

June 1993

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Sean T. Carnathan

University of Maine School of Law

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Recommended Citation

Sean T. Carnathan, *Due Process and the Independent Medical Examiner System in the Maine Workers' Compensation Act*, 45 Me. L. Rev. 123 (1993).

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DUE PROCESS AND THE INDEPENDENT MEDICAL EXAMINER SYSTEM IN THE MAINE WORKERS' COMPENSATION ACT

I. INTRODUCTION

Workers' compensation became front page news during the summer of 1991, when Maine's governor refused to sign the state's budget unless the Legislature reformed the system.¹ Although the vehemence of the governor's demands stunned both the public and the Legislature, the dire state of workers' compensation was well known to those involved.² In fact, the Legislature has debated reforming the system nearly every year,³ and sixteen significant changes have been made since the program's inception in 1915.⁴

In 1991, the Legislature focused on cutting costs. The system requires two types of highly paid professionals—doctors and lawyers.⁵ Therefore, an obvious way to reduce system costs is to reduce the involvement of these expensive people. The Legislature wanted a system where medical decisions would be made by medical practitioners.⁶ They hoped to discourage doctor shopping,⁷ foster more ob-

1. See, e.g., Nancy Perry, *Budget: Who Will Blink First?*, PORTLAND PRESS HERALD, July 2, 1991, at 1A ("Gov. John R. McKernan's decision to shut down state government in an attempt to force workers' compensation reforms is a high-risk strategy . . .").

2. See REPORT OF THE GOVERNOR'S TASK FORCE ON WORKERS' COMPENSATION, Apr. 1991; AFL-CIO, WORKPLACE INJURIES & WORKERS' COMPENSATION IN MAINE, May 29, 1991; WORKERS' COMPENSATION REFORM COMMITTEE, JOBS, THE ECONOMY AND WORKERS' COMPENSATION [hereinafter "WCRC"], Jan. 10, 1991; WORKERS' COMPENSATION RESEARCH INSTITUTE, WORKERS' COMPENSATION IN MAINE, Dec. 1990 [hereinafter "WCRI"].

3. In the last nine years, for example, the Workers' Compensation Act has been entirely reworked four times. S. Peter Mills, *Update on Workers' Compensation*, MTLA NEWS (Me. Trial Lawyers Ass'n), Jan. 1992, at 3.

4. See FREDERICK H. GREENE III, THE WORKERS' COMPENSATION '91 AMENDMENTS: A PATHWAY THROUGH THE MAZE (counting fifteen major changes). By adopting the plan prepared by the Blue Ribbon Commission, the legislature has once again entirely rewritten the workers' compensation laws, bringing the number of substantial revisions to sixteen. P.L. 1991, ch. 885 (Act effective Oct. 7, 1992) (to be codified at ME. REV. STAT. ANN. tit. 39-A, §§ 101-314).

5. GOVERNOR'S TASK FORCE ON WORKERS' COMPENSATION REFORM, REPORT 22 (1991) [hereinafter GOVERNOR'S TASK FORCE] ("[T]here is tremendous attorney involvement in Maine's comp system with the expected resulting litigation . . . there is heavy involvement of health care providers and considerable surgery . . . All of these factors drive costs up and overload the system with cases and procedures that clog it and create delays.")

6. WCRC, *supra* note 2, at 11.

7. *An Act to Improve the Maine Workers' Compensation System: Hearings on L.D. 1594 Before the Joint Standing Comm'n on Labor, Banking and Ins.*, (1991) (testimony of Edward David, M.D., J.D.).

jective and consistent decisions,⁸ and generally streamline the dispute resolution process.⁹

Toward this end, the Legislature enacted a statute that radically alters the process for determining the validity and value of a claim. The new system employs independent medical examiners (IMEs) to render all medical findings necessary "in any dispute relating to the medical condition of a claimant."¹⁰ On its face, this concept may not seem so extraordinary.¹¹ The new law, however, also provides that "the board shall adopt the medical findings of the independent medical examiner unless there is clear and convincing evidence to the contrary in the record that does not support the medical findings."¹²

This arrangement effectively relegates the workers' compensation hearing officers to the role of appellate judges, reviewing IME decisions under a clear error standard. Unfortunately, this revised process may not save the state any money at all.¹³ It may also be unconstitutional.

This Comment will focus on whether the independent medical examiner system satisfies the requirements of due process.¹⁴ The first

8. Memorandum from Ralph L. Tucker, Chairman of Workers' Compensation Comm'n to the Joint Standing Comm'n on Labor, Banking and Ins., 3 (May 29, 1991) (on file with author) [hereinafter MEMORANDUM]; WCRI, *supra* note 2, at 88-89.

9. WCRI, *supra* note 2, at 86.

10. P.L. 1991, ch. 885 (Act effective Oct. 7, 1992) (to be codified at ME. REV. STAT. ANN. tit. 39-A, § 312(3)).

11. After all, IMEs have been used in Maine's workers' compensation system for years. See R.S. ch. 31, § 22 (1954).

12. P.L. 1991, ch. 885 (effective Oct. 7, 1992) (to be codified at ME. REV. STAT. ANN. tit. 39-A, § 312(7)). In fact, the law provides that if the parties agree to a particular IME, then the findings are binding. *Id.*

13. As the Chairman of the Workers' Compensation Commission, Ralph Tucker, pointed out:

The cost of setting up and regulating a statewide system of coordinated state medical examiners would be substantial, particularly because the use of medical panels would be mandatory, even where the issue is minor or sufficient medical evidence already exists.

The assignment and scheduling of evaluations, together with the necessary gathering of medical information and distribution of reports, will be a tremendous task. Basically, we would be transferring onto the state the coordination of all the medical evaluation work which is currently performed directly between insurers and their networks of medical evaluators.

Disability Determination Services estimates they would need 50 new positions and \$2.9 million to take over evaluations. This may be low.

MEMORANDUM, *supra* note 8, at 2.

14. Anytime a lawyer (or prospective lawyer) cries out for more due process, she may expect skepticism. Popular cynicism has long viewed the lawyer as being concerned primarily with her wallet:

The one great principle of the English law is, to make business for itself. There is no other principle distinctly, certainly, and consistently maintained through all its narrow turnings. Viewed by this light it becomes a coherent scheme, and not the monstrous maze the laity are apt to think it. Let them but once clearly perceive that its grand principle is to make busi-

section provides a brief description of the statute itself. The next several sections offer a quick tour of the essentials of due process in the administrative context. Finally, this Comment will offer an analytical framework for judging the constitutionality of the IME program. The analysis will break the IME system into three separate phases—investigator, witness, and fact-finder. By separating the IME system into these three components, this Comment will clarify the constitutional issues raised by the system, and offer suggestions to keep the program within the bounds of due process.

II. THE STATUTE¹⁵

The independent medical examiner system creates a new dispute resolution process.¹⁶ The IMEs will be responsible for deciding medical issues “in any dispute relating to the medical condition of the claimant.”¹⁷ They will be selected and supervised by the Workers’

ness for itself at their expense, and surely they will cease to grumble.

CHARLES DICKENS, *BLEAK HOUSE* 509 (Bantam Books 1989) (1853). The Author, of course, wrote this Comment with a pure heart and altruistic intentions.

15. Originally, the Legislature introduced the new IME system as part of the reforms enacted in 1991. ME. REV. STAT. ANN. tit. 39, § 92-B (West 1992). The new legislation left the program substantially intact.

Section 312 substantially enacts the provisions of former Title 39, section 92-B on independent medical examiners, except the board is given the responsibilities the medical coordinator had under Title 39. In addition, section 312 requires the board to create a list of no more than 50 of the State’s most highly qualified and highly experienced health care providers to serve as independent medical examiners and the board must periodically validate the list. The disqualification from service of a person who has treated an employee at the request of an employer or insurer is expanded to include the request of an employee. The board must assign an independent medical examiner if the parties to a dispute can not agree on a medical examiner of their own choosing. Section 312 states that, if the parties have agreed to the independent medical examiner they are bound by the examiner’s findings. If the board assigned the independent medical examiner, the board is required to adopt the findings unless there is clear and convincing evidence to the contrary in the record that does not support the findings.

L.D. 2464, Statement of Fact (115th Legis., 3d Spec. Sess., 1992).

16. The statute discussed in this Comment was originally enacted by P.L. 1991, ch. 615, § D-19 (effective Oct. 17, 1991). The Legislature mistakenly enacted two sections designated 92-A; the other is titled “Assessment on workers’ compensation insurers and self-insured employers,” and was enacted by P.L. 1991, ch. 591, § AA-3 (effective July 17, 1991). Revisor’s Report 1991, c. 1 §§ 59, 60 changed the IME section to 92-B.

17. P.L. 1991, ch. 885, § A-8 (effective Oct. 7, 1992) (to be codified at ME. REV. STAT. ANN. tit. 39-A, §§ 101-314). Specifically, § 312(3) assigns responsibility to the IMEs to “render medical findings in any dispute relating to the medical condition of a claimant, including but not limited to disputes that involve the employee’s medical condition, improvement or treatment, degree of impairment, or ability to return to work.”

Since medical findings in workers’ compensation often blend with non-medical decisions, there may be concern that IMEs will in fact be deciding too much. Determin-

Compensation Board of Maine.¹⁸ Although the hearing officers will continue to make the ultimate decisions, the statute creates an extraordinary role for the IME.¹⁹ In combination, the weight accorded the IME's findings and the process by which the IME gathers her evidence create a system under which the IME's decision is essentially unchallengeable.

An IME's findings receive extraordinary weight. If the parties agree to a particular IME, her findings are binding.²⁰ If the parties cannot agree and the Board must appoint an IME, then the Board must accept her findings unless clear and convincing evidence indicates that she is mistaken.²¹ Perhaps most important, when reviewing an IME's findings, the Board may not evaluate evidence not considered by the IME.²²

ing incapacity for work, for example, includes evaluating the job market in the worker's community. *See, e.g., Warren v. Vinalhaven Light & Power Co.*, 424 A.2d 711, 713 (Me. 1981). A worker's post-injury earnings or her attempts to find work may also affect the ultimate decision. *See, e.g., McLellan v. Georgia-Pacific Corp.*, 444 A.2d 427, 430 (Me. 1982); *Comparetto v. Diaz Corp.*, 431 A.2d 1326, 1329 (Me. 1981); *Mitchell v. City of Bangor*, 385 A.2d 210 (Me. 1978). Although such considerations do not directly affect the constitutionality of the statute, they do raise questions about the wisdom of the program. Indirectly, they affect the potential value of additional safeguards.

18. P.L. 1991, ch. 885, § A-8 (effective Oct. 7, 1992) (to be codified at ME. REV. STAT. ANN. tit. 39-A, § 312(1)). Section 312(1) specifically directs the Board to create and maintain a list of not more than fifty IMEs and to adopt fee schedules and other regulations. *Id.* The Maine Workers' Compensation Board is a newly created entity as well. *Id.* § 151. Originally, the IME system was entrusted to the Medical Coordinator, whose position was specially created for that purpose. ME. REV. STAT. ANN. tit. 39, § 92-B, 121 (West Supp. 1991). It appears that the new Act eliminates the Medical Coordinator's position.

19. P.L. 1991, ch. 885, § A-8 (effective Oct. 7, 1992) (to be codified at ME. REV. STAT. ANN. tit. 39-A, § 312(7)).

20. *Id.*

21. *Id.* The original IME statute provided that the IME's findings would be adopted by the commissioner unless a preponderance of the evidence indicated that she was wrong. ME. REV. STAT. ANN. tit. 39, § 92-B(7) (West Supp. 1991). The duties performed by "commissioners" under the old Act will now be handled by "hearing officers." P.L. 1991, ch. 885 (effective Oct. 7, 1992) (to be codified at ME. REV. STAT. ANN. tit. 39-A, § 152(5)). It is unclear whether the Board must appoint an IME if neither party requests one. Earlier IME provisions applied only when a party requested an IME examination. ME. REV. STAT. ANN. tit. 39, § 65 (1989); ME. REV. STAT. ANN. tit. 39, §§ 52-D(2) & 92-B(3) (West Supp. 1991). The new statute, however, provides that "[a]n independent medical examiner *shall* render medical findings on the medical condition of an employee and related issues." P.L. 1991, ch. 885 (effective Oct. 7, 1992) (to be codified at ME. REV. STAT. ANN. tit. 39-A, § 312(7)) (emphasis added). As originally enacted, the IME statute then provided that "[t]he commissioner *may* select an independent medical examiner." ME. REV. STAT. ANN. tit. 39, § 92-B(3) (West Supp. 1991) (emphasis added). The new statute lacks this provision. The implication is that an IME will participate in every dispute. Even if this is not the case, one party may always impose an IME on the other, thereby raising due process issues.

22. P.L. 1991, ch. 885, § A-8 (effective Oct. 7, 1992) (to be codified at ME. REV.

The deference accorded the IME's findings makes the process unusual as well. Essentially, all evidence of the employee's medical condition must be gathered by the IME.²³ She therefore shoulders responsibility for collecting and analyzing a potentially daunting quantity of data. From the information gathered, the IME submits a written report to the hearing officer and both parties, providing a description of her findings and the basis for them.²⁴ If additional information is submitted to the IME after the report has been filed, but before the hearing, the IME must file a supplemental report only if the data affects her decision.²⁵

Despite the statute's attempt to depict them as evidence, the IME's findings are essentially binding. Once the report is filed, the parties can challenge only the IME's interpretation of the evidence. In fact, the statute's instructions to the Board sound like a "clear error" standard, used by appellate courts reviewing findings of fact.²⁶ Once the hearing officer adopts them in her decision, the IME's fact-findings sail through the system, enjoying almost unchallengeable status.²⁷

The system places the IME in an ambiguous role. Initially, she functions as an investigator for the Board, ferreting out important information on the government's behalf. She then transforms into a breed of high-powered, expert witness, who interprets a large body of information for the Board, subject to little or no direct challenge. Finally, her role shifts to resemble the fact-finder, as her decision is for all practical purposes binding. At all three stages, the IME's chameleon nature raises constitutional issues.

The opportunity to confront and rebut adverse evidence underpins our legal system. Nevertheless, a full-blown trial cannot be held in every setting. The fundamental question is whether the IME sys-

STAT. ANN. tit. 39-A, § 312(7)).

23. "The parties shall submit any medical records or other pertinent information to the independent medical examiner. In addition to the review of records and information submitted by the parties, the independent medical examiner may examine the employee as often as the examiner determines necessary . . ." P.L. 1991, ch. 885, § A-8 (effective Oct. 7, 1992) (to be codified at ME. REV. STAT. ANN. tit. 39-A, § 312(4)).

24. P.L. 1991, ch. 885, § A-8 (effective Oct. 7, 1992) (to be codified at ME. REV. STAT. ANN. tit. 39-A, § 312(5)).

25. P.L. 1991, ch. 885, § A-8 (effective Oct. 7, 1992) (to be codified at ME. REV. STAT. ANN. tit. 39-A, § 312(6)).

26. *Cf. Lowe v. C.N. Brown Co.*, 448 A.2d 1358, 1362 (Me. 1982) (factual findings of Workers' Compensation Commission reviewed only to determine whether the record contained competent evidence to support them).

27. The new workers' compensation statute bars review of a hearing officer's findings of fact. P.L. 1991, ch. 885 § A-8 (effective Oct. 7, 1992) (to be codified at ME. REV. STAT. ANN. tit. 39-A, § 320) (appeal to full Board); P.L. 1991, ch. 885 § A-8 (Act effective Oct. 7, 1992) (to be codified at ME. REV. STAT. ANN. tit. 39-A, § 320) (appeal to Law Court). Both sections provide that "there may be no appeal upon findings of fact."

tem allows each party a meaningful opportunity to be heard.²⁸ Perhaps in recognition of the potential for constitutional attack, the Legislature left room for the Board to flesh out the statute by directing it to adopt the rules necessary to implement the IME system.²⁹ Indeed, the rule-making provision of the former statute allowed the Medical Coordinator to draft regulations which, in fact, cured some of the significant defects in the state.³⁰

III. THE BROAD OUTLINE OF DUE PROCESS

The constitutional guarantee of due process prior to loss of liberty or property³¹ is not immutable, but is "flexible and calls for such procedural protections as the particular situation demands."³² Due process may therefore boil down to the court's view of what is fair.³³

28. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

29. P.L. 1991, ch. 885, § A-8 (Act effective Oct. 7, 1992) (to be codified at ME. REV. STAT. ANN. tit. 39-A § 312(4)).

30. Chapter 10 of the Rules of the Office of the Medical Coordinator was effective August 1, 1992 and was drafted by the Medical Coordinator pursuant to the original IME provisions of the statute. ME. REV. STAT. ANN. tit. 39, § 92-B(4) (West Supp. 1991-1992). The new statute directs the Board to adopt the rules necessary to implement the IME system. P.L. 1991, ch. 885, § A-8 (effective Oct. 7, 1992) (to be codified at ME. REV. STAT. ANN. tit. 39-A, § 312(1)). This Comment will assume that the Board's regulations under the new statute will be substantially similar to the Medical Coordinator's.

31. U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . ."); MAINE CONST. art. I § 6-A ("No person may be deprived of life, liberty or property without due process of law . . ."). The Law Court has consistently interpreted the Maine and federal due process standards as providing equivalent levels of protection. *See Fichter v. Board of Env'tl. Protection*, 604 A.2d 433, 436-38 (Me. 1992); *Penobscot Area Housing Dev. Corp. v. City of Brewer*, 434 A.2d 14, 24 n.9 (1981) (citing a line of cases back to 1939). The Law Court, however, as a matter of policy looks first to the Maine Constitution. *See Glen S. Goodnough, The Primacy Method of State Constitutional Decisionmaking: Interpreting the Maine Constitution*, 38 ME. L. REV. 491 (1986). Goodnough points to a number of cases where the Law Court in fact "interpreted the Maine Constitution to provide greater protection to individual rights than mandated by the United States Constitution." *Id.* at 494-95. In light of the nebulous standards applied by courts nationwide when confronted by procedural due process issues, attempting to distinguish a Maine standard from a federal standard seems fruitless. *Compare Mathews v. Eldridge*, 424 U.S. at 333 with *Secure Env'ts, Inc. v. Norridgewock*, 544 A.2d 319 (Me. 1988).

The potentially interesting aspect of the distinction would arise if the losing party wishes to petition the Supreme Court for certiorari. If the Law Court held that the IME system offended the Maine Constitution, then the state court might effectively insulate its decision from Supreme Court review. *See Goodnough, supra* note 31, at 510-18. It is well settled that a state has the authority to interpret its constitution as providing more extensive protection of individual rights than the Federal Constitution does. *Id.* at 492 n.3.

32. *Mathews v. Eldridge*, 424 U.S. at 334 (citing *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

33. *See, e.g., Secure Env'ts, Inc. v. Norridgewock*, 544 A.2d at 324-25 ("[D]ue pro-

Depending on the context, courts have interpreted due process to require that parties have several rights. Professor John Wigmore suggests due process includes the right: (1) to an impartial decision maker; (2) to submit evidence; (3) to be informed of the evidence; (4) to question and challenge adverse evidence; (5) to have third party assistance in gathering, presenting, and evaluating evidence; and (6) to have a reasoned explanation of the evidence by the decision maker.³⁴ Arthur Larson, a recognized authority on workers' compensation law, provides a roughly parallel list in his discussion of "Rules based on fair play and privilege."³⁵ Larson suggests that the fundamental elements of fair play are "the right of cross-examination, rules against ex parte statements, necessity of having all evidence on the record, and restrictions on determinations made by independent investigation conducted by the tribunal."³⁶

When deciding how extensive the procedural protections need to be in a given situation, courts have frequently used the three-part analysis articulated by the Supreme Court in *Mathews v. Eldridge*.³⁷

[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.³⁸

Unfortunately, this often repeated formula provides little help for determining the validity of a statute or procedure prior to a court's decision. As Wigmore pointed out, "there is a great deal of looseness in the joints of procedural due process."³⁹ Despite this disclaimer,

cess is not a static concept; rather, its requirements vary to assure the basic fairness of each particular action according to its circumstances." (quoting *In re Jo-Nell C.*, 493 A.2d 1053, 1055 (Me. 1985)).

34. 1 JOHN HENRY WIGMORE, WIGMORE ON EVIDENCE § 7.1, at 499-507 (Peter Tilters rev. ed. 1983).

35. 3 ARTHUR LARSON, THE LAW OF WORKMEN'S COMPENSATION § 79.83 (1989 & Supp. 1990).

36. *Id.*

37. *Mathews v. Eldridge*, 424 U.S. at 335. For Maine cases applying the *Mathews* framework, see *Hale v. Pettit*, 438 A.2d 226 (Me. 1981) and *Fichter v. Board of Envtl. Protection*, 604 A.2d 433 (Me. 1992).

38. *Mathews v. Eldridge*, 424 U.S. at 335 (citing *Goldberg v. Kelly*, 397 U.S. 254, 263-71 (1970)).

39. 1 WIGMORE, *supra* note 34, § 7.1 at 495. As Wigmore noted:

[T]he law of procedural due process remains in flux and . . . an inordinate amount of value should not be paid to precedent. (Only a prophet can safely predict the future shape of the law of procedural due process and the specific meanings that will be attributed to the rights listed above

the case law does provide some guidance. Reviewing decisions from similar situations will identify the aspects of the IME system that are subject to attack.

IV. LIBERTY OR PROPERTY

Due process requires that either a liberty or property interest be at stake.⁴⁰ While liberty interests are usually easily identified, property interests are harder to determine.⁴¹ In the United States, for example, the government provides its citizens with a number of benefits. The courts have recognized such "statutory entitlements" as a form of property, where the statute creates a right rather than a privilege.⁴² In the past, programs analogous to workers' compensation have been deemed to create statutory property.

The Supreme Court recognized welfare benefits as property in *Goldberg v. Kelly*⁴³ and social security as property in *Mathews v. Eldridge*.⁴⁴ In both cases, the government did not attempt to argue that the government-supplied benefits were not property interests. Nevertheless, the Court addressed the issue in both cases. As the Court said in *Goldberg*, "[s]ociety today is built around entitlement Many of the most important of these entitlements now flow from the government Such sources of security . . . are no longer regarded as luxuries or gratuities; to the recipients they are essentials, fully deserved, and in no sense a form of charity."⁴⁵

Workers' compensation deserves the same status. All fifty states have enacted workers' compensation laws based on the idea that "industrial employers should assume costs of occupational disabilities without regard to any fault involved."⁴⁶ In virtually every state, workers' compensation coverage for employees is compulsory.⁴⁷ The

[I]t is not always easy to determine whether the rights listed will apply at all.)

Id. at 508.

40. U.S. CONST. amend. V & XIV; see also *Mathews v. Eldridge*, 424 U.S. at 333.

41. See, e.g., *Mathews v. Eldridge*, 424 U.S. at 332-33; *Goldberg v. Kelly*, 397 U.S. at 262. Compare *Geneva Towers Tenants Org. v. Federated Mortgage Investors*, 504 F.2d 483, 488-89 (9th Cir. 1974) (the right to a particular rent in low income housing is a property right) with *Hahn v. Gottlieb*, 430 F.2d 1243, 1247 (1st Cir. 1970) (not a property right).

42. E.g., *Mathews v. Eldridge*, 424 U.S. at 332-33 (social security benefits); *Goldberg v. Kelly*, 397 U.S. at 262 (welfare benefits). For a complete discussion, see Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

43. *Goldberg v. Kelly*, 397 U.S. at 262.

44. *Mathews v. Eldridge*, 424 U.S. at 332.

45. *Goldberg v. Kelly*, 397 U.S. at 262 n.8 (quoting Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1255 (1965)).

46. U.S. CHAMBER OF COMMERCE, 1991 ANALYSIS OF WORKERS' COMPENSATION LAWS vii (1991).

47. *Id.* at 6-8 (Texas does not require insurance for private employers or for coun-

necessity of workers' compensation law for our industrial economy to function should ensure that courts will view it as a property interest.⁴⁸

V. HOW MUCH PROCESS IS DUE?

"The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'"⁴⁹ If a property interest is threatened, due process will require at bare minimum that the parties receive notice of jeopardy and an opportunity to be heard.⁵⁰ This seemingly clear formula, however, creates at least two obvious questions: What constitutes an opportunity to be heard? What procedural safeguards will make the opportunity meaningful?

Administrative hearings have been a hotbed of due process litigation in the past. In no other setting is the power of the legislature more unclear or the necessity of procedural protection more debatable. Two landmark United States Supreme Court Cases, *Goldberg v. Kelly*⁵¹ and *Mathews v. Eldridge*⁵² illustrate the spectrum of possibilities.

Goldberg v. Kelly marks the outer limits of procedural protections required by the Supreme Court in an administrative setting.⁵³ The Court held that prior to termination of welfare benefits, the recipient was entitled to a full hearing, including oral presentation of evidence and cross-examination.⁵⁴ In addition, the Court required that an impartial decision-maker decide the case based solely on the "legal rules and evidence adduced at the hearing" and that he state the "reasons for his determination and indicate the evidence he relied on."⁵⁵ In essence, *Goldberg* imposed all of Wigmore's potential protections on an administrative hearing. In doing so, the Court emphasized the magnitude of the welfare recipient's interest. "Against the justified desire to protect public funds must be weighed the individ-

ties, municipalities or other political subdivisions. It does cover state employees. New Jersey does not require coverage for private employees, but does require it for public employees.).

48. See, e.g., *Paco v. American Leather Mfg. Co.*, 516 A.2d 623, 625 (N.J. Super. Ct. App. Div. 1986). Cf. *Gauthier v. Penobscot Chem. Fiber Co.* (*Gauthier's Case*), 120 Me. 73, 76, 113 A. 28, 31 (1921) ("Upon the happening of an industrial accident the right to receive compensation becomes vested, and the obligation to pay it fixed."). In Maine, due process has even been imposed on the state's procedures to suspend a driver's license. *Giberson v. Quinn*, 445 A.2d 1007 (Me. 1982).

49. *Mathews v. Eldridge*, 424 U.S. at 333 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

50. 1 WIGMORE, *supra* note 34 at 499.

51. 397 U.S. 254 (1970).

52. 424 U.S. 319 (1976).

53. 1 WIGMORE, *supra* note 34, at 476 n.3.

54. *Goldberg v. Kelly*, 397 U.S. at 270-71.

55. *Id.* at 271.

ual's overpowering need in this unique situation not to be wrongfully deprived of assistance."⁵⁶ The extent of procedural due process should be directly proportional to the weight of the party's need.⁵⁷

Considering that the primary issue in *Goldberg* was the timing of the hearing, the holding becomes even more powerful. The procedure challenged in *Goldberg* provided for a full hearing after the termination of the welfare benefits; the Court held that this was inadequate protection, and that the recipient's opportunity to be heard must come prior to termination.⁵⁸ Since Maine's workers' compensation law provides for one fact-finding opportunity, the argument for *Goldberg's* extensive protections is even more compelling.

The *Goldberg* Court also lambasted the practice of conducting paper hearings to reach so important a decision.

The city's procedures presently do not permit recipients to appear personally with or without counsel before the official who finally determines continued eligibility. Thus a recipient is not permitted to present evidence to that official orally, or to confront or cross-examine adverse witnesses. These omissions are fatal to the constitutional adequacy of the procedures.⁵⁹

The Court reasoned that the process must be tailored to the capacities of the parties involved, and noted that without counsel most welfare recipients would be unable to adequately defend themselves adequately in writing.⁶⁰ Most important, the Court held that a paper hearing did not allow the fact-finder to analyze credibility and veracity.⁶¹

In a startling about-face, the Supreme Court came to the opposite conclusion six years later in *Mathews v. Eldridge*, demonstrating just how unpredictable "due process" can be. The issue in *Mathews* was whether the same sort of full-blown evidentiary hearing required by *Goldberg* prior to termination of welfare benefits was also required before cutting off social security payments.⁶² Cruelly misled by the seemingly clear holding in *Goldberg*, the fourth district affirmed the district court's holding that a hearing was necessary.⁶³ Creating the now well-known three-step analysis,⁶⁴ the Supreme Court reversed.

56. *Id.* at 261 (quoting *Kelly v. Wyman*, 294 F. Supp. 893, 901 (S.D.N.Y. 1968)).

57. *Goldberg v. Kelly*, 397 U.S. at 262-63.

58. *Id.* at 270-71.

59. *Id.* at 268.

60. *Id.* at 268-69.

61. *Id.* at 269.

62. *Mathews v. Eldridge*, 424 U.S. at 323.

63. *See Eldridge v. Weinberger*, 361 F. Supp. 520 (W.D. Va. 1973); *Eldridge v. Weinberger*, 493 F.2d. 1230 (4th Cir. 1974).

64. *Mathews v. Eldridge*, 424 U.S. at 335. *See supra* text accompanying note 38 quoting *Mathews* test.

With respect to the first factor of the three-step analysis, the Court emphasized the "degree of potential deprivation," and arrived at the puzzling conclusion that social security benefits are not as vital to the recipient as welfare benefits.⁶⁵ Despite recognizing the "torpidity of this administrative review process" and the "typically modest resources of the family unit of the physically disabled worker," the Court viewed the social security recipient's potential hardship as less than that of the welfare recipient.⁶⁶ Teetering on the verge of a non-sequitur, the Court announced that "[e]ligibility for disability benefits . . . is not based upon financial need."⁶⁷

Applying the second factor, the Court analyzed the "fairness and reliability of existing pretermination procedures, and the probable value, if any, of additional procedural safeguards."⁶⁸ Following more readily discernible logic, the Court pointed out that "medical assessment of the worker's physical or mental condition . . . is a more sharply focused and easily documented decision than the typical determination of welfare entitlement."⁶⁹ Relying on *Richardson v. Perales*,⁷⁰ the Court distinguished *Goldberg*, emphasizing that credibility and veracity are not nearly as questionable in the medical context.⁷¹

The Court also found adequate safeguards against mistake. Typically, physicians buttress their reports with such evidence as Xrays or lab tests.⁷² Prior to termination of benefits, the social security recipient had notice of and access to the evidence submitted, and an opportunity to submit written rebuttal. Because this opportunity included a detailed questionnaire, the prospect of a recipient being unable to express her position adequately was diminished.⁷³ At the bottom line lurked the questionable idea that medical assessments are more objective than judgments of issues like financial need.⁷⁴

Using the third factor, the Court examined the administrative

65. *Mathews v. Eldridge*, 424 U.S. at 340-43.

66. *Id.* at 342.

67. *Id.* at 340. Concededly, strict logic is on the Court's side; the benefits at issue are based on disability. However, the percentage of our work force able to support itself for any length of time without income is well known to be small, as the Court admits. *Id.* at 342. In fact, the Court's statement discounts the facts before it. "Indeed, in the present case, it is indicated that because disability benefits were terminated there was foreclosure upon the Eldridge home and the family's furniture was repossessed, forcing Eldridge, his wife, and their children to sleep in one bed." *Id.* at 350 (Brennan, J., dissenting) (Marshall, J., concurring in the dissent).

68. *Id.* at 343.

69. *Id.*

70. 402 U.S. 389 (1971) (See Part V.B., notes 116-24 and accompanying text for discussion of *Richardson*).

71. *Mathews v. Eldridge*, 424 U.S. at 343-44.

72. *Id.* at 345.

73. *Id.* at 345-46.

74. See Part V.B., note 119.

burden of further safeguards and the public interest. "At some point the benefit of an additional safeguard to the individual affected by the administrative action and to society in terms of increased assurance that the action is just, may be outweighed by the cost."⁷⁵ This proposition seems hard to refute. In the Court's view, the procedures satisfied the essence of due process in that both parties had a "meaningful opportunity to present their case."⁷⁶

Comparing *Mathews* with *Goldberg* demonstrates the unpredictability of due process analysis. The conclusion that social security benefits are less vital to the recipient than welfare benefits rings hollow, as does the Court's absurd rationale that social security is based on disability rather than financial need. Surely, social security embodies a recognition that disability creates need. Rather than representing a closely-reasoned decision, based on a fine distinction from *Goldberg*, *Mathews* arguably demonstrates a growing awareness of administrative burdens. In essence, the Court held that the procedures were "fair enough" in light of the potential costs.

Unfortunately, this means that *Goldberg*, and *Mathews* provide no clear answer for the constitutionality of the IME system. The program appears more analogous to *Mathews* since, technically, workers' compensation benefits are not based on financial need and the IME issues are medical. On the other hand, the decisions are not merely preliminary, subject to an eventual full-blown evidentiary hearing. Unlike the social security procedure in *Mathews*, the Maine workers' compensation system allows for only one hearing.

Thinking strictly in terms of the *Mathews* three-stage analysis leads to a view of an administrative system as a seamless whole. If the procedure, viewed in its entirety, seems essentially fair to both parties, then it stands. Our Constitution, however, creates different issues at different phases in the process.

Because of the IME's unique role in Maine's workers' compensation program, the IME system raises constitutional issues at each stage of the dispute resolution mechanism. Although the underlying policy concern is always that each party have a "meaningful opportunity to be heard," the specific constitutional safeguards available vary as parties pass through each stage of the process. As her role shifts from investigator to expert witness to fact-finder, the IME will face challenges to the constitutionality of her existence which will mirror those changes. While she functions as an investigator, due process demands fairness to both parties as the IME gathers the evidence. During her witness phase, due process may require that the parties have an opportunity to cross-examine her. Finally, once the IME assumes the role of fact-finder, due process protects the

75. *Mathews v. Eldridge*, 424 U.S. at 348.

76. *Id.* at 349.

record for meaningful appellate review.

A. Investigator

In her initial incarnation, the IME functions as an administrative investigator, gathering information to aid the decision-making process. At this stage in the proceeding, the focus is on the evidence. Therefore, the IME system should incorporate at least three of Wigmore's evidentiary protections during this phase: the right to submit evidence, the right to be informed of evidence, and the right to challenge adverse evidence.⁷⁷

At this stage, no problem arises with regard to the right to submit evidence. Each side has the right to submit evidence to the IME for consideration.⁷⁸ An IME's decision, however, effectively relies on information gathered without opportunity for rebuttal.⁷⁹ The parties may submit evidence to her and she may examine the employee personally. No provision is made, however, to notify the parties of the other side's adverse evidence until after the damage has been done—when she files her report.⁸⁰ As noted earlier, once the report is adopted by the hearing officer, it is virtually unassailable.⁸¹

Admittedly, the statute provides that both the parties and the hearing officer receive the report.⁸² Although the time allotted prior to the hearing for the parties to review the report is left undefined, the statute does presume that the parties receive the report three days after mailing.⁸³ Evidence in response to the report can come only from the employee's doctor, submitted at least fourteen days prior to the hearing.⁸⁴

77. 1 WIGMORE, *supra* note 34, § 7.1, at 502-505.

78. P.L. 1991, ch. 885, § A-8 (effective Oct. 7, 1992) (to be codified at ME. REV. STAT. ANN. tit. 39-A, § 312(4)). Neither the Maine Rules of Evidence nor the Federal Rules apply to an administrative proceeding. ME. R. EVID. 1101(a); FED. R. EVID. 1101(a). Neither may the parties look to the Administrative Procedure Act, ME. REV. STAT. ANN. tit. 5, §§ 8001-11008 (West 1989 & Supp. 1991-1992), for guidance. If the Legislature's intent was to create a separate procedure, then the act is inapplicable. *Hale v. Pettit*, 438 A.2d 226, 231 (Me. 1981). By its own terms, the Administrative Procedure Act does not apply to Workers' Compensation Commission proceedings. ME. REV. STAT. ANN. tit. 5, § 9051 (West 1989 & Supp. 1991-1992). The power of the Legislature to vary the admissibility and weight of evidence within constitutional bounds is well settled. *See, e.g., Ziehm v. Ziehm*, 433 A.2d 725, 727 (Me. 1981) (citing *Mansfield v. Gushee*, 114 A. 296, 298 (1921)).

79. P.L. 1991, ch. 885, § A-8 (effective Oct. 7, 1992) (to be codified at ME. REV. STAT. ANN. tit. 39-A, § 312(4)).

80. P.L. 1991, ch. 885, § A-8 (effective Oct. 7, 1992) (to be codified at ME. REV. STAT. ANN. tit. 39-A, § 312(5)).

81. *See supra* notes 26-27 and accompanying text.

82. P.L. 1991, ch. 885, § A-8 (effective Oct. 7, 1992) (to be codified at ME. REV. STAT. ANN. tit. 39-A, § 312(5)).

83. *Id.*

84. P.L. 1991, ch. 885, § A-8 (effective Oct. 7, 1992) (to be codified at ME. REV. STAT. ANN. tit. 39-A, § 312(6)).

These provisions do not even resemble an opportunity to meet and rebut the evidence. Satisfying the requirement that the parties be allowed to submit evidence is a bare constitutional minimum.⁸⁵ The parties do not receive notice of the adverse evidence until it is too late.

The statute's requirement that all evidence be filtered through the IME creates this shortcoming. Because the hearing officer is allowed to consider only evidence presented to the IME, the lone opportunity to rebut adverse evidence arises during the window between the IME's report and the hearing. During that time, if the IME can be persuaded to change her mind, a supplemental report might be generated.⁸⁶ The statute, however, allows only evidence from the "treating health care provider."⁸⁷

Taken literally, this provision allows no opportunity to rebut at all.⁸⁸ If the procedure outlined by the statute is followed, neither party will be aware of the evidence submitted by the other, except when it is revealed in the IME's report. Any chance to rebut the other side's evidence is rendered meaningless, because the IME will entertain only subsequent evidence from the treating health care provider. This provision should particularly upset employers and insurers, since a doctor will be more likely to sympathize with her patient than with a faceless employer or insurer.⁸⁹

Essentially, the question is whether an opportunity to be heard can be meaningful when the parties cannot meet adverse evidence head on. The process provides each side with a chance to tell its version of the story, but an opportunity to refute the other's "facts" is one of the linchpins of due process. While administrative due process is an elastic concept, being informed of adverse evidence after a final decision is reached stretches it past the breaking point.

The system creates a primarily paper hearing. First, only the employee presents evidence to the IME in person—during her physical

85. See 1 WIGMORE, *supra* note 34, § 7.1, at 502-504 n.62.

86. P.L. 1991, ch. 885, § A-8 (effective Oct. 7, 1992) (to be codified at ME. REV. STAT. ANN. tit. 39-A, § 312(6)).

87. *Id.*

88. A rule of thumb for statutory interpretation is to begin with the "plain language of the statute." *United States v. Ron Pair Enters.*, 489 U.S. 235, 242 (1989). "The plain meaning should be conclusive, except in 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'" *Id.* (citation omitted). In light of the Legislature's intention to curtail the dispute resolution process, there is no reason to discount the statute's plain language. Therefore, the Legislature intended that no evidence be submitted to the IME by the parties to rebut any of the conclusions in her report.

89. Common sense would dictate that doctors, as a group, must possess a higher level of compassion than the rest of us. Their estimation of an employee's disability may be unconsciously prejudiced by their natural impulses to relieve suffering. See Letter from Michael W. Mainen, M.D., to Senator Donald E. Esty, Jr., (May 24, 1991) reprinted in MEMORANDUM, *supra* note 8.

examination. Communication between the employer and the IME must be in writing.⁹⁰ Second, the IME submits her findings to the hearing officer as a written report.⁹¹ Although this form of hearing is not necessarily unconstitutional, courts do tend to insist that the parties be given an effective opportunity to rebut adverse evidence.⁹²

The Maine Supreme Judicial Court, sitting as the Law Court, has addressed similar situations in the past. *Gauthier's Case*,⁹³ a vintage Maine workers' compensation decision, offers some guidance. Mathias Gauthier broke his leg in an accident while employed by the Penobscot Chemical Fibre Company. Unfortunately, the leg never healed properly and within two years it had to be amputated.⁹⁴ Penobscot disputed the conclusion that the accident necessarily led to the amputation.⁹⁵ The Law Court overturned the original decree awarding compensation because it was based on facts "recited in the commission's findings, which [did] not appear in evidence."⁹⁶ Although the Industrial Accident Commission (now the Workers' Compensation Board) was an administrative body, the court noted its exercise of quasi-judicial functions. Then, as today, the commission's findings of fact were all but unappealable.⁹⁷

Due to their finality, the findings could not stand, since the parties had not had an appropriate opportunity to meet all adverse evidence. "It should go without saying that such final findings must be grounded upon evidence presented under such circumstances as to afford full opportunity for comment, explanation and refutation."⁹⁸ As today, the statute at the time allowed "certain medical testimony to be taken ex parte."⁹⁹ The court in *Gauthier*, however, refused to let such testimony serve as the foundation of a decree, unless each party was provided the opportunity to rebut it.¹⁰⁰

90. P.L. 1991, ch. 885, § A-8 (effective Oct. 7, 1992) (to be codified at ME REV. STAT. ANN. tit. 39-A, § 312(4)); Me. W.C.C. Rule 10.16 ("All . . . communication between the examiner and the parties [except between the IME and the employee or previous health care providers] must be in writing . . .").

91. P.L. 1991, ch. 885, § A-8 (effective Oct. 7, 1992) (to be codified at ME REV. STAT. ANN. tit. 39-A, § 312(5)).

92. See Part V.B., notes 116-24 and accompanying text.

93. *Gauthier v. Penobscot Chem. Fiber Co.* (*Gauthier's Case*), 120 Me. 73, 113 A. 28 (1921).

94. *Id.* at 74-75, 113 A. at 29.

95. *Id.* at 77, 113 A. at 30.

96. *Id.*

97. *Id.* at 78, 113 A. at 31 ("From the commission's findings of fact there is in the absence of fraud, no appeal."). Today, findings of fact appear entirely unappealable. P.L. 1991, ch. 885, § A-8 (effective Oct. 7, 1992) (to be codified at ME REV. STAT. ANN. tit. 39-A, §§ 320 (no appeal to Board); § 322 (no appeal to Law Court)).

98. *Gauthier v. Penobscot Chem. Fiber Co.* (*Gauthier's Case*), 120 Me. at 78, 113 A. at 31.

99. *Id.*

100. *Id.*

Hutchinson's Case,¹⁰¹ another seasoned Maine workers' compensation decision, also emphasizes the importance of a meaningful opportunity to confront adverse evidence. Lucy A. Hutchinson's husband died in an accident, while he was employed by the Bangor Railway & Electric Company. The Commissioner based his decision, in part, on "information gained from personal observation on two visits to the power plant."¹⁰² Citing *Gauthier*, the Law Court sustained the appeal because the Commissioner relied on evidence that he gathered in a manner that precluded the parties from refuting it.¹⁰³ Had the parties been present during the visit, or at least waived that right, the Commissioner might have viewed the plant to better understand the evidence submitted. Even then, however, the observations made at the plant could not form the basis for a decision.¹⁰⁴

In a similar situation, the Massachusetts Supreme Judicial Court reached the same conclusion. In *Meunier's Case*,¹⁰⁵ an insurer challenged a Massachusetts workers' compensation statute, which provided for a board of three impartial medical referees who would investigate claims and make a report to the department. This report included "the results of their study, together with their diagnosis and their opinion as to the extent and cause of disability," and was binding on the parties.¹⁰⁶ The court acknowledged the power of the Legislature to "prescribe the rules of evidence" and "the weight that must be accorded to certain evidence."¹⁰⁷

Nonetheless, the court struck down the statute because it did not provide for a complete transcript of the investigations underlying the decision. This statute denied the adversely affected party both the opportunity to explain or refute the report, and the opportunity to introduce "all available material evidence in support of or defence against the claimant to have it considered and weighed by the trier of fact."¹⁰⁸

These cases suggest that the IME system suffers from at least two problems. First, even if all the evidence relied on appears in the record,¹⁰⁹ it does not come to the attention of the parties in time for rebuttal. Second, the statute does not require that the IME notify the employer prior to an examination of the employee.¹¹⁰ Without

101. *Hutchinson v. Bangor Ry. & Elec. Co.* (Hutchinson's Case), 123 Me. 250, 122 A. 626 (1923).

102. *Id.* at 254, 122 A. at 628.

103. *Id.* at 255, 122 A. at 628-29.

104. *Id.*

105. 66 N.E.2d 198 (Mass. 1946).

106. *Id.* at 199-200.

107. *Id.* at 201.

108. *Id.* at 202.

109. See Part V.C., notes 162-85 and accompanying text.

110. P.L. 1991, ch. 885, § A-8 (effective Oct. 7, 1992) (to be codified at ME. REV.

notice, the employer cannot attend the physical examination. The IME therefore gathers the most significant evidence in the case without the employer having an opportunity to be present.

The regulations drafted by the Medical Coordinator nearly provide the necessary knowledge of the other side's evidence. "All . . . communication between the examiner and the parties [other than between the IME and the employee] must be in writing and copied to all opposing parties no later than seven days prior to the scheduled examination."¹¹¹ Obviously, if the parties are required to send copies of everything to their opponents, then adverse evidence would come to light. Again, however, the timing is unsatisfactory. By simply waiting for the deadline before submitting one's evidence, a party may avoid affording its opponent a meaningful opportunity to rebut that evidence. This is a significant loophole which must be closed in order to satisfy due process. Similarly, the regulation setting forth notice requirements prior to an independent medical examination appears to omit the employer, unless it requested the examination.¹¹² Logically, the employer would have greater need of notice when it did not request the examination. A simple rewording to clarify the regulation, however, would easily cure this minor defect.

B. Expert Witness

Once the IME submits her report, her status shifts to something closer to an expert witness. A physician's testimony, either oral or by written report, is familiar fodder for judicial or administrative decisions.¹¹³ Workers' compensation hearing officers have undoubtedly listened to more than their share of medical testimony. If we characterize the IME as a form of expert witness, however, the parties will certainly expect to cross-examine her. No other procedural due process right is so frequently invoked.¹¹⁴ Court responses to de-

STAT. ANN. tit. 39-A, § 312(4)). See also *Camizzi v. E.T. Fraim Lock Co.*, 29 A.2d 425, 427 (Pa. Super. Ct. 1942) ("It was proper for the board to view appellee's hand but it should not have been done in the absence of counsel for appellants, or at least until after notice had been given them of the intention of the board and an opportunity afforded them to be present.").

111. Me. W.C.C. Rule 10.16(A) (effective Aug. 1, 1992).

112. Me. W.C.C. Rule 10.15(F)(1) (effective Aug. 1, 1992) provides: "If the commissioner selects an independent medical examiner, the commissioner shall issue a notification of the examiner's name, date, time, and location of the independent medical exam, by regular mail to the *examiner, employee, requester, counsel, and the Office of Medical Coordination*" (emphasis added). Arguably, "counsel" encompasses both parties, which would solve the problem.

113. See, e.g., *Taylor's Case*, 127 Me. 207, 210-11, 142 A. 730 (1928) (doctor's testimony in workers' compensation case); *Weis Markets, Inc. v. W.C.A.B.*, 572 A.2d 1295, 1297 (Pa. Commw. Ct. 1989) (unsworn certificate from physician admissible in workers' compensation claim for fewer than twenty-five weeks disability).

114. 3 LARSON, *supra* note 35, § 79.83(b).

mands for cross-examination, however, are erratic. Particular confusion has arisen over the rules of evidence in the administrative setting in tandem with the right to cross-examine and challenge evidence.¹¹⁵

Richardson v. Perales,¹¹⁶ another landmark United States Supreme Court decision, addressed a similar situation. The issue was "whether physicians' written reports of medical examinations they have made of a disability claimant may constitute 'substantial evidence' supportive of a finding of nondisability."¹¹⁷ The Court held that they could, noting that the Secretary of Health, Education, and Welfare had statutory power to establish procedures.¹¹⁸ Although the Court seemed to approve in general the use of written medical reports in administrative hearings, the holding was specifically limited. The discussion of medical reports acknowledged that they may be admitted in formal trials as a hearsay exception, and asserted that the circuit courts of appeal have "uniformly recognized reliability and probative value in such reports."¹¹⁹ In addition, the Court recognized that "the sheer magnitude of that administrative burden" made the reports necessary.¹²⁰

The Court's rationale, however, relied on a procedural point. The Social Security statute provided that the claimant had the right to subpoena the physician for oral examination.¹²¹ Since the claimant failed to exercise this option, he was "precluded from now complaining that he was denied the rights of confrontation and cross-examination."¹²² Despite the Court's impressive dicta approving written medical reports, the holding depended on the failure of the claimant to exercise his procedural rights.

A vigorous dissent condemned the decision of the majority. In the dissent's view, even if such hearsay evidence is admissible, it cannot constitute substantial evidence to support the findings of the Secre-

115. 1 WIGMORE, *supra* note 34, § 4; 3 LARSON, *supra* note 35, § 79.83(b).

116. 402 U.S. 389 (1971).

117. *Id.* at 390.

118. *Id.* at 399.

119. *Id.* at 405. From a policy perspective, the idea that medical reports are inherently reliable crumbles in the workers' compensation context. At least when medical reports are excepted from the hearsay rule, the perceived reliability stems from the patient's self-interest in obtaining appropriate treatment. See FED. R. EVID. 803(4) (Notes of the Advisory Committee on Proposed Rules). In the workers' compensation examination context, this motive disappears; the worker's motive is at least influenced by his desire/need for compensation. Anyone who has ever been to a doctor knows how heavily the doctor must rely on the patient's own description of his malady. Without the usual motive for the patient's truthfulness, the doctor's report may be rendered wholly unreliable.

120. *Richardson v. Perales*, 402 U.S. at 406 (citation omitted).

121. *Id.* at 404, applying the 1970 version of 20 C.F.R. § 404.926.

122. *Id.* at 405.

tary, unless corroborated and tested by cross-examination.¹²³ "[H]earsay evidence in the nature of ex parte statements of doctors on the critical issue of a man's present physical condition is just a violation of the concept with which I am familiar and which bears upon the issue of fundamental fair play in a hearing."¹²⁴

Because the holding was so limited, the *Perales* decision has not resolved the fundamental tension between the need for administrative efficiency and the right to confront adverse witnesses. Numerous lower court decisions have wrestled with this problem, without creating a distinguishable trend of opinion.¹²⁵ Although the right of cross-examination is the most frequently invoked element of due process, the decisions have not achieved uniformity.¹²⁶

Whether *Goldberg*, *Perales*, and their progeny require cross-examination of the IME will probably be the most unpredictable issue the system generates. As drafted, the IME procedure will be almost entirely a paper hearing loaded with the ex parte findings of examining physicians.¹²⁷ While *Goldberg* disapproved of such a process, the aggressive dicta in *Perales* points toward a more forgiving standard.

The Medical Coordinator's regulation which allows either party to depose the IME prior to the formal hearing, however, may resolve any constitutional deficiency of this process.¹²⁸ Even a *Goldberg* approach might be satisfied by this regulation. Although providing for depositions re-injects lawyers into the system and undermines to

123. *Id.* at 413 (Douglas, J., dissenting).

124. *Id.* at 414 (citing Judge Spears, who issued the district court opinion that overturned the judgment against the claimant, *sub nom.*, *Perales v. Secretary of Health, Educ. and Welfare*, 288 F. Supp. 313, 314 (W.D. Tex. 1968)).

125. See, e.g., *North Am. Coal Co. v. Miller*, 870 F.2d 948 (3rd Cir. 1989) (due process right to cross-examine physician); *Republic Steel Corp. v. Leonard*, 635 F.2d 206 (3rd Cir. 1980) (award of benefits based on ex parte medical reports constitutional); *U.S. Pipe and Foundry Co. v. Webb*, 595 F.2d 264 (5th Cir. 1979) (medical reports sufficiently trustworthy to constitute substantial evidence without cross-examination); *Jackson v. Wyoming Workers' Compensation Div.*, 786 P.2d 874 (Wyo. 1990) (summary adjudication without opportunity to cross-examine physician denies due process); *Froysland v. North Dakota Workers Compensation Bureau*, 432 N.W.2d 883 (N.D. 1988) (no state obligation to bear cost of cross-examination of physician); *Jones v. Jesse's Disposal Serv.*, 702 P.2d 1299 (Wyo. 1985) (reports received into evidence not subject to cross-examination did not prejudice claimant when identical evidence properly admitted was sufficient to support decision); *John J. Orr & Sons, Inc. v. Waite*, 479 A.2d 721 (R.I. 1984) (documentary hearing allowable at pretrial conference); *Baker v. Babcock & Wilcox Co.*, 399 S.E.2d 630 (Va. Ct. App. 1990) (no absolute right to cross); *Paco v. American Leather Mfg. Co.*, 516 A.2d 623 (N.J. Super. Ct. App. Div. 1986) (fundamental due process right to cross-examination and presentation of oral evidence must be respected in workers' compensation hearing).

126. 3 LARSON, *supra* note 35, § 79.83(b).

127. P.L. 1991, ch. 885, § A-8 (effective Oct. 7, 1992) (to be codified at ME. REV. STAT. ANN. tit. 39-A, § 312(4)-(7)).

128. Me. W.C.C. Rule 10.16(E) (effective Aug. 1, 1992).

some extent the purpose behind the IME system, that same provision may effectively foreclose the most forceful constitutional objection to the system.

Maine Decisions

Examination of the relevant Maine decisions yields the same conclusion. While authority exists to support administrative efficiency over an absolute right to cross-examine as well as the opposite view, the Medical Coordinator's regulations should satisfy the Law Court's view of administrative due process. Although the private interests at issue have not been on par with workers' compensation benefits, the cases betray a trend toward heightened sympathy for the burdens of the administrative agency.

Ziehm v. Ziehm,¹²⁹ decided in 1981, supports the proposition that parties to an administrative proceeding have a right to cross-examine witnesses. *Ziehm* was a child custody case. The mother, having lost custody of her two daughters to the father, challenged the validity of a statute conferring evidentiary status on a custody report from the Department of Human Services (DHS). The court upheld the statute, reasoning that "[c]ounsel have access to the DHS report at least three days before the hearing and are assured at the hearing of a reasonable opportunity to cross-examine the maker of the report and to rebut the conclusion and underlying facts stated in the report."¹³⁰

Similarly, in *Public Utilities Commission v. Cole's Express*¹³¹ the Law Court held that parties must be provided an opportunity for cross-examination and rebuttal in an administrative context.¹³² *Cole's Express* challenged a decision of the Public Utilities Commission that established uniform rates for common motor carriers. The court struck down the decision, in part, because the Commission based "its findings upon evidence or purported knowledge, which [was] not made a part of the record."¹³³ The Commission had based its decision on a report of the New England Motor Rate Bureau, reports filed by other motor carriers, tariff studies, and reports filed by *Cole's Express* in other proceedings. Analyzing a variety of authorities, the court concluded that "evidence [must be] produced under such circumstances as to give to both parties a full opportu-

129. 433 A.2d 725 (Me. 1981).

130. *Id.* at 729 (citing *Specht v. Patterson*, 386 U.S. 605 (1967) ("in making a factfinding in a criminal case, use of a psychiatric report that is not disclosed to the parties nor subject to cross-examination and rebuttal violates due process")).

131. 138 A.2d 466 (Me. 1958).

132. *Id.* at 470-71 (quoting *Market St. Ry. v. Railroad Comm'n of Cal.*, 324 U.S. 548, 562 (1945)).

133. *Public Util. Comm'n v. Cole's Express*, 138 A.2d at 468.

nity for explanation and refutation."¹³⁴ The court further asserted that the opportunity must include cross-examination.¹³⁵

On the other hand, burgeoning authority supports the view that administrative proceedings do not require cross-examination to satisfy due process. As early as 1973, the Law Court began to erode administrative due process, deciding *In Re Maine Clean Fuels, Inc.*,¹³⁶ which stands for the proposition that cross-examination need not be oral.¹³⁷ Maine's Site Location Law, as implemented by the Chairman of the Environment Improvement Commission (EIC), provided for questioning of witnesses through written submissions to the Chair. Maine Clean Fuels challenged an adverse ruling, and contended that "this procedure so restricted the right of cross-examination as to amount to a denial of administrative due process . . . render[ing] it ineffective for purposes of discrediting adverse testimony."¹³⁸ The court disagreed.

In a comprehensive statement of administrative due process law, the court observed that cross-examination "has not yet attained the status of an absolute universally guaranteed requirement in administrative proceedings."¹³⁹ It emphasized the wisdom of the general rule allowing administrative agencies to develop their own procedures in absence of legislative directive,¹⁴⁰ and balanced the effectiveness of the procedure against the cost of its replacement with unrestricted oral cross-examination.¹⁴¹ On balance, the court found that written questioning provided adequate protection at a reasonable cost.¹⁴²

In the end, however, the court refrained from finding a due process right to cross-examination: "We note that the appellant has failed to point out, even arguendo, any specific instance where unrestricted oral cross-examination would have been more effective than the procedure actually utilized. The prejudice claimed is *theoretical* only and, if none results *in fact* we conclude that no error was committed."¹⁴³ *Maine Clean Fuels* therefore yields only the un-

134. *Id.* at 473 (quoting *Gauthier v. Penobscot Chem. Fiber Co. (Gauthier's Case)*, 120 Me. 73, 78, 113 A. 28, 31 (1921)).

135. *Id.* at 470-71.

136. 310 A.2d 736 (Me, 1973).

137. *Id.* at 747-48.

138. *Id.* at 745.

139. *Id.* at 746 (citing *Origet v. Hedden*, 155 U.S. 228, 237-38 (1894)).

140. *Id.* at 744.

141. *Id.* at 747-48.

142. *Id.* at 748.

143. *Id.* (emphasis in original). This could be important for a challenge to the IME procedures. As of Jan. 28, 1992, the draft of proposed procedures prepared by the Medical Coordinator, Sandra Hayes, included provision for examination of the IME (but not the other physicians reporting to the IME) through a deposition which would then be included in the record presented to the hearing officer. At least one message from *Maine Clean Fuels* would be to include specific assertions of harm.

satisfying holding that absent prejudice, the court will not require cross-examination.

In *Hale v. Petit*,¹⁴⁴ the court went a bit farther. When the DHS denied an applicant a certificate of need for construction of a nursing home, granting it instead to a competing party, the applicant challenged the procedure through which the decision was made. Prior to reaching a decision, the DHS held a hearing where each party could present its plan and criticize the other's. The proceeding, however, did not include the opportunity to cross-examine witnesses. The Law Court held that due process requirements vary with the type of proceeding, and that the procedures used were adequate.¹⁴⁵

Again, however, the court limited its holding. In recognition of the *Mathews* framework, the court considered the potential value that cross-examination would have offered as an additional safeguard. "Moreover, we do not see what additional benefit the plaintiffs would have gained from cross-examining witnesses [The plaintiffs] have not demonstrated how they were prejudiced"¹⁴⁶

Basing a decision on the idea that the moving party has not demonstrated prejudice yields a weak rationale. Since the court has no way to really know whether cross-examination would have shed a different light on the testimony, the bald conclusion that it would have been unavailing is sheer speculation. The assertion rings particularly hollow in a United States courtroom, where our legal system so reveres cross-examination as a guarantee of credibility and veracity.¹⁴⁷ Both *Hale* and *Maine Clean Fuels* provide a mere "no prejudice" rationale, which mirror the *Mathews* framework, but render only a pale reflection.¹⁴⁸

A more recent challenge to an administrative hearing based on in-

Although *Maine Clean Fuels* pre-dated *Mathews* by three years, its consideration of the potential benefits of cross-examination sounds very much like the second prong of the *Mathews* analysis. See *supra* note 38 and accompanying text. Unfortunately, the "no prejudice" rationale creates meager precedent.

144. 438 A.2d 226 (Me. 1981).

145. *Id.* at 231-32. The hearing in *Hale* was apparently conducted more like a town meeting than a trial. Also, the interest involved is not on par with workers' compensation benefits, if one applies the *Mathews* analysis. See *supra* note 38 and accompanying text.

146. *Id.* at 232 (citing *In re Maine Clean Fuels, Inc.*, 310 A.2d at 748).

147. See, e.g., *Ellicott v. Pearl*, 35 U.S. (10 Pet.) 412, 435 (1836) (hearsay rule based partly on lack of opportunity for cross-examination).

148. In the IME context, a "no prejudice" decision would be wholly unsatisfactory. Arguably, the process followed by the commission in years past, where both parties presented expert, medical witnesses, demonstrates that a medical expert's opinion does not establish any objective truth. If cross-examination has been a system component for decades, surely its benefits may be demonstrated. The Law Court will have to provide a better answer.

adequate opportunity for cross-examination was also rejected. *Secure Environments, Inc. v. Norridgewock*¹⁴⁹ came before the Law Court when the town's board of selectmen denied an application to construct and operate a landfill. Secure Environments attacked the decision-making process, arguing that the town offended due process when it hired expert witnesses but did not disclose their identities until the day of the hearing. As a result, Secure Environments claimed, its opportunity to cross-examine was inadequate. Examining the transcript of the hearing, the Law Court found that Secure Environments did not object to the conditions at the hearing, and had in fact conducted a rigorous cross-examination.¹⁵⁰ The requirement of "basic fairness" was therefore satisfied. If *Secure Environments* yields any guidance, it is that cross-examination need not be conducted with trial precision.

Finally, in its most recent administrative due process decision, the Law Court again denied the due process challenge. In *Fichter v. Board of Environmental Protection*,¹⁵¹ the court applied the three-step *Mathews* analysis and held that the Board of Environmental Protection did not need to afford parties the opportunity to cross-examine witnesses in a hearing over an application for a permit to build on an oceanfront lot. The way the court framed the issue may have sounded the death-knell for due process in the administrative setting.

An administrative agency often acts in a quasi-legislative role. The BEP acts in just such a capacity when it determines whether the Department has appropriately applied legislative guidelines in granting or denying applications for sand dune permits. The narrow question before us, which we answer in the negative, is whether it is necessary to import into that quasi-legislative process all those safeguards of a court proceeding in order to meet the requirements of due process.¹⁵²

When the question is whether a "quasi-legislative" process requires cross-examination, the answer flows easily.¹⁵³ The characterization,

149. 544 A.2d 319 (Me. 1988).

150. *Id.* at 325.

151. 604 A.2d 433 (Me. 1992).

152. *Id.* at 437.

153. "Where the administrative process could be characterized as quasi-legislative, or investigative, due process has been found not to require cross-examination." *In re Maine Clean Fuels, Inc.*, 310 A.2d at 747 (footnotes omitted). See *Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294, 303-308 (1933); *Rivera v. Division of Indus. Welfare*, 71 Cal. Rptr. 739, 750-51 (Cal. Ct. App. 1968) (cases cited in *In re Maine Clean Fuels, Inc.*, 310 A.2d at 747, n.9, as holding that cross-examination is not necessary in a quasi-legislative setting).

Hopefully, this does not mean that the Law Court can/will dispose of the IME question by labelling it "investigative." Labels make poor rationales. See also *Hannah v. Larche*, 363 U.S. 420, 442 (1960) (cited in *In re Maine Clean Fuels, Inc.* for proposition that investigative functions do not require cross-examination).

however, is unpersuasive.

Even the court's own description of the process it calls quasi-legislative sounds more quasi-judicial. Reviewing an agency's application of legislative guidelines does not resemble law-making. Courts, however, perform that sort of function constantly. Simply calling a process "quasi-legislative" does not make it so.¹⁵⁴

If that is true, then the court's rationale must lie elsewhere. The remainder of the opinion proceeds to apply the *Mathews* analysis, weighing the private interest against the state's. First, the court found that the Fichters' "interest in the full economic value of their land . . . [was] offset by the third [*Mathews*] factor, the administrative burden to the BEP of providing cross-examination and rebuttal rights to permit applicants."¹⁵⁵ Second, the court determined that the "Fichters had ample opportunity to present evidence both in support of their application for a sand dune permit and in rebuttal to any contrary evidence. The additional tools of cross-examination, and of immediate rebuttal at the first meeting, would have provided . . . little if any help."¹⁵⁶

Fichter's "no help" rationale stands for more than the watery "no prejudice" statements from *Hale* and *Maine Clean Fuels*. There is a difference between the court announcing that the moving party has failed in its burden to persuade the court of prejudice, and stating flatly that cross-examination would not have helped. *Fichter* offers a stronger holding, using the *Mathews* "value of additional safeguards" test to bolster its decision. Unlike *Hale* and *Maine Clean Fuels*, where the court essentially said the moving party did not meet its burden, *Fichter* simply says that the burden cannot be met.

Nevertheless, the "little or no value of additional safeguards" rationale should not apply to the IME system. First, the previous system employed cross-examination in its hearings for decades, which implies wide recognition of its value. Second, because the IME faces issues that cannot be entirely bifurcated from their non-medical component,¹⁵⁷ cross-examination might be the only effective method to elicit the flaws in her decision.

Reviewing the foregoing cases, a trend emerges. The *Mathews* test, which balances the private interest and the administrative burden, runs through all the cases, but it cannot be used to reconcile the decisions. There is no clear continuum of decreasingly vital private interests or increasingly heavy administrative burdens. In fact, the only Maine case that boldly asserts that an administrative hear-

154. This raises a second spectre. If a court can avoid striking down an administrative procedure by calling it quasi-legislative (or investigative), can due process requirements be avoided by simply making the proceeding look non-judicial?

155. *Fichter v. Board of Env'tl. Protection*, 604 A.2d at 437.

156. *Id.* at 438.

157. See *supra* note 17.

ing requires cross-examination involves uniform rates for motor carriers.¹⁵⁸ Somehow, the liberty or property interest there sounds roughly on par with the interests threatened in the cases where cross-examination was either limited or not required at all. Recall that *Maine Clean Fuels* disputed the denial of a permit to build an oil refinery, *Hale* the denial of an application to open a nursing home, and *Secure Environments* the refusal of an application to run a landfill.

If we look at the dates of the cases, however, a more instructive pattern emerges. *Cole's Express*, Maine's stridently pro-cross-examination statement, was decided in 1958. The more recent cases—*Maine Clean Fuels* (1973), *Hale* (1981), *Secure Environments* (1988), and *Fichter* (1992)—show a markedly greater reluctance to impose additional procedural burdens on an administrative agency. *Ziehm* then becomes slightly anomalous. Nevertheless, it may be distinguished since the interest involved, child custody, must rank in importance near the top of any list.

The position that workers' compensation will occupy on the continuum between minimal due process requirements and the entire "Wigmore list"¹⁵⁹ cannot be predicted with confidence.¹⁶⁰ Nevertheless, the cases strongly indicate that the provision in the most recent rules¹⁶¹ for depositions prior to the formal hearing should be enough to satisfy due process. In other words, the procedure provided by the regulations is probably "fair enough."

C. Fact-Finder

After her incarnations as investigator and expert witness, the IME takes on her strangest role when she submits her report. Because of the weight given to her findings, the IME rather than the hearing officer acts as fact-finder for all practical purposes. Technically, the IME's decision merely constitutes evidence from which a workers' compensation hearing officer makes the ultimate ruling. Practically, however, her decision carries such weight that the hearing officer "ruling" looks more like judicial review than fact-finding.

This oddity was the result of an attempt to defuse the inevitable court challenge to the new statute.¹⁶² Binding decisions by medical panels have been struck down in other states, and the legislature sought to avoid the same mistakes. The fact that the decisions were binding, however, was not the constitutional infirmity in those

158. Public Utils. Comm'n v. *Cole's Express*, 138 A.2d at 470-71.

159. 1 WIGMORE, *supra* note 34, § 7.1.

160. See *supra* notes 50-73 and accompanying text. The Maine cases at least show a greater degree of consistency than the U.S. Supreme Court cases, as evidenced by *Goldberg* and *Mathews*.

161. Me. W.C.C. Rule 10.16(E) (effective Aug. 1, 1992).

162. Memorandum, *supra* note 8, at 2.

cases.¹⁶³

There is nothing inherently unconstitutional in making the IME the fact-finder and the hearing officer an intermediate appellate decision-maker. "Due process has never been thought to require that the neutral and detached trier of fact be law trained or a judicial or administrative officer."¹⁶⁴ In fact, our jury system is based on the idea that the non-legal mind is preferable for fact-finding. By elevating the status of the IME to fact-finder, rather than a bizarre sort of unchallengeable witness, the legislature could diminish the confusion.

She, after all, functions very much like a full-fledged fact-finder. The parties submit evidence to her, which she weighs independently in reaching her verdict. Once her decision is made, it can only be reversed if the record shows that clear and convincing evidence discredits her conclusion.¹⁶⁵

This semantic solution, however, does not solve a more fundamental problem with the IME system. The IME is qualified and authorized to make only the medical decisions in a case. Even if we assume that the medical and non-medical issues can be bifurcated,¹⁶⁶ the system will require two sets of findings, which presumably will then need to be meshed to produce a final decision.

Administrative/Judicial Review

The primary issue raised by the IME's exalted status centers around the record. Binding decisions by medical panels have been struck down in the past, primarily because of inadequate records.¹⁶⁷ Our legal system abhors decisions based on information not received in evidence.¹⁶⁸ In addition to denying the parties an opportunity to rebut that evidence, there is a second, equally important shortcoming to an incomplete record—it precludes an effective review of the IME's decision.

In *Hunter v. Zenith Dredge Co.*,¹⁶⁹ the Supreme Court of Minnesota invalidated a workers' compensation statute that provided for a

163. See Part V.C., notes 167-76 and accompanying text. See also E.H. Schopler, Annotation, *Administrative Decision or Finding Based on Evidence Secured Outside of Hearing, and Without Presence of Interested Party or Counsel*, 18 A.L.R. 2d 552, 570-71 (1951).

164. *Parham v. J.R.*, 442 U.S. 584, 607 (1979).

165. P.L. 1991, ch. 885 (Act effective Oct. 7, 1992) (to be codified at ME. REV. STAT. ANN. tit. 39-A, § 312(7)).

166. See *supra* note 17.

167. See Schopler, *supra* note 163, at 570-71.

168. "Nothing is more repugnant to Anglo-American traditions of justice than to be at the mercy of witnesses one cannot see or challenge, or to have one's rights stand or fall on the basis of unrevealed facts that perhaps could be explained or refuted." 3 LARSON, *supra* note 35, § 79.83(a).

169. 19 N.W.2d 795 (Minn. 1945).

binding report by a medical board. The statute provided for the creation of a board to "determine such medical questions raised by the pleadings and such as are certified to it by the commission."¹⁷⁰ After reaching its conclusions, the board filed a report, which was required to include the "names of the doctors who appeared . . . and such medical reports and exhibits as were considered by it."¹⁷¹ The commissioner was required to adopt the report in his decision.¹⁷²

The constitutional problem in *Hunter* stemmed from the failure of the statute to require that the board file a transcript of its evidence. Without this information, the court's "power to review findings of the medical board and to determine whether they are supported by sufficient foundation in fact is . . . frustrated."¹⁷³ Therefore, the "claimant's right of appeal or review is effectively denied."¹⁷⁴

Again, in *Dation v. Ford Motor Co.*,¹⁷⁵ Michigan's highest court struck down an essentially identical statute. The court held that the absence of an adequate record unconstitutionally denied the parties both the opportunity to explain or rebut the medical board's conclusions, and the opportunity for judicial review.¹⁷⁶

In deference to these decisions, Maine's new law tries to provide an adequate record to allow review.¹⁷⁷ The report must include "a description of findings sufficient to explain the basis of those findings."¹⁷⁸ Taken alone, this required report would probably offend due process in the same manner as the reports in the cases above. If the IME's basis for her findings is the only requirement, then adverse evidence need not be included. All the evidence in the record would support the IME's conclusion, and review would be meaningless.

The regulations drafted by the Medical Coordinator also attempt to provide an adequate record for review of the IME's findings. They require that communication between the parties and the examiner be in writing and that all parties receive copies.¹⁷⁹ It is unclear whether this provision was intended to require that the hearing officer also receive copies. The only explicit provision defining the contents of an IME report requires that the IME include an itemized invoice for her bill and the information sought by the party

170. *Id.* at 797 n.1.

171. *Id.* at 797 n.3.

172. *Id.* at 797 n.4.

173. *Id.* at 799.

174. *Id.*

175. 22 N.W.2d 252 (Mich. 1946).

176. *Id.* at 258.

177. See Memorandum, *supra* note 8, at 2.

178. P.L. 1991, ch. 885, § A-8 (effective Oct. 7, 1992) (to be codified at ME. REV. STAT. ANN. tit. 39-A, § 312(5)).

179. Me. W.C.C. Rule 10.16(A) (effective Aug. 1, 1992).

requesting the examination "in concise narrative form."¹⁸⁰ Because the statute prohibits consideration of evidence not considered by the IME,¹⁸¹ a reasonable negative implication might be that the Legislature intended the hearing officer to review all the evidence that was considered. These regulations, however, fail to clarify this important point and should be rewritten by the new Maine Workers' Compensation Board.¹⁸²

Still more troubling is the section detailing how subsequent medical evidence should be handled.¹⁸³ If the treating health care provider submits further information to the IME between the time of the IME's report and the hearing, the IME must file a supplemental report only if the information affects her findings.¹⁸⁴ This provision threatens to exclude evidence improperly. If the new data rebuts the IME's findings without changing her position, it will never enter the record. Potentially, evidence that would render the IME's decision incorrect can be ignored by the IME and withheld from the hearing officer. "[I]f a Legislature attempts to make the findings of fact of its agencies conclusive, even though the findings are wrong and constitutional rights have been invaded, the legislative action is invalid

. . . ."¹⁸⁵

VI. CONCLUSION

The underlying policy concern during each phase of the process is the same: Each party must have an adequate opportunity to be heard. From the cases surveyed in this Comment, a meaningful opportunity to be heard appears to require at least the ability to present evidence, rebut adverse evidence, and to challenge it on appeal. As the statute stands, the IME system lacks a meaningful provision for the rebuttal of adverse evidence, and the record that it requires for review by the hearing officer may be constitutionally deficient.

In its efforts to skirt constitutional confrontation, the Legislature created a confusing statute, which suffers from the very problems it sought to avoid. If the Law Court views workers' compensation benefits as vital to the individuals affected, as well they might, then the requirements of due process could invalidate the new system. For

180. Me. W.C.C. Rule 10.16(B) (effective Aug. 1, 1992).

181. P.L. 1991, ch. 885, § A-8 (effective Oct. 7, 1992) (to be codified at ME. REV. STAT. ANN. tit. 39-A, § 312(5)).

182. P.L. 1991, ch. 885, § A-8 (effective Oct. 7, 1992) (to be codified at ME. REV. STAT. ANN. tit. 39-A, § 312(1)). ("The board shall develop and implement an independent medical examiner system consistent with the requirements of this section.")

183. P.L. 1991, ch. 885, § A-8 (effective Oct. 7, 1992) (to be codified at ME. REV. STAT. ANN. tit. 39-A § 312(6)).

184. *Id.*

185. *Dation v. Ford Motor Co.*, 22 N.W.2d 252, 258 (Mich. 1946) (quoting *Highland Farms Dairy, Inc. v. Agnew*, 16 F. Supp. 575, 585 (E.D. Va. 1936), *aff'd* 300 U.S. 608 (1937)).

two reasons, however, this result seems improbable. First, the regulations implemented by the Medical Coordinator address most of the due process concerns.¹⁸⁶ Second, the caselaw displays heightened awareness of administrative burdens. At a time when the state of Maine faces such dire financial woes, a court will not be eager to impose further costs on an already straining government.¹⁸⁷

A slight adjustment to the regulations should cure any constitutional defect in the IME system. They already provide for pre-hearing depositions which should satisfy the cross-examination concerns, and attempt to make the evidence from each party available to the other in time for rebuttal.¹⁸⁸ They should also require that all evidence considered by the IME, including any information submitted by the health care provider after the IME's initial report but before the decision, be presented to the hearing officer. An adequate opportunity to rebut adverse evidence presents a greater challenge in a paper hearing like that created by the IME system. Obviously, the system must eventually close the presentation of evidence. Perhaps the regulations should specifically provide a "last shot" for each party to submit rebuttal evidence after the deadline for their primary submissions.

Since the *Mathews* formula invites the court to weigh the administrative burdens and the value of other procedures, the question will remain whether the IME system makes sense in general. Rather than streamlining the process, it seems to have complicated it. Rather than saving money, it appears to be spending it. The IME system creates a new level of bureaucracy which may be hard pressed to justify its existence.

If basic fairness to the parties required by due process includes some requirement of common sense, the IME system stumbles here. The *Mathews* formula dictates consideration of the state's interest in controlling its administrative burden. The IME system, however, appears to increase that burden by assuming responsibility for medical analysis previously paid for by the private parties.¹⁸⁹ Moreover, its approach creates a new level of bureaucracy; only a legislative mind could view that as an avenue for increased efficiency.

186. See P.L. 1991, ch. 885, § 312(4) (effective Oct. 7, 1992) (to be codified at ME REV. STAT. ANN. tit. 39-A, § 312(4)). See *supra* note 143.

187. "[I]f the question presented is a novel one, if legal authority is divided, if the statute is ambiguous, or—sometimes—if legal doctrine, though clear, is outrageous, the reviewing court ought to be concerned with policy in the broadest sense." FRANK M. COFFIN, *THE WAYS OF A JUDGE* 106 (1980).

188. Me. W.C.C. Rule 10.16 (effective Aug. 1, 1992).

189. Undoubtedly in response to the Tucker Memo, see Memorandum, *supra* note 8, the statute provides that the cost of the examination will be paid by the employer. P.L. 1991, ch. 885, § A-8 (effective Oct. 7, 1992) (to be codified at ME REV. STAT. ANN. tit. 39-A, § 312(5)). The cost of the examination itself, however, is only part of the expense of the system.

Of course, the Legislature's view of increased efficiency encompassed a broader picture than simply the administrative burden. "Maine's system encourages an inordinate amount of litigation, protracted absences, more medical treatment, delays in return to work, unfairness and higher costs."¹⁹⁰ The larger view accounts for the loss of productivity when a worker spends eleven months on average resolving a claim,¹⁹¹ being examined by a flock of doctors along the way (at the behest of his naturally litigious attorney). Maine's system must consider the financial burden on employers and insurers as well as on itself.¹⁹² From a due process standpoint, of course, the burden on the state in general does not enter the formula.

If all the procedural due process analysis can be reduced to one test—"Is the process fair to both parties?"—then the IME system does not suffer from any serious defects. The objections suggested by the caselaw can be corrected easily. Unfortunately, the larger question—whether the system is an expensive blunder—is not a matter for judicial scrutiny. Courts may examine a statute's constitutionality, but not its wisdom.¹⁹³

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190. GOVERNOR'S TASK FORCE, *supra* note 2, at 20.

191. *Id.* at 35.

192. Our system is currently so expensive that insurers regularly threaten to abandon the state. See Eric Blom, *McKernan Plan Would Trim Comp Benefits*, PORTLAND PRESS HERALD, Feb. 26, 1992, at 1A. As Governor McKernan frequently points out, business and employment in Maine suffer when insurance costs soar. *Id.* Small picture thinking leads to unfair criticism. But see Mills, *supra* note 3, at 3.

In a market like Maine's where the value of claims has been so substantially chopped by the legislature, it is possible for an insurer to make a great deal of money if it simply fails to change its reserve setting policies in response to the cut in workers' benefits. There are many indications that this is what happened after the 1987 cuts.

Id.

193. *C.f.* *Lochner v. New York*, 198 U.S. 45, 75-76 (1904) (Holmes, J., dissenting) (arguing that the Constitution should not "prevent the natural outcome of a dominant [public] opinion").