CASE LAW SUMMARIES
DCA Meeting – February 4, 2014

Campos v. Daisy Construction Co., C.A. No. N13A-07-002 ALR (Jan. 16, 2014) (Memorandum Opinion).

The Delaware Superior Court affirms an Industrial Accident Board decision that granted the employer's Petition for Review terminating the claimant's total disability benefits and finding him ineligible for partial disability benefits. The claimant in this case was unable to provide a valid Social Security number to the employer. The court disagreed with the claimant's argument that the Board had wrongfully decided that the claimant was ineligible for benefits because of his immigration status. The court reasoned that the decision was actually based on the fact that the claimant was not displaced from the labor market due to his injury.

The claimant/appellant, Jose Campos, was injured in a work accident on June 3, 2011 while working as a heavy equipment operator for the employer/appellee, Daisy Construction Co ("Daisy"). The claimant was thrown off the back of a truck when it stopped and suffered injuries to his left shoulder and lower back. Following a November 2011 shoulder surgery related to the accident, the claimant was placed on total disability.

During the processing of the claimant's workers compensation claim, it was discovered that his Social Security number did not match his name. When the claimant was unable to provide a legitimate Social Security number, Daisy terminated him, citing its inability to continue to employ the claimant due to immigration requirements. However, Daisy told the Claimant it would offer him work if he were apple to supply a valid Social Security number.

Daisy filed a Petition for Review on September 6, 2012. On June 26, 2013, after considering the evidence, the Board decided that the claimant was not entitled to total disability benefits because he was physically capable of returning to work full time. The Board further found that the claimant did not qualify as a displaced worker and was ineligible for partial disability benefits. Specifically, it concluded that his lost earnings were not causally related to the work related injury, but were the result of Daisy's inability to hire the claimant back legally, despite its willingness to provide a position that would accommodate his restrictions.

On appeal, the claimant raised two arguments: (1) that there was not substantial evidence to support the finding that he was capable of returning to work and (2) that the Board committed legal error by using the claimant's immigration status as a basis to forfeit his benefits that had already vested. Regarding the first argument, the court concluded that there was substantial

evidence in the record, including medical testimony and the claimant's own testimony, for the Board to find the claimant was capable of returning to work.

In addressing the claimant's second argument, the court observed that "while it [was] undisputed that [the claimant had] been unable to gain employment; it [was] not a result of [the claimant]'s work injury." *Campos*, C.A. No. N13A-07-002, at *5. Work was available and the claimant was capable of taking the work. His inability to produce a valid social security card was what barred him from gaining employment, a reason wholly independent of the work injury. Therefore, the court held that his lost earning capacity was not related to the work injury and he did not qualify as a displaced worker.

The court further noted that the claimant's legal argument relying on *Delaware Valley Field Services v. Ramirez*, 2012 WL 8261599 (Del. Super. Sept. 13, 2012), was misplaced because *Ramirez* was factually distinguishable and addressed different issues. The court observed that, "[i]n *Ramirez*, the court held that an employee's immigration status cannot be used as a basis to forfeit benefits that have already vested." *Campos*, C.A. No. N13A-07-002, at *6. However, this was not a forfeiture case and here, unlike in *Ramirez*, the claimant's total disability had ceased because he was capable of returning to work. In this case, the Board's reasoning was based on a change in his physical condition and not on his immigration status.

Therefore, the court held that the Board did not commit any legal error in its decision because *Ramirez* did not apply. Because the claimant did not qualify as a displaced worker, he was ineligible for partial disability benefits.

Jackson v. Decrane Aerospace, 2013 WL 6408627 (Del. Super. Nov. 26, 2013).

The Superior Court affirms an Industrial Accident Board decision dismissing a claimant's Petition to Determine Compensation Due. The claimant had twice been granted continuances, but her third request for a continuance, made orally on the day of the hearing, was denied. The court held that the six-factor test set forth in the Superior Court's opinion, *Drejka v. Hitchens*, 15 A.3d 1221 (Del. 2010), was inapplicable to this case because it conflicted with a workers' compensation statute that specifically addressed the standard to be applied with regard to continuance requests before the IAB. The court further held that the Board did not abuse its discretion in denying the third continuance request.

The claimant/appellant, Julie T. Jackson, alleged that she injured her head, neck and back when she slipped and fell at work on December 21, 2009. Her employer at the time was Decrane Aerospace, Inc. Jackson filed a Petition to Determine Compensation Due on April 15, 2010, but decided to withdraw it. She filed a second Petition to Determine Compensation Due on December 16, 2011. The hearing was scheduled for April 20, 2012, but it was continued for 100 days because Jackson had not yet retained a medical expert to testify. A second hearing was scheduled for July 26, 2012, but ten days before the hearing, Jackson again requested a continuance for the same reason. Decrane agreed to the request and a second 100-day continuance was granted. In its order granting the continuance, the Board cautioned that any additional continuances "should only be granted upon a finding of both good cause and extraordinary circumstances" and that in cases involving an extension beyond 180 days, "the Board is to consider whether remedial action should be taken against the party whose lack of diligence caused the delay, including dismissing the petition." *Jackson*, 2013 WL 6408627, at *1. A third hearing was scheduled for November 1, 2012.

At the start of the third hearing, Jackson orally requested another continuance so that her treating physician could have more time to determine whether he could testify as to whether or not her injuries were related to her work accident. Decrane objected and the Board denied the third continuance because Jackson could not satisfy the requirements of "good cause" and "extraordinary circumstances" as required by 19 *Del. C.* § 2348(h)(2) and Industrial Accident Board Rule 12. The claimant's petition was dismissed because she had no medical expert who could testify as to causation.

Jackson contended on appeal that the Board erred as a matter of law and fact when it denied her request for a third continuance because when doing so the Board did not first consider the six-factor analysis set forth in *Drejka*. The court reasoned that *Drejka* was inapplicable to continuance requests before the Industrial Accident Board because it "dealt with the rules adopted by the Superior Court governing discovery and case management for cases being

litigated in that court," whereas, "19 *Del. C.* § 2348(h), by its plain and unambiguous language, governs how requests for continuances in matters before the Board are to be handled by the Board." *Jackson*, 2013 WL 6408627, at *1. Moreover, it concluded that "to apply *Drejka* to this case would require [it] to completely re-write Section 2348(h)." *Id.*

The court stated that in the situation before it, Section 2348 and IAB Rule 12 required the claimant to show good cause and extraordinary circumstances before her continuance request could be granted. The court found the reasons that she provided to be insufficient. It reasoned that she had already been given an extra 200 days; that the second continuance order forewarned her regarding the need to demonstrate good cause and extraordinary circumstances in the event she requested a third continuance; that her failure to submit a written request was a violation of the applicable law; and that she had almost three years from the date of her accident to prepare for her hearing and obtain a medical expert to testify. Without medical expert testimony to link her injury to her fall at work, she could not prove causation and succeed on her petition. Therefore, her petition had been rightfully dismissed.

Lastly, the court dealt with an ancillary contention that the Board had abused its discretion when considering the continuance because it had not excluded certain allegedly inflammatory and prejudicial statements made by counsel for Decrane. The court concluded that there was no evidence that the Board was influenced by them.

Accordingly, the IAB's decision was affirmed because the Board did not abuse its discretion in denying the continuance and its decision was free from legal error.

Sweiger v. Delaware Park, L.L.C., 2013 WL 6504641 (Del. Super. Dec. 3, 2013)

Delaware Superior Court Denies Defendant's Motion for Summary Judgment Based on Open and Obvious Nature of Glass Windows

In this case, Plaintiff was at Delaware Park on the evening of January 13, 2010 at approximately 6:20 p.m. when she exited the casino into a glass alcove, which she believed was a smoking area. As Plaintiff attempted to reenter the casino, through a different entrance, she walked into an unmarked glass window, fell down, and sustained bodily injuries. As a result, Plaintiff filed suit against Delaware Park alleging the glass window was a dangerous condition because it was not marked or properly lit.

Defendant, relying on the recent Delaware Supreme Court case, *Talmo v. Union Park Automotive,* 2012 WL 730332 (Del. Mar. 7, 2012), filed a motion for summary judgment arguing that a landowner does not owe a duty to business invitees to warn them of the existence of windows on their property. The *Talmo* Court held that a business invitee exercising reasonable care should be able to see a window without warning from the landowner. Plaintiff attempted to distinguish *Talmo* by arguing that the window was poorly lit and not marked, which created the hazardous condition.

In denying Defendant's motion for summary judgment, the Court distinguished *Talmo* from the facts of this suit. Specifically, the undisputed facts in *Talmo* were that the Plaintiff was visiting the Defendant's car dealership during the day and that the window was well lit. In the present suit, the Court focused on the allegations that the window was unmarked, poorly lit, and surrounded by the distractions of the casino. The Court held that where there are distractions, this may negate the Plaintiff's duty to observe a dangerous condition.

Hynson v. Whittle, 2013 WL 6913285 (Del. Super. Ct. Dec. 24, 2013)

Delaware Superior Court Grants Defendants' Motions for Summary Judgment, Holding that they had no Duty to Protect Plaintiff from Third-Party Criminal Activity

Plaintiff in this suit was shot in the parking lot of the Burnbrae Condominium Complex while visiting a friend who rented one of the condominium units from its owner ("Unit Owner"). Plaintiff filed suit against a number of defendants, including the Burnbrae Maintenance Association ("BMA") and the Unit Owner. Plaintiff alleged that BMA and the Unit Owner were negligent in failing to provide adequate security so as to prevent criminal activity on the premises. For the purposes of summary judgment, the parties agreed that there was some notice of criminal activity on the premises prior to the date when Plaintiff was shot.

BMA and the Unit Owner both filed their motions for summary judgment arguing that they owed no duty to the Plaintiff to protect him from the criminal activity of third-persons. Specifically, BMA argued that the Plaintiff was a guest without payment and that the Delaware Guest Statute, 25 *Del. C.* § 1501, applied. If the Guest Statute applied, BMA was only required to refrain from willful and wanton conduct toward the Plaintiff. The Unit Owner also argued that the Guest Statue should apply to her. The Unit Owner further argued that she had no actual control over the common areas where the incident occurred and, therefore, cannot owe a duty to the Plaintiff.

As it relates to BMA, the Court held that as a condominium association, BMA receives no economic benefit from allowing unit owners and/or their tenants to have social guests. As such, the Court found that Plaintiff was a guest without payment, which meant that the Guest Statute applied. Since there were no allegations of willful or wanton conduct on the part of BMA, the Court granted its motion for summary judgment.

As it relates to the Unit Owner, the Court held that the Plaintiff was a business invitee since he was a social guest of her tenant. Delaware Courts have long held that landlords receive an economic benefit from allowing their tenants to have social guest, which makes these social guests business invitees. As such, the Court held that the Guest Statute did not apply to the Unit Owner. The Court did, however, find that the Unit Owner did not have actual control over the common areas of the condominium complex where the shooting took place. As such, the Unit Owner did not owe a legal duty to the Plaintiff and summary judgment was granted in the Unit Owner's favor.