

DCA Meeting – January 8, 2012

Civil Case Updates

McFarlane v. Atlantic Budget Inn Millsboro, Inc., C.A. No. S10C-09-031 – RFS (Del. Super. Ct. Dec. 5, 2012)

The Superior Court dismissed a case where Plaintiff's causation expert failed to consider Plaintiff's preexisting medical conditions in rendering his opinion.

Plaintiff alleged that she slipped and fell on Defendant's premises on September 28, 2008. Plaintiff further alleged that she suffered a significant low back injury as a result of the September 2008 slip and fall. Ultimately, Plaintiff had two separate surgeries to her low back.

During litigation, Plaintiff identified a local neurosurgeon as the expert that would testify on her behalf regarding the causal connection of her injuries and treatment to the September 2008 slip and fall. The neurosurgeon obtained Plaintiff's medical history, as self reported by Plaintiff, during an initial visit with Plaintiff. During this initial visit, Plaintiff attributed her low back pain entirely to the September 2008 slip and fall. The neurosurgeon did not have knowledge of any low back pain complaints or treatment prior to the September 2008 slip and fall. As such, the neurosurgeon, in his expert report, opined that Plaintiff's low back injury and surgeries were directly related to the September 2008 slip and fall. Contrary to the neurosurgeon's knowledge of Plaintiff's medical history, Plaintiff had a lengthy history of low back pain, which predated the September 2008 slip and fall.

Defendant filed a motion in limine to exclude the expert testimony of Plaintiff's neurosurgeon. The Defendant argued that where a personal injury expert renders an opinion on causation without taking into account relevant prior medical history, the opinion lacks the required factual foundation to be admissible under Delaware Rule of Evidence 702. The Defendant further argued that if Plaintiff's neurosurgeon's opinion is excluded, she would not be able to establish a *prima facie* case of negligence against the Defendant and the case must therefore be dismissed. The Court agreed, excluded the opinion of Plaintiff's expert, and dismissed the case.

Joann F. Christian v. Counseling Resource Associates, Inc. et al., Del. Supr., No.460, 2011, *en Banc* (January 2, 2013)

The Supreme Court alters the *Drejka* analysis for case dismissal as a sanction for discovery violation and issues a practice guideline for discovery deadline extensions.

In its January 2, 2013 decision the Delaware Supreme Court considered how to balance the strong policy in favor of deciding cases on the merits against the need to resolve the trial court's high volume of cases in a timely manner. In doing so, the Court refined the factors it previously laid out in its

decision in *Drejka v. Hitchens Tire Service Inc.* which aid the trial court in deciding whether to dismiss a case for discovery violations. The Court's decision in this case added what they refer to as a practice guideline that will afford greater predictability to litigants and trial courts with regards to discovery deadlines.

In the case below, the Superior Court precluded appellants' (Joann Christian and others) expert from testifying because of their failure to provide the experts' reports in accordance with the trial scheduling order. As a result, the court granted the defendant-below's motion for summary judgment. Notably, the appellants had requested a conference with the trial court six months before the trial to discuss the need to revise the scheduling order given that conflicts in the case had resulted in substitution of counsel issues as well as discovery delays. Despite this request, the Trial Court refused to convene a conference and failed to step in to resolve the discovery difficulties that were unfolding.

In reversing the decision of the Superior Court, the Supreme Court took issue with the trial court's failure to address the Christians' concerns five months prior to trial when requested. The Court held, had the Trial Court held a conference when requested by appellants, the Court then could have determined whether the circumstances warranted a new trial date. Even if a new trial date was not warranted, the court could have set new discovery deadlines that would have maintained the trial date.

Despite the Trial Court's failure to act in this particular case, the Supreme Court repeatedly cautioned in the decision that, henceforth, parties who ignore or extend scheduling deadlines without promptly consulting the trial court do so at their own risk. While the Court acknowledged the civility that goes along with granting extensions informally and without court involvement, doing so, they warned, will preclude the granting party from seeking relief from the court with respect to any deadlines in the scheduling order.

The Supreme Court advised litigants, if one party misses a discovery deadline, opposing counsel has the choice to proceed informally or notify the court. If counsel chooses to contact the court, he/she may do so in the form of a motion to compel, a proposal to amend the scheduling order, or a request for a conference. If, on the other hand, the opposing counsel chooses not to inform the court, the party will be deemed to have waived the right to contest any late filings from that time forward and will not be allowed to file motions to compel, motions for sanctions, motions to preclude evidence, or motions to continue the trial.

The effect of their decision does not prevent parties from agreeing to reasonable extension requests as in the past, rather it only strongly encourages parties to promptly file a proposed amended scheduling order for the trial court's signature in order to bring any potential discovery deadline issues to the courts attention in a timely manner.

Workers' Compensation Case Updates

Armstead v. Delaware Claims Processing Facility, IAB No. 1383199 (Order) (Dec. 5, 2012)

The Board finds that a parking apron in front of a commercial building, where employer is a tenant, is part of an employer's premises for compensation purposes.

Claimant was injured while walking across a semi-circular parking apron (driveway) adjacent to a public street. Claimant slipped and fell on the asphalt of the driveway on her way into work. The driveway was owned and maintained by the owner of the building, the Employer was a tenant in that building.

Employer filed a motion to dismiss arguing that Claimant was not within the course and scope of her employment when injured. The Claimant contended that the driveway was part of the Employer's premises for the compensation purposes. The Board denied Employer's motion to dismiss. The Board recognized that the Employer did not have any responsibility for the maintenance or security of the driveway, this was the exclusive province of the landlord. Further, the Board cited to authority that suggested that use and control were operative requirements for premises liability. However, the Board concluded that the driveway was not an extension of the public street (this is likely the determinative fact), but rather was part of the Employer's premises. The Board reasoned that the Employer, through its business relationship with the landlord, maintained use of the driveway, which was therefore subsumed within Employer's premises.

Brown v. Kraft Foods, Inc., IAB No.: 1384244 (Nov. 29, 2012)

The Board finds that an injury sustained during a union meeting is not within the course and scope of employment, despite mandatory union membership.

In this case Claimant was attending an off-premises union meeting. Claimant fell while retrieving something from her vehicle in the parking lot of the venue where the meeting was held. Claimant sustained significant injury to her knee as a result of the fall. Claimant argued that because she was attending a union meeting, and that union membership was mandatory through her employer, that her injury was compensable within the course and scope of her employment.

Employer argued that although membership in the union was mandatory, attendance at the meetings was not mandatory. Further, Employer had no prior knowledge of the meeting, nor did the Employer provide any logistical arrangements or transportation for the meeting. Employer did not approve the venue nor exercise any control over where the meeting was held.

Lastly, Claimant was not paid or compensated in any fashion to attend the meeting, nor did the meeting occur during Claimant's working hours.

The Board rejected Claimant's allegation that her involvement with the union was inherent and integral to her employment relationship with the Employer. The Board distinguished the recreational activity cases cited by Claimant and noted that the Employer did nothing to encourage attendance at the meeting nor did the Employer have any say in the location of the meeting. Ultimately the Board held that the Employer had no control over the meeting and gained no discernable benefit from Claimant's attendance at the meeting. Accordingly, the Board denied Claimant's Petition to Determine Compensation Due.

Poole v. State of Delaware, C.A No. 11A-04-012-JOH (Del. Super., December 4, 2012)

The Superior Court determines that Employer does not have a right to submit medical expenses to Utilization Review, when the claim is defended on the grounds of causation/compensability; the Board must determine the reasonableness and necessity of those medical expenses.

In this case Claimant alleged a work-related injury. Employer contested whether an injury had occurred. Further, Employer contended that even if an injury had occurred the Claimant's current symptomology was not related to the alleged work accident.

The case proceeded to a hearing before the Industrial Accident Board. The Employer reserved a right, consistent with prior Board precedent, to submit the outstanding medical expenses to Utilization Review, in the event that the Board determined that the claim was compensable. The Employer correctly noted that it could not submit the medical expenses to UR to determine practice guideline compliance without waiving its causation defense. Claimant argued that the Board was to determine the reasonableness and necessity of the medical expenses while the issue was before the Board in the first instance. The Board ultimately provided the Employer an option to submit the medical expenses to UR after it found that the claim was compensable. Claimant appealed.

The Superior Court concluded that Utilization Review is available only on "acknowledged" claim, and thus with narrow focus on the specific language of the statute, the Court determined that when an Employer defends a claim on the basis of causation, it is not acknowledging the claim. As such, according to the Superior Court, in that procedural context, the legislative amendments to the worker's compensation statute (Senate Bill 1), do not alter the prior practice of the Board's determination of the reasonableness and necessity of medical expenses.