

Letter of the Law: The Most Educational Workers' Comp Legal Cases of the Year

Tuesday, March 24th, 2026

11:30-12:15pm

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Disclosures

Ed Moriarty, Jr., Esq.— I have nothing to hide.

Joe Markey, Esq.— My life is an open book.

Phyllis Phillips, Esq. — I'm just boring.

WHEN PAIN TRUMPS PARTIAL DISABILITY: ANDERSON V. ANDERSON MOTORLINES, INC. – DEFENSE ATTORNEYS' WATERLOO

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i. Thesis: How can a Massachusetts workers' compensation attorney not achieve the assignment of an earning capacity or preclude the finding of permanent and total disability with credible medical evidence of an earning capacity, including the following:

- 11A finding of partial, not total, temporary and not permanent total disability
- Labor market survey finding sedentary and light duty jobs available in the open labor market consistent with employee age, education, training, transferable skills, and physical capacity for gainful employment
- Even with a light duty offer from the employer
- Even with surveillance evidence of employee engaged in activities of daily living with minimal to no restrictions

II. Answer, Anderson v Anderson Motorlines, Inc., 4 Mass Workers' Comp Rep. 65 (1990)

- Employee's total disability based on chronic credible evidence of employee testimony of pain trumps expert medical opinion that employee is not temporarily totally disabled and can return to activities consistent with sedentary and light duty
- Anderson from insurer perspective: promote lump sum with liability or agreement regarding modest/minimal earning capacity, especially regarding maximum partial disability; not last best offers of zero loss of earning capacity, and defenses disputing disability and extent thereof, present and future
- Compromise regarding earning capacity or pay the price: employee remains on TTD or even goes to PTD

III. Capezzi v Alan Davis d/b/a Brockton Auto Repair, 17 Mass Workers' Comp. Rep. 119, 123 (2003)[limited use of arms]

- 11A Impartial references employee with chronic bilateral carpal tunnel syndrome, status post trauma, non-operable, with chronic pain affecting both lower extremities
- Employee job is auto repair and auto painting, heavy bilateral upper extremity intensive occupation
- 11A medical opinion finds employee to be partially, not totally, disabled.
- Yet the finding of temporary total disability, based on the employee's pain, trumps the physical effects of the work injury as it relates to employability
- The expert opinion regarding partial does not preclude a finding of temporarily total disability with adequate findings of credible chronic pain, by judge, based on employee testimony
- Again, pain trumps 11A partial opinion

IV. Delaney v Laidlaw Waste Systems, 13 Mass Workers' Comp. Rep. 72, 74 (1999)[limited use of low-back]

- Employee sustained a serious low back injury requiring laminectomy and chronic pain status post laminectomy diagnosis
- Employee was a truck mechanic and required a healthy back to perform the heavy duty/physically demanding duties of the job
- The 11A Impartial cleared employee to return to work, finding employee to be partially disabled, and that employee could return to work provided it was light duty with restrictions, or sedentary
- Again, employee pain, chronic, debilitating and credible, deemed sufficiently debilitating, despite the fact that employee is not temporarily totally disabled from an orthopedic perspective, that employee cannot return to gainful employment and remains on TTD

V. Cugini vs Town of Braintree School Dept., 17 Mass. Workers' Comp. Rep., 363, 366 (2003) [limited use of legs]

- Injury to the sural nerve chronic and debilitating and limiting the use of the affected extremity
- Employee was a custodian at a local school district and sustained a severe permanently disabling injury to the affected left leg, ankle, and foot
- The 11A found employee to be temporarily and totally disabled as a custodian, but only temporarily partially disabled as it relates to return to light duty within appropriate restrictions
- Again, pain trumps the 11A opinion clearing employee to return to sedentary or light duty
- Employee's credible testimony regarding chronic debilitating pain precluded the reliable performance of any gainful employment, all consistent with Anderson and its' progeny
- Employee stays on TTD
- Anderson carries the day for the injured worker

VI. Commonality of temporary total disability findings in Mass Workers' Comp Review Board extent of disability cases: pain disables even if 11A doesn't!

- Employee is at a medical end result
- The 11A doesn't clear employee to return to job on date of injury
- The 11A does clear employee to return to work with limitations consistent with or characterized as sedentary or light duty
- And the basis of the continuing TTD opinion is defined in credibility findings, including employee testimony, in general, and employee testimony regarding chronic pain, in particular, and the Judge's observation of the employee in the course of the proceeding as in pain and still disabled

VII. How is a record of chronic debilitating pain testimony developed to trump an 11A partial opinion keeping the employee on compensation, temp total, or even permanent and total despite clearance to return to sedentary /light duty?

- A credibility finding regarding employee testimony, in general, and employee testimony regarding pain, in particular, is needed
- There must be medical evidence that employee does have pain past, present, and continuing, causally related to the accepted industrial injury in employee, insurer and 11A meds
- The pain must be chronic with some of the following findings:
 - The pain is deemed non-responsive or uncorrectable regarding common treatment modalities including prescriptions, physical therapy, and/or additional surgery
 - Adverse side effects from pain meds noted
 - Sleep disturbance
 - Loss of judgment or tension

Required Findings (continued):

- Pain interferes with activities of daily living
- Pain interferes with employee's social life
- Pain limits employee's driving to local, short distances and limited times.
- Employee recreational activities limited or eliminated by pain
- Employee testifies to being bedridden for hours, or even days, if engaged in activities of a heavy, exertional, or repetitive nature, especially on a trial or limited basis
- Employee takes no vacations
- Employee drives only as necessary

VIII. How does an insurer and defense attorney fight pain as a critical disabling variable in a present disability hearing with an 11A opinion establishing partial disability?

- Effective cross examination of employee is critical
- Employee credibility should be challenged
- Employee allegation of no good days ever: not credible
- Employee testimony that he can't do anything a bridge too far
- Employee doesn't take prescription medications, emphasize it
- Employee doesn't take over the counter medications, emphasize it
- Employee isn't engaged in physical therapy or chiropractic care, or any other care or treatment for pain on a regular basis, or any basis, emphasize it

- Employee has a valid MA motor vehicle operator's license without restrictions, emphasize it
- Employee claims he has limited abilities to sit, stand, walk, talk, etc. Point out that employee has been sitting or standing and talking at the Hearing without apparent difficulty for an extended period of time: minutes, even hours, or all day
- Confront employee with surveillance evidence of activities inconsistent with the chronic pain and consistent with many activities that the employee engages in with no restrictions regarding activities of daily living: driving, shopping, recreation, walking, yard work, etc.
- Employee doesn't treat with a doctor at all, emphasize it
- Employee isn't scheduled for surgery, emphasize it
- Employee isn't going to have further diagnostic tests, emphasize it

- Even if employee sees the doctor, emphasize that he doesn't see the doctor very often
- Confront the employee with a labor market survey opinion that there are jobs out there within employee's physical capacity to return to work, according to the impartial, regarding sitting, standing, walking, lifting, bending, and carrying, and make employee testify under oath that he can't do those jobs either
- If employee hasn't tried to do a sedentary or light duty job, get him to admit it
- Any particularly harmful surveillance of activities inconsistent with chronic pain should certainly be highlighted with a confrontational cross examination and surveillance evidence
- All questions should be geared to question employee's report of pain as to its nature, quality, chronicity, and severity
- Anything and everything should be done on cross examination to harm, or at least to limit employee's ability to use Anderson to trump a medical opinion that employee is partially, not totally, disabled

IV. Conclusion:

- Defense attorneys and insurers are subject to judicial discretion in Massachusetts, at Hearing, relevant to the issue of present disability under Anderson; and if employee has chronic pain, and alleges continuing present disability notwithstanding an impartial opinion that employee's disability is partial, not total, will remain on continuing TTD more often than not today and tomorrow
- Anderson says credible and chronic pain can trump an 11A opinion regarding partial disability
- The insurer must consider “the power of pain” in evaluating every claim for settlement vs litigation costs and benefits
- If present disability is tried, defense attorneys should challenge employee testimony of chronic pain with cross examination and/or other evidence, including medical, surveillance, or labor market survey, to minimize employee's pain and its alleged impact on employee's activities of daily living; noting limited, minimal or absence of any ongoing medical care or treatment, use of prescriptions, no further surgery scheduled, nor any further diagnostic testing on the books
- Anderson is consistent with MA case law: loss of earning capacity, not extent of disability, is a question of fact, medicine, and law, for the judge to decide, on a case by case credibility basis
- Employees have benefits of Anderson for 35 years, and continuing: insurers should embrace MA case law and act proactively accordingly

My Career “Oh No” and “Aha” Moments

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“Oh No!”

Plaintiff’s attorney telephones baby defense lawyer:

“Where are you?”

Baby defense lawyer replies:

“Obviously not where I’m supposed to be.”

The moral: Calendars, baby, calendars.

“Aha!”

The case: *J.C. v. Experian Information Solutions*, Vermont W/C Opinion No. 23-08WC (June 5, 2008) (Phyllis Phillips, Hearing Officer):

Claimant suffered idiopathic seizure at work (“junk” mail printing operation), causing her to fall from standing height to concrete floor, “like a ton of bricks.”

As she fell, she hit her head on a large bolt on the end of a metal spindle and possibly as well on a metal bar at the base of the machine at which she was working.

Inconsistent evidence re whether and to what extent she continued seizing and “banging her head” on the floor after she fell.

“Aha!”

Claimant suffered multiple injuries, including **LEFT** occipital scalp laceration, **LEFT** basilar skull fracture, head injury w/ intracranial bleeding/stroke, **LEFT** shoulder dislocation, posterior lobe liver laceration, and rib fractures.

Issue for hearing: Which of Claimant’s injuries were caused by hitting her head on the metal bar (compensable) vs. which were caused by hitting the floor (not compensable)?

At hearing, Claimant showed me her scar, which was on the LEFT side of her head and in a circular shape.

“Aha!”

Claimant’s medical expert determined that all injuries were most likely related to hitting her head on the machine, except for left shoulder dislocation and rib fractures, which could have been caused by hitting the floor.

A panel of defense medical experts, all of whom personally examined Claimant, determined that none of her injuries were caused by hitting her head on the machine, BUT . . .

“Aha!”

... Their opinions were based on the mistaken assumption that her scalp laceration was to the **RIGHT** side of her head, not the **LEFT**.

The confusion likely resulted from an **error in the initial ER note**, which noted a **RIGHT** scalp laceration. Oops.

But the physical evidence – **THE SCAR!** – was clearly on the **LEFT**. OOPS.

“Aha!”

The moral:

Look for the fact (or facts) that are undeniable. E.g., the weather, or the neutral eyewitness, or the scar! If your theory of the case doesn't fit these facts, you're sunk.

Thank you!