INBRIEF

Current Developments in Maine Law

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Index

Rental Car Insurance: Are You Paying for Coverage You Already Have?

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By: Samuel G. Johnson, Esq.

It's not every day an attorney tells you to decline insurance coverage for a potential loss. Well brace yourselves, because that is exactly what I am going to do in this article.

Whether your car is in the shop for repairs or you are taking a long vacation far away from home, chances are you have rented a car and will do so again. Given your experience renting cars, you are familiar with the exchange that will likely take place each time you step up to the counter to rent a car. You are given the rental contract, but before you sign on the dotted line the salesperson is pushing hard for you to elect certain additional coverages for your vehicle, such as a Collision Damage Waiver. They invoke fear by explaining the expenses you could incur in the event of an accident if you decline the Collision Damage Waiver and you damage the rental vehicle. Fear not, they tell you, because for an additional cost of anywhere from $10.00 to $30.00 a day—depending on your location and the rental company—you will not have to worry about incurring these potential expenses.

So should you purchase the Collision Damage Waiver for your rented vehicle? In that moment not having previously considered the question, and given the compelling sales pitch from the agent behind the counter, you may not feel confident in your answer. On the one hand, you are a responsible driver and don't want to pay what could be upwards of $30.00 a day extra for the Collision Damage Waiver. On the other hand, accidents happen, that's why they are called accidents, right? Even an extra $30.00 a day is far less than what you would have to pay if you somehow damaged the

rented vehicle. So what do you do?

Decline the Collision Damage Waiver! Chances are you already have coverage for this type of situation, and despite the compelling sales pitch from the agent behind the counter, you do not need to purchase the Collision Damage Waiver. It is important to note at the outset that the answer to this questions is not one size fits all.There are several considerations you should undertake before making your decision. This article, however, should equip you with the tools needed to confidently answer this question when the time comes.

What is a Collision Damage Waiver?

So what is a Collision Damage Waiver? Despite what you may think, it is not insurance. It sounds like you are paying for coverage on the vehicle, but a Collision Damage Waiver, or a Loss-Damage Waiver, is actually what the name implies, it is a waiver. What this means is for the additional fee the rental company waives its right to pursue you in the event there is damage to the rented vehicle or it is stolen. Sounds like a good deal right? Although such a waiver may sound like all-encompassing protection, be aware of the fine print.

Most Collision Damage Waivers contain limitations and exceptions. For example, the damage or loss will likely not be covered if the vehicle is driven by someone who was not listed as an authorized driver, the driver has consumed any alcohol—whether or not he or she is over the legal limit—or the car is driven in a careless or reckless manner. While these don't sound like limitations that would be difficult to avoid, consider the following hypotheticals:

The Single Glass of Wine Hypothetical: It's another cold winter in Maine, so you and your spouse decide that it would be nice to take a trip somewhere warm, so you book a week-long vacation in Florida. After your flight lands, you step up the counter to rent a car. After a compelling sales pitch from the agent, you decide to purchase the Collision Damage Waiver from the rental company, sign on the dotted line, and rush out to check in to your hotel. After you get settled in you and your spouse head out for a nice dinner. At dinner you have of a glass of wine. After dinner, while leaving the parking lot, you back up into a light pole and damage the bumper and frame of your rental car. Although you are not over the legal limit, because you had a glass of wine at dinner you are likely on the hook for the damage despite purchasing the Collision Damage Waiver.

The Designated Driver Hypothetical: Consider the same hypothetical with a slight twist. Before leaving dinner you remember that you will not be covered for any damage caused to the rental vehicle because you have consumed alcohol. Even though you are not over the legal limit, you have your spouse who has not consumed any alcohol drive. While leaving the parking lot they back up into a light pole and damage the bumper and frame. Again, despite your spouse being a licensed driver, you are likely on the hook for the damage despite purchasing the Collision Damage Waiver because you did not list your spouse as an authorized driver.

Even if you determine that these situations are avoidable and you would like the Collision Damage Waiver, don't check that box just yet. You may already be covered, and that coverage would likely protect you in the two hypotheticals discussed above. To determine if you already have coverage you will want to consult your personal auto policy.

Where to look:

All motorists in Maine are required to carry, at a minimum, liability and uninsured motorist coverage. Typically, there are four potential coverages available in a personal auto policy.

- **Mandatory Liability Coverage** insures the owner of an automobile for damages he or she becomes legally liable for due to bodily injury or property damage caused by an accident of the insured vehicle.
- **Medical Payments Coverage** covers medical expenses incurred because of bodily injury that is sustained by an insured and caused by a motor vehicle accident.
- **Mandatory Uninsured Motorist Coverage** covers the insured for compensatory damages for bodily injury that the insured is legally entitled to recover from the owner or driver of an uninsured motor vehicle. In Maine, this coverage must match the motorists liability limits.
- **Physical Damage Coverage** covers damage or loss to the covered vehicle itself. Typically, there are two types of Physical Damage Coverage that an insured can elect to carry, Collision Coverage and Comprehensive Coverage. Collision Coverage covers loss stemming from the upset of the covered vehicle or its impact with another vehicle or object. Comprehensive coverage is often defined as other than collision coverage, meaning damage to the vehicle stemming from something other than upset or impact with another vehicle or object.

So are you already covered?

Chances are, depending on your personal auto policy, you are already covered for damage to the rented vehicle. In ascertaining whether you can decline a Collision Damage Waiver when renting a vehicle due to existing coverage, you will need to look to the Physical Damage Coverage section of your personal auto policy. It is important to note that this

"IF YOU HAVE ELECTED TO CARRY PHYSICAL DAMAGE COVERAGE, YOU ARE LIKELY ALREADY COVERED, AND YOU CAN CONFIDENTLY DECLINE THE COLLISION DAMAGE WAIVER AND SPEND YOUR $30.00 A DAY ON SOMETHING YOU WILL ENJOY."

type of coverage is not required, so the first thing you need to determine is if you carry this type of coverage. If you do, great, you may be one step closer to confidently declining the Collision Damage Waiver. What should you be looking for if you do carry this coverage? Here are a few excerpts from different personal auto policies:

Example 1: The standard ISO Policy includes an endorsement with language pertaining to rented vehicles, and provides coverage for "direct and accidental loss to any "non-owned auto which is a private passenger auto, pick up or van, or trailer, rented to you or any family member for a term of 45 continuous days or less, by any person or organization, including franchises, in the business of providing private passenger autos, pickups, vans or trailers to the public." This coverage applies to direct and accidental loss to a rented vehicle and equipment, minus the applicable deductible, caused by *collision* or *other than collisio*n so long as that coverage has been elected by the insured.

Regarding loss of use expenses, the endorsement provides that the insurer "will pay, without application of a deductible, for verifiable loss of use expenses that are for a continuous period of up to 30 days and for which [the insured] becomes legally responsible in the event of loss to a rented vehicle." If the loss is caused by other than theft, the coverage is limited to the period of time reasonably required to repair or replace the rented vehicle.

If you elected this coverage, and you verify that your present circumstances fall within definitions outlined in the policy, a Collision Damage Waiver is unnecessary.

Example 2: Other policy language from a major auto insurer states that if you carry Collision Coverage, the insurer "will pay for sudden, direct, and accidental loss to a covered auto ...or a *non-owned auto,* and its *custom parts or equipment* resulting from a collision." The policy defines a *non-owned auto* as "an *auto* that is not owned by or furnished or available for the regular use of *you* or a relative while in the custody of or being operated by you or a relative with the permission of the owner of the auto or the person in lawful possession of the *auto*," and defines collision as "the upset of a vehicle or its impact with another vehicle or object."

If you have Comprehensive Coverage, the insurer will cover loss to a *non-owned auto* that is not caused by collision. The policy then lists the types of damage that qualify as not caused by collision. If you elected to carry Comprehensive Coverage under this policy, the insurer will also pay for loss of use damages that you are legally liable to pay if a non-owned auto is stolen up to a combined maximum of $900.00 not exceeding $30.00 per day.

Again, if you have elected this coverage a Collision Damage Waiver is likely duplicative of the coverage you already have, and have already paid for.

Example 3: The last example, from a national auto insurer, states that if the insured elects to carry Collision Coverage the insurer "will pay for *collision loss* to the *owned auto* or *non-owned auto* for the amount of each *loss* less the applicable deductible." The policy defines *collision loss* as "loss that is caused by upset of the covered auto or its collision with another object, including an attached vehicle." *Non-owned auto* is defined by the policy as "an automobile or *trailer* that is not owned by or furnished for the regular use of either *you* or a *relative*, other than a *temporary substitute auto*. An auto that is rented or leased for more than 30 days will be considered as furnished for regular use." If the insured elects to carry Comprehensive Coverage, the insurer will pay "for each *loss,* less the applicable deductible, that is caused by other than collision to the *owned auto* or *non-owned auto.*" The policy then lists losses that qualify as other than collision.

This policy, too, will provide coverage for damage to a rented vehicle, less the applicable deductible, so long as the vehicle is not rented for more than 30 days and the damage falls within the definition of a collision or other than collision. No Collision Damage Waiver is needed.

Deciding whether your policy provides coverage necessarily requires determining first if you have elected to carry Physical Damage Coverage. This information will be contained in your policy's Declarations Page. Then you must determine whether the rental vehicle qualifies as a covered auto under the definitions provided by your policy. This will require cross-referencing the specific coverages with the definitions provided by your policy. Lastly, you should check if any limitations or exclusions apply to the Physical Damage Coverage.

After reviewing your personal auto policy if you are still unsure whether you are covered for damage to a rented vehicle, you can always call your insurance agency to ask about coverage for rented vehicles under your policy.

Additional Considerations:

As mentioned previously, the answer to whether you can decline a Collision Damage Waiver is not one size fits all. There are additional considerations you should make. For example, if you do not have a personal auto policy, the Collision Damage Waiver or some other form of coverage is advisable.

Depending on your policy, what appears to be a covered loss may nevertheless be excluded. For example, if you are using the rented vehicle to conduct business many policies seek to exclude coverage for the loss. Even with coverage, you will likely have to pay a deductible in the event damage is caused, that amount, depending on the length of your rental, may far exceed the price of the Collision Damage Waiver.

Another consideration is your location. Many personal auto policies do not provide coverage if you are renting a vehicle outside of the United States or Canada. Additionally, some policies provide coverage for loss of use while others may limit the amount covered or exclude it entirely. This means that a rental agency could potentially come after you for the loss of use of the vehicle while it is out of commission even though your policy covers the actual damage to it.

Conclusion:

With this information you now know where to look to determine for yourself whether you are already covered for potential damage to a rented vehicle. You have reviewed your personal auto policy or spoken with your insurance agent and can feel confident when you step up to the counter and are met with the fear-inducing sales pitch from the rental company. If you have elected to carry Physical Damage Coverage, you are likely already covered, and you can confidently decline the Collision Damage Waiver and spend your $30.00 a day on something you will enjoy, rather than coverage you already have.

Recent Decisions From The Law Court

By: Matthew T. Mehalic, Esq., CPCU

MATTHEW T. MEHALIC

Protections Against Disclosure Of Information In FOAA Requests

In *Marcel Dubois v. Department of Environmental Protection et al.,* 2017 ME 224 (Dec. 7, 2017), the Law Court addressed whether the Department of Environmental Protection's (DEP) withholding of certain documents in response to a Freedom of Access Act (FOAA) request was appropriate. Plaintiffs sought documents and information from the DEP related to Dubois Livestock, Inc., a composting facility. Included in the information sought were records containing identities of people who made complaints to the DEP about odors emitted from the facility.

The Superior Court ruled that the DEP's withholding of documents and information was appropriate under the work-product doctrine and the informant identity privilege, M.R.Evid. 509(a). The Law Court affirmed the Superior Court's decision with regard to the documents and information withheld under the work-product doctrine. Those documents consisted of drafts of an administrative search warrant, drafts of a warrant application, and emails concerning the drafting process and how to execute the warrant if granted. The Superior Court, and the Law Court agreed, that these documents were prepared in "anticipation of regulatory enforcement or other compliance-related litigation." *Dubois,* at ¶ 17.

Regarding documents and information withheld under the informant identity privilege, the DEP had argued that the complainants were "informants" and therefore the informant identity privilege included in M.R.Evid. 509(a) applied. M.R.Evid. 509(a) provides that the State "has a privilege to refuse to disclose the identity of an informant... [A]n 'informant' is a person who has furnished information relating to or assisting in an investigation of a possible violation of law to... [a] law enforcement officer conducting an investigation."

Although the DEP had not raised as a basis for the withholding of documents and information Maine's Intelligence and Investigative Record Information Act, the Law Court considered the Act in its review. The Act provides in pertinent part, "a record that is or contains intelligence and investigative record information is confidential and may not be disseminated by a Maine criminal justice agency... if there is a reasonable possibility that... inspection of the record would... [d]isclose the identity of a confidential source." 16 M.R.S. § 804(4). Title 16 M.R.S. § 803(7) defines "intelligence and investigative record information" as "information of record collected by or prepared by or at the direction of a criminal justice agency... while performing the administration of criminal justice." Because the statutes governing the DEP provided that violation of a law administered by it could result in the commission of a Class E crime the Law Court did not rule out the possibility that the Intelligence and Investigative Record Information Act confidentiality provision could apply in addition to the informant identity privilege under M.R.Evid. 509(a). However, the Law Court could not determine based on the factual record before it whether the DEP was conducting an investigation and whether its agents were acting as law enforcement officers in the matter, such that the Act would apply. Therefore, the Law Court remanded the decision regarding the documents and information withheld under the informant identity privilege to the Superior Court for factual findings as to whether the DEP was conducting an investigation and whether its agents were acting as law enforcement officers.

This decision is a reminder of the procedures that must be followed when attempting to obtain information from state agencies pursuant to a FOAA request and what information may be shielded from production by the various evidentiary, common law and statutory protections.

In reaching its holding, the Court reviewed the procedure for a FOAA request and the right to appeal when an agency declines or fails to allow inspection or copying of the requested information. Essentially, a person has the right to copy and inspect any public record pursuant to 1 M.R.S. §

408-A. When there is a declination by the agency, the person making the request has the right to appeal to the Superior Court. 1 M.R.S. § 409(1). If it is determined that the agency has failed to establish "just and proper cause" for refusing the inspection or copying the Superior Court "shall enter an order for disclosure." *Id.* In order to make the determination as to whether the refusal to allow inspection or copying is appropriate, the Court will conduct an *in camera* review.

The Court also identified an amendment to the FOAA appeal process effective October 15, 2015, that did not apply to the Plaintiffs appeal. Prior to October 15, 2015, appellants were entitled to a trial *de novo* in the Superior Court. With the amendment to 1 M.R.S. § 409(1), the appeal process now requires that the Superior Court conduct a "review, with taking of testimony and other evidence as determined necessary." 1 M.R.S. § 409(1). The amendment gives the court discretion as to how to conduct the appeal and resolve the dispute.

"THIS DECISION IS A REMINDER OF THE PROCEDURES THAT MUST BE FOLLOWED WHEN ATTEMPTING TO OBTAIN INFORMATION FROM STATE AGENCIES PURSUANT TO A FOAA REQUEST AND WHAT INFORMATION MAY BE SHIELDED FROM PRODUCTION BY THE VARIOUS EVIDENTIARY, COMMON LAW AND STATUTORY PROTECTIONS."

No Actual Malice In Statements Made

In *Bruce Plante et al. v. Ronald P. Long*, 2017 ME 189, (Nov. 30, 2017), on appeal to the Law Court was whether an individual acted with actual malice when he made allegedly libelous statements about others. Jonathan W. Brogan, Esq. and Joshua D. Hadiaris, Esq. of Norman, Hanson & DeTroy, LLC successfully argued that there was no actual malice and the Superior Court decision in favor of Long was affirmed.

The case arose out of alleged libelous emails sent by Long to the chief and captain of the Berwick Police Department, the Berwick Board of Selectman, and Bruce Plante's employer Gagnon Propane concerning Bruce and Dennis Plante's threatening and intimidating conduct toward Long and others. At all relevant times, Dennis Plante was the Fire Chief for the Town of Berwick and Bruce Plante was the Assistant Fire Chief for the Town of Berwick. In response to the alleged libelous emails, the Plantes filed a Complaint against Long including eight counts of libel and one count of punitive damages.

In consideration of the appeal, the Law Court assumed that the statements made by Long were false and confined the issue to whether the Plantes made a prima facie showing of actual malice. It was stipulated that the Plantes were public figures due to their roles in the Town of Berwick Fire Department. As such, the elements for libelous defamation were,

> [d]iscussion of public officials and public figures on matters of public concern, the U.S. Supreme Court has declared, deserves special favor in a democratic society, and thus such discussion is subject to a conditional privilege – the "First Amendment privilege" – that can be overcome only by clear and convincing evidence of [actual malice, i.e.,] knowledge or disregard of falsity.

Plante, at ¶ 10. In order for the Plantes to prevail on their appeal, it was incumbent upon them to present evidence that at least one of Long's false statements was made with "'actual malice' – that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* The Court looked to whether there was any evidence that Long knew that the content of the emails he sent was false or whether he "acted with a high degree of awareness of their probable falsity." *Id.*

The Court recognized that there was a history of contention between the Plantes and Long. However, in applying the above elements and burden of proof, the Court held that the history and an inference of ill will, in conjunction with evidence of falsity of the statements was insufficient to support a finding of clear and convincing actual malice. The Court reasserted a long standing principle in defamation cases that a fact-finder may not infer "that a defendant was consciously untruthful from evidence that her accusations were in fact false even if that evidence coincides with indicia of the defendant's ill will towards the plaintiff." *Id.* at ¶ 12. To do so would merge the elements of falsity and actual malice into one.

The Court rejected the Plantes argument that a less rigorous standard should be used in order to find evidence of actual malice. The Plantes cited to authority from other jurisdictions where actual malice was inferred, but the Court identified that in those cases the defamatory conduct arose out of events that spoke for themselves and which there could be no ambiguity about what occurred. One such example was from an autobiography of Chris Kyle where it was claimed that Kyle had punched Jesse Ventura. Because there had never been any kind of physical altercation between the two, the United States District Court for the District of Minnesota in *Ventura v. Kyle*, 8 F.Supp. 3d 1115 (D. Minn. 2014), held that Kyle's statement of punching out Ventura did not relate to an ambiguous event and, therefore, an inference of actual malice could be drawn from the falsity of the statement. *Plante*, at ¶ 16.

The Court rejected that the events and statements at issue between the Plantes and Long were unambiguous, that there could not have been any misperception, or that the events never occurred. Therefore, the less rigorous standard for inferred actual malice was rejected and summary judgment in favor of Long was affirmed.

Workers' Compensation: Law Court and Appellate Division Decisions

By: Stephen W. Moriarty, Esq.

STEPHEN W. MORIARTY

Employment Status.

In its second workers' compensation opinion of 2017, the Law Court addressed the determination of employment status in a unique factual context. *In Huff v. Regional Transportation Program,* 2017 ME 229, ____ A.3d ____, the Petitioner was a volunteer driver for a non-profit agency which provided transportation services to disabled and low-income clients. He received no income for his services. At the onset of the relationship the Petitioner signed a Memorandum of Understanding which expressly specified that volunteer drivers were not considered to be employees and that no employer-employee relationship existed between the parties. Although the Petitioner received no income, he was paid mileage reimbursement for the use of his personal vehicle at the rate of $.41 per mile. According to him he was able to retain approximately one-half of the mileage reimbursement as income after paying for gas and vehicle maintenance services.

The Petitioner was severely injured in a motor vehicle accident in August 2012 and filed a Petition for Award. By agreement of the parties the issue of employment status was tried separately, and the ALJ found that the Petitioner was not an employee within the meaning of the Act. The Appellate Division affirmed (*Huff v. Regional Transportation Program,* Me. W.C.B. No. 16-40 (App. Div. 2016)), and the Law Court granted Mr. Huff's Petition for Appellate Review.

On appeal the Court held that payment of income in exchange for services rendered is necessary to the existence of an employment relationship, and framed the controlling issue as follows:

> Whether a mileage reimbursement to a "volunteer" can constitute remuneration when it is significant enough to exceed the volunteer's immediate expenditures.

The Petitioner argued that the rate of mileage reimbursement was sufficiently high to constitute the payment of income necessary to establish an employment relationship.

The Court rejected the argument and agreed with the Appellate Division that there was no payment of income even though the Petitioner was able to operate his vehicle at a cost less than the mileage reimbursement rate. The Court ruled that the statutory definition of "employee" clearly requires that a worker must receive remuneration in return for services in order to be entitled to compensation benefits under the Act, but that mileage reimbursement does not qualify as income. Therefore, because the Petitioner was not an "employee" within the scope of the Act, the Court affirmed the denial of the Petition for Award.

Challenge to §201(3) Rejected.

In its final decision of 2017 an *en banc* panel of the Appellate Division consisting of seven ALJs unanimously denied an appeal brought by an employee in a case in which a claim of a gradual mental injury had been raised. In *Henderson v. Town of Winslow, Me.* W.C.B. No. 17-46 (App. Div. 2017), the claimant had a pre-existing emotional condition resulting from an occupational event which was barred by the statute of limitations. However, the claimant asserted a new gradual emotional injury related to interpersonal events at work, and also alleged that the injury was an aggravation of a pre-existing condition. The ALJ denied the stress injury claim on the grounds that the employee failed to meet the demanding burden of proof under Section 201(3).

Following the close of the evidence in the underlying litigation, the employee argued for the first time in her position paper that applying Section 201(3) would violate the equal protection clauses of both the United States and Maine Constitutions, and would also violate the Americans with Disabilities Act. The argument was made in a brief portion of an otherwise lengthy position paper and was asserted without substantial legal analysis or supporting authority. In denying the Petition for Award the ALJ did not comment upon the issues which were raised for the first time following the close of the evidence.

The employee then filed a Motion for Findings of Fact, but in

her proposed findings she did not raise either the constitutional or ADA issues. The ALJ did not change her decision. In a similar fashion, when the employee appealed to the Appellate Division she did not list these arguments in her Notice of Intent to Appeal as required by the WCB Rules. Ultimately, the employee argued before the Appellate Division that the ALJ committed reversible error in failing to address or act upon the alleged constitutional issues pertinent to Section 201(3).

In denying the employee's appeal the Appellate Division observed that long-standing established legal procedure prevents a party from raising issues for the first time on appeal, even though they may arguably be of constitutional significance. In effect, the Division ruled that the employee had waived her arguments by failing to raise them in a timely fashion and by doing so only in a brief and insubstantial manner without focused and developed legal argumentation.

> Therefore, we conclude that Ms. Henderson forfeited consideration of her equal protection and ADA arguments both by raising them belatedly, doing so in a perfunctory manner, as well as by failing to seek additional findings or conclusions regarding them.

Accordingly, the Division did not address the merits (or lack thereof) of the employee's constitutional objections to Section 201(3).

The Division also rejected the employee's argument that the burden of proof by clear and convincing evidence required by Section 201(3) should not be applied when a pre-existing condition is present. The Division found that Section 201(3) applies equally to new stress injuries as well as to those which may be an aggravation or exacerbation of a prior condition. Therefore, apart from any arguable constitutional issues, the Appellate Division upheld the clear and convincing standard mandated by Section 201(3) for all types of gradual emotional injuries.

Steve Moriarty represented the employer in litigation before the Board and on appeal.

Post-*Bailey* Decisions

In *Bailey v. City of Lewiston,* 2017 ME 160, 168 A.3d 762, the Law Court ruled that after a PI determination has been made by the Board, an employer cannot seek to lower the assessment in a subsequent proceeding based upon a change in medical circumstances. However, in its opinion the Court in the broadest possible language ruled that once the level of PI has been determined by the Board the issue can never be re-litigated by either party. Thus, the Court held that the doctrine of res judicata prevents an employee from seeking to increase a prior PI determination and also prevents an employer from seeking to decrease the assessed level.

In two decisions the Appellate Division has had an opportunity to comment upon the scope and application of the *Bailey* decision. The landmark significance of *Bailey* has now been firmly established.

Occasionally in written opinions appellate courts make comments which, strictly speaking, are not necessary to support the decision in the particular case under appeal. An extraneous comment by an appellate court is referred to by the Latin phrase *obiter dictum* (plural: *dicta*), and the term describes an assertion or a statement by a court which is essentially superfluous. Statements which are *dicta* are generally not considered to be binding or to have precedential effect. After the Court issued its decision in *Bailey*, there was uncertainty within the legal community as to whether the ruling would apply to employee attempts to increase PI, for the reason that the case only involved an attempt to decrease PI.

The issue has now been put to rest by the Appellate Division. In *Somers v. S.D. Warren Co.*, Me. W.C.B. No. 17-38 (App. Div. 2017), a Board decree had established the level of PI resulting from the injury at 7%. As the durational limit approached, the employer filed a Petition for Review seeking to terminate benefits, and the employee responded by arguing that there had been a subsequent worsening of the medical condition which justified an increase in the rating. The ALJ found that there was no comparative evidence of a change and granted the employer's Petition for Review, allowing the termination of benefits. The employee appealed.

The case was briefed and argued before the *Bailey* decision was released and the Division then requested the parties to submit additional briefs. At this stage the employee argued that the language of *Bailey* preventing an attempt to increase PI was *obiter dictum.* The Division affirmed the ALJ and rejected the employee's contention. As the Division ruled:

> The issue in *Bailey,* as framed by the Court, was whether the Workers' Compensation Act allows the board to revise a previously established impairment rating. It answered that question in the negative without distinguishing between upward and downward revisions. Therefore, pursuant to *Bailey,* the ALJ did not err when declining to revise the 7% rating assigned to Ms. Somers' knee in the 2008 decree.

The Division therefore rejected the employee's argument that a portion of the *Bailey* Court's decision was merely *dicta.*

"THE COURT RULED THAT THE STATUTORY DEFINITION OF "EMPLOYEE" CLEARLY REQUIRES THAT A WORKER MUST RECEIVE REMUNERATION IN RETURN FOR SERVICES IN ORDER TO BE ENTITLED TO COMPENSATION BENEFITS UNDER THE ACT, BUT THAT MILEAGE REIMBURSEMENT DOES NOT QUALIFY AS INCOME."

Similarly, in *Puiia v. Newpage Corp.*, Me. W.C.B. No. 17-36 (App. Div. 2017) the employee sustained separate respiratory injuries in 2001 and 2004 and also a gradual orthopedic injury to several portions of the body in 2005. In a 2008 Decree the employee was awarded ongoing benefits for partial incapacity based upon the two respiratory injuries.

The employee then filed Petitions to Determine the Extent of Permanent Impairment for the three injuries, and the parties entered into a Consent Decree establishing 19% PI resulting from the combined effects of all dates of injury. The Consent Decree did not recite individual impairment assessments pertinent to each date of injury.

"THE COURT HELD THAT THE DOCTRINE OF RES JUDICATA PREVENTS AN EMPLOYEE FROM SEEKING TO INCREASE A PRIOR PI DETERMINATION AND ALSO PREVENTS AN EMPLOYER FROM SEEKING TO DECREASE THE ASSESSED LEVEL."

At a later date the employer filed Petitions to Determine the Extent of Permanent Impairment with respect to the two respiratory injuries, requesting the Board to assign a PI percentage to the injuries individually. The presiding ALJ denied the petitions on the grounds that the res judicata effect of the 2010 Consent Decree prevented the Board from further intervening to assign specific percentages on a per-injury basis.

The Appellate Division affirmed the decision of the ALJ and specifically relied upon *Bailey*. The Division found that the 2010 Consent Decree was a valid and final adjudication of the PI issue, and that *Bailey* prevented the employer from seeking individual assessments post-decree, and that it was precluded from re-opening the issue after there had been a valid and final Board determination.

These two decisions clearly indicate that the Board will follow the broad language of *Bailey* and will reject post-decree attempts to revise a prior determination of PI.

Average Weekly Wage and Employment Status.

In most cases incapacity benefits are based upon the average of the employee's earnings received during the 52-week period preceding the injury. In some cases there may have been changes in the nature or type of an injured worker's employment during the 52 weeks. However, in a recent decision the Appellate Division ruled that not every change in pre-injury employment status will preclude the use of the standard averaging method.

Years ago the Law Court held in *Fowler v. First National Stores*, Inc., 416 A.2d 1258 (Me. 1980) that where an employee had been promoted from a part-time clerk to a full-time produce manager one week before she was injured, she had acquired a new occupation at the time of the injury and the earnings received as a part-time clerk should not be considered in calculating the average weekly wage. The Appellate Division was called upon to consider the applicability of *Fowler* in a slightly different factual context.

In *Winslow v. Aroostook Medical Center,* Me. W.C.B. No. 17-33 (App. Div. 2017) the employee had worked full-time as a registered nurse for the employer for many years prior to an undisputed August 2014 right shoulder injury. At some point in the spring and summer of 2014 the employee took maternity leave, and when she returned to work in July she chose to work on a part-time basis. However, there were no changes in her duties or responsibilities as a registered nurse. Thus, she was working on a part-time basis when injured.

In calculating the pre-injury average weekly wage, the ALJ averaged all sums earned during the 52-week period preceding the injury. The employer argued that shortly before the injury the employee had established a new earning capacity when she switched from full-time to part-time status, and that the earnings of comparable part-time employees should have been considered in determining the wage. In other words, the employer argued that the ALJ committed error in combining earnings as a full-time and part-time nurse to establish the average weekly wage.

The Appellate Division rejected the argument and found that the claimant did not acquire a new occupation with different responsibilities when she returned to work from maternity leave. On the contrary, there had merely been a reduction in hours without a corresponding change of duties or assignments. The Division affirmed the ALJs finding that averaging all earnings during the one year period prior to the injury was a fair and reasonable means of calculating the employee's future earning capacity, and that no error was committed in considering all earnings.

In summary, there must be more than a simple switch from full-time to part-time status prior to an injury before an ALJ may resort to earnings of comparable employees to determine the average weekly wage.

Benjamin Gilman Joins NHD as "Of Counsel"

BENJAMIN P. GILMAN

We are pleased to announce that Benjamin P. Gilman joined the firm in November of 2017 as *Of Counsel*. Ben served as General Counsel and Senior Government Relations Specialist for the Maine Chamber of Commerce for the past 8 years. He is one of the leading government relations attorneys in Maine, with a unique combination of more than 20 years' experience in Maine politics, lobbying and legal counsel. In his capacity at the Chamber, Ben focused primarily on utilities and energy, natural resources, education/workforce development, and business regulation issues representing Maine businesses before the Maine Legislature, Executive Branch, Federal Officials and in regulatory proceedings.

Prior to his work at the Chamber, Ben served as Director of Government Affairs with the Maine Energy Marketers Association, Director of Government Affairs for Associated Builders and Contractors, and as a legislative staffer at the state and federal level, including as Director of Outreach and Economic Development for US Senator Olympia Snowe.

Ben graduated from the University of Maine at Orono in 1997 with a B.A. in Political Science. He attended law school at the University of Maine School of Law, where he served in the Cumberland Legal Aid Clinic and worked as a clerk for the Maine District Court. He obtained is J.D. in 2001.

Ben holds a certificate in International Law from Santa Clara University School of Law. He enjoys spending time in the outdoors, hunting and fishing at the family's camp in Benedicta. Originally from Westbrook, Ben now resides in Gorham with his wife, Jessica and their four children.

2017 New England Rising Stars and New England Super Lawyers

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

We are also pleased to announce that Steve Hessert, Mark Lavoie, and Jim Poliquin have been designated as Super Lawyers for ten consecutive years.

2017 New England Super Lawyers Rising Stars

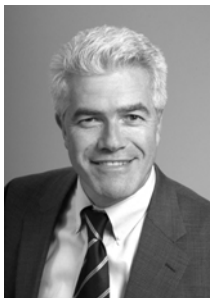
Joshua D. Hadiaris
General Litigation

Kelly M. Hoffman
General Litigation

Matthew T. Mehalic
Insurance Coverage

Darya I. Zappia
Intellectual Property Litigation

2017 New England Super Lawyers



Mark G. Lavoie
Designated as among the top 100 2017 New England Super Lawyers in the category of Personal Injury Medical Malpractice: Defense

Jonathan W. Brogan
Personal Injury General; Defense

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

Stephen Hessert
Workers' Compensation

John H. King, Jr.
Workers' Compensation

Theodore H. Kirchner
Personal Liability: Defense

Thomas S. Marjerison
Personal Injury General: Defense

Russell B. Pierce
Civil Litigation: Defense

James D. Poliquin
Insurance Coverage

Jennifer A.W. Rush
Prof. Liability Med Mal: Defense

Kudos

BOB BOWER was recently appointed by Governor Lepage to serve as the primary employer representative on the Maine Board of Arbitration and Conciliation. Bob had previously served as one of the alternate employer representatives.

DAVE HERZER will chair the Maine Professional Ethics Commission again for 2018. The Professional Ethics Commission is comprised of 8 attorneys who meet monthly to volunteer their time and experience to render formal and informal written advisory opinions to the Court, Board, Grievance Commission, bar counsel and members of the Maine bar involving the interpretation and application of the Maine Rules of Professional Conduct applicable to lawyers. Dave has been an active member of the Commission since 2010 and served as Chair in 2017.

MARK LAVOIE has been elected State Chair of the American College of Trial Lawyers for the State of Maine.

KELLY HOFFMAN was selected to join a panel of attorneys presenting before a group of Maine employers during the Central Maine Human Resources Association 2018 Annual Law Update in January. Kelly focused her presentation on the use of cell phones and their impact on the workplace, including suggested policies for use of both personal and company-issued cell phones. She further discussed how proper policy can protect the employer, specifically citing to a fatal distracted driving accident in which the court found the employer not liable under a theory respondeat superior.

MARK LAVOIE AND JEN RUSH recently spoke to nurses at the MaineGeneral Medical Center about medical malpractice claims and Board of Licensure complaints, as well as some of the particular risks associated with charting in the electronic medical record.

STEVE MORIARTY has been appointed to a second 3-year term on the Cumberland Planning Board.

KATLYN DAVIDSON and her husband, Andrew, welcomed their first child, Henry, in September 2017.

Fall 2017 issue

Return Service Requested

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