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TO: ALL DELAWARE CLAIMS SUPERVISORS¹

FROM: HECKLER & FRABIZZIO

DATE: January 2009

RE: CURRENT DEVELOPMENTS IN WORKERS' COMPENSATION,
LIABILITY, AND CASUALTY LAW

A. WORKERS' COMPENSATION LAW:

ATTORNEYS FEES

Kenneth Mitchell, Sr. v. Perdue, Inc., Del. Super., CA No. 08A-04-002, Graves, J. (11/25/08)

Claimant appealed a Decision of the Board granting total disability benefits, medical expenses, expert witness fees and attorney's fees of 30% of the award, or \$5,750.00, whichever is less. Claimant argued that Board erred as a matter of law by limiting the attorney's fee awarded based only on the monetary benefits secured for Claimant and not considering non-monetary benefits as a proper basis for an award of attorney's fees. 30% of the monetary award was \$1,845.62 which equated to slightly more than \$80.00 per hour of attorney's time spent on Claimant's case which Claimant argued was unreasonably low. Noting that Claimant made his first pitch for attorney's fees based on non-monetary benefits to the Court, on Appeal, and not to the Board, the Court affirmed the Decision of the Board and found that the attorney's fee award of the Board was reasonable. [Mr. Gilbert of our office represented the Employer/Carrier].

¹ Please review and circulate to those of your staff responsible for Delaware claims.

CAUSATION

Deborah Mustachi v. Christiana Care Health System, IAB Hearing No. 1279659 (9/24/08)

Claimant filed a Petition alleging permanent impairment to the lumbar spine and right upper extremity causally related to a work accident which initially involved injury to the low back but not the right upper extremity. Claimant's medical expert, Dr. Bandera, testified that Claimant subsequently developed right carpal tunnel syndrome as a result of the work accident. Employer's medical expert, Dr. Gelman, opined that Claimant's bilateral carpal tunnel syndrome was idiopathic and there was no reason to believe that it was causally related to the work accident. Noting that Employer does not have the burden to prove the cause of a condition and that it is sufficient for an employer to cast enough doubt regarding the causal connection to prevent claimant from meeting her burden, Board accepted the testimony of Dr. Gelman over that of Dr. Bandera, noting that Dr. Gelman pointed to other possible causes of the right carpal tunnel syndrome, which can be idiopathic, to include Claimant's hormonal replacement medication which may have played a role in the development of carpal tunnel syndrome. The Board denied Claimant's Petition for permanent impairment the right upper extremity. [Ms. Newill of our office represented the Employer/Carrier].

Larry Savage v. Brandywine Chrysler/Jeep, IAB Hearing No. 1267858 (8/26/08)

In 2007 Claimant filed a Petition alleging that right elbow problems and recommendation for surgery were related to 2005 work injury to right shoulder. Claimant's theory of causation was that elbow injury resulted from repetitive use while performing physical therapy for the shoulder injury. Claimant's medical expert, Dr. Sowa, testified that he chose to rely on the history of injury Claimant provided to a prior physician, Dr. Crain, rather than the history Claimant provided directly to him (Dr. Sowa). Employer's medical expert, Dr. Stephens, testified that because Claimant only performed physical therapy for a few weeks, such therapy would not be competent to cause a cumulative detrimental effects injury to the elbow. The Board denied Claimant's Petition for failure to establish causal relation between the work accident and subsequent elbow problems. The Board noted it was troubled by Claimant's inconsistent testimony regarding the onset of elbow symptoms. [Mr. Gilbert of our office represented the Employer/Carrier].

HORSEPLAY/COURSE OF EMPLOYMENT

Grabowski v. Mangler, DeFax Case No. D63370 (Del. Supr. *en banc*, 9/9/08) Oridgely, J.

Claimant worked at an oil refinery site and Employer had rules forbidding horseplay at job sites. Despite rules, employees, including Claimant, often engaged in horseplay and practical jokes. Claimant was the victim of a practical joke on 10/16/00, suffered physical injuries and received workers' compensation benefits. Claimant/Plaintiff filed a tort Complaint against

Employer seeking compensatory damages and Employer filed a Motion for Summary Judgment as Workers' Compensation Law was Claimant/Plaintiff's exclusive remedy. Superior Court granted Summary Judgment to Defendants and Claimant/Plaintiff Appealed to Supreme Court. Supreme Court adopted Professor Larson's 4-factor "course of employment" test to determine whether co-employee's conduct constituted horseplay of such character that it was outside the course and scope of Employment. Those factors are the extent and seriousness of the deviation; the completeness of the deviation (whether it involved an abandonment of duty); the extent to which the practice of horseplay had become an accepted part of the employment; and the extent to which the nature of the employment may be expected to include some horseplay. In this case, the Decision of the Supreme Court to affirm the Superior Court's grant of Summary Judgment turned on the third factor with the Court concluding that horseplay had become an accepted part of the parties' employment.

MEDICAL TREATMENT

Michael Wedington a/k/a Michael Sanders v. Christiana Care Health Services, IAB Hearing No. 1219720 (12/10/08)

During 2007 Claimant filed a Petition seeking pre-approval of low back surgery along with recurrence of total disability effective the date of surgery. The issue was whether the surgery was causally related to the 2002 work accident. Claimant's medical expert, Dr. Rudin, testified that the low back surgery was caused by the work accident and not a subsequent, 2007, motor vehicle accident. Employer's medical expert, Dr. Sommers, testified that Claimant had a long history of pre-existing degenerative lumbar spine problems before the 2002 work accident and dating as far back as 1996, and that he sustained a lumbar strain and sprain as a result of the 2002 work accident; he treated for the 2002 work-related low back strain and sprain until 2004 when he was discharged from care; the gap in treatment from 2004 until 2007 confirmed the chronic low back condition had returned to baseline following the 2002 work accident and before the 2007 a motor vehicle accident. The Board concluded that Dr. Rudin failed to give adequate consideration to claimant's pre-existing chronic back condition or the impact of the subsequent motor vehicle accident on the pre-existing condition when assessing his opinion as to causation. The Board accepted the testimony of Dr. Sommers over that of Dr. Rudin, concluded that the nature of the 2007 motor vehicle accident constituted an intervening event breaking the chain of causation attributable to the 2002 work accident, and Denied the Petition. [Ms. Newill of our office represented the Employer/Carrier].

PERMANENT IMPAIRMENT

Angela Jean Conti v. Macy's, IAB Hearing No. 1295248 (10/10/08)

Claimant filed a Petition alleging 33% permanent impairment to the abdominal wall based upon a cumulative detrimental effects injury diagnosed as an abdominal strain, but not a

hernia. Dr. Rodgers testified on behalf of Claimant that *AMA Guides* directed physicians to use the closest condition in the *Guides* to rate permanent impairment if the specific condition is not analyzed in the *Guides*; Dr. Rodgers utilized the rating for hernias and placed the claimant in Class II which is 33% permanent impairment to the abdominal wall. Dr. Morris testified on behalf of Employer that Claimant had no palpable defect as a result of the work accident and that, accordingly, she had 0% permanent impairment. The Board rejected Dr. Morris' opinion that Claimant was not entitled to any permanent impairment. However, the Board also found that Claimant had only occasional mild discomfort instead of frequent discomfort which would place her in a Class I for rating hernias and would qualify her for 20% permanent impairment to the abdominal wall which was awarded by the Board. [Ms. Ward of our office represented the Employer/Carrier]

TERMINATION OF BENEFITS

Sydney Hamm v. City of New Castle, IAB Hearing No. 1286235 (12/9/08)

Employer filed a Termination Petition to end total disability benefit entitlement on the basis of the opinion of Employer's medical expert, Dr. Townsend, who testified that Claimant was physically able to return to work with restrictions, and on the basis of Employer's Labor Market Specialist who testified that there was work available for the claimant within his capabilities/restrictions. Claimant argued that he was a displaced worker - - he was 49 years old with a 7th grade public school education, a history of working a variety of jobs and was functionally illiterate; he actively sought employment and obtained assistance completing job applications because of his illiteracy. The Board accepted the Employer's evidence of job availability in the open labor market even if one accepted his alleged functional illiteracy as potential employers were made aware of the alleged functional illiteracy, in addition to his physical restrictions, background, training and experience, and were willing to hire him anyway. The Board concluded Claimant was not a displaced worker and granted the Termination Petition. [Mr. Morgan of our office represented the Employer/Carrier]

Merritt v. United Parcel Service, DeFax Case No. D63387 (Del. Supr. 9/4/08) Jacobs, J.

Employer filed a Termination Petition to end total disability. On 4/4/06, about a month before the scheduled Termination Hearing, Employer's attorney sent a letter to the Board stating that Employer "[a]dmits temporary partial disability benefit entitlement from March 8, 2006 to the present and ongoing . . ." The Board terminated total disability and awarded partial disability for a closed period, not ongoing. Claimant appealed and the Superior Court Affirmed. Claimant appealed to the Supreme Court which determined that Employer's 4/4/06 letter admitting ongoing partial disability beginning 3/8/06 was the equivalent of a "judicial admission" which should have been given conclusive effect by the Board; as the Board abused its discretion by not giving conclusive effect to the Employer's letter/admission its Order was reversed and the case was remanded.

Melissa L. Shively Turney v. Christiana Care Health System, IAB Hearing No. 1244821 (10/24/08)

Employer filed a Termination Petition to end total disability on the basis of the opinion of Employer's medical expert, Dr. Meyers, who testified that Claimant's work accident resulted in a diagnosis of chronic right upper extremity pain but that she was, nonetheless, able to return to work with restrictions of no use of the extremity; it would actually be beneficial for the Claimant to return to work rather than sitting at home with nothing to distract her from her pain. Claimant's medical expert, Dr. Balu, testified that the diagnosis was RSD of the right upper extremity, that the pain was too great for Claimant to return to work and that he did not believe a potential employer would allow her to work with her one arm protected against impact. The Board concluded that the diagnosis was not relevant and agreed with Dr. Meyers that there was reason to believe that the beneficial effect of working would actually help. The Board granted the Termination of total disability. [Mr. Batman of our office represented the Employer/Carrier].

George Webster v Caliber Mechanical Prepping, IAB Hearing No. 1246278 (12/16/08)

Employer filed a Termination Petition to end total disability on the basis of the opinion of Employer's medical expert, Dr. Townsend, who testified that Claimant demonstrated symptom embellishment on physical examination. Claimant's medical expert, Dr. Grossinger, testified that the claimant was totally disabled as a result of ongoing pain. The Board noted that a Functional Capacity Evaluation found inconsistent variables showing that Claimant did not provide a full effort during testing. The Board also found that the claimant's demeanor and behavior at the time of the Hearing was inconsistent with his testimony as to his pain. The Board accepted the testimony of Dr. Townsend over that of Dr. Grossinger and granted the Termination of total disability. [Ms. Ward of our office represented the Employer/Carrier]

B. LIABILITY AND CASUALTY LAW:

EXPERT CAUSATION TESTIMONY/DAMAGES

Crisco v. Mandarano, Del. Super., CA #05C-05-079, MJB (11/6/08)

Plaintiff was a commercial tenant who signed a Lease Agreement with Defendant. A fire on the premises resulted in damage to Plaintiff's property. The Lease required Defendant/Landlord to maintain major systems, including the roof, plumbing, electric and heating. The Lease provided that damage as a result of fire would not be covered. The issue was the cause of the fire. Defendants filed Motion for Summary Judgment on the basis that Plaintiff failed to clearly establish the cause of the fire. The Court granted the Motion for Summary Judgment noting that proof of causation required expert testimony and that the

expert testimony was that of the Fire Marshall who was unable to make a determination as to the origin or cause of the fire.

Dailey v. Purse v. Wooten, Del. Super., CA #06C-04-015, Silverman, J. (10/15/08)

Plaintiff alleged injury as a result of falling from scaffolding at work. Allegation was that the wheels of the scaffolding were supposed to have been held in place by pins which was not done so that the wheels came out of the scaffolding and he fell. Plaintiff had sustained prior injuries to the same parts of his body that he claimed had been injured in the accident. Plaintiff did not present expert testimony. At the close of discovery Defendant moved for summary judgment and Court concluded that no expert testimony was required to establish negligence because the proper construction of the scaffolding was simple enough that it could be deemed within the common knowledge of lay persons. However, expert medical testimony was required to establish causation of claimed injuries and so Defendant's Motion for Summary Judgment was granted.

LIMITATIONS OF ACTION/STATUTE OF LIMITATIONS

Lee v. Linmere Homes, Inc., DeFax Case No. D63405 (Del. Super., 10/1/08) Ableman, J.

Plaintiffs purchased a new home from Defendant and, about a year after moving into the home discovered window leaks. The problems were reported to Defendant which agreed to make the necessary repairs, however, was unable to repair the defects and ceased all repair efforts by 9/8/06. On 3/3/08 Plaintiffs sued Defendant and Defendant moved to dismiss asserting that Complaint was barred by the applicable 3-year Statute of Limitations set forth at 10 Del.C. §8106. In ruling upon the Motion, the Court noted that settlement of the house occurred on 12/13/00 and, therefore, the Statute of Limitations would normally expire on 12/13/03. The Court found, however, that Defendant's conduct, by promising to repair the defects, regardless of the 1-year warranty or the 3-year Statute of Limitations, was sufficient evidence to create a genuine issue of material fact as to whether estoppel should preclude Defendant from raising the Statute as a defense and so Defendant's Motion was denied.

Meyer v. Dambro, DeFax Case No. D63404 (Del. Super., 9/30/08) Slights, J.

Medical malpractice case where Plaintiff had a mammogram taken by Defendant on 3/8/05 which was interpreted as normal. Subsequent mammogram on 5/4/06 was interpreted as indicating breast cancer. On 10/24/07, Plaintiff filed medical negligence action alleging that Defendant was negligent in failing to diagnose the presence of breast cancer in the mammogram of 3/8/05. Defendant moved for Summary Judgment asserting that Plaintiff's claim was barred by 18 Del.C. §6856 which sets forth a 2-year Statute of Limitations that begins to run from "the date upon which the injury occurred", i.e., according to Defendant, on 3/8/05 when Defendant allegedly misread mammogram. Plaintiff asked the Court to consider the passage of amendments to §6853. The Court pointed out that in a medical

negligence case involving surgery, it is generally easier to fix the date upon which the injury occurred as contrasted to a case involving a failure to diagnose which may or may not proximately cause injury at the time of the negligent act. The Court ruled that in a case of failure to diagnose a condition where the failure does not immediately cause injury, the Statute of Limitations must begin to run as of the first date upon which the Plaintiff could have submitted an Affidavit of Merit which satisfied all the statutory requirements of the amendments to §6853 which would be an issue of fact, if disputed, to be resolved by a jury. Accordingly, Defendant's Motion for Summary Judgment was denied.

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