CASELAW UPDATE

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Insurance Law:

Kelty v. State Farm Mutual Automobile Insurance Company, Del. Super., C.A. No. 10C-08-246 WCC, February 21, 2012.

The Superior Court granted summary judgment in favor of defendant in this case involving plaintiff's claim for personal injury protection benefits. Plaintiff was up in a tree, cutting a branch that was tied to the back of a truck. The truck was being used to keep the rope taught, so that the branch would not land on nearby power lines when it was cut loose. When the truck suddenly accelerated, the rope broke and the tree branch fell on the power lines and then back into the plaintiff, pushing him out of the tree. Plaintiff sustained injury from his fall. The question before the Court was whether plaintiff's injuries arose out of the ownership, maintenance or use of the vehicle. The Court analyzed this question utilizing the *Klug* test: (1) whether the vehicle was an "active accessory" in causing the injury, (2) whether there was an act of independent significance that broke the causal link between the use of the vehicle and the injuries inflicted, and (3) whether the vehicle was used for transportation purposes. The Court found that the factual circumstances presented satisfied elements (1) and (2) of the test, but failed to satisfy element (3). In so finding, the Court reasoned that there was no evidence that the vehicle was being used to move goods or people from one place to another, and, therefore, was not being used for transportation purposes at the time of the accident.

Civil:

Simpson v. Colonial Parking, Inc., Del., No. 396, 2011, February 13, 2012.

The Supreme Court affirmed the Superior Court's grant of summary judgment in favor of defendant. Plaintiff was injured while riding his bike through defendant's parking lot. While taking a short cut through the parking lot, plaintiff's bike struck a large pothole and he sustained injury. The Superior Court found that plaintiff was a trespasser and, as such, defendant's only duty was to refrain from willful and wanton conduct. Since plaintiff had neither alleged nor

proved willful and wanton conduct, the court granted summary judgment. Plaintiff appealed contending that he was a licensee, and not a trespasser, and therefore the premises liability standard set forth in Section 342 of the Restatement (Second) of Torts should apply. The Court held that Section 342 did not apply to licensees under Delaware common law, and re-affirmed its prior decision in *Hoesch v. Nat'l R.R. Passenger Corp.*, 677 A.2d 29 (Del. 1996), wherein the Court adopted the "willful and wanton" common law principles for both trespassers and licensees.

Workers' Compensation:

Jamie Williamson v. Dennison Landscaping, IAB Hearing No. 1349759 (December 6, 2011)

Employer filed a Petition for Review seeking to terminate Claimant's ongoing total disability benefits. Claimant agreed that his treating doctor released him to return to work in a full-duty capacity. Claimant also agreed that he was not a *prima facie* displaced worker. However, Claimant argued that he remained totally disabled based on *Watson v. Wal-Mart Associates*, Del. No. 442, 2010, Berger, J. (October 21, 2011).

In this case, Claimant applied for six jobs. He received a response from one Employer which said that he could not be hired if he could not lift on a regular basis. Claimant did not have any lifting restrictions imposed by his treating doctors, but told the potential employer that he might not be able to lift. Claimant did not hear back from the other five employers.

The Board accepted the testimony of Employer's vocational expert, and the labor market survey she prepared, as evidence that Claimant was employable in the open labor market. The Board noted that the case was distinguishable from *Watson* because (1) Claimant had a full duty release from his treating doctors; (2) Claimant admitted that he was physically capable of working and his attorney conceded that he is not a *prima facie* displaced worker; (3) Claimant applied for only six jobs, whereas Mr. Watson applied for twenty-eight jobs, including six of the eight jobs listed on the labor market survey; and (4) Employer is a small landscaping business, with no light duty positions, whereas Wal-Mart is a large company with many types of jobs. Accordingly, the Board granted Employer's Petition for Review, holding that Claimant failed to meet his burden of proving that he was a displaced worker based on a reasonable job search that failed due to the work injury.

Marcos Davila v. Johnny Janosick, IAB Hearing No. 1270972 (December 7, 2011)

Employer filed a Petition for Review seeking to terminate Claimant's ongoing total disability benefits. Claimant agreed that his treating doctor released him to return to work in a medium-duty capacity. However, Claimant argued that he remained totally disabled because he is a displaced worker based on *Watson v. Wal-Mart Associates*, Del. No. 442, 2010, Berger, J.

(October 21, 2011). The Board disagreed and noted that Claimant applied for only six jobs, over the course of one week, in preparation for the hearing. Employer's vocational expert testified that the job search was inadequate for finding employment. Further, even if the Board assumed for argument's sake that the job search was reasonable, it held that the vocational testimony and labor market survey prepared by Employer's vocational expert demonstrated that Claimant was employable in the open labor market.

The Board noted that this case is distinguishable from *Watson* because: (1) Claimant's treating doctor had released him to work in a medium-duty capacity, whereas Mr. Watson was limited to sedentary to light duty work; (2) Claimant only applied for six jobs that were listed on the labor market survey, over the course of four days in one week, in preparation for the hearing and Claimant did not conduct his own job search, whereas Mr. Watson applied for twenty-eight jobs; and (3) Employer's vocational expert confirmed that six of the nine labor market survey jobs remained available at the time of the hearing, and the other three positions hire frequently throughout the year, whereas the vocational specialist in *Watson* did not know if the labor market survey jobs were available at the time of the hearing. Accordingly, the Board granted Employer's Petition for Review terminating Claimant's total disability benefits, but awarding partial disability benefits based on the labor market survey.