NORMAN, HANSON & DETROY, LLC

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Current developments in Maine law

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The problem of notice after default under the reach and apply statute

BY JAMES D. POLIQUIN

In the recent decision of *MacDowell v. MMG Insurance Company,* 2007 ME 56 (May 1, 2007), the Law Court held that an insurer who received first notice of a lawsuit after default was liable for the judgment despite not having an opportunity to contest the issue of the insured's liability. This case did not involve an insurance coverage issue, and therefore a number of problems that arise in reservation of rights cases were not applicable.

The claimant MacDowell was walking his bicycle along Route 100 when struck by a car driven by Corey Burrill. Burrill was driving his then-girlfriend's father's car with permission. Counsel for MacDowell engaged in settlement negotiations with MMG, the insurer of the vehicle. MMG took the position that there was no liability because the claimant was in the middle of the road, intoxicated and wearing dark clothing. After these negotiations failed, MacDowell commenced a civil action against Burrill and did not notify MMG or provide MMG with a copy of the complaint. Burrill eventually was served and failed to answer the complaint or notify MMG. After a default was entered, counsel for MacDowell notified MMG of the pending civil action and entry of default. MMG obtained counsel to defend Burrill and filed a motion for relief from the default. The motion for relief was denied because Burrill did not have good cause for not answering the complaint. Following a hearing on damages, MMG unsuccessfully appealed the denial of the motion for relief from default.

MacDowell then commenced a reach and apply action against MMG. The reach and apply statute by its language technically requires only notice of the accident before judgment. MMG had notice of the accident prior to suit, and also notice of the suit after entry of default on liability, but not default judgment. In prior cases, the Law Court held that due process requirements protected an insurer from liability under the reach and apply statute, regardless of its technical applicability, if the insurer did not have a "meaningful opportunity" to be heard on the merits. MMG maintained that it had no opportunity to be heard on the merits of the significant liability issue, and therefore, obviously had no "meaningful opportunity."

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MacDowell argued that the procedural right to file a motion for relief from default was itself a "meaningful opportunity" regardless of whether the motion succeeded and the default was lifted. The Superior Court agreed with MacDowell, and MMG appealed.

In the earlier decision of *Michaud v. Mutual Fire, Marine & Inland Insurance Co.,* 505 A.2d 786 (Me. 1986), the Law Court addressed the issue of whether an insurer could be liable under the reach and apply statute if it received first notification after the entry of default on liability, but prior to default judgment. In that case, the insurer made no attempt to lift the default after being placed on notice. The Law Court held that the insurer could be liable for the judgment under those circumstances. MMG argued in *MacDowell* that the *Michaud* case was distinguishable because the insurer in *Michaud* made no effort to obtain a "meaningful opportunity" to litigate the merits by seeking relief from default. The Law Court in *Michaud* refused to

speculate about whether that motion for relief would or would not have been successful. The insurer could not be heard to complain if it did not avail itself of a procedural avenue to obtain relief that may have resulted in the opportunity to litigate all issues on the merits. MacDowell argued that *Michaud* was directly on point, and that whether an insurer walked away from the case or actively sought relief from judgment was immaterial.

In a 3 - 2 decision, the Law Court majority held that the *Michaud* case was on point and the mere existence of a right to file a motion for relief from default under the rules constituted a "meaningful opportunity" to be heard on the merits regardless of whether that motion was successful. Justice Alexander dissented, with Chief Justice Saufley joining that dissent, stating that "allowing MacDowell to recover over $100,000, rewards him with a significant windfall for his own drunken and careless acts, and violates the due process rights to fair notice that MMG has under the reach and apply statute."

The majority decision does not contain any explanation as to why the procedural right to file a motion for relief from default, standing alone, is a "meaningful opportunity" to be heard on the merits when the motion for relief is doomed to fail because the insured defendant had no good cause for ignoring the complaint. Neither does the majority opinion articulate what might distinguish a mere opportunity from a "meaningful opportunity," since due process requires that the opportunity be meaningful. Since the *MacDowell* decision does not hinge upon any facts peculiar to that case, it probably applies to every situation in which an insurer's first notification of a civil action is after the entry of default, regardless of what may have transpired earlier, and regardless of whether the claimant's counsel knew the identity of the liability insurer and intentionally avoided notification to the insurer until after default. The full Law Court is comprised of seven justices, and five justices sat on the *MacDowell* case with the end result being a 3 - 2 majority decision. Presentation of the same issue to a full Law Court at least theoretically could produce a different result without any of the justices changing their position. The only other relief from this decision is amendment of the reach and apply statute to prohibit enforcement of any judgment against an insurer who has no notice of a civil action until after a default, at least if the insurer has unsuccessfully exercised all rights available to seek relief from that default.

Insurers can take a couple of steps to lessen the impact of this decision. First, the insurer should take every opportunity after being placed on notice following an accident to provide every potentially responsible party who may be an insured with specific contact information in the event that insured receives either a letter or complaint. These steps are especially important when the tortfeasor who may have coverage is not the named insured or even a family member. Employees of named insureds or permissive users of named insureds' vehicles otherwise would have no information as to who the insurer may be or whether they have any coverage. In addition to providing very specific contact information at the outset, which would include the name of the adjuster, phone number, address and even e-mail, that information should be forwarded again to the appropriate individuals once it becomes apparent that the filing of an action is more likely or imminent, either because of failed settlement negotiations or some other reason. These steps should be taken even in situations where significant coverage issues exist, but where the insurer likely would have an obligation to defend. In short, insurers want to maximize the chances that an insured or potential insured will in fact advise the insurer on a timely basis when they are served with a complaint.

Another possible approach is to elicit from claimant's counsel at the outset of settlement negotiations a commitment that counsel will provide the insurer with a copy of the complaint at the time it is filed or served, whichever occurs first. Most claimant's counsel desire resolution of cases early on by settlement if at all possible, and therefore probably would agree to such a condition to settlement negotiations. If not, at least the civil action probably will be commenced more quickly, which generally enhances substantially the likelihood of the insurer being placed on notice once service is achieved. Although no Maine law exists on the specific issue, the failure of claimant's counsel to give notice of service or suit to an insurer in breach of an actual agreement to do so could alter the result reached in the *MacDowell* case.

In the long term, the real remedy lies in the legislature. The reach and apply statute is archaic on a significant number of issues and should be repealed, and a new statute enacted that addresses modern day issues and circumstances, protecting the rights of all parties. □

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is published quarterly to inform you of recent developments in the law, particularly Maine law, and to address current topics of discussion in your daily business. These articles should not be construed as legal advice for a specific case. If you wish a copy of a court decision or statute mentioned in this issue, please e-mail, write or telephone us.

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Smith v. Hawthorne: The Supreme Court continues to struggle with the Maine Health Security Act

By Jonathan W. Brogan and Jennifer A.W. Rush

On June 7th, the Law Court published its second opinion in the case brought by James Edward and Sheryl Smith against Catherine Hawthorne, M.D., which can be found at *Smith v. Hawthorne*, 2007 ME 72 *(Smith II)*. A discussion of *Smith v. Hawthorne*, 2006 ME 19 *(Smith I)*, can be found in our Spring 2006 newsletter. Essentially, the plaintiffs claimed that Dr. Hawthorne was negligent in her treatment of James Smith. The medical malpractice prelitigation screening panel unanimously found that Dr. Hawthorne had deviated from the standard of care, but unanimously concluded that the deviation was not the proximate cause of Mr. Smith's alleged injuries.

The parties proceeded to a trial, which resulted in a hung jury. During the second jury trial, the trial court followed the direction of 24 M.R.S.A. § 2857(1) and admitted the panel's finding as to causation, but not as to deviation from standard of care. The jury returned a defense verdict, which the Law Court vacated after concluding that the trial court's admission of one panel finding and exclusion of the other denied the Smiths their right to a "fair" jury trial.

In the third trial, Dr. Hawthorne objected to the introduction of either one of the unanimous panel findings. The trial court admitted both of the panel's findings and the jury returned a verdict for the Smiths. On appeal, Dr. Hawthorne contended that the trial court erred by admitting the panel's findings over her objection. Chief Justice Saufley and Justices Clifford, Calkins, and Levy agreed and vacated the judgment. The majority reasoned that the wording of 24 M.R.S.A. § 2858(2), which states that "[i]f the unanimous findings of the panel as to either [negligence or causation] are in the negative, the claimant must release the claim . . . *or be subject to* the admissibility of those findings," demonstrates that if the panel unanimously finds in favor of the defendant on either standard of care or causation, the defendant has control over whether the panel's findings will be admitted at trial.

Extraordinarily, *Smith II* produced two concurring opinions and a dissenting opinion. Justice Levy wrote separately to address the dissenting opinion's contention that *Smith II* is contrary to the holding in *Smith I*. Justice Levy accurately points out that the two opinions addressed different sections of the Maine Health Security Act and therefore, the decisions are not conflicting. Chief Justice Saufley and Justice Clifford also wrote a separate concurrence to express their opinion that the prelitigation screening process has become cumbersome and at odds with the intentions of the Legislature. The fact that these opinions were expressed in the Court's decision is unfortunate, considering that *Smith II* will be, for most people, the only thing they ever read or rely on to shape their view of the functionality of the prelitigation screening process.

The fact is, *Smith v. Hawthorne* is a rarity. For the vast majority of cases, the prelitigation screening process operates exactly as it should. In fact, there is no evidence that it did not function properly in this case. Given that the panel found against the doctor on standard of care, for the doctor on causation, and that the three trials resulted in a hung jury, a verdict for the defendant and then a verdict for the plaintiff, clearly, this was not one of the cases that either side should have felt compelled to settle. The prelitigation screening process only took up thirteen months of the almost eight years that have passed since the Smiths filed their claim. The court process is responsible for the other six and a half years.

The concern is that this concurrence is going to prompt the Legislature to change the prelitigation screening process. Changes to the prelitigation screening process, if they are needed, should only be prompted in one of two ways. First, the Legislature might need to make a change based on the Court's determination that a portion of the statute is unconstitutional. Second, the Legislature might undertake a change in response to concerns raised by those who the screening process affects – i.e., plaintiffs, doctors, insurance companies and the attorneys who advocate on behalf of them. The Legislature should not feel forced to evaluate a legislatively-created process based on concerns from the judicial branch when those concerns are not based on the constitutionality of the applicable statutes. As Justice Levy wrote in his dissent in *Smith I*, which was joined by Chief Justice Saufley and Justice Clifford, "[i]t is not within [the Court's] prerogative to judge the wisdom of the statute or the public policy that underlies it absent a violation of the United States or Maine Constitutions." *Smith I*, 2006 ME 19, ¶ 53.

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JENNIFER A.W. RUSH

What is also unfortunate is the Court's use of the term "negligent," both in *Smith I* and *Smith II*. Both opinions are replete with references to the panel's determination that the doctor was "negligent." The panel, however, never determined that Dr. Hawthorne was negligent. As Professor David Gregory of the University of Maine Law School often said, "negligence does not occur in the air." As the Court has stated many times, negligence is comprised of four elements: duty, breach, causation, and dam-

ages. The Legislature has asked the pre-litigation screening panel to determine whether three out of four of those elements exist. 24 M.R.S.A. § 2855(1)(A) & (B). In this case, the panel determined the appropriate standard of care and determined that there was a deviation from that standard of care. The panel unanimously concluded, however, that there was no causation. Thus, no negligence. As Justice Cardozo wrote in *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 248 N.Y. 339 (Ct. App. N.Y. 1928):

> Negligence in the abstract, apart from things related, is surely not a tort, if indeed it is understandable at all. Negligence is not a tort unless it results in the commission of a wrong . . . . One who seeks redress at law does not make out a cause of action by showing without more that there has been damage to his person.

Thus, it is unfortunate that the majority, concurrences, and dissent all imply that Dr. Hawthorne was a negligent doctor. Using the term "negligent" suggests that whenever doctors breach the standard of care but there is no causation and thus, no recoverable injury, that they are somehow getting away with something and that we need to amend the system to solve this problem. *See Smith II*, 2007 ME 72, ¶ 32 (JJ. Alexander and Silver, dissenting) ("This case demonstrates the difficult, costly, and time-consuming burdens an individual must overcome to recover for injuries caused by negligent doctors and why it is economically impossible to seek redress for any but the most severe injuries caused by medical negligence.").

Smith II intimates that the Court feels that medical malpractice plaintiffs are not getting a fair shake. The history of jurisprudence following the passage of the Health Security Act proves otherwise. The system works and has been hailed and adopted by other states. Maine has never had the malpractice crisis seen in so many other states where doctors are leaving practice because malpractice premiums are so high.

It is too early to determine what the impact of *Smith II* will be on the legislatively-created medical malpractice pre-litigation screening process. Hopefully, the Legislature will listen to the opinions of those who are actually involved in the process and will not feel compelled to make changes solely because of opinions expressed by the Court that were not based on the constitutionality of the statute. □

Kudos

EMILY BLOCH has been appointed by the President of the Maine State Bar Association to a three year term on the Judicial Evaluation Committee. This committee is responsible for developing a survey that evaluates trial judges in the District and Superior Courts, for collecting the response data from attorneys, for preparing judicial evaluation reports, and for recommending to the Board of Governors whether judges are qualified for re-nomination.

In May **MARK LAVOIE** served as a faculty member of the Maine College of Trial Advocacy. The three-day program took place at the Cumberland County Superior Court with faculty members drawn from the Federal District Court, the Maine Supreme Judicial Court, and the Superior Court, together with preeminent trial lawyers from throughout the state. Approximately fifty attorneys attended, and Mark's presentation focused on the cross-examination of expert witnesses.

STEVE MORIARTY was re-elected to a three year term on the Cumberland Town Council.

Three new employees joined the staff of NH&D during the month of June. **THERESA RUEL**, **SANDRA BRUEL** and **GAIL FRASER**. Theresa relocated to Maine from Dover, NH where she was employed as a paralegal since 2004. She has been hired as a Workers' Compensation Case Manager.

Sandy has been employed as a legal secretary for many years, previously working in the claims department at HRH Northern New England. She will be working with Dan Cummings and Adrian Kendall in the Commercial Group.

Gail, having previously worked as the Executive Assistant to the President of Hancock Lumber, has been hired to work in the Litigation Department with Tom Marjerison.

JON BROGAN has been appointed by the Maine Supreme Judicial Court to serve a three year term on the Advisory Committee on Rules of Evidence.

AARON BALTES and his wife Kathy proudly announced the birth of their son, Matthew, who was born on June 20, 2007. Congratulations to the new parents!

ANN FREEMAN and her husband Josh became parents for the second time with the birth of their daughter, Elsa Ryan, on March 1, 2007. Congratulations again!

STEVE MORIARTY participated as a panel member at the Maine Human Resources Convention in May focusing upon developments in workers' compensation litigation over the previous year.

STEPHEN HESSERT moderated and presented at a national teleseminar sponsored by the American Law Firm Association on Medicare Secondary Payer Issues on June 20, 2007. Approximately 200 listeners attended and three Medicare Health Specialists were on the panel. The teleseminar was a first for the ALFA Workers' Compensation Practice Group, which Steve chairs. Steve also presented on the same topic to the Maine Council of Self Insurers at their Annual Meeting on June 28. □

Two recent Law Court decisions

By David P. Very

DAVID P. VERY

Prejudgment interest

Is an insurer that settles for the policy limits of a liability policy obligated under the terms of the policy to pay prejudgment interest beyond that limit? That question was addressed by the Law Court in *State Farm Fire and Casualty Company v. Haley*, 2007 ME 42 (March 2, 2007).

Hazel Stygles, a State Farm insured, ran a stop sign and struck a vehicle operated by Angela Haley. Ms. Haley suffered serious long-term injuries. Ms. Haley filed suit against Ms. Stygles and State Farm reached a policy limits settlement of $100,000 before judgment. The settlement agreement left open the question as to whether State Farm was responsible for prejudgment interest and costs in excess of the policy limit. It was agreed that State Farm would file a declaratory judgment action to determine whether prejudgment interest and costs should be awarded.

In the subsequent declaratory judgment action, the Superior Court held that State Farm was not responsible for prejudgment interest. The pertinent policy provision stated that State Farm agreed, in addition to the limits of liability, to pay "interest on damages owed by the insured due to a judgment and accruing before the judgment, where owed by law, and until we pay, offer or deposit in court the amount due under this coverage, but only on that part of the judgment we pay."

The Law Court held that the plain language of the policy provision clearly dictates that State Farm pay interest only in the instance of a judgment. The Law Court held that a settlement is not a judgment and, thus, State Farm is not obliged to pay prejudgment interest in excess of its policy limit.

Justice Dana, in one of his last decisions before his retirement, dissented. Justice Dana reasoned that in settling for the full value of the policy limits, State Farm must remit to the Plaintiff the same exposure under the policy in order to fulfill its duty under the law to protect its insured, despite the absence of a judgment.

Conflict of interest for successive representation

Under the Maine Bar Rules, an attorney may not commence representation adverse to a former client without that client's informed written consent if such new representation is substantially related to the subject matter of the former representation or may involve the use of confidential information obtained through such former representation. In *Hurley v. Hurley*, 2007 ME 65 (May 22, 2007), the Law Court expounded on what may constitute confidential information.

Nadine Hurley retained Attorney C. H. Spurling to represent her in a personal injury lawsuit as a result of an automobile accident. During the course of the litigation, which lasted over two years, discovery included interrogatories and a deposition of Nadine. The case settled prior to trial.

Over four years later, Nadine's husband, John, retained Spurling to represent him in the Hurleys' divorce action. Nadine filed a motion to remove Spurling as counsel for her husband due to a conflict of interest. The Superior Court agreed that Attorney Spurling had a conflict of interest and the issue was appealed to the Law Court.

The Law Court first held that confidential information gained by Attorney Spurling concerning Nadine's health, work history, and injury history could be used to leverage greater parental rights and responsibilities in favor of John, and thus supported the disqualification of Attorney Spurling.

Of greater interest, the Law Court also held that in addition to the factual information Attorney Spurling acquired about Nadine's health and earning history during the course of the personal injury representation, he also acquired information about the way in which Nadine handled the litigation process. The Court noted that an attorney representing a client in a personal injury action involving significant representation would learn confidential information about the way in which his or her client handles the stress of litigation. An attorney could observe the client's ability to testify under oath, his or her reactions to her adversary, his or her patience with the protracted process, his or her ability to accept compromise, his or her ability to handle stress, and the way in which he or she relates to an attorney. The Court held that knowledge of these strengths and weaknesses in these areas would be detrimental to the former client's interests in another litigation. Thus, the Court held that this information is indeed confidential and would be grounds to disqualify an attorney from successive representation.

Therefore, under this decision, if an attorney gains knowledge as to how a former client handles contested litigation, that attorney may not be able to represent a party adverse to the interest of his former client, even if the second matter is totally unrelated, without the informed written consent of the former client. □

Extension of Benefits for Partial

The duration of entitlement to benefits for partial incapacity was extended to 364 weeks effective January 1, 2000, but in the years since the Board has not extended the period based upon appropriate actuarial and statistical data. However, the Board's actuary, Jeffrey P. Kadison of Practical Actuarial Solutions, has recently recommended an additional 52 week extension to 416 weeks. Section 213 provides that entitlement may be extended in increments of 52 weeks if statistical data demonstrates that Maine's claim frequency is lower than the national average. Mr. Kadison concluded that recent data supports an additional extension.

At its meeting of June 12, 2006, the Board voted unanimously to send the issue forward for public comment. It is understood that the Board will draft a rule (presumably an amendment to current Ch. 2, §2 of the WCB Rules) extending the period of entitlement effective January 1, 2006. The rule-approval process is likely to take several months, and will require extensive public involvement. □

Kendall appointed honorary consul to Maine and New Hampshire by Federal Republic of Germany

Adrian Kendall's appointment the first in New England

Horst Köhler, the President of the Federal Republic of Germany has appointed Adrian P. Kendall as Honorary Consul to Maine and New Hampshire. The appointment ceremony took place at The Cumberland Club in Portland at 4 pm on May 30, 2007. This appointment is an important step that recognizes the increasing strength of the economic and cultural ties between this European nation and northern New England. Kendall is the first to hold this office in the entire New England region.

Paul F. Driscoll, Daniel L. Cummings, Dr. Wolfgang Vorwerk, Adrian P. Kendall, Stephen Hessert

Kendall was first appointed as *Vertrauensanwalt* (trusted counsel) by the German Consulate General in Boston in 2000. As Honorary Consul, Kendall will focus his efforts on the continued enhancement of economic, academic, cultural and political relations between Germany and the two New England states of Maine and New Hampshire. He also will perform traditional consular functions, such as providing consular protection and assistance to German citizens and businesses.

Kendall is no stranger to the international scene. He served as special advisor to Governor Baldacci on the 2004 Maine Gubernatorial Trade Mission to Germany and Northern Italy. In 2005, he was invited to brief Governor Lynch and other participants of the New Hampshire Trade Mission to Germany and the Czech Republic. He assisted the International Trade Centers of both states with respect to those trade missions, and is regularly consulted on German and European economic and trade matters.

Kendall, a former director of the World Affairs Council of Maine, frequently speaks at area high schools on the importance of foreign languages in career options for youth. NH&D also sponsors a prize for the Maine German Student of the Year, which is awarded annually at the Blaine House. Kendall and NH&D have also hosted numerous visits to Maine and New Hampshire by German Consul General Dr. Wolfgang Vorwerk, a frequent visitor to northern New England.

With over 82 million inhabitants, Germany is Europe's largest single market. Germany is an important market for businesses in the New England region and German-owned businesses employ thousands of workers in Maine and New Hampshire. Bordered by 9 countries and with excellent transport and communication infrastructure, Germany's unique location between Western and Eastern Europe make it a perfect choice for any company seeking to establish a trading, service or manufacturing location in Europe.

Kendall lives in Cumberland, Maine with his wife Rebecca and their sons George and Kurt. He earned his juris doctor degree cum laude from the University of Maine School of Law in 1992, and graduated from the University of Pennsylvania in 1989. Since joining NH&D in 1997, he has worked with the firm's Commercial Law and Practice Group, and regularly advises Maine companies on doing business overseas, and also is active in assisting foreign nationals in the purchase and development of businesses in the U.S. □

Workers' compensation – Law Court decisions and Board developments

By Stephen W. Moriarty

STEPHEN W. MORIARTY

Apportionment

The Law Court determined many years ago in *Johnson v. S. D. Warren*, 432 A.2d 431 (Me. 1981) that in a multi-injury case, an employee's entitlement to incapacity benefits is based upon the average weekly wage in effect at the time of the most recent injury. The employer responsible for that injury must pay all benefits owed to the employee based upon its average weekly wage, but is subrogated to the employee's rights against earlier responsible employers or carriers. An earlier employer may be required to reimburse the more recent employer based upon the average weekly wage in effect at the time of the earlier injury. These mutual obligations have become standard features of workers' compensation apportionment practice, but in a new decision the Law Court has added an unexpected twist to the equation.

In *Trottier v. Thomas Messer Builders*, 2007 ME 64 (May 22, 2007), the employee initially injured his back in 1991 at a time when his average weekly wage was $259.53. Later, while working for a different employer in 2002, he injured his knee at a time when his average earnings were $543.72 per week. The two injuries combined to produce incapacity, and the presiding Hearing Officer found as a fact that the initial injury was 80% responsible, and the second injury was 20% responsible. The claimant was laid off by the second employer for reasons unrelated to the injuries, and was out of work completely for two months. He then found a new position with a third employer, and earned $467.36 per week thereafter.

The Hearing Officer ordered payment of benefits for partial at a 100% rate during the two months that the claimant was out of work completely, as well as ongoing benefits for partial based upon a differential between the second average weekly wage and the employee's current earnings with the third employer. The 2002 employer was initially responsible for payment of all benefits, and the initial employer was ordered to reimburse the second based upon its 80% proportionate share of responsibility for the incapacity.

The first employer challenged the Hearing Officer's decision and argued that it had no reimbursement obligation because the employee's earning capacity at the time of the second injury had exceeded the 1991 average weekly wage. After analyzing the basic concepts of apportionment liability, the Court ruled that the Hearing Officer erroneously failed to calculate the first employer's responsibility with reference to its own average weekly wage. Noting that the second employer's rights against the first employer were no greater than the employee's own, the Court ruled that the first employer had no obligation to reimburse the second because the employee's current earning capacity ($467.36) exceeded the average weekly wage at the time of the initial injury ($259.53). Accordingly, the second employer was exclusively responsible for payment of all benefits, notwithstanding the fact that its injury was only 20% responsible for the overall incapacity.

Therefore, according to the Court, an earlier employer is not responsible for payment of any portion of incapacity benefits if the claimant's average weekly wage and earning capacity have surpassed the prior level by the time of a subsequent occupational injury. However, there is nothing in *Trottier* that suggests that the first employer's responsibility for payment of medical expenses can be avoided. In other words, if the dispute had focused upon payment of medical expenses, as opposed to disability benefits, it is likely that the first employer would have been found responsible for its 80% share, as liability for payment of medical expenses is not linked to the average weekly wage.

In a different portion of the opinion, the Court noted that there had been a subsequent non-occupational injury to the back in 2001 and that in a 2003 consent decree it had been agreed that a resulting closed period of incapacity in 2001 had been causally related to the initial 1991 injury. The first employer argued on appeal that it should not be bound by the terms of the consent decree, and that it could challenge any subsequent incapacity resulting from the 2001 non-occupational injury. The Hearing Officer found that the first employer was bound by the terms of the consent decree, and the Court affirmed on appeal. Last year the Court had held in *Hoglund v. Aaskov Plumbing & Heating*, 2006 ME 42, 895 A.2d 323 that the parties were bound by any terms or agreements reflected in a written record of mediation. Applying *Hoglund* to the facts of the present case, the Court held that the Hearing Officer committed no error in ruling that the consent decree precluded the first employer from disclaiming any liability for the non-occupational back injury. Both *Trottier* and *Hoglund* remind employers and carriers that the terms of records of mediation and of consent decrees have binding legal effect and that great care must be taken in the drafting of the language which defines an employer's obligations.

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