April 2015

CIVIL LITIGATION CASE LAW UPDATES

***21st Century Assurance Company v. Liberty Mutual Insurance Co.*, Del. Super., N13C-06-212 FWW, Wharton, J. (March 23, 2015) (Order)**

2118(g)(3)'s silence on appeals precludes an insurer's appeal of mandatory arbitration between insurers

21st Century sued Liberty Mutual for subrogation, arising out of PIP benefits paid by 21st Century. The parties had already submitted the matter to arbitration, which ruled in Liberty Mutual's favor. Liberty Mutual moved for summary judgment, arguing that 21 Del C 2118(g)(3) requires disputes among insurers as to liability or payments are required to be arbitrated, and that the arbitrators' decisions are not appealable. 21st Century opposed, arguing that the arbitrator's decision was not on the merits, but on the fact that 21st Century's vehicle was insured and registered in New Jersey, making it ineligible for PIP in Delaware. As such, 21st Century could appeal the arbitrator's decision under 21 Del C 2118(j)(5).

The Court initially denied Liberty Mutual's Motion, and allowed 21st Century to amend its complaint to reflect the case as an appeal, holding that an appeal from the arbitrator's decision was permissible. 21st Century filed an amended complaint, identical to its predecessor except for its caption. Liberty Mutual again moved for summary judgment.

The Court granted Liberty Mutual's summary judgment, noting that 2118's silence as to an insurer's right to appeal an arbitrator's decision was fatal to Plaintiff's claim that it may appeal to the Superior Court. The Court also examined 2118(g)(3) and 2118(j)(5). 2118(g)(3) mandates insurance arbitration for disputes between insurers. 2118(j)(5) requires an insurer to submit to arbitration upon request of a party (i.e. a claimant, not claimant's insurer) claiming to have suffered a loss. 2118(j)(5) allows an appeal *de novo* to the Superior Court.

21st Century and Liberty Mutual are insurers. As such, 2118(g)(3) required them to submit the matter to arbitration. 2118(g)(3)'s silence as to an appeal to the Superior Court does not grant the Superior Court jurisdiction over an appeal from mandatory arbitration between insurers.

***Elijah N. Perkins v. Towne Dollar and Tobacco, LLC, t/a "The Hot Spot," and Wail Ayoub*, Del. Super., C.A. No. K13C-05-020, Witham, J. (Dec. 4, 2014) (Order)**

Superior Court Denies Employee and Employer's Motion to Exclude Criminal Conviction as a Prior Bad Act

Defendant, Wail Ayoub ("Ayoub"), was an employee of Defendant, Towne Dollar and Tobacco, LLC ("Towne Dollar"). Ayoub accused Plaintiff Elijah N. Perkins ("Plaintiff") of attempting to pass a counterfeit bill at the register. Ayoub and Plaintiff were allegedly involved in a physical altercation, and Plaintiff brought this personal injury claim for harms suffered as a result of Ayoub's negligent, reckless, and intentional acts.

The Defendants filed a motion *in limine* to exclude any reference to Ayoub's past acts, including a Disorderly Conduct conviction that arose from an incident at Towne Dollar involving a patron whom Ayoub suspected of stealing. If admissible, Defendants sought to have the evidence only admitted for impeachment purposes, as Defendants believed the Plaintiff would seek to introduce the evidence to prove an alleged violent interaction with the Plaintiff.

The Plaintiff opposed the motion, indicating that the evidence of the prior act was directly relevant and admissible pursuant to Rules 403 and 404 of the Delaware Uniform Rules of Evidence. The Plaintiff contended that the evidence would be used to show that Towne Dollar was negligent in retaining Ayoub as an employee. Further, Plaintiff was only seeking punitive damages from Towne Dollar.

Although the Court held that the evidence was not admissible to impeach the witness pursuant to Rule 609, the Court denied the motion to exclude any reference to Ayoub's prior bad acts. In denying the motion, the Court stated that the deciding factor in whether an employer is negligent in hiring is whether the risk of harm from the employee was reasonably foreseeable. In light of this, the Court found that Ayoub's prior conviction arising in a similar scenario was highly probative and relevant to proving that Ayoub's behavior in regards to the Plaintiff was reasonably foreseeable to Towne Dollar.

The Court also conducted a *Getz* analysis and found that: (1) the evidence was material to the issue of whether Towne Dollar knew or should have known of Ayoub's prior conviction; (2) the conviction addressed whether Towne Dollar was negligent in retaining Ayoub as an employee; (3) the evidence was plain, clear, and conclusive; and (4) was not too remote in time from the proposition sought to be proved; (5) the probative value was high; and (6) the Court would allow the jury to hear a limiting instruction prior to trial.

Therefore, the Court ordered that evidence involving a conviction in a similar scenario was admissible against the Defendants.

WORKERS' COMPENSATION CASE LAW UPDATES

***Davis v. Christiana Care Health Servs.*, C.A. No. N14A-05-012 (Del. Super. Feb. 27, 2015).**

The Superior Court holds that an approved Medical Only Agreement specifying that an injury has resolved does not preclude a claimant from seeking benefits that may arise in the future.

The claimant, Kenneth Davis, sustained a compensable injury to his low back when he slipped and fell in the scope of his employment on August 21, 2012. The employer agreed to acknowledge the work accident and recognize a "lumbar spine contusion, resolved" pursuant to a medical only agreement and a final receipt that were filed with the Board. Eight months later, the claimant filed a Petition to Determine Additional Compensation Due, seeking permanent impairment benefits for the injury to the lumbar spine. The Board granted the employer's motion to dismiss the

permanency petition and concluded that the medical only agreement precluded a later permanency claim by providing that the lumbar spine contusion had "resolved."

The claimant appealed the decision to the Superior Court. The Superior Court examined the language of the settlement correspondence between the parties as well as the agreement, itself, and held that it was unreasonable for the Board to broadly interpret "resolved" to mean that the claimant was precluded from raising any and all future claims for work-related benefits. The Court referred to 19 *Del. C.* § 2358(a)'s commutation provision as the only appropriate mechanism to achieve a resolution of the entirety of a workers' compensation claim. The Court further held that the Board was required to hear medical evidence regarding whether Claimant suffered permanent impairment as a result of the work accident. In support of that holding, the Court opined that the permanency determination was separate and apart from the reasonable, necessary and related determination applicable to medical treatment and that the permanency issue had never been litigated and was not barred by the doctrines of *res judicata* or collateral estoppel. Lastly, the Court found *Chavez v. David's Bridal*, 979 A.2d 1129, 1134 (Del. Super.), *aff'd*, 950 A.2d 658 (Del. 2008), to be inapposite to and distinguishable from the facts of the instant case.

Ultimately, the Court held that, besides in the commutation context, the Workers' Compensation Act "does not contemplate closing the door on a claimant's ability to seek benefits to which he may be entitled to receive before his claim for said benefits ripens." The Board's decision was reversed and remanded.

***Edwards v. State of Delaware,* IAB Hearing No. 1164832 (Nov. 14, 2014).**

The Board rejects a claimant's theory that "adjacent segment degeneration," resulting from a spinal fusion, can skip the adjacent level, and concludes that two low back surgeries at L2-3 were not causally related to four, prior compensable surgeries at L4-S1.

The claimant, Gloria Edwards, injured her low back in a compensable work accident on February 7, 2000. She later underwent four compensable surgeries, including a spinal fusion at L4-5 and L5-S1 and hardware removal, performed by Dr. Kalamchi in 2005-2006, followed by a revision surgery at L5-S1 and an augmentation of the fusion at L4-5, performed by Dr. Rudin in 2009 and 2010. The claimant was significantly improved following the fourth surgery and was released from Dr. Rudin's care in 2011. However, in March 2013, she began experiencing new pain going into the groin area and the legs. Dr. Rudin attributed these symptoms to L2-3 spinal stenosis. He then performed two additional surgeries that addressed that level, in May 2013 and December 2013. The employer denied that the 2013 surgeries were causally related to the work accident or the previous four surgeries, so the claimant filed a petition with the Board.

At the hearing, Dr. Rudin testified for the claimant and Dr. Keehn testified for the employer. The Board found Dr. Keehn's causation opinions more persuasive for several reasons: (1) there was no evidence that the claimant injured her spine at L2-3 in the work accident, (2) the claimant did not present with symptoms consistent with L2-3 pathology until 2013, (3) L2-3 showed signs of slowly progressive degeneration between 2007 and 2009 and (4) claimant had significantly improved by

2011 with regards to her L4-S1 symptoms. The Board rejected Dr. Rudin's testimony that "adjacent segment degeneration" resulting from a spinal fusion can skip the adjacent level (L3-4 here) and affect a level above. Dr. Keehn acknowledged that a high rate of degeneration can develop one level above a fusion, but he was aware of no medical literature accepting the theory proffered by Dr. Rudin that "adjacent segment degeneration" can skip a level.

The Board agreed with Dr. Keehn and concluded that it was likely that L2-3 simply deteriorated naturally between 2007 and 2013 and that the very rapid degeneration at L2-3 took place after the May 2013 surgery, so that surgery was the likely trigger, rather than the prior fusion two levels below. Accordingly, the Board determined that the Claimant had failed to show a causal relationship between the work accident and the 2013 surgeries, so the petition was denied.