NORMAN, HANSON & DETROY, LLC

newsletter

Current developments in Maine law

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Summary judgment procedure under fire

BY: RUSSELL B. PIERCE

The recent Law Court case of ***Stanley v. Hancock County Commissioners,*** 2004 ME 157, 2004 Me. LEXIS 189, contains the most heated written debate among the seven Justices of the Maine Supreme Judicial Court that we have seen in a long time. What is perhaps as much of a surprise is that the debate was over a relatively mundane subject of practice and procedure involving motions for summary judgment. Fine nuances about summary judgment procedure drove the Justices into divergent opinions, including views on the more all-encompassing role of summary judgment in all civil actions. The debate is a reflection of a much larger concern in an age-old dilemma – the tension between the idea that every citizen is entitled to a "day in court" and has a right to trial by jury, and the competing idea of a nearly equal "right" that no one should have to defend a meritless case before a jury. The latter "right" is not a constitutional protection; but it is has become today as vital an interest in the civil justice system as the interest in protecting trial by jury.

In simplest description, a motion for summary judgment is a means of asking the judge to dispose of part or all of the case – either for or against a plaintiff or defendant – finally, by entering judgment without the need for a jury trial on any factual issue. The theory of a pretrial "summary judgment" by a judge is not new. In 1855, England adopted the "Bills of Exchange Act," which allowed creditors suing on a debt to apply for a form of summary judgment and avoid the delay of a trial where the debtor had no valid defense. A few states adopted similar, though seldom-used summary procedures. In modern practice, bank foreclosure actions remain a common arena for use of judgment procedure. It is noteworthy that although these laws were generally precursors to the modern summary judgment procedures that began to be used in the 1900's in the United States, summary judgment procedures by and large came after the original establishment of state and federal constitutional rights to trial by jury in civil actions.

Then, in the 1930's, state and federal courts began to adopt uniform sets of rules of procedure that applied to all civil actions. These were "transsubstantive" rules, meaning that they could apply across the board to any kind of civil action regardless of the kind of case. Summary judgment procedure became a part of those efforts, codified primarily as Rule 56. Instead of serving original purposes for particular cases like creditor actions, the summary judgment rules began to serve all kinds of cases – basically any civil case at all. Hence, along came the debate that has waxed and waned over the decades for at least the past 60 years: when does a judge have the power, by a summary judgment grant, to take away a party's "day in court" or to eliminate the constitutional right to trial by jury?

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The Law Court's majority opinion, dissenting opinion, and concurring opinion in ***Stanley*** is a reflection of many of the competing interests involved in this dilemma. As an indication of the depth of the opposing views, the dissenting opinion of Justice Alexander (joined by Justices Dana and Calkins) cites to an infamous "plagiarism" case of the 1940s against Cole

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Porter, brought by a "litigious" composer Ira Arnstein: *Arnstein v. Porter,* 154 F.2d 464 (2nd Cir. 1946). The periodic debate about Rule 56's summary judgment procedure was exemplified in this case by the opinions of Second Circuit Judges Clark and Frank, who took opposing views. Judge Frank, while conveying some skepticism about Arnstein's chances of winning the case against Cole Porter, nonetheless ruled in favor of trial and against summary judgment, saying that "the plaintiff must not be deprived of the invaluable privilege of cross-examining the defendant – the 'crucial test of credibility' – in the presence of the jury." Id. at 469-70. Justice Alexander picked up on this point, raising the concern that summary judgment practice in Maine may be coming too close, in his view, to impermissibly crossing this line.

The ***Stanley*** case itself raised only relatively picayune issues about summary judgment practice. Ronald Stanley sued the Hancock County Commissioners in a "whistleblowers" action, asserting that he should not have been fired from his job as a maintenance worker for complaining to the County about unlawful activities of other workers. In order to defeat the summary judgment motion, Stanley needed to come forward with evidence that controverted the County's facts that he was fired for other reasons, such as poor performance or breaking workplace rules. Instead of doing so completely, he admitted that although many defense witnesses testified about poor performance issues, these were all "self-serving" statements subject to credibility attack on cross-examination at trial. He supported his denial of the facts on the summary judgment motion, in part, with a citation to case precedent – a United States Supreme Court age discrimination case, which Stanley then argued stood for this principle.

Stanley lost. So much of what heightened the tone of the opinions of the Law Court Justices – and resulted in separate majority, concurring, and dissenting opinions – had to do with fine details in how the evidence should be organized and presented to the judge before trial on the summary judgment motion itself. In general, and in theory under the rules, the moving party presents to the court in numbered paragraphs (much like detailed complaint allegations) all of the "facts" that – as a practical matter – the moving party wants the judge to know about on the summary judgment motions. The responding party then either admits those facts, or denies or qualifies them. Each party's set of facts must reference deposition testimony, an affidavit under oath, or some other discovery answer or admissible document that supports each statement of fact. The responding party can also add more facts, to which the first party files similar reply.

The concurring opinion in ***Stanley*** of Chief Justice Saufley (joined by Justice Clifford) called these rules "straightforward." While simple in theory, in practice the procedure raises many unanswered questions that may require further revisions to the procedures or clarification of methods by which the judges decide the motions. There remain questions, for example, about the proper procedural context to challenge an opposing party's evidence on admissibility grounds at the summary judgment stage. In particular, the ***Stanley*** case raises the question whether argument about the relevance of evidence can, or should, be included in the "statement of facts" portions of the summary judgment motion, as opposed to the legal brief or memorandum of law. There are still questions about how a party should be expected to "negate" facts presented on summary judgment – such as Stanley's obligation to "negate" the testimony of opposing witnesses who, he thought, were not testifying credibly.

The summary judgment record is not – and cannot be – a complete written recitation of all of the evidence as it would play out at a live trial. But the pitfalls in the rules lead parties – as in the ***Stanley*** case – to attempt that kind of presentation. These unanswered questions about nuances in the procedure raise another question about whether all summary judgment motions should be decided, as currently in federal court, without any oral arguments in person from counsel, before the judge acts on the motion.

One critical aspect of summary judgment procedure has certainly changed. Not only are the trial judges no longer obligated to search parts of the record that are not referenced in the party's presentation of evidence (the "statement of facts" sections of the motion), most trial judges – if not all – take the view that they are *prohibited* from considering any record evidence that is not specifically cited in the statement of facts. There are other inconsistencies in practice: one judge has commented that the proper way to challenge evidence on admissibility grounds is to file a separate "motion to strike;" another state court judge has declined to rule on separately filed "motions to strike" evidence, and instead incorporated by use of footnotes in the written opinion each ruling on critical evidentiary considerations.

There is no question that summary judgment procedure has developed into a significant and complex proceeding in its own right, more often employed today in diverse cases. Judges by and large no longer view summary judgment motions as rare or unusual, sparingly deployed or uncommonly granted. One

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

Stephen W. Moriarty, Editor
J. Julie Welch, Managing Editor

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

preeminent civil practice scholar, Arthur Miller – in an article referenced in the dissenting opinion in ***Stanley*** – observes that a summary judgment motion was once a "toothless tiger" that has now evolved into a "powerful tool for judges." Miller is critical of that evolution, or at least of the reasons often given to support it. The pendulum may begin to swing back, to scale down the procedure's complexities, or to resolve some of the issues that so divided the Law Court Justices about how motions for summary judgment work and the standards for deciding them.

The modern use of summary judgment in litigation now empowers the interest of a party in justifiably *avoiding* trial by jury, squaring off against the opposing constitutional right to present civil actions seeking damages to a jury. The right to trial by jury is a constitutional one. The right to avoid a trial is a counterbalance that has grown over the past 60 years, and is now equally rooted in the civil justice system. Although not every case is appropriate for summary judgment, in any case where a motion is filed its prospects of success are still much better today than ever. ☐

Mark G. Lavoie - fellow of the American College of Trial Lawyers

Congratulations to Mark Lavoie who was inducted into the prestigious American College of Trial Lawyers in October, 2004.

Founded in 1950, the American College of Trial Lawyers is widely considered to be the premier legal professional organization in America. It is composed of the best of the trial bar from the United States and Canada. Fellowship in the college is by invitation, extended only after careful investigation to experienced trial lawyers who have demonstrated exceptional skill as advocates and whose professional careers have been marked by the highest standards of ethical conduct, professionalism and civility. Geography is immaterial.

Mark is one of only twenty attorneys in the state of Maine who are fellows. Peter DeTroy became a fellow in October, 1990. Membership is limited to those lawyers actively engaged in trial work as their principal activity. Fellowship in the College cannot exceed one percent of the lawyer population in any state or province. ☐

MARK G. LAVOIE

ROBERT F. HANSON

In Memorium

Robert F. Hanson

1944 - 2004

Since the passing of our founding and managing partner, Bob Hanson, we have received many kind messages of condolence and support. We, the members of Bob's professional family, are deeply grateful for your thoughtfulness at this time of painful loss. ☐

Three recent decisions from the Law Court

BY: DAVID P. VERY

"Abuse or molestation" exclusion in CGL policy

Martin Finley and his wife owned the Chalet Motel in Lewiston. Mr. Finley paid Sarah G., age 13, and her sister, Bianca, age 12, to dance and pose nude for photographs at the motel. At times, he gave the girls alcohol and allowed them to spend the night at the motel with false name and age registrations. These events lead to Finley's conviction for sexual exploitation of a minor.

Sarah and Bianca brought an action against the motel and the motel owners for negligence, negligent infliction of emotional distress and other claims. Maine Bonding, who had issued a commercial general liability policy to the motel, declined to provide a defense. The parties entered into a stipulated judgment for $2 million and the defendants assigned to Sarah and Bianca their claims against Maine Bonding for failure to defend and indemnify them in the suit. Maine Bonding filed a motion for summary judgment on Sarah and Bianca's reach and apply action on the grounds that coverage was excluded under the policy's "abuse or molestation" exclusion. After originally denying the motion, the Superior Court reconsidered and issued a judgment for Maine Bonding holding that the exclusionary clause applied.

The clause in question specifically excluded coverage for the "actual or threatened abuse or molestation by anyone of any person while in the care, custody or control of any insured or the negligent employment, investigation, supervision, failing to report, or retention of a person for whom any insured is or ever was responsible and whose conduct would be excluded by the above conduct." The Law Court had never interpreted this particular exclusion. The term "abuse" was not defined in the policy, nor did the policy limit abuse to sexual or physical activity or to conduct involving minors.

Sarah and Bianca argued on appeal in ***Sarah G. v. Maine Bonding & Casualty Company,*** 2005 ME 13, 2005 Me. LEXIS 12, (January 20, 2005) that the term "abuse" is hopelessly broad and ambiguous. The Law Court disagreed stating that the term "abuse or molestation" includes sexual exploitation of minor children. The Court went on to state that the fact that a word may have several definitions does not necessarily render it ambiguous. Regardless of what other conduct falls within the scope of the "abuse or molestation" exclusion, the Court found that it includes the conduct at issue in this case. Therefore, the Law Court affirmed the conclusion that the exclusion barred the negligence claims against the motel and Finley's wife. As a result, Sarah and Bianca could not recover the judgment from the insurer in the reach and apply action. Because the abuse and molestation exclusion independently barred all claims, the Law Court did not address whether the "expected or intended injury" exclusion would also bar Sarah and Bianca's claims.

Emergency doctrine and evidence of delay in commencing suit

Gregory Coyne and Greg Peace were friends. On March 16, 1997, they went snowmobiling together with Peace following Coyne. Coyne suddenly hit a bump and was thrown from his snowmobile landing in the trail in front of Peace. Peace attempted to avoid hitting Coyne and was flown from his own snowmobile in the process. Peace did not believe his snowmobile hit Coyne. Coyne indicated that he had no memory of what caused his injuries. On March 13, 2003, three days before the six year statute of limitations was to expire, Coyne filed a

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Complaint against Peace alleging that Peace was negligent in his operation of the snowmobile. Following a jury verdict finding that Peace was not liable for injuries to Coyne, Coyne appealed.

On appeal, in ***Coyne v. Peace,*** 2004 ME 150, 2004 Me. LEXIS 178, (December 14, 2004), Coyne first argued that the Court erred in instructing the jury as to the emergency doctrine. The emergency doctrine provides that a person confronted by an emergency that the person did not cause is not to be held to the same degree of care as an ordinary person with time to consider that person's actions. The test for reasonableness of the actions of a person confronted by an emergency is how a reasonably prudent person would have acted when confronted by the same or similar circumstances.

Coyne argued that a general negligence instruction was sufficient considering that the general negligent instruction directed the jury to evaluate the standard of ordinary care under the circumstances considering all of the evidence in the case. Coyne also asserted that the emergency instruction was a vestige from doctrines developed in the contributory negligence era that had no place under the law of comparative fault. Finally, Coyne argued that giving the

emergency instruction had the effect of improperly commenting on the facts and highlighting Peace's theory of the case.

The Law Court disagreed and reiterated the validity of the emergency doctrine for jury instructions. The Court stated that a sudden unexpected accident threw the Plaintiff, Coyne, into the traveled way in front of Peace, requiring him to react quickly to the unanticipated accident in front of him. The Court found that in such circumstances, the instruction was proper. The Court found that the instruction does not impermissibly comment on the evidence.

Coyne further argued that it was improper for the Defendant to provide evidence and argument that the Plaintiff had waited until three days before the expiration of the six year limitations before filing suit. The Law Court stated that evidence and argument about a long gap between an event occurring and the filing of suit is relevant in evaluating witnesses' ability to recall events and the incentive or lack of incentive one may have to preserve evidence and conduct investigations when events were more recent and memories were clearer. Thus, the Court held that evidence of the long delay in bringing the suit and comment on that delay is indeed proper. The Court further held that Peace's comment that he was surprised by the filing of the suit, while not relevant, is not prejudicial as to justify vacating the judgment.

The Law Court thus affirmed judgment in favor of the defendant.

Law Court extends *Jack v. Tracy* to all UM policies

In ***Jack v. Tracy,*** 1999 ME 13, 722 A.2d 869, the Law Court, interpreting an Allstate UM policy, held that the father of an adult child who did not reside with him was entitled to coverage where the child was killed in an automobile accident involving an uninsured motorist. The Allstate policy stated that the insurer would pay damages for injury "which an insured person is legally entitled to recover from the owner or operator of an uninsured auto." Because the father was legally entitled to recover for his child's death pursuant to the Wrongful Death Act, the Law Court held that he was covered under the Allstate UM policy. Unlike Allstate's policy, many other policies, to include ISO policies, state that UM coverage is available because of "bodily injury sustained by an insured." Since the deceased was not an insured, it was believed by many that the ***Jack*** decision was limited to policies that contained a similar policy provision to the Allstate provision.

A split Law Court rejected that thinking and extended the holding in ***Jack*** to all policies in ***Butterfield v. Norfolk & Dedham Mutual Fire Ins. Co.,*** 2004 ME 124, 860 A.2d 861, (September 30, 2004). The majority of the Law Court specifically held that an insurer may not use limiting language in a UM policy restricting its coverage to claims brought by insureds for injuries sustained by insureds.

In ***Butterfield,*** as in the ***Jack*** case, plaintiff's adult daughter, who did not reside with him, died in an automobile accident caused by an uninsured driver. There was no question that plaintiff's daughter was not an insured under the policy. However, the plaintiff asserted that since he was legally entitled to bring a claim for damages caused by an uninsured motorist, he was entitled to coverage despite the policy language limiting recovery to situations where bodily injury was sustained by an insured. The Superior Court agreed with the plaintiff and the carrier appealed.

On appeal, the Law Court stated that Maine's UM statute requires coverage for "the protection of persons insured there under who are legally entitled to recover damages from uninsured, underinsured or hit and run motor vehicles, for bodily injury." The Law Court held that Norfolk's policy deviated from the statute by limiting UM coverage to damages an insured is legally entitled to recover because of bodily injury sustained by an insured. Although this limiting language is contained in numerous policies, to include ISO policies long before ***Jack***, the Law Court mused that in response to ***Jack*** insurers began adding limiting language to their insurance contracts.

The Court stated that the case turned not on the interpretation of the contract, but on the meaning of the words in the statute. The UM statute, the Court found, requires insurers to provide coverage as was provided in ***Jack***. Since the Plaintiff was "legally entitled" to recover from an uninsured motorist, coverage must extend to insured's persons who are legally entitled to bring a wrongful death claim as a result of the death of a person killed by an uninsured motorist. The Court stated that the legislature set this standard for minimum coverage and insurers must meet that standard. As the Norfolk policy did not meet the requirements of the UM statute, the majority held that its limiting language was unenforceable.

The dissenting justices, Justices Clifford and Alexander, noted that without the policy provision at issue in the case, Norfolk could not accurately address the risk to which it is exposed in the UM part of its policy and on which it could base a reasonable premium. The dissenters found that the provision was reasonable, comported with the UM statute, and was not contrary to prior case law.

The dissenters stated that UM coverage for injuries to unknown third parties creates an increased risk to insurers. The legislature, the dissenters noted, did not intend the UM statute to prevent insurers from assessing risks and limiting UM coverage to damages arising from injury to insureds. The dissent concluded by stating that the decision of the majority, when taken to its logical conclusion, means that an insurer offering UM protection, is prevented from restricting in any way the scope of coverage.

Although that dire result is unlikely, it is clear that this decision will be utilized by insureds in an attempt to override restrictive language in situations where the insured is "legally entitled to recover damages from an uninsured driver." □

Milestone: Over twenty years at NH&D

In January 2005, the firm welcomed its most recent and its fifth loyal employee to reach her 20th anniversary of employment with the firm. The diligent **Deanna Pike** began working in NH&D's litigation department with Mark Lavoie in 1985. After twelve years in that group, Deana moved to a new area, the worker's compensation group, where she presently works with Steve Moriarty.

Debbie Becker began working in 1981with Rod Rovzar in the commercial group. After fifteen years and a brief move, we gratefully welcomed her return to NH&D where she worked with David Norman in the area of medical malpractice. After David's retirement, Debbie returned to the commercial group but then became the firm's morning receptionist in late summer 2004. Debbie's diverse schedule includes assisting worker's compensation associate C. Lindsey Morrill in the afternoon.

left to right seated: Sue Pollard, Maggie DeGrishe. left to right standing: Deanna Pike, Patte O'Donnell, and Debbie Becker.

June 2004 marked the 20th anniversary of employment at NH&D for **Sue Pollard**. The inimitable Ms. Pollard has ably assisted Ted Kirchner for over nineteen years in his litigation practice. Of course, Sue assists all of us, too, by her willingness to solve all those frequent questions we have that only Sue seems to be able to answer.

The worker's compensation group has had the privilege of working with paralegal **Maggie DeGrishe** for twenty-two years. She's observed the many changes in worker's comp law in the State of Maine and for the past four years she has been and continues to be a valuable asset to associate, Doris V.R. Champagne. Maggie began working at NH&D in 1983 with Steve Hessert.

Patte O'Donnell began working at NH&D as Bob Hanson's secretary in 1981. In those early days, the firm had less than ten attorneys. After working in the litigation group, Patte changed job titles and became a vital member of the accounting department where she continues to work today. Patte is not far from celebrating her 25th anniversary with the firm.

We extend a special thanks to these women for their loyalty, achievement, and exemplary work ethic. The firm would be a very different place without their constant and reassuring presence and competence. □

Briefs/Kudos

Martindale-Hubbell informed us that after an extensive and confidential peer review by members of the Maine Bar, **JONATHAN W. BROGAN** has been awarded an AV rating by this distinguished legal directory. This rating "identifies a lawyer with very high to preeminent legal ability and is a reflection of an attorney's experience, integrity and overall professional excellence." Jonathan recently presented a seminar to The Maine Claims Conference on "State and Federal Privacy Acts and Insurers' Responsibilities." And away from the law and on to the links, Jonathan has been elected to Cape Elizabeth's Purpoodock Club's Board of Governors. Also, Jonathan won his eighth club championship which is the record number of wins in the now 82 year history of the Club.

The Maine Bar Foundation recognized **NORMAN, HANSON & DETROY** at its January 2005 meeting as one of the Maine firms who provided exemplary pro bono services to low-income Mainers in 2004 through the Maine Volunteer Lawyers Project, "VLP." Norman, Hanson & DeTroy was the firm that had the most hours on completed VLP cases by a law firm. Special recognition was given to **CHRIS TAINTOR** for donating more than 100 hours of pro bono representation. □

Workers' compensation- Law Court, Board, and legislative updates

BY: STEPHEN W. MORIARTY

Aggravation of Preexisting Condition

One of the key innovations of the Workers' Compensation Act of 1992 was the introduction of 201(4), which sets forth the eligibility for benefits in cases in which a preexisting condition is aggravated by an occupational injury. As the statute provides:

> If a work-related injury aggravates, accelerates or combines with a preexisting physical condition, any resulting disability is compensable only if contributed to by the employment in a significant manner.

Prior to the adoption of this statute, it was generally understood that disability resulting from the combination of a prior condition and an occupational injury was fully compensable as long as the effects of the occupational injury continued to contribute to any extent, however minimal, to the disability. See, e.g., *Smith v. Dexter Oil Company,* 408 A.2d 1014 (Me. 1979), *Bernier v. Coca-Cola Bottling Plants, Inc.,* 250 A.2d 820 (Me. 1969).

In a recent decision, the Law Court had an opportunity to discuss the duration of entitlement to benefits where a preexisting condition has been exacerbated in a significant manner. In ***Sanders v. Seaside Nursing Home,*** 2004 ME 135, 861 A.2d 1283, the employee had been diagnosed with a severe latex allergy prior to accepting a position with the employer. Several months later, she was exposed to latex and experienced a worsening of the underlying condition which lasted for only a couple of days. The presiding Hearing Officer explicitly found that at the end of this period the employee had returned to her baseline condition. However, because the employer was unable to return the employee to work safely and without threat of future exposure, ongoing benefits were awarded.

The Court granted the employer's Petition for Review and vacated the decision of the Board. Although the Court digressed in its opinion into an analysis of the requirements for a compensable gradual injury, the Court ultimately held that "it was error for the hearing officer to order the payment of benefits beyond the point that her condition returned to baseline." The Court held that the entitlement to benefits lasted only for that period of time in which the underlying condition had been changed or altered by the effects of the employment exposure. Once there was no continuing physical disability attributable to an occupational injury, the employee was no longer entitled to receive benefits.

Accordingly, whenever a preexisting condition is only temporarily aggravated in a significant manner by an occupational injury, compensation is payable only for the duration of the period of aggravation.

Board update

A number of personnel changes took effect on January 1, 2005. Former Assistant General Counsel Timothy Collier became a Hearing Officer assigned to the Portland Regional Office. Jan McNitt, previously a Worker Advocate in Portland, succeeded Mr. Collier as Assistant General Counsel. Finally, Richard Dunn assumed the position of Clerk of the Workers' Compensation Board, taking the place of the long-serving John Jolicoeur, who passed away last year. Previously, Mr. Dunn had served both as a Mediator and a Hearing Officer.

STEPHEN W. MORIARTY

Last year the Legislature reduced the size of the Board from eight to six members, equally divided between representatives of management and labor. In accordance with that structural change, management and labor as of early February had both submitted lists of the names of twelve prospective nominees to the Board, from which Governor Baldacci will select three management and three labor representatives. Incumbent members, with the exception of labor representative Anthony Monfiletto, are eligible for reappointment. It is anticipated that current Executive Director Paul Dionne will receive a gubernatorial appointment to continue in that capacity. The statutory revision provides that the Executive Director may serve for an unlimited period of time at the pleasure of the Governor.

The Board has hired an actuary to provide analysis and recommendations concerning the adoption of a PI threshold and a possible 52-week benefit extension for 2004, together with a possible benefit extension for 2005. It is anticipated that the report of the actuary will be completed by early March, and that the Board will then consider the recommendations.

Legislative update

With the opening of the current session of the Legislature, inevitably a number of amendments to the Workers' Compensation Act have been introduced with more likely to follow. At least two measures have been submitted by the Board itself, the first of which would amend §312. As it currently stands, the findings of a §312 examiner appointed by the Board must be adopted unless there is clear and convincing evidence to the contrary. However, if the parties agree to the appointment of a particular examiner, the medical findings are absolutely binding upon the Hearing Officer without regard to contradictory evidence. As a result, only in rare instances have the parties agreed to the appointment of an examiner. L.D. 302 would amend §312(7) to delete the provision requiring the Board to adopt the findings of a mutually agreed-upon examiner. The purpose is to encourage the parties to select an appropriate examiner without committing in advance to be bound by the result.

Pursuant to §320, the Hearing Officer may request the full Board to review a decree if the decision involves an issue of significance to the operation of the system. Such a request may only be made by a Hearing Officer, and must be made within five days of the issuance of a decree. However, the filing of a motion for findings of fact can complicate the statutory timetable. As a result, the Board has endorsed a proposal submitted as L.D. 322, which would expand the timeframe for a Hearing Officer to request review to twenty five days in order to allow for the filing of motions for findings. If a motion for findings is filed, a Hearing Officer would then have five days in which to request Board review after findings had been issued. This amendment would eliminate possible jurisdictional disputes and would allow a Hearing Officer to make findings upon request before the deadline for Board review expires.

A measure has also been introduced to exempt employers of six or fewer employees from compliance with the Act if an employer obtains liability insurance coverage with minimum limits and if healthcare coverage through Dirigo Health Insurance is provided. The Board has unanimously opposed this bill.

A number of additional bills have been introduced but which were still undergoing drafting revisions as of early February. These include:

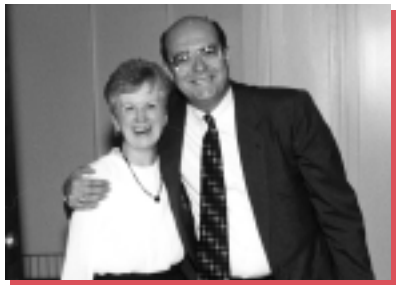
- A bill to require the application of the 5th Edition of the AMA Guides to the evaluation of permanent impairment with respect to PI to the spine;
- A bill to allow for reduction of compensation benefits for post-injury wages paid by a new employer. If enacted, this measure would modify or overturn the decision of the Law Court in ***Grant v. CMP***, 2003 ME 96, 828 A.2d 800;
- A bill to require subcontractors to carry workers' compensation insurance;
- A bill to include certain hospital charges within the Board's medical fee schedule;
- A bill to establish a commission to comprehensively regulate medical expenses payable under the Act.

We will follow legislative developments as the session progresses and will keep you informed of all major legislative revisions. ☐

Pending Legislative Document

LD 302, An Act to Encourage Parties to Agree to the Selection of Independent Medical Examiners on Workers' Compensation Cases is reported by Senator Strimling, D-Cumberland, on behalf of the Maine Workers' Compensation Board. *Joint Standing Committee on Labor.* Whether or not two parties have agreed to the selection of an independent medical examiner, the IME's findings must be adopted unless there is clear and convincing evidence to the contrary in the record that does not support the medical findings.

We remember Bob



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

Return service requested

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