DCA Meeting – January 10, 2017

CIVIL CASE LAW UPDATES

Delaware Superior Court further defines "notice of claim" requirement under 18 *Del. C.* § 3914 obligating an insurer to provide a potential claimant notice of the statute of limitations

Butler v. Staplford et. al, C.A. No. S16C-07-024 MJB (Del. Super. Ct. Jan. 3, 2017)

On July 21, 2016, the plaintiff filed suit to recover damages for bodily injuries sustained in a two vehicle accident that occurred on August 31, 2013 (the "Accident"). The Accident occurred when the motorcycle operated by the plaintiff (while intoxicated) struck the rear of the vehicle operated by the alleged tortfeasor-defendant. Plaintiff's complaint alleged that the defendant was negligent in causing the Accident.

The defendant moved to dismiss the plaintiff's complaint because it was filed more than two years after the Accident and, therefore, barred by the applicable statute of limitations. In response, plaintiff argued that the defendant's insurer was aware of the plaintiff claim because it had sent the plaintiff a subrogation letter seeking to recover the amount the insurer paid on behalf of the its insured (the now defendant) for damage the plaintiff caused to the insured vehicle. Plaintiff argued that the insurer sending this subrogation letter and referring to "a claim involving you" was sufficient to put the insurer on notice of the plaintiff's claim and, therefore, required the insurer to notify him of the statute of limitations pursuant to 18 *Del. C.* § 3914. Because the insurer failed to provide the plaintiff with notice of the statute of limitations, he argued, the statute of limitations was tolled and the suit should not be dismissed based on the expiration of the two year statute of limitations.

In reply, the defendant argued that his insurer was never put on notice of a bodily injury claim being made by the plaintiff. Instead, as the subrogation letter clearly indicated, the insurer was making a claim against the now plaintiff for the damage to the insured vehicle. Therefore, the defendant argued, the insurer was not obligated to provide the plaintiff with notice of the statute of limitations, the statute was not tolled, and the complaint was untimely.

In deciding the Motion to Dismiss, the Court held that to implicate the requirement to give notice of the statute of limitations pursuant to 18 *Del. C.* § 3914, the plaintiff must show the following: (1) there must be notice of the claim to the insurer; (2) the claim must be pursuant to a casualty insurance policy; and (3) there must be the pendency of a claim. The Court held that in this case, the subrogation letter was clearly the insurer's attempt to make a claim against the plaintiff and was not sufficient to put the insurer on notice of the plaintiff's bodily injury claim. The Court further held that there was no other documentation or proof that the plaintiff attempted to assert a claim prior to filing the complaint. As such, the Court held, the insurer was not required to notify the plaintiff of the statute of limitations. Because the insurer was not required to give notice of the statute of limitation, the statute of limitations was not tolled for its failure to do so and the plaintiff's complaint was untimely. Therefore the Court dismissed the case against the alleged tortfeasor/defendant.

Supreme Court upholds trial court's denial of new trial and *sua sponte* additur after $0 jury verdict but clarified proper procedures for additur

Rash v. Moczulski and Diamond Materials, LLC, No. 214, 2016 (Del. 2016)

This is a personal injury, auto accident case in which a jury found that the appellants, plaintiffs below, "sustained one or more injuries proximately caused by" negligence on the part of the appellee, defendant below but returned a zero verdict. The plaintiffs moved for a new trial (but did not request additur). The Superior Court denied the motion for a new trial but *sua sponte* imposed an additur of $10,000. The plaintiffs appealed and assert two claims: (1) the trial court's denial of their motion for a new trial was an abuse of discretion and (2) the award of $10,000 for additur was unreasonable. The defendants cross-appealed, contending that the motion for a new trial should have been denied without additur.

The Supreme Court acknowledged that that additur may be granted on motion of either the plaintiff or the defendant or *sua sponte* by the trial court. In this case the the Supreme Court noted that there were significant disputed issues concerning the nature and extent of the plaintiff's injuries as well as alleged failure on his part to mitigate his injuries through treatment. The Supreme Court also pointed out that in its order denying the plaintiffs' motion for a new trial, the trial court observed that "the exact nature and extent of plaintiff's injury [and] plaintiff's failure to mitigate his injuries through treatment made identifying and compensating the injury quite problematic". As such, the Supreme Court stated that it "see[s] no abuse of discretion in the trial court's decision to award an additur." "Where a court does award additur, it increases the award to the absolute minimum amount that the record requires."

The Supreme Court continued on, however, the clarify the rules of additur. The Court held that normally, additur is not considered unless the trial court first determines that the motion for a new trial should be granted. If the court decides that the motion should be denied, the matter is ended and there is no need to consider additur. Additur is not properly considered unless the trial court first decides that the motion for a new trial should be granted. Normally, where additur is awarded, the trial court would grant the motion for a new trial subject to the defendant's acceptance of the additur. If the defendant accepts the additur, the court can then refuse the new trial. If the defendant rejects the additur, the new trial goes forward. In this case, the trial court erred by not giving the defendant the option to accept or reject the additur. On appeal, however, the defendant indicated that it would accept the additur thereby curing the trial court's error. As such, the trial court's additur of $10,000 was affirmed.

WORKERS' COMPENSATION CASE LAW UPDATES

Superior Court affirms Industrial Accident Board's Decision that the Claimant did not voluntarily remove herself from the workforce and that she made a good faith effort to secure employment entitling her to recurrence of total disability benefits.

State of Delaware v. Cathy Ewing, 2016 WL 6805351 (Del. Super. Ct., November 7, 2016)

Claimant filed a DACD Petition seeking recurrence of total disability benefits as of February 24, 2015 when she was placed on total disability pending a second cervical spine surgery. Employer argued that Claimant has voluntarily removed herself from the workforce such that she was not entitled to total disability benefits.

Claimant while working as a special education teacher sustained injuries to her cervical spine and left shoulder on December 20, 2012. She last worked for the Employer in January 2013. The parties stipulated that claimant was capable of working in a part time capacity as of January 2014 and that she was totally disabled as of February 24, 2015. Employer argued that Claimant did not demonstrate an intention to remain in the workforce between January 7, 2014 and February 24, 2015.

Claimant had cervical spine surgery in August 2013 and was released to return back to work by her treating surgeon in January 2014. She had a worsening of her symptoms post-surgery and began to experience significant radiculopathy down both upper extremities, as well as trouble swallowing and breathing. On February 24, 2015, due to a decline in Claimant's condition and following additional diagnostic testing, it was determined Dr. Dr. Zaslavasky that additional surgery was necessary. He placed the Claimant on total disability until surgery scheduled for June 8, 2015.

At the Industrial Accident Board Hearing, Claimant testified during the time period at issue she prepared a resume, requested recommendation letters and attempted to return back to work as a special education teacher. Claimant's documented job search materials included updated resumes; cover letters; four letters of recommendation as well as a job application to another school dated May 20, 2014. The Board further considered that Claimant obtained at her own cost professional teaching certifications to improve her employability. Claimant had also testified regarding contact with the Colonial School District's personnel office to apply for teaching and other light duty positions during this time.

Upon review and analysis of the Board's Decision the Superior Court found that the Claimant had not voluntarily removed herself from the workforce during the time period at issue. Claimant had initially left her teaching position because of her work related injuries without returning to a level of physical capacity that would allow her to return to her prior position. Although the Claimant did not conduct an extensive job search, the Board recognized her efforts to find a new position and improve her employability. The Superior Court held that the Board's Decision was supported by substantial evidence.

Delaware Supreme Court affirms decision of the Superior Court upholding the Industrial Accident Board's determination that the Claimant's need for treatment for his lumbar spine injury, following a second work related accident, resulted from Claimant's initial work accident with the Employer such that the initial carrier was liable for payment of medical expenses and total disability benefits.

Greenville Country Club (Guard Insurance) vs. Greenville Country Club (Technology Insurance), 2016 WL6471898 (Del. Supr. November 2, 2016).

Appellant, Greenville Country Club (Guard) appealed the Superior Court's Order affirming the Industrial Accident Board's Decision. The Industrial Accident Board Hearing involved the Claimant - Rash, who sustained injuries to his lumbar spine in a compensable work accident. The first accident occurred in 2009. At the time, Employer was insured by Guard. Guard paid benefits stemming from the 2009 injury through 9/4/09. Thereafter, Claimant was involved in a second work accident while working for Greenville Country Club on 6/29/12 when he fell on his lumbar spine while mowing a wet lawn. At that time, Greenville Country Club was insured by Technology Insurance who paid benefits through 7/10/13. In 2014, Claimant - Rash, filed two DACD Petitions seeking payment of outstanding medical bills associated with a lumbar spine surgery as well as recurrence of total disability benefits. The Industrial Accident Board determined that the Claimant's condition was a recurrence of his initial 2009 work injury and not an aggravation of the 2012 work injury, such that Guard was responsible for payment of the benefits.

Guard argued that the Board failed to properly apply the rule for determining successive carrier liability and that there was not substantial evidence to support the Board's finding that Claimant – Rash fully recovered from the 2012 accident or that his condition was solely as a result of the 2009 work accident. The Superior Court held that the Board's decision was free of legal error and supported by substantial evidence.

Appellant Guard argued that the Board erred as a matter of law by improperly applying the rule for determining successive carrier liability and that when Technology accepted responsibility for the 2012 injury, the burden of liability for compensation arising from the lumbar spine shifted to it. Guard further argued that causation was severed from the first accident, no further analysis under *Nally* was warranted, and that Technology became liable for compensation after the 2012 accident.

The Superior Court addressed the successive of carrier liability analysis pursuant to *DiSabatino & Sons, Inc. v. Facciolo*, finding that the successive carrier was not strictly liable as a matter of law for a later condition which manifests itself after the second accident. It was only liable if the newer work accident was the cause of the later condition.

The Board further analyzed the last injury as "exposure" rule under *Standard Distributing Company v. Nally* finding that the burden of proving the causative effect of the second event was upon the initial carrier seeking to shift responsibility for the consequence of the initial injury. The Superior Court indicated that the issue before the Court was whether liability for a later manifestation of injury occurring after both accidents fell upon the first carrier or the second

carrier, and that liability for the later condition falls upon the carrier responsible for the injury which proximately causes the later condition whether it be the first or second injury. The burden of proving that the second event caused the later condition was upon the initial carrier.

Guard further asserted claims that there was not substantial evidence to support the Board's finding that claimant Rash fully recovered from the 2012 accident and that his condition was solely caused by the 2009 accident. However, the Superior Court noted that four to five doctors that had testified related the claimant's condition to the 2009 accident and not the 2012 accident. Thus, the Board found that Guard failed to meet its burden of proving that Claimant - Rash's injury and treatment at issue were proximately caused by the 2012 accident.

On appeal, the Supreme Court upheld the Superior Court's decision finding that the Claimant met its burden of proving his condition at issue was proximately caused by the 2009 accident thus, making Guard responsible for payment of benefits.