NORMAN, HANSON & DETROY, LLC

newsletter

Current developments in Maine law

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The Problem of Workers' Compensation Liens in the Settlement of Tort Claims: Calculating Attorney's Fees Owed by the Workers' Compensation Employer to the Plaintiff

BY ROBERT W. BOWER, JR.
C. LINDSEY MORRILL

The presence of a significant workers' compensation lien must be appreciated by insurers seeking to settle their third party liability tort claims. The greater the workers' compensation lien, the less money will be available from any third party settlement to go directly to the plaintiff, thus making settlement offers less attractive to plaintiffs. Workers' compensation employers, too, must understand their rights and obligations under the workers' compensation lien statute to enable them to meaningfully negotiate the workers' compensation lien at the time the tort case settles. To fully appreciate the impact of the lien insurers must understand the workers' compensation employer's obligation to reimburse the plaintiff for attorney's fees incurred in recovering the lien.

The workers' compensation lien statute, section 107, provides that the workers' compensation employer shall recover its lien upon payment of the third party claim "less the employer's proportionate share of the cost of collection, including reasonable attorney's fees." Complicating the analysis is the fact that where the third party settlement exceeds the workers' compensation lien, a "workers' compensation holiday" arises upon settlement of the third party claim. The employer is entitled to offset any workers' compensation obligations it may have to the injured worker post third party settlement until the holiday is exhausted. The Maine Supreme Judicial Court created confusion in 2002 when it held that the employer's obligation to pay a proportionate share of attorney's fees applies both to the lien on workers' compensation benefits already paid *and* the holiday on future payments. Now parties involved in negotiating tort liability settlements are skirmishing over how to calculate the costs and attorney's fees associated with the holiday. A recent decision of Maine's Superior Court, skillfully argued by Norman, Hanson & DeTroy's Jim Poliquin, has clarified this issue, and provides guidance to attorneys and claims handlers involved in these cases.

ROBERT W. BOWER, JR.

C. LINDSEY MORRILL

39-A M.R.S.A. §107 provides that an employer paying workers' compensation has a lien on any damages recovered by an employee against a third party liable for the injury. Section 107 further provides that if the employee recovers damages from a third person, the employee shall repay the employer, out of

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recovery against the third person, the benefits paid by the employer under the Act, less the employer's proportionate share of costs of collection, including reasonable attorney's fees.

In *Liberty Mutual v. Weeks*, 404 A.2d 1006 (Me. 1979), the Law Court held that section 107 not only gives the employer a lien on payments already made, but also relieves the employer of future workers' compensation obligations (i.e., creates a "holiday" on payments otherwise owed under the Workers' Compensation Act), to the extent that the third party settlement created an excess recovery to the employee over and above the lien for past workers' compensation benefits paid. For many years after *Weeks* was decided parties assumed that the "proportionate share of attorney's fees and costs" calculation was based on the amount of the past benefits paid by the employer only and not the "value" of the future holiday. The holiday was always taken by the employer free of any attorney's fees and costs. It took more than twenty years for the plaintiff's bar to question this practice.

The Law Court finally addressed this issue in *McKeeman v. Cianbro Corp.*, 2002 ME 144, 804 A.2d 406. In *McKeeman*, the employee had died in a work-related accident while working for S.D. Warren. His widow was therefore entitled to 500 weeks of compensation under the Act. His widow also filed a complaint against third party Cianbro Corporation for negligence and breach of implied and express warranties. She ultimately settled with Cianbro for $970,000. By agreement the employee's counsel was entitled to a contingent fee of one-third of the amount of the settlement, or $330,000. S.D. Warren argued that its proportionate share of recovery under section 107 was one-third of the benefits that they had already paid, 228 weeks of compensation, and a "free" holiday for the remaining obligation of 272 weeks. In contrast the widow argued that S.D. Warren was liable for proportionate fees for the recovered amounts paid (228 weeks), as well as what S.D. Warren would have paid during the remaining weeks post settlement but for the "holiday" (272 weeks). The Law Court agreed. It ordered that the "holiday fee" be deducted from the lien recovery and the balance paid over to S.D. Warren. After *McKeeman*, the employer must reimburse the claimant for his or her attorney's fees expended to recover both the lien and the future holiday.

McKeeman addressed and resolved the threshold question of whether the employer must pay proportionate attorney's fees on both the lien and the holiday it receives under section 107. It must. *McKeeman*, however, did not address the question of how parties should value the future holiday. When it is of uncertain duration, and when such calculation should be made. *McKeeman* did not need to address that question because the workers' compensation obligation in that death case was easily defined and finite. No more than 500 weeks of benefits are payable on a death case under the Act barring circumstances not present in *McKeeman*. The employer's total lien plus holiday was easily ascertained, 500 weeks of benefits.

Unfortunately, the vast majority of workers' compensation claims are of indeterminate value, since in most cases the Act provides no automatic cut off of indemnity or medical entitlement. Instead those benefits are awarded over time in greater or lesser amounts depending on the plaintiff's changing circumstances.

For example, consider the case of *McKeeman*, but assume that the employee had not died but remained on compensation as of the date of the third party settlement. The 500 week cap on benefits would not apply. But other variables would arise. For example, the length of time that the plaintiff receives benefits under the Workers' Compensation Act is controlled by a number of factors: the degree of permanent impairment, whether the plaintiff regains work capacity medically in the future, whether vocational opportunities exist for the plaintiff in his geographic area, whether he has refused an offer of suitable employment from his employer, and whether he dies prematurely from non-work related causes or lives beyond his statistical life expectancy. More confounding is that the Workers' Compensation Board's analysis of benefit entitlement is not performed once, fixing the compensation obligation forever. Instead, benefit entitlement can be repeatedly considered and readdressed any time a "change in circumstances" occurs. Further, the plaintiff's work related medical treatment is compensable for the duration of the claim.

Given the uncertain nature of predicting future entitlement to workers' compensation, how and when do we value, for purposes of assigning a proportionate attorney's fee as required by *McKeeman*, the benefit of not having to pay the employee this hypothetical and indefinite stream of income and medical treatment over time?

During the six years since *McKeeman* was decided, employers, plaintiffs' counsel and tort defendants have struggled with this concept. Most such cases are resolved with a "lien waiver" of some amount and a workers' compensation settlement to liquidate the issue. But occasionally workers' compensation employers refuse to compromise their section 107 rights. Maine's Law Court has yet to address the method for valuing section 107 holidays outside of the amount certain context present in *McKeeman*.

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However, this issue has been recently litigated before the Superior Court in *Construction Services Workers' Compensation Group Self Insurance Trust v. Dennis Stevens and Gilbert & Greif*, Superior Court, Civil Action Docket No. CV-06-146 *[Stevens]*. This case involved an employee who settled the third party claim in the amount of $970,000. Twenty percent of the settlement was attributable to a loss of consortium claim and not subject to the lien, leaving $776,000 subject to the lien. The workers' compensation claim remained open, and the employer asserted a lien relative to the payment of benefits already paid which totaled $340,000. Additionally, as the benefits paid in the past did not consume the entire third party settlement, the employer was entitled to a holiday for future benefits to be paid under *Weeks*. In calculating the employer's proportionate share of costs and attorney's fees, which the parties stipulated was 38% of the entire recovery, the Superior Court was required to make that determination with reference to both past benefits paid and future liability relieved (the "holiday"). The employer argued that the present value of the holiday was clearly speculative as one cannot determine an employee's future earning capacity, the likelihood that the capacity will change, and whether medications and medical treatment are likely to change in the future. It argued that the exercise of trying to determine the present value of an individual's future entitlement to workers' compensation, and therefore the value of the "holiday," is inherently speculative.

The employer proposed instead that the court adopt a *pari passu* or "pay as you go" method under which holiday attorney's fees and costs are deducted as they are "earned"; that is when the employer uses (gets the benefit of) a holiday on a week-by-week and bill-to-bill basis. This method is the only one that guarantees the holiday will be calculated correctly and will not result in an underpayment or overpayment of attorney's fees. Under this method the employer would receive $210,000 at the time of settlement (the past benefits paid of $340,000 multiplied by 38%) and then pay the holiday fee on a weekly basis.

The plaintiff argued instead that the entire excess recovery ($436,000) was "the holiday" and 38% of that amount was the attorney's fee on the holiday ($165,680). That is, the employee argued the workers' compensation employer has "received" the benefit of the entire excess amount of the settlement as a holiday, and can use it as needed to offset its obligations until it is exhausted. This fee on the holiday should be collected by reducing the amount of the employer's lien by that amount.

Under this method the plaintiff would have to pay to the workers' compensation employer $44,320 at the time of settlement ($210,000 lien recovery minus "holiday fees" of $165,680).

As can be readily observed the plaintiff's obligation to his employer as of the date of settlement is very different depending on which methodology is adopted: $210,000 (pay as you go) vs. $44,320 (pay in advance).

The Superior Court considered these competing methods and accepted the employer's methodology:

> It is difficult to apply the general rule of *McKeeman* to this case. While the employer's proportionate share of costs and attorney fees can include both past benefits paid and future liability relieved, the proportionate share of the future liability relieved is only factored in "to the extent that it can be determined." *McKeeman*, 2003 Me. 144 ¶17, 804 A.2d at 411. The evidence presented at trial is not sufficient to permit the court to make this determination because it is not known at this time whether the [plaintiff/employee] will be eligible to receive future benefits, and if eligible, what the eligibility period will be. Consequently, the only way that the court can determine the [employer's] proportionate share of costs and attorney fees related to future liability relieved is to require that [employer] pay its share as the benefits accrue periodically.

Accordingly, the Superior Court ordered that the employer had a lien on the entire amount of the workers' compensation benefits paid, $210,000, and that the employee be sent a check for 38% (attorney's fees and costs) of the workers' compensation benefits to which he would be entitled each month if the benefits were not being set off pursuant to the holiday. In other words: "pay as you go." The effect of this ruling is that upon the tort settlement the plaintiff must return to the employer the lien *unreduced by the "holiday fees."* Post settlement the employer begins to pay the employee a weekly fee reimbursement of one-third of the amount he would otherwise receive in workers' compensation. This result means that plaintiffs must part with much larger pieces of their settlements up front to resolve the employer's lien. This case greatly increases the employer's leverage when negotiating "lien waivers" and workers' compensation settlement issues, which frequently are part of global settlement discussions to resolve this type of claim.

It is expected that the *Stevens* case will be appealed and the question of an appropriate methodology for determining the fees and costs associated with an employer's holiday will reach the Law Court. In the meantime parties on all sides of tort claims involving workers' compensation liens can better understand their opportunities and risks with a thorough understanding of the issue raised in *Stevens*. □

Dickey v. Vermette: The Impact of "Continuing Treatment" On the Medical Malpractice Statute of Limitations

BY CHRISTOPHER C. TAINTOR

CHRISTOPHER C. TAINTOR

On December 9, 2008, the Maine Supreme Judicial Court decided the case of *Dickey v. Vermette*, 2008 ME 179. The Court affirmed a summary judgment in favor of Dr. Vermette, a dentist who was represented by NH&D, on a claim that he had negligently failed to diagnose oral cancer. The judgment was based on the Superior Court's conclusion that the case was barred by the three-year statute of limitations contained in the Maine Health Security Act (MHSA). The judgment was affirmed over two strongly-worded dissenting opinions, signaling a significant split when it comes to applying the MHSA in cases involving allegations of latent medical negligence.

Under the MHSA, the general rule is that a lawsuit alleging professional negligence on the part of a health care practitioner must be brought "within three years after the cause of action accrues." The Act goes on to specify: "For the purposes of this section, a cause of action accrues on the date of the act or omission giving rise to the injury." Application of this rule can become problematic when a practitioner has an ongoing relationship with a patient, and the patient's injury develops gradually. For example, if a physician, dentist, or other practitioner sees a patient periodically while a cancer is spreading but fails to diagnose the condition and initiate treatment, two problems can arise. First, it may be difficult in retrospect to identify "the date of the act or omission giving rise to the injury." Furthermore, by the time the disease is diagnosed more than three years may have elapsed from a critical medical encounter, making it too late for the patient to sue for any harm alleged to have been caused by that "act or omission." In *Dickey v. Vermette* the claimant, backed by the Maine Trial Lawyers Association, urged the Law Court to let her pursue her claim even though it was agreed that no "act or omission giving rise to the injury" had occurred within three years of the filing of her lawsuit. Although the Court's decision in favor of the doctor reinforced the vitality of the MHSA in these specific circumstances, it left some questions to be answered another day.

Facts

In 1993, Maetta Dickey became a patient in the dental office of Gerald Vermette, D.D.S. She was treated there at various times by Dr. Vermette, and often by other dentists in the practice. In 2000 panoramic x-rays were taken of Ms. Dickey's mouth. The films were interpreted as normal. Between 2000 and 2005, according to Ms. Dickey, a hygienist in the practice periodically commented that tissue in the lower left part of her jaw "looked funny." Dr. Vermette never had occasion to perform any work or examine the tissue in that part of Ms. Dickey's mouth after the 2000 x-rays were taken. Another dentist in the office did, however, and on one occasion the hygienist allegedly pointed out to him the tissue that she thought "looked funny." He, in turn, told her to "keep an eye on it."

In March 2005 more x-rays were taken, and upon reviewing the films one of Dr. Vermette's colleagues referred Ms. Dickey to an oral surgeon, who diagnosed mucoepidermoid carcinoma, an oral cancer. In August 2005 Ms. Dickey terminated her treating relationship with Dr. Vermette's practice, and on February 23, 2006 she and her husband Todd filed their Notice of Claim, accusing Dr. Vermette of professional negligence. The Dickeys asserted both in their Notice of Claim and in the designation of their expert witness that Dr. Vermette or his agents (other dentists in the office and the hygienist) had breached a duty of care on occasions both before and after February 23, 2003. They claimed that the 2000 x-rays showed an early cancerous lesion, and that if the cancer had been diagnosed promptly Ms. Dickey could have been spared painful and disfiguring surgery to remove the tumor. Dr. Vermete, supported by the expert opinions of a general dentist and an oral surgeon, denied negligence and also asserted that whatever delay might have occurred in diagnosing the cancer made no difference in the patient's treatment or prognosis – even Ms. Dickey's expert could not say that if the diagnosis had been made in 2000 instead of 2005 she would have avoided the surgery.

While the case was pending before a prelitigation screening panel, Dr. Vermette was given permission to file in Superior Court a motion for partial summary judgment, in which he requested that the court enter judgment in his favor with respect to any liability arising from acts or omissions that had occurred before February 23, 2003 – i.e., more than three years before suit was filed. In their response to Dr. Vermette's motion, the Dickeys argued that the statute of limitations was tolled because the cancer had been "fraudulently concealed," and alternatively that their claims had not accrued

until August 2005, when Ms. Dickey terminated her treating relationship with Dr. Vermette's office. In support of this latter argument they invoked the "continuing treatment doctrine." The Superior Court rejected both arguments, and granted partial summary judgment in Dr. Vermette's favor.

This ruling was not an appealable "final judgment" since it only disposed of part of the case – the Dickeys could still, in theory, try to prove that the continuing failure to diagnose Ms. Dickey's cancer after February 23, 2003 contributed to her injuries. Faced with the prospect of going to panel, and perhaps ultimately to trial, solely on the claims the Superior Court had identified as surviving its ruling, the Dickeys voluntarily abandoned those claims. The parties entered into a formal stipulation that "no act or omission that occurred after February 23, 2003 was the proximate cause of an injury sustained by the Claimants," and they "jointly requested the entry of judgment, in favor of Respondent, on those claims." The Superior Court thereupon directed the entry of final judgment. The Superior Court's Order, which was entered by agreement, explicitly stated that "there is no legal basis for pursuing claims arising out of acts or omissions that occurred after February 23, 2003." The Stipulation and Order finally resolved all the claims asserted in the Notice of Claim, and made the case ripe for appeal.

The Law Court Appeal

On appeal, the Dickeys abandoned any claim of "fraudulent concealment." They focused instead exclusively on the argument that the statute of limitations should be tolled by the "continuing course of treatment" doctrine – that is, that the time for bringing suit should not begin to run as long as a health care practitioner continues to treat his patient. They advanced two rationales for the doctrine. First, they contended that it "fosters better physician-patient relationships" because it relieves patients of any need to second-guess their doctors while the relationship remains extant. Second, they argued that it "promotes fairness where . . . a plaintiff has been subjected to a series of treatments or examinations and it is difficult or impossible to determine a precise moment when the actual harm was occasioned." The Maine Trial Lawyers Association, in an *amicus curiae* brief, distinguished between the "continuous course of treatment" and "continuing negligent treatment" doctrines. Under the latter, the MTLA argued, the limitations period should begin to run for all claims on the date of the last act of negligence (as opposed to the last date of treatment), as long as that act occurred within three years before the lawsuit was initiated.

The Law Court rejected the first argument for the simple reason that it conflicted with the unambiguous language of the MHSA. The Court said: "In setting a three-year limitation period [and] declaring that the cause of action 'accrues on the date of the act or omission giving rise to the injury,' . . . the Legislature effectively declined to adopt the continuing course of treatment doctrine." The Court thus refused to "impose a judicially-created exception that is contrary to the plain meaning of section 2902 [of the MHSA]." The Court also agreed with Dr. Vermette that the second justification advanced by the Dickeys, although arguably the more persuasive of the two, had no relevance to their case since they had stipulated that *no* "actual harm" occurred after February 23, 2003. The Court reasoned that "any discussion about [the continuing negligent treatment] doctrine, including whether it is consistent with section 2902, is irrelevant and premature."

Two justices of the Law Court dissented from the decision. Justice Alexander opined that the statute of limitations should be tolled by "fraudulent concealment." He took this view even though the Dickeys had abandoned that argument, and even though there was not a shred of evidence that Dr. Vermette or anyone else in his office knew, but had concealed the fact, that Mrs. Dickey had cancer. Justice Silver thought that in a case involving a series of allegedly negligent acts or omissions, the Court should interpret Section 2902 as tying the accrual of a cause of action to the last such event. Under Justice Silver's analysis, which essentially mirrors the position advanced by the MTLA, whenever a plaintiff sues a physician for damages resulting from a continuing course of alleged negligence, the statute of limitations should not begin to run until the last negligent act or omission, even if nearly all the plaintiff's damage resulted from conduct that had occurred many years earlier.

In pronouncing that any discussion of the continuing negligent treatment doctrine would be "irrelevant and premature," the majority of the Law Court seemed to be responding to Justice Silver's dissent. It is very likely that when another "continuing treatment" case comes to the Law Court and there is some uncertainty about the timing of the plaintiff's injury – that is, where some of the plaintiff's injury was caused by conduct that occurred more than three years before suit was brought, and some may have been caused by conduct occurring less than three years earlier – the MTLA will be back before the Court seeking to persuade a majority of the Court to adopt Justice Silver's view.

From the standpoint of the medical profession, it has been and remains important to dissuade courts from second-guessing the legislature on this important question of public policy. As the Law Court observed in *Myrick v. James*, 444 A.2d 987 (Me. 1982), "[t]he formulation of a statute of limitations represents a balance of several competing interests." On the one hand, "parties injured by the actions of others must be afforded an opportunity to pursue their meritorious claims and seek relief in the courts." On the other, "potential defendants are entitled to eventual repose and to protection from being required to meet claims which could have been addressed more effectively if asserted more promptly." *Id.* at 994. No statute of limitations is completely fair to everyone, and it is the legislature's job to balance the interests of litigants and society at large.

There is no doubt that when the Maine Legislature amended Section 2902

of the Health Security Act it fully appreciated the competing interests at stake in the formulation of rules of limitation and repose. The statute it enacted reflects a careful and deliberate balancing of those interests. The new statute extended the limitation period from two years to three for many, perhaps most, cases – those where a doctor's allegedly negligent act or omission causes an immediately perceptible injury. Simultaneously, however, the statute established a clear rule of accrual that could have the effect of shortening the limitation period in other cases. By establishing the date of an allegedly negligent "act or omission" as the date of accrual for almost all cases, the Legislature told health care providers that in all but the most exceptional circumstances they could assume that if they had not been sued within three years of a patient encounter they would not be; they did not have to be concerned that the deadline for bringing a lawsuit based on that encounter would be prolonged by delayed manifestation of a medical injury, or by a patient's belated discovery of the harm. In striking this balance, the Legislature no doubt understood that the new law would yield harsh results in particular cases. It decided, however, that society's interest in affordable and available health care outweighed the interests of individual patients whose rights to compensation for medical injury would be compromised. It will be important to remind the Law Court of the Legislature's wisdom – and, perhaps more importantly, its constitutional prerogative to make these judgments – when this issue arises again. □

KUDOS

At its annual winter meeting in January, the Maine State Bar Association recognized **CHIP HEDRICK** for having contributed the highest number of pro bono hours for Androscoggin County in 2008.

JOHN AND GINNY KING'S daughter, Julia, a senior center mid and tri-captain of the Bowdoin College field hockey team, helped lead the Polar Bears to their fourth straight New England Small College Athletic Conference (NESCAC) Championship and their second straight NCAA Division III National Championship. In 2007 the Bowdoin team's first National Championship was the first such event won by Bowdoin in any sport in the history of the college. Over the course of four years the seniors on Bowdoin's 2008 team compiled a record of 74-5, won the NESCAC Championship every year, traveled to the Final Four every year, and had a post season NCAA Tournament record of 21-2. They also prevailed over arch rival Middlebury College (John's alma mater) each of the nine times the teams met. For the second year in a row, Julia was named First Team All-American and First Team All-NESCAC. In 2007 she led the country with 21 assists. She led all New England players this season with 16 assists and finished her field hockey career as Bowdoin's all-time leader in assists with 49.

KEN ALBERT has served two terms as Vice President of the Board of Directors for Common Ties Mental Health Services, and was recently selected to serve a one-year term as its President. Common Ties Mental Health Services provides case management, social networking, housing, medication management, peer support, and other necessary services to people in the central Maine area with mental illness and/or dual diagnoses. Common Ties believes strongly that all people deserve an opportunity to be productive members of their community.

KEN was also one of five panelists of a small business advisory group to address an audience sponsored by the Lewiston Chamber of Commerce. The substance of his presentation focused on the impact of Maine's sexual orientation definition (transgender and gender expression) on small business owners.

JENNIFER A. W. RUSH and her husband, Adam, celebrated the birth of their new daughter, Addison Williams Rush, on November 4. Addison has joined her sister, Evelyn, at their parents' home in Falmouth.

ADRIAN KENDALL has been invited to speak at the New Hampshire International Trade Resource Center's 2009 export seminar series in advance of Governor Lynch's March trade mission to Brazil. The Center plans, develops, and administers programs for international trade promotion and foreign market development for businesses located throughout New Hampshire. **ADRIAN** also recently returned from a trip to India where he delivered presentations on risks and opportunities in international trade and investment in the major cities of Kolkata and Mumbai, and also attended the annual ALFA International conference in Mumbai. Feedback received from the presentations was overwhelmingly positive. "Your unique and synthesized perspective offered amazing detail and insight to the audience" was just one of the comments received from the Deputy Director of the United States Consulate's American Center. NHD is a member of ALFA International, a US and global network of law firms committed to excellent and cost-effective legal representation.

Last fall, **DAVE HERZER** toured the brokerages and underwriting companies associated with Lloyd's of London in London, England, at the invitation of Jeffrey Harnish of East Coast Claims Service located in North Scituate, Rhode Island. Over the course of a week, they met with over 100 brokers, claims handlers, and underwriters at more than 30 companies to discuss the status of pending claims, aspects of Maine law, the state of American litigation, and American politics as they may affect the insurance industry and litigation. Dave hopes to make this tour an annual event. □

Two Recent Law Court Decisions

By David P. Very and David A. Goldman

DAVID P. VERY

DAVID A. GOLDMAN

Extinguishment of joint tortfeasors' liability necessary prior to seeking contribution?

A recent decision by the Law Court came tantalizingly close to laying down a rule in Maine on whether a tortfeasor seeking contribution from a joint tortfeasor after settling with an injured party must ensure that the settlement releases such a joint tortfeasor from liability to the injured party.

Estate of Eleanor Dresser v. Maine Medical Center, 2008 ME 183 (December 11, 2008), arose out of a trip to the emergency room at Maine Medical Center by Eleanor Dresser following a fainting episode. Ms. Dresser was examined and released, but not warned that she should avoid driving. Two days later, Ms. Dresser fainted while driving and her car crashed into one occupied by Wayne and Brenda Edgecomb. Ms. Dresser later died from injuries suffered in that accident.

The Edgecombs brought suit against Ms. Dresser's estate and settled their claim for $265,000. The settlement and release, however, only applied to claims asserted by the Edgecombs against the Estate and did not address the potential for the Edgecombs to pursue claims against Maine Medical Center. Subsequently, Ms. Dresser's Estate sued Maine Medical Center seeking contribution for payments made in connection with the Estate's settlement with the Edgecombs.

The issue presented to the Law Court was whether the Estate could seek contribution from Maine Medical Center without having secured a release on its behalf in the settlement with the Estate? The danger in permitting contribution in such a situation is that a tortfeasor could be subjected to double liability if the injured party sues the tortfeasor directly after the tortfeasor has already paid its share of the damages in connection with a contribution claim. The Court recognized that permitting double recovery would not be in keeping with the principles behind contribution, which is a judicially created doctrine designed to ensure fairness between joint tortfeasors whose negligence caused a third party harm.

In its 4-3 decision, the Court stated that deciding whether a tortfeasor must secure a release of claims against joint tortfeasors before seeking contribution from the joint tortfeasors "could be an interesting academic exercise, but it would be an exercise of dictum unnecessary to resolution of this appeal." Rather, the Court found that the statute of limitations for bringing suit against Maine Medical Center had passed by the time the Estate brought its suit for contribution against Maine Medical Center. Given this fact, the Court stated that it would be "absurd" to require the Estate to seek a release on Maine Medical Center's behalf for a "stale claim" and held that the Estate's action for contribution against Maine Medical Center could proceed.

As noted by the three dissenting Justices, *Estate of Eleanor Dresser* creates the substantial possibility that "settlements between victims and fewer than all of the potential joint tortfeasors [in a case] will become difficult, and often impossible, due to the uncertainty that [the majority's] decision leaves in place" regarding whether a tortfeasor must secure releases for all joint tortfeasors in order to preserve the right to seek contribution.

The dissent would have taken the opportunity to hold that extinguishment of joint tortfeasor liability is a precondition for seeking contribution. The dissent noted that this result would have been in accord with the approach provided in the Restatement (Third) of Torts and that, more fundamentally, to hold otherwise would be "simply inequitable and would undermine the rationale for allowing contribution actions."

Even more provocatively, the dissent noted that the majority's holding, relying on the statute of limitations as extinguishing Maine Medical Center's potential liability to the Estate, is rooted in an exception to the "extinguishment rule." Thus, the dissent asserts that the majority essentially conceded that the extinguishment rule exists in Maine without explicitly saying so, and that this case simply fell within an exception to that general rule. In any event, in future litigation before the Law Court on the issue of the extinguishment rule, it appears that parties can safely rely on at least 3 of the 7 Justices supporting recognition of the rule in Maine.

Post-sale "duty to warn" and calculating loss of consortium claims

In *Brown v. Crown Equipment Corporation,* 2008 ME 186 (December 11, 2008), the Law Court brought a new level of clarity to the nature of a manufacturer's duty to warn of dangers in one of its products it becomes aware of after a consumer purchases the product as well as to the nature and calculation of loss of consortium claims in Maine.

On August 1, 2003, Thomas Brown, an employee at Prime Tanning, was killed while operating a forklift at Prime's warehouse. Mr. Brown's widow sued Crown, the manufacturer of the forklift, and the case was removed to the United States District Court on the basis of diversity of citizenship.

At trial, the evidence showed that Crown originally manufactured the forklift in question in 1989 and sold it to a third party in 1990. Prime later purchased the forklift from a used equipment dealer.

In 1995, Crown learned that many warehouses were using a new shelf design that exposed operators of their forklifts to the risk that shelves could enter the forklift at an unshielded level and strike the operator of the forklift.

Between 1989 when Crown manufactured the forklift and August of 1999, Crown received notices of 134 such "horizontal intrusion" accidents, including more than fifty that resulted in serious injuries or death. Despite these notices, until 1999 Crown made no attempt to warn its customers of the horizontal intrusion risk and did not inform anyone that serious injuries and deaths were occurring in connection with this risk.

In 1995, Crown developed a kit to reduce the risk of horizontal intrusions and in August of 1999 mailed its customers to notify them of its existence. The mailing, however, gave no indication on the envelope that it contained safety information and did not urge the use of protective measures or inform readers that operators had been injured and killed in a series of horizontal intrusion accidents. Parties that did not purchase their forklifts directly from Crown, such as Prime, did not receive the notice at all.

A few months after the notices were mailed, a Crown employee visited Prime to assess an OSHA-mandated modification that Prime had requested for the forklift in question. The Crown employee did not mention the notices that had been mailed, the risk of horizontal intrusion, or the kit that existed to reduce that risk.

Mr. Brown's death in 2003 was the direct result of a horizontal intrusion that occurred while he was turning his forklift while near a shelf. Brown became the eleventh operator of one of Crown's forklifts to die from a horizontal intrusion.

At the conclusion of the trial, the jury found for Brown's widow on her failure to warn claim, but rejected her defective product claim. Additionally, the jury found Brown to have been comparatively negligent. Based on these findings, the jury assessed Brown's total damages at $4.2 million, with $800,000 allocated for economic damages, $400,000 for Mr. Brown's conscious pain and suffering and $3,000,000 for Mrs. Brown's loss of consortium. The jury then reduced the total damages by $200,000 to $4,000,000 to account for Mr. Brown's own negligence. The jury was not informed that, by statute, the applicable cap at that time for recovering damages on the basis of loss of consortium was $400,000.

In determining how to apply Maine's loss of consortium damages cap in light of the jury's comparative fault finding, the trial judge calculated that the jury's $200,000 reduction in damages for comparative fault equated to 4.7619% of its total damages calculation of $4,200,000. The judge then applied that percentage reduction to each individual component of damages. In the case of loss of consortium damages, the judge applied the reduction *after* first reducing those damages to the $400,000 cap amount.

Crown appealed the judgment against them to the First Circuit Court of Appeals, which, in turn, issued two certified questions to the Maine Law Court. The first question was "Does Maine law incorporate the rule of Restatement (Third) of Torts: Products Liability § 10 that a manufacturer has a duty to warn known but indirect purchasers where its product was not defective at the time of sale but a product hazard developed thereafter?"

As to this first question, the Law Court neither adopted nor rejected the Restatement's "expansive" product liability approach, holding that the case at hand could be decided more narrowly under traditional negligence principles. Specifically, the Court cited prior Law Court precedent in which it held that manufacturers have a duty to keep abreast of developments in their field and that professionals upon whom others rely for expertise in their field have a duty to warn of "learned dangers."

The Law Court applied these precedents in ruling that Crown's appreciation of the serious nature the danger posed to operators of their forklifts, going so far as to develop a kit to mitigate that danger, together with its direct personal contact with Prime, including an evaluation of the very forklift that Mr. Brown was operating at the time of his accident, created a situation where the Court had "no difficulty concluding that Crown owed a duty to Brown as a known user of that forklift." The Court further held that "Crown breached that duty by failing to warn Brown or his employer when it had an opportunity to do so," a failure that was the proximate cause of Mr. Brown's death.

The second question certified to the Law Court was, "Under Maine law, how is a jury's dollar adjustment for comparative negligence to be applied where a portion of the original damages award is reduced pursuant to the statutory cap?"

In answering this second question, the Law Court first clarified that loss of consortium claims are not independent claims, but rather derivative of the injured spouse's underlying claims. To the extent past decisions had implied otherwise, the Court expressly overruled them.

With that established, the Court approved of the trial judge's reduction of loss of consortium damages by the percentage corresponding to the dollar amount offset the jury believed was appropriate for Mr. Brown's own negligence. The Court, however, disagreed with the way in which that reduction was applied, stating that it should have been applied against the $3,000,000 total loss of consortium damages awarded by the jury, followed by a reduction to the statutory cap of $400,000 for such damages, as opposed to first reducing the damages to the cap and then reducing it further for Brown's comparative fault. The Law Court reasoned that applying the comparative fault reduction in this manner more accurately reflected the jury's intent, while still respecting the legislature's determination that loss of consortium awards should not exceed $400,000. □

Workers' Compensation – Law Court Decisions And Board Update

By Stephen W. Moriarty

STEPHEN W. MORIARTY

Benefit Entitlement While Attending School

In *Tucker v. Associated Grocers of Maine, Inc.*, 2008 ME 167, 959 A.2d 75, the claimant sustained a compensable back injury and ultimately lost his job when his restrictions could no longer be accommodated. He enrolled in a community college on a full time basis to obtain an associate's degree, and remained unemployed for approximately one year before ultimately obtaining a part-time position with a new employer. During that period of time the claimant unsuccessfully searched for work, but limited his search to only part-time positions so that he could continue to attend courses.

The employee filed a petition for review seeking benefits for partial at a 100% rate during the one-year period that he remained out of work, as well as ongoing partial based upon his actual earnings. It was acknowledged that during the one-year period the claimant had full-time light duty work capacity, but restricted his work search efforts to part-time. The hearing officer ruled that the claimant had not removed himself from the work force by attending college, and awarded 100% partial benefits.

On appeal the employee argued that his need for retraining resulted from the occupational injury and that because he was attempting to improve his employment prospects through higher education it was appropriate for the Board to have awarded 100% benefits before he ultimately secured a part-time position. The key issue was whether "an injured employee with full-time light duty earning capacity [is entitled to] 100% partial incapacity benefits for a closed-end period…when the employee concedes that he searched for only part-time work so that he could complete a full-time course of study". The Court held that an employer is responsible only for the loss of earning capacity resulting from an occupational injury, and concluded that an employer "is not required to pay 100% partial benefits or ongoing partial benefits based on a part-time earning capacity to an employee with full-time earning capacity who elects to attend school full time and work only part time." Finding that the hearing officer had misconceived the law, the decision was vacated and remanded to the Board with instructions to re-calculate the extent of entitlement during the closed period based upon an imputed full-time earning capacity.

Personal Jurisdiction

Jurisdictional disputes arise only rarely in workers' compensation proceedings, and invariably involve unique factual circumstances. The term "subject matter jurisdiction" refers to the ability of the Board to act upon a particular claim for benefits resulting from an injury, and typically arises in the context of an injury which occurs out of state. In such cases, it has been found that the Board may exercise jurisdiction over a claim if the employee is a Maine resident. By contrast, the term "personal jurisdiction" refers to the legal ability of the Board to assert its authority over a non-resident employer for whom a claimant worked at the time of an injury. Personal jurisdiction disputes typically involve analysis of the due process provisions of both the Maine and federal constitutions.

In *Cavers v. Houston McLane Company, Inc.*, 2008 ME 164, 958 A.2d 905, the claimant was a Maine resident who was selected by the Houston Astros in the 2004 Major League Baseball amateur draft. The Astros' Director of Scouting visited the employee at his home where a minor league player contract was negotiated and signed. The contract provided that it should be interpreted under the laws of the State of New York, but did not identify any state or jurisdiction as the place for resolution of disputes. The employee began his career with an Astros' rookie league team in Tennessee and injured his shoulder throwing a ball. Surgery and rehabilitation followed, and the employee was assigned by the Astros to a new team. None of the Astros' teams ever played in Maine. The employee was released from his contract at the end of the 2006 season.

The employee filed a petition for award and a petition for payment of medical services, and the Astros asserted that the Board could not exercise personal jurisdiction over the club. The Board disagreed, and awarded the employee the protection of the Act, and also ordered the Astros to pay various medical bills. On appeal the Astros challenged the Board's exercise of personal jurisdiction.

In affirming existence of jurisdiction, the Court examined the applicable constitutional criteria by which due process is determined. First, it found that Maine had a legitimate interest in the subject matter of the claim by virtue of the employee's residence and the fact that he had received some medical treatment in Maine. Secondly, the Court examined whether the Astros had certain minimum contacts with Maine such that litigation in this state could reasonably have been anticipated. By sending its Director of Scouting to Maine to recruit the employee and to obtain a signed contract, the Court found that the Astros had sufficient contacts with

Maine to have expected possible legal or administrative claims arising from the employment contract. Finally, the Court found that traditional notions of fair play and substantial justice were not violated by subjecting the Astros to the obligations of the Maine Workers' Compensation Act. The *Cavers* decision illustrates the minimum threshold of activity within Maine that can legally trigger the exercise of personal jurisdiction over a non-resident employer.

Permanent Impairment

Within the space of a month the Law Court issued three ground-breaking opinions that addressed key issues which had long been simmering in the area of determination of the extent of permanent impairment resulting from an occupational injury. Briefly, the Court held both that the Workers' Compensation Act permits the assessment of psychological impairment and allows a hearing officer to rely upon an alternative method in assessing spinal impairment. The net effect of these decisions will make it substantially easier for injured workers to exceed the applicable permanent impairment threshold for an injury and to secure unlimited entitlement to benefits for partial incapacity.

1. Psychological Impairment.

For years the law has recognized the compensability of traumatic and gradual and psychological injuries, as well as the emotional consequences of physical injuries. However, the legal significance of psychological permanent impairment has been highly controversial and, until recently, unaddressed by Maine's highest Court. In *Harvey v H. C. Price Company,* 2008 ME 181, 957 A.2d 910, the Court directly confronted the issue of "whether the Board may give a numerical percentage rating to permanent impairment associated with the psychological component of a work injury, despite the fact that the…[4th Edition of the AMA] *Guides*…does not assign numerical impairment percentages to non-neurological psychological conditions".

Chapter 14 of the *Guides* addresses "Mental and Behavioral Disorders", and the authors intentionally chose *not* to adopt numerical assessments of impairment for psychological conditions. While the chapter describes five progressively- serious categories of impairment for the loss of activities of daily living, social functioning, concentration, and adaptation, the authors wrote that "there is no available empiric evidence to support any method for assigning a percentage of impairment of the whole person". Citing the lack of "precise measures of impairment in mental disorders" and warning of the risk that "the use of percentages implies a certainty that does not exist", the text advises against the use of percentages for mental and behavioral disorders. At the same time, the authors left the door slightly ajar and noted that examiners must make judgments based upon clinical impressions and that "in those circumstances in which it is essential to make an estimate, the ordinal or numeric scale might be of some general use". Nevertheless, according to the chapter, the decision not to use specific percentages was reached only after considerable thought and discussion.

In the *Harvey* matter, the Board had previously found that the claimant had sustained a 5% whole person PI due to the physical consequences of an injury to the leg, but the claimant sought additional impairment due to the psychological consequences. A §312 examiner assessed a 7% emotional impairment, and a unanimous Court affirmed the hearing officer's decision establishing a combined 12% impairment.

In reaching this decision, the Court cited several factors that were persuasive in the recognition of psychological impairment. First, the statutory definition of permanent impairment includes "any anatomic or functional abnormality or loss" resulting from an injury, and the Court found that the language was broad enough to include the psychological consequences of an injury. The Court then noted that the *Guides* does not actually *prohibit* the assigning of a numerical percentage. Furthermore, although Chapter 14 does not recommend percentages, the examining physician had relied upon a table in Chapter 4, which addresses injuries to the nervous system. That particular table provides ranges of impairment for emotional or behavioral loss, and the Court found no error in the use of the table on the grounds that the measurements of loss were essentially analogous to the descriptive classifications of impairment contained within Chapter 14.

Most importantly of all, the Court noted the vital role that determination of PI plays in the overall functioning of the system. Benefits for partial are unlimited if the total whole body impairment exceeds a designated threshold as established by the Board. Noting that the duration of benefits are premised upon the level of impairment, the Court held that "it is essential for an evaluator to make a numeric estimate of the degree of impairment" if an injured employee has "also suffered a loss or abnormality of psychological function" as a consequence of the injury. Accordingly, any concerns about the applicability of the specific table in Chapter 4 to emotional injuries were overridden by the importance of obtaining an overall measurement of impairment.

In a separate decision a few weeks later, the Court emphasized that psychological impairment must be calculated in accordance with the 4th Edition of the *Guides*, and not on the basis of any other source. In *Smart v. Department of Public Safety,* 2008 ME 172, 959 A.2d 756, a §312 examiner relied upon the 2nd Edition of the *Guides* in assessing impairment and the hearing officer accepted the examiner's opinion. The 2nd Edition, published in 1984, established actual percentage ranges for varying degrees of impairment. In reversing the hearing officer, the Court ruled that only 4th Edition may be used and that an opinion based upon another source could not be adopted or relied upon.

2. Spinal Impairment.

Chapter 3.3 of the *Guides* addresses impairment to the spine, and provides that the "Diagnosis-Related Estimates" (DRE) Model should be used to determine percentages. However, the chapter also states that the alternative "Range of Motion" (ROM) Model can be used if none of the DRE categories apply or if disagreement exists between examiners as to which of

the categories is appropriate. In other words, while the *Guides* expresses a strong preference for the use of the DRE Model, the ROM Model may be used as a differentiator in some circumstances.

In *Sprague v. Lucas Tree Experts,* 2008 ME 162, 957 A.2d 969, the claimant had undergone two back surgeries following an occupational injury and was left with residual symptoms, and a §312 examiner assessed PI at 12%. The examiner concluded that the DRE categories did not take the unsuccessful results of surgery into proper account and relied instead upon the ROM Model. The examiner's opinion was adopted by the presiding hearing officer.

In affirming the decision, the Court deferred to the expertise of the hearing officer and held that because the examining physician was not *required* to use the DRE method, no abuse of discretion was committed in adopting an assessment based upon the alternative model. The Court found no error in reliance upon the §312 examiner's opinion and effectively ruled that it was within the discretion of the hearing officer to determine whether conflicting evidence rose to the clear and convincing level.

The combined impact of these decisions will make it easier for injured workers to exceed the permanent impairment threshold and to avoid the statutory durational cap on benefits for partial. Eventually, following the collection of sufficient data, the threshold presumably will be adjusted to take the full impact of these decisions into account, but such action will be long in coming and in the meantime many claimants will likely secure an overall assessment above the applicable threshold.

Board Update

Based upon a recommendation from its actuarial consultant, the Board has voted to extend the benefit level for partial by an additional 52 weeks, effective January 1, 2008. The Board had last extended the durational limits to 416 weeks effective January 1, 2007, and the additional extension would push the entitlement period out to 468 weeks. Approval by the Attorney General's office is required before the extension may take legal effect, and the application is still under consideration. However, approval is essentially an administration action and it is fully expected that the extension will take effect.

The actuary has also recommended another 52 week benefit extension, which would extend entitlement to partial to the full 520-week period permitted by §213. The Board is scheduled to vote in late January to send the matter out to public comment, and further action on the recommendation will likely follow later this year.

A possible adjustment to the permanent impairment threshold is still on hold, as discussions continue on a possible compromise agreement which would "freeze" the threshold at a certain level while the Board continues to gather more accurate and reliable PI data. The threshold was to have been adjusted effective January 1, 2008.

The consensus-based rule making process regarding a fee schedule for the use of medical facilities has now come to an end, and the Board is scheduled to vote in late January on a proposal from its consultant to adopt a modified Medicare approach to establish facilities fees. Last year the Kennebec County Superior Court ordered the Board to comply with its statutory obligation to adopt a fee schedule. □

Aaron K. Baltes – New Member

We are pleased to announce that Aaron K. Baltes, who joined the litigation group in 1999, has become a member of the firm as of January 1, 2008. Aaron grew up in Saco and Old Orchard Beach. He attended the University of Maine in Orono and in 1994 received a Bachelor's Degree in Economics with High Distinction. Aaron worked and traveled for one year in the southeastern United States, and then attended law school at the University of Maine School of Law in Portland, graduating *magna cum laude* in 1998.

While at law school, Aaron served as articles editor for the Maine Law Review, and an article he authored on war crimes jurisdiction was chosen for publication in 1997. During law school, Aaron worked for two years for the Maine Unemployment Insurance Commission as a law clerk. After law school, Aaron served for one year in the Penobscot County Superior Court as a law clerk.

Since joining the firm, Aaron has focused his practice on civil litigation and criminal defense. His civil practice includes commercial litigation, real estate disputes, construction cases and personal injury matters. He has extensive jury trial experience, and several of his cases have resulted in reported decisions from the Maine Supreme Judicial Court. He is licensed to practice in the state and federal courts of Maine, as well as the First Circuit Court of Appeals and United States Supreme Court.

Aaron and his wife, Kathy, live in the Deering Center neighborhood of Portland with their three children, Ellie (8), Meg (6) and Matthew (1). Aaron currently serves on the Board of the Children's Museum and Theater of Maine, and is an active member of a business networking group, Business Network International. He is a past member of the Board of Bar Governors of the Maine State Bar Association and Chair of the Young Lawyer's Section. □

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