

## **No Fault Regulations**

Regulation 68, the controversial measure introduced by the Superintendent of Insurance as a means to combat Insurance Fraud, has survived the latest challenge to its legality. The rule reduces the time injured motorists have to file claims from 90 to 30 days while also reducing the time doctors have to submit compensation claims from 180 to 45 days.

By way of background, the rules were first promulgated in 2000, however they were successfully challenged by the New York State Trial Lawyers Association and the Medical Society of the State of New York as the Insurance Department had failed to follow proper protocol in that it did not seek comments or consider other options. That ruling was affirmed by the Appellate Division, First Department.

In In the Matter of the Application of the Medical Society of the State of New York -v- Serio, (New York Law Journal 2/22/02) Justice Wetzel of the Supreme Court, New York County dismissed the suit challenging the regulations, finding that the Superintendent had addressed the previous administrative violations and that he had acted within his authority and not acted irrationally or unreasonably.

The stated purpose of Regulation 68 is to reduce Insurance Fraud and Justice Wetzel cites statistics showing the dramatic rise in fraud cases in the state. For example, in 1992, there were 489 reported cases of Insurance Fraud. That number skyrocketed to 12,372 by 2000. Given that dramatic increase, Justice Wetzel found that the Superintendent should have broad powers to deal with the problem. The court felt that the Superintendent was not “limited to treating the symptom, but not the system.”

On the day after the decision, the New York State Trial Lawyers filed a Notice of Appeal, a Motion for a Stay, and a request for interim relief to preserve the status quo until the

court ruled on the Motion for a Stay. Justice Saxe of the Appellate Division, First Department granted the interim relief. Stay tuned.

### **Admissibility of MRI Reports**

Recently, a member of our office tried a case involving an all too familiar fact pattern. The plaintiff was claiming, among other things, a herniated disc at L5-S1 which was confirmed by MRI. However, the plaintiff's only medical witness was a physiatrist. The plaintiff did not intend on calling the radiologist who took the MRI, nor did the plaintiff serve a Notice of Intention pursuant to CPLR sec. 4253-a, which would have permitted the MRI film to go into evidence without the radiologists testimony.

Instead, the plaintiff attempted to put the MRI film in evidence through the physiatrist, as a predicate to having the physiatrist to review the MRI in front of the jury. The attempted introduction of the MRI film was objected to, as there was no foundation for its admission. The court heard oral argument on the issue, agreed with the defense argument, and excluded the MRI film from evidence.

The plaintiff's attorney continued on undeterred and asked the witness what he relied upon in reaching his diagnosis. The doctor said that he relied on a number of things, including the MRI *report*. The doctor went on to say, over objection, that based upon his examination and the documents he reviewed, that, to a reasonable degree of medical certainty, the plaintiff sustained a herniated disc at L5-S1. (This is an example of what is called winning the battle, but losing the war).

Unfortunately, we have seen numerous instances in the last few years where doctors are permitted to testify about the contents of reports which they reviewed and relied on in reaching their opinion, despite the fact that the contents of the report is clearly hearsay. The Appellate

Division, Second Department finally addressed this problem in Wagman v. Bradshaw, A.D.2d \_\_\_ (2d Dep.t March 18, 2002).

Wagman involves the same factual scenario as detailed above. Following the accident, the plaintiff's treating chiropractor sent the plaintiff for an MRI of the back. Although the chiropractor did not see and interpret the actual MRI films, he did review the MRI report. During the trial, the plaintiff's attorney asked the chiropractor to share with the jury the results of the MRI. The defendant objected, however as the chiropractor stated that he had relied upon the written MRI report to form his diagnosis, the objection was overruled, and the jury heard the contents of the MRI report. As the Appellate Division noted, the chiropractor's testimony was based upon a subjective interpretation of MRI films from an inadmissible report written by a non-testifying health care provider.

The court went on to examine the bases for expert testimony; specifically what is known as the "professional reliability" basis. This category permits an expert to base his or her opinion on material not in evidence, provided: 1) the out-of-court material is of the kind accepted in the profession as a basis in forming an opinion and 2)the out-of-court material is accompanied by evidence establishing its reliability. However, the court held that "expert opinion, based on unreliable secondary evidence, is nothing more than conjecture if the only factual foundation, as in this case, is another healthcare provider's interpretation of what an unproduced MRI film purports to exhibit." The court went on to state that "admission into evidence of a written report prepared by a non-testifying healthcare provider would violate the rule against hearsay and the best evidence rule.

As a practical matter, this decision should not have an adverse effect on plaintiffs' attorneys. As long as CPLR section 4253-a is literally complied with, the MRI films themselves

will come into evidence. The plaintiff can then have the treating orthopedist, neurologist, etc., review the film in front of the jury, and disclose his findings. The plaintiff cannot call only a chiropractor, as a chiropractor is not qualified to read MRI films. By doing so, the plaintiff can make out a prima facie case. Of course, the defense should always have the films reviewed by a Board Certified radiologist, not only to counter the testimony of the plaintiff's doctor, but also, assuming the plaintiff does not call the radiologist who took the films, to compare the qualifications of the experts to read MRIs.

### **Labor Law Update**

Last month we discussed two cases in which the Court of Appeals discussed the applicability of Labor Law section 240(1) to cases involving falling objects. In Narducci v. Manhasset Bay Associates, 727 N.Y.S.2d 37 (2001), which decided two separate cases, the Court held that under the facts, the plaintiff had not established that liability under the Labor Law. The Court made clear that not all accidents that occur on a construction site implicate the Labor Law. The Court continued reining this area of the law in Roberts v. General Electric Company, 2002 WL 432367 (March 19, 2002).

In Roberts, the plaintiff was injured while employed as an asbestos handler by the third-party defendant. The job required the plaintiff to stand on top of cylindrical tanks approximately four feet high and cut steel support bands to allow the asbestos insulation to fall to the floor where other workers would retrieve and remove it. The plaintiff was injured when a falling piece of asbestos struck him on the shoulder.

Ultimately, the Supreme Court granted the plaintiff's summary judgment motion and that decision was affirmed by the Appellate Division, Third Department. In reversing the Appellate

Division, the Court cited Narducci and held that the asbestos “that fell was not a material being hoisted or a load that required securing for the purposes of the undertaking and this labor Law section 240(1) did not apply.” The Court went on to state that “it was not a situation where a hoisting or securing device of the kind enumerated in the statute would have been necessary or even expected.”

Clearly, the Court of Appeals is signaling that it is no longer enough to show merely that the plaintiff was struck by an object that fell from a height. The plaintiff must prove that the object that fell was in the process of being hoisted and that no hoisting or securing device was provided, or what was provided was inadequate.

We again note that the plaintiff in Roberts, like the plaintiffs in Narducci, did not fall after they were struck. The Court has left open the possibility that there would be a different outcome if the plaintiff fell after being struck. We expect the Court to address this issue once it is faced with the appropriate fact pattern.

### **Summary Judgment Practice**

Last month we discussed three recent Richmond County cases which dealt with whether summary judgment on liability in auto cases implicates the serious injury threshold. The answer to date is unclear, as each case reached a different result. This issue arose again, this time in Queens County, in Zafir -v- Turbo Trans Corp. (New York Law Journal 3/4/02).

The facts of Zafir are somewhat different from the prior cases, in that it does not involve summary judgment, but rather a default judgment. Nevertheless, the theory is the same. After granting a default judgment the court setting the matter down for an Inquest on the issue of damages.

At the outset, the court states that, “[t]he preliminary question that must be addressed by

this Court is whether , as a condition precedent to an award of damages, plaintiff, who was granted a default judgment on liability, must first establish at inquest that he suffered a ‘serious injury’ as defined by section 5102(d) of the Insurance Law.” The court answered this question in the affirmative, holding that even at an Inquest, where only the amount of damages is an issue, the plaintiff must make out a prima facie case as to serious injury. (Interestingly, the court also held that the plaintiff did not meet his burden and dismissed the case.) This decision is in direct conflict with the First Department’s decision in Maldonado v. DePalo, 715 N.Y.S.2d 245 (1<sup>st</sup> Dep’t 2000). Given the conflicting the decisions in this area, the Appellate Division will likely address the issue in the relatively near future.

### **Surveillance Tapes**

In Tran v. New Rochelle Hospital Medical Center (New York Law Journal 3/27/02) the Appellate Division, First Department faced a question already decided by two other Appellate Divisions. Specifically, whether a defendant is required to furnish copies of surveillance tapes prior to a further deposition regarding the plaintiff’s daily activities. Both the Third and Fourth Departments, as well as the IAS court, held that the tape must be turned over before the deposition. The First Department however, disagreed..

The court began by noting that there are two competing interests which must be balanced; the defendant’s desire in preventing the plaintiff from tailoring his or her testimony and the plaintiff’s concern regarding the deceptive alteration of the tapes. The court further noted that the Court of Appeals already resolved this conflict in favor of the defendant in DiMichel v. South Buffalo Ry. Co., 80 N.Y.2d 184 (1992). However, confusion resulted because shortly after the DiMichel decision the Legislature enacted CPLR 3101(i) which requires disclosure of all surveillance tape taken, not just those portions which a party intends to

use at trial.

A number of subsequent decisions held that the CPLR amendment overruled DiMichel. However, the First Department points out correctly that CPLR 3101 does not address the priority in disclosing surveillance videos. As such the court held that the unanimous DiMichel decision still stands for the proposition that “surveillance materials created by the defendants must be disclosed only after the plaintiff has been deposed.”

As an aside, the court also addresses when a second deposition is proper. The court points out that a second deposition serves an important truth finding function in view of facts which are newly discovered through the use of surveillance. As such, upon a proper showing that the prior examination of the plaintiff failed to address issues raised through the use of surveillance, a second deposition is warranted.

### **Proposed Legislation**

There are currently identical bills pending in both houses of the Legislature which would amend Insurance Law 3420(g), which was adopted in 1937. The section in question provides that there is no insurance coverage for an injured spouse, something which no state besides New York has. The bill would require insurers to provide notice in every policy that spousal coverage is not included. It would also require insurers to offer supplemental spousal liability coverage for a reasonable premium.

Not surprisingly, the bill is being strongly opposed by the American Insurance Association. The Association’s opposition to the bill is based on the argument used for the adoption of the bill in the first place, that it will lead to an increase in fraud. The spokesman for the Association has stated that the law should remain the same as spouses are not true adversaries and since they are part of the same household and as such the defendant spouse has

an incentive to help the plaintiff spouse. The Association also believes that the \$50,000 of No-Fault benefits available to an injured spouse should be sufficient compensation.

Although not mentioned by the Association, as a practical matter, the negligent spouse often ends up being a third party defendant in an action where the injured spouse sues another tortfeasor. In that case, there would be coverage for the negligent spouse. In any event, we will keep you apprised of the legislation's progress.