INBRIEF

Current Developments in Maine Law

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Changes in expert witness discovery: M.R. Civ. P. 26(b)(4)(C) produces more efficient and effective collaboration

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Most of us are accustomed to telling our experts to be careful because anything they put in writing can be discovered by the other side. This is because former versions of both the Federal and Maine Rules of Civil Procedure required the disclosure of "the data or other information considered by the witness in forming the opinions." Fed. R. Civ. P. 26(a)(2)(B) (2009); M.R. Civ. P. 26(b)(4)(A)(i) (2013). Courts interpreted this provision very broadly and it was generally accepted that anything in the expert's file was discoverable.

Accordingly, we have been very cautious with our communications and have picked up the phone or met with our expert in person to discuss anything of substance, instead of communicating in writing. (In reality, this practice did not truly protect the communication from disclosure, but it did make it more difficult to discover.) Limiting the exchange of information often compromised the quality of the expert's opinion or led to unwelcome surprises when the expert testified. Some cases required two experts – a consulting expert with whom the attorney engaged in open communications and a retained expert, whose opinion was designated for testimony once the attorney

had developed a theory of the case through communications with the consulting expert.

I. Rule changes allow freer discussions.

In 2010, the federal Committee on Rules of Practice and Procedure formally recognized the gamesmanship and inefficient expenditure of resources that the language of Rule 26 produced. Effective December 1, 2010, the Federal Rules provided explicit protection against the discovery of draft expert witness reports, "regardless of the form in which the draft is recorded." Fed. R. Civ. P. 26(b)(4)(B). Explicit protection was also provided against the discovery of communications between counsel and the retained expert, "regardless of the form of the communication," with three exceptions. Fed. R. Civ. P. 26(b)(4)(C). Communications relating to the expert's compensation; facts or data provided by the attorney and considered by the expert in forming her opinion; and assumptions provided by the attorney and relied on by the expert in forming her opinion were still discoverable. Fed. R. Civ. P. 26(b)(4)(C)(i)-(iii). Effective September 1, 2014, the Maine Civil Rules of Procedure were amended to adopt similar changes, with some important differences.

II. Differences between the federal rule and the Maine rule.

The Federal Rules of Civil Procedure require that the disclosure of any retained or specially employed expert be accompanied by a report prepared by the expert. Fed. R. Civ. P. 26(a)(2)(B). Maine's rules do not impose this requirement. Thus, while the federal rules protect against the discovery of "drafts of any report or disclosure required under Rule 26(a)(2)," see Fed. R. Civ. P. 26(b)(4)(B), the Maine rules protect against the discovery of "drafts of Rule 26(b)(4) disclosures ordered by the court and reports to the attorney." M.R. Civ. P. 26(b)(4)(C). "Reports to the attorney" is broader in meaning than the federal counterpart and arguably includes any communication from the expert with information or opinions for the attorney to consider. Thus, if M.R. Civ. P. 26(b)(4)(C) had existed at the time the Law Court decided *Boccaleri v. Maine Medical Center,* 534 A.2d 671 (Me. 1987), the letter from the defendant's pathology expert to the defendant's attorney outlining his observations and opinions concerning a biopsy slide, the report issued by the defendant's pathologist, and the applicable standard of may have been protected instead of produced.

A second difference between the federal rule and the Maine rule is that the federal rule characterizes drafts of reports and attorney-expert communications as work-product, protected by Fed. R. Civ. P. 26(b)(3)(A) and (B). Accordingly, the information is discoverable if it is "otherwise discoverable under Rule 26(b)(1)" and the party seeking the discovery "shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means." Fed. R. Civ. P. 26(b)(3)(A)(i) and (ii).

In contrast, M.R. Civ. P. 26(b)(4)(C) does not characterize the protected information as work-product, and it imposes a stricter standard for the discovery of the protected information. Pursuant to the rule, communications that do not meet one of the three exceptions can only be discovered "as provided in Rule 35(b)," which is the rule regarding the physician and mental examination of persons, or if the party seeking the discovery shows "exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means." Notably, this is the same standard that must be met to discover the facts known, or opinions held by, a non-testifying, or "consulting," expert. M.R. Civ. P. 26(b)(4)(B).

III. Developments in the interpretation of the new rule.

It will take years for Maine courts to develop case law on M.R. Civ. P. 26(b)(4)(C) in a volume that results in meaningful guidance. In the meantime, guidance from the federal courts is helpful, so long as the differences between the rules are recognized.

- **The term "considered" will still be given an expansive meaning.**

  In general, any facts or data that are provided by the attorney and received and reviewed by the expert must be disclosed. This broad definition of "considered" was in place before the amendment to Fed. R. Civ. P. 26 and remains in place currently. *Yeda Research and Development Co. v. Abbott GmbH& Co.,* 292 F.R.D. 97 (D.D.C. 2013) ("Because the word 'considered' is unchanged, cases interpreting its meaning remain valid."); *United States v. Dish Network, L.L.C.,* No. 09-3073, 2013 WL 5575864 (C.D. Ill. Oct. 9, 2013).

- **If there are any "factual ingredients" in the communication, it will not be protected.** According to the 2010 Advisory Comments to Fed. R. Civ. P. 26, "The intention is that 'facts or data' be interpreted broadly to require disclosure of any material considered by the expert, from whatever source, that contains factual ingredients." There is some case law interpreting the scope of the term "facts or data," but we can expect to see more. See *D.G. ex rel. G. v. Henry,* No. 08-74, 2011 WL 1344200 (N.D. Okla. Apr. 8, 2011) (notations or highlights do not constitute facts or data, statutes and policies provided to the expert constitute facts or data, and summaries that contain factual ingredients must be produced). Yet, if the expert and attorney collaborate to prepare a summary of the "facts and data," that work-product may be protected. *Davita Healthcare Partners, Inc. v. United States,* 128 Fed. Cl. 584, 591 (Ct. Fed. Cl. 2016) (holding that the expert's spreadsheets, graphs and analyses did not have to be produced simply because they contained "facts and data" – "These formulations, however, are interpretations of data that reflect counsel's mental impressions and result from the expert's and counsel's collaborative efforts to organize, marshal, and present data. This selective presentation of data is separate and distinct from the underlying facts and data themselves.").

- **Communications between the expert and individuals other than the attorney will not be protected.** See *Fialkowski v. Perry,* No. 11-5139, 2012 WL 2527020 (E.D. Pa. June 29, 2012) (ordering the production of spreadsheets and document analysis prepared by the Plaintiff from her QuickBooks records and tax returns); *In re Application of Republic of Ecuador,* 280 F.R.D. 506, 514–16 (N.D. Cal. 2012) (communications between non-attorney employees of corporation and its expert witness are not protected, nor are those between testifying and non-testifying experts). These holdings prioritize full disclosure over the protection of work-product. Documents and information that would be protected as work-product, such as documents prepared in anticipation by

a non-attorney representative, lose that protection once provided to the expert.

- **Expert work-product, such as notes and calculations, may be protected.** In *Dongguk Univ. v. Yale Univ.*, No. 3:08-cv-00441, 2011 WL 1935865, *1 (D. Conn. May 19, 2011), the United States District Court of Connecticut concluded that an expert's notes did not constitute a draft of a report, nor were they intended to be communications between the expert and the attorney. Thus, they were not protected. The Ninth Circuit has also refused to provide blanket protection to an expert's work-product. In *Republic of Ecuador v. Mackay,* 742 F.3d 860 (9th Cir. 2014), the court concluded that the "driving purpose" of the 2010 amendments was to protect attorney opinion work product from discovery. *Id.* at 870. Accordingly, the rule "does not provide presumptive protection for all testifying expert materials as trial preparation materials." *Id.* at 871. See also *Republic of Ecuador v. Hinchee,* 741 F.3d 1185, 1195 (11th Cir. 2013).

On the other hand, the District of Colorado concluded that pages of calculations, described by the court as "working notes," were protected because Rule 26(b)(4)(B) protects against the disclosure of draft reports "regardless of the form in which the draft is recorded." *Etherton v. Owners Ins. Co.,* No. 10-cv-00892, 2011 WL 684592, *2 (D. Colo. Feb. 18, 2011); see also *Int'l Aloe Science Council, Inc. v. Fruit of the Earth, Inc.,* No. 11-2255, 2012 WL 1900536 (D. Md. May 23, 2012) (protecting notes that were created by the party's expert for the purpose of assisting the attorney prepare to depose the adversary's expert); *Davita Healthcare Partners, Inc. v. United States,* 128 Fed. Cl. 584, 591 (Ct. Fed. Cl. 2016) (protecting drafts of spreadsheets, graphs, and charts that were prepared for inclusion with draft expert reports); *United States v. Veolia Env't N. Am. Operations, Inc.*, No. 13–mc–03, 2014 WL 5511398 (D. Del. Oct. 31, 2014) (protecting emails between a testifying expert and counsel who were collaborating on the creation of a valuation report). As the *Davita* court explained, "documents reflecting [the expert's] preliminary analysis are work product whether viewed as a 'preliminary expert opinion' or as a communication from expert to counsel reflecting their joint effort to develop strategy." 128 Fed. Cl. at 591.

The fact that M.R. Civ. P. 26(b)(4)(C) protects against the disclosure of "reports to the attorney," regardless of whether the report to the attorney includes any attorney opinion work product, suggests that greater protection may be afforded to "working notes" in Maine than in some of the federal cases cited above. The expert could, for instance, include all of his or her working notes in a report to counsel, theoretically invoking the protection of the rule. On the other hand, the advisory committee's notes suggest that the content of the documents might still be discoverable: "The facts observed, the information learned, and the opinions reached by the expert are not protected from discovery simply because they are shared with the attorney." M.R. Civ. P. 26 Advisory Note – June 2014. The circumstances under which expert work product is protected under M.R. Civ. P. 26(b)(4)(C) requires further clarification.

IV. Practical implications for communications with experts.

The goal of M.R. Civ. P. 26(b)(4)(C) is to enable freer communications between attorneys and experts, thereby reducing the costs of litigation and producing higher quality expert testimony. There is a concern, however, that placing limits on expert witness discovery will stifle effective cross-examination. The legitimacy of this concern will be revealed as Maine courts interpret and apply M.R. Civ. P. 26(b)(4)(C). In the meantime, litigants should employ the following practices in order to safeguard against waiving the protections afforded by the rule:

- Advise your expert that her notes may be discoverable but that the risk of production can be lessened by containing them within a report to counsel. If, for example, an expert wants to create a summary of the evidence, that should be done in a report format.
- When communicating with your expert, clearly separate the communications that contain facts and data from the communications that contain mental impressions or your theory of the case. If you send a letter to your expert enclosing medical records for review and also have a question you need your expert to answer, send your question in a separate letter.
- Discuss the different standards in M.R. Civ. P. 26(b)(4)(C) with your expert. Facts and data that have been provided by the attorney must be disclosed if they are "considered" by the expert, which is a very broad standard. Assumptions provided by the attorney need only be disclosed if they were "relied on." Your expert should be able to differentiate between those standards.
- Limit your expert's communications with anyone other than you.
- Send summaries of facts and data only if the underlying facts and data has been provided. You may be able to argue that the summary reflects your mental impressions and is protected by the rule. That argument will not succeed, however, if the facts and data have not been provided outside of your summary.

In closing, the new rule should allow parties to focus on the expert's opinions and the support for those opinions. If the expert's opinions are supported by the facts and the standards of his or her profession, then the expert's opinion should carry weight, regardless of whether the retaining attorney's theory of the case was presented to the expert along the way.

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Workers' Compensation: A Primer on PI Determinations

By: Stephen W. Moriarty, Esq.

STEPHEN W. MORIARTY

For injuries sustained prior to January 1, 1993, permanent impairment represented a potential entitlement to a one-time cash benefit for loss of function either to a designated part of the body or to the body as a whole (depending on the law in effect on the date of injury) resulting from an occupational injury. With the enactment of the Workers' Compensation Act of 1992 the role of PI changed dramatically. Instead of a benefit for loss of function, PI became a benchmark for determining the durational limit of entitlement to incapacity benefits for injured workers who are partially disabled. In this sense PI has served since 1993 "as a rough measure of an employee's overall level of work-incapacity", *Sprague v. Lucas Tree Experts,* 2008 ME 162 ¶8, 957 A.2d 969, 972, *Churchill v. Central Aroostook Ass'n. for Retarded Citizens, Inc.,* 1999 ME 192 ¶11, 742 A.2d 475, 478. As we all know, only those individuals whose PI levels fall above a specific percentage threshold are entitled to unlimited partial benefits pursuant to Section 213, and benefits for the rest are capped at 520 weeks. The percentage thresholds that apply to various dates of injury are set forth in Ch. 2, §1 of the WCB Rules. Although an ALJ's finding of the level of impairment is presumably factual in nature and therefore not subject to appeal pursuant to Section 321-B(2), issues related to PI have been a fertile source of litigation at the hearing and appellate levels.

At the outset, it should be clear that there is a distinction between obtaining a medical assessment of PI and obtaining a Board determination of PI. Either party may request a PI assessment from a healthcare provider at any time during the life of a claim, and such opinions are useful for settlement evaluation purposes as well as for projecting future exposure. The parties may rely upon assessments to agree upon the extent of PI resulting from an injury, and such agreements may be memorialized in a Record of Mediation, a Consent, or a Consent Decree. If the degree of PI is agreed-upon, there is no need to litigate the issue. If, however, the parties are unable to agree, a Petition to Determine PI must be filed and the assigned ALJ must rule upon the issue. For purposes of this article a "determination" refers to a Board decree which establishes the extent of PI related to an injury following litigation and the submission of inevitably conflicting reports. As may be anticipated, complications will arise in seeking a binding PI determination, and in the years since 1993 a significant body of law has developed delineating the issues in resolving PI through litigation, and this article will summarize the key matters which may come into play.

Reference Source for Determination.

By statute, MMI must have been attained before PI can be assessed. PI is defined in Section 102(16) as "any anatomic or functional abnormality or loss existing after the date of maximum medical improvement that results from the injury." Although the 3rd Edition of the "*AMA Guides to the Evaluation of Permanent Impairment*" was adopted by statute as a "temporary schedule" (Section 153(8)), the Board long ago adopted the 4th Edition by rule. See Ch. 7, §6(2) of the WCB Rules. Although two subsequent editions of the *Guides* have since been published, neither one has been adopted by the Board. A valid assessment must be based upon the 4th Edition or "circumscribed within" the Edition. *Harvey v. H.C. Price Co.,* 2008 ME 161 ¶28, 957 A.2d 960, 968. If an examiner has assessed PI without having read or considered the 4th Edition, the assessment will not be accepted by the Board. *Gowen v. L.L. Bean, Inc.,* App. Div. Dec. No. 17-06.

The Administrative Law Judges will not apply the *Guides* in a rigid or mechanical manner. For example, Ch. 14 of the 4th Edition addresses psychological impairment, and explicitly states that translating degrees of emotional impairment into percentage figures cannot reliably be done. However, the Law Court held in *Harvey,* supra, that the psychological consequences secondary to a physical injury must be included in determining PI even though the authors did not endorse numerical percentages. Recognizing that it was essential for an evaluator to make a numeric estimate, the Court affirmed an examiner's reliance upon the chapter in the 4th Edition dealing with injuries to the nervous system to arrive at a percentage of psychological impairment. See also, *Smart v. Department of Public Safety,* 2008 ME 172, 959 A.2d 756, in which the Court extended the scope of *Harvey* and approved a specific assessment of psychological impairment arising from a primary mental stress injury.

Similarly, in cases of injury to the spine the 4th Edition expresses a strong preference for the use of the "Diagnostic Related Estimates" (DRE) model to assess PI, but provides an alternative "Range of Motion" (ROM) model which can be used when the DRE method is not applicable. In *Sprague v. Lucas Tree Experts,* 2008 ME 162, 957 A.2d 969 the Court approved the Board's reliance upon the ROM model in a case in which the medical examiner found that it provided the better approach. In short, the test of whether

an assessment is "circumscribed within" the 4th Edition is broad, and the Board may properly rely upon the clinical judgment of an examiner when the 4th Edition permits latitude.

Burden of Proof.

Ordinarily in workers' compensation proceedings the burden of proof rests with the moving party or the party that filed a petition. However, there have been some instances in which the Law Court has placed the burden upon the opposing party. Having perceived a "potential for mischief" in relying upon the traditional placement of the burden, the Court has specifically defined the duties of the parties regardless of which may have filed to seek a determination of PI.

When PI and the duration of entitlement to partial are an issue, the employee initially bears a "burden of production" to assert and offer evidence suggesting that the level of impairment is higher than the durational limit threshold. Once an employee has satisfied the initial burden of production, the ultimate burden of proof then shifts to the employer to establish that the level of PI is below the applicable threshold and that it is therefore entitled to discontinue benefits. *Farris v. Georgia-Pacific Corp.,* 2004 ME 14, 844 A.2d 1143. See also *Bisco v. S.D. Warren Co.,* 2006 ME 117, 908 A.2d 625. Therefore, whenever the level of PI is in dispute, the obligation falls upon the employer to convince the ALJ that PI is below the threshold.

Ripe for Determination.

A disputed issue is not considered to be ripe for adjudication unless there exists "a real and substantial controversy, admitting of specific relief through judgment of conclusive character". *Halfway House, Inc. v. City of Portland,* 670 A.2d 1377, 1379 (Me. 1996). In other words, the Board will likely conclude that an attempt to establish PI is premature if litigation is initiated too far away from the expiration of the durational limit. If several years remain before the durational limit expires, establishing the level of PI will not have any immediate consequence and precludes the possibility that a person's medical condition may change before the durational limit is reached. There are several ALJ-level decisions dismissing or denying petitions to determine the level of PI when the date of the durational limit is too remote in time. See, e.g., *Graham v. County of Androscoggin,* 2012 WL 1597042 (April 4, 2012), Peters v. V.I.P., Inc., 2012 WL 1597059 (April 13, 2012), Freeman v. New Page Corp., 2011 WL 4796900 (September 1, 2011), *Soule v. S.D. Warren,* 2009 WL 2092882 (June 16, 2009). In the *Graham* decision, ALJ Goodnough ruled that filing a Petition to Determine PI approximately twelve months prior to the expiration of the durational limit "would be reasonable and would not subject the petitions to a dismissal on lack of ripeness ground".

Moot Issue.

There is no cap or limit on benefits for total incapacity. Nevertheless, establishing the level of PI may be useful for settlement purposes, and Section 307 of the Act allows any interested party to seek an adjudication of rights by filing an appropriate petition with the Board. However, the Law Court has held that determining PI for someone who is totally incapacitated presents a moot issue, as a ruling would not affect the rights or entitlement of either party. Because there is no practical consequence to establishing the level of PI for someone who is totally disabled, a petition to do so will be dismissed. *Legassie v. Securitas, Inc.,* 2008 ME 43, 944 A.2d 495, *Smith v. Hannaford Bros., Co.,* 2008 ME 8, 940 A.2d 1079, *Gagnon v. Twin Rivers Paper Co.,* App Div Dec. No. 17-16. Thus, a Petition to Determine PI will only be acted upon when the employee is partially incapacitated.

Prospective Relief.

Notwithstanding the concerns regarding ripeness and mootness discussed above, an employer is not required to wait until the eve of the expiration of the 520 week period to seek a determination, as doing so would inevitably result in an overpayment. In *Young v. Central Maine Power Co.,* 2003 ME 10, 814 A.2d 998 the Court recognized the legislative intent to limit the receipt of partial incapacity benefits in certain cases and recognized that delaying a decision until after the cap had been reached would conflict with that intent. The Court ruled that an employer could obtain a prospective order terminating payment of benefits on a specific date in the future, recognizing that if there were an intervening change in circumstances the employee could file a petition seeking to extend benefits. Although Young addressed a claim for partial benefits governed by former Section 53-B, which imposed a cap at 400 weeks from the date of MMI, the rationale is equally applicable to partial benefits capped on the basis of PI. It is suggested that employers seeking a prospective determination file both a Petition for Review and a Petition to Determine the Extent of PI approximately 12-15 months before the anticipated expiration of the 520-week cap.

Post-Determination Change in PI.

Assuming that the degree of PI has been established by the Board, the extent of the impairment may nevertheless change following the decree. There are conflicting Appellate Division decisions on the legal impact of such a development.

In *Bailey v. City of Lewiston,* App. Div. Dec. No. 16-11 the employee was awarded ongoing benefits for partial incapacity in a decision which also established PI at 32%. The Board adopted the assessment provided by a Section 312 examiner. Benefits continued beyond the 520-week point. Later, the same Section 312 examiner found that there had been such a significant degree of intervening medical improvement that PI was now 0%, and the employer filed both a Petition for Review and a Petition to Determine PI. The ALJ found that there had been a comparative change of circumstances and ordered termination of payment of partial benefits, but the Appellate Division vacated the decision. The Division ruled that when MMI has been proven, the statutory definition precludes a subsequent reconsideration of the date on which it occurred, and therefore prevents the Board from reducing the level of PI resulting from the injury. The Law Court has granted the employer's Petition for Appellate Review and oral argument took place on April 11.

By contrast, in *Strout v. Blue Rock Industries,* App. Div. Dec. No. 16-37 the Board (in a three-injury case) relied upon the opinion of a Section 312 examiner and found that the employee had sustained 11% PI related to the first two injuries. That employer filed a Petition to Terminate Benefits based upon expiration of the durational limit, and the employee responded by filing Petitions to Determine PI against all three injuries, alleging that there was additional psychological impairment. In 2-1 decision the panel ruled that an established level of PI may be increased upon changed medical circumstances. A new Section 312 examiner had found that MMI had not been reached from the psychological consequences of the injuries, and the panel denied the Petition to Terminate Benefits on that basis. Although the 520-week period had already expired for the first two injuries, ongoing benefits for partial were awarded. See also, *Gilbert v. S.D. Warren,* App. Div. Dec. No. 16-12 in which the panel strongly implied that a previously established

level of PI could be increased on the basis of sufficient prohibitive evidence.

The employers both filed Petitions for Appellate Review, and the Law Court has not yet acted upon them. Therefore, pending clarification from the Court, case law currently supports the proposition that PI established by decree may be increased upon changed medical circumstances, but cannot be decreased.

Terminating Benefits.

Ch. 2, §5(1) of the WCB Rules provides that before payment of benefits for partial incapacity are stopped by virtue of the durational limit in Section 213(1), the employee must be given at least 21 days advance notice of the upcoming expiration of payment. According to the rule, failure to send the mandatory notice automatically extends an employee's entitlement. Therefore, employers who have successfully obtained a prospective order pursuant to *Young* establishing PI and specifying the date of future termination must be sure to send the advance notice required by the rule.

However, in a recent decision ALJ Elwin held that the rule does not apply in all situations. In *Somers v. S.D. Warren Co.* (February 28, 2017), the Board had determined by decree that the employee sustained 7% PI and awarded ongoing benefits for partial incapacity. Prior to the expiration of the 520-week period, the employer filed a Petition for Review. After more than 520 weeks of benefits had been paid, the Board granted the Petition for Review and authorized the employer to immediately discontinue payment of benefits for partial. No advance notice was sent to the employee.

The employee filed a Petition for Reinstatement of Benefits based upon an alleged failure to comply with Ch. 2, §5 of the Rules. Noting that the previous decree authorized the immediate cessation of benefits, ALJ Elwin held that because the rule only applies to situations in which "benefits are due to expire", it would be absurd to apply the rule in context of the claim. Finding that the rule did not apply to the case, the ALJ held that the employer had no obligation to provide advance notice of termination or to notify the employee of the right to file a financial hardship appeal. The employee has filed a Motion for Findings, and a supplemental decree is expected.

Conclusion.

As can been seen, PI may be established in a variety of means and can be assessed at any point after MMI has been reached following an injury. However, termination of benefits at the 520-week mark is not self-executing, and barring an agreement between the parties Board authorization is required. The potential consequences of post-decree changes in the level of impairment only further complicate the matter. Employers and insurers should work closely with their attorneys to develop a game plan for establishing PI and terminating partial incapacity benefits at the appropriate time.

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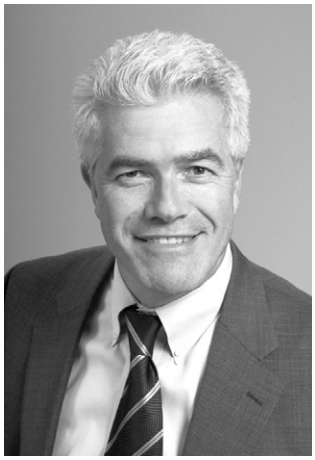
Medical Malpractice Law – Defendants



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Personal Injury Defense/Medical Malpractice

Recent Decisions From The Law Court

By: Matthew T. Mehalic, Esq., CPCU

MATTHEW T. MEHALIC

No Duty to Defend Claims Arising Out of Assault or Battery

In *Barnie's Bar & Grill, Inc. v. United States Liability Ins. Co.,* 2016 ME 181 (Dec. 20, 2016), the Law Court addressed whether a duty to defend existed under commercial general liability and liquor liability policies for claims arising out of an altercation between patrons. The plaintiff in the underlying litigation claimed that Barnie's Bar had notice of the risk that an assault was imminent, that Barnie's Bar breached its duty of care to prevent or interfere with the assault by failing to contact law enforcement, and that Barnie's Bar failed to interfere with the assault and battery. The insurer denied a defense.

Resolution of the duty to defend revolved around the question of whether the potential for coverage was categorically defeated by a policy exclusion which encompassed any claim "based upon any actual or alleged 'assault' or 'battery', or out of any act or omission in connection with the prevention or suppression of any 'assault' or 'battery.'" *Id.* at ¶ 3. The underlying complaint clearly alleged that the insured, Barnie's Bar had been negligent in failing to protect a patron from an assault, and in failing to summon help after the patron was assaulted. On appeal, however, Barnie's Bar pointed out that the complaint contained a paragraph alleging that it had "breached a duty of care 'not to create a dangerous circumstance on its premises'". Barnie's Bar argued that the broad language of that paragraph could be read as "an allegation of general negligence pursuant to which [the plaintiff] might prove facts that fall within the policy's coverage at trial." *Id.* at ¶ 9.

The Law Court rejected Barnie's Bar's argument, refusing to read that single statement in isolation from the rest of the complaint, which clearly focused on the assault. The Court reasoned:

> [T]he comparison test is limited to the language of the underlying complaint and the insurance policy. Just as we cannot read extrinsic facts or allegations *into* an underlying complaint in the comparison test, we cannot selectively read facts or allegations *out of* that complaint in order to conclude that the insurer has a duty to defend, and we will not do so in this instance.

Id. The Law Court found that the exclusion was so broadly written and the underlying personal injury complaint so narrowly drafted that there was no overlap between the complaint and the grant of coverage provided by the policies. Judgment was affirmed in favor of the insurer holding that there was no duty to defend Barnie's Bar.

This decision is important to insurers concerned with the ever broadening scope of cases where the Law Court has found a duty to defend. It shows that there are limits to the duty to defend and that insurers, in the right cases, should not shy away from challenging that duty where the complaint allegations fall outside the grant of coverage.

Despite Finding of Negligence, No Award for Loss of Consortium

In *Jaime Wilson v. William Condon*, 2016 ME 187 (January 19, 2017), Jaime Wilson brought a loss of consortium claim against William Condon that derived from her former husband, Philip Barnard's negligence claim against Condon. There was a finding of negligence against Condon, but the jury did not award Wilson any damages. Wilson appealed the jury verdict and trial court's denial of her motion for additur or a new trial.

The facts giving rise to the lawsuit were that Wilson and Barnard rented an apartment from Condon. Barnard was injured when the deck he was standing on attached to the leased apartment collapsed. During the pendency of the lawsuit, Wilson and Barnard divorced.

On appeal, the Law Court looked to whether there was an abuse of discretion by the trial court in denying the motion for additur or a new trial. The Court did not find that the award was without rational explanation or that the jury disregarded the evidence or otherwise based its decision on passion, bias, prejudice, accident, mistake of fact or law, or improper compromise. "Verdicts in which a jury finds a defendant liable but awards low or no damages to the plaintiff are not inherently irrational or improper and do not necessarily warrant additur or a new trial pursuant to M.R.Civ.P. 59(a)." *Wilson, supra,* at ¶ 7.

The Court also addressed the jury verdict form, but did not find that the verdict form created uncertainty leading to an irrational or improper verdict. In reaching this conclusion, the Court "disavowed" language in its prior holding of *Shaw v. Bolduc,* 658 A.2d 229, 231 (Me. 1995), stating that separating the questions of negligence and proximate cause for each defendant represented a practice neither necessary nor desirable. Instead, the *Wilson* Court held that "[s]eparation of the questions of negligence and causation on verdict forms is not only permissible but, in

many instances, may be necessary to avoid jury confusion and allow a more accurate and reviewable report on the jury's verdict." *Wilson supra*, at ¶ 10. The *Wilson* decision will further assist defense counsel arguing for separation of the question of negligence and causation in jury verdict forms.

Auto Liability Regular Use Exclusion Applied

In Estate of *Rebecca L. Mason v. Amica Mutual Ins. Co.*, 2017 ME 58 (March 28, 2017), the Law Court once again looked at a provision in an automobile liability policy that excluded coverage for liability arising out of the use of a vehicle "furnished for the regular use of any family member."

The background facts were that Kristina Lowe was driving a vehicle with passengers Rebecca Mason and Logan Dam on January 7, 2012. While driving, Lowe negligently caused the vehicle to crash resulting in the deaths of Mason and Dam. The vehicle Lowe was driving at the time of the accident was owned by her friend, Dakota Larson. Larson's driver's license was suspended several months before the accident. Lowe had agreed to drive Larson to work, to school and to visit friends. Lowe's own car broke down at the end of December. From that point forward, Larson authorized Lowe to use Larson's car "as if it was her own, as long as she continued to give him rides, until her car was fixed. Around this same time Larson left town for a few days and left the only set of keys with Lowe. After Larson returned, Lowe's use and permission to use the car was unchanged. Lowe used Larson's car to drive to and from work, to visit relatives, to pick up friends, to go tanning, and to go to the gym. She kept Larson's car at her family's home. She also paid for gas most of the time. At the time of the accident, Lowe was a resident at her mother, Melissa Stanley's home. Stanley had a personal automobile liability policy with Amica that included the above referenced exclusion.

Following the accident the Estates of Mason and Dam brought claims again Lowe. The parties stipulated to the entry of judgments against Lowe in the amount of one million dollars. The Estates brought reach-and-apply actions against Amica, who had denied coverage due to the regular use exclusion. The trial court entered summary judgment in Amica's favor finding that the regular use exclusion precluded coverage.

On appeal the Law Court reviewed prior precedent and reiterated that regular use exclusions are to be interpreted with their "obvious contractual purpose." That purpose is to "cover occasional or incidental use of other cars without the payment of an additional premium, but to exclude the habitual use of other cars, which would increase the risk on the insurance company without a corresponding increase in the premium." *Estate of Mason, supra*, at ¶ 11 (quoting *Acadia Ins. Co. v. Mascia*, 2001 ME 101, ¶ 11, 776 A.2d 617; and citing *Allstate Ins. Co. v. Gov't Emps. Ins. Co.*, 263 A.2d 78, 80 (Me. 1970)). The Law Court affirmed the trial court's entry of summary judgment in favor of Amica finding that Lowe's use of Larson's vehicle was not occasional or incidental, or infrequent or merely casual. The vehicle was available for Lowe's regular use despite the fact that Lowe's use was encumbered by her agreement to give Larson rides. The Court also disregarded as a determinative factor the duration of use and declined to hold that temporary use cannot also be regular use.

Workers' Compensation - Appellate Division Decisions

By: Stephen W. Moriarty, Esq.

STEPHEN W. MORIARTY

Rejection of Reinstatement Offer.

Employers of injured workers have the ability to limit exposure by extending offers of reinstatement to reasonable employment pursuant to the provisions of §214(1)(A). An employee who rejects such an offer without good and reasonable cause is not entitled to receive incapacity benefits for the duration of the refusal. Thus, the Act creates a strong incentive to accept reinstatement offers, as is illustrated in two recent decisions of the Appellate Division.

In *Shaw v. Cumberland County Sheriff's Department,* App. Div. Dec. No. 17-14 the employee was injured while working as a corrections officer. Following recovery from surgery she returned to work initially in a light duty position and then to full duty. While working without restrictions, the employee resigned for reasons unrelated to the injury and later underwent additional surgery. The surgery was successful and the employee recovered to the point that she was no longer incapacitated. However, she had neither returned to work nor looked for work since having resigned.

The employee filed a Petition for Award and the presiding ALJ granted the Petition in part, awarding benefits for the period of post-resignation surgical recovery. However, the ALJ found that the voluntary resignation constituted the refusal of an offer of suitable employment which had been rejected without reasonable cause. Accordingly, the ALJ refused to award disability benefits for any period of time which the employee had been partially incapacitated.

The Appellate Division affirmed. The panel noted that in *Holt v. SAD #6,* 2001 ME 146, 782 A.2d 779 the Law Court had held that an existing employment relationship was equivalent to an ongoing offer of reinstatement, and that the resignation was a rejection of that offer without good and reasonable cause. The Division noted that the period of refusal can only end either when an employee communicates an intent to accept a reinstatement offer, or when an employee obtains higher paying work elsewhere. In this case, because the employee had never returned to work for any other employer following the resignation, the Division found that the period of refusal had not ended and that therefore the employee was not entitled to ongoing benefits.

In *St. Louis v. Acadia Hospital Corp.,* App. Div. Dec. No. 17-13 the employee had been struck on the head by a patient while working at a psychiatric facility, and left her job several years later. She then obtained lower-paying, part-time employment as a grocery store cashier. However, three days earlier the employer extended a reinstatement offer to a different position paying substantially more than the cashier position.

The employee rejected the reinstatement offer on the grounds that she had already accepted the cashier position and felt more comfortable with the work. The ALJ found that the employee had good and reasonable cause to reject the reinstatement offer on the basis that it had not actually been received until after she began working as a cashier. The employer appealed and the Division ruled that the ALJ had not considered all of the relevant and appropriate factors necessary to determine the reasonableness of the refusal. Although acceptance of post-injury employment is one factor to be considered, it is not the sole or determinative factor. Accordingly, the decision of the ALJ was vacated and the matter was remanded for further proceedings with instructions to evaluate all appropriate considerations to determine whether the reinstatement offer had been rejected without reasonable grounds.

14-Day Rule Violation.

Everyone involved in workers' compensation claims management is familiar with Ch. 1, §1 of the WCB Rules, which requires an employer to controvert a claim within 14 days of notice or knowledge, or face automatic responsibility for retroactive payment of benefits. The Appellate Division recently had an opportunity to elaborate upon the proper application of the rule.

In *Estate of Boyle v. W.W. Osborne,* App. Div. Dec. No. 17-09 the employee died from asbestos-related lung cancer and petitions for incapacity benefits during his lifetime as well as dependent's benefits were filed against the employer and two insurance companies, Firemen's Fund and American Insurance Company. American Insurance was a subsidiary of Firemen's Fund but issued policies in its own name, and in fact was the named insurer of W.W. Osborne during the time of last injurious exposure.

The Petitions were received by Firemen's Fund, but the copies sent to American Insurance were returned as undeliverable. On the eve of mediation, the Petitions were faxed to Firemen's Fund, and an NOC was filed on behalf of the employer and American Insurance. Eventually the employee filed a Petition for Order of Payment against both insurers alleging a late Notice of Controversy. The parties stipulated that American Insurance was the carrier at the time of injury and that although it was a subsidiary of Firemen's Fund it issued policies in its own name. The parties further stipulated that American Insurance did not have notice or knowledge of the claim until shortly before mediation, when Firemen's Fund filed an NOC on its behalf.

he ALJ denied the Petition for Payment on the grounds that Firemen's Fund was not the insurer and that American Insurance was unaware of the claim. The Estate appealed and the decision of the ALJ was affirmed. The panel observed that there was no authority for the proposition that notice to a parent company was equivalent to notice to a subsidiary, and that Firemen's Fund was not the responsible insurer. Most importantly, the Division ruled that because the Board rule imposed a penalty, the rule must be construed strictly.

Ordinary Activities in the Workplace.

In a recent decision the Division affirmed the long-standing doctrine that work injuries sustained while performing ordinary daily activities in the work place are not compensable. In *Fuller v. Hannaford Brothers Co.,* App. Div. Dec. No. 17-07 the employee was working in her customary position as a supermarket cashier and experienced an acute onset of low back pain when she simply turned to her right side to throw away a receipt. It was determined that she had a pre-existing condition in her lumbar spine, and therefore in order to establish legal causation the employee bore the burden of showing that employment conditions created a risk of injury above and beyond that faced in normal daily living. The ALJ found that the employee failed to sustain her burden of proof, and the Division affirmed.

In its decision, the Division held that an objective assessment of the evidence supported the finding that while the injury occurred at work, there were no employment-related activities that increased the risk of injury. Having failed to show legal causation, the employee's petition could not be granted. Claims of this nature are highly dependent upon the facts, but it is important to note that an injury is not automatically compensable simply because it occurs while working.

Permanent Impairment.

A recent decision illustrates the unpredictable barriers that can arise when an employer attempts to establish permanent impairment for durational limits purposes.

In *Gowen v. L.L. Bean, Inc.,* App. Div. Dec. No. 17-06 a compensable injury was described in a Consent Decree as having

involved the right hand, right arm, and right shoulder. The employer obtained PI assessments from two physicians, both of whom placed whole body PI at 11% and filed a Petition to Determine Permanent Impairment. When the employee testified before the Board, she stated that she had developed neck and bilateral shoulder complaints after the injury. It is not clear whether these same complaints had been expressed to either physician, or whether either physician was aware of additional symptoms having developed as a consequence of the injury. The two PI assessments did not address the neck and upper back and did not take those portions of the body into account.

The employee offered a 19% assessment from a different physician. Paradoxically, that examiner acknowledged that he had never read the 4th Edition of the AMA Guides and had not referenced the publication in assessing PI. This physician's opinion was rejected. The ALJ granted the employer's Petition and found that the employee had a 11% whole-body PI resulting from the injury.

On appeal the decision was reversed. The Division ruled that when an employer files a PI Petition, an employee must then meet a burden of production to raise an issue as to whether or not the level of PI exceeds the prevailing threshold. The employee did so by producing a report, even though the report was thoroughly discounted because it was not based upon the 4th Edition. Nevertheless, the Division noted that the employer, as the moving party, bore the ultimate burden of proof but did not do so because the medical opinions upon which it relied did not take the full scope of the injury into account. As a result, the Petition was denied even though the employee's own assessment was rejected.

> " AS A RESULT OF THIS DECISION, IT WILL BE NECESSARY FOR EMPLOYERS TO OBTAIN MODIFIED PI ASSESSMENTS IF AN EMPLOYEE AT HEARING CLAIMS THAT THERE HAVE BEEN ADDITIONAL PROBLEMS OR SYMPTOMS RESULTING FROM THE INJURY WHICH WERE NOT CONSIDERED BY AN EXAMINER WHO ASSESSED PI. "

As a result of this decision, it will be necessary for employers to obtain modified PI assessments if an employee at hearing claims that there have been additional problems or symptoms resulting from the injury which were not considered by an examiner who assessed PI. Although there may be issues concerning an employee's credibility, an employer must protect itself by obtaining a supplemental assessment that covers the areas of the body that the employee claims were affected by the injury.

Date of Injury in Gradual Stress Claims.

It can be difficult to determine with certainty the date of injury in a gradual injury claim. The Law Court has struggled with the concept, but ultimately in *Jensen v. S.D. Warren Co.*, 2009 ME 35, 968 A.2d 528 held that the date of injury in a gradual injury claim is the date on which the injury "manifests" itself. An injury may become manifest in different ways and at different times, and uncertainty is inevitable. This is particularly true with claims for gradual stress injuries.

In *Marean v. City of Portland*, App. Div. Dec. No. 16-47 the employee had worked as an EMT since 1992 and ultimately stopped working 20 years later due to a combination of physical and emotional problems. Prior to leaving he had intermittently sought treatment for PTSD and depression, and ultimately his treating physician advised that he was no longer able to perform his work due to PTSD, anxiety and depression. The employee filed a Petition for Award alleging a gradual mental injury.

Determination of the correct date of injury is critical for issues such as notice, statute of limitations, and average weekly wage. The ALJ determined that the injury did not become manifest until the date on which the employee's physician determined that he was disabled. The Appellate Division affirmed and rejected the employer's argument that the time of manifestation was earlier than the date of the disability assessment.

Although it upheld the ALJ, the Division did not rule that the date of disability must inevitably be found to be the date of manifestation. Gradual injury claims should be examined closely and every effort should be made to argue that manifestation can occur prior to disability, such as with the commencement of treatment, personal awareness of a relationship between employment activities and symptoms of stress, or accommodations implemented as the result of stress.

Conversion Disorder.

The employee had a pre-existing history of depression, anxiety, and migraine headaches. She sustained an occupational injury when she was struck on the head by falling ice, and voluntary payment of benefits was initiated. Approximately two years later the employer filed a Petition for Review and asserted that she was no longer disabled from the effects of the injury.

In *Labbe v. The Goggin Co.*, App. Div. Dec. No. 16-44 the ALJ adopted the opinion of a Section 207 examiner and found that the injury had caused both a concussion and a post-concussion syndrome. However, the ALJ also found that the post-concussion syndrome had resolved and that ongoing psychological symptoms were not causally related to the injury.

The employee appealed and argued that the psychological consequences of an injury do not necessarily end when the physical consequences have resolved. She also argued that a post-injury conversion disorder developed as a consequence of the physical injury. The appeal was denied, and the Division found that the decision of the ALJ was supported by competent evidence and that the ALJ was not compelled to find that the conversion disorder had developed as a consequence of the physical injury.

Bob Bower and Katlyn Davidson represented the employer in litigation and on appeal.

Kudos

EMILY BLOCH and **MARK LAVOIE** recently spoke at the Maine Osteopathic Association Mid-Winter Symposium and presented a program entitled "Communication Breakdown Lane: Board Complaints and Malpractice Claims". The presentation was well attended and provoked thoughtful questions from the audience, leading to a valuable exchange of information and conversations that continued for a lengthy period of time following the conclusion of the presentation.

MATT MEHALIC assembled and moderated a panel of Superior Court Justices consisting of Chief Justice Roland Cole and Justices Andrew Horton, Thomas Warren and Lance Walker to discuss the "Do's and Don'ts of Litigation" at the annual Tri-State Defense Lawyers Association spring seminar on March 23, 2017 at the Mariner's Church in Portland. Matt is the Maine Vice-President of the Association.

JENNIFER RUSH has been elected as a Member of the Board of Directors of Family Crisis Services, an organization providing resources and services to all victims and survivors of domestic violence in Cumberland County, as well as educational programming and outreach in an effort to prevent violence.

EMMA BOUTHILLETTE, Legal Assistant to Kathryn M. Longley-Leahy, has researched and written a book on the history of Biddeford, Maine. The manuscript was submitted in December, and "A Brief History of Biddeford" will be officially released on June 12, 2017. Congratulations Emma!

On February 23, **STEVE HESSERT** was the keynote speaker at the annual meeting of the Maine Merchant's Workers' Compensation Trust. His topic was Medical Marijuana. On March 23, Steve spoke before the American Law Firm Association Workers' Compensation Seminar in Austin, Texas on the topic of the Maine Opioid Law and developments in controlling pharmaceutical costs in workers' compensation cases.

STEVE MORIARTY has been re-elected as Chairman of the Cumberland Planning Board.

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