DCA 9/12/17

WORKERS' COMPENSATION CASE LAW UPDATES

The IAB declined to grant a separate permanency to the left lower extremity, finding that Claimant's 17% lumbar spine impairment rating.

Juan Baltierra v. Puglisi Egg Farm, IAB No.: 1429534 (March 30, 2017)

Claimant sustained a compensable low back injury while working for the Employer on January 29, 2015 when he fell on a cement floor while cleaning overhead. On April 6, 2015, Dr. Zaslavasky performed a microdiscectomy at L4-5 and repair of a left dural tear. Following surgery, Claimant continued to have low back pain with radicular symptoms down his left lower extremity.

On 8/31/16, Claimant filed a DACD Petition for permanent impairment benefits alleging permanent impairment to the lumbar spine and left lower extremity. Claimant's medical expert, Dr. Stephen Rodgers in utilizing the ROM method in the 5th Edition AMA Guidelines, rated a 26% permanent impairment to the low back and 10% permanent impairment to the left lower extremity due to atrophy and loss of strength. Employer's medical expert, Dr. Ali Kalamchi, utilizing the DRE method under the AMA Guidelines, 5th Edition rated a 17% permanent impairment to the low back and did not provide a separate rating for the left lower extremity. Dr. Kalamchi opined that claimant's lower extremity symptoms of numbness and physical findings such as atrophy / weakness were taken into consideration when assessing what DRE category to place claimant in to assess his lumbar spine impairment. Ultimately, Dr. Kalamchi placed claimant in a DRE category III which considered claimant's residual radiculopathy, reflective in an increased rating.

The Board in its March 30, 2017 Decision found that the medical experts agreed with the following: Claimant had a residual lumbar spine condition with radiculopathy features into the left lower extremity following a one level microdiscectomy surgery, causally related to the work accident and that condition affected claimants function such that he had a permanent impairment. Further the DRE method was determined to be the preferred method to assess spinal impairment if it could be used under the circumstances over the ROM method. The expert disagreed over whether the DRE Method adequately described claimant's condition and whether ROM method should be used instead to assess impairment and whether the left lower extremity radiculopathy warranted a separate impairment rating. The Board determined that Dr. Kalamchi' testimony was more credible than Dr. Rodgers and concluded that Dr. Rodgers failed to convince the Board that a separate rating should be awarded for the left lower extremity. The Board was convinced that claimant's spine impairment was best evaluated under the DRE method and accepted Dr. Kalamchi' s opinion that no separate rating should be provided to the left lower extremity as the lumbar rating adequately reflected the degree of radiculopathy and symptomatology in the left leg.

The Superior Court affirms the Industrial Accident Board's Decision declining to award a separate permanent impairment for speech function when Board awarded a 23% permanent impairment to the brain / central nervous system.

Lawrence Bendistis v. Donald F. Deaven Inc., C.A. No. N16A-09-003 ALR (Del. Super. Ct., August 14, 2017)

Claimant sustained catastrophic injuries in a work accident that occurred on September 18, 2012, when he fell from scaffolding while working as an iron worker. Claimant filed a Petition for permanent impairment for multiple body parts including the brain and alleged an 8% permanent impairment for loss / use of speech. The Industrial Accident Board granted Claimant's petition and awarded a 23% impairment to the brain, however, the Board declined to award a separate permanency for any speech deficiencies holding that they were a result of claimant's brain injury. The Board determined that claimant did not suffer any direct traumatic injury to the larynx, vocal cord or air passage as a result of the work accident.

Claimant appealed the portion of the Decision failing to award a separate speech permanency to the Superior Court. By Decision dated August 14, 2017, the Superior Court affirmed the Industrial Accident Board's Decision finding that the Board's conclusion that any loss of speech suffered by the Claimant is subsumed as sequelae from the traumatic brain injury with a corresponding 23% permanency rating was supported by competent medical testimony.

Superior Court affirms Decision of Industrial Accident Board denying Claimant's DCD Petition seeking compensability of cervical spine surgery and post-surgery total disability benefits.

Jennifer L. Windle v. State of Delaware, CA No.: N16A-10-009 JRJ (Del. Super. Ct., June 14, 2017)

Claimant appealed a Decision of the Industrial Accident Board denying to award benefits for cervical spine surgery and total disability benefits. Claimant was injured on February 14, 2015 while performing snow removal work as a custodian for Christina School District. She sustained a compensable injury to her cervical spine. The State of Delaware did not dispute the occurrence of the work accident, however the causal relationship of Claimant's June 2016 cervical spine surgery performed by Dr. Zaslavsky and total disability from the date of surgery ongoing was disputed. Employer's medical expert Dr. Fedder, opined that Claimant's compensable work injury was a cervical strain that had resolved by no later than November 11, 2015.

Claimant had a history of neck pain and cervical complaints dating back to 2008 when her rheumatologist referred her for an x-ray to the cervical spine that showed degenerative changes. She had periodic symptoms and complaints in her joints as well as cervical spine symptoms from 2009 through the work accident. In 2012, she was diagnosed with a cervical radiculitis and received injections. She also had several course of physical therapy prior to the work accident.

Dr. Zaslavsky, claimant's medical expert, ultimately recommended surgery for believing that the 2016 MRI revealed a worsening of a herniation at the C-5/6 level, as well as other pathologies at

the C4/5 and C6/7 level. On June 2, 2016, Claimant underwent surgery with Dr. Zaslavsky that helped to alleviate her symptoms, however she continued to have tingling and pain in her arm going down her fingers.

Dr. Fedder, Employer's medical expert, opined Claimant's cervical MRI studies revealed a natural history of degenerative disease and did not reveal any evidence of a traumatic injury. He noted that the MRIs lacked a link between their findings and Claimant's clinical examination. He further denied that the February 2015 work accident aggravated the Claimant's preexisting condition in her cervical spine.

Dr. Fedder opined that Claimant's cervical spine condition as a result of the work accident resolved as of November 11, 201, based upon her primary care physician records describing a normal range of motion, unremarkable gate and station which was basically a negative neurological inventory. At that point, Claimant also had advanced rheumatoid arthritis and her symptoms correlated with that diagnosis.

The Industrial Accident Board found the Claimant did not meet her burden of proof to show that her cervical spine condition related back to the February 17, 2015 work accident. The Board held that Dr. Fedder's opinion was very convincing and persuasive as he provided a timeline of the Claimants injury established in her primary care physician's records through November 2015. He further documented that her current complaints of pain comported with her rheumatoid arthritis diagnosis and relied upon her diagnostic studies reflecting a natural progression of her degenerative condition as opposed to a traumatic work injury to determine her work related condition.

On Appeal, the Superior Court affirmed the Board's Decision.

CIVIL CASE LAW UPDATES

Delaware Superior Court barred a negligence claim against a corporate entity which employed a nurse because the statute of limitations had expired on a claim against the negligent nurse.

Lewis v. McCracken, 2017 WL 2875388 (Del. Super. July 5, 2017)

Plaintiffs brought a claim for negligence against a doctor and the doctor's employer, All About Women (AAW), under a *respondeat superior* theory. The complaint alleged that Plaintiff's obstetrician caused her daughter to suffer permanent brachial plexus palsy (a/k/a Erb's Palsy) during childbirth. While delivering the baby, the doctor determined that the baby's left shoulder was impeded but pulled on the baby's head in an attempt to deliver the shoulder. Following the birth, the baby was diagnosed with permanent Erb's Palsy.

During the trial, it was unexpectedly discovered through cross-examination that a nurse who worked for AAW was the one who gave the improper instruction to Plaintiff to "push" after it was

discovered that the baby's shoulder was impacted. The Plaintiffs' own expert then stated that the instruction fell below the standard of care. The trial ended in a mistrial.

The Plaintiffs then applied to the Court to be able to discuss the nurse's negligent actions with the jury during a retrial. Plaintiffs argued that they were not adding a new party or amending the complaint since the complaint had generally claimed that AAW was negligent through its employees. The new theory was that AAW was vicariously liable for the negligent acts of the unnamed nurse instead of the named doctor.

The Court held that Plaintiffs' new theory of liability as to the nurse was barred by the statute of limitations because the nurse had not been included in the original complaint. Under Delaware law, a viable cause of action must exist against the employee for a corporate entity to be found liable for the negligence of its employees. Accordingly, AAW could not be held vicariously liable for the nurse's alleged negligence after the expiration of the statute of limitations.

Delaware Superior Court grants summary judgment for the insurance company finding that the relevant date for insurance coverage purposes is the date of loss.

Vaughn v. Stillwater Property & Cas. Ins. Co., 2017 WL 2709750 (Del. Super. June 23, 2017)

Plaintiff filed suit against a homeowner's insurance company for breach of contract and bad faith seeking coverage for his personal property that was damaged in a fire. The insurance company covered damage to his residence but refused to cover the damage to his personal property because he was not the named insured.

Plaintiff purchased the property with the named insured in 2009 and both parties were named on the deed and in the property's mortgage documents. For unknown reasons, the named insured did not include Plaintiff on the homeowner's insurance policy. They married in 2012 and divorced on March 6, 2014. The fire occurred on August 3, 2014. At the time of the fire, the named insured was not living in the property and was no longer married to the Plaintiff. Therefore, the insurance company determined that Plaintiff was no longer covered under the policy as a relative of the named insured and denied coverage for his personal property.

The Court answered the fundamental question - when is coverage under an insurance policy determined: at the beginning of the policy period, at the date of loss, or at some other date? It held that precedent in Delaware and in other jurisdictions provides that the date of loss is the determinative date for purposes of defining the scope of coverage under an insurance policy. The rule is both logical and fair because it relies on the circumstance existing on the date of loss without unnecessarily including people who no longer meet the conditions for coverage. Therefore, the Court upheld the homeowner's insurance company's denial of coverage to Plaintiff's personal property.

Delaware Superior Court denies motion for a new trial because Defendant's cross-examination of Plaintiffs and their experts provided ample evidence for the jury to doubt their credibility.

Pabon v. GEICO Corp., 2017 WL 3635569 (Del. Super. Aug. 23, 2017)

In this personal injury action, the Plaintiffs were both involved in two car accidents in which the drivers of the other vehicles were uninsured or underinsured. After a two-day jury trial, the jury found that neither accident proximately caused the Plaintiffs' injuries and returned a verdict for the Defendant.

To prove causation and damages at trial, Plaintiffs relied on their own testimony as well as their doctors' expert opinions. Defendant cross-examined Plaintiffs and their doctors but did not present its own expert on the issues of causation or damages. At the close of the Plaintiffs' case, Plaintiffs moved for a directed verdict on the proximate cause issue. The Court denied the motion and found that Defendant solicited enough testimony from the experts on cross-examination to cast doubt on their credibility. The jury then found that the automobile accidents were not the proximate cause of either Plaintiff's injuries.

Plaintiffs then moved for a new trial because all of the experts agreed that the Plaintiffs were injured in the accidents. The Court denied the motion because Plaintiffs' complaints were largely subjective and the jury could have doubted Plaintiffs' credibility and their experts' opinions. Defendant had also pointed out that the experts' opinions were based on incomplete and inconsistent information because the doctors did not know about Plaintiffs' prior injuries. Accordingly, the Court found that the jury's verdict was not against the great weight of evidence and denied Plaintiffs' motion for a new trial.

Delaware Superior Court grants insurance company's motion for summary judgment because it met its burden of proving that it made a "meaningful offer" to Plaintiffs consistent with 18 *Del. C.* § 3902(b).

Spivey v. USAA Cas. Ins. Co., 2017 WL 3500402 (Del. Super. Aug. 15, 2017)

Plaintiffs were involved in a car accident where the other driver was charged with DUI, driving across a median, and driving on the wrong side of the roadway. His insurance carrier tendered the statutory minimum liability insurance limits to Plaintiffs. Plaintiffs then sought to reform their insurance policy to increase the limits of their UM/UIM coverage liability to the equivalent limits of their bodily injury liability coverage.

In 2009, Plaintiff signed and returned a Form 999DE(18) to the insurance company, which provided a menu of various insurance coverage options, and selected the option to lower the UM/UIM limits. Between that date and the date of the accident, Plaintiffs received 17 semi-renewal packets but never made any further changes to the UM/UIM limit. Plaintiff testified that she "didn't really understand" the policy and typically made changes to it over the phone.

The Court interpreted Defendant's form Delaware Offer of Insurance Coverage in accordance with 18 *Del. C.* § 3902(b) which requires insurance carriers to clearly communicate offers of additional UM/UIM coverage to their policyholders. A meaningful offer requires the insurer to demonstrate: (1) the cost of the additional coverage; (2) a communication to the insured which clearly offers UM/UIM coverage; (3) an offer for uninsured motorist coverage made in the same manner and with the same emphasis as the insurer's other coverage. If an insurer fails to meet this burden, then the offer is treated as a continuing offer for additional insurance, which the insured may accept even after the insured's accident.

Here, the Court found that the Defendant met its burden of offering the cost of additional coverage to Plaintiffs, made the offer clear with the captions, "**DELAWARE OFFER OF INSURANCE COVERAGE**," did not bury the location of the form in the renewal packet, and made the offer for UM/UIM coverage in the same manner and emphasis as the other coverage. Therefore, the Court upheld Defendant's form as consistent with § 3902(b) and did not reform the insurance policy to include the higher UM/UIM coverage limits.

Delaware Superior Court denies subcontractor's motion for summary judgment because genuine issues of material fact existed over the subcontractor's responsibility for water damage.

State Farm Fire and Cas. Co. v. Pettinaro Constr. Co., 2017 WL 3233070 (Del. Super. July 28, 2017)

The insurance company in this case filed suit to recover monies that it paid for water damage to a condominium located in Ocean View, Delaware. The subcontractor installed a fire sprinkler system in the condominium. The insurance company alleged that cold air penetrated a gap in the exterior wall that was not properly sealed, causing water in the sprinkler pipe to freeze and the pipe to burst. Its expert offered an opinion to that effect. The subcontractor's expert offered the opinion that it had no obligation to seal the gap in the exterior wall under its subcontract or under construction trade and industry custom, but that another subcontractor had the obligation.

The Court found that because the manufacturer's installation instructions for the dry sprinkler head indicated that sealing the penetration is important then the subcontractor here should have sealed the penetration. Since the subcontractor's contract does not make a distinction between the interior walls and the exterior walls, the Court found that there are genuine issues of material fact and denied the subcontractor's motion for summary judgment.

WORKERS' COMPENSATION CASE LAW (CONT.)

The IAB terminated Claimant's entitlement to totally disability benefits, finding that despite her undocumented status, she was not a displaced worker.

Guardado v. Roos Foods, IAB No.: 1405006 (May 18, 2017) (Decision on Remand)

As a result of the Supreme Court's reversal and remand of the prior Board determination that Claimant was essentially *prima facie* displaced as a result of her undocumented status, the IAB heard additional evidence at the hearing on remand. Specifically, Claimant offered supplemental testimony as to her employment prospects and Employer offered a new labor market survey, and the economic expert testimony of Dr. Desmond Toohey as to job availability for undocumented workers.

Dr. Toohey, a Professor of Economics at the University of Delaware, testified that his research expertise was in the field of economic demography. As a result he had prepared a report regarding the employment opportunities available to undocumented workers in the State of Delaware. Dr. Toohey estimated the number of undocumented workers in Delaware and the types of jobs that those workers held and concluded that approximately 80% of the 28,000 undocumented workers in Delaware were employed. Dr. Toohey correlated the jobs on the revised labor market survey with the industries and occupations that undocumented workers in Delaware are typically employed and opined that the survey was a reasonable representation of employability. Dr. Toohey acknowledged that there was a great deal of estimation and lack of precision with respect to his research; further, he acknowledged that he did not control for English language fluency or frequency of job availability.

The vocational expert testified as to the new labor market survey, opining that she had identified jobs that were available to an individual who was not fluent in English, as well as specific to Claimant's physical and vocational restrictions. The vocational expert did not predicate her survey upon willingness to engage an undocumented worker.

The Board undertook a standard termination analysis, initially finding that Claimant was not medically totally disabled from all employment. When evaluating displacement, the Board took instruction from the Supreme Court remand, which held that her undocumented status was not to be instructive to a *prima facie* displacement analysis, but only for an actual displacement analysis. The Board, excluding any discussion of Claimant's immigration status, concluded that she was a *prima facie* displaced worker based upon her particular educational and vocational restrictions. Though unnecessary, the Board also evaluated whether Claimant was actually displaced and concluded that her job search efforts were insufficient to warrant a finding of actual displacement.

The Board next looked to determine whether the Employer offered sufficient evidence to rebut the *prima facie* displacement finding. With direct citation to the Supreme Court's instruction relative to usage of reliable social science to support employment of undocumented workers, the Board concluded that the combination of Dr. Toohey and the vocational expert overcame the *prima facie* displacement conclusion and merited termination. Thus, Employer's Petition for Review was

granted. (Claimant has lodged an appeal to the Delaware Superior Court, an appellate decision has not yet been rendered).

The Supreme Court addressed whether a claimant's immigration status alone rendered her a *prima facie* displaced worker and concluded that Claimant's undocumented immigration status was not relevant in determining whether she was a *prima facie* displaced worker, but was a relevant factor to be considered in the Board's determination as to whether she was actually displaced.

Roos Foods v. Guardado, 2016 WL 6958703 (Del. Nov, 29, 2016)

Employer filed a Petition to terminate claimant's total disability benefits with the Industrial Accident Board on the basis that the claimant was no longer totally disabled and could return to work. Claimant was an undocumented worker. The Board found that the employer met the initial burden of proving that the claimant was no longer totally disabled, however the Board further found that claimant was a *prima facie* displaced worker based solely on her status as an undocumented worker. In addition, the Board held that employer failed to meet its burden of showing regular employment opportunities within claimant's work capabilities and denied the employer's petition. Employer appealed Industrial Accident Board's decision.

The Superior Court affirmed the Board's decision and the employer appealed the matter to the Supreme Court. After conducting a thorough analysis of displaced worker status, the Supreme Court reversed and remanded the matter back to the Board for a new Hearing.

The Supreme Court concluded (1) a claimant's status as an undocumented worker does not automatically entitle such claimant to total disability merely because of such status and (2) there is no requirement that a labor market survey used by an employer in a case involving an undocumented worker include testimony from actual employers that such employers would hire undocumented workers.

The Supreme Court recognized that while the Industrial Accident Board's decision might be construed as including a "requirement that employers demonstrate that specific employers exist who hire undocumented workers and have jobs within the claimant's ability that are open, we clarify that no such requirement exists." Rather, the Court stated that "using reliable social sciences methods, there should be no barrier to employers in presenting evidence regarding the prevalence of undocumented workers in certain types of jobs in certain regions and combining that with more specific information about actual jobs in those categories."

The IAB concludes that the general contractor is liable for Claimant's work-related injuries under §2311, despite technical compliance with the statutory requirements.

Candido Perez-Rosa v. Lenape Builders, Inc., IAB No.: 1405006 (August 2, 2017)
Candido Perez-Rosa v. HRC, Inc., IAB No.: 1405006 (August 2, 2017)
Candido Perez-Rosa v. MB Brothers Construction, LLC, IAB No.: 1405006 (August 2, 2017)

Claimant was injured on a job site in Milford, Delaware. While framing a townhome the exterior wall was not properly secured and the wall (plywood) fell on top of Claimant. As a result Claimant sustained injuries, requiring surgery, and rendering him totally disabled for a period of time.

Claimant was alleged to be employed by MB Brothers Construction, LLC ("MB"), MB was contracted to perform framing work by HRC, Inc. ("HRC"), HRC was contracted to provide framing to the general contractor, Lenape Builders, Inc. ("Lenape").

MB provided HRC a certificate of insurance ("COI") demonstrating general liability coverage ("GL") but without any Delaware workers' compensation coverage. There was a subcontractor agreement entered into between MB and HRC in advance of any contractual relationship between Lenape and HRC.

HRC then responded to an inquiry for framers for a townhome community being constructed by Lenape. Lenape engaged HRC with a memorandum of understanding and required HRC to provide a number of documents, inclusive of a COI and/or workers' compensation waiver. HRC represented that it did not have any employees and that its only employees were the two principals of the LLC and therefore it was not obligated to procure workers' compensation coverage.

Claimant filed petitions against all entities. Ultimately, MB was unresponsive until the date of the hearing, HRC retained counsel, and Lenape as the only entity with valid workers' compensation coverage retained counsel. Lenape denied based on compliance with §2311(a)(5) and the Supreme Court's holding in *Cordero*.

The Board concluded that HRC was clearly responsible under 2311(a)(5) for failing to procure a COI with WC coverage or a waiver from MB; however as HRC was without coverage, the Board analyzed Lenape's liability. The Board determined that Lenape knew or should have known that HRC was unable to handle the scope of work contracted with only the parties listed on workers compensation waiver and therefore that it did not comply with 2311(a)(5) and therefore was liable for Claimant's workers compensation benefits.

Currently under appeal on the basis of compliance with the *Cordero* safe harbor provisions and statutory notice requirements.