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WC Appellate Division Decision issued on November 13, 2017 – Scope of Bailey Decision

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 condition. 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 relitigated by the parties. Thus, the Court held that the doctrine of res judicata prevents an employee from seeking to increase a prior PI determination and prevents an employer from seeking to decrease the assessed level. 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 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 the rest by the Appellate Division. In *Somers v. S.D. Warren Company*, 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 justifying an increase in the rating. The case was litigated before the *Bailey* opinion issued. 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 Appellate Division 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% impairment rating assigned to Ms. Somers' knee in the 2008 decree.

Any doubt about the scope of the *Bailey* decision has now been resolved, and the attempt to limit *Bailey* solely to petitions seeking to decrease the PI level has been rejected.