

MAINE STATE LEGISLATURE

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STATE OF MAINE
HOUSE OF REPRESENTATIVES
118TH LEGISLATURE
FIRST SPECIAL SESSION

HOUSE AMENDMENT "B" to COMMITTEE AMENDMENT "B" to S.P. 491, L.D. 1523, Bill, "An Act to Make the Workers' Compensation System More Equitable"

Amend the amendment by inserting after section 5 the following:

Sec. 6. 39-A MRSA §313, sub-§3-A is enacted to read:

3-A. Legal representation at hearing. If mediation does not successfully resolve all pending issues, at the close of mediation the employer must notify the board and the employee whether the employer will be represented by legal counsel in later meetings. An employer who elects to be represented by legal counsel in later meetings is responsible for payment of attorney's fees for the employee in accordance with section 325-A if the employee retained an attorney and prevails.

A. At the close of mediation, the mediator shall provide the employer with a form on which to indicate whether the employer will be represented by legal counsel in later meetings. The mediator shall explain to both parties that if the employer elects to be represented, the employer may be liable for all or part of the employee's attorney's fees in accordance with section 325-A if the employee prevails. The mediator shall also explain that, if the employer waives the right to be represented by an attorney, the employee will be responsible for the employee's attorney's fees even if the employee prevails on all of the issues. The mediator shall explain the employer's election to the employee and explain the employee's options. The mediator shall inform the employee of the availability of an advocate assigned by the board whether or not the employer retains counsel. A

2 written summary of the parties' rights and responsibilities
3 regarding representation must be provided to both parties.

4 B. If the employer fails to make the election at the close
5 of mediation, the board shall proceed as if the employer
6 elected to be represented by counsel. An employer who
7 waived the right to be represented by legal counsel is
8 precluded from being represented by legal counsel at any
9 deposition, hearing, proceeding or other required meeting
10 with the employee without the consent of the employee and
11 the board for good cause shown.

12 This subsection applies to legal representation at arbitration if
13 the parties have agreed to arbitration.'

14 Further amend the amendment by inserting after section 6 the
15 following:

16 'Sec. 7. 39-A MRSA §325, as enacted by PL 1991, c. 885, Pt.
17 A, §8, and affected by §§9 to 11, is repealed.

18 Sec. 8. 39-A MRSA §325-A is enacted to read:

19 **§325-A. Legal expenses and standards for legal representatives**

20 **1. Attorney's fees.** When an employee prevails in a
21 controverted proceeding under this Act, the employee's attorney
22 may recover from the employer a reasonable fee for those legal
23 services that were necessary to sustain the employee's position
24 on the issue on which the employee prevailed.

25 **2. Limitations.** The employer may only be assessed under
26 subsection 1 for employee legal services rendered after the date
27 of mediation. The employer may not be assessed under subsection
28 1 for any employee legal services if the employer waived the
29 right to be represented by legal counsel at the conclusion of
30 mediation and the employer, in fact, was not represented by legal
31 counsel at any proceeding or required meeting with the employee.

32 **3. Standards.** An attorney for any party may not be
33 compensated for services that do not contribute to the prompt,
34 just and expedient resolution of claims under this Act. Upon
35 petition by the employer, the employee, an attorney or any other
36 interested party, a legal charge incurred by any party may be
37 reviewed by the board and confirmed, adjusted or denied. Among
38 the factors that determine the reasonableness of legal charges
39 are the following:

40 A. The efficiency and expediency with which counsel brought
41 the controversy to resolution;

- 2 B. The time and labor that was necessary for proper
 management of the dispute;
- 4 C. The difficulty or complexity of the issues presented;
- 6 D. The skill required to perform the service properly;
- 8 E. The experience and ability of the attorney performing
10 the service;
- 12 F. The level of responsibility assumed;
- 14 G. The severity of the injury and disability;
- 16 H. The amount in controversy;
- 18 I. The significance of the personal, medical and vocational
20 issues at stake for the employee and the employee's
 dependents;
- 22 J. The comparative time and effort expended by the opponent;
- 24 K. The end result achieved; and
- 26 L. Other factors determined significant by the hearing
 officer.

28 4. Maximum rates. For legal fees that are based on an
30 hourly charge, the rate per hour may not exceed the rate
 established by the board by rule.

32 5. Penalties. If any legal representative has overcharged
34 for services rendered under this Act, the board may order
 deletion and, as necessary, repayment of the amount overcharged.
36 In addition, the board may order that a penalty be paid to the
 party overcharged in an amount up to twice the amount of the
38 overcharge.

40 If an attorney or a representative for a party impedes the
 efficient, expedient or just resolution of a dispute under this
42 Act, the board may assess against that person a civil penalty in
 an amount not to exceed \$1,000 payable to the board and
44 collectible by civil action. The board may prohibit the person
 from appearing in proceedings before the board and may take such
46 other action as is authorized by section 309, subsection 4;
 section 313, subsection 4; and sections 317, 323 and 324.

48 6. Settlement fees payable by employee. If an attorney
50 negotiates the final resolution of a claim in the best interests

of the employee, the attorney may collect from the employee's settlement proceeds a fee based on a percentage of the net amount recovered. After first deducting any out-of-pocket costs that are chargeable to the employee, the percentage may not exceed 10% of the net present value of the settlement up to 150 times the State's average weekly wage prevailing at the time of the employee's injury plus 5% of the remaining net value of the settlement.

7. Definitions. For purposes of this section:

A. A controversy is initiated on the date when a petition, a notice of controversy or a certificate under section 205, subsection 9 is mailed, served or filed; and

B. "Prevail" means to obtain or retain more compensation or benefits under this Act than were offered to the employee by the employer in writing at the conclusion of mediation. If no offer was made, "prevail" means to obtain or retain compensation or benefits under this Act.

8. Application. This section applies to all cases in which the date of injury falls after December 31, 1992, except that:

A. Provisions relating to controversies apply to those controversies for which mediation occurs after the effective date of this section; and

B. Provisions relating to settlements apply only to those settlements that are approved after the effective date of this section.

Unless otherwise governed by this section, the amount of the attorney's fee is determined by the law in effect at the time the employee's injury occurred.

9. Repeal. This section is repealed September 1, 1999.

Sec. 9. 39-A MRSA §352, as amended by PL 1995, c. 560, Pt. G, §25, is further amended to read:

§352. Settlements

1. Agreement. An insurer, self-insurer or self-insured group and an employer and employee may by agreement discharge any liability for compensation, in whole or in part, by the employer's payment of an amount to the employee if:

A. The insurer, the employer, the employee or the employee's dependents petition the board for an order

2 commuting all payments for future benefits to a lump sum or
3 a series of structured settlement payments;

4 B. Six months' time has elapsed from the date of an injury;
5 and

6 C. The provisions of this section have been met and the
7 agreement has been approved by the board.

10 2. **Policy.** The board shall by rule adopt policies
11 establishing the circumstances under which ~~lump-sum--payments~~
12 settlements may be approved under this section. The circumstances
13 must be at least as restrictive as those set forth in this
14 section.

16 3. **Review.** Before approving any ~~lump-sum~~ settlement, the
17 board shall review the following factors with the employee:

18 A. The employee's rights under this Act and the effect a
19 ~~lump-sum~~ settlement would have on those rights, including,
20 if applicable, the effect of the release of an employer's
21 liability for future medical expenses;

24 B. The purpose for which the settlement is requested;

26 C. The employee's post-injury earnings and prospects,
27 considering all means of support, including the projected
28 income and financial security resulting from proposed
29 employment, self-employment or any business venture or
30 investment and the prudence of consulting with a financial
31 or other expert to review the likelihood of success of these
32 projects; and

34 D. Any other information, including the age of the employee
35 and of the employee's dependents, that would bear upon
36 whether the settlement is in the best interest of the
37 claimant.

38 4. **Procedure.** The board shall initiate the review within
39 14 days of receipt of a request for a settlement review. An
40 employer is considered a party for the purposes of this section.

42 5. **Approval.** The board may not approve any ~~lump-sum~~
43 settlement unless there is an agreement pursuant to subsection 1
44 or, in the event the employer refuses to agree to the settlement,
45 the board has reviewed the proposed agreement and finds it to be
46 in the best interests of the parties, and unless:

48 A. The employee has fully participated in the review
49 process, except in circumstances amounting to good cause;

2 B. The board finds the settlement to be in the employee's
3 best interest in light of the factors reviewed with the
4 employee under subsection 3; and

6 C. In the case of a ~~lump-sum~~ settlement that requires the
7 release of an employer's liability for future medical
8 expenses of the employee, the board finds that the parties
9 would be unlikely to reach agreement on the amount of the
10 ~~lump-sum~~ payment without the release of liability for future
11 medical expenses; and

12 D. Payments in larger settlements are structured or
13 deferred over time so that proceeds received in any calendar
14 year will not exceed 50 times the state's average weekly
15 wage unless special circumstances justify receipt of
16 payments on a more compressed schedule.

18 **6. Monitoring of settlement recipients.** The board shall
19 establish and maintain a program to monitor the postsettlement
20 employment experience of employees who settle their claims
21 pursuant to this section to help develop future policy. The
22 Department of Labor shall cooperate with the board in the
23 establishment and operation of this monitoring program.'

26 Further amend the amendment by inserting after section 8 the
27 following:

28 **'Sec. 9. Review of legal expenses and standards for legal**
29 **representatives.** The joint standing committee of the Legislature
30 having jurisdiction over labor matters shall review the
31 provisions of the Maine Revised Statutes, Title 39-A, section
32 325-A and no later than March 1, 1999 report out recommended
33 legislation, including, but not limited to, the repeal of Title
34 39-A, section 325-A, subsection 9.'

36 Further amend the amendment by relettering or renumbering
37 any nonconsecutive Part letter or section number to read
38 consecutively.

42 FISCAL NOTE

44 The expansion of legal representation provisions in this
45 amendment will increase the State's workers' compensation costs
46 through September 1, 1999. The impact on the current department
47 and agency premium rates and the General Fund appropriations and
48 Highway Fund allocations that will be required can not be
49 determined at this time.

SUMMARY

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4 The amendment changes the provisions regarding settlements
6 to encourage structured settlements when the settlement amount is
8 large. This amendment requires that at the conclusion of
10 mediation the employer must inform the board and the employee
12 whether the employer will be represented by legal counsel at any
14 subsequent proceeding or meeting with the employee. If the
16 employer elects to be represented, the employee is entitled to
18 have the employee's attorney's fees paid for by the employer if
the employee hires an attorney and prevails. The amendment
defines "prevail" as obtaining more compensation or benefits than
were offered by the employer in writing at the conclusion of
mediation. The employee may use an advocate even if the employer
is represented. The mediator is required to inform both parties
of their rights at the conclusion of mediation. If the employee
prevails and is entitled to have the attorney's fees paid for by
the employer, only those services rendered after the date of
mediation are allowable.

20

22 This amendment puts a repeal date of September 1, 1999 on
24 that section of the committee amendment that entitles an employee
26 who hires an attorney and who prevails to have the employee's
28 attorney's fees paid by the employer and requires the joint
standing committee of the Legislature having jurisdiction over
labor matters to review that section of law and recommend whether
it should be continued.

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