

DCA Meeting – ~~January 8, 2012~~

March 5, 2013

Andrew Lukashunas

Civil Case Updates

Polaski v. Dover Downs, Inc., 2012 WL 1413577 (Del. Super.), *aff'd*, 49 A.3d 1193 (Del. 2012)

The Delaware Superior Court Grants Summary Judgment Where Well-lit And Brightly Painted Curb Does Not Constitute A Dangerous Condition As A Matter Of Law

In this premises-liability action, the Plaintiff filed suit against Defendant after she fell from a curb and injured herself while walking to a designated smoking area. Plaintiff alleged that Defendant either installed a defective curb or created a dangerous condition and then failed to warn her about the curb. Since Plaintiff was a business invitee, Defendant owed Plaintiff a duty to exercise reasonable care to protect her from foreseeable dangers that she might encounter while on the premises.

Defendant moved for summary judgment arguing that the curb was neither defective nor a dangerous condition. Defendant contended that the curb was actually clearly marked in bright yellow paint and was in a well-lit area. As such, the curb could not be considered a dangerous condition as a matter of law. Defendant further argued that Plaintiff was required to present expert testimony establishing that the curb was defectively designed. Since Plaintiff did not offer expert testimony regarding the alleged design defect, Defendant argued that Plaintiff would not be able to establish a *prima facie* case of negligence based on the curb's alleged defective design.

The Superior Court, in granted Defendant's motion for summary judgment, agreed that a well-lit and clearly marked curb was not a dangerous condition as a matter of law. The Court further held that even if the curb was a dangerous condition, it was so open and obvious that Defendant had no duty to warn Plaintiff of the alleged dangerous condition. The Court also agreed that expert testimony was required to establish defective design of the curb. As such, the Court also granted summary judgment on Plaintiff's defective design theory based on the lack of expert testimony to support such claim.

Dunlap v. State Farm Fire and Casualty Co., 878 A.2d 434 (Del. 2005).

Plaintiff in a UM/UIM lawsuit may have a claim against its UM/UIM insurer where the insurer refused to cooperate and accept Plaintiff's proposed settlement with a tortfeasor, for less than policy limits, where that tortfeasor was not likely liable

In this case the Plaintiff, a car passenger, suffered catastrophic injuries during a collision with a bus. Plaintiff initially filed suit against the driver of the vehicle that she was a passenger in as well as the bus owner. At the outset, it was unlikely that liability would lie with the bus owner. The insurance policy covering the vehicle that Plaintiff was a passenger in tendered policy limits, which Plaintiff accepted. The insurer of the bus owner disputed liability but offered half of the policy limits, or \$175,000.00, to settle the litigation.

In response, Plaintiff wrote to her UM/UIM insurance carrier and requested that they approve settlement with bus owner, given the unlikelihood of liability on the bus owner, even though it would not exhaust all available insurance policies. Plaintiff sought approval from the UM/UIM carrier so that she could access her \$1 million UM/UIM policy. Plaintiff's UM/UIM carrier refused to approve settlement with the bus owner for less than policy limits and still permit a UM/UIM claim. As such, Plaintiff went to trial with the bus owner, which resulted in a defense verdict. Plaintiff's UM/UIM carrier immediately tendered the \$1 million policy.

Plaintiff then brought this action against her UM/UIM carrier to recover for bad faith by refusing to consent to settlement with the bus owner for less than its liability coverage limits. The Superior Court dismissed the complaint *with prejudice* and the Plaintiff appealed. Plaintiff argued that the insurer was informed and could easily verify that the bus owner was not responsible for the accident and that her severe, permanent injuries would far exceed the total of all available policy limits. The insurer contended that a claimant had to exhaust liability coverage before UIM coverage was available. The Delaware Supreme Court upheld the lower court's holding that there was no bad faith in denying Plaintiff request to approve settlement for less than the bus owner's policy limits. However, the Delaware Supreme Court held that the insurer's alleged refusal to cooperate and agree to Plaintiff's settlement with bus owner could be a breach of the implied covenant of good faith and fair dealing. It was noted by the Supreme Court that the implied covenant of good faith and fair dealing does not require an insurer to risk financial exposure in order to assist the insured. However, it does obligate the insurer not to take advantage of the unequal positions. As such, the Court remanded the case to have it dismissed *without prejudice* so that Plaintiff may re-file the suit and plead that the UM/UIM carrier breached the implied covenant of good faith and fair dealings.

Workers' Compensation Case Updates

Dixon v. Delaware Veteran's Home, C.A. No. K12A-01-001 JTV (Del. Super., Jan. 29, 2013)

Claimant's failure to disclose disability to potential employers is a threshold question in the displaced worker analysis; without disclosure Claimant is not entitled to an inference that her rejection by employer was related to her partial disability

Claimant worked as a certified nursing assistant for the Delaware Veteran's Home. Claimant suffered a compensable low back injury, and was paid total disability benefits accordingly. Thereafter, Employer filed a Petition for Review (Termination Petition), arguing that Claimant was no longer entitled to ongoing total disability benefits. Claimant's treating physician, Dr. Ali Kalamchi, and the Employer's DME physician, Dr. Robert Keehn, agreed that Claimant had residual capacity to return to work. Claimant alleged that she was a displaced worker. (This was the first case post-Watson, where the Board engaged in a displaced worker analysis).

The Board determined that Claimant's total disability had terminated, but awarded Claimant partial disability benefits. The Board found that Claimant was not particularly credible and that she had not conducted a reasonable job search. Specifically the Board noted that Claimant did not begin to look for a job until the filing of the termination petition, despite earlier release to return to work, and that Claimant did not feel "really pressured" to look for work until receipt of Employer's Labor Market Survey. The Board found that Claimant was not a displaced worker, and thus was not entitled to ongoing total disability benefits.

Claimant appealed to the Superior Court. Claimant alleged that the Board erred in concluding that her job search was unreasonable.

The Court reiterated that the displaced worker doctrine may operate to provide a Claimant, who is not totally medically disabled, with ongoing total disability benefits, provided certain conditions are met. The proper analysis places the initial burden upon the Employer to prove that a claimant is no longer medically incapacitated for the purpose of worker. (Both doctors in this case agreed that Claimant had residual working capacity). Then the burden shifts to a claimant to demonstrate that s/he is a displaced worker. A claimant may satisfy this burden by showing that s/he conducted a reasonable job search, but **because of the injury**, has not been able to locate employment. If a claimant discloses the nature of her/his disability, then s/he is entitled to an inference that the rejection was because of the disability.

The Court concluded that there was no testimony that Claimant had disclosed, to any employer, that she had a disability, and therefore was not entitled to an inference that her rejection from employment was at all related to her work-related partial disability. Accordingly, she failed to sustain her burden with respect to proving that she was a displaced worker. The

Court found it unnecessary to reach the Board's determination that Claimant's job search was not reasonable.

Pelletier v. Delaware Community Investment Corp., IAB No.: 1380379 (Feb. 15, 2013)

Claimant's Petition to Determine Compensation Due for a mental health stress claim is denied where the Board concluded that Claimant's workplace, although objectively stressful, was not a substantial cause of his mental health problems.

Claimant was employed with Delaware Community Investment Corp. as an asset manager. He was initially praised by his supervisor and given a substantial performance-based raise. Thereafter, he was given additional responsibility in the workplace. At the same time his supervisor, became increasingly difficult to work with. The Board recites the supervisor's behavior to include threatening, degrading and abusive conduct. Further, the supervisor was known to have previously slapped another employee across the face. After several years of this behavior, the supervisor was forced to resign in January 2011. Claimant suffered a panic attack / breakdown in January 2012.

Claimant alleged that his mental health issues were compensable under the workers' compensation system. Specifically he alleged that his workplace was objectively stressful and was a substantial cause of his mental health issues.

The Board analyzed the issue under the controlling State v. Cephas, 637 A.2d 20 (Del. 1994) standard, which sets forth a two-part test for the compensability of stress / mental injury claims. First, the claimant must prove that the work conditions were objectively stressful. Second, the claimant must prove that the work conditions were a substantial cause of her/his mental disorder.

In this case the Board concluded that Claimant met his burden with respect to the first prong. The Board held that his work conditions were objectively stressful, and that the stressful conditions continued after the departure of Claimant's supervisor. However, the Board found that Claimant had not met his burden with respect to the second prong; insofar that his work conditions were not a substantial cause of his mental disorder. In so holding, the Board noted that Claimant had a broad constellation of factors that impacted his mental disorder, some of which predated his work condition. Further, the Board found Employer's expert credible with regards to the causation of Claimant's bipolar disorder, who opined that such a condition was not caused by Claimant's work environment.

Ultimately, the Board denied Claimant's Petition to Determine Compensation Due on the grounds of causation.