

IN BRIEF

Current Developments in Maine Law

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Peter J. DeTroy
1948 - 2016

With profound sadness and regret, we announce
the loss of our late partner, Peter J. DeTroy,
who passed away unexpectedly on May 28, 2016.

Eyewitnesses Seldom Are

BY JONATHAN W. BROGAN, ESQ.

At trial no evidence is more compelling than that of an eyewitness. A person who was at the scene watching the events, hearing the cries of the injured and the crunching of metal, helping victims, guiding rescue worker is powerful and usually very convincing before any jury. Any experienced trial lawyer knows a credible and convincing eyewitness can establish or destroy a case.

Recently, I represented a client who was involved in an automobile accident on a major thoroughfare between Maine and New Hampshire. At the time he was traveling southbound from Wells, Maine, returning to his home in New Hampshire. Traveling in the opposite direction was a 103 year old gentleman who had just left his daughter's home in southern York County and was traveling northbound towards his home in Sanford, Maine. In front of him was a vehicle that was trying to make a left-hand turn. The older gentleman was driving a 4-door sedan. My client was driving a 4-door pickup. The older

gentleman rear ended the woman making a left-hand turn causing a chain reaction accident which ended up involving, finally, four vehicles.

There were three independent eyewitnesses on the side of the road eating a piece of pizza at the convenience store that the turning woman was trying to enter. Unfortunately the older gentleman died as a result of the accident without making a statement about which way he was traveling. However, the testimony of my client was taken and he and his front seat passenger stated, truthfully, that they were traveling southbound. The family of the older gentleman testified that he had immediately left their home just before the accident and that his trip, if he was traveling as he should have been, could only have taken him northbound. The eyewitnesses testified that, in fact, all the vehicles were traveling in opposite directions to where they should have been.

At the deposition of the main eyewitness, a motorcyclist who was eating a piece of pizza at the side of the road, he was completely convinced that the truck driven by my client



JONATHAN W. BROGAN

was traveling northbound. Despite being presented with undeniable evidence that he was incorrect, his memory was firm and his testimony was, in his mind, unshakable. Unfortunately, this is not an unusual event. Recently in a trial that I was defending, an eyewitness testified that the ambulance driven by my client was traveling without siren or emergency lights. At the trial, we presented the testimony of the driver, two EMTs, and the patient in the ambulance involved in the accident. All testified that the lights were activated and the siren was working. The “eyewitness” stuck to her story despite conclusive proof that she was incorrect.

Justice Felix Frankfurter once said, “Identification testimony, even when uncontradicted, is proverbially untrustworthy.” The criminal courts have long dealt with this issue and in fact the United States Supreme Court requires trial judges to assess the reliability of any eyewitness identification by applying a five factor test. Criminal defendants have been allowed to call expert witnesses to educate jurors on the scientifically proven perceptual difficulties of humans, especially under extreme stress.

Despite the known, and proven, fact that eyewitness testimony is intrinsically unreliable, most people, especially jurors, rely on eyewitness testimony at trial. The lawyer who is presenting that eyewitness testimony feels much more confident than the person having to cross examine that testimony even when it is patently unreliable. A famous jurist once wrote:

All of us are familiar with the difficulties

THE BASIC FINDINGS ARE: ACCURACY OF RECOLLECTION DECREASES AT A GEOMETRIC RATHER THAN AN ARITHMETIC RATE (SO THE PASSAGE OF TIME HAS A HIGHLY DISTORTING EFFECT ON RECOLLECTION); ACCURACY OF RECOLLECTION IS NOT HIGHLY CORRELATED WITH THE RECOLLECTOR'S CONFIDENCE; AND MEMORY IS HIGHLY SUSCEPTIBLE -PEOPLE ARE EASILY REMINDED OF EVENTS THAT NEVER HAPPENED, AND HAVING BEEN 'REMINDED' MAY THEREAFTER HOLD THE FALSE RECOLLECTION AS TENACIOUSLY AS THEY HOLD THE TRUE ONE.

that Brian Williams encountered in 2015 when talking about his “memory” problems. Though it made Mr. Williams the source of much derision, his same testimony, presented at trial, without refutation, would have been powerful and dispositive.

Scientifically, memory is a three stage process. First, there is perception. Perception, especially perception that takes place for a short time in an unfamiliar location in a moment of great stress, is highly suspect.

Once a perception is formed, every person then retains that perception in their memory. Unlike a photograph or a recording, a person’s memory is not fixed at the time of the perception. In fact, memory is a malleable process subject to subsequent information and misinformation. In other words, a person who has a memory and begins to retain it, may have that memory changed by subsequent events, including interviews and suggestions. It has been shown through numerous tests that scientists can introduce misinformation to their subjects, destroying their memories, and creating, even in the strongest minded person, erroneous memories.

Time is also the enemy of eyewitness testimony. The further from the actual event, the less likely the person who perceived it will remember it accurately. However, anyone experienced with the trial process understands that people cling to their memories.

Permanent memories, which have been formed for years, are much more susceptible to memory illusions than recent memories. Memory illusions are the result of a human being’s need to make sense of events. For instance, in the automobile accident case with the two vehicles traveling in opposite directions, the motorcyclist eyewitness was very influenced by the fact that the driver of the sedan that struck the turning vehicle was very elderly. It was clear he was trying to protect that gentleman and make his memory fit his belief that the older gentleman could not have caused the accident. The same was true with the ambulance case in which the eyewitness, who worked at a local bus station, saw emergency vehicles traveling through this very busy intersection near the hospital on many occasions and believed they did so without due regard for other vehicles. She also believed that this ambulance, which because of the grave nature of the condition the patient within the ambulance, was

ordered to leave the scene of the accident and go to the hospital, had obviously not been operating as it should have under the law. Therefore, at many trials we are confronted with witnesses who testify, honestly, as to what they thought happened even though it didn’t.

Finally, the third stage of memory is retrieval. Each time a person is asked to remember an event, that event is retrieved and organized based upon the present situation of the eyewitness. If the eyewitness has to reconstruct the memory each and every time, the possibility of distortion is huge. Needless to say the same memory issues that can confront an eyewitness also confront jurors when they are evaluating the testimony of witnesses who are testifying at trial. The underlying biases and prejudices of jurors are meant to be discovered during voir dire, but jurors tend to believe fact witnesses who testify to what they saw, heard or felt in compelling detail even if that testimony has been shown to be incredible or lacking in truth.

Hundreds of criminal defendants have been convicted of crimes based on eyewitness testimony. It is only later that DNA testing shows that that eyewitness testimony was completely unreliable. In those situations, corroborating evidence is needed to break the jury from the belief that eyewitness testimony is infallible and must be believed at all times.

The best response to any eyewitness testimony that is irrational is to establish the basic underlying facts through corroboration. It is fascinating that even with the actual facts being established through corroboration that witnesses and their attorneys will still cling to the belief that a jury will reject the facts and accept the perception of an eyewitness, however tainted. More than once a trial has ended with the lawyer who had the better case finding that the jury did not believe his client because they believed the disputed and disproved eyewitness testimony. This is especially true in very emotional cases such as those involving the death of a highly susceptible victim (a child or an older person), a person claiming abuse at the hands of another or one claiming discrimination. It is important to remember that those kinds of highly stressful and difficult cases create in jurors the belief that they may have to “stand up” for the

victim and therefore believe what they want to believe to do so.

In especially difficult eyewitness cases, behavioral and psychological experts can be employed to explain to jurors that humans are very prone to misperception of stressful events and that they overwrite their recollections of events with misinformation and are not “lying” when presenting these perceptions at trial. Obviously if a juror can be convinced by corroborating evidence and expert testimony that a sincere eyewitness is “sincerely” incorrect in their perception then that testimony is nullified.

W.C. Field famously said “*there’s a sucker born every minute*”. Someone once observed it is important to “*tell them what they want and then give them what you tell them.*” In a trial situation, credibility is always crucial. An eyewitness, who will come into court, raise his or her

hand, and relate what they claim they saw, is always difficult to refute. However, eyewitness testimony is highly unreliable and if it is the centerpiece of the opposition’s argument, it must be refuted through corroborating evidence and, possibly, expert testimony regarding the unreliability of a person’s memory. Though many don’t want to believe it, most have had a Brian Williams moment. Nothing is more embarrassing then for someone’s “recollection” to be pointed out to be wholly or partially false. Luckily most of us don’t have network news shows and dozens of reporters recording our every move. However, reminding a juror of “Brian Williams moments” as well as the frailty of their own memory (how many of us have forgotten where are glasses are when they are still right on top of our head?) can be highly effective in helping jurors recognize

that people make up stories for any number of reasons.

The criminal courts have recognized this problem and have instructions to deal with eyewitness testimony. In civil cases, however, the law still assumes that jurors and judges can tell fact from fiction. As we all know, that is not correct. Jurors need to be told, either through other testimony, expert testimony, and in instructions from the judge that their daily experiences may not be the best preparation to evaluate the truth of eyewitness or memory based testimony and that the human memory is open to error at each of three stages or memory. Despite the jurors’ belief, eyewitness testimony is often the worst kind of testimony, not the best.

Recent Decisions From The Law Court

BY MATTHEW T. MEHALIC, ESQ.

Oral Notice Does Not Suffice Under Maine Tort Claims Act

In *Deschenes v. City of Sanford*, 2016 ME 56 (April 14, 2016), the Law Court addressed whether a person can substantially comply with the notice requirement of the Maine Tort Claims Act, 14 M.R.S. § 8107, without filing some form of written notice within 180 days after a claim accrues against a government entity. The matter arose out of the Plaintiff’s fall down stairs at the Sanford City Hall and injuries arising out of that fall.

After his fall, City employees assisted Plaintiff into the Clerk’s office, rendered him first aid, called 9-1-1, and the responding Police Officer arranged for emergency medical assistance. There was a dispute of fact regarding whether Plaintiff signed an insurance form at the Clerk’s office immediately following the fall. The City Clerk overheard the Plaintiff tell an EMT as he was leaving the building that he fell when his foot caught an uneven stair tread. One hundred seventy-eight days after his fall, Plaintiff went to City Hall and spoke with an employee in the Clerk’s office and in the Finance office. He commented to the individuals he spoke with that he knew he only had 180 days to make a claim against the City and provided medical information and bills to the City. Plaintiff conceded at his deposition that when asked directly by the Finance Director whether he was going to sue the City, he replied that he was not and that he was simply telling them he was still being treated for his injuries resulting from the fall. One hundred ninety-seven days after the fall, Plaintiff’s attorney sent a letter to the City Manager providing written notice of a claim against the City. A complaint was subsequently filed.



MATTHEW T. MEHALIC

The Superior Court entered summary judgment in favor of the City determining that Plaintiff's action were not substantial compliance within 14 M.R.S. § 8107(1), requiring written notice of a claim against a governmental entity within 180 days of the accrual of the cause of action. Plaintiff appealed on two grounds, "(1) that the substantial compliance exception to the Act's 180-day deadline is not limited to situations in which a written notice is filed within the 180-day period but is defective in some way, and (2) that he substantially complied with the statute because the City was aware of his accident and was not prejudiced by his failure to file a written notice before the 180-day deadline." *Deschenes*, at ¶ 10.

The Law Court rejected both arguments. In doing so, the Court identified the requisite information to be included in the notice and to whom the notice should be provided. *See* 14 M.R.S. § 8107(1)(A)-(E) and M.R.Civ.P. 4(d) (5). The Court also pointed to the substantial notice compliance required by subsection 14 M.R.S. § 8107(4), which provides,

Substantial notice compliance required. No claim or action shall be commenced against a governmental entity ...unless the foregoing notice provisions are substantially complied with. A claim filed under this section shall not be held invalid or insufficient by reason of an inaccuracy in stating the time, place, nature or cause of the claim, or otherwise, unless it is shown that the governmental entity was in fact prejudiced thereby.

In summary, the deficiencies with the notice must be mere inaccuracies and the government must be unable to show prejudice. *Deschenes*, at ¶ 12. Despite its recognition of the substantial compliance requirement, the Court emphasized that substantial compliance only applies when some sort of written notice has been received within 180 days of the claim accruing. In the pending matter, no written notice was received until 197 days after the claim accrued. Plaintiff conceded that no good cause existed for his failure to provide timely written notice. The Court held that "oral notice can never constitute substantial compliance with the [Maine Tort Claims] Act, even if the contents of the oral notice otherwise meet the requirements of section 8107." *Id.* at ¶ 16. Summary Judgment was affirmed in favor of the City of Sanford.

Plaintiff's Burden In Personal Injury Asbestos Litigation Remains Unchanged

In *Grant et al. v. Foster Wheeler, LLC et al.*, 2016 ME 85 (June 7, 2016), summary judgment was entered against the Plaintiffs on their complaint for negligence, failure to warn of defective unreasonably dangerous goods, and loss of consortium. The matter arose out of allegations by decedent Edward Grant that he was exposed to asbestos in the mid to late 1960s as an employee who cleaned up areas in ship construction areas. The Defendants included the seller of insulation that contained asbestos fibers used to insulate ships' pipes, a boiler and air ejector manufacturer, a pump manufacturer, and a pump and turbine manufacturer, among several others. Some of the Defendants moved for summary judgment, which was granted. The Superior Court held that Plaintiffs were unable to produce evidence to establish a prima facie case that the decedent ever breathed asbestos from the Defendants' products. The Plaintiffs appealed.

In addressing the appeal, the Law Court set forth the standard for establishment of a prima facie case in personal injury asbestos litigation to be "a plaintiff must demonstrate both product nexus, meaning that the plaintiff was exposed to the defendant's asbestos-containing product, and medical causation, meaning that such exposure was a substantial factor in causing the plaintiff's injury." *Id.* at ¶ 16. The Court identified various approaches to what burden a plaintiff must meet. The Court recognized a "frequency, regularity, and proximity test" as set forth in *Lohrman v. Pittsburgh Corning Corp.*, 782 F.2d 1156 (4th Cir. 1986), which requires "evidence of exposure to a specific product on a regular basis over some extended period of time in proximity to where the plaintiff actually worked." *Id.* at ¶18. The Court also recognized a less burdensome test, as was applied by the Superior Court in granting summary judgment to the Defendants, which required only that the plaintiff show "that the defendant's asbestos-containing product was at the site where the plaintiff worked or was present, and that the plaintiff was in proximity to that product at the time it was being used." *Id.* at ¶ 19.

The Court declined to decide whether it should adopt the more burdensome standard as set forth in *Lohrman* because it found that

the Plaintiffs' evidence failed to even satisfy the less burdensome standard applied by the Superior Court. Therefore, despite contemplation of the two different approaches, there remains uncertainty going forth as to what burden the Law Court will impose on Plaintiffs to establish a prima facie case in future personal injury asbestos litigation.

"IN THE PENDING MATTER, NO WRITTEN NOTICE WAS RECEIVED UNTIL 197 DAYS AFTER THE CLAIM ACCRUED. PLAINTIFF CONCEDED THAT NO GOOD CAUSE EXISTED FOR HIS FAILURE TO PROVIDE TIMELY WRITTEN NOTICE. THE COURT HELD THAT 'ORAL NOTICE CAN NEVER CONSTITUTE SUBSTANTIAL COMPLIANCE WITH [MAINE TORT CLAIMS] ACT, EVEN IF THE CONTENTS OF THE ORAL NOTICE OTHERWISE MEET THE REQUIREMENTS OF SECTION 8107'."

Legislature Clarifies WC Appellate Practice

BY STEPHEN W. MORIARTY, ESQ.

In *Workers' Compensation Board Abuse Investigation Unit v. Nate Holyoke Builders*, 2015 ME 99, 121 A.3d 801, the Law Court ruled that when it accepts a case for review from the Appellate Division the Court will only review the underlying decision from the ALJ and not the conclusions or findings reached by the Division. In a concurring opinion, Chief Justice Saufley encouraged the Legislature to expressly state whether it is the decision of the ALJ or of the Appellate Division which is to be reviewed on appeal by the Court, and to enact any necessary enabling legislation.

In the recently-concluded session, the Legislature accepted the Chief Justice's invitation and squarely addressed the matter.

Effective July 29, 2016, §322(1) has been amended to provide that "only a decision of the division may be reviewed on appeal". Accordingly, from the effective date of the legislation forward, when the Court grants a Petition for Appellate Review it will consider only the decision of the Appellate Division and not that of the ALJ who decided the case following hearing. It is unclear whether the new standard will apply to a Petition for Appellate Review filed before the effective date but not granted by the Court until after the effective date.

Kendall Receives President's Award

BY DANIEL L. CUMMINGS, ESQ.

Adrian Kendall received the President's Award at a ceremony held in conjunction with the Maine International Trade Center's Trade Day held on May 26 in Portland. MITC was celebrating its 20th anniversary.

The MITC President's Award is given to an individual or organization that has displayed exceptional support to MITC. Adrian, who is a lawyer in the firm's commercial and international practice group, has been active in MITC since 2000. During that time Adrian has assisted and provided legal counsel to MITC and its administration leadership, participated in and briefed participants on numerous MITC-coordinated trade missions and led many trade and legal education programs in Maine.

Adrian was also recognized for his work as Honorary Consul to the Federal Republic of Germany in assisting with many cooperative trade, education, and workforce efforts with the State of Maine, particularly concerning renewable energies and the Trans-Atlantic Climate Bridge initiative. He has also been an annual presenter to the Best of New England Life Science Consortium regarding German and European markets and has worked closely with MITC on both export development and international business attraction efforts.

NH&D congratulates Adrian in receiving this significant and well-deserved recognition.



Maine International Trade Center
President, Janine Bisailon-Cary,
Adrian P. Kendall, Esq.

New Federal Law Offers Different Avenue for Trade Secret Protection

BY CARL E. WOOCK, ESQ.

In almost every industry, companies big and small rely on trade secrets to maintain an edge in a competitive marketplace. Trade secrets occupy a broad category of information that is commercially beneficial to a business and not generally known to the public. Some famous examples readily come to mind: the formula for Coca Cola or the secret behind the “nooks and crannies” in Thomas’ English Muffins. Other trade secrets are more conventional (and less tasty): for example, a customer list for a Kennebunk plumbing company, purchasing information for a Bangor hardware store, or a consumer market analysis performed by a local credit union, all of which may be protected by trade secret law. Unlike patent, trademark, or copyright protections, which eventually expire, trade secrets last for as long as the secret is kept. Once that secret is lost, though, it is lost forever.

Until very recently, trade secrets were also different from trademark, copyright and patent law for another reason: trade secrets were primarily an object of state law. That is no longer the case. On May 11, 2016 President Barack Obama signed into law the federal Defend Trade Secrets Act of 2016 (“DTSA”). DTSA gives trade secret owners a new option to bring lawsuits for trade secret misappropriation using federal law and the federal courts. It has been called “most important piece of intellectual property legislation that Congress has passed in several years.” That might overstate the law’s significance, but this is certainly a development that businesses should take seriously.

What are the practical implications of this new law? Well, if a former employee marches over to a competitor with a confidential list of clients, a business owner might now bring a misappropriation of trade secrets claim in federal, rather than state, court. There are some conditions. The business can only make use of the federal remedies

if “the trade secret is related to a product or service used in, or intended for use in, interstate or foreign commerce.” DTSA uses an existing definition of “trade secret” from the Economic Espionage Act—that is, “all forms and types of” various categories of information, regardless of how stored, if “the owner thereof has taken reasonable measures to keep such information secret” and “the information derives independent economic value, actual or potential, from not being generally known” to the public. From there, the definition of “misappropriation” is borrowed from the Uniform Trade Secrets Act adopted in most states, primarily defined as the “acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means,” or the “disclosure or use of a trade secret of another without express or implied consent by a person” who “used improper means to acquire knowledge of the trade secret.” If these conditions apply to the employee hawking a confidential list of clients, federal remedies may be on the table.

Federal Remedies Are Both Familiar and New

DTSA largely tracks with the remedies provided by the Uniform Trade Secret Act. Specifically, DTSA’s remedies include injunctive relief, actual damages, restitution, and exemplary damages of up to two times the actual damages, as well as attorneys’ fees. In contrast to the uniform state laws, DTSA permits ex parte civil seizure of property to prohibit the dissemination of a trade secret without advance notice to the other side in “extraordinary circumstances.” If prosecuted by the federal government, an offender also faces penalties from \$5 million to the greater of \$5 million or three times the value of the stolen trade secret.

The headline, though, is that these remedies are available in federal court, which



CARL E. WOOCK

offers an intuitive upside. Without a uniform federal law, a company seeking to curtail the misappropriation of trade secrets would rely on one set of law in Maine (i.e., the Uniform Trade Secrets Act, which Maine has adopted), but an entirely different set of laws in Massachusetts (which is one of just two states that has not adopted Uniform Trade Secrets Act). Under that scheme, it is possible that the same misuse of company secrets would result in inconsistent outcomes depending on which state hears the case. Ideally, DTSA will provide more predictability to businesses bringing this claim, while still permitting companies to use those long-standing state remedies when preferable.

Holding Back High Praise

On the other hand, DTSA is in some ways less wave-making than it could have been. For starters, one could argue that the law does not improve the legal landscape in a substantive way. The federal government already had the power to enforce trade secret laws through criminal and civil actions, and state laws are mostly uniform and consistent in offering private remedies. In that sense, the immediate consequence of DTSA is to complicate and disrupt existing trade secret law. Trade secret litigation was already capable of being tedious and expensive, but with dual layers of state and federal law, cases are bound to become more complicated, as well as more costly.

Further, DTSA missed an opportunity to tailor protections for victims of cyber-hacking and cyber-espionage, a growing area

of concern among some companies. Recent high-profile corporate hacks and espionage exploits have targeted Sony Pictures, DuPont, and Lockheed Martin, but smaller companies (often with comparatively less cyber-security) are also vulnerable to these types of attacks. A cynic might suggest that DTSA is merely the result of a dysfunctional Congress coming together to needlessly federalize legal protections already covered in near-uniformity by the states.

What Business Owners Need to Know Today

The main reason DTSA is generating some buzz is not because of what the law says, but rather the fact that it is going to affect many businesses. Exactly how it will affect businesses is less clear. Like with any new law, opinion is divided as to how DTSA's provisions will operate in the real world. For example, the ex parte civil seizure provision has the potential to offer swift and decisive justice to a victim of trade secret misappropriation, but it can also become a controversial weapon for bad faith actors who seek to unsettle their competitors.

Hopefully, most businesses will not need to discover first-hand how the federal law plays out in practice. But two things are certain: first, DTSA will usher more claims into federal courts, either as a standalone claim or as related breach of contract or unfair competition claims (which are state law matters) make it to federal court via supplemental jurisdiction when attached to a federal law claim. Second, DTSA reaches almost every business, from your brother-in-law's general contracting company to your uncle's accounting firm. Arguably every business has methods, data, or information that might be considered trade secrets, and every business with trade secrets can be economically harmed if that information is stolen or misused. Business owners must therefore act in advance if they hope to take full advantage of the law.

On that note, DTSA protects employees who disclose trade secrets in response to a court order or government investigation. In order to be eligible for all of the remedies created by DTSA, employers must provide notice of the statute's whistleblower immuni-

ty in any "contract or agreement with an employee that governs the use of a trade secret or other confidential information." That means confidentiality, non-disclosure, and non-compete agreements must be updated accordingly. Failure to do so may mean that a successful plaintiff cannot recover exemplary damages or attorneys' fees as otherwise allowed by the statute.

Any business that may be affected by DTSA should also take this time to update policy manuals to include the appropriate immunity language. Form employment agreements used with employees who handle confidential business information will need to be modified. While agreements executed prior to May 12, 2016 are not required to have the whistleblower notice language, any businesses that entered into an employment agreement after May 12, 2016 will need to go back and amend those agreements to enjoy the full protection of DTSA. After all, if a company finds itself in the unfortunate situation of needing to use DTSA, it probably wants to have all of those brand new federal remedies at its disposal.

Pitfalls in Using Nonprofits as a Return to Work Option

BY LINDSEY M. SANDS, ESQ.

A key method to reduce exposure on any claim following a work-related injury is to be able to provide the injured employee with accommodated work. This option, when feasible, benefits all involved. It allows employers to limit indemnity costs associated with any injury while getting necessary work done. It also provides earnings to employees all while assisting in faster recoveries with less risk of deconditioning and psychological setbacks which are common for employees who are out of work indefinitely. However, often an employer does not have the ability to bring back a worker to perform necessary work within the employer's organization. For such cases, a crop of third party services have emerged which provides "transitional

employment programs" in which employees are placed in either jobs which are not open to the general public or volunteer programs. In both cases, the employer pays the employee to simply keep them acquainted with work experience and in touch with the daily work routine.

These services can still benefit both employers and employees. However, there are risks involved in using such services in the context of litigation as a means to limit an employee's entitlement to workers' compensation benefits. The potential risk was recently highlighted by a case before the Appellate Division, *Sylvester v. Marco Petroleum Industries*, App. Div. Dec. No. 16-16. Mr. Sylvester was receiving total incapacity benefits



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per Decree when the employer offered to pay the employee \$7.50 per hour to volunteer at Threads of Hope, a non-profit organization under the auspices of Catholic Charities of Maine. Mr. Sylvester accepted this offer and began to volunteer approximately six hours per week. The employer then filed a Petition for Review and Reduce Benefits pursuant to §205(9)(B)(2). After filing the Petition, the Employer reduced benefits based on receipt of the wages the employee was paid for volunteering at the non-profit. Mr. Sylvester then filed a Petition for Penalties with the Abuse Investigation Unit (“AIU”) contesting the reduction of benefits and arguing that his income did not represent genuine wages. The employee specifically requested imposition of a fine in the amount of \$200 per day pursuant to 39-A M.R.S.A. §324(2) for each day the employer/insurer was not paying him benefits reflecting total incapacity as set forth under the Decree.

The employee requested that the AIU Hearing Officer “take some testimony on this case or, based upon the written submissions, conclude that this is not a real job at all.” According to Board Rules, the AIU will not allow testimony on a penalty proceeding absent “extraordinary circumstances.” Citing this rule, the AIU Hearing Officer decided the case based upon written submissions and declined to impose a fine under §324(2). He found that the employer’s unilateral reduction was proper “based on his earnings at Threads of Hope.” The AIU Hearing Officer subsequently declined to issue further findings and the appeal to the Appellate Division followed. The Appellate

Division vacated the underlying decision and remanded the matter back to the AIU for other evidentiary hearing, or an order staying the proceedings, until the Administrative Law Judge had decided the employer’s pending Petition for Review.

As the Appellate Division pounced on a procedural error of the AIU Hearing Officer only, the case does not give guidance as to whether the employer’s reduction of benefits based on Mr. Sylvester’s “earnings” was appropriate or not. This case should, however, serve as a reminder to employers as to the risks and potential for litigation when using nonprofit providers as de facto return to work options. Litigation is ripe if the return to work offer is merely a sham with no genuine work being performed.

The Law Court further limited the use of these transitional work assignments in the case of *Avramovic v. RC Moore Transportation*, 2008 ME 140. In *Avramovic*, an employer used a vendor to basically create a job for the injured worker. When the injured worker refused the job, the employer argued in favor of forfeiture of benefits for “refusal of a bona fide offer of reasonable employment.” The Hearing Officer (now referred to as an Administrative Law Judge) found that forfeiture was not appropriate as the record included “very little evidence offered” about the job or what the employee would be doing. He further found that the employer did not prove that “the position offered is one that is actually available in the competitive labor market.” An appeal followed and the Law Court upheld this finding. *Avramovic* establishes that created jobs and/or assignments

which provide no benefit to the employer will not be considered the equivalent of real work for purposes of the forfeiture provision under 39-A M.R.S.A. §214(1)(A).

This does not mean that any such program should be viewed as useless. As noted above, there are certainly benefits both mental and physical to providing these accommodated work options. However, the employee’s participation (or lack thereof) should not be used as the sole basis for pushing litigation. Moreover, such programs should be considered only when there is no viable return to profitable work with the employer.

“THIS CASE SHOULD, HOWEVER, SERVE AS A REMINDER TO EMPLOYERS AS TO THE RISKS AND POTENTIAL FOR LITIGATION WHEN USING NONPROFIT PROVIDERS AS DE FACTO RETURN TO WORK OPTIONS. LITIGATION IS RIPE IF THE RETURN TO WORK OFFER IS MERELY A SHAM WITH NO GENUINE WORK BEING PERFORMED”

Career Change for Kevin Gillis

We announce that Kevin Gillis has left NH&D and the active practice of law to pursue an exciting and challenging new phase of his career. Kevin now serves as the President of the Lunder Foundation, a charitable family foundation based in Maine with offices in Portland. The Lunder Foundation supports education, the arts, and medicine. Kevin will also serve on the Advisory Board

of the Lunder-Dineen Health Education Alliance of Maine, which offers free education to health professionals and communities in Maine.

Kevin has been a leading member of the workers’ compensation defense bar for over 35 years, and his skills and legal expertise will be greatly missed. In addition to maintain-

ing an active litigation practice, Kevin has served simultaneously as Executive Director of the Workers’ Compensation Coordinating Council and the Maine Council of Self Insurers, and the Administrator of Maine Self Insurance Guarantee Association. We at NH&D wish him all the very best in his new position.

Workers' Compensation – Law Court and Appellate Division Decisions

BY STEPHEN W. MORIARTY, ESQ.

Maximum rate.

Workers' compensation practitioners are familiar with the maximum rate provisions of §211 and the annual adjustments that must be made to the rate. The Law Court only rarely accepts appeals from decisions of the Appellate Division, but recently it decided a case involving application of the maximum rate in the context of multiple compensable injuries.

In *Freeman v. NewPage Corporation*, 2016 ME 45 (March 31, 2016) the employee sustained an initial occupational injury in 2007 at a time when her average weekly wage was high enough to trigger the max rate. She then sustained a second injury in 2011 which resulted in several months of total incapacity and was paid benefits at a 100% rate based upon the 2007 injury. Although the employee received benefits at the max rate, she argued that she was entitled to additional compensation for the same period of incapacity resulting from the 2011 injury. The presiding ALJ determined that the employee was ineligible for benefits in excess of the max rate regardless of the number of injuries. This decision was unanimously affirmed by the Appellate Division, and the Law Court accepted the case for review.

The Court focused its analysis upon legislative intent and held that §211 was designed to impose a maximum benefit level without any exceptions or contingencies based upon the overall number of injuries. The Court acknowledged that the Legislature

could have included language within §211 creating a separate max rate entitlement for each date of injury, but because it did not do so the Court refused to find such an intent in the face of clear and unambiguous language. As a result, the Court affirmed the decision of the ALJ and ruled that the max rate is the highest weekly benefit available to an injured worker regardless of the number of compensable injuries sustained.

Penalty proceedings.

The Board's Abuse Investigation Unit was established pursuant to §153(5) for the purpose of investigating complaints of fraud, illegal or improper conduct, or any violation of the Act or Board rules. In a recent decision the Appellate Division addressed both the procedural discretion of an AIU hearing officer as well as the problems generated when proceedings are pending simultaneously before both the Board and the AIU.

In *Sylvester v. Marco Petroleum Industries, Inc.*, App. Div. Dec. No. 16-16 the employee was awarded benefits for total incapacity by decree and at some point thereafter the employer offered to pay the employee to work several hours per week at a non-profit organization. Once the employee accepted the offer, the employer filed a Petition for Review and reduced benefits to offset the earnings. For a more complete discussion of this aspect of the case, see the article titled "Pitfalls in Using Nonprofits as a Return to Work Option" by Lindsey M. Sands in this edition of In Brief.



STEPHEN W. MORIARTY

“ON APPEAL THE APPELLATE DIVISION EXPRESSED CONCERN ABOUT PARALLEL PROCEEDINGS PENDING BEFORE THE BOARD AND THE AIU, AND RULED THAT ‘BEST PRACTICES’ DICTATED THAT THE AIU SHOULD DEFER ACTION ON A PENALTY REQUEST UNTIL SUCH TIME AS UNDERLYING LITIGATION BEFORE THE BOARD HAD BEEN RESOLVED.”

While the employer's Petition for Review was pending before the Board, the employee filed a Petition for Penalties with AIU under §324(2) challenging the reduction of benefits and arguing that the income did not represent genuine wages. WCB Rules, Ch. 15, §6(2)(C) does not permit testimony on a forfeiture proceeding unless "extraordinary circumstances" exist. The AIU hearing officer decided the case based only upon written submissions and declined to impose a penalty. In response to a Motion for Findings of Fact the hearing officer once again refused to hold an evidentiary hearing and affirmed his original decision.

On appeal the Appellate Division expressed concern about parallel proceedings pending before the Board and the AIU, and ruled that "best practices" dictated that the AIU should defer action on a penalty request until such time as underlying litigation before the Board had been resolved. Apart from this issue, the Division also found that "extraordinary circumstances" existed which required a testimonial hearing before the AIU and that the AIU hearing officer committed legal error by refusing to schedule a hearing. As a result, the decision of the AIU hearing officer was vacated and was remanded either for a testimonial hearing or a stay of the proceedings pending the outcome of the Petition for Review.

Ordinarily ALJs and AIU hearing officers are given broad discretion in determining procedural issues in matters pending before them. The Division did not indicate why, in its view, "extraordinary circumstances" existed which mandated a hearing, nor did the Division itemize any guidelines to indicate when a hearing must be held. As a consequence of this decision, it is anticipated that AIU hearing officers may be more inclined to schedule hearings when unusual legal or factual issues exist.

Idiopathic fall.

In workers' compensation terminology an idiopathic fall is a fall which is determined to have occurred as the result of some internal weakness or personal illness unrelated to one's employment. It has been held that an idiopathic fall onto a hard level surface is not compensable. *Riley v. Oxford Paper Company*, 149 Me. 418, 103 A.2d 111 (1954). However, idiopathic falls from a height or onto sharp or dangerous objects present a different case,

and in such situations a fall may be compensable if employment is determined to have placed an employee at an increased level of risk of injury.

In *Atwood v. Sloane Group, LLC*, App. Div. Dec. No. 16-13, the employee was working on a level surface when she experienced a seizure. She alleged that she struck her head on a desk when she fell, thereby causing post-concussive symptoms and dental problems. The ALJ concluded that the injuries were the result of the idiopathic seizure, and ruled that the injuries were unrelated to employment. A Motion for Findings of Fact was denied and the employee appealed.

The Appellate Division agreed that the fall had been idiopathic in nature and did not disturb that finding. However, the Division found that the ALJ had not adequately addressed the issue of whether the employee actually struck her head on a desk when she fell, and if so whether the incident created an employment-related cause of the injuries sustained. In order to determine whether the injury arose out of the employment, the Division vacated the decision of the ALJ. The matter was remanded for further findings on whether the employee struck the desk while falling and whether that impact was an employment-related cause of the injuries.

Permanent impairment.

In two separate decisions panels of the Appellate Division consisting of the same ALJs reached confusing and seemingly inconsistent decisions on whether the date of MMI and the extent of PI can be changed following Board decrees. The statute defines the terms as follows:

Maximum medical improvement.

"Maximum medical improvement" means the date after which further recovery and further restoration of function can no longer be reasonably anticipated, based upon reasonable medical probability. (§102(15).

Permanent impairment.

"Permanent impairment" means any anatomic or functional abnormality or loss existing after the date of maximum medical improvement that results from the injury. (§102(16).

As is clear, PI cannot be determined until MMI has been reached.

In *Bailey v. City of Lewiston*, App. Div.

Dec. No. 16-11 the employee sustained a respiratory injury and the Board determined that he had reached MMI and had sustained 32% whole person PI resulting from the injury. Benefits for partial were awarded, and continued beyond the 520 week durational limit by virtue of the extent of PI. The extent of PI had originally been assessed by a §312 physician. The employer filed a Petition for Review and another Petition to Determine Extent of PI based upon a report from the same §312 physician who performed a new exam and found that there had been such a significant degree of intervening medical improvement that PI was now 0%. The ALJ found that the employer had established a comparative change of circumstances sufficient to overcome the binding effect of the original decree and assessed PI at 0%. The ALJ also granted the Petition for Review and ordered a termination of benefits for partial on the grounds that the durational limit had been exceeded.

The Appellate Division vacated the decision of the ALJ and denied the two petitions filed by the employer. The panel held that a sufficient showing of a change of circumstances can overcome the res judicata effect of a prior Board decree, and noted that an employee can establish an increase in the level of PI provided that there is a sufficient showing of comparative worsening. However, the panel observed that whether the level of PI can be decreased based upon comparative improvement "is a novel issue", and held that the statutory definition of MMI precluded a reconsideration of the date of MMI when an employee's condition improves. Thus, the panel strictly adhered to the concept of res judicata notwithstanding evidence of a significant improvement in the employee's medical condition provided by the same §312 examiner. Accordingly, the initial determination of MMI and PI was determined to be "final" and not subject to revision.

In *Gilbert v. S. D. Warren*, App. Div. Dec. No. 16-12 (issued just 5 days later), there had been a Board determination of 8% PI resulting from an occupational injury. Several years later the employee filed both a Petition for Review and a Petition to Determine Extent of Permanent Impairment and relied upon post-decree reports prepared by a physician who had not previously examined the em-

ployee. The ALJ ruled that the employee's testimony regarding symptoms was not credible, and that medical opinion based on that testimony could not support a finding of a change of circumstance.

The Division affirmed the ALJ and ruled that the employee had failed to meet his burden of proof. However, the panel strongly implied that if the employee had submitted sufficiently persuasive evidence of a comparative worsening of his condition, the extent of PI could have been increased.

Unlike the *Bailey* decision, the panel did not hold that the date of MMI established by the initial decision was a final determination on that subject.

These two decisions create ambiguity on the finality of a Board determination of MMI and PI, but suggest that while an employee may establish a comparative worsening of his or her medical condition after MMI, an employer cannot as a matter of

law establish an improvement.

The employer in *Bailey* has filed a Petition for Appellate Review with the Law Court.

Retirement presumption.

In two companion decisions the Division has solidly upheld the application of the retirement presumption set forth in §223 of the Act. In *Wing v. NewPage Corporation*, App. Div. Dec. No. 16-5, the employee returned to work in a modified duty position on a full-time basis prior to retiring and receiving nondisability retirement benefits. The employee asserted that the presumption did not apply because a §312 examiner found that the decision to retire was compatible with recommended limitations and that the employee was "forced" to work beyond his restrictions until he reached an age qualifying him for employer-paid health insurance. Citing *Cesare v. Great Northern Paper Company*, 1997 ME 170, 697 A.2d 1325, the Division found that a person is considered to be

"actively employed" even when working in a modified duty position, and that this is all that is required to trigger the presumption.

In *Hallock v. NewPage Corporation*, App. Div. Dec. No. 16-6, the employee similarly had returned to work in modified duty status until the point at which he retired. A §312 exam took place seven weeks following retirement, and the physician found that the employee's decision to stop working was consistent with applicable restrictions. The ALJ found that the employee failed to rebut the presumption and on appeal the employee argued that he was not "actively employed" at the point of retirement by virtue of the §312 examiner's limitations. The Division rejected the employee's appeal based upon the undeniable fact that the Employee was in fact working in his customary employment at the time of retirement and that the post-retirement §312 assessment did not change that reality.

Rovzar Feted by Maine Credit Union League

BY DANIEL L. CUMMINGS, ESQ.

Rod Rovzar received the League Chairman's Award at ceremonies held in conjunction with the Maine Credit Union League's annual convention held on May 20 in Portland. He was only the 15th recipient of this prestigious award, the last one having been presented in 2004.

Rod was recognized for his significant contributions to the League and Synergent over a nearly 40 year period. Jim Lemieux, Chairman of the League, and John Murphy, President of the League since 1992, both praised Rod for being an indefatigable supporter of Maine credit unions throughout his career. John also highlighted the fact that Rod played a major role in all of the chief initiatives of the League and Synergent over the last 25 years. John was effusive during tribute to Rod, highlighting the qualities Rod always brought to the mix: a bright legal mind, unparalleled business acumen, and a great sense of humor.

John wrapped up his remarks by emphasizing that over his long career, Rod developed close relationships and deep friendships with numerous people involved in the credit

union movement, which will last well beyond Rod's legal career.

NHD proudly congratulates Rod in receiving this award.



Jim Lemieux, Chairman of the League, Roderick R. Rovzar, John Murphy, President of the League

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NH&D Recognized Among the Best in *Benchmark Litigation*

The 2016 edition of Benchmark Litigation's "The Guide to America's Leading Litigation Firms and Attorneys" has listed NH&D among the top 7 of the "Highly Recommended" law firms in the State of Maine. The following attorneys have received individual recognition.

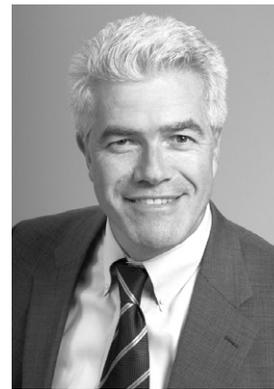
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NH&D Recognized by Chambers & Partners

Chambers & Partners USA 2016 has once again recognized **Mark Lavoie** as a “**Star**” attorney, having received exceptional recommendations from fellow practitioners.

The following NH&D attorneys have received the “**Ranked Lawyer**” distinction in the publication.



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