any failure to remove snow and ice in violation of an ordinance does not create a cause of action in favor of pedestrians injured thereby."

Plaintiff also argued that she had a viable action against Fox as a third-party beneficiary of the maintenance contract between Peoples and Fox. Plaintiff asserted that the contract was intended to benefit pedestrians who were using the public sidewalk to patronize the bank's business establishment. The Law Court noted that in order to make a claim as a third-party beneficiary, it is not enough that the plaintiff benefit from the performance of the contract: the intent must be clear and definite as expressed in the contract itself, or in the circumstances surrounding its execution. The Court held that there was no language in the contract to generate an issue of the bank's intention to create in plaintiff enforceable rights as an intended beneficiary. The contract between Peoples and Fox provided simply for Fox to manage and maintain the building. The Law Court upheld the Superior Court's finding that the plaintiff failed to establish a genuine issue of fact with respect to the third-party beneficiary claim.

The plaintiff then argued that the defendants were liable on the theory that they assumed the duty of care when they arranged for maintenance of the public sidewalk. The Court reiterated that the defendants did not voluntarily undertake to remove the snow and ice; they were under a legal obligation to clear the public sidewalk, and no duty arises from acts performed in compliance with the law.

Finally, the plaintiff argued that the defendants had created the hazard. While an abutting landowner is not liable for a failure to remove snow and ice from the public sidewalk, a landowner may be liable if its actions created the snow or ice. The Law Court noted that Fox had not performed any maintenance, shoveling, or sanding services on the day of the incident and there was nothing in the record to suggest that any prior affirmative acts of the defendants had created a hazard. Accordingly, the Law Court affirmed the Superior Court decision granting summary judgment to the defendants. Norman, Hanson & DeTroy's Tom Marjerison successfully represented Fox Enterprises.

When may insurer bring a declaratory judgment action?

In an unusual case, the Law Court addressed the question of when an insurer may bring a declaratory judgment action asserting no obligation to defend or indemnify before a complaint is filed. In *Patrons Oxford Mutual Insurance Co. v. Garcia*, 1998 ME. 38 (February 26, 1998), Patrons insured Garcia's residence under a standard homeowner's policy. Garcia leased the single-family residence to a tenant for a one-year term. During the lease, the tenant was injured when he received an electric shock while operating a pump in the flooded basement. The policy excluded coverage for bodily injury "arising out of the rental or holding for rental of any part of the premises" by an insured; however, the policy contained an exception to that exclusion for the occasional rental of the premises as a residence.

Prior to filing any complaint against its insured, Patrons brought a declaratory judgment action asserting that it had no obligation to defend or indemnify Garcia regarding any claim the tenant might assert as a result of the accident. Garcia moved to dismiss the declaratory judgment action contending that the action was not ripe because the tenant had not filed a complaint. The Superior Court concluded the question of coverage was not ripe for determination and Patrons appealed.

The Law Court stated that an insurer's duty to defend its insured against a suit is ordinarily determined by comparing the facts alleged in the complaint with the terms of the policy. Thus the insurer's duties are not usually fit for adjudication until a complaint has been filed against its insured. The Court stated that, nevertheless, there are instances where the insurer is not required to await the filing of the complaint in order to seek declaratory relief. First, an exception exists where the insurer disputes its duties to defend and indemnify based on nonpayment of a premium, cancellation of a policy, failure to cooperate, or lack of timely notice. In

those circumstances, both obligations may be appropriately determined prior to entry of judgment in the underlying tort action since the coverage dispute depends entirely on the relationship between the insurer and the insured, not on facts to be determined in the underlying litigation.

A second exception exists where the insured, the insurer, and the injured claimant stipulate to the facts material to the insurer's duty to indemnify, or where the pertinent facts have been determined in other proceedings. In either case, the concern about requiring the insured to litigate the facts of a claim simply to obtain a defense is not present.

Patrons argued that its complaint falls within the exception allowing adjudication of a coverage issue if that issue is entirely separable from the merits of the injured party's claim. The Court avoided addressing this fundamental question because it found the coverage issue not separable from facts potentially relevant to the claim against the insured. The Law Court held that although the rental exclusion may ultimately be determined to be applicable, its applicability could not be determined without factual inquiry by the Court. Such an inquiry into the relationship between the tenant and the insured would draw the insured into litigation of at least some aspects of the injured party's claim in order to obtain a defense. The Law Court held that an insurer may not bring a declaratory judgment action prior to the filing of a complaint if the coverage decision directly involves in some respects resolution of facts regarding a relationship — not between the insurer and insured — but between the insured and the claimant.

Finally, Patrons urged the Court to consider the hardship to the insurer caused by the withholding of judicial consideration. Patrons contended that requiring an insurer to await the filing of a complaint against its insured will force insurers to defend and investigate claims that are unlikely to result in a duty to indemnify. The Law Court recognized the reality of Patrons' concerns. The Court noted, however, it has always recognized that application of the comparison test will occasionally require an insurer to defend where there may be no ultimate duty to indemnify.

The Law Court concluded that the hardship to the insurer is outweighed by two competing interests: preventing duplicative litigation, and sparing insureds the costs of defending the insurer's collateral action to determine its obligations under the insurance contract before the nature of the claim implicating coverage has been identified. The Law Court thus upheld the Superior Court's determination that Patrons' declaratory judgment action did not come with any exception that would allow adjudication before the filing of a complaint.

While the Court held in this case that adjudication of the coverage issue was not separable from facts potentially relevant to the claim against the insured, this decision does not prevent an insurer from bringing a pre-complaint declaratory judgment action where facts relevant to the coverage issue are truly unrelated to facts of the claim. □

Anne H. Jordan new associate

Anne H. Jordan recently joined Norman Hanson & DeTroy and is practicing with the Liability Group. Anne came to NH&D after seven years of litigation experience in the Biddeford office of a Portland law firm, and has extensive jury trial experience, including major felony and vehicular accident prosecutions. Previously, she spent six years in the York County District Attorney's office specializing in arson and fraud prosecutions.

Anne is a graduate both of the National Fire Academy's Fire, Arson Investigation course, and the National Law Enforcement Training Center's Advanced Arson for Profit investigation course.

She earned her J.D. from the University of Maine School of Law in 1984, where she served on the Jessup International Moot Court Board, and worked summers and during the school year at the office of the Cumberland County District Attorney. On graduation from the University of Southern Maine, *summa cum laude*, with a major in political science, she was voted Outstanding Senior Woman.

Anne was born in Portland, and educated in the Kennebunk school system. She and her husband, the City Manager of South Portland, live in South Portland with seven-year-old Rob and three-year-old Kate. She coaches son Rob's soccer team and teaches Sunday school. The family summers in Vinalhaven.

ANNE H. JORDAN

Anne's professional activities are extensive: she serves on the Governor's Board of Pardons, and the Breast Cancer Awareness Project of the Maine Bar Association's Women's Law Section. The Project recently conducted an education program - together with the American Cancer Assocation - on breast cancer awareness for women at the Windham Correctional Center. She serves on the Task Force for Fire Safety for Children, which trains individuals in local communities to identify children who are likely fire setters. Anne is also a member of the American Bar Association's Tort and Insurance Section, and the Cumberland County Bar Association. □

Workers' compensation - Law Court decisions

By Stephen W. Moriarty

Fringe benefits

Two years ago the Law Court decreed in *Beaulieu v. Maine Medical Center*, 675 A.2d 110 (Me. 1996) that the fringe benefit provisions of §102(4)(H) of the Workers' Compensation Act were fully retroactive. However, there remained an unresolved issue as to whether fringe benefits should be included for higher wage earners in cases where inclusion of the fringes would produce a benefit level for total incapacity in excess of two-thirds of the state average weekly wage. The hearing officers were split on this issue, but the Court has now ruled that fringe benefits must be included in the average weekly wage of all injured workers.

In *O'Neal v. City of Augusta*, 1998 ME 48 (March 9, 1998), the Court ruled in two consolidated cases that the plain language of §102(4)(H) required that the value of fringe benefits must be included in all cases to determine the average weekly wage. The Court rejected contrary authority from an intermediate appellate panel in Michigan, whose statute is virtually identical to Maine's. The Michigan panel had held that the average weekly wage must be determined once and for all on the date of injury and that fringes could not be included if the entitlement to benefits for total incapacity exceeded two-thirds of the state average weekly wage. Thus, in Michigan, if a claimant's weekly benefit entitlement dips below two-thirds of the state average weekly wage, the value of fringe benefits may not be added to the pre-injury average weekly wage at that point. The Law Court held that if the Maine Legislature intended §102(4)(H) to function in that fashion, it could have used language to express its intent accordingly.

As a result of *O'Neal*, fringe benefits must always be included in calculating the average weekly wage. By statute, the value of the fringe benefits must be disregarded if a claimant's weekly benefit level exceeds two-thirds of the state average weekly wage at the time of injury. However, if the level of entitlement is reduced to the point where the "weekly benefit amount" is less than two-thirds of the state average weekly wage, the value of fringe benefits must then be included in the average weekly wage, thereby increasing the amount of the entitlement. Although in cases of fixed partial entitlement it should be easy to determine whether fringe benefits must be included or not, cases of partial entitlement at varying rates may require a week-by-week calculation. The Court dismissed concerns of the administrative burden involved in varying rates cases, and observed that the Board could address such difficulties through its rule-making authority.

STEPHEN W. MORIARTY

Applicable law in multi-injury cases

In our last issue, we reported on the Law Court's landmark decision in *Ray v. Carland Construction, Inc.*, 1997 ME 206, 703 A.2d 648, which involved calculation of entitlement where disability had occurred as the result of the combination of an "old law" and a "new law" injury. As will be recalled, the employee had suffered injuries in 1987 and 1993, and the issue was whether the employee was entitled to an inflation adjustment for that portion of his incapacity attributable to the earlier injury. In a separate consolidated case, the issue was whether under similar circumstances a claimant's entitlement to partial was to be based on former §55-B or current §213. Although the implementing language of the Workers' Compensation Act of 1992 indicated that §213 should not be applied retroactively, the Court held that where disability occurs in part as a result of an injury occurring after January 1, 1993, §213 controls a claimant's entire potential entitlement to benefits. Therefore, in these circumstances no entitlement to inflation adjustment exists and §213 limits the employer's potential liability.

Approximately two months later, the Court was confronted with a similar factual pattern and the potential application of §214. In *Smith v. Market Square Health Care Center*, 1997 ME 237, 704 A.2d 379, the employee had suffered injuries to the wrist, shoulder and arm on January 28, 1991 and again on September 23, 1993. Following surgery in 1994 the employee resigned from the employer and moved elsewhere in Maine with her family. She filed Petitions for Restoration and for Award for the respective injuries, and both petitions were granted. However, the Workers' Compensation Board determined that her resignation from the employer constituted refusal of a bona fide offer of reasonable employment within the meaning of §214(1) of the Act, and refused to award any continuing disability benefits.

The Law Court accepted for appeal the limited issue of whether it was proper for the Board to apply §214, when the disability was in part attributable to the earlier 1991 injury. The employee argued, as had the appellant in *Ray*, that §214 was one of the sections of the Workers' Compensation Act of 1992 which, according to the same key transitional

language cited in Ray, could not be applied retroactively. The Court upheld the decision of the Board and concluded once again that the Legislature intended the new law to apply to successive injury cases when the most recent injury occurred after January 1, 1993. Therefore, §214 applied even though the initial injury occurred in 1991.

The *Smith* decision has two interesting aspects. First, in *Ray*, Justices Dana and Lipez filed a vigorous dissenting opinion arguing that the Legislature had clearly expressed its intent that several specifically-designated sections, including §213 and §214, were not to be applied retroactively. In *Smith*, however, Justice Lipez joined the majority and Justice Dana evidently did not participate in the decision. It is not clear why Justice Lipez did not offer a similar dissenting opinion.

Also, the *Smith* Court never dealt directly with the central issue litigated between the parties, which was whether a decision to relocate within the state constituted a refusal of an offer of reasonable employment without good and justifiable cause. In prior opinions, the Court has held that benefits may not be denied based on post-injury fault on the part of an employee. However, in *Smith*, the employee lost her benefits merely because she chose to move with her family for unspecified reasons. Without expressly saying so, the Court appears to have concluded that there was an adequate factual basis in the record to support the Board's decision and that it was therefore appropriate to defer to the judgment of the Board. All the same, it is somewhat surprising that the Court chose not to elaborate upon the legal issues generated by the application of §214 to the facts.

As a result of these decisions, it is now clear beyond any doubt that the new Act will apply in full to all multi-injury cases in which at least one of the injuries has occurred on or after January 1, 1993. It remains to be seen whether the Legislature will respond to the Court's interpretation of its intent.

Average weekly wage

As is well known, §102(4) sets forth the various methods for calculating the average weekly wage, and the Court has held on numerous occasions that the alternatives must be applied in the order listed until the most appropriate method is arrived at. Method "D" is generally considered to be the residual option, and is only to be used when any of the prior methods cannot reasonably or fairly be applied. In *Bossie v. S.A.D. #24*, 1997 ME 233 (Dec. 17, 1997), the employer sought to invoke Method "D" in a case involving a worker who was neither a seasonal employee nor a full-time employee.

The claimant had been employed for 24 years as a school cook, but was so employed only 36 weeks per year. The employer argued that the average weekly wage should be determined by dividing her total earnings by 52 weeks, and not by the number of weeks worked per year. The latter alternative, the employer argued, would artificially enhance the wage and would produce a benefit level that was not based on demonstrated work history. The Board agreed with the employer and applied Method "D," dividing the claimant's total annual earnings by 52.

On appeal the Law Court held that Method "D" was the most appropriate means for calculating the wage in this case, and observed that the wage should be based on actual work history rather than theoretical work capacity. The Court cited with approval a passage from Professor Larson's treatise in which he indicated it would be unrealistic to assume a 12 month per year earning capacity for a teacher who customarily works only 9 months per year. Such a result would inevitably artificially enhance the average weekly wage of someone who has deliberately chosen to work on less than a full-time basis.

However, as the Court reminded the employer, before Method "D" may be applied, it is imperative that an employer introduce evidence of earnings of two or more employees in the same or similar classification as the injured individual. Relying on its earlier decision in *St. Pierre v. St. Regis Paper Co.*, 386 A.2d 714 (Me. 1978), the Court emphasized that the new statute (as well as its predecessor) requires evidence of earnings of more than one comparable employee before Method "D" may be utilized. Unfortunately, the employer had failed to offer evidence of earnings of other comparable employees, and the Court concluded that the proper evidentiary basis for applying Method "D" had not been established. As a result, the Court held that Method "B" should have been applied and that the employee's wage should have been calculated by dividing total earnings by the number of weeks worked.

For those individuals who work on a part-time basis and yet do not qualify for seasonal employment treatment, the Court has clearly signaled that Method "D" is the appropriate means for determining the average weekly wage. However, this method cannot be used unless evidence of the earnings of two or more comparable employees has been introduced. In the absence of such evidence, an employee's average weekly wage will be calculated pursuant to a method which will inevitably produce a higher figure.

Calculation of interest

In *Guiggey v. Great Northern Paper, Inc.*, 1997 ME 232, 704 A.2d 375, the employee sustained an injury in 1994, and although the employer contested liability for payment of compensation, the Board ultimately agreed with the employee and awarded benefits for total incapacity retroactive to the date of injury. The employer then promptly paid all benefits which had accrued in a single lump sum, but without interest.

The employee responded by filing a petition seeking an additional award of interest pursuant to the provisions of §205(6) of the Act. The Board denied the petition and concluded that the payments

of compensation were not "due" within the meaning of §205(6) until a decree issued ordering the employer to pay benefits. The Law Court granted the employee's petition for appellate review and reversed the decision of the Board.

The Court initially found the statutory language to be clear and unambiguous, and ruled that §205(6) required payment of interest at the rate of 10% per year computed from the date that each payment would have been made if the employer had originally accepted the case and paid timely benefits in a voluntary fashion. Although the Court recognized that a primary purpose of the Workers' Compensation Act of 1992 was reduction of costs throughout the system, it also observed that the statute was designed to encourage informal acceptance of claims. The Court reasoned that assessing pre-decree interest serves two legislative purposes: It compensates employees for delay in the receipt of benefits, and discourages employers from disputing otherwise valid claims. Finally, the Court noted that the Maine statute was virtually identical to its Michigan counterpart, and that the Supreme Court of Michigan had interpreted its statute in a similar fashion. Accordingly, the employee was entitled to an additional award of interest calculated at 10% pursuant to the provisions of §205(6).

Set-off for sick leave

In *Gendreau v. Tri-Community Recycling*, 1998 ME 19 (Jan. 26, 1998), the employee became disabled in the summer of 1994 and received sick leave pay from his employer for approximately two months. The employee filed a Petition for Restoration, and was awarded benefits for a closed period which corresponded with the time period for which sick leave benefits had been paid. At issue was whether the employer was entitled to a set-off for the sick leave benefits paid during the period of total incapacity that was ultimately established.

The employer was a relatively small operation without a written personnel manual or a written policy regarding sick leave benefit entitlement. There was, nevertheless, an established policy allowing employees to accrue sick time after an initial six-month probationary period.

Turning to the language of §221(1)(B), the Court held that the sick leave policy constituted a wage continuation plan within the meaning of the statute, and that therefore under §221(3)(A)(2), the employer was entitled to a set-off for the sums received under the wage continuation plan. The Court found that the language of the statute was plain and unambiguous and held that a construction of the statute allowing a set-off for the sick leave payments was consistent with the policy of the Act prohibiting stacking of benefits or double recoveries. Accordingly, the employer was entitled to a set-off for the amounts paid as sick leave.

Although not discussed by the Court, employers should not overlook the second sentence of A221(3)(A)(2), which provides that if wage continuation plans or disability insurance plans are entitled to repayment in the event of a workers' compensation recovery, the employer or carrier shall make such repayment from the funds saved as the result of coordination of benefits. In other words, an employer which has paid benefits under a wage continuation plan might be required by the plan's terms to refund such payments if a claimant is ultimately awarded workers' compensation benefits. Such a result would not produce a double recovery, however, as the employee merely receives a payment from a single source during a period of disability. □

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