Bill as Introduced

HB 647-FN – AS INTRODUCED

2013 SESSION

13-0735
01/04

HOUSE BILL ***647-FN***

AN ACT relative to appeals from the compensation appeals board.

SPONSORS: Rep. G. Richardson, Merr 10

COMMITTEE: Labor, Industrial and Rehabilitative Services

ANALYSIS

This bill allows any party in interest aggrieved by a decision of the workers' compensation appeals board to appeal to the superior court. Such appeal shall be limited to issues of law. Current law allows appeals from the board to go directly to the supreme court.

Explanation: Matter added to current law appears in ***bold italics.***
Matter removed from current law appears [~~in brackets and struckthrough.~~]
Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

13-0735
01/04

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Thirteen

AN ACT relative to appeals from the compensation appeals board.

Be it Enacted by the Senate and House of Representatives in General Court convened:

1 Appeals From Compensation Appeals Board. Amend RSA 281-A:43, I(c) to read as follows:

(c) Any party in interest aggrieved by any order or decision of the board may appeal to the supreme court ***or the superior court*** pursuant to RSA 541. ***Appeals to the superior court shall be limited to issues of law. Appeals to the superior court shall be filed in the county or judicial district thereof where the employee or employer resides. If neither party resides in the state, the appeal may be filed in any county or judicial district. Any appeal from the superior court to the supreme court shall be by notice of appeal in accordance with the rules of the supreme court.***

2 Award of Fees and Interest. Amend the introductory paragraph of RSA 281-A:44, I(a) to read as follows:

(a) In any dispute over the amount of the benefit payable under this chapter which is appealed to the board***, the superior court,*** or ***the*** supreme court [~~or both~~], the employee, if such employee prevails, shall be entitled to reasonable counsel fees and costs as approved by the board or ***applicable*** court and interest on that portion of any award the payment of which is contested. For the purposes of this paragraph, to "prevail" means:

3 Effective Date. This act shall take effect January 1, 2014.

1

LBAO
13-0735
01/29/13

HB 647-FN – FISCAL NOTE

AN ACT relative to appeals from the compensation appeals board.

FISCAL IMPACT:

Due to time constraints, the Office of Legislative Budget Assistant is unable to provide a fiscal note for this bill, **as introduced**, at this time. When completed, the fiscal note will be forwarded to the House Clerk's Office.

Committee Minutes

Printed: 04/12/2013 at 3:25 pm

SENATE CALENDAR NOTICE
COMMERCE

Senator Andy Sanborn Chairman
Senator Jeb Bradley V Chairman
Senator Sam Cataldo
Senator Andrew Hosmer
Senator David Pierce

For Use by Senate Clerk's Office ONLY
☐ Bill Status
☐ Docket
☐ Calendar
Proof: ☐ Calendar ☐ Bill Status

Date: April 12, 2013

HEARINGS

Tuesday **4/23/2013**

(Name of Committee)	(Place)	(Time)
COMMERCE	LOB 101	1:00 PM

EXECUTIVE SESSION MAY FOLLOW

1:00 PM	HB246	relative to falsity by employer.
1:20 PM	HB359	relative to mailing of notices and determinations by the department of employment security.
1:40 PM	HB440	relative to new hire reports to the department of employment security.
2:00 PM	HB546	relative to medical examinations under workers' compensation.
2:20 PM	HB647-FN	relative to appeals from the compensation appeals board.

Sponsors:

HB246
Rep. Andrew White

HB359
Rep. Andrew White

HB440
Rep. Andrew White

HB546
Rep. Jeffrey Goley
Rep. Timothy Copeland
Sen. Bette Lasky
Rep. Herbert Richardson
Sen. Donna Soucy
Rep. Janet Wall

HB647-FN
Rep. Gary Richardson

Patrick Murphy 271-8631

Sen. Andy Sanborn
Chairman

SENATE COMMERCE COMMITTEE

Patrick Murphy, Legislative Aide

House Bill 647-FN relative to appeals from the compensation appeals board.

Hearing Date: April 23, 2013

Time Opened: 3:05 p.m. **Time Closed:** 3:55 p.m.

Members of the Committee Present:
Senator Sanborn, Senator Bradley, Senator Cataldo, Senator Pierce

Members of the Committee Absent:
Senator Hosmer

Bill Analysis: This bill allows any party in interest aggrieved by a decision of the workers' compensation appeals board to appeal to the superior court. Such appeals shall be limited to issues of law. Current law allows appeals from the board to go directly to the Supreme Court.

Sponsors: Rep. G. Richardson, Merr 10

Who supports the bill: Rep. G. Richardson, Merr 10; Rep. White, Graf 13; Doug Grouel, Grouel Law Office

Who opposes the bill: Dave Juvet, BIA; Ryan Hale, NH Auto Dealers Association; Jim Owens, Solloway and Hollis; Kevin Stuart, Bernard and Merrill; Donna Daneke, Bernard and Merrill; George Roussos, American Insurance Association and NH Association of Domestic Insurance Companies; Mark MacKenzie, NH ALF-CIO; Dick Bouley, Teamsters Local 633; Denis Parker; Bob Morneu, Workers' Compensation Advisory Board

Summary of testimony presented in support:
Rep. G. Richardson, Merr 10

- People are being denied a right to judgment. This will streamline operations and cost less money. If this bill becomes law, the compensation appeals board will remain the only body with the authority to determine issues of fact in contested cases. No one should lose their case because of an error of law. With the Appeals Board making reversible errors of law in62% of its cases and the Supreme Court only willing or able to accept 36% of the appeals filed, the current system is broken. This bill will fix it by providing a relative inexpensive and speedy remedy to both sides.

Rep. White, Graf 13

- Access to the courts is a right. People who appeal workers comp rulings often feel they've been wronged. This doesn't create a big additional work load for the Superior Court.

Summary of testimony presented in opposition:

Dave Juvet, BIA

- These individuals currently have a right to an administrative appeal. These cases were moved to the administrative process because the courts couldn't keep up the case load. This will cost time and money and will increase the cost of workers compensation.

Ryan Hale, NH Auto Dealers Association

- Prior to 1991 the workers' compensation system in NH was on the verge of collapse. Upon the recommendation of Governor Gregg's task force, the Superior Court was eliminated from the process of hearing workers' compensation appeals and the Compensation Appeals Board was developed. The purpose of the board was to streamline the process' making it more efficient and less time consuming.
- Reintroducing the Superior Court back into the appeals process gives claimants' not 3 but 4 bites at the apple.
- There is already a backlog in the court system.

Jim Owens, Solloway and Hollis

- This bill seeks to add a forth hearing into the process by creating an intermediate appeal between the final Compensation Appeals Board decision and an appeal to the Supreme Court.
- This is unnecessary to protect the rights of the parties, and it will increase the cost of the system, lead to delay and uncertainty, and make the process more adversarial and litigious.

Kevin Stuart, Bernard and Merrill

- Agreed with previous comments from those in opposition. Repeated concerns that this will delay the process and add cost to the entire system.

Donna Daneke, Bernard and Merrill

- Agreed with previous comments from those in opposition. Repeated concerns that this will delay the process and add cost to the entire system.

George Roussos, American Insurance Association and NH Association of Domestic Insurance Companies

- Agreed with previous comments from those in opposition. Repeated concerns that this will delay the process and add cost to the entire system.

Bob Morneu, Workers' Compensation Advisory Board

- There are 11 boards with 3 members each. It takes about three to four months to get a case through the process and that time frame is by design.

Mark MacKenzie, NH ALF-CIO

- Agreed with previous comments in opposition.

Dick Bouley, Teamsters Local 633

- The current system is working well.

Fiscal Note:

Due to time constraints, the Office of Legislative Budget Assistant is unable to provide a fiscal note for this bill, as introduced, at this time. When completed, the fiscal note will be forwarded to the House Clerk's Office.

Future Action: Pending

Speakers

Senate Commerce Committee: Sign-In Sheet

Date: April 23, 2013 Time: 2:20 pm Public Hearing on HB 647-FN

HB 647-FN relative to appeals from the compensation appeals board.

Name	Representing					
Dave Juvet	BIA	Support ☐	Oppose ☒	Speaking?	Yes ☒	No ☐
Ryan Hale	NH Auto Dealers	Support ☐	Oppose ☑	Speaking?	Yes ☒	No ☐
Andrew White	Grafton (3) (Have Legal)	Support ☐	Oppose ☐	Speaking?	Yes ☐	No ☐
Jim Owens	Sullowpy + Hollis	Support ☐	Oppose ☑	Speaking?	Yes ☑	No ☐
Rep Gary B Richardson	Sponsor	Support ☑	Oppose ☐	Speaking?	Yes ☑	No ☐
Doug Grauel	Grauel law office	Support ☒	Oppose ☐	Speaking?	Yes ☒	No ☐
Kevin Stuart	Bernard & Merrill	Support ☐	Oppose ☒	Speaking?	Yes ☒	No ☐
Donna Daneke	Bernard + Merrill	Support ☐	Oppose ☒	Speaking?	Yes ☒	No ☐
George Bassas	American Insurance Association	Support ☐	Oppose ☒	Speaking?	Yes ☒	No ☐
	NH Association of Domestic Insurance Companies	Support ☐	Oppose ☐	Speaking?	Yes ☐	No ☐
		Support ☐	Oppose ☐	Speaking?	Yes ☐	No ☐
Bob Mannan	WCAB	Support ☐	Oppose ☒	Speaking?	Yes ☐	No ☐
Mark S MacKenzie	NH AFL CIO	Support ☐	Oppose ☒	Speaking?	Yes ☒	No ☐
Dick Bouley	Teamsters Local 633	Support ☐	Oppose ☒	Speaking?	Yes ☒	No ☐
Denis Parker	self		X			X

Testimony

COMMENTS -- HB 647

Senate Commerce

James Owers, Sulloway & Hollis, P.L.L.C.
April 23, 2013

Mr. Chairman and Senators, thank you for the opportunity to speak on HB 647.

My name is Jim Owers. I practice law at the Concord law firm of Sulloway & Hollis. I am not appearing on behalf of a client today. For the past 30 years, my practice has included a large number of workers' compensation cases primarily on behalf of employers, their workers' compensation insurance carriers, or self-insured groups. I am speaking in opposition to the proposed legislation.

As background, there are presently three levels to the hearing process in a workers' compensation case. A first level hearing is held at the Department of Labor usually within 1 or 2 months of the request. There is then a right to appeal the decision to the Compensation Appeals Board. The Appeals Board typically hears cases within 4 to 6 months of filing the appeal. There are 33 members on the Board. Each case is heard by a panel of 3 members. By law, one member must represent labor, one must represent management, and there is a lawyer and panel chair. Following the

CAB decision, there is a right to a direct appeal to the New Hampshire Supreme Court.

The present bill seeks to layer a fourth hearing into this process by creating an intermediate appeal between the final CAB decision and an appeal to the Supreme Court.

I believe this is unnecessary to protect the rights of the parties, and it will certainly increase the cost of the system, lead to delay and uncertainty, and make the process more adversarial and litigious.

This is **NOT** a new idea. Prior to 1991 before the legislature created the Compensation Appeals Board, all appeals from Department of Labor hearings were heard in superior court. It often took one to two years or longer before a case was heard. Often a case would be scheduled multiple times before it was actually reached. Cases were heard by a single judge without experience in the workers' compensation system, usually in the county where the injury took place. The court system was not well equipped to deal with these cases.

The cost and inefficiency of this system lead the legislature in 1991 to abolish superior court appeals in favor of an appeal to a three-member administrative board. The advantages of this system are clear. Cases are heard by three people who can balance opposing viewpoints. Appeal Board

members develop expertise in understanding the complexities of the workers' compensation law and interpret and understand medical evidence. Cases are heard when they are scheduled and decisions are issued promptly.

The present proposal to add a new superior court appeal after a CAB decision simply imports the old failed superior court model back into the present system and adds another layer of cost and inefficiency. I understand that the proposal calls for only a "legal" appeal based upon the prior record, but I believe this will turn out to be a distinction without a difference.

The court system today is under serious stress with staff shortages and budget constraints. There is no fiscal note I have seen analyzing the cost of this proposal, the number of appeals which are likely to be filed in superior court, but this is certainly going to take away a substantial amount of time from court staff, law clerks and judges that is now devoted to existing court business.

I also do not believe an appeal to the superior court protects parties any more than the present appeal to the Supreme Court. As part of a study I did for a client, I analyzed appeals to the Supreme Court from the CAB between 2005 and 2009. There were 182 appeals filed in this period. The Court accepted 62 of those cases or 34%. However, it would be a mistake to conclude that the Court did not review the other 120 appeals filed. All 5

justices of the Supreme Court review every CAB appeal which is filed. If a single judge believes an error has occurred in the case, or it presents a legal issue which should be reviewed, the case will be accepted. What the Court will not accept are cases where the appealing party simply alleges that the CAB gave improper weight to the evidence in deciding against one of the parties. It is not the job of an appellate court to reweigh evidence and the same would be true of appeals to superior court. I also found that of the 62 appeals accepted, that in 26 of those cases, or somewhat less than half the cases filed, the appealing party abandoned the appeal somewhere in the process because the case settled or the party did not want to pursue it any further. In the remaining 36 cases, the Court reversed the Board 17 times, meaning that from the start of the process to the end, the reversal rate was 9.3%. There is no reason to believe this pattern would change if a new appeal layer were added.

Finally, a decision by a single superior court judge would have no binding precedent on any other case, meaning that in any case which really does involve a legal issue, the Supreme Court would have to issue a decision.

Testimony of Ryan Hale in opposition to House Bill 647-FN

Mr. Chairman and members of the Commerce Committee:

My Name is Ryan Hale; I work for the New Hampshire Automobile Dealers Association. Our membership consists of all new-car and new-truck dealers in the state, along with motorcycle, recreational vehicle, farm equipment, used-car, snowmobile and OHRV dealers, and construction equipment dealers as well as motor vehicle service, auto body repair, and motor vehicle parts sales facilities.

We have approximately 570 small businesses in all corners of the state that employ approximately 14,400 citizens and make up 25% of the states retail sales.

We also have a small self-insured workers' compensation trust which has given back over $67,500,000 to its membership since 1990. Due to the nature of our workers' compensation program we are always very concerned with bills that could negatively impact our membership such as HB647.

NHADA opposes HB 647-FN for following reasons:

- Prior to 1991 the workers' compensation system in NH was on the verge of collapse. The system utilized the Superior Courts to hear appeals. This was a long and arduous process which created a backlog in the court system due to the complexity of compensation cases. These claims were also extremely costly for parties involved. It was obvious that changes needed to and were made before a collapse of the system occurred. Upon recommendation of Governor Gregg's task force, the Superior court was eliminated from the process of hearing workers' compensation appeals and the Compensation Appeals Board was developed. The purpose of the board was to streamline the process' making it more efficient and less time consuming.

- Reintroducing the Superior Court back into the appeals process gives claimants' not 3 but 4 bites at the apple; a hearing with the commissioner, the appeals board, the superior court, and then the supreme court. This forces carriers into court more often. The financial impact of this bill on an already unstable, workers' compensation marketplace in NH would increase over time. NH could possibly revert back to the situation we faced in the late 80's; an unstable marketplace on the verge of collapse.

- There is already a backlog in the court system. For example, Lynne Tuohy of the AP wrote an article for The Boston Globe in July of 2010 stating that the Merrimack Superior Court in Concord, NH (one of NH's busiest courts) had a serious backlog. Some cases were not being heard for over 2 years. At the time the article was written, there were 2,400 cases pending.

- The current process is efficient and fair. In 2001 the appeals board ruled in favor of the claimant 48% of the time and the carrier 41% of the time and decisions were being made within 30 days of the hearing.

In closing I urge the committee to vote in favor of an Inexpedient to Legislate (ITL) motion as this bill is far reaching, unnecessary, and will cause additional strain on an already weak workers' compensation system in NH.

AP Associated Press

Backlog forces NH court to close early each day

By Lynne Tuohy
Associated Press Writer / July 22, 2010

CONCORD, N.H.—One of New Hampshire's busiest courts will close its clerk's office early every afternoon to cope with case backlogs and staff shortages.

The Merrimack Superior Court in Concord will lock its clerk's office doors each day at 1 p.m. beginning Aug. 2. Court officials say the office is so short-staffed that orders issued in more than 350 cases have not been sent out and more than 500 files contain mail that has yet to be filed.

Superior Court Chief Justice Robert Lynn said he may assemble a "swat team" from other courts to help Merrimackdig out from the avalanche of files.

"It's a very troubling situation," Lynn said Thursday. "This is not a step we took lightly. We're going to monitor this very closely and review it every 30 days. My hope is that this is something that won't last more than a couple of months, but it's gotten to such a state we had no alternative."

Three out of nine clerk positions at the court are unfilled due to budget cuts. Lynn said the backlog "becomes something of a vicious cycle." He said the longer litigants have to wait for court orders or hearings, the more they call or visit the clerk's office to complain or seek answers. "The more calls they get puts them farther behind."

Concord attorney Kenneth Barnes said the backlog statistics "are pretty bad."

"I had a trial bumped four times over the course of almost two years," Barnes said, of a breach of contract case involving a small family business. "That's very disturbing to the litigants to be sure and it can prejudice their interests."

"Because the state does not provide enough funding to the judicial system, there are not enough clerks to send out the orders the judges have already signed," Barnes said. "That's not fair to the citizens of the state."

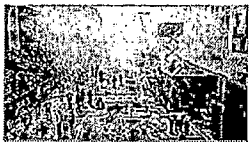
William McGraw, chief clerk of Merrimack Superior Court, said the backlog is the worst he's seen in 20 years of working at the courthouse.

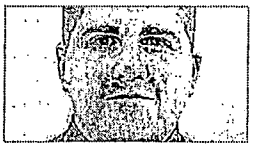
"Right now the people coming to the counter and calling are getting all the attention and the people waiting for the 350 orders that are backed up aren't being served," McGraw said. But McGraw said he hates the solution of locking the doors to litigants.

"There's usually something rough going on in their lives and they need to address it," McGraw said. "Not being able to do that is not the way a court should run."

Merrimack Superior Court has 2,400 civil and criminal cases pending.

The Judicial Branch has already implemented plans to close courts and furlough staff one day each month, and starting in September will cut jury trials by one-third. Gov. John Lynch had ordered Judicial to come up with $3.1





million in cost reductions and then cut the branch's budget by another $1 million.

McGraw said the 350 orders that have not been sent out run the gamut from motions to suppress evidence or add witnesses and parties to final orders.

"Whether the cases themselves are jeopardized, I can't really say," McGraw said. "People may be sick and tired of waiting and make decisions tactically in a case they wouldn't otherwise make."

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PAGE 18

NHBR

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PAGE 2

FEBRUARY 8 - 21, 2013 NEW HAMPSHIRE BUSINESS REVIEW ■ NHBR.COM VOL. 35, NO. 3, $1.75

Trouble on the horizon?

Employers aren't squawking, but insurers see problems brewing when it comes to workers' comp costs

■ INSURANCE

BY BOB SANDERS

Does New Hampshire have a problem when it comes to workers' compensation insurance premiums and costs? It depends on who you ask.

First, consider the facts:

• New Hampshire ranks ninth in the nation in adjusted workers' compensation premium rates, up from number 14 just four years ago.

• For every dollar collected in premiums, insurance carriers pay out $1.30 in costs.

• Nearly three-quarters of workers' comp costs are medical, as opposed to less than half nationally — nearly the opposite picture of a few decades ago.

The statistics sound scary when recited by Deb Stone, the state Insurance Department's point person on workers' compensation, who testified last month before the House Labor Committee. And they sound just as scary when repeated by insurance lobbyists.

The insurance industry, blaming high medical costs, proposed that one way to

WORKERS COMP, PAGE 10

Battle begins over minimum wage hike

BY BOB SANDERS

Among the actions of the last, Republican-controlled Legislature was to eliminate the state's minimum wage. It didn't take long for the current Democratic majority in the House to start the ball rolling on reinstating it.

The House Labor Committee heard two bills at a Jan. 29 hearing. House Bill 241 would set the minimum wage at $9.25. HB 127 would start out at $8 an hour, after that, the minimum wage would be tied to the Northeastern Consumer Price Index, although the Legislature would have to approve any increase.

Another measure, HB 501, which does not have a hearing date yet, would set the minimum wage at a dollar above the federal minimum.

The federal minimum wage currently stands at $7.25 an hour.

All three bills, said House Labor Committee Andrew White, would be examined in the same subcommittee in detail.

Some 14,000 people are paid minimum or sub-minimum wages in the state (people who wait on tables are paid 45 percent of the minimum, with the rest theoretically made up in tips) and a quarter of them are adults — figures that some committee members had dif-

MINIMUM WAGE, PAGE 9

An artist's illuminating entrepreneurial career

Mary Boone Wellington shows off samples of LightBlocks, an industrial product she invented for one of her sculptures that she turned into a successful commercial business. (Photo by Kathleen Callahan)

How Mary Boone Wellington's LightBlocks became an architectural rage

■ NHBR PROFILE

BY KATHLEEN CALLAHAN

Mary Boone Wellington started her business both accidentally and reluctantly.

A sculptor by education and trade, she was working on an art installation for a private home when she found herself frustrated by not being able to find a material that she could imagine so clearly in her head: vivid and colorful, but also translucent to show the stone wall hidden behind it.

So she decided to make it herself. The year was 1999, and through much trial and error, she developed a process for producing a durable plastic resin that could take on virtually any transparency or color, from tangerine peel to daisy yellow to cornflower blue.

"I wasn't really thinking about inventing an industrial product or an architectural product," said Wellington, who lives on 22 acres in Whitefield. "I was just trying to get the thing I saw in my mind's eye built."

Once she was pleased with the result, she used it in other sculptures, and it wasn't long before an architect friend of hers — who just so happened to be designing the Discovery Channel flagship stores — saw the material and asked to use it.

Wellington agreed, perhaps a little quickly,

LIGHTBLOCKS, PAGE 12

CONTENTS

Q&A: SMUTTYNOSE BREWERY FOUNDER PETER EGELSTON Page 6

WORKING IN RETAIL? TRY TO ENJOY YOUR JOB Page 17

Workers' comp

FROM PAGE 1

reduce them is to mandate that employees initially in the workers' comp process go to a doctor picked by the employer's insurance carrier.

Unions and other representing labor instead urged the state to crack down on independent contractors who don't pay premiums but collect benefits when they are hurt.

There is one problem with both of those proposed solutions: There doesn't seem to be an urgent problem, at least for those who foot the bill: employers.

The total amount of workers' compensation premiums paid by New Hampshire employers has actually fallen between 2007 and 2011, though there is anecdotal evidence that they may have inched up last year. Businesses aren't really squawking, at least not yet.

"I haven't gotten many complaints about it," said Jasen Stock, president of the New Hampshire Timberland Owners Association, whose members include loggers and sawmill owners, who have among the highest workers' comp rates of any group in the state.

Ditto for the Homebuilders and Remodelers Association of New Hampshire, which also represents companies with high rates.

"We have seen some increasing concern from our members," said David Juvet, vice president of the Business and Industry Association of New Hampshire, but as of deadline he wasn't able to find one concerned enough to talk about the issue.

The BIA has yet to take a position on legislation being put forward.

The lack of urgency is reflected among lawmakers as well.

"I don't think the system is broken," said Rep. Andrew White, D-Lebanon, who chairs the House Labor Committee. "It needs to be tweaked, not overhauled."

Premiums in check

It's a far cry from the situation two decades ago, when rising compensation costs were driving insurers out of the market and rates were rising faster than any company's budget.

At the time, the problem was indemnity — what is paid out to workers to compensate for lost time due to injury. But a series of reforms enacted by the Legislature cut those costs, and now the situation is reversed, with 73 percent going to cover medical care. To insurance companies, this is a bit alarming.

"We are not heading to the level of crisis," said George Roussos, lobbyist for the New Hampshire Association of Domestic Insurance Companies. "But we are heading in the wrong direction. How fast are we going to get there? Who knows?"

Medical costs in general are going up in the Granite State, but the medical compensation costs in particular are being driven up for other reasons. New Hampshire is one of the few states that doesn't limit provider's fees, does the state — unlike about half of the other states — limit provider choice by workers.

Add to the mix New Hampshire's enforcement of independent contractor laws, which does appear to be pretty lax compared to Massachusetts, for example. The Bay State refuses to bid contracts to companies that violate compensation law for three years. Indeed, some 184 of those companies affected are from New Hampshire — about the same amount from all the other border states combined.

Thus far, premiums have been kept in check for several reasons:

• New Hampshire does a good job of getting people back to work quickly, which keeps indemnity costs down. Also, the number of work-related accidents has been generally down. And state law compensates workers at only 60 percent of the wages lost, as opposed to the 66.6 percent level that most states require.

• New Hampshire is so small that the medical loss figures used to compute premiums is regional, meaning the state's greater medical costs are flattened out.

• It simply takes a while for these medical costs to be reflected in premiums.

Not everybody is sure that they will.

Kathryn Barger, who directs the Workers' Compensation Division at the state Department of Labor, notes that payouts — which include medical and indemnity costs — rose by some $20 million in 2008, but have remained stable over the past four years, even falling $5 million, to $193 million, in 2011.

And, according to the state Insurance Department, total premiums paid have gone down, from $271.6 million in 2007 to >

15.8 million in 2011.

Whether there is a problem now, or a possible problem down the road, two major initiatives have been launched to try to fix it.

The first — the Advisory Council on Workers' Compensation — offered recommendations that have been incorporated into House Bill 255, which would limit workers' choice in choosing a provider, as well as give insurers more control over prescription drugs.

However, the major cost-cutting provision – which would change provider's fees from "full amount" to "a reasonable fee" – was removed by bill sponsor Rep. Gary Daniels, R-Milford (and the former Labor Committee chair) when he introduced it, because of the hue and cry from the medical community.

Some 43 states impose some sort of restriction on provider's fees, but New Hampshire is one of a handful that doesn't, said Stone of the New Hampshire Insurance Department.

But that doesn't mean that the insurer usually pays full freight.

The majority of insurers have negotiated contracts, and about a fifth are handled by the eight managed care companies listed on the Labor Department's website. But for the rest – Stone estimates about 20 percent – insurers pay the "default rate," the same sticker price charged to the uninsured.

But the medical community was not much happier with proposed restrictions on providers.

HB 255 would require workers to see a doc- chosen by the insurer within the first 10 s following a workplace injury, if they want to get reimbursed by workers' compensation. In addition, during the first three months following the injury, workers in the state's three biggest counties — Hillsborough, Rockingham and Merrimack — would be limited to a network of providers offered by the insurer, as long as those providers were within 60 miles of the worker's home.

If a worker goes to see his or her own doctor during that time, he or she will probably pay out of pocket, since most regular health care plans don't cover workplace injuries, leaving that to the compensation system.

Thomas Callahan – chair of the advisory council and managed care veteran who now heads Orchard Medical Management LLC – compared the proposal to the type of care given to professional athletes.

"It's so they go to a specialist to get them back to the playing field," Callahan told the House Labor Committee. "If you play for the Patriots, the key is go to someone trained in sports medicine. If you are injured at work, you want to someone better able to treat you."

He said that the alternative for most injured workers is not their family doctor, but the emergency room, because "those that push and pull may not have the [health insurance] benefits."

Both Callahan and Stone said that the regular managed care networks are simply not doing a good job because they don't restrict physician choice enough.

he number of people involved in man- l care, it's almost impossible for the injured to know who are the best people to go to," Stone said.

Callahan, asked whether he could say how much money the proposal would save, answered, "No, but I am confident it will."

Others, however, were more skeptical.

"This will be a horrible bill," said Michael Reynolds, general counsel for the State Employees Association. "It's not an employee-friendly bill at all. It's all about control. These company store doctors are bought and paid for to provide opinions for the insurance companies. They will not be hired if their opinions are too favorable to injured employees."

"I might be naïve," replied Stone to such skeptics. "But I would like to think that most employers want their employees to get the care they need so they can get back to work."

But many workers simply won't trust anyone but their own doctor, said Rep. Chuck Weed, D-Keene. "I love my employer, but his goal is to cut costs, not take care of workers' health."

"They want doctors who send people back to work sooner, before they are ready, who will question how badly they got hurt or whether they got hurt at all," said Douglas Grauel, an attorney who represents injured workers.

Chairman White didn't give the bill much of a chance, calling it "lopsided" on the side of insurance companies. "It isn't a bill that tries to balance between employees and the industry."

Another initiative

After the apparently unwelcome reception at the House hearing, Callahan retreated to the section of the bill that would set up a pharmacy benefits management program, not just to manage the fast-growing health care sector, but also because of over-prescription of pain medication, he said. (Sen. Lou D'Allesandro, D-Manchester, has introduced another bill to study abuses in painkillers in workers' compensation.)

The other major workers' comp-related initiative has been the New Hampshire Misclassification Task Force, which includes the heads of various agencies who are working to figure out a way to prevent people who are really employees from calling themselves independent contractors, when it comes to workers' compensation, as well as unemployment insurance. NHR

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Bar Journal - Fall 2004

An Old Conflict: Due process and the demand for efficiency in the administration of Workers' Compensation Appeals - did *Appeal of Edward Fay* seek the right balance?

By: Beth Deragon

INTRODUCTION

In 1991 New Hampshire's workers' compensation procedure was completely overhauled to rescue a system on the verge of collapse. The previous system relied on the resources and formal processes of the Superior Court for appellate review and had practically ground to a stop. The cost, number and adversarial nature of the cases brought before the court had escalated and become so unmanageable that the backlog threatened to defeat the essential purpose of the workers' compensation system prescribed by RSA 281-A. The consequence of the deliberate Superior Court process was that many people had to wait an unreasonable amount of time for their cases to be resolved and when their case finally was heard, Superior Court rules limited the extent to which their voices were heard, thus denying many claimants their opportunity to present their entire story to the tribunal.[2] The 1991 reforms created a new process that replaced the \Superior Court's role with a new tribunal – the Compensation Appeals Board ("CAB") that would review and decide appeals in cases initially heard and ruled on by hearing officers employed by the New Hampshire Department of Labor.[3]

Thirteen years later, there is uncertainty as to the meaning of the *de novo* standard of review that the CAB applies to the cases it hears. The Board has interpreted it to mean that it may determine any issue originally before the hearing officer below. The Supreme Court has held the Board may consider and determine only those issues raised by an appealing party – that *de novo* refers only to the standard of review, not the scope. This article aims to illustrate that the *de novo* standard currently applied by the CAB conforms with legislative intent and CAB founders' and practitioners' understanding of that standard while the New Hampshire Supreme Court has been promulgating a *de novo* standard that originates from a 1970's unemployment *de novo* standard of review that some of the CAB founders specifically aimed to avoid.

THE *FAY* DECISION

The Court's current understanding of the CAB's *de novo* standard of review is reflected in its most recent decision in this area, *Appeal of Edward Fay,* where the Court held that the CAB exceeded its authority when it ruled on issues that were not raised at the department of labor hearing.[4] The Court made clear its understanding by stating that, "The board's *de novo* review is limited to issues raised in the department of labor proceedings being appealed."[5] However, the Court went further. It held that a decision made by the hearing officer on issues actually raised at the hearing could *not* be reviewed because neither party appealed that portion of the decision.[6]

In the *Fay* case, there were two hearings before labor department hearing officers on issues related to the same work-related injury. The first hearing, held in December 1999, addressed whether there was a causal relationship between Fay's November 1999 injury and his employment.[7] The hearing officer found that there was a causal relationship between Fay's November 1999 injury and his employment and therefore Fay had a compensable claim that was the responsibility of his employer, Elliot Hospital ("employer").[8] At the time of the injury, Fay's personal physician opined that he had a "full-time, full-duty work capacity" and that Fay did not "lose any time" as a result of his injury.[9] The hearing officer for this December 1999 proceeding determined that he had no occasion to rule on the extent of Fay's disability and therefore did not.[10] There was no appeal.

The second labor department hearing in this case took place almost 2½ years later, resulting from the refusal by Fay's employer to pay chiropractic, gastrointestinal and mental health counseling bills that Fay claimed were related to his compensable injury.[11] By the time of the second hearing, in May 2002, Fay had not worked at his original place of employment since December 1999, but had been employed at a restaurant which he left in March 2000 to continue his firewood business.[12] Between the hearings, Fay underwent two medical evaluations: first a functional capacity evaluation in 2001 and then an independent medical evaluation in 2002 regarding the extent of

his disability.[13] The evaluations concluded that Fay had a, "full-time, light duty work capacity" at the time of the evaluations.[14] Fay sought to secure benefits on the basis of this new evidence. At the May 2002 hearing, the hearing officer concluded that: (1) Fay continued to be disabled by his workplace injury and thus was entitled to temporary partial disability benefits and vocational rehabilitation assistance; (2) The employer had continuing responsibility for medical bills related to Fay's back injury, including chiropractic bills; and, finally, (3) The employer was not responsible for the mental health or gastrointestinal bills because Fay did not prove that they were a result of his work-related injury of November 1999.[15]

Fay appealed the hearing officer's denial of his claim for payment of the mental health and gastrointestinal bills to the CAB. Following a *de novo* hearing, the CAB found that: (1) Fay did not prove that he was disabled from the November 1999 injury; (2) The employer was responsible for medical bills related to his back injury on or before December 21, 1999; and (3) Fay did not establish that his mental health bills and other medical bills related to his anxiety problem [gastrointestinal] were the result of his November 1999 injury.[16] Fay appealed the first and third of these rulings to the New Hampshire Supreme Court. DATE OF SUPREME COURT DECISION... The Court held that although Fay appealed to the CAB for a *de novo* hearing, he only raised one specific issue and the CAB should have ruled on that issue alone and no other.[17] This assertion is the crux of the Court's understanding of *de novo* as applied to the CAB's standard of review of labor department hearing officer's decisions. Out of *Fay* there emerged a two-part test defining the CAB's standard of review: (1) The issue presented for CAB review must have been addressed by the hearing appealed from[18] and; (2) The issue must have been raised in the appeal to the CAB. The Supreme Court has maintained that the CAB is without jurisdiction to consider and determine any other issue, regardless of whether such issues might be related to the issues that were the subject of the appeal. In the Fay case, the only way the CAB could lawfully reach the question of whether Fay was disabled by a statutory injury was if the defendant, who lost on that issue before the hearing officer, were to reopen the question by appealing it. As the employee was satisfied with the hearing officer's overall disposition, no appeal on that issue was made.

Some practitioners have said that the only way they believe they can responsibly respond to *Fay* is to automatically file cross appeals in the face of an opposing party's appeal, thus assuring that they preserve their client's rights to have the CAB consider all relevant issues. This *Fay*-generated practice will burden the CAB process with the complexity and possible confusion of multiple appeals where only one issue is truly being contested. There is also some concern that *Fay* may reward a sharp practice when litigating against a *pro se* claimant: filing a last-minute appeal on an issue upon which one did not prevail, with the expectation that the typical *pro se* litigant will not respond in time with cross-appeals. It is the thesis of this paper that the Supreme Court's narrow understanding of the CAB *de novo* review jurisdiction is not sound. However, it is clear that *Fay* is consistent within the Court's decisions concerning the meaning of *de novo* review since its pronouncement on the subject in 1974 in *Chaisson v. Adams.*[19]

EVOLUTION OF THE *DE NOVO* STANDARD

The contemporary judicial understanding of CAB *de novo* review evidenced in *Fay* has its genesis in the decision *Chaisson v. Adams* and the body of law resulting from it.

The scope of *de novo* review was originally defined by the Court in *Chaisson v. Adams, Harkeem v. Adams* and *Nizza v. Adams* for the Superior Court's appellate review of unemployment compensation proceedings.[20] The Court's interpretation in these cases of the *de novo* standard hinged in part upon the language of the unemployment compensation statute, RSA 282:5 (G)(3), (since repealed) and in part upon its presumed purpose: "The appeals procedure, as expressly set forth in RSA 282:5 (G)(3), requires only that a claimant's petition set forth specifically the grounds upon which it is claimed the decision is in error" and therefore, "The Superior Court's *de novo* review takes place within the parameters set by the claimant's petition."[21] In *Nizza* the Court explained the reasons supporting the requirements of the statute, "The purpose of this requirement is to allow the claimant the opportunity to prepare a case to rebut the specific reasons for denial of benefits to him. Without this narrowing of the issues the claimant would have to be prepared to present evidence and persuade the trier on all the statutory criteria, a requirement that would deprive the plaintiff of due process of law."[22]

The Court later applied the unemployment proceeding *de novo* review standard to a workers' compensation appeal in *Charles & Nancy, Inc. v. Zessin.*[23] In that case, the Court cited *Harkeem v. Adams* and *Nizza v. Adams* and the language above that defined the *de novo* standard of review. In the last workers' compensation case reviewed by the Court before the adoption of the new CAB system, *Leccacorvi v. N.H. Workers' Comp. Com mission*,[24] the Court in reviewing the Superior Court's ruling reiterated, "The Superior Court's *de novo* review of department of labor workers' compensation decisions is limited to issues raised in the proceedings being appealed."[25]

In 1998, the Court reviewed a CAB decision in *Appeal of Brian Staniels*[26] and applied its understanding of the Superior Court's *de novo* standard of review to the CAB. The Court cited *Leccacorvi* stating that, "The [board's] *de novo* review of department of labor workers' compensation decisions is limited to issues raised in the [department of labor] proceedings being appealed."[27] This substitution of the word "board" for "Superior Court" is the clearest indication of the Supreme Court's view that the 1991 statutory overhaul did not change the scope of review in appeals. This CAB standard of *de novo* review, enunciated by the Court in *Staniels*, was applied again to CAB decisions in *Appeal of Rainville* and *Appeal of Currin.*[28] This line of cases culminates in 2003 with *Appeal of*

Edward Fay in which the Court cites the same language in *Currin* and *Rainville* that defines its understanding of the CAB standard of *de novo* review which, in turn, is based on the line of cases beginning with *Chaisson.*

From its decision in *Chaisson* to its decision in *Fay*, the Court has defined *de novo* review in terms taken from unemployment and workers' compensation cases appealed from the department of employment security and the department of labor to the New Hampshire Superior Court without regard to the 1991 shift from judicial to party-lay administrative appeal processes. In doing this, the Court has imposed upon the CAB review process the very burdens its creators intended to eliminate by the removal of the Superior Court and its more formal process from the administration of appeals in the workers' compensation system. The Court's imposition of this standard to present-day workers' compensation cases conflicts with the intention of the legislature and the CAB creators, which was to create a new, more efficient means of providing a full review of workers' compensation grievances.

ORIGIN AND PURPOSE OF THE CURRENT SYSTEM

In 1989, Governor Gregg issued Executive Order Number 89-4.[29] Its purpose was to

> address, "an urgent and substantial need to review and evaluate the performance of the State's workers' compensation system in order to ensure the system's consistent, affordable, and equitable operation; and [the necessity] to provide an effective long-term solution which acknowledges growth and its effect on the varied interests involved in the system .... ."[30] It was with these objectives in mind that the Governor's Task Force issued its proposals, stating in its introduction, "In most states, the workers' compensation system has either already broken down or is on the verge of breaking down. Workers' compensation as originally conceived was based on the concept of 'liability without fault.' Under this concept, the fundamental purpose is a swift, certain and assured remedy without litigation. The system was never meant to create adversarial relationships between employer and employee. A system that was so simple in concept has become highly complex in its application."[31]

Process	Structure/Forum	Criteria
Step 1:	Hearing Officer: informal hearings held in Concord and at other locations throughout the state.	Case merits and facts: require all available evidence be disclosed.
Step 2:	Compensation Review Commission: Appeals Board.	Case merits and facts: plus record from Step 1 hearing. Can only present evidence that was unknown at the date of Step 1 hearing.
Step 3:	Superior Court	Questions of Law only

The Task Force elaborated on the sources of problems in the system that they were charged with resolving. "As a result of the additional administrative burdens, lack of sufficient staff, increasing complexity of the system and lack of management consistency, many inefficiencies and lack of attention to detail problems exist in the overall administration of the workers' compensation system. There appears to be widespread agreement among participants in the system that the current New Hampshire workers' compensation system is much too adversarial and does not provide for prompt hearings."[32] One of the most substantial changes proposed by the Task Force was the redesign of the hearings process to include a new appeals board. This new hearing process, "...should allow for a swift resolution of all disputes realizing that the central issue underlying all disputes is the awarding of benefits – their duration and amount. Lengthy delays of the hearings process are a major factor in the upward cost spiral and are unfair to both injured employees and their employers."[33] The Task Force proposed the configuration of the hearing process as follows:[34]

Significantly, the Task Force, in Step 2, called what is now the CAB the "Compensation *Review* Commission." As is evident from the criteria section of the proposal, the compensation review commission would be considering *all* information from the hearing plus any evidence unknown at the date of the hearing. An appeal to the Superior Court was the stage at which the Task Force limited the standard of review to, "questions of law only." Interestingly this understanding of the Step 2 standard of re view is reflected in the language of the Labor Department's regulations:

> Lab 201.01 'De novo hearing'
>
> 'De novo hearing' means a new hearing which is not bound by the findings and rulings of a previous hearing before the commissioner or hearing officer and which allows the parties to introduce new evidence or evidence not considered by the hearing officer or commissioner at such a hearing, subject to the provisions of Lab 206.[35]

Additionally, the purpose behind the Task Force is currently reflected in the language of Lab 202.01 'Purpose of

these Rules':

> The following rules are to assist interested parties in understanding and conforming to hearings procedures established to promote and assure the conduct of a full, fair and adequate exposition of issues and the expeditious resolution of disputes. These rules are to be construed to secure the just, speedy and inexpensive determination of every proceeding.[36]

There is no indication that either party in *Fay* drew the Court's attention to these regulations.

The Legislature, having received the Task Force recommendations, sent it to the committee which amended it, "while still remaining within the original intent of the Governor's Workers' Compensation Task Force Report."[37] "This bill does allow for a more timely appeal and provides for a just outcome. The bill allows the Labor Commission to more efficiently work with the employee, the employer and insurers for the benefit of a more cost-effective system of compensation."[38] The committee proposed the following change, "... 1. Redesigns the hearing process by creating a compensation review commission to hear appeals on decisions of the commissioner before such appeals are taken to court. Any party aggrieved by a decision of the board may appeal to the Supreme Court."[39]

The changes made to the workers' compensation system were in response to a system on the verse of collapse. New Hampshire took a proactive approach to resolving the problem, and for a time it made New Hampshire a role model for other states in this area. The Journal of the New Hampshire Senate Special Session of December 14, 1989 attests to the high regard in which the new workers' compensation system was held. Senator Blaisdell stated, "Conference of insurance legislators have marked New Hampshire as one of the model states on workers' compensation from what we have done. I just returned from a conference .... and our model is this [state]. The model in New Hampshire's bill is the model for the country in workers' compensation."[40]

New Hampshire practitioners implemented this new workers' compensation model and wrote instructive articles for other practitioners to be able to efficiently utilize the new structure. Two articles that explained the workers' compensation appeals process illustrate the difference in practitioner's understanding of the *de novo* standard of review pre-CAB formation and post-CAB formation.

In an article written in 1989 (before the implementation of the new workers' compensation structure) an appeal to the Superior Court is described:

> "The statute provides that on appeal, 'a full trial shall be had before a Justice of the Superior Court, without jury, and within thirty (30) days thereafter, the Court shall make its award, setting forth its findings of fact and law applicable thereto'.[41] The issue or issues to be heard by the Superior Court on appeal are limited to issues raised before the Department of Labor."[42] "The parties may introduce any and all relevant evidence that is available to them unless it must be excluded under the applicable evidentiary and procedural rules that apply to Superior Court trials."[43]

The same article, under a section titled 'practical considerations,' states that, " It must be remembered that the trial of the appeal is conducted in the same manner as any other issue to Court case. ... but in Superior Court, the strict Rules of Evidence do apply and this type of testimony must be presented by live testimony or by deposition."[44]

In an article written in 1992 (after the new workers' compensation structure had been implemented) the author states that, "The intent of the law is that appeals to the Board move very quickly."[45] The CAB is "designed to remedy the serious problem" of backlog in the Superior Courts.[46]

Most significantly, the article describes practitioners' understanding of the *de novo* standard of review applied by the CAB to hearing officer decisions:

> "The significance of the "*de novo*" perspective is that the Board is not determining whether the Hearing Officer below erred on a matter of law or misconstrued the facts. The Board hears the matter *as if it were tried for the first time before that tribunal.* It is solely upon the state of the record and the evidence presented in the course of that hearing that a decision is made. In the conduct of the hearings the formal Rules of Evidence do not apply.[47] The Board members do review the written decision from the Department of Labor primarily to determine the scope of issues properly before it. This is because the issues properly before the Appeal Board are limited to those issues which were litigated before the Department of Labor."[48] (emphasis added).

Therefore, after the implementation of the new CAB system, the scope of review shifted from the Superior Court approach that entailed the observance of the Rules of Evidence and preservation of issues below to one in which the Rules of Evidence do not apply and that the CAB reviews the case as if it is hearing it for the first time with original jurisdiction. The CAB consults the hearing officer's decision only in the context of ascertaining the scope of the matter to be decided. The legal practitioner's understanding of the standard of review observed by the CAB is

consistent with that of the designers of the CAB.

The committee that oversaw the design of the CAB comprised representatives from labor, the insurance industry and legislators. Its main objective was to create a an efficient but open system so that a claimant would have every chance to be heard and to keep down the costs of bringing a claim forward. The CAB's designers considered the *de novo* standard that was being implemented by the unemployment appeals system and specifically rejected that model, as they did not want the claimant restricted as to the matter brought forward for review.[49] The designers also considered using an Administrative Law Judge to hear appeals, but rejected it because as too costly a step. The designers ultimately decided on the scope of review in use today, that conforms to the same objectives of the Governor's Task Force and has been embodied in Labor Department rules. This *de novo* standard promotes efficiency and allows for the claimant's appeal to be given full review by the CAB, consistent with the vision of the CAB's founders and legislative intent.

The CAB model today, as attested to by a study of appeals board cases prepared for the legislature in the fiscal year 2001, does not produce skewed results and most importantly does not have a backlog of cases. For example, in the fiscal year 2001, although 70 percent of the appeals to the CAB were by the claimant, the CAB held for the claimant in 48 percent of the appeals and for the carriers in 41 percent of the appeals (7 percent were mixed and 4 percent were the successive carrier).[50] Appeals are being heard in a timely manner and decisions by the CAB are forthcoming within 30 days.

The Court's current understanding of the CAB *de novo* standard of review as exemplified in their recent *Fay* opinion does not account for the goals of the Governor's Task Force, legislative intent and current practice of workers' compensation law. The Court's reversion to the narrow *de novo* standard used in unemployment compensation cases dating from 1974 presents the members of the CAB and practitioners with procedural and evidentiary problems. Although the Rules of Evidence do not apply to workers' compensation hearings or CAB reviews, the court's insistence that the CAB hear only particular issues appealed suggests that some procedure will have to be used in order to ensure that the issue being appealed to the CAB is properly preserved below. A requirement of specific grounds for appeal implies challenge to particular acts such as the consideration of certain evidence or to procedural decisions. Deciding evidentiary issues will be untenable for the CAB since the CAB is a mixed board, comprising one attorney and two non-attorneys. In addition, the Court's understanding of CAB *de novo* review will result in discrepancies of evidentiary rulings among the various compensation appeal panels since CAB opinions do not bind subsequent CAB decisions.

CONCLUSION

The Court's reversion in the recent *Fay* opinion to the narrow *de novo* standard of review specifically rejected by the task force, legislature and CAB designers will result in the proliferation of the same inefficiencies that propelled the workers' compensation system into a state of near collapse thirteen years ago. The workers' compensation system that will eventually evolve will be cumbersome, adversarial, protracted and user-unfriendly – flaws that the founders were resolved to avoid. Even if the view of some practitioners that the *Fay* holding streamlines the workers' compensation appeal process is accepted, thereby making that process more efficient, due process will be affected in the cases where a claim is brought *pro se*.

Although named the Compensation *Appeals* Board, the CAB from its inception, as evidenced in the task force report, legislative intent and practitioners' understanding of the standard of review today, was intended to be a *review* board. Today the CAB efficiently hears and decides cases based on that principle and most decidedly meets the purposes set forth by Governor Gregg in 1989, "to ensure the system's consistent, affordable, and equitable operation." *Fay's* failure to consider the value of efficiency threatens the CAB process with the burdens it was created to mitigate.

ENDNOTES

1. Paul L. Salafia & Donna M. Daneke, *New Hampshire Workers' Compensation Manual* § 1.01, at 1-2 (3d ed., Matthew Bender 2004) (Citing Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* ch. 1 (Matthew Bender 1997).
2. N.H. Exec. Or. 89-4 (1989); N.H. Task Force on Workers' Compensation Rpt., 1 (August 31, 1989).
3. RSA 281: A42-a; RSA 281-A: 43I(b).
4. 150 N.H. 321, 324-325 (2003).
5. *Id.* at 324 (Citing *Appeal of Rainville*, 143 N.H. 624, 629 (1999)).
6. *Id.* at 324-325.
7. *Id.* at 322.
8. *Id.*
9. *Id.* at 322-323.
10. *Id.*
11. *Id.* at 323.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*

16. *Id.* at 324.
17. *Id.* at 324-325.
18. *Appeal of Staniels*, 142 N.H. 794, 796 (1998).
19. 114 N.H. 219, 220 (1974).
20. *Chaisson v. Adams*, 114 N.H. 219, 220 (1974); *Harkeem v. Adams*, 117 N.H. 687, 692 (1977); *Nizza v. Adams*, 118 N.H. 383, 385-386 (1978).
21. 114 N.H. 219, 220 (1974); 117 N.H. 687, 692 (1977).
22. 118 N.H. 383, 385-386 (1978).
23. 118 N.H. 556, 558 (1978).
24. 135 N.H. 91, 94 (1991).
25. Citing *Charles & Nancy, Inc. v. Zessin*, 118 N.H. 556, 558 (1978).
26. 142 N.H. 794, 796 (1998).
27. *Id.*
28. 143 N.H. 624, 629 (1999); 149 N.H. 303, 307 (2003).
29. N.H. Exec. Or. 89-4 (1989).
30. N.H. Task Force on Workers' Compensation Rpt., 1 (August 31, 1989).
31. *Id.*
32. *Id.* at 8.
33. *Id.* at 9.
34. *Id.*
35. N.H. Admin. R. Ann., Dept. of Lab. Hrgs. Part. Lab. 201 (2003).
36. N.H. Admin. R. Ann., Dept. of Lab. Hrgs. Part. Lab. 202 (2003).
37. N.H. H. J., Reg. Sess. 318 (1990).
38. *Id.*
39. *Id.* at 334.
40. N.H. Sen. J., Spec. Sess. 564, 1064 (1990).
41. Thomas W. Kelliher, *The Appeals Process*, Continuing Legal Education Program, 132, 133 (1989).
42. *Id.* at 133 (Citing *Nizza v. Adams*, 118 N.H. 383, 383 (1978); *Charles & Nancy, Inc. v. Zessin*, 118 N.H. 556, 556 (1978)).
43. *Id.* at 133, 134 (Citing *Feuerstein v. Gilmore*, 127 NH 715 (1986)).
44. *Id.* at 137, 138.
45. Peter S. Wright, Jr., *Practice Before the Workers' Compensation Appeals Board*, Continuing Legal Education Program, 138 (1992).
46. *Id.* at 138.
47. *Id.* at 145.
48. *Id.* at 141 (Citing *Charles & Nancy, Inc. v. Zessin*, 118 N.H. 556, 558 (1978).
49. Interview with Robert Morneau, Member Compensation Appeals Board 1991-2006, (February 5, 2004).
50. Robert Morneau, *Fiscal Year 2001: Workers' Compensation Appeals Board Cases* (2001).

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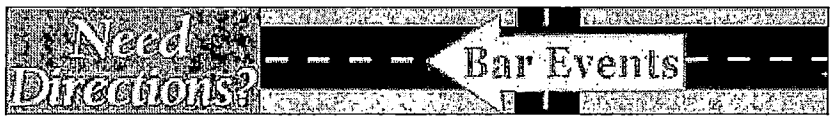

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JUSTICE DELAYED — NEW HAMPSHIRE COURT SYSTEM

Several attorneys filed suit against the State recently to try to obtain proper funding for our judicial system. It is broken and I could not sit idly by and let it be gutted by excessive legislative budget cuts so I joined in as counsel.

Each year 230,000 court cases are filed in New Hampshire.

Certain types of court cases have specific time frames in which to act and those are set by the legislature. For example, domestic violence cases and criminal cases require certain scheduling dates by law. Thus, work on such cases means other cases must be delayed if judge time is lacking due to vacancies. For instance, in 2009, there were 5,300 cases of domestic violence with hearings required between five or thirty days of filing, depending on the request.

Stalking cases were 1,470 in number, with the same time requirements. 9,600 landlord/tenant cases must be heard ten days from service of process. Involuntary emergency admissions to the N.H. Hospital were filed 1,700 times last year and they must be heard within three days of hospitalization.

Families are also heavily affected by the lack of a judge to help decide their disputes. 7,200 juvenile cases, 10,000 new divorce or family petitions and 7,000 closed cases reopened for parenting or lack of child support issues were heard last year alone.

Judges cannot decide cases without someone processing them, scheduling them, getting orders out, and otherwise processing paperwork. Each month thousands of orders have to go to the office of child support enforcement, various criminal law agencies, and to parties involved in marital and civil cases.

In the non-criminal area our State Constitution's Bill of Rights (Part I, Article 14), says that everyone is entitled to a certain remedy for all injuries they may receive and that they are to obtain it "completely, and without any denial; promptly, and without delay."

The purpose of that provision is to make civil remedies readily available and to guard against arbitrary denial of access to the courts. It is an equal protection clause because, whether you are suing someone or being sued, you want to have your case resolved as soon as possible.

Last year there were $3.1 million of cuts out of a judicial branch budget of about $65 million, with another $2.2 million hit in May. Concord District Court, which is a three-judge court, is now operating with one full-time judge. Due to the reduction in personnel a form letter went out this summer canceling all civil trials.

Small claims cases were all cancelled in the Manchester District Court this summer for an indefinite period.

On July 22, Merrimack County Superior Court began closing to the public daily from 1:00 p.m. to 4:00 p.m. As of June 30, it had nearly 500 case files with pieces of mail that had yet to be docketed in the court record, with some documents dating back to March. Another 150 trial and hearing notices had not been sent out and more than 350 files contained court orders that had not been issued.

And Hillsborough County just announced:

HILLSBOROUGH SUPERIOR COURT CLERKS TO CLOSE OFFICES

TUESDAY AND THURSDAY AFTERNOONS

Categories

- Automobile Accidents
- Blog
- Boating Accidents
- Bullying
- Civil Rights
- Criminal
- Criminal Defense
- Discrimination
- Divorce and Family Law
- DUI – DWI
- Employment Law
- General
- Medical Malpractice
- Motorcycle Accidents
- Municipalities
- Personal Injury
- Pregnancy
- Retaliation
- School Harassment
- Sexual Abuse
- Sexual Harassment
- Slip and Fall
- Snowmobile Accidents
- Wage Claim
- Workers' Compensation
- Wrongful Death
- Wrongful Termination

Archives

- April 2013
- March 2013
- January 2013
- December 2012
- November 2012
- October 2012
- September 2012
- August 2012
- May 2012
- April 2012
- March 2012
- February 2012
- December 2011
- November 2011
- September 2011
- August 2011
- July 2011
- June 2011
- May 2011
- April 2011
- March 2011
- February 2011
- January 2011
- December 2010

Staff shortages prompt move to focus on reduction of case backlog

CONCORD, October 1 – The clerk's office in Nashua for Hillsborough County Superior Court North and Hillsborough County Superior Court South will close at 1 p.m. on Tuesday and Thursday beginning October 5 to allow uninterrupted time for processing cases and related materials.

Both clerk's offices, which had been closed from 8 a.m. to 9 a.m., will reopen at 8 a.m. daily, beginning Oct. 5 with implementation of the new Tuesday/Thursday afternoon closings.

After 1 p.m. on Tuesday and Thursday, no telephone or counter service will be available to lawyers, litigants or the public in the clerk's office during those hours; the automated telephone system will be monitored so that emergency requests are addressed promptly. A "drop box" will be set up inside the courthouse at 30 Spring Street in Nashua for filing documents during the hours when the clerk's office is closed.

As of today, the Merrimack County Superior Court, which had been closed down since last August on weekday afternoons to work on reducing the case backlog, will be open for a full day on Fridays. The clerk's office in Concord remains closed to lawyers, litigants and the public Monday through Thursday from 1 p.m. to 4 p.m. to allow for uninterrupted case processing.

Several other court locations statewide, faced with backlogs and staff shortages, also have limited public operating hours to allow uninterrupted time for employees to process cases.

Superior Court Chief Justice Robert J. Lynn said the schedule will be reviewed every 30 days to determine when the clerk's office can return to routine office hours. Reductions in the court system budget have required administrators to maintain 71 full-time non-judicial vacancies, which means court locations have fewer employees on staff to carry out day to day clerical responsibilities.

These cutbacks affect all citizens who seek justice. I will do all I can to fight for fair funding. If you have a delay horror story, email me at info@nojustice.org

Comments are closed.

TOP

- November 2010
- October 2010
- September 2010
- August 2010
- July 2010
- June 2010
- May 2010
- April 2010
- March 2010
- February 2010
- January 2010
- December 2009
- November 2009
- October 2009

Search

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Douglas, Leonard & Garvey, P.C. attorneys represent clients in courts throughout New Hampshire, including Concord, Manchester, Nashua, Salem, Rochester, Portsmouth, Laconia, Plymouth, Franklin, Keene, Lebanon, Littleton, Hampton, Hooksett, Derry, Claremont, Goffstown, North Conway, Exeter, Durham, Plaistow, Henniker, Newport, Milford, Merrimack, Hillsborough, Bow, Hopkinton. We also represent clients in all counties, including Merrimack County, Belknap County, Carroll County, Cheshire County, Coos County, Grafton County, Hillsborough County, Rockingham County, Strafford County and Sullivan County.

HB 647-Workers' Compensation Appeals from
the Compensation Appeals Board

Between 2009 and 2012 there have been 126 appeals filed with the New Hampshire Supreme Court from decisions by the Compensation Appeals Board. The Supreme Court has only accepted 45 of these, or 36%:

2009	34 cases filed	12 accepted
2010	39 cases filed	16 accepted
2011	30 cases filed	9 accepted
2012	23 cases filed	8 accepted

Of the 45 cases accepted, 13 have resulted in formal opinions. Four of those appeals were filed by insurers. Nine were filed by claimants.

Of the 13 cases for which formal opinions were issued, the Supreme Court reversed the Compensation Appeals Board in 8 of those cases and upheld the Board in 5 cases. In other words, the Compensation Appeals Board was reversed 62% of the time.

These statistics demonstrate the problem:

1. With only 36% of the cases being accepted, a number of claimants and insurers are being deprived of any meaningful appeal.

2. With a reversal rate of 62%, the Compensation Appeals Board is making an unacceptable level of errors of law, for which the only current remedy is an expensive appeal to the NH Supreme Court and is unlikely to result in any judicial review because of high case loads.

The argument that allowing appeals to the Superior Court would create four bites at the apple just plain wrong. **If this bill becomes law, the Compensation Appeals Board will remain the only body with the authority to determine issues of fact in contested cases.** No one should lose their case because of an error of law. With the Appeals Board making reversible errors of law in 62% of its cases and the Supreme Court only willing or able to accept 36% of the appeals filed, the current system is broken. This bill will fix it by providing a relative inexpensive and speedy remedy to both sides.

Respectfully submitted,

Rep. Gary B. Richardson
Majority Floor Leader
Merrimack District 10
Concord, Ward 5 and Hopkinton

Committee Report

STATE OF NEW HAMPSHIRE

SENATE

REPORT OF THE COMMITTEE

Date: April 25, 2013

THE COMMITTEE ON Commerce

to which was referred House Bill 647-FN

AN ACT relative to appeals from the compensation appeals board.

Having considered the same, the committee recommends that the Bill:

IS INEXPEDIENT TO LEGISLATE

BY A VOTE OF: 4-0

AMENDMENT # {Type 4-digits here}s

Senator Jeb E. Bradley
For the Committee

Patrick Murphy 271-8631

Docket of HB647

Bill Title: relative to appeals from the compensation appeals board.

Official Docket of **HB647**:

Date	Body	Description
1/3/2013	H	**Introduced** 1/3/2013 and Referred to Labor, Industrial and Rehabilitative Services; **HJ 12**, PG.204
2/4/2013	H	Public Hearing: 2/19/2013 11:15 AM LOB 307
2/21/2013	H	Executive Session: 2/26/2013 1:15 PM LOB 307
2/28/2013	H	Committee Report: Ought to Pass for Mar 20 (Vote 12-6; Part II, RC); **HC 23** PG.594
3/20/2013	H	**Ought to Pass**: MA DIV 206-143; **HJ 27**, PG.882
3/28/2013	S	Introduced and Referred to Commerce
4/15/2013	S	Hearing: 4/23/13, Room 101, LOB, 2:20 p.m.; **SC17**
4/25/2013	S	Committee Report: Inexpedient to Legislate, 5/2/13; **SC18**
5/2/2013	S	Inexpedient to Legislate, MA, VV === BILL KILLED ===;

Other Referrals

COMMITTEE REPORT FILE INVENTORY

HB 647-FN ORIGINAL REFERRAL _____ RE-REFERRAL

1. THIS INVENTORY IS TO BE SIGNED AND DATED BY THE COMMITTEE AIDE AND PLACED INSIDE THE FOLDER AS THE FIRST ITEM IN THE COMMITTEE FILE.
2. PLACE ALL DOCUMENTS IN THE FOLDER FOLLOWING THE INVENTORY IN THE ORDER LISTED.
3. THE DOCUMENTS WHICH HAVE AN "X" BESIDE THEM ARE CONFIRMED AS BEING IN THE FOLDER.
4. THE COMPLETED FILE IS THEN DELIVERED TO THE CALENDAR CLERK.

✓ DOCKET (Submit only the latest docket found in Bill Status)

✓ COMMITTEE REPORT

✓ CALENDAR NOTICE

✓ HEARING REPORT

✓ HANDOUTS FROM THE PUBLIC HEARING

✓ PREPARED TESTIMONY AND OTHER SUBMISSIONS

✓ SIGN-UP SHEET(S)

ALL AMENDMENTS (passed or not) CONSIDERED BY COMMITTEE:

____ - AMENDMENT # _____ ____ - AMENDMENT # _____
____ - AMENDMENT # _____ ____ - AMENDMENT # _____

ALL AVAILABLE VERSIONS OF THE BILL:

✓ AS INTRODUCED ____ AS AMENDED BY THE HOUSE
____ FINAL VERSION ____ AS AMENDED BY THE SENATE

✓ OTHER (Anything else deemed important but not listed above, such as amended fiscal notes): _____

DATE DELIVERED TO SENATE CLERK 8-14-13 _____
BY COMMITTEE AIDE

Revised 2011