2002 Legislative Update

One responsibility of the new Legal Department is the continuing education of Beacon Mutual personnel on workers' compensation legal issues pending before the General Assembly, the Workers Compensation Advisory Council, the Department of Labor, the Donley Center, the Workers' Compensation Court, both at the trial and appellate levels, and the Supreme Court. We plan to update this monthly to keep you informed of recent trends which should provide guidance on decisions made at all levels of Beacon Mutual. We welcome your suggestions on how we can be of further assistance in this regard.

GENERAL ASSEMBLY
During the fourth quarter of 1999 the Senate Judiciary Committee held two hearings on the necessity of replacing Judge Gilroy and Judge Messore. The Committee also considered the further issue of the necessity for a permanent Appellate Division as opposed to the present "semipermanent" Appellate Division. The absence of two judges has resulted in more work for the remaining eight, causing delay in the scheduling of pretrial hearings and further delay in trial and appellate decisions. Although the Senate hearings have not concluded, the Senate Judiciary Committee has not scheduled further hearings.

Judge Rao is scheduled to retire in October 2000. Effective February 24, 2000 he will neither be taking new cases nor sitting at the pretrial level. This will further reduce the number of judges hearing cases. This has led to the return of Judge Healy and Judge Morin to a more active role at the pretrial level. As you know, they have been hearing pretrials biweekly. It is expected that they will now be hearing pretrials every week. These developments should prompt the General Assembly to suggest of appointment of more judges and not establish a permanent Appellate Division.

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The argument in support of a permanent Appellate Division is that there are less hearings being held at the Workers' Compensation Court; therefore, the need for a completely separate Appellate Division can be met without impacting the cases at the trial level. Of course, this fails to take into consideration that more judges sitting at the appellate level will result in more new petitions being assigned to the judges remaining at the trial level, thus leaving those judges less time to render decisions. Another result will be a delay in matters being assigned for initial hearing and trial as judges' calendars will become full. An increased case load will result in less time to render decisions at both the trial level and appellate level, which would evolve into a vicious circle of delay and increased costs, i.e. greater exposure = greater value of settlement. As an advocate, we should point out that it is the insurers and employers of the State of Rhode Island who fund the system and it would be in their best interests, as well as injured workers, to have matters handled as expeditiously as possible. In summation, we do not need a permanent Appellate Division but need to replace the retired trial judges. We shall keep you advised as to the status of these bills and hearings.
There are presently over forty (40) legislative bills which have been introduced for consideration by the House and Senate Labor Committees to amend the Workers' Compensation Act.

Traditionally, the Chairmen of the House and Senate Labor Committees have deferred substantive consideration of legislation proposed by either labor or business factions pending consideration and hearing by the Workers' Compensation Advisory Council. No hearings have yet been scheduled by the Advisory Council or the Senate or House Labor Committees.

Most of the proposed legislation is a rehash of similar legislation submitted over the past eight (8) years or since the reforms of 1992. Most of the labor proposals seek to remove the reforms of 1990 and 1992. There are two new bills this year which would remove the judges' discretion in awarding counsel fees at all levels and would establish mandatory fees for an employee's success at the pretrial, trial and appellate levels. Of course, these proposed fees are higher than those that are customarily awarded. We do not anticipate these bills being well received by the General Assembly.

Employers' legislative proposals include the establishment of a schedule for specific compensation benefits, the prohibition of filing separate petitions for loss of use and disfigurement, and a concomitant award of two counsel fees for same, and the need to wait one year from a disfiguring event before a petition could be filed seeking benefits for disfigurement. There is also a bill which would remove the employer's obligation to use comparative medical evidence in requesting a reduction from total to partial incapacity.

SUPREME COURT
There has been a great deal of activity at the Supreme Court. In November 1999 the Court overturned the Appellate Division's decision in the case of American Power Conversion v. Benny's, Inc., M.P. No. 98-379. The Appellate Division had found that the "last employer" in an occupational disease case could not file a memorandum of agreement memorializing liability and disability without waiving all rights to seek apportionment against prior employers. The Supreme Court overturned this and found that an employer or insurer who does accept liability is not prohibited from seeking apportionment against prior employers. Notwithstanding this decision, great caution should be taken in memorializing occupational disease claims by clearly indicating on the memorandum of agreement that the memorialized injury is an occupational disease.

In December 1999 the Supreme Court found, in the case of Brooks v. Dockside Seafoods, that the six-month statute of limitations set forth in §28-35-61 does not apply to original petitions seeking to add new or separate injuries which were not previously litigated or considered and memorialized by pretrial order or decree. This eliminates a defense that employers had used in cases in which an original petition had been filed in the past and a different injury was raised in a subsequent original petition. Essentially, the Court found that if the previously litigated injury or event was decided by the Court and one particular injury was not alleged, then the six-month limit on review of that decree does not apply when that particular injury is alleged in a new original petition. The statute of limitations does still apply, with new modifications outlined below.
On January 26, 2000, in the case of Ponte v. Malina Company, the Supreme Court distinguished the omission of an injury from the description of an injury on a memorandum of agreement, the payment of indemnity benefits as a result of an injury which was omitted from a memorandum of agreement, the memorialization of a flow from injury from a memorialized injury on a memorandum of agreement and an original injury which was known but not omitted from a memorandum of agreement. This is both factually and procedurally very confusing. In summation, there is no statute of limitations defense regarding a sustained injury that is inexplicably omitted from the description of the injury on a memorandum of agreement.

In the case of Ponte, the employee suffered an injury to her neck and left shoulder in May 1986. The memorandum of agreement, which only memorialized a left shoulder injury, was filed in July 1986. The employee's benefits were suspended through an employer's petition to review in September 1988.

Subsequently, the employee filed an employee's petition to review to amend the description of injury to include the neck. An employee's petition to review alleging a recurrence was also filed. The employee's attorney withdrew the petition to review seeking to amend the description of the injury to include the neck. Unfortunately, defense counsel in the case did not mandate that the withdrawal stipulation reflect that the petition was withdrawn with prejudice. The employee's petition alleging a recurrence was denied and no appeal was taken.

Years later the employee filed another petition to review seeking to amend the description of the injury to read neck. It also alleged an incapacity pertaining to the neck injury from the original date of injury to the present and continuing. The employer defended the petition on the grounds that more than three years had passed; therefore, the statute of limitations would bar the inclusion of that injury. The employer further argued that the employee could not proceed on the petition seeking to amend the description of the injury to include the neck as a previous petition with the same allegation had been withdrawn. It was also argued that the previous recurrence petition, which also included testimony about the neck, had been denied thereby precluding the alleged entitlement to indemnity benefits on the legal doctrine of res judicata.

The Supreme Court distinguished the omission of an injury from the inclusion of a new or original injury or a flow from injury. In so doing, the Supreme Court found that if the employer omitted or did not include an injury which did occur, then under §28-35-5 there would be no limitation of time in which an employee could memorialize that injury which, otherwise, should have been included on the memorandum of agreement. However, the Supreme Court did rule, somewhat confusingly, that although there was no time limitation to include an omitted injury, there was a statute of limitations on which an employee could seek indemnity benefits for the described injury.

In this instance, the employee was allowed to describe the injury as a sprain, left shoulder and neck. The employee's efforts to seek indemnity benefits from the date of injury to the present and continuing for the neck were denied on the grounds that the
statute of limitations had passed. In addition, the Supreme Court found that as the issue of incapacity had already been litigated and denied, with evidence about the neck, the employee was not entitled to indemnity benefits.

This case is very confusing in that the Supreme Court only found that no statute of limitations would apply when a body part has been omitted from the original description of the injury. Do not let employees or their attorneys convince you that there is no statute of limitations on indemnity benefits or on "flow from" petitions, or on new original injuries which date back more than two years. I remain available on this very confusing procedural case.

If anything is gleaned from the Ponte case, it is the admonition that before authorizing defense counsel to allow an employee to withdraw a petition, the stipulation must include the statement "with prejudice".

The Supreme Court also had the opportunity to address the issue of "manifest injustice" on odd lot petitions in the case of Lombardo v. Atkinson-Kiewit. On February 1, 2000, the Supreme Court decided a petition for writ of certiorari filed by the employee from a decree of the Appellate Division, finding that the employee had failed to successfully prosecute an employee's petition to review showing that he was totally incapacitated under the "odd lot" doctrine of §28-33-17(b)(2).

At trial the employee presented the deposition testimony of two treating physicians and the live testimony of a vocational expert. It is not clear from the record that the employer presented contrary evidence. The trial judge found that the employee was totally incapacitated under the "odd lot" doctrine. The Appellate Division overturned, finding that the trial judge was clearly wrong in relying upon the opinions of the vocational expert whose opinions were not based upon sufficient evidence. The employee petitioned for writ of certiorari to the Supreme Court, which was granted.

It is imperative to consider, briefly, the facts and travel of the case before summarizing the conclusions of the Supreme Court. Mr. Lombardo suffered a back injury in 1991 while working as a carpenter for Atkinson-Kiewit. He eventually underwent back surgery. A memorandum of agreement filed in July 1991 memorialized total incapacity. In December 1994 his benefits were reduced to partial. Thereafter, the employee's attorney filed a petition to review alleging that he was totally incapacitated under the "odd lot" doctrine.

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The statutory "odd lot" doctrine ( §28-33-17(b)(2) ) was codified with the 1992 reforms. The date of injury preceded the statutory enactment of the "odd lot" doctrine. The 1992 reforms obligated employees to not only show, based on age, education, background and training, that the employee was totally incapacitated, but to also show that a manifest injustice would otherwise result if there was no finding of total. The Supreme Court found that the employee had waived any argument that the codified
"odd lot" doctrine of 1992 could not be applied retroactively. Nevertheless, the Supreme Court did hold that the enactment of §28-33-17((b)(2) codified the common law definition of "odd lot" and also modified it. Specifically, it found that to prove an "odd lot" case, the employee must prove not only that he was incapable of doing his regular job, but was also incapable of doing any alternative employment. They defined "any alternative employment" as being a "practical or regular alternative" to the employee's former job. This finding will do nothing but promote further litigation.

In characterizing "practical or regular alternative to employee's former job" the Court distinguished this from the "material hindrance" burden of the employee to get through the gate of §28-33-18.3. The Court inferred that the "material hindrance" burden is lower than "any alternative employment". This has not yet been defined but only has been alluded to here.

In summary, "manifest injustice" was defined as "not being characterized as total". Thus, there is no longer a two-step burden to prove "odd lot". The Court also found that to prove "odd lot" one would have to show that an employee is incapable of performing his or her regular job or any practical or regular alternatives to their regular job. This must be done with the use of vocational expert testimony that includes many sources of testing which were conducted on the employee at issue. Otherwise, the burden of proof would not be met.

The effect of this decision will, in all likelihood, result in more litigation. No easy answers were set forth on what is "odd lot". If anything, the burden of proving "odd lot" was lowered. Unfortunately, the Court interchanged the terms of "alternative employment" with 'suitable alternative employment". If anything is to be taken from this, it is that the definition of material hindrance in §28-33-18.3 remains open and, additionally, that any retained vocational expert should be well qualified and capable of testifying based on scientific evidence which can be measured and considered by the Court.

Finally, on February 15, 2000 the Supreme Court considered, for the first time, the issue of the chart of §28-33-18(c). In Star v. DelBarone, the employee had suffered a neck injury after May 18, 1992, was at maximum medical improvement, had his benefits reduced to thirty percent (30%), and suffered from a seven percent (7%) whole person functional impairment. The employer filed a petition seeking an earnings capacity based on the impairment level. At trial, the employer presented medical evidence, but neither vocational evidence nor a vocational expert. The trial judge found that the employer had to present more than just medical evidence because of the language of §28-33-18(c) which provides that the earnings capacity is established based on "evidence of ability to earn including, but not limited to, a determination of the degree of functional impairment and/or disability"(emphasis added). The Appellate Division affirmed, holding that the employer must present some reasonable relationship between the employee's actual physical impairment and his ability to earn. The employer petitioned the Supreme Court for a writ of certiorari, which was granted.
In its decision, the Supreme Court affirmed the Appellate Division and the trial judge, denying the employer's petition. The employer argued that it only had to present an impairment rating for a chart reduction to be implemented. The Court found that there was nothing in the Act that obligated the Court to do this. Interestingly, the Court did find that it was within the discretion of the trial judge to consider the functional impairment rating or an employee's actual disability, or both, in establishing an earnings capacity.

The employer also argued that it was the employee's burden to show that there was no relationship between the functional impairment rating and the actual disability. The Supreme Court rejected this, finding that it was the employer's burden to present evidence of "disability" and the relationship between earning capacity and functional impairment. No vocational evidence was presented so the trial judge could not establish the earning capacity. In fact, the Supreme Court wrote, "[no] evidence was introduced about DelBarone's level of education, or about the availability of jobs that he would be able to perform". In so doing, the Court recognized that the employer need not identify "particular employment" and the employee "may" have to defend by showing he or she actively sought employment. This issue, however, was never addressed.

In summary, for an employer to best position itself to succeed in establishing an earnings capacity under the "chart" of §28-33-18(c), the employer should present not only medical evidence of the functional impairment rating, but vocational evidence of the employee's employability and ability to earn along with a labor market survey.