

NECOEM Reporter

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Special points of interest:

- Permanent Impairment, Using 5th Edition, March 19th, Montpelier, VT. www.impairment.com/vt.htm.
- Millender Conference, March 22-23, Sheraton Ferncroft, Danvers, 617-754-6132.
- Maine Institute of Occupational Health Education Conference, "What Works in the Workplace: Evaluating Safety and Health Interventions", May 17, University of New England, Biddeford, ME. Info at bingham@gwi.net.
- MMS, Earth Day 2001- Environmental Issues in Clinical Practice, May 30. With keynote speaker Dick Jackson from the CDC, and workshops to include West Nile Virus, drinking water safety, cluster analysis, toxic threats to child development, bio-diversity, health impacts of air pollution, endocrine disrupters, low level toxicity from mercury.
- NECOEM Dinner Meeting: June 7, Burlington Marriott, "Respiratory Fitness" with Bob McClellan.
- NECOEM/MAAOHN Annual Conference, December 6-7, Sheraton Boston. With topics to include confidentiality, ethics and malpractice, update on HIPPA, mercury mortality, the psychologic environment of home and work, infomatics in OH, complementary care, and more.

ANNUAL REPORT

The year 2000 has been an excellent year for NECOEM and its membership. NECOEM hosted two highly successful educational dinner meetings in the Spring and Fall. In the coming year, the Board of Directors has voted to increase the number of educational dinner meetings to a total of three starting this summer 2001. These three dinner meetings, along with the two day Annual Conference each December, provide a year-round program of educational and networking activities for our members. Special thanks to Kim Pearson, Reid Boswell, and Jim McEleney for their dedicated efforts as members of the Program Committee.

This year we said goodbye to Daryl Bichel,

who resigned as Executive Director of NECOEM. NECOEM owes a tremendous debt of gratitude to Daryl for his outstanding contribution to NECOEM over the years. Daryl generously offered to remain involved with NECOEM until the end of this year in order to facilitate the transition for our new Executive Director, Dianne Plantamura. Dianne was formerly the Coordinator for the Center for Occupational and Environmental Medicine at the Massachusetts Respiratory Hospital. She has had 19 years of administrative and research experience in occupational and environmental health. Dianne has done a superb job of assuming the Executive Director position and has played



Fred Kohanna, MD, MBA

an instrumental role in preparing for this year's Annual Conference.

In the past year, NECOEM worked closely with the Massachusetts Medical Society and Dr. William Patterson, to lobby for increases in workers' compensation reimbursement rates. Last summer, NECOEM provided testimony before the Division of Health Care Finance and Policy that along with other organizations' testimony resulted in a 6.9% increase in rates for

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VIOLENCE IN THE WORKPLACE

Robert Naparstek, MD

Recently the Caritas Good Samaritan Occupational Health Services hosted a conference on workplace violence. It marked one of many attempts in the profession and government to jump start a mobilization

of resolve and action. Human Resources and Safety Professionals were mostly in attendance. Although the conference focused on such "nuts and bolts" issues as OSHA guide-

lines, and employers' legal exposure, the theme was broad. All attendees were encouraged to act in their respective workplaces where they can make a difference and where they

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ANNUAL REPORT

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the Commonwealth of Massachusetts.

NECOEM hosted an exhibit booth during the two day Millender Educational Conference sponsored by the Caregroup Occupational Health Network last Spring. The booth provided information to attendees about the activities of NECOEM and for prospective NECOEM members. Since the booth was so successful, NECOEM will continue to sponsor a booth at the next Millender conference.

NECOEM continually strives to recruit and retain physician members who practice occupational and environmental medicine in the New England region. The number of NECOEM members has remained approximately 240 for all membership categories. The membership committee, chaired by

Steve McCloy, will continue to play an active role in recruiting and retaining NECOEM members.

Three NECOEM members have distinguished themselves in the past year. Bob McCunney completed his one-year term as president of ACOEM. Bob McLellan received the President's award from ACOEM for his outstanding contribution to the College and was also elected to the ACOEM Board of Directors. Cheryl Barbanel was reelected to the ACOEM Board of Directors for her second term

Finally, I want to say thank you to all of the members of NECOEM who have participated in the organization in the past year, and especially to those who volunteered their time and expertise when it was needed. I want to especially thank several Board members who are stepping down this year: Charlie Sweet, Bob McLellan, Doug Weir, and

Jerry Berke. It has been a privilege to work with these outstanding individuals and their presence on the Board will be greatly missed.

In the final analysis, NECOEM is an organization of volunteers, who come together for support, friendship, education, networking, and above all, "to promote optimal health and safety of workers, workplaces, and environments". To accomplish all of this, we need members who are energetic, enthusiastic, and willing to donate a few hours of their time each year to help accomplish NECOEM's many strategic initiatives. I encourage each of you to volunteer just a few hours of your time to keep the momentum that NECOEM has achieved, moving in the right direction. As someone who took the plunge and got involved with NECOEM, I can tell you that I have gained far more than I have given.

Respectfully submitted,
Fred H. Kohanna, MD, MBA

VIOLENCE...

(Continued from page 1)

have the power and authority to do so. Numerous quotes of Mohandes Gandhi were used as illustrations for a commitment to action and nonviolence.

"Nonviolence is not a quality to be evolved or expressed to order. It is an inward growth depending for sustenance upon intense individual effort."M. Gandhi

Barry Beder of Health Resources, Inc. (Woburn, Massachusetts) spoke eloquently of the ultimate unpredictability of certain violent acts. However he emphasized

that no amount of bulletproof glass could substitute for getting to know employees well, noting changes in their patterns of behavior and providing high quality and readily available EAP services.

Donna Ferreira, N.P., C.O. H.N., of National Grid, Inc. delivered a wealth of information from personal (and frightening!) anecdotes with violent employees to the complexities of the corporate policy. She described the formation of a "threat assessment team" where numerous senior executives could share judgement and responsibilities for a particular situation. Such issues as "duty to warn", encouraging employees to report violations

of the company policy without fear of reprisal and creating a harassment free workplace are examples of the work of this team.

"It has always been a mystery to me how men can feel themselves honored by the humiliation of their fellow beings." M. Gandhi

Keith McCown of Morgan, Brown and Joy, L.L.P. challenged the attendees to ponder certain legal conundrums. He reminded them that OSHA has not issued any required measures concerning violence prevention but has released

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FEDERAL APPEALS COURT REJECTS PHYSICIANS' JUDGMENT BY LIMITING "DIRECT THREAT" DEFENSE TO DISABILITY DISCRIMINATION CLAIMS

By Keith H. McCown

Can an employer rely on informed, reasonable medical advice to bar an employee from a job that poses a serious health hazard to that employee? Or, as a federal appeals court has recently found, is this just another form of paternalistic, discriminatory stereotyping against the disabled?

Mario Echazabal was offered work at a Chevron refinery involving exposure to various chemicals on a daily basis. In a pre-employment physical the company's doctor discovered that Echazabal had asymptomatic, chronic active hepatitis C. Chevron revoked the offer to Echazabal because of a strong risk that he would damage his liver by working in this facility. Echazabal did not take this decision gratefully—he sued Chevron, alleging the company had discriminated against him on the basis of a disability.

There is a common-sense principle woven into the Americans With Disabilities Act and many of its state-law counterparts—accommodating employees with disabilities was never meant to foster dangerous conditions, where a person's disability actually poses a serious safety hazard in the workplace. The Equal Employment Opportunity Commission promulgates the regulations implementing the ADA, and the EEOC has long acknowledged that an employer can legitimately deny a job to an employee or applicant if the person has a disability

that, in combination with the characteristics of the workplace or of the job in question, would pose a "direct threat" to the safety of others, *or* to the safety of the employee/applicant. Thus, the law has recognized the so-called "direct threat" defense for employers charged with discriminating against the disabled.

In response to Echazabal's lawsuit, Chevron asserted the "direct threat" defense as interpreted by the EEOC, and argued that the revocation of Echazabal's job offer was lawful and justified because the job posed a "direct threat" to his health and safety. In *Echazabal v. Chevron*, issued last Spring, the United States Court of Appeals for the Ninth Circuit (with jurisdiction over California and several other Pacific and Western states) rejected Chevron's defense and found that the revocation of the job offer constituted discrimination against a disabled person. Setting aside the EEOC's long-standing regulatory stance, the court found that the "direct threat" defense simply does not apply to the candidate's *own* health or safety—regardless of the accuracy and reliability of the medical opinion, and regardless of the severity of the health threat.

The court primarily relied on a literal reading of the ADA, which only mentions "threat to others" in describing this defense to a discrimination charge. The court found significant support in the ADA's legislative history, where in Congressional conference reports and legislative debates the term "direct threat" was used in reference to the threat to "others," but not in reference to threats to the individual disabled person.

The Ninth Circuit was

quick to answer a question that had been raised by Chevron and would no doubt be on the minds of most employers: can an employer be held liable for an employee's injury that arose from the impact of the workplace on the employee's disability? The court felt that this issue had been previously addressed in similar cases, and that state tort law would not be permitted to interfere with federal anti-discrimination law. The court reasoned that where the ADA required an employer to hire a disabled employee whose disability might be aggravated by the workplace, the employee could not find a legal remedy for his or her injury under state law, because state law would be preempted by the ADA. Thus, if Echazabal accepted the job at the refinery knowing that he would be exposed to chemicals that could further harm his liver, he could not successfully hold Chevron liable for any such injury under state tort law.

Because *Echazabal* was decided by the Ninth Circuit, the decision directly applies only to California, Oregon, Washington, Arizona, Montana, Idaho, Nevada, Alaska, Hawaii, Guam, and the Northern Mariana Islands. The EEOC, for its part, has publicly stated that it will honor the court's decision in those states and territories, but it has no immediate plans to alter its regulations to conform to the Ninth Circuit's opinion. At least one other federal appeals court has endorsed the EEOC's interpretation of the "direct threat" defense. Given that there is now a split within the federal courts it is likely that this issue will continue to be raised, and may eventually be addressed by the United States Supreme Court.

For now, *Echazabal* will

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Excerpt of the Harriet Hardy Award Presentation November 30, 2000

It is a great privilege for me, as the President of the New England College of Occupational and Environmental Medicine, to make the Harriet Hardy Award presentation for the Year 2000. In preparing for this presentation, and acknowledging my own limited understanding of Harriet Hardy and her work, I embarked on a fascinating historical journey into the life and career of Harriet Hardy. As part of my research, I read the now out-of-print memoirs of Harriet Hardy, entitled "Challenging Man-Made Disease". Next, I contacted Dr. Lloyd Tepper, himself a Harriet Hardy Award recipient in



Join us December 6-7 for the 2001 Annual Conference

1984, who worked as a fellow with Dr. Hardy for 3 years. He shared with me, in a recent phone conversation, some fascinating insights into her personality. He described her as a tough, no-nonsense individual with a passion for "fairness" and "social justice". He stated that she wasn't very "keen" on business with respect to their treatment of workers' health and safety issues, and stated that she was "immune

to intimidation". Dr. Tepper described her unique ability to bring together teams of industrial hygienists, toxicologists, epidemiologists, preventive medicine specialists, and business leaders to address work related health issues, at a time when multidisciplinary teams were the exception rather than the rule. She cajoled lawyers into doing Pro Bono work on behalf of workers and would obtain free medication for workers' who needed treatment but could not afford it. She convinced the Atomic Energy Commission to give her money to set up one of the first disease registries in the country in order to record beryllium related diseases. In the course of her long career, she was involved in cases related to asbestos, silica, lead, coal and cotton dust, cyanide, cadmium, benzene, carbon tetrachloride, as well as work-related Anthrax. She was a prolific researcher and wrote many journal articles and books including her well-known collaboration with Alice Hamilton entitled "Industrial Toxicology". As I reflect on the pioneering work of Harriet Hardy and the values that she cherished throughout her life, I am particularly gratified that the NECOEM Board of Directors has selected Dr. Robert McCunney as this year's Harriet Hardy Award recipient. Dr. McCunney embodies many of the qualities and ideals that Harriet Hardy stood for. Dr. McCunney shared with me in a recent conversation, that his interest in the health of workers began with his father, who worked all of his life as a machinist. When Dr. McCunney was a college student, he worked as a drafter at the Philadelphia Navy Yard, where he experienced

first hand, the work environment of shipyard workers. His growing interest in "work and health", led him (after the completion of medical school at Thomas Jefferson, and an Internal Medicine Residency at Northwestern University) to enroll in the Masters in Public Health Program at Harvard. After completing his MPH, he started the first hospital based occupational health clinic in Massachusetts at the Goddard Hospital. He later went on to distinguish himself as the Chief of Occupational and Environmental Medicine at Boston University Medical Center and was a founder of their Occupational Health Residency Program. In 1994, he accepted and continues to hold the position of Director of Occupational and Environmental Medicine at the Massachusetts Institute of Technology. As many of you already know, Dr. McCunney was the President of our own component society, NECOEM, from 1984-1986 and had the privilege of presenting the Harriet Hardy Award during those years. He is, as most of you also know, the immediate past-president of the American College of Occupational and Environmental Medicine, and served in that post with distinction. Certainly, it was a source of pride for many of us at NECOEM, that one of our own members had become the President of ACOEM. Dr. McCunney has published almost a hundred journal articles, book chapters, and books. I have no doubt, that if Harriet Hardy were alive today, she would be absolutely thrilled to know that this year's recipient of the award named in her honor, is Dr. Robert McCunney. It is my pleasure to now present the Harriet Hardy Award in Occupational Health and Environmental Medicine for the year 2000 to Dr. Robert McCunney.

Excerpted from: COMMENTS ON ACCEPTING THE HARRIET HARDY AWARD

NOVEMBER 30, 2000

ROBERT J. MCCUNNEY, MD, MPH



Dr. McCunney sporting his gift

It is indeed an honor to accept the Harriet Hardy award for so many reasons. First, to be recognized by one's peers and colleagues is a great distinction that I hold in high regard, especially in receiving such acknowledgement from our local chapter, the New England component of the American College of Occupational and Environmental Medicine (ACOEM). You, my local colleagues are quite familiar not only with my achievements but also the stumbles and fumbles I've made along the way of my career.

Second, to receive an award in honor of one of occupational medicine's great pioneers is especially satisfying for many different reasons including; one, I had the opportunity to meet Harriet when she was in her late 70's and I was a new board member for ACOEM's New England chapter. At that time, she displayed the earnestness, sharp wit, and intelligence that so many other people had noted in the earlier parts of her career. Two, when the award was established in 1982, I

was a NECOEM board member and had the privilege of helping to select the first few winners. Three, I currently have the challenge of continuing Harriet's great work at MIT in the Environmental Medical Service which she founded over 51 years ago. In fact, our current links are almost uncanny in that she had and I have a dual affiliation with both Massachusetts General Hospital and MIT. And finally, to join such an esteemed group of physicians, the list of which would read like a "Hall of Fame" in occupational medicine, is incredibly rewarding. It makes me think that I have been doing something right over the years. On the other hand, as the cliché goes, you know you're getting old when you start getting awards!

principle demonstrated by Harriet in her career is the importance of good clinical skills. Although those of us who practice occupational medicine can do so from many perspectives, we should never forget the importance of being a good physician. Establishing a link with the patient in showing objectiveness as well as empathy can only make us more effective at what we do.

Third, and perhaps more important to the field of occupational medicine is how Harriet showed the value of documenting and publishing our work. Any field is as only good as its literature and occupational medicine is no different. We should strive to do what Harriet showed us to do so well, through keen observational skills and documentation of our efforts. In turn, we can help advance the recognition of hazards associated with work and ultimately prevent illnesses associated with such exposures.

Once again, thank you again very much. I truly appreciate the honor associated with this award.

In summary, major principles that I feel that Harriet demonstrated in her work that are worthy of emulation into the future, include the following: "Think out of the box," to use the cliché, "dare to be different." Certainly, Harriet demonstrated these qualities first as a woman entering a male dominated field in the early 30's when internships were extremely limited to woman.

Secondly, another major prin-

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recommendations limited to health care and service employees. OSHA has emphasized that health care and service workers face an increased risk of work related assaults. OSHA can enforce the "general duty clause". Nevertheless he pointed out that there is not a large body of law that applies and "in the end it is a moral obligation and simple prudence that should

compel employers to give some thought to violence as a workplace safety issue." Common law claims fall into two categories; issues involving violence by employees and those involving violence towards employees. Generally employers are not liable for violent acts by employees unless the action occurs within the "scope of employment". Various cases were cited. But if the employer can reasonably

foresee an employee's violent action and fails to prevent it liability exists falling under the legal theories of negligence. For more information: • www.osha.slc.gov/sltc/workplaceviolence/index.html • www.cdc.gov/niosh/violcont.html

Note: 'Violence in the Workplace' will be one feature of the 2001 Annual Conference.

From Below the Beltway: News from Rhode Island

Steven G McCloy, MD

Assessing Quality in Workers' Compensation: The Technical Resources Center

LAST YEAR I reported on the establishment of the Technical Resources Center under a grant from the Robert Wood Johnson Foundation. The mission of the center is to assess, interpret and disseminate data about access and quality of medical care for injured workers. The eventual goal of the RWJ program is to establish a national clearinghouse of information on quality of care for this population.

The RI Department of Labor and Training brought together a large group of "stakeholders" representing all the groups and agencies that are involved in or impacted by the Workers' Compensation system.

To make it to the first list of quality measurements of care, each parameter had to meet criteria for measurability, for the value of whatever measurement was made (we can measure it but is it relevant?) and had to have an identifiable data source either inside or outside of Rhode Island.

By May 2000 when the

Stakeholders met to narrow the list of Quality determinants to the most important and the most measurable, they reviewed all of the input and recommendations from the various working groups with their diverse constituent interests. They decided on:



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- **Access to Care**—does the injured worker exercise an informed choice based on good information with access to the best clinicians? Are there barriers for vulnerable populations?
- **Appropriate Clinical Care**—Do the clinicians follow up to date medical guidelines and protocols?
- **Timelines of Care**—How soon after the injury does care commence?
- **Work related Outcomes**—How quickly does the worker return to work and what is his/her employment status 6 or 12 months later?
- **Injured Worker Satisfaction.**

These are the most important indicators of quality as defined for the Technical Resources Center of the Robert Wood Johnson grant. The next challenge is to find and define the sources of information to allow measurement of the indicators. Some of this information could be obtained only through survey of injured workers, clinicians, attorneys, etc. Rhode Island has an advantage in that greater than 90% of its workers' comp insurance is written by one company, Beacon Mutual. If Beacon's data banks can be tapped in a way that preserves the privacy of the patient, the physician and the proprietary needs of Beacon, the Technical Resources Center will have a major source of information.

Rhode Island has a legislated mandate to re-evaluate its W/C system in 2002. This mandate was written into the radical restructuring of the W/C system in 1990-92. The information obtained by the TRC will have a major importance if the legislature wants to use a scientific approach to its reevaluation.

Vermont State Report

Verne Backus, MD, MPH

Ergonomics: VOSHA is reviewing the new Federal Ergonomic Standard to determine the final Vermont version. Occupational Physicians in Vermont can send letters or email to VOSHA regarding deficiencies such as those ACOEM has identified with the Federal Standard. The VOSHA website is <http://www.state.vt.us/labind/vosha.htm>.

To communicate contributions to the VT Corner of this newsletter, send email to: vbackus2@ohplus.com

NEW HAMPSHIRE STATE REPORT

Carolyn Murray, MD, MPH

House Bill 1244 directs the Department of Labor to appoint a committee to draft a rule regarding needle safety devices. Membership includes a physician, nurse, EMT, health department staff and a health care administrator. The committee has met several times and a draft rule, modeled to some degree after Massachusetts's law, is now undergoing legal and fiscal review. This revision of the state labor regulations would serve to cover state and municipal health care workers not

subject to OSHA in terms of ensuring they are provided appropriate needle safety devices. A public hearing on the proposed rule should be announced soon. House Bill 1390, passed in May 2000, established a commission to study the relationship between public health and the environment. One member will be "a licensed physician knowledgeable in occupational and envi-

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ronmental medicine” to be appointed by the governor. Who better to serve in this role than our own NECOEM immediate past president, Bob McLellan, MD, MPH? The commission has been tasked with studying the medical and public health impact of a wide range of environmental exposures. Addressing gaps in environmental

health data identified in the New Hampshire Comparative Risk Project is one focus of the commission’s work. Currently lead is the only environmental exposure tracked systematically within the state. Looking at other state environmental surveillance activities, reviewing national recommendations regarding tracking of environmental illness and making specific recom-

mendations to legislators and policy makers will be one of the outcomes of this commissions work. Dr. McLellan lists better integration of environmental protection and public health initiatives, and emphasizing the importance of environmental health promotion as other goals of this commission.

MASSACHUSETTS STATE REPORT

BILL PATTERSON, MD, MPH

Responding to physician concerns about deficiencies in the current workers compensation system, the Massachusetts Medical Society has filed a bill in the state legislature to address some of these problems. The Society’s bill proposes that the Division shall set rates for physician services at a level which compares favorably to rates paid by commercial insurers. In addition, separate rates shall be established which fully compensate physicians for administrative and other costs that are unique to worker’s compensation cases. The Society also requests regulations to insure that the Department of Industrial Accidents review the claims procedures of workers compensation insurers in-

cluding duplicative and excessive documentation requests, utilization review standards, and promptness of payment. Of interest, the Massachusetts AFL-CIO has also filed a bill addressing some of these concerns, prompted by difficulty union members and workers are having in getting access to medical care, especially in western Mass. It is certainly possible that these bills will be brought together in committee and consolidated, although there are some differences in them at the present time. Another parallel effort is that many states around the country (as reported by the AMA) have successfully passed Promptness of Payment laws, in response to continuing egregious delays by insurers in payment to providers.

Get Involved! Represent our Specialty!

MMS sponsors “**Doctors Speak Out on Health Care**”, The State House Wednesday, April 4, 2001.

As many ACOEM members from other states have reported, the most critical factor in getting responses from legislators is to show up! I encourage NECOEM members who are MMS members to participate in this planned lobbying effort. Legislators regularly hear from lobbyists representing insurers and business groups which have their own ideas about how we should practice medicine or how much or when we should be paid. Now is especially timely, because it would give us an opportunity to orient our representatives on this important workers’ compensation issue before the bills come to committee, increasing the likelihood that they would pay attention to it.

Those who are interested should call Lori DiChiara at 800-322-2303.

Survey of New England Workers Compensation Reimbursement Rates

	RI	CT	Maine	VT	NH	MA	Medicare
<u>Initial visits</u>							
Fee Scale - level 3 (99203)	\$85.34	\$96.99	\$159.00	\$65.48	\$90.00	*	\$62.70
Fee Scale - level 4 (99204)	\$123.95	\$138.56	\$224.20	\$100.47	\$125.00	*	\$114.96
*Fee code X9157						\$106.69	
<u>Follow Up Visits</u>							
Fee Scale - level 3 (99213)	\$57.91	\$63.24	\$79.20	\$42.46	\$65.00	\$39.27	\$43.57
Fee Scale - level 4 (99214)	\$75.18	\$91.65	\$124.80	\$67.67	\$90.00	\$60.11	\$66.14
<u>Rehab Evals</u>							
Fee Scale - assuming one hour	\$91.44	\$90.00	\$97.80	\$81.49	\$160.00	\$106.69	+\$60.87
<u>Rehab Treatments</u>							
Fee Scale - assuming one hour	\$66.04	\$90.00	\$158.40	\$108.72	\$140.00	\$95.76	+\$72.49
<u>Nerve Conduction (one nerve) (95903)</u>	\$74.17	\$197.00	\$69.00	\$80.07	UC***	\$50.08	

+Assumes unbundled charges

***Usual and Customary

Note: Maine is implementing a slight reduction in some fees.

New England College of Occupational
and Environmental Medicine

22 Mill Street,
Groveland, MA 01834

Voice/ Fax: 978-373-5597
Email: NECOEM@aol.com

NECOEM Reporter,
Editor: Robert Naparstek, MD
NECOEM President: Fred Kohanna, MD, MBA
Executive Director: Dianne Plantamura, MSW

NECOEM

"NECOEM is a not-for-profit, regional component society of the American College of Occupational and Environmental Medicine, the pre-eminent organization of occupational and environmental physicians in the United States.

NECOEM has over 200 physician members and is dedicated to preventing and treating occupational injuries and illnesses. NECOEM provides continuing medical education for its physician members in order to enhance the care that they provide to men and women in the workplace. NECOEM is an advocate for workplace safety, occupational health research, raising public awareness of occupational and environmental health issues, guiding public policy, and recognizing outstanding achievement by individuals in occupational and environmental health."

The editorial Board welcomes letters to the editor. Write to NECOEM at the above address. The editor reserves the right to edit letters for publication purposes

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DIRECT THREAT

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only have an impact in cases where an employee is initially qualified to perform a job, but suffers from a medical condition that could be exacerbated by factors in the job or the workplace. **Echazabal** did not alter the fundamental principle that an employee initially must be able to perform the essential functions of a job, with or without a reasonable accommodation; it was only an interpretation of the employer's "direct threat" defense.

If an employee initially presented health or disability issues that prevented the employee from performing any of the essential functions of a

job, even with a reasonable accommodation, **Echazabal** does not compel the employer to award the job in those circumstances.

However, the boundaries of the law tend to be pushed on a case-by-case basis. One can easily imagine the next case, where an applicant defies medical opinion and claims that it is strictly his or her choice —not a doctor's—whether to perform essential job functions that would imperil the applicant's health.

Thus, can an applicant with a known, medically verifiable back problem insist upon being given the chance to fill a heavy-lifting job, against medical advice, so long as the applicant is able ini-

tially to perform the work? Does the opinion of the insistent, or confident, or even foolhardy employee prevail over the opinion of the physician? Somewhere in the continuum of medical opinion, there is an important distinction between legitimate, reasonable medical disqualification from a particular job, and overprotective, paternalistic discrimination. By equating the two, the **Echazabal** ruling seems to disqualify medical expertise in favor of an employee's own judgment. This is bound to have further repercussions.

Mr. McCown is a partner at Morgan, Brown & Joy in Boston, a management-side employment and labor law firm representing large and small employers in all segments of the economy.