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MEMORANDUM

To: Delaware Claims Association
From: Sean A. Dolan, Esquire
Date: January 13, 2009
Re: Case Law Update

**SUPREME COURT DISCUSSES
COMPENSABILITY OF WORK
RELATED HEART ATTACK.**

Day & Zimmerman Security v. Simmons,
Del. Supr., No. 283, 2008 (Dec. 23, 2008)

This case arises from a worker's compensation claim, in which the claimant suffered a heart attack. The claimant was employed as a security guard, and while working for one of his employer's clients, he sustained a heart attack. The evidence showed that the plaintiff had pre-existing coronary artery disease. The employer argued that, while the claimant did sustain the heart attack, it did not arise out of his employment. There was a factual dispute as to the exact timing of symptoms, and the Board ultimately found in favor of the claimant, determining that the heart attack occurred within the course and scope of the claimant's employment, and that it arose out of the employment.

The employer raised a number of issues on appeal, but the Supreme Court affirmed. With regard to the onset of the symptoms,

the employer apparently kept a log that the employees are required to fill out, noting important events that occur during the work day. The log for the day of the claimant's heart attack was apparently missing, and the Board drew a negative inference against the employer as a result. The Supreme Court upheld this determination.

In addition, the Supreme Court reiterated the standard for compensability of a heart attack in the face of a pre-existing coronary condition, and again upheld the Board's determination as to compensability.

SUPERIOR COURT DISCUSSES APPROPRIATE EXPERT WITNESS FEES

Taveras v. Mesa, Del. Super., C.A. No. 07C-04-438 JAP (Dec. 15, 2008).

This was a medical malpractice action that resulted in a defense verdict. After trial, the defendant sought to have the plaintiff pay his expert witness costs. Here the Court awarded costs to the defendant, but discounted the amounts being sought. The Court noted that the Delaware Superior Court frequently relies on a 1995 study conducted by the Medical Society of Delaware. However, the Court noted that there has been a 49.4% increase in the consumer price index since that time.

The Court concluded that a reasonable range of fee for a half day of testimony by an expert would be between \$1,942.20 and \$2,689.20. The Court noted that the experts may be compensated for their time testifying or waiting to testify, as well as reasonable travel expenses. Time for preparation for testifying is typically not paid. As such, while the Court awarded the fees, it modified the amounts being sought.

**SUPERIOR COURT DISCUSSES
DISCOVERABILITY OF INSURANCE
ADJUSTER'S TAPED STATEMENT OF
INSURED.**

Gonzalez v. Caraballo, Del. Super., C.A.
No. 07C-06-255 JAP (Nov. 12, 2008).

This case discusses whether the defendant's tape recorded statement to his insurance company is discoverable. The case arose out of a slip and fall incident where the plaintiff was a business invitee at the defendant's place of business. A few months after the slip and fall, the plaintiff's attorney wrote to the defendant and to his insurance company, advising of his representation and indicating that his intention was to seek redress from the defendant.

A couple of weeks after the letter of representation, the insurance adjuster took a tape recorded statement of the insured, the defendant. Suit was filed and the plaintiff later sought production of the taped statement. The defendant refused on the ground that the statement constituted work product and was privileged. The plaintiff filed a Motion to Compel. The Superior Court denied the Motion, concluding that the tape recorded statement was protected. The Court reviewed a five factor test with regard to discoverability. The factors are: 1) Whether the event that prompted the preparation of the materials is one that is likely to lead to litigation; 2) Whether the materials contain legal analysis and opinions or purely factual matters; 3) Whether the materials were prepared or requested by the party or a representative; 4) Whether the materials were routinely prepared; 5) Whether specific claims were present or whether discussion or negotiation had occurred at the time that the materials were prepared. Analyzing these factors, the Court concluded that this statement should be protected. The Court noted that the statement was taken about six months after the plaintiff fell, but only a couple of weeks

after the insurance company received the letter of representation. The Court also noted that, for purposes of the third factor, the insurance adjuster would be considered the defendant's representative. Further, the Court suggested that this documentation was prepared for purposes of litigation, and was not considered to be within the ordinary course of business.

**DELAWARE RESIDENT ENTITLED
TO UM COVERAGE AFTER
ACCIDENT IN NEW JERSEY**

**Patterson v. State Farm Mutual
Automobile Insurance Company, Del.**
Super., C. A. No. 08C-04-127 JRJ (Oct. 29,
2008).

The question in this case is whether an insured who is a Delaware resident and who has a Delaware UM policy is entitled to recover uninsured motorist benefits arising from an accident in New Jersey between the insured and a New Jersey resident, where a New Jersey law precludes the recovery of such damages from the tortfeasor because of New Jersey's verbal threshold requirements. The plaintiff was insured by State Farm and was injured in an accident in New Jersey by a tortfeasor who was insured by AllState. AllState denied the plaintiff's claim for damages on the grounds that her injuries did not meet the verbal threshold requirements of the New Jersey insurance statute. State Farm argued that, under these circumstances, the defendant is not uninsured, but the Superior Court disagreed. Citing prior Delaware case law (Kent v. Nationwide, 844 A.2d. 1092 Del. Super. 2004), the Court noted that the contract between the plaintiff and State Farm was a Delaware contract and the scope of the coverage is governed by Delaware law. In order to achieve the intent of Delaware's statute, the operation of the New Jersey law renders the tortfeasor an uninsured driver for purposes of the plaintiff's contract.