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*DELAWARE AND PENNSYLVANIA BAR

TO: ALL DELAWARE CLAIMS SUPERVISORS

FROM: HECKLER & FRABIZZIO

DATE: APRIL 1, 2005

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

A. WORKERS' COMPENSATION LAW:

Termination:

Williams v. E.I. DuPont de Nemours, IAB Hearing No.: 1176205 (11/23/04): An Employer need not show a change in the medical condition of the claimant to succeed in a Petition to Terminate. It is sufficient to show that the claimant's "incapacity had terminated, not that her physical condition has improved."

Causation:

Hallett v. Avalon Exhibits, Inc., Del. Super., C.A. No. 04A-04-004 RRC (January 27, 2005) (Cooch, J.): This case involves an Appeal of a decision of the Industrial Accident Board in which it was undisputed that the claimant sustained a work accident due to a blunt force trauma to his back and that he was totally disabled for an 8-week period due to the back injury. The dispute was whether or not the claimant was entitled to ongoing total disability benefits as a result of a claimed injury to his neck.

The Board considered testimony from the claimant's treating physician, Dr. Sternberg, who stated that he thought the neck condition was related to the work accident but was unable to explain how the mechanism of the accident could have caused a neck injury when the claimant struck his mid-back on a crate. The Board also heard testimony from the Employer's evaluating physician, Dr. Stephens, who testified that any potential neck condition could not have been related to the work accident because it first manifested 8 weeks after the accident. The Board found that the claimant's neck condition was not related to his accident and denied ongoing total disability as well as medical expenses for such injury. The claimant appealed to the Superior Court asserting that the neck condition must have been related to the work accident as there was no other explanation for the manifestation of the neck problems 8 weeks after the accident. The Superior Court affirmed the decision of the Board noting that the existence of a neck injury was not the issue but rather the issue was "whether a problem with Employee's neck could be causally related to the work accident." The Court ruled that there was not enough evidence to make the causal connection between the work accident and the neck injuries complained of. [Mr. Morgan of our office represented the Employer.]

Rosado v. Star Enterprises, IAB Hearing No.: 870151 (11/9/04): The claimant filed a Petition to Determine Additional Compensation Due seeking recurrence of disability benefits for treatment of avascular necrosis of the right hip. The underlying work injury of 7/7/99 involved a slip-and-fall related to the low back and right leg. Dr. D'Alonzo testified that steroid injections from 1999 to 2000, administered for the compensable work injury, prompted the development of claimant's avascular necrosis. Dr. D'Alonzo agreed that the avascular necrosis can be idiopathic but that known risk factors include steroid use, such as injections as administered by Dr. Cucuzzella. The doctor believed that the three series of injections caused a significant amount of intrathecal steroid to be absorbed into the claimant's bloodstream to produce systemic side effects. Dr. D'Alonzo further believed that the claimant probably received some additional intravenous steroid around the time of his previous surgeries. Dr. Kalamchi testified on behalf of the employer and opined that causation of the avascular necrosis in the claimant's right hip was idiopathic rather than relating to epidural injections. Finding the claimant's medical evidence to be more credible than that of the Employer, the Board awarded benefits.

Walton v. Radiology Associates, IAB Hearing No.: 1230425 (11/15/04): The Industrial Accident Board denied the claimant's Petition alleging recurrence of total disability due to a right femur fracture which the claimant argued resulted from use of a cane attributable to a prior acknowledged work-related left groin strain. The claimant alleged that she used the cane to walk from May - December 2003 following the work accident. In so ruling for the Employer, the Board rejected Dr. King's opinion that the right femur fracture resulted from the use of a cane/walker as well as the use of a steroid/Prednisone which the claimant was taking for a non-work-related asthma condition, and accepted the testimony of Dr. Case, who stated that it was impossible to relate the claimant's right femur fracture to her left groin strain.

DuPont v. Clayville, C.A. No. 04A-07-001 (November 16, 2004): The Court affirmed the Industrial Accident Board's Decision awarding the claimant Worker's Compensation benefits due to his exposure to asbestos at the DuPont Nylon Plant from 1961 through 1998 which resulted in the development of cancer. The claimant smoked cigarettes from the age of 21 through his retirement in 1998 and his exposure to asbestos ended sometime in the 1990s. The claimant's physicians attributed his development of cancer to his asbestos exposure; the Employer's medical expert said that the cancer is not attributable to asbestos exposure, but rather tobacco consumption. The Court noted that the Board was free to consider and accept the testimony of the plaintiff's experts rather than those of the defendant when such experts are in disagreement.

Disfigurement:

Kee v. S.I.P. of Delaware, DeFAX Case No. D61848 (IAB November 10, 2004): 375 weeks of disfigurement benefits were Awarded to the claimant for the amputation of several fingers on both hands. In determining the compensation, the Hearing Officer performed the Bagley analysis in setting forth the scale setting disfigurement Awards. Bagley requires that the Board determine the scale to be the greater of the standard scale 0 to 150 weeks, or 0 to the number of weeks for permanent impairment plus an additional 20%. In this case, the claimant received 144 weeks of permanent impairment to the left hand and 168 weeks of impairment to the right hand which resulted in a disfigurement Award scale of 0 to 173 weeks for the left hand and 0 to 202 weeks for the right hand. The Hearing Officer proceeded to award the claimant the maximum disfigurement allowable for each hand.

Termination of Total Disability:

Weathersby v. The Chimes, Inc., DeFAX Case No. D61845 (IAB September 14, 2004): The Board concluded that the claimant was no longer totally disabled and granted a Termination Petition accepting the employer's medical witness' opinion over that of the claimant's treating physician. The defense examining orthopedic surgeon, Dr. Riederman, testified that the claimant was capable of sedentary duty work with restrictions. The claimant's treating orthopedic surgeon, Dr. Katz, stated that the claimant was unable to work pending the results of a Functional Capacities Evaluation (FCE). The FCE did not take place, however, because it was not approved by the insurance carrier. As Dr. Katz was not committed as to his opinion for return to work capability subject to the FCE, the Board relied upon the opinions of Dr. Riederman. It was also noted that Dr. Katz had released the claimant to work previously but changed his mind based upon a misunderstanding with the claimant as to whether or not she actually attempted to return to work. Accordingly, Dr. Katz's opinion did not appear to be credible to the Board. Notwithstanding the above, the Board stated that the claimant had the right to rely upon her treating physician's advice not to work and therefore granted the Petition through the date of Hearing, 9/2/04. Given Dr. Riederman's

restrictions, the Board awarded the claimant partial disability based upon a Job Survey Investigation effective 9/2/04.

Medical/Chiropractic Expenses:

Hernandez v. Boston Market, Inc., DeFAX Case No. D61914 (Del. Super. 1/26/05): The Court found that the claimant was not entitled to compensation for palliative chiropractic treatment because claimant would have obtained similar relief from simple home remedies. The Industrial Accident Board was convinced by the Employer's medical expert, Dr. Meyers, who stated that while chiropractic treatment was initially reasonable, the claimant had received the maximum therapeutic benefit and that the disputed treatment was merely palliative. The Board determined that over-the-counter medicines and applied heat were alternatives to chiropractic treatment and denied the claimant compensation. The Court affirmed the Board's Decision.

Permanent Impairment:

Tamara Kelley v. Christiana Care Health Services, IAB Hearing No.: 1219308 (2/7/05): The Board found Dr. Stephens' opinion on behalf of the Employer more persuasive than that of Dr. Rodgers in rating permanent impairment to the lumbar spine. The claimant alleged 9% impairment to the low back based upon Dr. Rodgers' report placing the claimant into DRE Category II. Dr. Stephens stated that the claimant had a normal physical examination and diagnostic studies revealed no significant anatomic findings, neurological problems, or radiculopathy which placed the claimant in DRE Category I. The Board found that Dr. Rodgers' 9% rating was out of proportion to the loss of use based upon the claimant's work accident, nature of injury of lumbosacral strain, and continuing symptomatology. The Board also rejected the claimant's request for medical treatment expenses, agreeing with Dr. Stephens that the claimant sustained a lumbar strain which is a short-term injury that generally heals within no more than 3 months. The Board found that chiropractic treatment provided more than 2 years after the injury was no longer reasonable or necessary. Dr. Gondolfo, chiropractor, testified as to the continuing chiropractic care. [Ms. Newill of our office represented the Employer.]

Kathleen Rinarelli v. Christiana Care Health Services, IAB Hearing No.: 1206220 (2/14/05): The claimant filed a Petition alleging 14% permanent impairment to the cervical spine and 15% to the lumbar spine resulting from a 2/15/02 work accident. The Employer conceded permanency at 7% to the lumbar spine, 3% of which is related to the 2002 accident and denied any permanency to the cervical spine. In ruling in favor of the Employer and against the claimant, the Board found Dr. Stephens' opinion on behalf of the Employer more persuasive than that of Dr. Rodgers on behalf of the claimant. Specifically, the Board rejected Dr. Rodgers' placement of the claimant in DRE Cervical Category II, holding that his opinion was out of proportion to the objective findings on physical examination and radicular symptomatology which was

not verified by EMG studies. The Board found that the claimant had a 7% impairment to the low back but did not apportion 4% to any pre-existing, non-work-related condition but rather the entire 7% to the work accident. [Ms. Newill of our office represented the Employer.]

Recurrence:

Sherrill Davis v. Bob Evans Farms Restaurants, IAB Hearing No.: 1152804 (1/21/05): The Hearing Officer denied the claimant's Petition alleging recurrence of total disability as of 8/26/04 and a payment of a medical bill which was produced 8 days prior to Hearing. In rejecting the claim for recurrence of total disability, the Hearing Officer noted that the claimant had no evidence of any worsening of condition since the claimant's Termination of total disability in January 2004. The Employer's medical expert, Dr. Townsend, had seen the claimant prior to and subsequent to the alleged recurrence and was able to compare findings. The claimant relied upon Dr. Bose, the treating neurosurgeon, who had not seen the claimant since her alleged recurrence. The Hearing Officer rejected the claimant's attempt to have medical records from family physicians allowing her to be considered disabled stating that expert witnesses can consider other doctors' records in forming their own opinion but they cannot in themselves be the basis for medical determination. The Hearing Officer also declined to award Dr. Bose's medical bill from the 11/29/04 examination since it was not presented for payment until 8 days prior to Hearing and prior to the expiration of the 30-Day Rule time frame in which the Employer has the opportunity to respond pursuant to Board Rule No. 4. [Ms. Newill of our office represented the Employer.]

Statute of Limitations/Notice Defense:

Smolka v. DaimlerChrysler Corporation, C.A. No. 03A-04-001 (July 13, 2004): The Court affirmed the Decision of the Industrial Accident Board to deny the claimant's Petition for Worker's Compensation benefits because the claimant did not comply with the 6-month notice requirements of 19 Del. C. § 2342. Substantial evidence was presented to the Industrial Accident Board to support its determination that the claimant, as a reasonable person, should have recognized the "nature, seriousness, and probable compensable character" of his lung cancer allegedly caused by asbestos exposure prior to 2/20/02 and that the claimant's notice to the Employer of his disease on 8/20/02 was outside the 6-month notice requirement of 19 Del. C. § 2342. 19 Del. C. § 2342 states that "notice shall be given within a period of six months after the date on which the employee first acquired such knowledge that the disability was, could have been caused, or resulted in the employee's employment." The Industrial Accident Board found that 10/29/01 was the date that the clock began running on the claimant -- this is the date that the claimant's medical expert (at the request of claimant's counsel) found that the x-rays showed bilateral interstitial fibrosis and bilateral pleural plaques consistent with asbestosis.

Production of Documents:

Joshua Roberson v. The Wackenhut Corporation, IAB Hearing No.: 1166547: The Industrial Accident Board issued an Order compelling the claimant's attorney to respond to a Request for Production and to produce a medical authorization even though there was no Petition pending, as the claimant was receiving ongoing Worker's Compensation benefits. This Order upholds the proposition that a Petition need not be filed in order for the Employer/Carrier to obtain responses to Request for Production, so long as the claimant is receiving Worker's Compensation benefits. [Ms. Newill of our office represented the Employer.]

Parke v. Sunrise Assisted Living, Inc. Company, Del. Super., C.A. No. 04A-03-004 FSS, 1/31/05, Silverman, J.: The Superior Court affirmed the Board's granting of the Employer's Petition to Terminate partial disability benefits, rejecting the claimant's argument that the reliance upon the claimant's physician's, Dr. Thompson, records did not constitute substantial evidence. Of particular concern was the claimant's allegation that the Board erred when it allowed the Employer to rely upon medical records from the claimant's treating physicians which were not provided prior to Hearing. The claimant argued that her counsel did not have adequate time to review the records and address a response at Hearing. The Superior Court rejected the claimant's argument and stated that the claimant was not prejudiced or surprised by her own medical record and the Board's reliance upon Dr. Thompson's testimony was legally adequate to support its findings. [Ms. Newill of our office represented the Employer.]

Course and Scope:

Orench-Ramirez v. Key Communities of Delaware, IAB Hearing No.: 1250456 (11/19/04): The Employer opposed a Petition to Determine Compensation Due on the grounds that the claimant's injuries resulted from horseplay, thus taking the claim outside of the course and scope of employment. The Board agreed with the Employer's position and denied benefits.

Death Benefits:

Estate of Charles Watts and Estate of Verna Watts v. Blue Hen Insulation, IAB Hearing No.: 1209205 (11/15/04): The Industrial Accident Board ruled that death benefits cease to be issued to a surviving spouse (or her Estate) who had passed away before she had exhausted 400 weeks of death benefits. The surviving spouse received death benefits following the death of Charles Watts, claimant, from work-related lung cancer (asbestosis). The Board relied upon 19 Del. C. § 2330(g) allowing the cessation of death benefits to a dependent who dies.

B. LIABILITY AND CASUALTY LAW:

Expert Opinion - Admissibility - Motor Vehicle Accidents - Police Officer Testimony

Lagola v. Thomas, Del. Supr., No. 566, 2003 (ORDER) (Ridgely, J., January 31, 2005): The Delaware Supreme Court reversed a 1 million dollar jury verdict for plaintiff, ruling that a police officer may not testify as to the "primary contributing circumstance" of an accident, unless the officer is qualified as an expert in accident reconstruction. Here, the officer was not an accident reconstruction expert and was permitted by the trial court to offer an opinion that the primary contributing cause of the accident was the defendant's excessive speed. A fact issue existed regarding whether or not the road was icy at the time of the incident. The Delaware Supreme Court observed that the officer was not qualified to state the offered opinion and that the opinion otherwise lacked a proper foundation pursuant to Delaware Rule of Evidence 701 & 702.

Verdicts - Zero Damages - Motor Vehicles

Dunn v. Riley, Del. Supr., No. 195, 2004 (ORDER) (Jacobs, J., December 1, 2004): The Delaware Supreme Court denied plaintiff a new trial, where jury found defendant negligent and awarded plaintiff zero damages, where plaintiff failed to conclusively establish that defendant's negligence was the cause of plaintiff's injuries. Plaintiff was in two separate accidents - 12/19/99 and 07/99. Plaintiff complained of similar neck and back problems after each accident. Plaintiff's expert, Dr. Senu-Oke issued two separate expert reports. The September 2000 report related plaintiff's injuries to the July 99 accident. In Dr. Senu-Oke's February 2001 report, he opined that plaintiff's injuries were caused by the 12/19/99 accident. Each report failed to mention the "other" accident. At trial, Dr. Senu-Oke was cross-examined on this glaring inconsistency. In Delaware, where a defendant's negligence is conclusively shown to be the cause of a plaintiff's injury, a zero verdict will be overturned on Appeal. Here, because plaintiff's own expert offered inconsistent reports on causation, the Supreme Court upheld the jury's zero verdict.

Dog Bite - Premises Guest Statute - Affirmative Defense

McCormick v. Hoddinott, Del. Super., C.A. No. 03C-11-256 (December 8, 2004) (Cooch, J.): A seven-and-a-half-year-old plaintiff was bitten on the face by defendant's dog while plaintiff was on defendant's property. The cause of the attack was disputed. Plaintiff claimed defendant violated Delaware's Dog Bite Statute, which imposes strict liability except in certain cases, such as whether the dog is being teased, tormented, or abused. Defendant raised Delaware's Premises Guest Statute 25 Del. C. §1501 and plaintiff's contributory negligence as affirmative defenses. In response, plaintiff moved to strike the contributory negligence on grounds that a child with a mental capacity less

than that of a seven-year-old is entitled to a rebuttable presumption that plaintiff was incapable of contributory negligence as a matter of law.

The Court noted that prior to the enactment of the Dog Bite Statute in 1996, plaintiff's case would have been barred by the Premises Guest Statute. Relying on earlier decisions, the Court ruled that the Dog Bite Statute was controlling and struck the Premises Guest Statute Affirmative Defense. Plaintiff next argued that plaintiff was incapable of contributory negligence because a behavioral disorder (ADHD) rendered her mental capacity less than that of a seven-year-old child (a fact supported by expert opinions). Defendant argued that only the child's chronological age could be considered. In Delaware, a child under seven is entitled to a rebuttable presumption that the child is incapable of negligence. Again relying on earlier decisions, the Court ruled that ultimately, whether a child older than seven, with a mental age of less than seven, was capable of negligence, is a fact specific determination and one that will be left for the jury. The Court did not strike the Affirmative Defense of Contributory Negligence.

Failure to Prosecute - Dismissal

DeJesus v. Thomas, Del. Super., C.A. 02C-12-057 PLA (Nov. 17, 2004) (Ableman, J.): Plaintiffs filed suit against defendant landlords on December 7, 2002, claiming plaintiff's husband suffered injuries when he fell on defendant's property and that his injuries were caused by defendant's negligence. Plaintiffs then moved to Ohio, failed to return their attorney's telephone calls, and refused to participate in the discovery process. On January 22, 2004, plaintiffs failed to appear for Arbitration. On May 5, 2004, the Court issued a Scheduling Order, requiring that plaintiff provide expert medical reports by September 30, 2004. Plaintiffs failed to do so. Defendants filed a Motion to Dismiss, which was heard on September 29, 2004. Plaintiffs' counsel indicated that plaintiffs had returned to Delaware and were prepared to pursue the case. The Court denied the Motion, but gave plaintiffs 30 days to produce an expert report and various medical records. Plaintiffs failed to do so. The Court concluded it had no choice but to dismiss the case because plaintiffs had ignored Court Orders, thus placing the Court's credibility at risk. The Court also noted the need to protect defendant from "being eternally entrapped in a case against a party who shows no willingness to ever bring it to a conclusion."

UM Limits - Reformation - Statutory Interpretation

Sammarco v. USAA Casualty Ins. Co., Del. Super., C.A. No. 04C-07-112 PLA (Oct. 20, 2004) (Ableman, J.): Plaintiff filed suit against defendant insurer seeking reformation of his UM policy limits, claiming that defendant failed to inform plaintiff that he could purchase UM coverage up to his bodily injury policy limit of \$300,000 per person, \$500,000 per incident. USAA agreed that it had failed to inform plaintiff of his right to purchase additional UM coverage, and that the policy should be reformed.

However, USAA argued that the policy could only be reformed up to \$100,000 per person \$300,000 per incident – the maximum amount of UM coverage that insurers are required to provide pursuant to 18 Del. C. §3902(b). The Court agreed, noting that, by its plain language, the Statute only required a maximum of \$100,000/\$300,000 in coverage. The Court dismissed plaintiff's claim, on condition that USAA reform the insured's limits to \$100,00 per person, \$300,000 per accident.

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