INBRIEF

Current Developments in Maine Law

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Medical Information Privacy in the Workplace

By: Katlyn M. Davidson, Esq.

KATLYN M. DAVIDSON

Whether and to what extent insurers and employers can share medical information regarding an employee's workers' compensation claim is a question which the Maine Workers' Compensation Act provides little guidance. Sharing such medical information can be important both for insurers to keep their insureds informed of the status of a claim and for employers to be aware of an employee's restrictions to help facilitate a successful return to work. However, there are other employment related laws that prohibit or significantly restrict the sharing of medical information in the workplace that insurers and employers should keep in mind when it comes to managing workers' compensation claims.

The starting place for any discussion regarding medical information privacy is the Health Insurance Portability and Accountability Act of 1996, commonly referred to as "HIPAA." Enacted in 1996, the primary purpose of HIPAA is to protect the privacy and security of individuals' protected health information by imposing various restrictions on when and how

such health information can be disclosed. Protected health information is generally information in any format (oral, written, or electronic) that relates to a medical condition, treatment or payment for health care. HIPAA applies to covered entities, which are generally identified as health care providers, health plans and healthcare clearing houses. HIPAA also applies to business associates of a covered entity. An entity is considered a "business associate" if a covered entity discloses protected health information to that entity so that the entity can perform or assist in certain services on behalf of the covered entity. Examples of such services include but are not limited to, claims processing and administration, billing or benefit management, data analysis, data storage, etc.

Generally HIPAA does not apply to an employer unless the employer is considered to be a covered entity or a business associate. Employers, however, are still likely impacted by the requirements of HIPAA in so far as they need to obtain necessary medical information about an employee from a covered entity.

With respect to workers' compensation, HIPAA specifically excludes workers' compensation from the usual requirements of HIPAA. The corresponding federal regulations provide that covered entities may use or disclose protected health information in cases where the law requires such disclosures and the use or disclosure complies with and is limited to the relevant requirements of such law. 45 C.F.R. § 164.512(a)(1). The federal regulation goes on to specifically identify workers' compensation matters as an exclusion from HIPAA. Subsection 164.512(l) provides: "A covered entity may disclose protected health information as authorized by and to the extent necessary to comply with laws relating to workers' compensation or other similar programs, established by law, that provide benefits for work-related injuries or illness without regard to fault."

The Maine Workers' Compensation Act also provides that an authorization from an employee is not required for an employer to obtain medical information from health care providers "if the information pertains to treatment of an injury or disease that is claimed to be compensable under this Act." 39-A M.R.S.A. § 208(1). The Act also creates an affirmative obligation on health care providers to produce medical information on certain prescribed Board forms to an employer. For example, section 208(2)(A) provides that, for lost time claims, a healthcare provider must forward to the employer, within 5 business days of treatment, a diagnostic medical report that includes information about an employee's work capacity, likely duration of incapacity, return to work suitability and treatment required. Section 208(2)(B) further provides that a health care provider shall forward every 30 days a diagnostic medical report if ongoing treatment is provided. An employer also "may request, at any time, medical information concerning the condition of the employee for which compensation is sought. The health care provider shall respond within 10 business days from receipt of the request."

It would seem, therefore, that between the HIPAA exclusion for workers' compensation matters and the relevant provisions in the Maine Workers' Compensation Act an employer and insurer need not worry about any duties or obligations with respect to the medical information that is obtained through a workers' compensation claim. However, there are other significant employment laws to be aware of which restrict what an employer can do with this medical information.

The Americans with Disabilities Act ("ADA"), which generally prohibits discrimination against a qualified individual with a disability because of the disability and also creates a duty for employers to provide reasonable accommodations, limits when an employer can inquire about a disability and who can be aware of medical information obtained from any such inquiry. With respect to its employees, the ADA provides that an employer may make disability related inquiries or request a medical exam only if the inquiry or request for a medical exam is "job-related and consistent with business necessity." 42 U.S.C. § 12112(d)(4)A). This requirement is considered by the EEOC to apply to all employees and not just employees with disabilities. An inquiry or exam is considered to be job related and consistent with business necessary when an employer has a reasonable belief, based on objective evidence, that: (1) an employee's ability to perform essential job functions will be impaired by a medical condition; or, (2) an employee will pose a direct threat due to a medical condition. A direct threat is defined as a "significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation." 29 C.F.R. § 1630.2(r).

When an employer has acquired medical information through a permitted disability related inquiry or medical exam, the ADA also imposes limits on an employer's ability to share such medical information. The employer must be sure to keep such information confidential on separate forms and in a separate file from an employee's general personnel file. 29 C.F.R. § 1630.14(c). Further, an employer is restricted as to who can be aware of such medical information. Supervisors and managers can know about an employee's necessary restrictions and necessary accommodations only. First aid and safety personnel may be informed when appropriate about a disability if the disability might require emergency treatment. See 42 U.S.C. §§ 12112(d)(3)(B)(i) and (ii).

In 2011, the U.S. District Court of Maine took on the issue of an alleged violation of medical privacy under the ADA. In

> " THE STARTING PLACE FOR ANY DISCUSSION REGARDING MEDICAL INFORMATION PRIVACY IS THE HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT OF 1996, COMMONLY REFERRED TO AS "HIPAA." ENACTED IN 1996, THE PRIMARY PURPOSE OF HIPAA IS TO PROTECT THE PRIVACY AND SECURITY OF INDIVIDUALS' PROTECTED HEALTH INFORMATION BY IMPOSING VARIOUS RESTRICTIONS ON WHEN AND HOW SUCH HEALTH INFORMATION CAN BE DISCLOSED."

Blanco v. Bath Iron Works, 802 F. Supp. 2d 214 (D. Me., 2011), the employee had failed to disclose a medical condition (ADHD) on his pre-employment medical questionnaire when he became employed. This did not come to light until later on after the employee had been working for the employer and had a job transfer. In the new position, the employee felt that the job aggravated his ADHD and he was struggling with job performance. The employee requested an accommodation and was sent to meet with the employer's in-house doctor. During this meeting, the doctor reviewed the employee's pre-employment medical questionnaire and discovered that the employee had not disclosed his ADHD condition at that time. The doctor disclosed this omission to the employer's Labor Relations Department and the employee was subsequently terminated. The employee challenged this disclosure, arguing that it violated the confidentiality provisions of the ADA. The presiding judge agreed, determining that the exceptions for sharing confidential medical information did not apply to this situation. Instead, the judge found that the purpose of the disclosure was to reveal the alleged lie by the employee and not to advise of necessary restrictions or accommodations.

Questions have been raised about how the ADA interacts with workers' compensation laws. The EEOC published enforcement guidance on this issue in 1996. Although this guidance is not considered to be law or binding legal precedent, the EEOC expressed its opinion that the ADA does not prohibit an employer or its agent from asking disability related questions or requesting medical exams. The EEOC provided that any such inquiries or exams must be consistent with state law and limited in scope to the occupational injury. Further, the EEOC cautioned that an employer should avoid excessive or "far-ranging" questions and medical exams.

The Maine Human Rights Act is another major body of law for insurers and employers to be aware of with regards to obtaining and retaining medical information about employees. The Maine Human Rights Act provides that it is unlawful for an employer, prior to employment, to elicit or attempt to elicit information directly or indirectly pertaining to physical or mental disability (among other protected classes). The Act further provides that it is unlawful discrimination for an employer to make or keep a record of physical or mental disability except when an employer requires a physical or mental exam prior to employment. In that case, a privileged record of the exam is allowed if made and kept in compliance with the Act. *See* 5 M.R.S.A. §§ 4572(1)(D)(1) and (2). The Maine Human Rights Act also requires employers to keep records regarding physical or mental disability confidential and maintained on separate forms and in separate files. 5 M.R.S.A. § 4573(2).

Similar to the ADA, the Maine Human Rights Act's corresponding rules prohibit an employer from requiring a medical exam or from making inquiries about an individual's physical or mental disability or about the nature or severity of any disability. Chapter three of the Rules do provide some exceptions, however, which permit an employer to request a medical exam or make an inquiry of an employee if it is job-related and consistent with business necessity. Again, any information obtained from a permissible exam or inquiry must be kept confidential and maintained separately. The Rules also limit who within the employer can receive this medical information. Supervisors and managers may be informed about necessary restrictions on the work or duties of the employee and necessary accommodations. First aid and safety personnel may also be informed if the employee's disability might require emergency treatment.

Another major employment law to consider is the Family and Medical Leave Act ("FMLA"), which provides eligible employees with the right to unpaid, protected leave for specified family and medical reasons. When the leave is due to an employee's own health condition, an employer is quite restricted in the medical information that it can obtain. First, there is no exclusion under HIPAA for medical information obtained through administration of the FMLA. Generally, an employee provides certification of the medical condition on prescribed forms that are quite vague about the nature of the employee's condition. An employer can only follow up for further information when clarification or authentication of a certification is needed and after an employee has been provided with an opportunity to cure a defect in the certification. Even then, the federal regulations provide that clarification or authentication can only be requested by a healthcare provider, human resources professional, leave administrator or management official. See 29 C.F.R. § 825.307(a). The same regulation provides that "under no circumstances" may a supervisor contact the employee's healthcare provider.

The FMLA does, however, contemplate an employee taking leave under the FMLA for a workers' compensation injury. In that case, the federal regulations provide that if FMLA leave runs concurrent with a workers' compensation absence and the provisions of the workers' compensation statute permit an employer to request additional medical information from the employee's workers' compensation health provider, then the FMLA does not prevent an employer from following the workers' compensation provisions. 29 C.F.R. § 825.306(c). Similar to the ADA and the MHRA, the FMLA also imposes confidentiality and record keeping requirements for medical information.

Finally, the Genetic Information and Nondiscrimination Act of 2008, 42 U.S.C. § 2000ff et seq., prohibits employers from using genetic information to make employment decisions. The Act also prohibits employers from intentionally acquiring genetic information and any genetic information that the Employer does possess must be kept confidential. Further, the scope of what is considered to be genetic information is quite broad and includes genetic tests of the individual and family members and family medical history.

In sum, while both HIPAA and the Maine Workers' Compensation Act do not really restrict an employer or insurer's ability to obtain medical information when it relates to a workers' compensation claim, employers and insurers should still remain cognizant of other area of law that do restrict an employer's ability to obtain and share medical information. While it is certainly desirable to keep the insured informed of the latest medical information regarding a workers' compensation claimant, it is important to always consider who is on the receiving end of that email correspondence or who is participating in the conference call or team meeting in order to ensure that confidential medical information is not being shared with those who are restricted from access to such information.

Reptile II: It Depends

JONATHAN W. BROGAN

By: Jonathan W. Brogan, Esq.

As those of you who read my earlier article regarding reptile theory and its pervasive use by the plaintiff's bar understand that this theory, though not scientifically valid, is dangerous to defendants in cases involving safety and reasonable care. Cases that involve medical malpractice, trucking and/or auto accidents, and products liability matters can be open to "reptiling" and its powerful psychological message.

As has become clear as more and more plaintiff attorneys employ reptile theory, it is most effective in discovery in destroying legitimate liability defenses to complicated issues of liability and safety. Reptile theory is a psychologically specific tactic employed to get a witness to admit to general safety theories and then tie that witness down to more and more precise safety theories until they are so flummoxed that they admit that the specific result in your case was the result of a failure to follow eminently reasonable safety rules and that the claimed damages could have been easily prevented by simply following a more prudent and safe course.

Reptile theory consists of the plaintiff's counsel presenting the defendant witness a series of general safety questions to which almost any person would agree. For instance, "any person who is driving a motor vehicle beyond the posted speed limit puts other drivers on the road in danger?" Or, "it would be wrong to needlessly endanger someone, correct?" "Everyone must try to avoid increasing dangers for others, right?" From these general questions, a witness is then tricked into placing themselves, and maybe the company they represent, into absolute inflexible stances that admit the actual circumstances of the case and negate the witness' judgment.

The plaintiff's attorney goes from "safety is your top priority, right?" to "if you see (a), (b) and (c), the safest thing to do would be (x), correct?" And "if you didn't do (x) then someone will be in danger, right?" As many have seen, these reptile questions can present unsuspecting defendants, or safety managers, with insoluble psychological decisions.

Most people want to be agreeable, even in testifying at deposition. They want the opposite side to like them and to, hopefully, ask them less difficult questions as a result of liking them. So, when presented with general safety questions like "you have a duty to put safety first?" or "safety is your first priority, right?" they want to agree because what reasonable person wouldn't agree. But, a simple way of dealing with these broad general questions is to understand where they are leading. The plaintiff's attorney is trying to lead the witness to more specific safety questions about the unique circumstances in the ongoing case. Once the broad base is established, then the safety principle is drilled down to the actual claim being made. It is ingenious, and insidious.

There are a variety of fascinating and intricate psychological factors at work in reptile theory. Numerous psychologists have studied reptile theory and its use of psychology to get agreement to things that witnesses know not to be as simple as they are being presented. They key in managing the reptile inquiry is to respond to it at each level of questioning. When the general safety questions start, the answers must also be general, not specific. A witness must be prepared that he does not have to agree with everything that the plaintiff's attorney says even if it sounds perfectly reasonable. When presented with a general safety agreement such as safety is priority number one, the witness must respond by questioning the question and asking such questions as safety in what regard or blunting the request by simply saying safety is important but there are a variety of issues in each situation that may go into an issue of safety. Or simply "In general, yes, safety is an important priority."

Once the general safety questions are parried and answered correctly, then the more specific questions can be dealt with head on. Many times the plaintiff's attorney will go from these general safety questions to a specific safety question and ask whether, in every situation, one must do something in order to be "safe." The response to that question necessarily has to be "it depends." Because in almost every situation it does depend on specific circumstances, the whole picture and the complete safety situation that the person is involved. For instance if a person is accused of speeding but they are exceeding the speed limit by some small amount, they are not necessarily responsible for an accident where someone cuts in front of them while they have the right of way. Certainly it would have been better had the person been driving at the speed limit, for the defense of the case, but the actual accident was caused by the other driver who failed to yield the right of way and pulled out in front of a visible vehicle. The plaintiff's attorney wants to go from the general safety rule that speeding is unsafe to the specific issue of the person speeding being a significant contributing cause to the accident, even though what really caused the accident was the other driver's inattention and failure to follow the rules of the road. A driver who is entering into a roadway without the right of way must yield to oncoming traffic, whether it is speeding or not.

Traditionally witnesses have been reminded that at deposition "answer the question and don't argue with the other attorney." Reptile practitioners know this and exploit those instructions. A witness should be instructed to listen to the question and answer what is asked but if the answer is "it depends," or the question itself has a premise that is false, the witness must push back against the reptile plaintiff's attorney's simple misdirection.

Understanding "reptile" questions, and proper responses, is difficult. First, witnesses have to be aware of reptile theory and how it is used. We have several articles regarding reptile theory, and we use those to help prepare witnesses. Next, once the witness understands what might be coming towards them, the specific questions that might be asked in a deposition need to be rehearsed with the witness and the witness needs to be helped to avoid falling in the traps of general to specific safety absolutes. Additionally witnesses have to be warned and told that they are not there to agree, they are there simply to provide truthful and accurate testimony to factual questions. Questions that present large safety philosophies are always leading to questions regarding the safety practices in the case at hand. Telling the plaintiff's attorney he is incorrect or that the answer to his question depends on the situation, immediately disengages the reptile theory. It is clear that in depositions where reptile theory has been disengaged through honest answers and a good understanding of the actual facts, not the facts invented by the other side, it is ineffective.

Reptile theory was designed to maximize settlements. Traditional witness preparation, where the witness is instructed to "answer the question" and not engage with the other attorney, simply plays into reptile theory and its insidious psychological trap.

Witnesses must be familiar with reptile theory, how it is presented, and when the trap is being laid. Once aware that there is a trap, then one will be able to avoid it. The best reptile defense is to simply point out that each situation is different and "it depends."

Recent Decisions From The Law Court

MATTHEW T. MEHALIC

JAMES D. POLIQUIN

By: James D. Poliquin, Esq. and Matthew T. Mehalic, Esq., CPCU

Duty to Defend Where Possibility of Recovery for Emotional Distress Damages Exists

In *Harlor v. Amica Mutual Ins. Co.*, 2016 ME 161 (November 3, 2016), James D. Poliquin, Esq., of Norman, Hanon & DeTroy, successfully argued that prior precedent issued by the Law Court dictated that Amica Mutual Insurance Company had a duty to defend its insured. This case involved a homeowner insurer's duty to defend its insured, Dawn Harlor, in an action brought against her by an adjacent property owner regarding the right to use a dock according to an easement Harlor had granted to those property owners, the Primes. The Primes alleged that Harlor refused to confirm the scope of the Primes' easement rights and made false statements regarding the extent of those rights, allegedly thereby preventing the Primes from selling property that benefited from the easement. The Primes complained against Harlor and sought damages for slander of title, interference with an advantageous relationship, unjust enrichment, fraud and negligent misrepresentations.

Harlor tendered the defense to its homeowners insurer, Amica. Amica denied the defense asserting none of the claims were potentially covered. Harlor argued that the slander of title claim was covered under the "personal injury" coverage and the claim for tortious interference with contract raised the possibility of a claim for emotional distress, thereby triggering a defense under the "bodily injury" coverage of the policy. The Prime complaint did not expressly allege emotional distress damages. The Superior Court granted summary

judgment for Amica and Harlor appealed.

The Law Court found that Amica was obligated to provide Harlor with a defense because of the possibility that the claim for tortious interference with contract gave rise to an emotional distress claim that might amount to "bodily injury". The Law Court had held previously in *York Insurance v. Lambert*, 1999 ME 173, 740 A.2d 984, that a homeowners insurer was obligated to defend a claim for tortious interference with an expectancy even though the complaint did not expressly assert emotional distress damages. The Law Court found that "the comparison test transcends the specific factual allegations and forms of relief requested in the complaint." The Court concluded that the general allegations in the complaint generated a possibility that the Primes could have established that they suffered bodily injury as a result of emotional distress caused by Harlor's actions.

The Court also found that Amica's breach of the duty to defend did not necessarily render Amica responsible for the amount paid in settlement of the claim. The duty to indemnify is narrower than the duty to defend, being only a subset of the latter. The Court noted that "this narrow duty to reimburse the insured for liability for covered damages is unaltered by a breach of the independent duty to defend." The Court reiterated its prior holdings that an insurer that wrongfully declines to defend assumes the burden of proving non-coverage, which includes an appropriate apportionment of liability between covered and uncovered claims. Significantly, "if the insurer cannot meet the burden of establishing an appropriate apportionment, it may be held liable for the entire settlement."

Justice Alexander wrote a concurring opinion making several interesting observations. In essence, he agreed with the duty to defend but did not believe that there was any potential for ultimate indemnification because the tortious interference claim in his view was legally deficient. Justice Alexander observed:

> Here, because the tortious interference claim was asserted, Amica had a limited duty to appear and defend the action as long as it included the tortious interference claim, but with a reservation of rights that did not obligate Amica to defend or indemnify the other, valid contract claims that apparently led Harlor to settle the action with the Primes...

The best practice would have been to separate out consideration of the tortious interference claim and have the court proceed to determine Amica's responsibility to defend that claim, presumably by a quick and successful motion to dismiss.

Justice Alexander's comments bring to the surface two longstanding issues relating to the duty to defend. First, as a general principle, the law requires an insurer to defend all claims in a complaint, not simply the covered claim, unless the defense of the uncovered claims is clearly able to be segregated. Although what defense activities are clearly able to be segregated depends on each case, it is an unusual circumstance that defense of the potentially covered claims is clearly able to be segregated from the defense of the uncovered claims given the overlapping of relevant facts to varying theories of liability. Second, Justice Alexander suggests that the remedy to an insurer who is required to defend because of the assertion of a frivolous, dismissible claim is to simply file a motion to dismiss, thereby cutting off the duty to defend going forward. Although the elimination of the only potentially covered claim should terminate the insurer's duty to defend going forward, Justice Alexander does not allude to the process involved in obtaining that dismissal. Generally speaking, defense counsel for the insured in the case (the only attorney who has entered an appearance representing the insured) will not move to dismiss even a frivolous claim if the consequence is an adverse result to the insured, i.e., the loss of the duty to defend the rest of the claim going forward. Although the Law Court has not addressed the right of an insurer to intervene to obtain such a dismissal if defense counsel balks because of a conflict, most superior courts rely upon distinguishable cases prohibiting the insurer to intervene, such as when an insurer wants a special verdict to answer a specific coverage question.

With the right set of facts and counts alleged in a Complaint, at least on the basis of Justice Alexander's concurring opinion, moving to intervene appears to be a viable option for insurers to eliminate the duty to defend in cases where a frivolous count is the only count triggering a defense.

"THE DUTY TO INDEMNIFY IS NARROWER THAN THE DUTY TO DEFEND, BEING ONLY A SUBSET OF THE LATTER. THE LAW COURT FOUND THAT AMICA WAS OBLIGATED TO PROVIDE HARLOW WITH A DEFENSE BECAUSE OF THE POSSIBILITY THAT THE CLAIM FOR TORTIOUS INTERFERENCE WITH CONTRACT GAVE RISE TO AN EMOTIONAL DISTRESS CLAIM THAT MIGHT AMOUNT TO 'BODILY INJURY'."

Re-joining the firm as "Of Counsel"

ELIZABETH M. BROGAN

We are pleased to announce that Elizabeth Brogan has rejoined the firm, "of counsel," and will be working with the Governmental Relations and Workers' Compensation practice groups, representing the interests of the employer and self-insured employer community before the Maine Legislature. Elizabeth initially joined the firm in 1987, fresh from a year as a visiting student at the University of Maine Law School and from Boston College Law School, where she graduated *cum laude.* She also graduated from McGill University, in Montreal, with honors. Elizabeth primarily worked in the Workers' Compensation group, becoming one of our first female partners in 1995.

Since leaving the firm in 1997, Ms. Brogan served as longtime editor of her town's community newspaper, as a literacy volunteer at Portland Adult Education, and as a claims consultant to the Workers' Compensation Supplemental Benefit Fund, while raising two children with her husband, and fellow Norman, Hanson & DeTroy attorney, Jonathan Brogan. Most recently, in June, 2016, Ms. Brogan became Executive Director of both the Workers' Compensation Coordinating Council and Maine Council of Self-Insurers, as well as Administrator of the Maine Self-Insurance Guarantee Association. She is currently serving as a member of the Maine Workers' Compensation Board Rules Taskforce.

Elizabeth resides in Cape Elizabeth with her husband, two miniature poodles and the occasionally visiting son or daughter.

New Member: David A. Goldman

DAVID A. GOLDMAN

We are pleased to announce that David Goldman has been selected to become a member effective January 2017. David graduated from Colby College in 1998 with a B.S. in Psychology. Prior to law school, David worked in advertising and for a video game development and publishing company. David attended law school at the University of Maine School of Law where he served as articles editor for the Ocean & Coastal Law Journal, worked at the Cumberland Legal Aid Clinic, and interned with Judge Kermit Lipez of the First Circuit Court of Appeals. David graduated magna cum laude in 2006.

After law school, David served as law clerk with the Maine Superior Court, working with Chief Justice Thomas Humphrey, Justice Robert Crowley, and Justice Thomas Warren. He then became the first law clerk for the Maine Business and consumer Docket under Chief Justice Humphrey and Justice John Nivison. He joined Norman, Hanson & DeTroy as an associate in 2008 and has developed a broad litigation practice, with a focus on real estate and commercial litigation and appellate work.

David lives in Cumberland with his wife Beth and his two sons, Jacob and Sam. David enjoys skiing, watching baseball, and accompanying his sons on the piano for family sing-alongs.

New Member: Charles C. Hedrick

CHARLES C. HEDRICK

We are pleased to announce that Charles C. "Chip" Hedrick has been selected to become a member effective January 2017. Chip is a native of Augusta, Maine and graduated from Hebron Academy, where he was awarded the Milton G. Wheeler Good Fellowship Award for citizenship and integrity. Chip graduated from St. Michael's College *magna cum laude* with a degree in Political Science. Between college and law school, he completed a Margaret Chase Smith internship in Maine State Government with the Maine Department of Labor. Chip graduated from the University of Maine School of Law, where he served as Research Editor of the Maine Law Review. Upon graduation he received the Maine State Bar Association Pro Bono Student Award for his volunteer work during law school. Since having been admitted to the bar, Chip has received pro bono public awards from both the Maine State Bar Association and the Maine Bar Foundation.

Chip was associated with the Lewiston-based law firm of Bonneau & Geismar, which merged with NH&D. Chip's practice includes a broad variety of work with business and non-profit organizations as well as estate administration, wills and trusts, and elder law. He is a frequent speaker at legal education seminars on the probate process and on challenges in estate administration.

Chip has been involved with numerous non-profit and community organizations, including serving as a past Treasurer of the American Civil Liberties Union of Maine, as past Vice President of Androscoggin Network Builders, as Vice President of the Androscoggin County Fish and Game Association, and as a director of Common Ties Mental Health Services.

Chip resides in New Gloucester with his wife, Sarah, who is an environmental engineer with the paper industry.

MICHAEL T. DEVINE

New Associate: Michael T. Devine

We are pleased to announce that Michael Devine joined the firm as an Associate in November 2016. Mike is a Portland native and attended Waynflete School. He graduated from Tufts University in Medford, Massachusetts with honors, and studied History and International Relations. After graduation from Tufts, Mike worked for a large construction firm in New York City.

Mike returned to Portland in 2009 and attended the University of Maine School of Law, receiving his law degree with high honors in 2012. During law school, Mike served as a Comment Editor for the Ocean and Coastal Law Journal and was a recipient of the *Pro Bono Publico* award.

Following law school, Mike served as a law clerk to the Superior and District Courts, primarily in the Augusta, Bangor, and Lewiston areas. Mike served as an Associate with one of Maine's oldest law firms prior to joining Norman, Hanson & DeTroy.

Mike is a board member of the New Lawyers Section of the Maine State Bar Association. Mike also serves as a Trustee of the Victoria Mansion in Portland.

In his spare time, Mike enjoys downhill skiing, running, and soccer.

Workers' Compensation – Appellate Division Decisions

By: Stephen W. Moriarty, Esq.

STEPHEN W. MORIARTY

Heart Attack.

It has long been recognized that a heart attack may meet the criteria of a compensable personal injury under the Act in the same fashion as conventional orthopedic or neurological injuries. A heart attack may arise from a variety of causes, and in a recent decision the Appellate Division ruled upon the standard of proof required when emotional stress is a contributing cause.

In *Johnson v. Vescom Corporation*, App. Div. Dec. No. 16-41 the ALJ adopted the opinion of a Section 312 examiner and concluded that occupational stress led to the rupture of a plaque, thereby causing a heart attack. Much of the stress originated from personal perceptions which were actually unfounded, but the employee had never claimed a gradual stress or emotional injury. Concluding that the employee had sustained her burden of proof under general compensability standards, the ALJ granted the Petition for Award.

On appeal the employer argued that the ALJ was required to apply the stringent provisions of Section 201(3) by virtue of the allegation that stress causally contributed to the heart attack. The Division ruled that the ALJ had correctly declined to apply the §201(3) standards because the asserted injury was physical and not mental in nature. Because the employee had not claimed a mental injury, the general standards of causation determined the outcome.

The employee also suffered from a pre-existing cardiac condition and the employer argued on appeal that the employee failed to establish that work activities aggravated the underlying condition. Although the heart attack itself occurred at work, the employer argued that it could just have easily had happened while at home. The Division affirmed the ALJ's finding that occupational stress increased the risk of injury and that legal causation had therefore been established.

Volunteers.

Over 40 years ago the Law Court ruled in *Harlow v. Agway*, 327 A.2 856 (Me. 1974) that pure volunteers are not considered to be employees under the Act in part because in such situations there is no payment or expected payment for the services rendered. A recent decision of the Appellate Division affirmed this core principle of workers' compensation law.

In *Huff v. Regional Transportation Program*, App. Div. Dec. No. 16-40 the claimant was an unpaid volunteer driver for Regional Transportation and received no income whatsoever other than mileage reimbursement at the IRS rate of $.41 per mile. The claimant drove for Regional Transportation on a full-time basis and each morning was provided with a list of driving assignments for that day. The ALJ found that there was no anticipation of payment for services rendered and that therefore the claimant did not satisfy the definition of "employee" under the Act. The ALJ denied

> "CLOSELY ALIGNED WITH THESE PRINCIPLES IS THE DOCTRINE OF 'THE LAW OF THE CASE', WHICH HOLDS THAT A JUDGE IN THE SAME CASE SHOULD NOT OVERRULE OR RECONSIDER A DECISION MADE BY A DIFFERENT JUDGE IN THE SAME CASE AT AN EARLIER STAGE."

the Petition for Award, and the Appellate Division affirmed.

On appeal the claimant argued that "merely labeling" a relationship as that of a volunteer is not legally binding and that the mileage reimbursement was equivalent to remuneration for services rendered. The Division agreed that categorizing a relationship in a particular manner does not necessarily control, but that an employment relationship requires payment in exchange for services, and not simply reimbursement for costs incurred.

The claimant also argued that IRS regulations established a mileage reimbursement rate of $.14 per mile for volunteers for charitable organizations, and that Regional Transportation elected to pay at the $.41 per mile reimbursement rate established by the IRS for employees. Relying upon earlier decisions from the Law Court, the Division found that provisions of the Internal Revenue Code do not control the interpretation of the Maine Workers' Compensation Act and that the sums received by the claimant were reimbursement for expenses rather than payment for services. Accordingly, the claimant was not an employee.

The Law of the Case.

Over the decades doctrines have evolved in courts of general jurisdiction which support the finality and integrity of final judgments made in the same case. For example, most are familiar with the concept of "res judicata", which stands for the proposition that the same parties may not re-litigate an issue which has been finally determined in a prior proceeding. Similarly, the concept of "collateral estoppel" holds that the parties to the same proceeding may not re-litigate a factual issue which has been finally resolved in a previous proceeding. Both of these doctrines have been fully integrated into the workers' compensation system in order to avoid duplicative litigation and to ensure the dependability and reliability of previous determinations in the same case.

Closely aligned with these principles is the doctrine of "the law of the case", which holds that a judge in the same case should not overrule or reconsider a decision made by a different judge in the same case at an earlier stage. The doctrine is particularly applicable to workers' compensation litigation, where successive claims for benefits are a fundamental component of the system and where assigned ALJs frequently change due to retirement or territorial re-adjustments. The Division recently applied the doctrine in a case involving permanent impairment and the durational limits for partial incapacity.

In *Allaire v. Jolly Gardner Products, Inc.*, App. Div. Dec. No. 16-39 the employee had a serious pre-existing neck condition and later sustained an occupational injury to the neck which was determined by the Board in a 2006 decree to have been a significant aggravation of the underlying condition. Ongoing partial benefits were awarded.

As the 520 week durational limit approached the employer requested the appointment of a §312 examiner, and in his report the physician found a 25% whole person permanent impairment based upon the cervical spine condition, but found that the occupational injury itself was not responsible for any degree of impairment. The presiding ALJ accepted the PI assessment but rejected the examiner's opinion that the impairment was unrelated to the injury. Noting that causation had been established by the previous Board decree, the ALJ denied the employer's Petition to Stop Benefits and awarded ongoing benefits for partial as the PI assessment exceeded the threshold.

The Appellate Division affirmed the ALJ and rejected the argument that the Board was required to adopt the §312 examiner's opinion of 0% whole person PI resulting from the injury. The Division found that the contribution of the occupational injury to the employee's disability in a significant fashion was established as the law of the case in the original decree, and that this determination could not be re-litigated or reconsidered in a successive round of litigation. In other words, the doctrine prevented the employer from re-opening the causation issue notwithstanding a new §312 opinion to the contrary. Finally, although the Division rejected the challenge to the underlying causation finding, it ruled that the ALJ correctly adopted the examiner's assessment on the extent of PI and appropriately ordered that payment of partial benefits continue.

Retroactive Social Security Offset.

Pursuant to the express language of §221(3) workers' compensation benefits must be coordinated or reduced for old-age Social Security benefits that the injured worker is "receiving or has received". The amount of the offset is 50% of the weekly Social Security benefit. Strangely, the statute does not impose a duty upon an employee to advise an employer when he or she is receiving old-age Social Security benefits, and that information may not come to light until some point after such benefits have begun.

The Appellate Division was recently confronted with a situation in which an employer was unaware for several years that Social Security payments were being made, and continued to pay workers' compensation benefits without taking an offset. In *Urrutia v. Interstate Brands Corporation,* App. Div. Dec. No. 16-35 the employer filed a Petition to Determine Entitlement to Reduction of Compensation in order to claim a credit or payment holiday in the amount of the offset that it would have been entitled to take if it had known of the Social Security payments. Following hearing the assigned ALJ granted the Petition and found that the employer was entitled to a retroactive credit. The ALJ authorized the employer to suspend payment of benefits until such time as the retroactive credit had been exhausted.

The employee appealed and argued that the phrase "received or being received" only applied when retroactive workers' compensation benefits were awarded per decree for a time period in which Social Security benefits were received. The employee also argued that an employer was not entitled to a credit for an inadvertent overpayment of benefits. In less than clear language, the Division held that the statute permits an offset only "with respect to the same time period" during which an employee simultaneously receives Social Security benefits. In other words, the Division found no support in the statute for a retroactive credit and for a prospective order terminating benefits until such time as the credit could be taken. Because the Division found no authority for the granting of a payment holiday, it reversed the decision of the ALJ.

The employer has appealed to the Law Court.

Permanent Impairment.

The finality of permanent impairment determinations by the Board is questioned by virtue of a 2-1 decision of the Appellate Division. The decision issued approximately 18 months following oral argument. The

issue arose in a multiple injury and employer context.

In *Strout v. Blue Rock Industries,* App. Div. Dec. No. 16-37 the employee sustained back injuries in 1999 and 2001 while working for one employer, and a third back injury in 2007 while working for another. In a 2009 decree the Board found that the employee had sustained an 11% whole person PI resulting from the first two injuries. The Board adopted the opinion of a §312 examiner on the extent of PI. In that same decision ongoing benefits for partial incapacity were awarded.

The first employer filed a Petition to Terminate Benefits based upon the expiration of the durational limit, and the employee filed Petitions to Determine PI against all three injuries. The PI Petitions alleged additional psychological impairment. The first employer had already paid in excess of 520 weeks of benefits.

The majority ruled that an established level of PI may be modified upon changed medical circumstances. A new §312 examiner found, somewhat inconsistently, that although MMI from a psychological standpoint had not been reached, there would ultimately not be any PI in any event. The majority then denied the Petition to Terminate Benefits on the grounds that MMI had not been reached, thereby extending the employee's entitlement to ongoing benefits for partial.

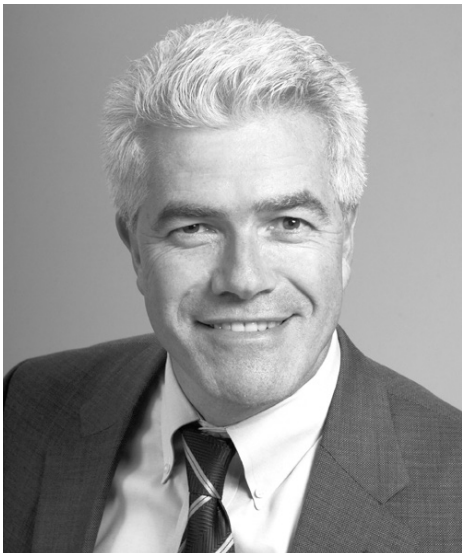
The dissenting member of the panel found that the net effect of the §312 examiner's opinion was to leave the overall PI level at 11%, thereby entitling the employer to terminate payments based upon the expiration of the durational limit.

In summary, a Board determination of PI is not necessarily final and can be increased (presumably at any time) upon a showing of changed medical circumstances or can be stripped of its legal impact if MMI for a peripheral condition has not been reached.

The employer has appealed to the Law Court.

> " IN SUMMARY, A BOARD DETERMINATION OF PI IS NOT NECESSARILY FINAL AND CAN BE INCREASED (PRESUMABLY AT ANY TIME) UPON A SHOWING OF CHANGED MEDICAL CIRCUMSTANCES OR CAN BE STRIPPED OF IS LEGAL IMPACT IF MMI FOR A PERIPHERAL CONDITION HAS NOT BEEN REACHED."

2017 New England Super Lawyers and Rising Stars



Norman, Hanson & DeTroy is proud to announce that that the 2017 edition of New England Super Lawyers and the 2017 New England Rising Stars has recognized several of our attorneys for inclusion in the publications. We congratulate each of these attorneys for this accomplishment.

Mark G. Lavoie

Designated as among the top 100 2017 New England Super Lawyers in the category of Professional Liability Med Mal: Defense

CORRECTION

In our summer edition we reported that David Herzer had been designated as "Lawyer of the Year" in the practice area of Insurance Law. In fact, Dave's designation was limited to Professional Malpractice Law – Defendants. It should be noted, though, that Dave was also recognized as a Best Lawyer in the practice areas of Insurance Law, Personal Injury Litigation – Defendants, and Professional Malpractice Law – Defendants.

2017 New England Super Lawyers

Aaron K. Baltes
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Jonathan W. Brogan
Prof. Liability General: Defense

David L. Herzer, Jr.
Personal Injury Defense: Medical Malpractice

Stephen Hessert
Workers' Compensation

John H. King, Jr.
Workers' Compensation

Theodore H. Kirchner
Personal Liability: Defense

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Personal Injury Defense

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Professional Liability

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Prof. Liability Med Mal: Defense

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Insurance Coverage

Joshua D. Hadiaris
General Litigation

Kelly M. Hoffman
General Litigation

Matthew T. Mehalic
Insurance Coverage

Darya I. Zappia
Intellectual Property Litigation

Kudos

RUSS PIERCE has been elected as President of the Natural Resources Council of Maine, the state's largest environmental advocacy organization. Founded in 1959, NRCM harnesses the power of science, the law, and the voices of people who value Maine's environment for effective advocacy protecting the nature of Maine. Russ has represented NRCM's interests for over a decade in many areas of environmental law, and in 2009 was presented with the NRCM's annual Environmental Award.

DAVE VERY has been appointed as the DRI State Representative for Maine. Founded as the Defense Research Institute in 1960, DRI is the leading organization of defense attorneys and in-house counsel and is the largest international membership organization of attorneys defending the interests of business and individuals in civil litigation. Please contact Dave for more information about the benefits of DRI membership.

ELIZABETH BROGAN is the Executive Director of the Workers' Compensation Coordinating Council and the Maine Council of Self Insurers, and is also the administrator of the Maine Self-Insurance Guaranty Association. She organized and presided over the annual meeting of these organizations held on November 17, 2016. **DAN RILEY** and **LINDSEY SANDS** were featured speakers at the annual meeting. Dan addressed the legislative changes to be expected given the recent election and Lindsey recapped the significant decisions issued by the Workers' Compensation Board Appellate Division in 2016.

KELLY HOFFMAN and **JESSICA SMITH** presented at a two-day National Business Institute seminar in Portland entitled "Human Resources Law from A-Z". Kelly addressed the topics of Controlling Unemployment Compensation Costs, Discrimination and Harassment, and Work Place Behavioral Issues: Appropriately Handling Thorny Situations. Jessica spoke on the topics of Workplace Privacy and Employee Monitoring, as well as Disciplining and Firing Employees.

RUSS PIERCE was honored with the "Best in Show" for his artwork that had been selected for the Maine College of Art's "Create V" Exhibition in September.

DAVE HERZER has been appointed as Chair of the Professional Ethics Commission for 2017.

J.D. HADIARIS has been selected as a Corporator of Saco & Biddeford Savings Institution. Founded in 1827, the Institution has been in business longer than any other bank in the State, with branches currently located in Saco, Biddeford, Old Orchard Beach, Scarborough, South Portland, and Westbrook.

FALL 2016 issue

Return Service Requested

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