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Maine

1. Citation for the state's workers' compensation statute.

Maine Revised Statutes Annotated, title 39, or 39 M.R.S.A. § 1 et seq. (Repealed December 31, 1992). For all dates of injury on or after January 1, 1993, Maine Revised Statutes Annotated, title 39-A, or 39-A M.R.S. § 101 et seq.

SCOPE OF COMPENSABILITY

2. Who are covered "employees" for purposes of workers' compensation?

An employee is defined as "every person in the service of another under any contract of hire, express or implied, oral or written." 39-A M.R.S. § 102(11). Owners of businesses may elect to be covered. The term employee excludes independent contractors, and persons engaged in maritime employment who are within the exclusive jurisdiction of admiralty law of the United States. Certain agricultural employees are exempt. See answer 5.

3. Identify and describe any "statutory employer" provision.

None. See 39-A M.R.S. § 102(11)(A)(8).

4. What type of injuries are covered and what is the standard of proof for each:

A. Traumatic or "single occurrence" claims.

Injuries are in five categories: "traumatic physical, gradual physical, traumatic mental, gradual mental and occupational disease." There is no "by accident" requirement. A single traumatic physical injury is compensable, as is a gradual physical injury that results from a series of repetitive events over time which produce physical symptoms and result in incapacity. The burden of proof is on the employee to demonstrate, by a preponderance of evidence that the injury arose out of and in the course of the employment. Traumatic mental injuries are similarly compensable, with the same burden of proof.

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B. Occupational disease (including respiratory and repetitive use).

Occupational disease has been covered since January 1, 1946. The employee has the burden of demonstrating, by a preponderance of the evidence that the disease is due to conditions characteristic of a particular trade, occupation, process or employment and that arises out of and in the course of the employment.

Gradual mental injuries caused by cumulative work-related stress are compensable, but the employee must demonstrate, by clear and convincing evidence: (1) the work stress was extraordinary and unusual in comparison to pressures and tensions by the average employee; and (2) the work stress, and not some other source of stress, was the predominant cause of the mental injury. See 39-A M.R.S. §201(3-A).

If a law enforcement officer, firefighter, or emergency medical services person is diagnosed by a licensed allopathic physician or osteopathic physician specializing in psychiatry or a licensed psychologist with post-traumatic stress disorder that resulted from work stress which was extraordinary or unusual compared with that experienced by the average employee and the work stress and not some other source of stress was the predominant cause of the post-traumatic stress disorder, the post-traumatic stress disorder is presumed to have arisen out of and in the course of the workers' employment. This presumption may be rebutted by clear and convincing evidence. See 39-A M.R.S. § 201(3-A).

A mental injury is not considered to arise out of and in the course of employment if it results from any disciplinary action, work evaluation, job transfer, layoff, demotion, termination or any similar action, taken in good faith by the employer. See 39-A M.R.S. §201(3-A)

5. What, if any, injuries or claims are excluded?

Rideshare- Injuries while participating in a private, group, or employer sponsored car pool, van pool, commuter bus service or other rideshare program are not compensable. The provision does not apply to drivers, mechanics, or anyone else employed in the operation of the car pool or rideshare program. 39-A M.R.S. § 201(2).

Domestic Service- Employees who are "engaged in domestic service" at the time of the injury are not covered by the Act. 39-A M.R.S. § 401.

Miscellaneous Agricultural Injuries- There are several exemptions for injuries sustained in the course of agricultural employment. Employers of seasonal or casual employees in agriculture or aquaculture are not required to provide workers' compensation benefits as long as they maintain employers' liability insurance coverage within specified limits. Further, employers of six or fewer such employees need not provide coverage if they obtain employers' liability insurance coverage and medical payment coverage within certain limits. Finally, those employed by agricultural employers in the harvesting of 150 cords of wood or less per year from farm wood lots are not considered to be employees within the Act. See 39-A M.R.S. §§ 102 & 401.

Maritime Employment- Individuals within the exclusive jurisdiction of the admiralty laws of the United States are not employees within the meaning of the Act.

Employer-Sponsored Athletic Event- Individuals injured while voluntarily participating in an employer sponsored athletic team, or in an employer sponsored athletic event, are not considered employees under the Act. 39-A M.R.S. § 102(l1).

Real Estate Brokers- If a real estate broker or salesperson has signed a contract with an

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agency acknowledging an independent contractor relationship, and if the broker receives pay exclusively through commissions, the broker is not considered an employee. Id.

6. What psychiatric claims or treatments are compensable and is PTSD a compensable diagnosis?

See answer 4 (B). Gradual mental injuries caused by cumulative work-related stress are compensable, but the employee must demonstrate, by clear and convincing evidence: (1) the work stress was extraordinary and unusual in comparison to pressures and tensions by the average employee; and (2) the work stress, and not some other source of stress, was the predominant cause of the mental injury. See 39-A M.R.S. §201(3-A).

If a law enforcement officer, firefighter, or emergency medical services person is diagnosed by a licensed allopathic physician or osteopathic physician specializing in psychiatry or a licensed psychologist with post-traumatic stress disorder that resulted from work stress which was extraordinary or unusual compared with that experienced by the average employee and the work stress and not some other source of stress was the predominant cause of the post-traumatic stress disorder, the post-traumatic stress disorder is presumed to have arisen out of and in the course of the workers' employment. This presumption may be rebutted by clear and convincing evidence. See 39-A M.R.S. § 201(3-A).

A mental injury is not considered to arise out of and in the course of employment if it results from any disciplinary action, work evaluation, job transfer, layoff, demotion, termination or any similar action, taken in good faith by the employer. See 39-A M.R.S. §201(3-A)

7. What are the applicable statutes of limitations?

Any claim for injury must be brought within two years after the date of the injury or six years after the date of the most recent payment of benefits made on account of the injury. The two-year statute of limitations does not begin to run, however, until an employer files a First Report of Injury as required by the statute. If an injury has been accepted with a compensation payment scheme, the only limitations applicable is that no petition of any kind is allowed after a certain number of years following the last payment of benefits. For injuries occurring on or after October 17, 1991, that is six years. For injuries prior to that date, the period was ten years from the date of the last payment. 39 M.R.S.A. § 95 and 39-A M.R.S. § 306. However, these periods are also tolled until the employer files a required First Report of Injury.

8. What are the reporting and notice requirements for those alleging an injury?

For injuries prior to January 1, 2013, an employee is required to give notice of an injury within 90 days after the date of injury. For injuries on or after January 1, 2013 and prior to January 1, 2020, notice must be given within 30 days of the date of injury. For injuries on or after January 1, 2020, notice must be given within 60 days of the day of injury. The notice must include the time, place, cause and nature of the injury, together with the name and address of the employee. 39-A

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M.R.S. § 301. Failure to give notice does not render a claim invalid if the employer had actual knowledge or if the employee was unable, by reason of physical or mental incapacity, to give timely notice. In cases of death, notice must be given within three months after death. 39-A M.R.S. § 302.

9. Describe available defenses based on employee conduct:

A. Self-inflicted injury.

Benefits are not allowed for injury or death occasioned by the employee's willful intention to bring about the injury or death. 39-A M.R.S.A § 202.

B. Willful misconduct, "horseplay," etc.

The statute does not specifically mention the term "horseplay," but the Maine Supreme Court has held that injuries which occur as the result of playful misbehavior on the job are not compensable. This is based upon an employee's conduct that represents a substantial departure or deviation from normal employment responsibilities. An innocent victim of horseplay, however, is entitled to compensation. See Bouchard v. Sargent, 127 A.2d 260 (Me. 1957).

C. Injuries involving drugs and/or alcohol.

Injury or death resulting from the employee's intoxication while on duty is not compensable, unless the employer knew at the time of the injury that the employee was intoxicated or was in the habit of becoming intoxicated while on duty. 39-A M.R.S. § 202.

10. What, if any, penalties or remedies are available in claims involving fraud?

An Abuse Investigation Unit has been established for the purpose of investigating fraud and improper conduct in conjunction with workers' compensation. All parties are required to cooperate with the Unit, and, after concluding its investigation, the Unit reports its findings to the Workers' Compensation Board. If the Board then determines that "a fraud, attempted fraud or violation of this Act or rules of the Board may have occurred," it must report its findings and all supporting information to the office of the Attorney General. The Attorney General may then take appropriate action, including criminal prosecution and a civil action to recover funds paid. 39-A M.R.S. § 360.

In addition, any party may petition the Board to annul a compensation agreement if the agreement was entered into on the basis of mistake of fact or fraud. This section has limited applicability, however, since approved agreements for payment of compensation essentially no longer exist under the current statutory framework. However, the Act provides that any party may petition to re-open a compensation payment scheme where fraud on the part of the opposing party is alleged. Such a petition must be brought within one year after the initiation of the scheme. If the Board finds that fraud occurred, the case may then be re-opened and the Board may either terminate or modify the employee's obligation to make payment. 39-A M.R.S. § 321.

Finally, the Workers' Compensation Board may assess a civil penalty up to $1,000 for an individual, and $10,000 for a corporation, for "any willful violation of this Act, fraud, or

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intentional misrepresentation." The Board may also require an employee to repay any compensation received as the result of a violation of the Act, fraud, or intentional misrepresentation, together with interest at a 10% annual rate. Penalties assessed by the Board are enforceable by the Superior Court, and all penalties are payable to the General Fund of the State of Maine. Incidentally, a penalty assessed against an insurer may not be considered an element of loss for the purpose of establishing a rate for workers' compensation insurance. 39-A M.R.S. § 360(2).

11. Is there any defense for falsification of employment records regarding medical history?

No.

12. Are injuries during recreational and other non-work activities paid for or supported by the employer compensable?

No. See answer 5.

13. Are injuries by co-employees compensable?

An innocent victim of horseplay is entitled to compensation. See Answer 9B. Injuries resulting from disputes between employees are compensable if the dispute arose out of the requirements of the job or the method of job performance. Injuries related to private disputes that happen to occur at work are not compensable.

14. Are acts by third parties unrelated to work, but committed on the premises, compensable (e.g. "irate paramour" claims)?

The answer is not clear. The fact that an injury occurs on the employer's premises has never been sufficient, by itself, to render an injury compensable. See Barrett v. Herbert Engineering, Inc., 371 A.2d 633 (Me. 1977). Compensation was denied to a surviving dependent of an employee who was shot and killed on the job by a crazed gunman. Hawkins v. Portland Gaslight Co., 43 A.2d 718 (Me. 1945). On the other hand, compensation was awarded to a woman who was raped on the job by a non-employee where the location, the lack of lighting, and other circumstances of employment enhanced the risk of such criminal activity.

BENEFITS

15. What criterion is used for calculating the average weekly wage?

The average weekly wage includes the amount received at the time of injury for the hours and days constituting a regular full work week, provided the employee was employed for at least 200 full working days during the year prior to the injury. In cases of piece employees or employees whose wages vary from week to week, the wages are averaged by determining the entire amount

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of wages or salaries earned by the employee during the year preceding the injury and dividing that number by the total number of weeks, any part of which the employee worked, during the same period. For "seasonal workers," the wage is determined by dividing the total wages for the prior calendar year by 52. The average weekly wage does not include fringe benefits or other benefits paid by the employer that continue during disability. Any fringe or other benefit paid by the employer that does not continue during disability must be included for purposes of determining an employee's average weekly wage to the extent that the inclusion will not result in a weekly benefit that is greater than two-thirds of the state average weekly wage at the time of injury. For injuries on or after January 1, 2020, this is increased to greater than two-thirds of 125% of the state average weekly wage at the time of injury.

16. How is the rate for temporary/lost time benefits calculated, including minimum and maximum rates?

For injuries from January 1, 1993 through December 31, 2012, lost time benefits are based upon 80% of the employee's after-tax average weekly wage, subject to the maximum benefit provided under 39-A M.R.S. § 211, which is 90% of the state average weekly wage as adjusted annually. For injuries beginning on January 1, 2013, lost time benefits are calculated based upon two thirds of the average weekly wage. For injuries from January 1, 2013 through December 31, 2019 the maximum rate is 100% of the SAWW. As of July 1, 2019, the maximum rate for these injuries is $856.79, and it will be adjusted on July 1, 2020 and on each July 1 thereafter. For injuries beginning on January 1, 2020, the maximum rate is 125% of the SAWW. As of July 1, 2025, the maximum rate is $1,498.55, and it will be adjusted on July 1, 2026, and every July 1st thereafter.

17. How long does the employer/insurer have to begin temporary benefits from the date disability begins?

The employer must begin payment, or indicate that a controversy exists, within 14 days from the date disability begins.

18. What is the "waiting" or "retroactive" period for temporary benefits (e.g. must be out 21 days before recovering benefits for the first 3 days)?

Compensation for incapacity to work is not payable for the first 7 days of incapacity, except that firefighters must receive compensation from the date of incapacity. In case incapacity continues for more than 14 days, compensation is allowed from the date of incapacity. See 39-A M.R.S. § 204.

19. What is the standard/procedure for terminating temporary benefits?

If the employee returns to work for the employer paying benefits under the Act, the employer may unilaterally terminate benefits by filing a Discontinuance form with the Workers' Compensation Board. In circumstances other than a return to work for the employer paying benefits under the Act, or increase in pay, and if there is no compensation payment scheme in

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effect, the employer may discontinue or reduce benefits no earlier than 21 days from the date it provides notice to the employee by certified mail of its intent to do so, together with the information relied upon in making that decision. Benefits may then be terminated on the 21st day and an employee who disagrees is entitled to a hearing.
If a compensation payment scheme is in effect and the employee has not returned to work for the employer paying benefits under the Act, the employer/insurer must petition the Board for an order to reduce or discontinue benefits and may not reduce or discontinue benefits until a decision is received on the petition. See 39-A M.R.S. § 205.

20. Is the amount of temporary total disability paid credited toward the amount entitled for permanent partial disability?

Yes. See 39-A M.R.S. §§ 212-213.

21. What disfigurement benefits are available and how are they calculated?

For injuries occurring between 1965 and November of 1987, facial disfigurement awards were allowed as part of the specific loss or permanent impairment provision of the statute. From November of 1987 until December 31, 1992, permanent impairment was based upon whole-person impairment schedules formally published and recognized in the American Medical Association's Guide to the Evaluation of Permanent Impairment. The new statute, effective January 1, 1993, does not appear to provide for awards for disfigurement.

22. How are permanent partial disability benefits calculated, including the minimum and maximum rates?

Partial incapacity claims are subject to durational caps. For injuries occurring prior to January 1, 2013, the weekly compensation is equal to 80% of the difference between the injured employee's after-tax average weekly wage before the personal injury and the after-tax average weekly wage that the injured employee is able to earn after the injury, but not more than the maximum benefit under 211. Compensation must be paid for the duration of the disability if the employee's permanent impairment, determined by the impairment guidelines adopted by the board, resulting from the personal injury is in excess of 15% to the body. In all other cases, the employee is not eligible to receive compensation after the employee has received a total of 260 weeks of compensation under either section 212 or section 213 of the act, or both. The Board may at its discretion extend the duration of benefit entitlement beyond 260 weeks in cases involving financial hardship due to the inability to return to work.

If the injured employee's date of injury is on or after January 1, 2013, but before January 1, 2020, the weekly compensation is equal to 2/3 of the difference, due to the injury, between the employee's average gross weekly wages, earnings or salary that the employee is able to earn after the injury, but not more than the maximum benefit under section 211. An employee is not eligible to receive compensation under this paragraph after the employee has received a total of 520 weeks of compensation under section 212, section 213, or both. However, extended partial

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incapacity benefits are available if, at the expiration of 520 weeks of benefits, the employee is working and legitimately demonstrates an earning capacity which is 65% or less of the pre-injury average weekly wage, and if the permanent impairment caused by the injury is in excess of 18%. This provision is designed to provide extended benefits for employees with relatively severe injuries who have returned to work and have a significant long-term loss of earning capacity. Additionally, the Board may in the exercise of its discretion extend the duration of benefit entitlement beyond 520 weeks in cases involving extreme financial hardship due to inability to return to gainful employment.

If the injured employee's date of injury is on or after January 1, 2020, the weekly compensation is equal to 2/3 of the difference, due to the injury, between the employee's average gross weekly wages, earnings or salary before the injury and the average gross weekly wages, earnings or salary the employee is able to earn after the injury, but not more than the maximum benefit under section 211. An employee is not eligible to receive compensation under this paragraph after the employee has received a total of 624 weeks of compensation under section 212, section 213, or both. The Board may in its discretion extend the duration of benefit entitlement beyond 624 weeks in cases involving extreme financial hardship due to inability to return to gainful employment.

A. How many weeks are available for scheduled member/parts, and the standard for recovery?

The statute provides specific schedules of benefits available for losses of certain body parts. The number of weeks varies for each portion of the body involved, and it appears that the benefits are available only for actual amputations or losses of the body parts in questions. 39-A M.R.S. § 212(3).

B. Number of weeks for "whole person" and standard for recovery.

For injuries from January 1, 2006 through December 31, 2012, benefits for partial incapacity must be paid for the duration of the disability if the permanent impairment attributable to the injury, as calculated by the fourth edition of the AMA Guide, is in excess of 12% to the whole body. If the permanent impairment is not in excess of 12%, and the employee is partially incapacitated, incapacity benefits are limited to 520 weeks. For injuries prior to January 1, 2006, consult the Workers' Compensation Board Rules and Regulations for the applicable permanent impairment threshold. Me. W.C.B. Rule Ch. 2, § 1.

For injuries from January 1, 2013 through December 31, 2019, an injury causing partial incapacity is generally limited to 520 weeks of incapacity benefits. However, extended partial incapacity benefits are available if, at the expiration of 520 weeks of benefits, the employee is working and legitimately demonstrates an earning capacity which is 65% or less of the pre-injury average weekly wage, and if the permanent impairment caused by the injury is in excess of 18%. This provision is designed to provide extended benefits for employees with relatively severe injuries who have returned to work and have a significant long-term loss of earning capacity.

For injuries beginning on January 1, 2020, an injury causing partial incapacity is generally limited to 624 weeks of incapacity benefits.

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Regardless of whether the injury is before or after January 1, 2013, an additional possible extended benefit for partial incapacity is available, if the employee can demonstrate that he or she is unable to find work and as a result is experiencing extreme financial hardship. Regardless of the duration of entitlement, for injuries before January 1, 2013, partial incapacity benefits are based upon 80% of the difference between the employee's pre-injury, after-tax average weekly wage and the after-tax average weekly wage that the employee is able to earn post-injury. For injuries after January 1, 2013, benefits are based upon two thirds of the difference between the pre-injury average weekly wage and the amount the employee is able to earn post-injury. All benefits are subject to the maximum benefit level as indicated in 39-A M.R.S.§ 211. See 39-A M.R.S. § 213(1) and Answer 16 supra.

23. Are there any requirements/benefits for vocational rehabilitation, and what is the standard for recovery?

In the prior Workers' Compensation Act, Maine had an extensive vocational rehabilitation statute, with rules and regulations promulgated by the Board. These provisions were repealed effective January 1, 1993. At present, it appears that vocational rehabilitation will generally be done on a voluntary basis, though the statute does provide that, if vocational rehabilitation is necessary for a return to employment, it may be mandated by the Workers' Compensation Board. See 39-A M.R.S. § 217.

24. How are permanent total disability benefits calculated, including the minimum and maximum rates?

For injuries prior to January 1, 2013, total disability benefits are based upon 80% of the employee's after-tax average weekly wage, subject to the statutory maximum indicated in 39-A M.R.S. § 211. See 39-A M.R.S. § 212. See also Answer 16 supra.

For injuries after January 1, 2013, total disability benefits are based upon two thirds of the average weekly wage, subject to the maximum rate. Benefits are available for the duration of total disability. Once the employee's disability becomes partial, the limitation of benefits set forth in Answer 22 applies.

For dates of injury on or after January 1, 2020, beginning after the receipt of 260 weeks of total disability benefits, weekly compensation benefits must be adjusted annually. The adjustment is equal to the actual percentage increase or decrease in the state average weekly wage, as computed by the Department of Labor, for the previous year or 5%, whichever is less. The annual adjustment must be made after the receipt of 260 weeks of total disability benefits and on each succeeding anniversary date of the injury, except that when the effect of the maximum benefit under section 211 is to reduce the amount of compensation to which the claimant would otherwise be entitled, the adjustment must be made annually on July 1st. See 39-A M.R.S. §212 (4).

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25. How are death benefits calculated, including the minimum and maximum rates?

A. Funeral Expenses.

The employer must pay reasonable expenses of burial up to $4,000.00, and an additional payment of $3,000.00 as incidental compensation. The burial expense must be paid to the person who has paid or is responsible for paying the expenses. The incidental compensation must be paid to the employee's estate. See 39-A M.R.S. § 216."

B. Dependency claims.

If death results from the injury, the employer shall pay the employee's dependents a weekly payment equal to 80% of the employee's after-tax average weekly wage, but not more than the maximum benefit referred to above, for a period of 500 weeks from the date of death. For injuries beginning January 1, 2013, the weekly compensation rate is two thirds of the average weekly wage, subject to the maximum rate. If, at the expiration of the 500-week period, any wholly or partially dependent person is less than 18 years of age, the employer shall continue to pay weekly compensation until that person reaches age 18. See 39-A M.R.S. § 215.

26. What are the criteria for establishing a "second injury" fund recovery?

There is no such fund at this time.

27. What are the provisions for re-opening a claim for worsening of condition, including applicable limitations periods?

In any case where a compensation payment scheme exists, an employee may, at any time up to six years from the date of the last payment, petition the Workers' Compensation Board for increased disability benefits based upon recurring or worsened disability. Conversely, the employer may also petition the Board at any time for a reduction of benefits.

28. What situation would place responsibility on the employer to pay an employee's attorney fees?

The Maine statute has changed many times over the past ten years on this issue. For injuries prior to January 1, 1993, the employee's attorney has to establish that he or she "prevailed" in order to recover fees from the employer. The standard has been interpreted very liberally by commissioners and courts, and simply maintaining the protection of the statute has been considered adequate. For injuries on or after January 1, 1993, the statute provides that, in all circumstances, the employees are responsible for their own attorney's fees.

EXCLUSIVITY/TORT IMMUNITY

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29. Are there any specific compensability requirements or applicable statutes for hybrid employees?

There are no current specific requirements or applicable statutes pertaining to hybrid employees.

30. Is the compensation remedy exclusive?

A. Scope of immunity.
An employer who has secured the payment of compensation is exempt from civil actions involving personal injury sustained by an employee arising out of and in the course of employment, or from a death resulting from those injuries. The exclusivity applies to all employees, supervisors, officers, and directors of the employer, and is well supported by case law.
B. Exceptions (intentional acts, contractual waiver, "dual capacity," etc.). Exclusivity does not apply to an illegally employed minor. 39-A M.R.S. § 408(2).

31. Are there any penalties against the employer for unsafe working conditions?

Yes. In addition to standard OSHA requirements, the Maine criminal law was recently amended and a person is guilty of criminal manslaughter if that person "[h]as direct and personal management or control of any employment, place of employment or other employee, and intentionally or knowingly violates any occupational safety or health standard of this State or the Federal Government, and that violation in fact causes the death of an employee and that death is a reasonably foreseeable consequence of the violation." The provision does not apply to any person who performs a public function on a volunteer basis or to any public employee responding to or acting in a life threatening situation and who is attempting to save a human life. 17-A M.R.S. § 203.

32. What is the penalty, if any, for an injured minor?

None, but the employer may be subject to other penalties for violating Maine employment laws. See answer to question 29.

33. What is the potential exposure for "bad faith" claims handling?
The statute contains penalties for failure to pay benefits in a timely fashion. Current penalties include payment of up to $50.00 per day for violations, subject to a $1,500.00 maximum. 39-A M.R.S. §§ 205, 324. In addition, case law recognizes a tort remedy for bad faith handling of claims. See Gibson v. National Ben Franklin Ins. Co., 387 A.2d 220 (Me. 1978). The damages available are the typical loss of consortium, etc. damages available in any tort action, including pain and suffering. The Maine Supreme Court has recently recognized a cause of action against an insurance carrier and a private investigation company for torts committed in the course of surveillance activity. See Hawkes v. Commercial Union Insurance Co., 2001 Me. 8 (January 16, 2001). The Court held that the carrier had immunity for personal injuries such as mental injuries,

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but that the insurance carrier could be liable for torts that are not personal injuries, such as trespass, intrusion of privacy, or economic injuries.

34. What is the exposure for terminating an employee who has been injured?

Maine law prohibits discrimination against an employee who has brought a workers' compensation claim or has testified in a related proceeding. If an employee prevails in a discrimination case, the Administrative Law Judge may award the employee reinstatement to the previous job, back wages, re-establishment of employee benefits, and reasonable attorney's fees. 39-A M.R.S. § 353.

THIRD PARTY ACTIONS

35. Can third parties be sued by the employee?

Yes.

36. Can co-employees be sued for work-related injuries?

No.

37. Is subrogation available?

Yes. See Me. Rev. Stat. Ann. tit. 39-A, § 107. The basic procedure is that an employee who is receiving compensation benefits has the option of pursuing a third party claim against the nonemployer tortfeasor. If the employee chooses not to do so, after notice, the employer may sue in the employee's name. If the employee controls the suit, he or she must repay benefits from the recovery, less the employee's proportionate share of costs of collection, including reasonable attorney's fees. If the employer controls the lawsuit and recovers damages in excess of compensation or benefits paid for or for which the employer has become liable, any excess must be paid to the employee, less the proportionate share of the expenses of costs of collections, including attorney's fees. Settlement of subrogation claims and the distribution of proceeds therefrom must be approved by the Superior Court.

MEDICALS

38. Is there a time limit for medical bills to be paid, and are penalties available for late payment?

Where there is no ongoing dispute, if medical bills are not paid within 30 days after the employer/insurer has received notice of non-payment by certified mail, $50.00 or the amount of

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the bill due, whichever is less, must be added and paid to the Workers' Compensation Board Administrative Fund for each day over 30 days in which the medical bills are not paid. No more than $1,500.00 may be added to the bill. See 39-A M.R.S. § 205.

39. What, if any, mechanisms are available to compel the production of medical information (reports and/or an authorization) at the administrative level?

Both the employer and the employee are required to provide copies of medical reports to the opposing party within seven days of receipt. In addition, a party desiring to offer a medical report as an exhibit in a testimonial hearing must serve a copy of the report upon the opposing party at least 14 days before the scheduled hearing. In practice, medical reports and similar documentation are freely exchanged by the parties. 39-A M.R.S. § 206(9).
A signed certificate authorizing the release of medical or health care information for treatment rendered due to an occupational injury is no longer required. 39A M.R.S. § 208.

40. What is the rule on choice (a) claimant's choice of physician; (b) employer's right to a second opinion and/or Independent Medical Evaluation?

For injuries on or after January 1, 1993, the employer initially has the right to select a healthcare provider. After 10 days from the inception of treatment, the employee may select a different provider by giving the employer notice of an intention to treat. If the employer objects to the named provider, it may file a petition indicating the objection, which will then be set for dispute resolution proceedings.

41. What is the standard for covered treatment (e.g. chiropractic care, physical therapy, etc.)?

Maine law is very liberal with respect to covered treatment and provides for coverage for any reasonable and proper medical, surgical, hospital services, nursing, medicines, mechanical, surgical aids, etc. Case law has allowed treatment by acupuncture and other novel treatment methods. The state does have a medical utilization review procedure that has not been frequently used and the effectiveness of which has not yet been determined.

42. Which prosthetic devices are covered, and for how long?

Prosthetic devices determined by a fact-finder to be reasonable and necessary for treatment of the injury are covered for the duration of the need. See 39-A M.R.S. § 206(8).

43. Are vehicle and/or home modifications covered as medical expenses?

These are not specifically covered in the statute, but Administrative Law Judges from time to time, have found them to be covered.

44. Is there a medical fee guide or schedule, or other provisions for cost containment?

Yes.

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45. What, if any, provisions or requirements are there for "managed care"

None.

PRACTICE/PROCEDURE

46. What is the procedure for contesting all or part of a claim?

An employer contests a claim by filing a Notice of Controversy with the Workers' Compensation Board and with the employee. The form must be filed with the Board electronically.

47. What is the method of claim adjudication?

A. Administrative level.

Maine law was radically revised effective January 1, 1993. The current law provides for an initial conference to resolve a dispute by informal means. If that is unsuccessful, a disputed claim must undergo mandatory mediation. If that is unsuccessful at totally resolving the claim, all unresolved issues go to formal hearing before an Administrative Law Judge of the Workers' Compensation Board. The Administrative Law Judge resolves disputed issues of fact and also rules on issues of law. Parties, at their option, may elect to arbitrate disputes rather than go through the formal hearing process. The Rules of Evidence do not apply at proceedings before the Board, but Rules of Privilege do apply.

B. Trial court

Not applicable.

C. Appellate.

Legislation in 2012 established the Appellate Division of the Workers' Compensation Board, comprised of a panel of three Administrative Law Judges other than the Judge who issued the initial decision, to review the initial Administrative Law Judge's decision. An appeal from the decision of the Appellate Division decision may be made to the Maine Supreme Court. Review by the court is discretionary and is restricted to errors of law.

There is also a provision that the Workers' Compensation Board itself, which is comprised of six individuals (three representatives of labor and three representatives of management) and the Executive Director, who serves as a tie-breaker, may review a decision of the Administrative Law Judge if the Judge asks for a review of his or her decision. In that situation, the parties may appeal the decision of the Board to the state Supreme Court, which—as noted above—is a discretionary appeal.

48. What are the requirements for stipulations or settlements?

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The parties may stipulate at any point in the proceedings. Stipulations will be incorporated into a mediator or Administrative Law Judge's report. They must be signed by the parties and are thereafter binding. Lump sum settlements of cases must be approved by an Administrative Law Judge.

49. Are full and final settlements with closed medicals available?

Yes. A settlement, in order for it to be approved, must be considered to be in the best interest of all parties. "… A settlement may not occur until six months has passed from the date of injury and requires a recorded hearing before the Workers' Compensation Board. Generally, this is delegated to Administrative Law Judges. The Administrative Law Judge must review the employee's rights under the statute and the effect of a lump sum settlement on those rights. The Administrative Law Judge must review the purpose for which the settlement is requested and take into consideration all of the employee's post-injury earnings and prospects. In the case of a lump sum settlement that requires a release of the Employer from liability for future medical expenses, the Board can approve the settlement only if it finds that the parties would have been unlikely to reach agreement on the amount of the lump sum settlement without the release of those medical expenses. Such approval is routinely given. See 39-A M.R.S. § 352.

50. Must stipulations and/or settlements be approved by the state administrative body?

Yes. See answer 47.

RISK FINANCE FOR WORKERS'COMPENSATION

51. What insurance is required; and what is available (e.g. private carriers, state fund, assigned risk pool, etc.)?

Every employer must secure coverage. The failure to do so subjects the employer to potential criminal sanctions. Generally, the method for securing compensation is to obtain coverage through an insurer. There is a private, although somewhat restricted, market. An employer unable to obtain coverage through the private market in the past has been relegated to an assigned risk pool, but that entire process was terminated through statutory reform effective January 1, 1993. Since that time, employers unable to secure private insurance must apply to and be accepted by the Maine Employers Mutual Insurance Company (MEMIC), a company owned by the employers who obtain coverage through it.

52. What are the provisions/requirements for self-insurance?

A. For individual entities.

In order to be self-insured, an individual employer must submit an appropriate application to the Maine Bureau of Insurance, the essential purpose of which is to satisfy the Bureau of the employer's financial and administrative ability to pay compensation benefits to its employees.

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B. For groups or "pools" or private entities.

In cases where an employer is not large enough to obtain self-insurance individually, Maine law does allow trusts of private entities to form which may obtain self-insurance status by pooling assets and liabilities. See 39-A M.R.S. §§ 401 through 409.

53. Are “illegal aliens” entitled to benefits of workers’ compensation in light of The Immigration Reform and Control Act of 1986, which indicates that they cannot lawfully enter into an employment contract in the United States, although most state acts include them within definition of “employee”?

Yes, “illegal aliens” are entitled to workers’ compensation benefits under the Maine Workers’ Compensation Act if they meet the statutory definition of “employee.” The Act broadly defines “employee” as “every person in the service of another under any contract of hire, express or implied, oral or written.” See Huff v. Regional Transportation Program, 175 A.3d 98 (2017). This definition is expansive and includes individuals who are employed under a contract of hire, regardless of their immigration status.

54. Are terrorist acts or injuries covered or excluded under workers-compensation law?

There are no special provisions relating to injuries caused by terrorist related acts.

55. Are there any state specific requirements which must be satisfied in light of the obligation of the parties to satisfy Medicare’s interests pursuant to the Medicare Secondary Payer Act?

There is no provision in the Maine Workers’ Compensation Act that addresses the Medicare Secondary Payer Act or the issues associated therewith.

56. How are subrogation liens of Medicaid and health insurers treated under workers’ compensation law?

The Federal Medicaid statute requires States to include in their plan for medical assistance provisions (1) that the individual will assign to the State any rights to payment for medical care from any third party and (2) that the individual will cooperate with the State in pursuing any third party who may be liable to pay for care and services available under the Medicaid plan. 42 U.S.C.A. § 1396k(a). The State is authorized to retain such amount as is necessary to reimburse it (and the Federal Government as appropriate) for medical assistance payments and to pay the remainder to the individual. 42 U.S.C.A. § 1396k(b).

57. What are the requirements for confidentiality and privacy of medical records under workers-compensation law and how are they affected by state and federal law (HIPAA)?

At the present time, the Health Insurance Portability and Accountability Act (HIPAA)— 45 C.F.R. parts 160-164 and 65 F.R. 82462—is in effect. The law provides an exception for workers-

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compensation claims so as to allow the collection of medical records by employers and insurers. [45 C.F.R. 164.512(l).] Therefore, the current practice of obtaining medical records could proceed under state law. See answer to Question 38. Federal and state privacy laws apply to all medical records that are not generated by direct treatment for the work injury. A lawful release or discovery order is required for production of all records of treatment for other (non-work-related) conditions.

58. What are the provisions for "Independent Contractors"?

The issues pertaining to "Independent Contractors" are addressed in various provisions within the Maine Workers' Compensation Act, including the following:

A. 39-A M.R.S. § 102 (11)(A)(7), which excepts "Independent Contractors" from the general definition of "Employee;"

B. 39-A M.R.S. § 102 (11)(A)(8), which excepts employees of "Independent Contractors" from being employees of the person who hired the "Independent Contractor;"

C. 39-A M.R.S. § 102 (13-A), enacted in 2012, which provides a definition for "Independent Contractors;"

D. 39-A M.R.S. § 105, which allows for a procedure to obtain a predetermination of "Independent Contractor" status;

E. 39-A M.R.S. § 105-A, which was enacted in 2009 to provide a presumption of employee status for a person performing construction work on a construction site, unless the worker (1) is a "construction subcontractor", the definition of which is the same as that of an independent contractor under §102 (13-A); or (2) owns or leases and operates an item of equipment weighing more than 7,000 pounds and is hired to operate the equipment on the construction site or to use the equipment to transport materials to or from the site.

F. 39-A M.R.S. § 401, which deals with the insurance requirements of private employers; and

G. 39-A M.R.S. § 906, which states that the liability of an employer to employees of an "Independent Contractor" is not barred if the injury was caused by "any defect in the condition of the ways, works, machinery or plant, if they are the property of the employer or are furnished by the employer and if the defect arose, or had not been discovered or remedied, through the negligence of the employer or of some person entrusted by the employer with the duty of seeing that they were in proper condition."

59. Are there any specific provisions for "Independent Contractors" pertaining to professional employment organizations/temporary service companies/leasing companies?

There are no provisions in the Maine Workers' Compensation Act that discuss "Independent Contractors" in the context of professional employment organizations/temporary service companies/leasing companies. Outside of the Maine Workers' Compensation Act, however, there are provisions that deal specifically with Employee Leasing Companies and workers' compensation insurance issues. See 32 M.R.S.A. § 14055.

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60. Are there any specific provisions for “Independent Contractors” pertaining to owner/operators of trucks or other vehicles for driving or delivery of people or property?

39-A M.R.S. § 105-A of the Maine Workers’ Compensation Act notes that, though there is a presumption that persons performing construction work on a construction site are employees of the person who hired him or her, there is an exemption from employee status if that person owns/operates equipment weighing more than 7,000 pounds. See also answer 57(E) supra.

61. What are the "Best Practices" for defending workers' compensation claims and controlling workers' compensation benefits, costs and losses?

To effectively defend against workers’ compensation claims and manage benefits, costs, and losses, organizations should implement the following best practices:

1. Prompt Reporting: Ensure that any workplace injury is reported immediately to avoid delays in the claims process.
2. Effective Documentation: Maintain detailed documentation of all injury-related information, including incident reports, witness statements, and medical records, This documentation supports the claims process and helps prevent potential fraudulent claims.
3. Return-to-Work Programs: Establish effective return-to-work programs that facilitate the injured employee’s transition back to suitable work. This not only benefits employees by allowing them to contribute while recovering but also minimizes the impact of absences on business operations and productivity.
4. Legal Compliance: Stay informed about workers’ compensation laws and regulations. Compliance with state laws is crucial for a smooth claims process and to avoid potential legal issues.

62. Are there any state specific requirements which must be satisfied in light of the obligation of the parties to protect Medicare’s interests when settling the right to medical treatment benefits under a claim?

Maine law imposes specific requirements to protect Medicare’s interests when settling claims involving medical treatment benefits. These requirements are primarily governed by the MaineCare program under Title 22 of the Maine Revised Statutes Annotated (M.R.S.A.), which outlines the state's obligations and rights regarding recovery of medical costs paid on behalf of MaineCare recipients. These provisions are relevant to settlements involving medical treatment benefits under workers' compensation claims.

Under 22 M.R.S.A. § 14, the MaineCare program is designated as the payer of last resort, providing medical coverage only when no other resources are available. The statute grants the Commissioner of the Department of Health and Human Services (DHHS) the right to recover costs for medical benefits provided to MaineCare recipients from third parties who are or may be

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liable for the medical costs of injury, disease, or disability. This right of recovery is independent of any rights or causes of action belonging to the MaineCare recipient. The Commissioner is subrogated to the extent of benefits provided under MaineCare to any cause of action or claim that a recipient has against a third party liable for medical costs. See 22 M.R.S.A. § 14.

The statute also establishes a statutory lien on the proceeds of an award or settlement from a third party to recover MaineCare costs included in the recipient's claim for damages. The lien is limited to the recovery for medical expenses and cannot be reduced to reflect a pro rata share of the recipient's attorney's fees or litigation costs. However, the Commissioner may compromise, settle, or waive claims if collection is deemed not cost-effective or if a compromise is necessary for the best possible outcome See 22 M.R.S.A. § 14

63. Does your state permit medical marijuana and what are the restrictions for use and for work activity in your state Workers' Compensation law?

Maine offers medical marijuana registration cards for patients with debilitating medical conditions. ME. Rev. Stat. tit. 22 § 2425. A person may not be subjected to arrest, prosecution, penalty or disciplinary action, including but not limited to a civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for lawfully engaging in conduct involving the medical use of marijuana. ME. Rev. Stat. tit. 22 § 2423-E.

Employers cannot discriminate against employees or applicants on the sole basis of their status as qualifying patients. ME. Rev. Stat. tit. 22 § 2423-E(2). However, employers are not required to accommodate marijuana use in any workplace or any employees working under the influence. ME. Rev. Stat. tit. 22 § 2426(2)(B).

64. Does your state permit the recreational use of marijuana and what are the restrictions for use and for work activity in your state Workers' Compensation law?

Under the Marijuana Legalization Act, persons 21 years or older may use, possess, and transport up to two and a half ounces of marijuana or combination of marijuana and marijuana concentrate; grow up to six flowering marijuana plants, 12 immature plants, and unlimited seedlings, and possess all the marijuana produced by the plants at the person's residence; and purchase up to two and a half ounces of retail marijuana or up to 12 seedlings or immature plants. 7 M.R.S.A. § 2452.

An employer may not refuse to employ, discriminate, or otherwise penalize a person 21 years or older solely for that person's consumption of marijuana outside the workplace. 7 M.R.S.A. § 2452(3). However, an employee need not permit or accommodate the use, consumption, or possession of marijuana in the workplace; may enact and enforce workplace policies restricting the use of marijuana by employees; and may discipline employees who are under the influence of marijuana in the workplace. 7 M.R.S.A. § 2452(2).

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