DCA Case Law Updates – September 2013

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Workers' Comp.

Delaware Supreme Court Affirms Employer's Right To Compel A Claimant To Utilize Preferred Prescription Providers

Boone v. SYAB Services, Del. Supr. No. 525, 2012 (July 16, 2013) (Order)

Claimant, Patricia Boone, suffered a work-related low back injury. Thereafter, she came under the medical care of Dr. Ganesh Balu. Claimant routinely utilized Dr. Balu's in-house pharmaceutical dispensary. Employer, SYAB Services, requested that Claimant utilize its preferred pharmacy contractor, Express Scripts. Employer requested, and the Industrial Accident Board granted, an Order compelling the Claimant to utilize Express Scripts. Employer argued that its vendor could provide the exact same prescriptions to the Claimant, but at a fraction of the cost.

Claimant appealed the Board's Order to the Superior Court, arguing that she had an absolute right to direct medical care and utilize a pharmacy of her choosing. Employer contended that under the workers' compensation statute the Claimant had no such expressed and unqualified right. The Superior Court agreed with Employer and affirmed the Board's Order. Claimant next appealed to the Supreme Court.

At the Supreme Court, similar arguments were asserted. The Court concluded that the statute does not provide the Claimant with an unqualified right to choose a pharmacy – based upon a plain reading of the statute delineating Employer's obligations. The Court contrasted that language against the statutory language providing the Claimant a right to choose a medical provider and noted that the latter provision omitted a "pharmacist" or "pharmacy". The Court went on to conclude that although Dr. Balu's prescription costs were within the Fee Schedule, it was within the Board's discretion for it to determine that the Employer's less costly alternative (Express Scripts) was reasonable and the Board was empowered to compel the Claimant to utilize Express Scripts.

Delaware Supreme Court Affirms That An Implied Agreement Will Only Be Found When The Board Determines That The Facts Support That An Employer Paid Medical Expenses Under A "Feeling Of Compulsion."

Andreason v. Royal Pest Control, Del. Supr. No. 185, 2013 (Aug. 14, 2013)

This matter concerned a Claimant with multiple injuries. Although, Claimant had sustained a compensable knee injury, his back problems were ruled to be unrelated to the work

injury by the Board. After this ruling, Claimant discovered that the carrier had errantly paid medical expenses related to a back surgery. Therefore Claimant alleged that the payment of those surgical expenses created an implied agreement that the back symptoms were compensable. The carrier argued that the expenses were paid in error and therefore did not form the requisite basis for an implied agreement (the feeling of compulsion standard). The Board held an evidentiary hearing and applied the feeling of compulsion doctrine. The adjuster testified that the back surgery was paid by mistake and that she believed that the expenses were related to the compensable knee surgery. This mistake was found in a routine audit of claims files. The Board agreed and found that the payment was by mistake and that there was no implied agreement formed.

Claimant appealed to the Superior Court, which affirmed the Board's decision. Thereafter, Claimant appealed to the Delaware Supreme Court, which also affirmed.

On appeal, Claimant argued that the statutory amendments, providing for the option of paying medical expenses without prejudice, had statutorily abrogated the common law "feeling of compulsion" doctrine. The Supreme Court concluded that the statutory amendments left the "feeling of compulsion" doctrine undisturbed. The Court held that there was nothing in the statutory language that indicated an intention to repeal the doctrine. Further, the Court concluded that Claimant's interpretation of "payment without prejudice" provision of the statute would lead to the absurd result that any mistaken payment would leave the carrier liable for a noncompensable injury on that basis alone. The Court did not find this interpretation persuasive.

Ultimately, the "feeling of compulsion" doctrine remains the legal standard for evaluating whether an implied agreement will be formed. This issue will be analyzed by the Board based on the factual circumstances in each case.

CIVIL

The General Assembly Has Amended 18 *Del. C.* §3902(b)(2) And The Definition Of UIM To Allow UIM Coverage Where Liability Policy Limits Are Equal To Or Even Greater Than The Insured's UIM Policy Limits

Under the new Underinsured motor vehicle, "[a]n underinsured motor vehicle is one for which there may be bodily injury liability coverage in effect, but the limits of bodily injury liability coverage under all bonds and insurance policies applicable at the time of the accident ~~total less than the limits provided by the uninsured motorist coverage~~ *are less than the damages sustained by the insured.*"

The purpose of this amendment is to allow insureds involved in motor vehicle collisions to access their own underinsured insurance benefits in circumstances where the insured's damages are greater than the amount of the negligent driver's insurance policy limits. Delaware courts have ruled that if the insured and the negligent driver have the same policy limit or the

insured's policy limits are less than the negligent driver's, then the negligent driver is not considered "underinsured" even if the negligent driver's policy limit is inadequate to compensate the insured. This statutory amendment will abrogate *Nationwide Mut. Ins. Co. v. Williams*, 695 A.2d 1124 (Del. 1997). The provisions of the law will not affect existing insurance policies, and will apply only to renewing or new policies that become effective six (6) months after the law is enacted. This new definition applies to all policies issued/renewed after January 3, 2014.

Delaware Supreme Court Modifies Three-part "Klug Test" To Determine If Individuals Are Entitled To PIP Coverage

Kelty v. State Farm Mut. Auto. Ins. Co., 121, 2012, 2013 WL 3864527 (Del. July 26, 2013)

This suit arises out of injuries sustained by the Plaintiff when he fell out of a tree. Plaintiff was assisting friends in trimming tree branches from the top of a tree. Plaintiff climbed the tree and was using a chainsaw to cut tree branches from the tree. Because the tree was near power lines, the Plaintiff and his friends wanted to ensure that the falling branches did not land on the nearby power lines. Therefore, the Plaintiff and his friends tied one end of a rope to the branch they were cutting and the other end to a truck. An individual was in the truck pressing the accelerator to keep the rope taut. Unfortunately, the truck unexpectedly accelerated and the rope snapped. The tree branch then recoiled, broke free from the tree, hit the power line, and caused the Plaintiff to fall from the tree. The Plaintiff suffered multiple injuries as a result of the fall.

Plaintiff sough personal injury protection ("PIP") benefits from State Farm, the insurer of the truck that was being used to keep the rope taut. State Farm denied Plaintiff's claim for PIP benefits and the Plaintiff filed suit. State Farm moved for summary judgment arguing that under the three-part "Klug Test" to determine PIP eligibility, the vehicle was not being used for transportation purposes, as the third prong of the test required, and therefore State Farm was entitled to summary judgment. The Klug Test required the court to determine (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 use of the vehicle and the injuries inflicted, and (3) whether the vehicle was used for transportation purposes. Finding that the vehicle was not being used for transportation purposes, the Delaware Superior Court granted State Farm's Motion for Summary Judgment. The Plaintiff appealed to the Delaware Supreme Court.

In reviewing the present case, the Court determined that when adopting the Klug Test to PIP coverage in *Sanchez v. Am. Indep. Ins. Co.*, 886 A.2d 1278 (Del. 2005), the Delaware Supreme Court inadvertently referred to 21 *Del. C.* § 2118(a)(1), which contained language that coverage applied to injury or damages "arising out of ownership, maintenance or use of the vehicle". However, §2118(a)(1) applies only to liability coverage and not PIP coverage. The

Court determined that under the PIP coverage there is no requirement that the vehicle be used for transportation purposes. Rather, the PIP statute contained broader language, which states that "coverage required by this paragraph shall be applicable to each person occupying such motor vehicle and to any other person injured in an accident involving such motor vehicle . . ." 21 *Del. C.* § 2118(a)(2)(c).

The Delaware Supreme Court, therefore, determined that in *Sanchez*, the Klug Test applied a standard inconsistent with the plain statutory provisions of 21 *Del. C.* § 2118 (a)(2) where there is no requirement that the vehicle be used for transportation purposes. The Delaware Supreme Court overturned *Sanchez*. The Court did find that the first two prongs of the Klug Test are consistent with the PIP statute and those two prongs still remain. However, the third prong has been eliminated in the PIP eligibility analysis. In removing the third prong on the Klug Test, the Court found that the Plaintiff met the remaining two prongs and reversed the lower court's grant of summary judgment.