

DCA Meeting – March 7, 2017

By: Bobby Cecil – Tybout, Redfearn & Pell

WORKERS' COMPENSATION CASE LAW UPDATE

The Industrial Accident Board addresses permanent impairment evaluations and finds that there are reliability concerns when a treating physician does not conduct a separate evaluation to assess permanent impairment, holding that the AMA Guidelines are clear that the evaluator should be conducting a specific examination for an impairment rating.

Thomas Varga v. Countywide HR, IAB No. 1423871 (December 13, 2016).

Claimant filed a Petition to Additional Compensation Due alleging a 30% permanent impairment to the right lower extremity as rated by claimant's medical expert, Dr. Xing, who believed claimant had CRPS as a result of his right ankle injury following the work accident. Employer's medical expert, Dr. Jeffery Meyers' opined that the claimant had a 15% permanent impairment to the right lower extremity based upon a diagnosis of tarsal tunnel syndrome. The issue presented was which expert utilized the more appropriate method to rate impairment under the AMA Guidelines.

The Board outlines in the Decision Dr. Xing's treatment of the claimant since May 2015. In calculating claimant's permanency rating, Dr. Xing relied upon the 5th Edition AMA Guideline taking into consideration a reduction in the Claimant's range of motion as well as a gait derangement, which she believed resulted from a CRPS diagnosis. Dr. Xing did not complete a separate permanent impairment examination of the Claimant and relied upon her prior treatment notes and documents in rendering her opinion.

In contrast, Dr. Meyers, employer's medical expert conducted a separate permanency evaluation measuring ranges of motion in utilizing different methodology within the lower extremities portion of the 5th and 6th Edition AMA Guidelines. Dr. Meyers provided extensive testimony as to why he did not believe that claimant qualified for a CRPS diagnosis, although he had some symptoms associated with CRPS. He believed claimant had a 15% permanent impairment to the right lower extremity based upon a diagnosis of tarsal tunnel syndrome.

The Industrial Accident Board agreed with employer's expert, Dr. Meyers finding his testimony more credible and reliable than Dr. Xing. The Board did not fully believe that the evidence established a CRPS diagnosis. Dr. Meyers' testimony was determined to be more credible as he performed a thorough permanent impairment examination in conjunction with AMA Guidelines utilizing the appropriate tools and methodologies. In contrast, Dr. Xing relied upon a review of her treatment records to determine a rating. However, at the examination closest in time to the permanency report that she authored, Dr. Xing did not record claimant's ranges of motion in the right lower extremity. Thus, the Board found that her methodology raised reliability issues with her permanent impairment opinions.

The Board concluded that the AMA Guidelines are clear that the evaluator should be conducting a specific examination for an impairment rating and awarded the Claimant a 15%

permanent impairment to the right lower extremity. This Decision was not appealed.

The Superior Court reversed and remanded the Industrial Accident Board's decision granting claimant an ongoing period of total disability benefits, where there were contradictory statement by claimant's treating physician as to claimant's disability status as the Board failed to articulate in its' Decision how it reconciled Dr. Zaslavsky's contradictory statements.

Capitol Uniform & Linen Service v. Reginald Martin, 2017 WL 624855 (Del. Super. 2017).

Employer-Below / Appellant, Capital Uniform & Linen Service appealed a portion of an amended decision of the Industrial Accident Board awarding total disability benefits from December 24, 2015 ongoing. Claimant sustained a cervical spine injury while working on a delivery truck for the employer. Claimant's medical expert, Dr. Zaslavsky initially testified that the claimant was totally disabled during the time frame at issue, and that at the claimant's last evaluation he gave him the impression that he was unable to work. However, later in his deposition testimony, Dr. Zaslavsky testified that claimant had light duty restrictions and that and if there's a light-duty position available with the employer, claimant could start at that level. Appellant / Employer argued that the Board erred when it awarded total disability benefits and that the Board's determination was not based on substantial evidence because it failed to reconcile inconsistencies in the testimony of Dr. Zaslavsky. The Board's amended order found the injuries to be causally related to a work accident and, among other things, awarded total disability benefits from April 30, 2014 until August 30, 2015, partial disability benefits from August 30, 2015 until December 23, 2015, and total disability benefits from December 24, 2015 and ongoing.

The Superior Court in reviewing the testimony at issue held that by failing to expressly reconcile contradictory testimony by Dr. Zaslavsky, the Board did not base its determination on substantial evidence. The Board failed to meet its responsibility to articulate how it resolved Dr. Zaslavsky's conflicting testimony as the decision did not mention the doctor's testimony that claimant was on light duty as of December 23. The Superior Court reversed and remanded the decision in order for the Board to articulate how it reconciled Dr. Zaslavsky's contradictory statements as to whether he issued a no-work order on December 24, 2015.

CIVIL CASE LAW UPDATE

Delaware Superior Court grants landowner and subcontractor's motion for summary judgment based on the continuing storm doctrine.

***Day v. Wilcox Landscaping, Inc.*, C.A. No. N15C-06-277 AML (Del. Super. Ct. Feb. 28, 2017)**

Plaintiff in this case filed suit to recover for bodily injuries allegedly sustained in a slip and fall incident on January 21, 2014. On that day, a winter storm began at approximately 9:00 a.m. and continued into the night with total accumulation of snow of 11 inches. That morning, the Plaintiff arrived at work shortly after 9:00 a.m. Because snow began to accumulate, the Plaintiff decided in the mid-afternoon to leave and drive home before the weather conditions got worse. As the Plaintiff walked outside, it was snowing but the sidewalks around the building had been cleared and salted. When the Plaintiff reached the parking lot, however, she saw a sheet of ice and having no way to get to her car, she attempted to cross the ice, but fell and sustained an injury to her right knee. As a result of her fall, the Plaintiff filed suit against the contractor and subcontractor hired to remove snow and ice from the parking lot.

In light of the stormy conditions at the time of the Plaintiff's fall, the Defendants moved for summary judgment. The Defendants argued that although ordinarily a landowner has a duty to exercise reasonable care to keep the premises safe for all invitees, under the continuing storm doctrine a landowner is entitled to await the end of the storm and a reasonable time thereafter to remove snow and ice from the property.

In opposition, the Plaintiff argued that the continuing storm doctrine does apply to landowners, but not to independent contractors retained by the landowner. The Plaintiff next argued that even if the continuing storm doctrine did apply to independent contractors, the Defendants had a contractual obligation to clear snow and ice that it created a legal duty, superseding the application of the continuing storm doctrine. The Plaintiff also argued that because snow and ice removal had already begun, the Defendants failed to adequately remediate the snow and ice and therefore were negligent. And finally, the Plaintiff argued that the Defendants were negligent in failing to pretreat the premises where the Plaintiff fell in order to prevent the accumulation of snow and ice on the premises in the first place.

Ultimately, the Court granted Defendants' Motion for Summary Judgment holding that for the purposes of the continuing storm doctrine, there is no distinction between the landowner and the independent contractors it retains to perform its obligation to keep its premises free and clear of the accumulation of snow and ice. The Court also notes a prior Delaware Supreme Court decision has applied the continuing storm doctrine to the landowner and a third party retained by the landowner to engage in snow and ice removal services. In addressing the Plaintiff's argument that the contractual obligation created a legal duty on the Defendants, the court found that it was unavailing. As the Court found that the continuing storm doctrine applies to both landlords and their third party contractors, under the continuing storm doctrine, even if a party takes on the task of removing snow and/or ice prior to the end of the storm, even if unsuccessful, they are still entitled to the benefit of the continuing storm doctrine. And finally, the Court indicated that there

is no precedent in Delaware to support the Plaintiff's position that the Defendants were required to pretreat the premises.

Finding that none of the Plaintiff's positions were meritorious, the Court granted summary judgment in favor of the Defendants.

Superior Court grant's Defendant's Motion for Summary Judgment because Plaintiff failed to establish fire was caused by negligence

***Newark Square, LLC v. Ladutko*, C.A. No. N15C-08-227-MMJ (Del. Super. Ct. Feb. 2, 2017).**

This suit was filed to recover property damage following a fire that occurred on November 6, 2014. The Plaintiff owned property adjacent to the Defendants' property where the fire took place. The Defendants' property was occupied by various tenants on the date of this fire. The fire ultimately spread from the Defendants' property to the Plaintiff's property causing substantial damage. At the close of discovery, the Defendants moved for summary judgment against the Plaintiff indicating that they had failed to produce any specific evidence as to the cause of the fire and therefore, could not prove that the Defendants were negligent in causing the damage. Although the Plaintiff did produce an expert, that expert did not provide any theory as to negligence being the cause of the fire. The expert did opine as to the origin of the fire, but not its actual cause.

The court agreed with Defendants that the Plaintiff did not provide sufficient testimony to establish that the cause of the fire and/or whether it was the result of negligence on the part of the Defendants. Because the Plaintiff had failed to prove the cause of the fire, summary judgment was granted in favor of the Defendants.