

Defending a claim of mild traumatic brain injury

BY JONATHAN W. BROGAN

Mild traumatic brain injury has been called the whiplash of the 90's. Many plaintiffs' attorneys, disappointed with the results they receive in whiplash cases, have turned to neuropsychologists to try to explain their clients' complaints of fatigue, memory loss, irritability and depression. Neuropsychologists, using a battery of psychological tests, offer opinions that an ordinary rear end car accident has led to mild traumatic brain injury and permanent disability. Suddenly, a small case becomes a huge problem and the plaintiffs are asking for six-figure settlements.

Unfortunately, there is no inexpensive way to defend a claim of mild traumatic brain injury. It is essential that as many records and data as possible be gathered to defend the claim. Investigating and collecting these materials is both expensive and time consuming. Thereafter, the defendant must likely retain a neuropsychologist to consult on the plaintiff's neuropsychological test results, as well as a neurologist to offer opinions concerning whether or not the plaintiff actually has any form of traumatic brain injury.

Records that need to be reviewed, and it is hoped provided before the matter is put in suit, include police accident reports, and the 48-hour reports of the plaintiff and the potential defendant. If an ambulance is called to the scene, the run sheet must be obtained. Particular attention should be paid to the ambulance attendant's review of the plaintiff's symp-

toms. Did the plaintiff have any head trauma? Was the plaintiff unconscious or disoriented? Is there any evidence of a head injury? Photographs of the vehicles should also be obtained and notes made about any "starring" or breakage of the windshield, or evidence that the plaintiff struck his head during the accident.

As much as possible of the plaintiff's pre-accident emotional, mental and physical state should be discovered. A chief problem with neuropsychological testimony is that it usually has no basis for comparison except for the subjective reports of the plaintiff. In other words, the neuropsychologist has no objective basis for a finding that the plaintiff has a disability associated with a brain injury, as he has no records showing any pre-exist-

ing neuropsychological condition. To help point up this problem, the plaintiff's school records, work records including complete personnel files and physical examinations taken by an employer, and any pre-existing medical records should be obtained. The medical records should be reviewed carefully for the possibility of pre-existing psychiatric or psychological problems and treatment. Additionally, the plaintiff's pre-accident emotional condition, including domestic problems, grief, ongoing or concurrent pain problems, and/or substance abuse should be investigated. All this information will be crucial in providing the jury or fact finder with an overall picture of the plaintiff's pre-accident state and in cross-examining the plaintiff's expert.

All current medical and work records should also be obtained. The complete hospital records as well as all nurse's notes and notes from triage or the emergency room are vital. Were there tests done that determined the plaintiff's awareness? Was the Glasgow Coma Scale used? Was it not used because the plaintiff showed no signs of a head injury? These are important in determining whether or not the claim of a mild traumatic brain injury is appropriate.

The plaintiff is most likely to rely on a neuropsychologist for the opinion that he is suffering from a brain injury. However, many courts have determined that a neuropsychologist cannot offer an expert opinion concerning the cause of brain injuries, as this professional is not a medical doctor, and the opinion will be based

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solely on review of subjective neuropsychological testing. It is crucial for the defense to have the neuropsychologist's raw data, which an expert should examine to determine if the plaintiff's neuropsychologist is using appropriate criteria to analyze the test results. Many times the neuropsychologist does not use age, gender or other specific criteria within the testing guidelines. This can make a significant difference in showing that the neuropsychologist has his own agenda in finding an alleged brain injury.

If the claim proceeds to suit, a neurologist should be retained. That physician can review all objective data surrounding the accident. Specifically, the doctor will review whether or not there was a loss of consciousness at the scene, or some consciousness alteration leading to belief of a concussive event. Is there evidence of post-traumatic amnesia? Were there radiologic studies done, CT scans or MRIs which show any brain injury? Is there evidence of an abnormal neurological exam? All are important to show to the jury that the plaintiff's claim of a mild brain injury has no basis in fact or medicine.

Many neuropsychologists offer opinions concerning "shear injuries." Shear injuries are defined by neuropsychologists as the whipping of the brain within the skull leading to "microscopic" injuries between different lobes, not discernible through objective testing, but only through neuropsychological testing. A neurologist will testify that in fact shear injuries are extremely uncommon, and the usual basis for a diagnosis of "shear injury" is the death of the injured person. There appears to be no scientific consensus that a whiplash type accident without objective evidence of brain injury (loss of consciousness, post-traumatic amnesia, positive CT scans or MRIs) can lead to a diagnosis of permanent mild traumatic brain injury.

As in any case, it is important to determine whether or not the plaintiff is believable. It is vital for the insurer to take a statement from the plaintiff as soon as possible after any accident, especially in

potential brain injury cases. If the plaintiff is making no complaints of amnesia, head injury, or loss of consciousness immediately after the accident, it will be difficult for him or her to later state that these events actually took place.

In looking at the whole case, does a claim of a mild traumatic brain injury make sense? Did the plaintiff return to work? Is the plaintiff continuing to work without interruption and is the plaintiff being reviewed by supervisors in the same way as before? What other problems does the plaintiff have besides complaints of memory loss, lethargy and depression? Consider also that litigation is a stressful event. Many neuropsychologists point out that simply entering into litigation can lead to false positives on tests. Your neuropsychological consultant can advise you about other tests to verify the plaintiff's emotional state as psychogenic problems, which can lead to the same neuropsychological diagnosis as physical neurogenic problems.

While defending a mild traumatic brain injury case is expensive and time consuming, it is only the conscientious and strong defense of these cases that will prevent plaintiffs' attorneys from trying to extort large settlements for minor physical injuries. □

NORMAN, HANSON & DETROY newsletter

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Alexander F. McCann new partner



ALEXANDER F. McCANN

Warmest congratulations are in order to attorney Alexander F. McCann, recently voted to partnership in Norman, Hanson & DeTroy.

Born in Bethesda, Maryland, Alex attended schools in South Portland, Maine. He entered the study of law after immersion in philosophy in undergraduate and graduate studies at the University of Southern Maine and Boston College. As a law student, Alex worked for the Senate Judiciary Committee and Senate President's office in Massachusetts, and earned his J.D. at Suffolk University School of Law, graduating *cum laude* in 1990. He joined Norman Hanson & DeTroy following his admission to the bar.

Alex's practice is concentrated in the field of workers' compensation, representing insurance companies and self-insurers, and he represents clients in the litigation and commercial areas as well. Alex is a member of the Maine State Bar and Cumberland County Bar Associations. He and his wife Theresa Ann make their home in Scarborough with their daughter Kiely, son Conor, and two dogs. □

Compliance with the ADA: What the employer can (and cannot) ask an applicant before making a job offer

BY ANNE M. CARNEY

Disability discrimination claims have been making headlines in Maine recently. The U.S. Supreme Court will review the AIDS discrimination claim asserted in *Abbott v. Bragdon*, which arose out of a dentist's refusal to treat a patient in his office, and a Bangor jury has awarded significant damages to a worker asserting an ADA claim.

How can employers better protect themselves from disability discrimination claims? One important step is to begin at the beginning: review your hiring process to ensure it complies with the EEOC's ADA Enforcement Guidance on pre-employment disability-related questions and medical exams. Here are some questions employers have been asking us about meeting these initial interview requirements covered in the Guidance.

Q. I know that I am allowed to ask an applicant "Can you do this job with or without a reasonable accommodation?", but I am not allowed to ask "Will you need reasonable accommodation to perform this job?". What is the difference between these questions?

A. The first question does not require the applicant to reveal information about a disability. The applicant can answer yes even if she has a disability, so long as she knows of a reasonable accommodation which will allow her to perform the job. The second question requires the applicant to reveal her disability, if she needs any accommodation to perform the job.

Q. But how can the applicant determine that an accommodation she expects the employer to make is "reasonable?"

A. Once a job offer is made, it is the applicant/employee's responsibility to ask for reasonable accommodation. At that point, the employer and employee must follow the procedure specified in the federal regulations to determine whether there is, in fact, a reasonable accommodation. An employer does not violate the ADA if a job offer is made, and subsequently the employer determines that no reasonable accommodation can be made.

Q. Suppose it is obvious to me that a job applicant needs an accommodation to perform the job. Can I ask about the applicant's disability?

A. You are really asking two questions. First, is it ever lawful for an employer to talk about the need for reasonable accommodation at the pre-offer stage? Second, how does an employer initiate this discussion?

If an applicant has a disability which is obvious to the interviewer, and the interviewer reasonably believes the disability will affect job performance, the interviewer may ask whether the applicant believes an accommodation will be needed to perform the job, and may ask the applicant what reasonable accommodations will be needed. The applicant also may be asked to demonstrate how she could perform the job without accommodation, or with the accommodation she requested. If an applicant voluntarily discloses a disability which is not obvious, the interviewer may ask these same questions, and request a demonstration.

A second way to address this issue is to ask all applicants to demonstrate

how they would perform the job. However, an interviewer cannot selectively ask only applicants who he believes might have a disability to demonstrate how they would perform the job.

Q. Can an employer ask questions about disabilities on the employment application if that information is not relied upon in the pre-offer stage?

A. No. An employer cannot ask disability-related questions until a conditional job offer is made.

Q. The interview process seems so complicated – do I need to review the law before I speak to every applicant?

A. Here is a helpful guide: Always ask questions about the applicant's ability to do the job, rather than questions which elicit information about an applicant's physical or medical condition. If you ask a broad question which elicits information about disabilities, you are likely to receive information from applicants about all sorts of underlying conditions which bear no relationship to the applicant's ability to do the job. This information doesn't really help you evaluate the applicant, but it might open the employer up to a claim that the applicant was rejected because of the underlying condition.

Also, employers should remember that there are many questions which can and should be asked at the pre-offer stage.

- Attendance requirements should be described and the applicant asked whether he can meet these attendance requirements.

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Jury tries to alter verdict after dismissal

BY JONATHAN W. BROGAN

A recent Maine Superior Court trial for personal injury resulted in a somewhat confused jury, and the finality of its verdicts was ultimately determined by the Law Court.

Brooke Taylor sued Pasquale Lapomarda, Jr., d/b/a The Casa Company, alleging that the stairs at her cousin's apartment building were so poorly maintained and dilapidated that her shoe caught in a step causing her to slip and fall. She alleged a variety of injuries including reflex sympathetic dystrophy. A two-day trial ensued. The jury returned its verdict, but there seemed to be a problem. The trial justice did not read the verdict immediately, but instead called counsel to side bar to discuss it. The verdict form was not consistent. The jury had found the defendant negligent, the plaintiff negligent, and found plaintiff's negligence greater than or equal to defendant's. Judgment therefore should have been entered for the defendant. However, when the trial judge turned the page, the jury had awarded plaintiff damages of \$8,500 and reduced them, based on her negligence, to \$500.

Prior to trial, the defendant had made a significant offer to the plaintiff. During trial that offer had been increased; plaintiff had rejected all offers. The jury verdict form, as the jury first filled it out, would have resulted in an award of damages to plaintiff of nothing, if the original comparative negligence judgment had been entered. Even without a finding of comparative negligence, damages would have been nothing, as a settling co-defendant had paid \$6,500. Pursuant to Maine law, the settlement of a negligent co-defendant leads to a set off, therefore the plaintiff's judgment of \$500 would have been reduced to zero.

The Court asked both sides for alternatives. The plaintiff asked for a mistrial. The defendant suggested the Court reinstruct the jury on comparative negligence, give them a new form, and ask them to retire and deliberate again. The Court

agreed, and the jury began again to deliberate.

Within five minutes the jury returned, this time finding the defendant negligent the plaintiff negligent, but the plaintiff's negligence not greater than nor equal to the defendant's. The Court inquired of both sides whether they had anything further for the jury and both said no. The plaintiff did not ask that the jury be polled. The judge dismissed the jury, thanking them for their service. The jury, led by a court officer, was escorted from the courtroom. The defendant's attorney made a motion to reduce the verdict to zero pursuant to Maine law. The plaintiff renewed her motion for a mistrial. As Judge Nancy Mills was considering both motions, the court officer entered the courtroom and addressed the judge in a discernible stage whisper. She whispered something that sounded like "the jury has made a terrible mistake." She also said the jury wanted to speak to the presiding justice. Court was adjourned and the judge retired to evaluate her options.

Thereafter she called counsel to chambers and the court officer was questioned. The officer reported the jury had told her that they had made a terrible mistake and that they wanted to award plaintiff \$8,000 instead of \$500. Given the nature of the case, and the substantial offer made at the beginning, even \$8,000 would have been a victory for the defendant because the most the plaintiff could recover from an \$8,000 verdict was \$1,500 because of the \$6,500 set off. The justice correctly informed the attorneys that she could not speak to the jurors again as they had been dismissed. She suggested sending the jury a note. The plaintiff again moved for a mistrial; the Court denied it. Plaintiff then suggested that the judge send a note to the jury asking them to write down their revised intention. The jury replied it was their intention to award the plaintiff \$8,000.

The plaintiff filed a myriad of post-trial motions. All were denied and a judgment for zero dollars was entered for the

plaintiff. The plaintiff then appealed.

The Law Court, in *Taylor v. Lapomarda, Jr.*, 1997 ME 216 (Nov. 7, 1997), decided the appeal in a unanimous decision. The Court determined, based on long settled precedent, that *once a jury is dismissed* any evidence that the jurors' intentions were different from the intentions announced in the verdict could not be used to impeach their final judgment. The Court again announced the "bright line" rule that a dismissed jury's judgment could not be impeached by the testimony of the individual jurors, unless some evidence existed of external misconduct by individual jurors or outside influence on the jury. As the Court observed, the "bright line" rule excludes testimony from a juror about his or her own thought process at arriving at a verdict. A juror cannot testify that the jury misunderstood the evidence or the instructions, or that their verdict was different from the verdict reported in the courtroom. The Law Court pointed out the need for finality, and allowing a juror to testify about the jury's deliberations would mean that no verdict would ever be safe.

The moral of the story is clear: absent evidence of misconduct by a juror or evidence of outside influence on a jury, once a jury is dismissed, the case is over. Or to paraphrase Casey Stengel, "It is over when it's over." □



JONATHAN BROGAN

Three significant Law Court decisions

BY DAVID P. VERY

Fraudulent concealment of sexual abuse claim fails to toll statute of limitations

Plaintiff Dawn Harkness alleged that beginning in 1963, when she was two years old, and continuing until 1977, she was subjected to physical and sexual abuse by her father. She alleges that during the same period of time, her mother allowed the abuse to occur and often blamed her. In 1977, Harkness reported an incident of abuse to her school guidance counselor and she was taken into the custody of the state. She attained her majority in 1979, and ten years later, she allegedly awoke from sleep gagging with her first conscious memory of her father's sexual abuse. Plaintiff commenced an action against her mother and father in 1995. With respect to the statute of limitations, she alleged that she did not discover the abuse until 1989, and that, although she had always been conscious of the acts of physical and emotional abuse, her parents misrepresented those acts as punishment-knowing the acts were not punishment-to prevent her from reporting the abuse. The Superior Court found the entire action was barred and plaintiff appealed.

In *Harkness V. Fitzgerald*, 1997 ME 207 (October 21, 1997), the Law Court first declined the plaintiff's request to adopt a judicially crafted discovery rule with then respect to sexual abuse claims. Plaintiff then argued that her parents' misrepresentation of her father's acts as punishment constituted fraudulent concealment of her cause of action. The Law Court determined that when she reported the abuse, at age 16, she reflected her understanding that her father's actions could not be characterized as normal punishment. Further, while the parent/child relationship is a special relationship that requires the parents to disclose their wrongdoing,

after the plaintiff left her parents' household, there was no factual basis for the establishment of a special relationship that would support a finding of a duty to disclose.

Finally, the plaintiff alleged that her father's behavior caused her to repress her memory and resulted in the fraudulent concealment of the basis of her cause of action. The Law Court disagreed because there was nothing in the record to support the conclusion that the father's sexual abuse was perpetrated for the purpose of causing plaintiff to repress her memory. Given that the Law Court rejected a similar argument last year in *Nuccio v. Nuccio* based on the doctrine of equitable estoppel, it is clear that victims of sexual abuse alleging repressed memory to avoid the statute of limitations will have a most difficult time bringing actions against their parents or the perpetrator.

What constitutes an illegal game of chance

In a quirky Law Court decision, the Court, in *Classic Oldsmobile v. State of Maine*, 1997 ME 214 (Nov. 4, 1997), determined that a car dealership's sales promotion constituted an illegal game of chance.

The promotion provided that any person who entered into a lease arrangement for a new vehicle during a specified four-week period would have twelve monthly lease payments paid if the temperature equaled or exceeded 96° Fahrenheit at the Portland International Jetport on a subsequent date. The State of Maine contended that this promotion constituted an unlawful game of chance and the Superior Court agreed.

On appeal, the Law Court found that the promotional plan clearly involved an element of chance that could not be eliminated through the applica-



DAVID P. VERY

tion of skill. The question before the Court was whether the participant staked or risked any part of the lease consideration for the opportunity to win.

The dealership argued that the customers had nothing of value at stake and no risk of loss. If the customers did not win, they still had the car that they leased. The Law Court stated that if the prospect of winning induces anyone to enter into a lease, it follows that the lease consideration, in part, is provided for that chance. The Court found that since the chance to win is offered as part of the benefit of the bargain, a customer responding to such an offer necessarily stakes some part of the consideration on the chance to win. The Court, therefore, agreed that the sales promotion plan involved an illegal game of chance, and that a license was required.

Discretionary function immunity bars claims of slander

Janet Berard was a member of China Rescue, Inc., a volunteer emergency medical services (EMS) organization. She responded to a call at the home of her uncle in her private vehicle

along with four other China Rescue crew members. The four crew members later reported having smelled alcohol on Berard's breath while at the call. China Rescue's president, Daniel McKinnis, wrote a letter to Berard advising her of the allegations and placed her on suspension. McKinnis sent a copy of the letter to the Kennebec Valley EMS. Berard wrote a letter to the Kennebec Valley EMS asserting that she responded as a family member of the patient and denied the use of alcohol. Berard requested a hearing before the China Rescue Executive Board and again reiterated her position that she was at the call in a private capacity. McKinnis sent another letter to Berard with a copy to Maine EMS, advising her that China Rescue was withdrawing its sponsorship of her EMS license for making less than truthful statements to the Board.

Berard then filed a civil action against McKinnis and China Rescue alleging slander and slander per se. Both defendants filed a motion for summary judgment arguing discretionary function immunity. The Superior Court denied the motion and defendants filed an interlocutory appeal to the Law Court.

On appeal, in *Berard v. McKinnis*, 1997 ME 186 (August 11, 1997), the Law Court stated that Maine law required McKinnis to notify Maine EMS of China Rescue's termination of its sponsorship of Berard's license. Berard argued that Maine law did not require McKinnis to provide Maine EMS with the reasons for termination of sponsorship and, thus, defendants McKinnis and China Rescue were liable for slander.

The Law Court disagreed, stating that while McKinnis was not required to provide Maine EMS with the reasons for the termination, his decision to state the reasons for the termination was so closely tied to the discretionary function of reporting termination that he was protected by discretionary function immunity. The Law Court distinguished this case from *Rippett v. Bemis*, 672 A.2d 82 (Me. 1996) In *Rippett*, the Court

concluded that a deputy sheriff was not immune from a defamation suit in a situation where he made public statements concerning the results of an investigation. In that instance, the public statements were not essential to accomplish any basic governmental policy, program or objective. In *Berard*, McKinnis was legally required to report his decision, and his decision to include

the reasons for the withdrawal was "reasonably encompassed by the duties of his position as China Rescue's president." The Law Court remanded the matter to the Superior Court with direction to enter a judgment in favor of the defendants. □

Briefs/Kudos

A lively Human Resource Seminar sponsored by the Maine Credit Union League was presented by ANNE CARNEY, BOB BOWER, BILL LACASSE and JOHN KING in October. The two-day event dealt with federal and state employment discrimination law, return to work and discrimination issues under Maine's Workers' Compensation Act, and employee leave rights under federal and state law.

STEVE MORIARTY was elected to the Cumberland Town Council in a special election held in November.

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.

Corporate group attorney ADRIAN KENDALL and his fiancée Rebecca Blaesing were married at Falmouth's Church of St. Mary of the Virgin on October 20, 1997. The newlyweds enjoyed a two-week tour of Italy, and are now making their home in Portland.

NORMAN HANSON & DeTROY offered its first Fall Forum for clients November 21 at the Portland Club, with sessions on property and casualty insurance and workers' compensation. DAVID HERZER reviewed computer data as evidence in litigation, and confidentiality and liability issues related to workplace computers. STEVE

HESSERT, BILL LACASSE, JOHN KING and STEVE MORIARTY discussed discrimination, return to work issues, and the year's overview of workers' compensation; JON BROGAN, DAVE VERY, and JIM POLIQUIN discussed minor head trauma cases, significant coverage decisions from the Law Court, and a review of case law and Maine laws affecting claims adjustments and defense.

The credit unions of Maine began their eighth yearly Campaign for Ending Hunger in October, working with Hand to Hand, a Maine nonprofit organization. Since the beginning of this fundraising partnership, Maine credit unions have raised nearly \$470,000 to help hunger organizations statewide. A new fundraising tool, the CU Campaign for Ending Hunger Recipe Book, with over 700 recipes, was sold at credit unions this fall.

At Comp Summit 1997 at Sugarloaf STEVE HESSERT moderated a panel for risk managers on "How to Measure Success in Your Workers' Compensation Program." The panel included Dan Ferguson, Director of Risk Management at Bath Iron Works, and Doane Heselton, Financial Analyst at BIW. JOHN WALLACH chaired a panel discussion on psychological injuries, workers' compensation and the ADA. STEVE MORIARTY introduced Governor Angus King as the keynote speaker. □

Workers' compensation - Law Court decisions

BY STEPHEN W. MORIARTY

Applicable law in multi-injury cases

The Maine worker's Compensation system contains many cases of successive employee injuries which occurred both before and after January 1, 1993, the effective date of the current Act. Such employees seeking compensation have generally filed separate petitions against each potentially responsible employer. Two of these cases were recently consolidated on appeal before the Law Court, and in a sharply divided opinion the majority held that an employee's rights are determined by the law in effect at the time of the most recent injury.

In *Ray v. Carland Construction, Inc.* 1997 ME 206 (Oct.23, 1997), the first case involved an employee who injured his back in 1987 and again in 1993. The average weekly wage for the second injury was slightly lower than for the first. In granting petitions filed against both injuries, the Workers' Compensation Board awarded benefits based on the higher average weekly wage in effect at the time of the first injury, and also concluded that the employee was entitled to the benefit of the inflation adjustment provisions in effect at the time of the 1987 injury. The Law Court reversed and held that benefits should have been based upon the average weekly wage in effect at the time of the second injury, as the evidence failed to show that the wage was lower because of the first injury. More importantly, the Court held that no inflation adjustments were available, because the Legislature intended that the current Act should apply to all awards of benefits in successive injury cases where the most recent injury occurred after January 1, 1993.

In the second case consolidated for appeal, the claimant suffered injuries in 1992 and 1994, and the parties agreed that because the employee's earnings were lower in 1994 by virtue of the first



STEPHEN W. MORIARTY

injury, all benefits should be based on the wage in effect in 1992. The Board had concluded that both injuries contributed equally to the employee's incapacity, but the critical issue was whether her entitlement to partial incapacity should be calculated pursuant to current Section 213 or former Section 55-B. The Board ruled that entitlement to ongoing partial was governed by the law in effect at the time of the second injury and that the provisions of Section 213 applied in full. The Law Court agreed, and held that in successive injury cases the Legislature intended that Section 213 should apply when at least one injury occurred after the effective date of the new Act.

Two Justices vigorously dissented and pointed out that when the new Act was adopted the Legislature expressly stated its intent not to alter benefits for injuries which occurred before January 1, 1993. For that reason, certain sections of the new statute, including those involving entitlement to total and partial incapacity, were to apply prospectively only. The dissenters argued that the majority had, in effect, overlooked the intent of the Legislature and had trans-

formed successive cases into single injury claims governed by the new law.

Ray will have a profound impact upon multi-injury cases in which at least one contributing injury occurred after January 1, 1993. The value and potential exposure for prior contributing injuries will now be substantially reduced, and in effect all entitlement will be determined as if the most recent injury were the only injury. Because of the far-reaching impact of this decision on older claims, it is possible that there may be legislative attempts to reverse or modify the Court's opinion.

Concurrent income and seasonal employment

When an individual is concurrently employed at the time of injury, Section 102(4)(E) provides that earnings from all employers must be combined to produce a single average weekly wage. Thereafter, the employer for whom the employee was working at the time of injury must pay benefits based on the average weekly wage calculated from concurrent employment. In *Harrigan v. Maine Veterans Home*, 1997 ME 224 (Nov.24, 1997), the employee sustained an injury on August 4, 1994 while working at the Maine Veterans Home. At the time she was also employed as a cashier at a seasonal amusement park and usually worked in that position only 14 weeks a year. Maine Veterans Home argued that the concurrent employment was seasonal in nature and that these wages ought to be calculated pursuant to the seasonal employment provisions of Section 102(4)(C). The Board had rejected the argument and evidently calculated the average weekly wage as if the cashier's job were a year round position.

Having accepted the employers' appeal, the Law Court reversed the decision of the Board and held that income

Continued on page 8

from concurrent employment should be calculated separately, based on the nature of that employment. Finding that the position of an amusement park cashier was seasonal in nature, the Court held that the seasonal wage calculation must be made with regard to that employment, and that the resulting figure must then be added to the non-seasonal wages to produce the average weekly wage which reflects concurrent employment.

Although she worked only 14 weeks a year as an amusement park cashier, the employee argued that she was not a seasonal worker within the meaning of the statute and relied upon the Court's earlier decision in *Frank v. Manpower Temporary Services*, 687 A.2d 623 (Me. 1996). In *Frank*, the Court had suggested that seasonal employment applied only to those positions which were inherently seasonal in nature, such as a ski instructor. Relying upon *Frank*, the employee had argued that her cashier position was theoretically available year-round, and therefore could not be considered as inherently seasonal.

Fortunately, the Court clarified its position and stated that seasonal employment does not refer to a theoretical position but to an individual's actual employment within a particular trade or industry. Therefore, because the employee's position with the amusement park was strictly limited to the summer season, her average weekly wage as a cashier had to be calculated pursuant to the seasonal employment provisions of the statute.

Harrigan breathes new life into the concept of seasonal employment, and loosens the restrictive definition earlier applied in *Frank*.

Apportionment

In cases in which an employee has filed claims against multiple employers or insurers, it has been the practice to consolidate all pending matters for hearing and decision before the Board and to adjudicate responsibilities of the employers in a single proceeding. However, a recent decision of the Law Court ques-

tions the continued viability of this practice, and may have a major impact on how successive injury cases are handled.

In *Rosetti v. Land Reclamation*, 1997 ME 197 (Sept.26, 1997), the employee had sustained successive occupational injuries in 1979 and 1991. In 1993, the second employer filed a Petition for Apportionment against the first, and the employee filed a Petition for Restoration against the first employer. In granting the pending petitions, the Board found that a precise division of liability between the



TENTH ANNIVERSARY ISSUE

The Winter 1998 issue of the Norman Hanson & DeTroy Newsletter marks the tenth year of our complimentary information service to clients, and your warm response indicates a firm future for its continued publication.



employers was not possible and therefore split liability equally between the two. The employee filed a Petition for Appellate Review; meanwhile, the second employer filed a motion with the Board requesting reimbursement from the earlier employer for its share of the benefits that the second employer continued to pay pending appeal. The Board granted the motion and ordered the first employer to pay its proportionate share of benefits pending appeal.

On appeal, the Law Court vacated the Board's order granting the second employer's motion for reimbursement. The Court ruled that Section 354 set forth

the exclusive means by which one carrier or employer could obtain apportionment from another, and that pursuant to the express language of the statute a party seeking apportionment must file a request for arbitration with the Superintendent of Insurance. Thus, the Court found that the Board had no jurisdiction to determine apportionment disputes, and ruled that the Board lacked authority to order the first employer to reimburse the second employer for payments made while the employee's appeal was pending.

It is unclear how broadly the Hearing Officers will apply the *Rosetti* holding. A demand for reimbursement by one insurer from another is clearly in the nature of an apportionment proceeding, and all would agree that such disputes must be submitted to arbitration pursuant to Section 354. However, when an employee files claims against multiple employers seeking recovery from each, the relief sought is not a true apportionment.

In view of *Rosetti*, it is unclear whether Hearing Officers will continue to allow employees to proceed against several employers and insurers simultaneously. It is possible that claimants will be limited to proceeding only against the employer at the time of the most recent injury, leaving it to that employer to seek reimbursement from earlier responsible employers pursuant to Section 354. If this becomes the prevailing interpretation of *Rosetti*, the last chronological employer will have to both defend an employee's claim and then seek apportionment in a subsequent proceeding, which could complicate and delay matters considerably. The full impact of the *Rosetti* decision must await application by the Hearing Officers, but it is unlikely a uniform interpretation of the decision will emerge.

Retroactive payments

In *Weeks v. Allen & Coles Moving Systems*, 1997 ME 205 (Oct.21, 1997), the employee alleged a 1993 injury, and her Petition for Award was ultimately

denied on grounds of untimely notice. However, because the employer did not file a notice of controversy until 33 days after receiving notice of the injury, the Board ordered the employer to pay benefits from the time of knowledge to the date of the NOC. The employer evidently failed to do so, and the Board then directed the employer to pay benefits for total and partial incapacity from the alleged date of injury to the date of the decree denying the Petition for Award.

The employer appealed, and the Law Court ruled that the Board had no authority to order payment of benefits retroactively from the date of the alleged injury to the date of the decree, and rejected each argument advanced by the Board to support its decision.

First, the Court held that Section 205 does not impose a penalty upon an employer for failing to controvert within 14 days and does not require ongoing payment of benefits if a NOC is filed after 14 days. Similarly, the Court found no support for the Board's action in either a former version of Chapter 1, WCB Rule Section 1.1 or the current version of the same rule. The current rule provides that payment of benefits must be made from the date of incapacity to the date of filing of a notice of controversy. However, the current rule became effective after the employee's Petition for Award was filed, and the Court therefore had to determine whether the current rule applied to proceedings which were pending as of its effective date.

According to the general rule of statutory construction found in 1 M.R.S.A. Section 302, changes or amendments to a statute do not apply to pending proceedings unless there is a clear and unambiguous statement of legislative intent that the change should apply. In *Weeks*, the Court applied the same rule to changes in administrative rules, and held that when the Board adopted the current rule it did not express an intent to apply it to proceedings which were then pending. Therefore, in the absence of any statutory or rule-based authority to support the award of retroactive benefits,

the decision of the Board was vacated.

This decision has particular importance with regard to the Board's rule-making authority and the application of rules which the Board may adopt to proceedings that are pending at the time of adoption. The Court has now clearly held that unless the Board expresses an intent to apply a rule change to pending proceedings, such proceedings will not be affected by the adoption or an amendment of a rule.

Specific loss benefits

The Workers' Compensation Act of 1992 abolished permanent impairment as it had previously existed and in its place established entitlement to specific loss benefits for the actual loss of designated portions of the body. It has been generally understood that such benefits were available only in instances of amputation, and that no benefits could be awarded where a specified portion of the body merely lost its physical usefulness. The Court recently addressed the proper interpretation of the statute in *Gibbs v. Fraser Paper, Ltd.*, 1997 ME 225 (Nov.26, 1997).

In *Gibbs*, the employee suffered an occupational crush injury to the ring finger of his left hand in September, 1994 and ultimately returned to work following a several month period of incapacity. As a result of the injury, the finger became "like a fused joint" with almost no motion whatsoever, and estimates of permanent impairment to the finger ranged as high as 65%. Claiming that the finger was virtually useless for all intents and purposes, the employee filed a petition seeking specific loss benefits pursuant to Section 212(3)C of the Act. Noting that the finger itself had not been amputated, the Board denied the petition.

In *Gibbs*, the Court affirmed the Board's decision and held that the phrase "actual loss" means exactly what it says and is not equivalent to loss of function. Therefore, in the absence of an actual amputation, specific loss benefits may not be awarded even though the affected portion of the body may have lost all of its use.

Exempt employers

Most employers in Maine are required by Section 401 to secure the payment of workers' compensation benefits for their employees either by purchasing workers' compensation insurance or by becoming self-insured. However, several types of employers have been exempted from this requirement, including employers of seasonal agricultural or aquacultural laborers, provided these employers obtain liability insurance coverage within certain specified policy limits.

In *Zorn v. Carl R. Smith Potatoes*, 1997 ME 223 (Nov.24, 1997), the employee was a seasonal laborer in a family agricultural business and filed a Petition for Award with the Board for an occupational injury. The Board determined that the employer was exempt from the obligation to secure payment of workers' compensation benefits and denied the Petition for Award based on lack of jurisdiction.

On appeal, the employee unsuccessfully argued that the employer did not qualify as exempt within various alternative provisions of Section 401. More importantly, the employee mounted a constitutional challenge to the statute itself and alleged a denial of equal protection of the laws if the remedies afforded by the Workers' Compensation Act were not available to her. The Court held that acts of the Legislature are presumed to be constitutional and that the burden was upon the employee to show that the statute was either arbitrary or without reasonable basis. The Court rejected the claim of denial of equal protection, and found that exempting certain employers from obtaining workers' compensation coverage while at the same time requiring those employers to obtain liability insurance coverage was not arbitrary. Thus, the employee failed to show that it was constitutionally impermissible to protect smaller agricultural businesses in the manner chosen by the Legislature, and the decision of the Board was affirmed. □

Continued from page 3

- An applicant may be asked about arrests and convictions, which could reveal important information about illegal drug use.
- The applicant may be asked about current and past illegal use of drugs, but not about addiction to drugs or treatment for drug addiction.

- An applicant may be asked about alcohol use, whether the applicant has been disciplined by prior employers for alcohol use at work, and about OUI arrests and convictions, but not about the extent of alcohol use, alcoholism, or treatment for alcoholism. For example: Have you ever been disciplined by an employer for alcohol use during working hours? Have you ever been arrested for OUI?

These questions, coupled with a request that all applicants demonstrate their ability to perform the job functions, will give the interviewer a fairly solid basis for whether an employment determining offer should be made.

In the Spring issue of the Newsletter, we will look at disability-related questions and medical examinations after a conditional employment offer is extended. □

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Return service requested

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