CASELAW UPDATE

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Saxton v. Scully, 2011 WL 4377524 (Del. Sept. 21, 2011)

The Delaware Supreme Court affirmed the final judgment of the Superior Court in admitting photographs of the plaintiff's vehicle and in denying plaintiff's motion for a new trial. This personal injury case arose from an automobile collision between co-defendants' vehicles. Plaintiff alleged that her vehicle was impacted as a result of that collision, causing her injuries. The underlying decision allowing the photographs into evidence held that the photographs were admissible to assist the jury in determining the factual dispute as to whether the plaintiff's vehicle was struck as a result of the accident, and if it was struck, whether it was struck by defendant's vehicle or by construction debris being ejected from the defendant's vehicle. Further, the trial court found *Davis v. Maute,* 770 A.2d 36 (Del. 2001) inapplicable to the facts of this case, as the use of the photographs was not an attempt to correlate severity of vehicle damage, or lack thereof, to the severity of bodily injury.

The underlying decision denying plaintiff's motion for a new trial held that the jury's determination as to liability and damages did not shock the court's conscience. As to liability, the court found the jury's verdict in favor of both co-defendants was supported by the conflicting evidence at trial regarding whether an impact occurred to plaintiff's vehicle. As to damages, the court found the jury's verdict was supported by the evidence at trial of plaintiff's pre-existing injury. It is important to note that the court was unable to determine whether the jury's decision was premised upon liability or damages, as the special verdict form combined the concepts of fault and causation into a single question: "Do you find the defendant...was negligent in a manner proximately causing injury to plaintiff...?"

Sivakoff v. Nationwide Mut. Ins. Co., 2011 WL 1877610 (Del. May 16, 2011)

Irene Sivakoff appealed the Superior Court's grant of Nationwide's motion to dismiss. The appeal arose from a motor vehicle accident caused by Jessica F. Talley, from which Sivakoff alleged serious injury. The vehicle being operated by Talley at the time of the accident was insured by Traveler's Indemnity Company of America (Travelers). Travelers offered the full

liability limits of its policy, $15,000, to settle Sivakoff's claims. Sivakoff executed a "Release in Full" in settlement of her claims against Talley in exchange for the $15,000 Travelers policy limits. Sivakoff thereafter discovered that Talley was also insured under a policy of insurance issued to her mother, because Talley resided at her mother's home. Sivakoff filed a complaint against Talley, which was dismissed based upon Sivakoff's execution of the release. Sivakoff also proceeded against her own insurance company, Nationwide, for underinsured motorist coverage. The Delaware Supreme Court affirmed the grant of Nationwide's motion to dismiss, holding that Sivakoff was not entitled to seek UIM coverage because she had failed to "exhaust all bodily injury bonds and insurance policies available" to her, as required by 18 Del. C. § 3902(b)(3).

Miller v. State Farm Ins. Co., 993 A.2d 1049 (Del. Supr. 2010)

In this case, plaintiff brought a suit against a third party tortfeasor and his own insurance company for UIM benefits, for injuries suffered as a result of a motor vehicle accident. Plaintiff had received worker's compensation benefits for injuries suffered in the subject accident. The third party tortfeasor settled with plaintiff and the worker's compensation carrier accepted a portion of that recovery in reimbursement of its lien. The trial proceeded only as to the UIM carrier. At trial, the Court allowed the evidence of satisfaction of the lien and payments made by plaintiff's worker's compensation carrier, into evidence. The Supreme Court reversed and remanded, holding the collateral source rule prohibited evidence of the fact that plaintiff received worker's compensation benefits. The collateral source rule states "a person deemed legally responsible to another cannot claim the benefit of the ability of the injured party to recover from a third party expenses related to the injury." The Court reasoned that the evidence should be excluded based upon the prejudice to the jury in hearing that evidence and being reluctant to then award a plaintiff a "double recovery."

Christopher Taylor v. RGS Electrical, Inc., IAB Hearing No. 1322587 (August 12, 2011)

Claimant filed a Petition to Determine Additional Compensation Due seeking benefits for an 11% permanent impairment to his thoracic spine, as rated by Dr. Stephen Rodgers. Dr. Rodgers rated the impairment using the DRE Method set forth in the *Fifth Edition of the AMA Guides*. Dr. Rodgers placed Claimant in DRE Category II, based primarily on evidence of herniated discs, without radicular symptoms. Dr. Rodgers placed Claimant at the high end of the DRE Category II range, which resulted in an 8% whole person rating, due to multi-level abnormal findings with respect to Claimant's thoracic spine. Dr. Rodgers applied the lumbar spine conversion factor to arrive at a regional impairment rating of 11% to the thoracic spine.

On behalf of Employer, Dr. G. Dean MacEwen, rated a 6% permanency to Claimant's thoracic spine using the *Sixth Edition of the AMA Guides*. Dr. MacEwen placed Claimant at the upper end of the range for Class I, which is for thoracic spine injuries without neurological involvement. Dr. MacEwen asserted that the 6% rating was already regionalized, so he did not

need to apply a conversion factor. The Board found Dr. MacEwen's rating and use of the *Sixth Edition* more appropriate in this case, due to the relatively minor injury suffered by Claimant and lack of radicular symptoms. However, the Board held that the 6% rating offered by Dr. MacEwen was a whole person rating that needed to be converted to a regional rating, according to the *Clarifications and Corrections to the Sixth Edition of the AMA Guides*. Therefore, the Board applied the lumbar spine conversion factor of 0.75, to arrive at the regional thoracic spine rating of 8%.

Patricia Boone v. SYAB Services, IAB Hearing No. 1198151, (October 5, 2011) (Order)

Claimant has a compensable low back injury for which she continues to undergo medical treatment and use prescription medications. Employer filed a motion to compel Claimant to obtain her medications through Express Scripts, a prescription medication plan that would allow Claimant to have her current prescriptions filled at any pharmacy or by mail-order, but would be much less expensive. Claimant was obtaining her medications from Dr. Ganesh Balu's office.

Claimant argued that Dr. Balu's office was appropriately charging the Delaware Fee Schedule rates for her medications, even though the rates are higher than those charged by Express Scripts. Further, Claimant argued that Employer cannot direct Claimant's method or means of obtaining the medications. The Board held that, pursuant to 19 *Del. C.* § 2322(a), Employer is required to furnish reasonable medications, which it is doing through Express Scripts. Subsection (b) of § 2322, which allows Claimant to obtain the medications and seek reimbursement from Employer, if Employer has refused to make the medications available, is not applicable under these circumstances. Finally, 19 *Del. C.* § 2323, which allows an employee to select a medical provider of their own choosing to treat her work injury, does not address prescription medications or pharmacies. Further, section 2323 is not applicable since Express Scripts allows Claimant to obtain the medications from any pharmacy or have them delivered directly to her home.

Jose Luna v. Turf Pro, Inc., IAB Hearing No. 1368492 (October 4, 2011) (Order)

Employer filed a motion to dismiss Claimant's Petition to Determine Compensation Due, filed on May 27, 2011, on the basis that the Petition alleged a May 13, 2009 work injury and was barred by the applicable two-year statute of limitations set forth in 19 *Del. C.* § 2344. Claimant argued that Employer had already made payments with respect to the claimed injury and the five-year statute of limitations set forth in 19 *Del. C.* § 2361(b) should apply.

Claimant testified that he injured his right foot at work on May 13, 2009, when stepping off the back of a truck. Claimant's supervisor drove him to Christiana Hospital emergency room for treatment that same day. When Claimant received the hospital bills for the ER visit, they were paid by Employer, but the money for the bills was deducted from Claimant's paychecks. Claimant agreed that he never completed an accident report or reported the injury to the office manager or owner of the company. The owner of the company testified that the medical bills

were not paid as workers' compensation or for a compensable work injury. He was unaware that the physical issues that Claimant developed with his leg on May 13, 2009 were allegedly due to a work injury. Rather, the medical bills were paid as a loan to Claimant so that he could avoid the collections process. Loan documents were prepared but never actually executed by Claimant. However, the actual checks written to pay the hospital bills had payment stubs expressly stating that the payments were a loan to Claimant.

The Board held that under these circumstances, it was clear that the medical bills were not paid pursuant to the Workers' Compensation Act or under a sense of compulsion to pay under the Act. Further, the Board rejected Claimant's argument that Employer should have followed the "payment without prejudice" procedure set forth in the Act, noting that Employer would have had to first know that there was an alleged work injury before it could make a payment without prejudice. Therefore, the Board dismissed Claimant's Petition as time-barred.