DCA Meeting – April 4, 2017

CIVIL LITIGATION CASE LAW UPDATE

The Superior Court granted summary judgment in slip and fall personal injury case based upon the continuing storm doctrine; Plaintiff's allegation that storm had "just begun" and was limited to rainfall irrelevant to the triggering of the doctrine.

Laine v. Speedway, LLC, 2017 WL 1079987 (Del. Super. Ct. March 21, 2017)

Plaintiff was involved in a slip and fall injury upon defendant's premises on January 10, 2014 at approximately 7:15 a.m. and filed suit against the property owner for damages. On the date in question it was undisputed that precipitation began shortly before 7:00 a.m. Defendant moved for summary judgment based upon the continuing storm doctrine, Plaintiff opposed in advance of the discovery closure deadline, arguing that additional information needed to be determined as to whether the storm was "ongoing" at the time of fall. No additional discovery supported Plaintiff's position. A renewed summary judgment motion was filed based upon the undisputed facts that the precipitation commenced in advance of the fall and continued through (and after) the timeframe of the fall. Plaintiff opposed, arguing that the continuing storm doctrine should not apply to "rain events" and that the doctrine should not cover the defendant because they had two employees available at the time of the injury that could have cleared the icy area where Plaintiff fell. The Court plainly disagreed with Plaintiff's argument and granted summary judgment in favor of the Defendant.

The underlying PIP carrier had intervened in the action and attempted to present an expert affidavit of a previously undisclosed expert purportedly alleging that there was no "measurable" precipitation at the time of the fall. This was disregarded as it would have been inadmissible at trial, further the Court reasoned that even a small amount of precipitation that was not "measurable" would be sufficient to render the ground slippery.

The Delaware Supreme Court affirmed a directed verdict for failure of evidence relative to a bad faith claim after Superior Court trial.

Bennett & Bennett v. USAA Casualty Insurance Company, No. 144, 2016 (Del. 2017)

Plaintiffs owned a condominium in Lewes, Delaware. When Plaintiffs were not in residence there was a water leak from a broken toilet that lead to substantial structural damage to the unit, as well as personal property damage. The condominium complex had an insurance policy through Philadelphia Indemnity Insurance Company ("PIIC"), whereas Plaintiffs had a personal policy through USAA. The USAA policy had a provision determining that the USAA policy would be secondary to any other applicable insurance coverage. USAA denied coverage. Plaintiffs were unable to secure payment of the necessary repairs through the condomnium association or PIIC. Plaintiffs ultimately filed breach of contract and bad faith claims against USAA.

The matter proceeded to trial and Plaintiffs neglected to call any representative from USAA to testify as to the basis of the denial or the decision-making behind the denial. USAA moved for directed verdict of the bad faith claim as a result of the Plaintiffs failure to substantiate their burden of proof. Directed verdict was granted and Plaintiffs ultimately appealed, with Plaintiffs arguing that it was Defendant's burden to prove that its denial was reasonable. The Supreme Court concluded that the Directed Verdict ruling was appropriate given that there was no evidence presented that USAA did not have a reasonable justification to deny the claim. Further, the Court noted that the strategy, mental impressions and opinions behind the denial are of central importance in a bad faith claim, all of which were absent from the evidence presented to the trial Court.

WORKERS' COMPENSATION CASE LAW UPDATE

The Superior Court reversed and remanded the Industrial Accident Board's decision addressing whether a claimant who was injured while playing in an employee softball game was within the course and scope of his employment. The Superior Court held that the Industrial Accident Board erred and applied the incorrect legal standard to assess whether a recreational event that is not company sponsored is within the course and scope of one's employment.

Morris James LLP v. William Weller, C.A. No. N16A-05-006 FWW (Del. Super. 2017).

Employer–Below / Appellant, Morris James LLP appealed a decision of the Industrial Accident Board awarding benefits to Employee – Below / Appellee, William Weller finding that his injury that occurred during a softball game was within the course and scope of his employment. Mr. Weller was a paralegal for Employer and joined the employee's softball team after encouragement from a partner. The Employer supported the team paying for jerseys, equipment and meals. Additionally, the Employer signed liability agreements so that the team could practice at local fields. On the date of the injury, claimant left work early to prepare for the game and purchase beverages. This was permitted by the Employer. While running around the bases at the game, his Achilles tendon ruptured, requirement treatment and surgery. Claimant was totally disabled from work from 6/11/15 through 9/8/15 while recovering from surgery.

The Board heard testimony from several employees, who characterized playing on the team as a "great team building exercise for the firm" and claimant testified that playing on the team enhanced morale and camaraderie within the firm. An executive director with the firm testified that playing on the team lead to increased productivity at work. The Board relied upon the four-factor test from *Larson's Workers' Compensation Law* to determine that Employer "probably obtained a benefit through increased productivity of players by having the firm team in the softball league". Further, the Board determined that the Employer's willingness to sign hold harmless agreement and accept liability for filed incidents evidenced a "modicum of initiative or control" sufficient to bring the game within the course and scope of employment.

The Appellant / Employer argued that the Board applied the incorrect legal standard to determine whether the claimant was within the course and scope of his employment when he was injured, and the Court agreed. The Industrial Accident Board applied the factors set for in *Nocks v. Townsend's, Inc.*, 1999 WL 743658 (Del. Super, August 25, 1999), to assess course and scope (time and place factor; degree of employer initiative; financial support and equipment furnished by employer; and employer benefit from company team). The Superior Court held that the Board should have applied the factors set forth in *State v. Dalton*, 2005 WL 1487700 (Del. Super, Jan. 20, 2005, aff'd 878 A.2d 451 (Del. 2005)). In *State v. Dalton* a Delaware State Trooper sustained an injury during a charity softball game that was compensable. Adopting a different standard from *Larson's* the Court considered whether: 1) the injury occurred on the premises during a lunch or recreational period as a regular incident of employment; 2) the employer, by expressly or impliedly requiring participation, or by making the activity a part of the service of the employee, brings the activity within the orbit of the employment; or 3) employer derives substantial direct benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life. The *Dalton* decision was affirmed by the Supreme Court that further held that the claimant only had to prove that one of the three factors existed for an injury to be compensable.

The Superior Court reversed and remanded the decision in order for the Board to apply the *Dalton* factors to determine if the claimant was within the course and scope of his employment.

The Industrial Accident Board denied claimant's Initial Petition and DACD Petition for right wrist surgery, finding that claimant did not meet her burden of proof that she was injured at work on two separate occasions due to credibility issues.

Janice Allen v. DART, IAB No. 1441592 (February 24, 2017).

Claimant filed an Initial Petition to Determine Compensation Due alleging that she was injured on 4/15/16 and 6/30/16 while working as a paratransit driver for DART. Additionally, she filed a Petition to Determine Additional Compensation Due seeking authorization for right wrist surgery.

Claimant alleged that on 4/15/16 while operating a DART bus she developed severe right wrist pain while making a sharp turn. On 6/30/16, she alleged she was injured while unloading a large passenger in a doublewide wheelchair from the bus. Both incidents were reported the same day to the Employer and claimant sought medical treatment with Work Pro and had physical therapy thereafter. She came under the care of Evan Crain, M.D. at First State Orthopaedics who recommended surgery to address de Quervains tenosynovitis of the right wrist.

The claims were denied based upon bus video footage that did not depict any apparent injury. Both medical experts as well as the Board had an opportunity to view the bus videos.

Dr. Evan Crain testified on behalf of the claimant with regard to the need for treatment and compensability of her alleged injuries, however he agreed that he relied upon the claimant's history / mechanism of injury to provide his causation opinions and if claimant was not truthful, the alleged work accidents were not the cause of claimant's right wrist condition.

Dr. Gregory Tadduni testified for the Employer that based on the claimant's MRI, she did not have any structural problem in the right wrist. Additionally, there was no reason why someone with a normal wrist would "lock up" as claimant described. He did not believe based upon the bus video that claimant sustained any injury on either date. With regard to credibility, Dr. Tadduni believed claimant voluntarily limited her motion on physical examination and Jamar testing and that her complaints were not substantiated by any objective physical findings. Claimant's subjective complaints also did not correlate with a specific problem or pattern.

The Board concluded that claimant was not credible based upon her own inconsistent testimony regarding the reporting of the alleged accidents; mechanism of injury; relief of symptoms post injection; high pain levels and exaggerated symptoms. The Board further after viewing the bus video accepted the testimony of Dr. Tadduni that claimant's reported onset of symptoms did not correlate with her physical examination findings and determined that the claimant did not sustain any injuries while working on either date.