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MAINE BAR

TO: ALL DELAWARE CLAIMS SUPERVISORS¹

FROM: HECKLER & FRABIZZIO

DATE: APRIL 2009

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

A. WORKERS' COMPENSATION LAW:

CAUSAL RELATION

James R. Hamilton v. Finish Master, IAB Hearing Nos. 1322734 & 1322735 (1/30/09)

Claimant filed Petitions alleging work accidents on 3/20/07 and 3/20/08. Claimant testified that he worked for Employer since 2004 at a delivery job which entailed lifting heavy drums of paint. He injured himself on 3/20/07 while repetitively moving paint drums and was out of work for about two weeks because of back pain. On 3/20/08 he was again loading drums and felt back pain. Claimant testified he had no idea of an impending lay-off which took place on 3/21/08. Dr. Bandera testified on behalf of Claimant that he began treating Claimant on 4/21/08 and through 6/4/08 during which time Claimant had out-patient therapy and was totally disabled because of the 2007 back injury and March 2008 re-injury. Employer's witness testified that Claimant was advised in advance of the March 2008 lay-off. Employer's medical expert, Dr. Gelman, testified that Claimant had a history of back injury which was well documented and he did not agree that the medical records support total disability status. The Board concluded that Claimant failed to meet his burden of proof to

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

show that an accident occurred at work in either March 2007 or March 2008 that aggravated pre-existing back conditions. The Board noted that despite receiving medical treatment during this timeframe, there was no mention of claimant's ongoing symptoms being related to a work injury until April of 2008 with Dr. Bandera. The Board denied Claimant's Petitions stating it was not convinced that any pre-existing condition was aggravated or exacerbated by the alleged work incidents in question and that Dr. Bandera's testimony was not helpful because he was not privy to the bulk of the Claimant's past records prior to the Hearing. [Mr. Rimmer of our office represented the Employer/Carrier].

Ronnie L. Miller v. Lutheran Senior Services, IAB Hearing No. 1304441 (1/26/09)

Claimant filed a Petition alleging a right shoulder injury on 12/15/06. Claimant testified that he did not "punch in" to work on the day of the alleged accident and that there were many times when he would just come in to help out briefly and without pay. Employer's witness testified that employees were expected to clock in when they worked and that there were no "volunteer" paid employees. Employer did not learn of the alleged December 2006 accident until May 2007. Employer noted that Claimant did work a lot of hours but there was no evidence that he worked on the day of the alleged work accident. The Board denied Claimant's Petition in its entirety finding that he did not meet his burden of proof to show that he injured himself at work on the day in question, and that his injury could have occurred without the necessity of a work accident for a trigger. [Ms. Ward of our office represented the Employer/Carrier].

DISFIGUREMENT

Joy Melcher v. Beebe Medical Center, IAB Hearing No. 1191040 (6/9/08)

Claimant awarded 21 weeks of benefits for nine inches of scarring to the neck; there is no award allowed for claimed postural abnormality.

Young v. Universal Forest Products, DeFAX Case No. D63513 (2/3/09)

Claimant awarded 30 weeks of benefits as a result of scars on his lips and three lost teeth.

FORFEITURE OF BENEFITS

Samuel J. Colvin v. Purdue Farms, Inc., IAB Hearing No. 1310864 (1/8/09)

Claimant alleged a 10/07 back injury while working for Employer. Employer did not question the back injury but defended on the basis that claimant forfeited his right to benefits pursuant to §2353(b) and (d) based on deliberate and reckless indifference to danger. Prior to being hired by Employer in 9/07, Claimant was under the care for many years of Dr. Fried for multiple conditions, to include back pain and spasm, and Dr. Fried repeatedly recommended and advised Claimant to work in a modified duty capacity. Even in Fall 2007

when Claimant was hired, Dr. Fried noted in his records that he doubted Claimant would be able to handle the full-duty job. The Board found that Claimant forfeited his right to benefits because he was injured due to his deliberate and reckless indifference to danger of re-injury when he knowingly failed to report prior back problems to Purdue, even when specifically questioned about the subject during his post-hire medical evaluation, and when he knowingly ignored his doctor's recommendation to work in a light-duty capacity. [Mr. Gilbert of our office represented the Employer/Carrier].

PERMANENT IMPAIRMENT

Nabor Santos v. Citisteel USA, Inc., IAB Hearing No. 1301901 (2/27/09)

Claimant filed a Petition alleging 10% permanent impairment to the right lower extremity as determined by Dr. Rodgers based on the *AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition*. Employer maintained that Claimant's permanency is one percent based on the *Sixth Edition of the Guides*. The parties submit Memoranda of Law regarding whether the Fifth or Sixth Edition of *the Guides* should be utilized in determining Claimant's permanent impairment. The Hearing Officer noted that in the absence of any case law or statutory authority to mandate which version of *the Guides* is preferable, the Board cannot either mandate or prohibit use of any specific edition of *the Guides*. The Hearing Officer found Dr. Rodgers' to be more persuasive not based on the fact that he utilized the Fifth Edition but because, in each case, the specific question for the Board to consider is how much weight should be given to the doctor's testimony.

Richard L. Severance v. City of Wilmington, IAB Hearing No. 1261697 (1/28/09)

Claimant filed a Petition alleging permanent impairment due to loss of taste. The Hearing Officer accepted the opinion of the Employer's medical expert, Dr. Medford, that the claimant did not have a loss of taste because he had normal testing for taste, to include sweet, sour, bitter and salty functions, but that he did have a loss of flavor (inability to distinguish the taste of any particular food). However, the Hearing Officer ruled that loss of flavor was really a loss of the olfaction function -- smell -- not taste, and since the claimant had already been compensated for a 90% loss of smell due to multiple sinus surgeries there was no separate permanency award for loss of taste for failure to distinguish flavors. [Mr. Frabizzio of our office represented the Employer/Carrier]

Angela Williams v. Vitas Healthcare Corp., IAB Hearing No. 1300778 (3/27/09)

Claimant filed a Petition alleging 6% permanent impairment to the lumbar spine in accordance with Dr. Bandera's evaluation. Employer's medical expert, Dr. Stephens, testified that his physical examination of the claimant was normal and he thought she sustained a lumbar strain as a result of the work accident which went on to heal normally and not result in permanent impairment. Claimant testified that she had good days and bad days with her back pain and that she was having a good day when she reported for the examination of Dr.

Stephens. Noting that each medical expert examined Claimant only one time and for the purpose of a permanency rating, the Board accepted the testimony of Dr. Stephens over that of Dr. Bandera because his findings were more consistent with the findings of the initial treating physicians and his examination of the claimant was more recent than that of Dr. Bandera. The Board determined that the claimant did not sustain any permanent impairment. [Mr. Morgan of our office represented the Employer/Carrier].

TERMINATION OF BENEFITS

Escobar v. Concrete Walls, Inc., DeFAX Case No. D63566 (2/17/09)

Employer filed a Termination Petition to end total disability benefit entitlement based on the opinion of its medical expert, Dr. Case, who testified that Claimant was capable of returning to work without restriction. By the time of the Hearing, the parties agreed that Claimant was no longer totally disabled and was, in fact, back to work with another employer so that the issue was entitlement to partial disability. Claimant's treating physician, Dr. Bandera, testified that Claimant was involved in a step-by-step return to work treatment plan and made a slow recovery during the work-hardening program. Dr. Bandera and Claimant each testified that Claimant was told he could return to work modified duty but not back to his former job because the work was too heavy and so Claimant found a lower paying job with another employer. The Board accepted the opinion of Dr. Case over that of Dr. Bandera and concluded that Claimant was capable of full-time work without restriction as of the date of the Hearing. Nonetheless, the Board believed that it was proper to apply the rationale set forth in Gilliard-Belfast v. Wendy's, Inc. and ruled that Claimant was entitled to partial disability until either the date that Dr. Bandera released him to regular duty work or the date of the Decision, whichever occurred first, because Claimant should not be put in a position of having to choose between disobeying the doctor's work restriction, or obeying it and losing compensation.

B. LIABILITY AND CASUALTY LAW:

DEFENSE AND INDEMNITY/GENERAL LIABILITY INSURANCE POLICY/ ASSAULT AND BATTERY EXCLUSION

Regis Ins. Co. v. Lobby House, Inc., DeFAX Case No. D63568 (Del. Super., 3/20/09), Vaughn, J.

A fight between patrons took place in Defendant's bar/restaurant and one of the involved patrons filed suit against bar owners alleging that owners and employees were negligent in various ways, including taking no action to intervene in the fight, protect patrons or contact the police. Plaintiff-Insurer had a multi-peril general liability policy to Defendant and brought a Declaratory Judgment seeking a Judgment stating that it had no duty to defend or indemnify Defendant in the underlying personal injury suit relying on the policy's assault

and battery exclusion. The policy's exclusion for assault and battery provided that Plaintiff is under no duty to defend or indemnify an Insured in any action or proceeding alleging the following causes of action and damages: "(1) assault and battery or any act or omission in connection with the prevention, suppression or results of such acts; (2) harmful or offensive contacts between or among two or more persons; (3) apprehension of harmful or offensive contact between or among two or more persons; (4) threats by words or deeds." The Court determined that suing-patron's claims clearly arose from circumstances falling within the exclusion and granted Plaintiff-Insurer's Motion for Summary Judgment.

NEGLIGENCE/ASBESTOS EXPOSURE/FAILURE TO WARN

Lillian Riedel v. ICI America's, Inc., #156, 2008 (Del. Supr. 2/4/09)

Plaintiff brought a negligence action in Superior Court alleging that her husband's Employer of nearly 30 years, ICI America's, Inc., failed to prevent her husband from taking asbestos home on his clothing and failed to warn her of the dangers of asbestos exposure proximately causing her to develop asbestosis. ICI moved for Summary Judgment which the Trial Judge granted on the basis that ICI and Plaintiff did not share a legally significant relationship that would create a duty ICI owed to her. The Supreme Court affirmed the grant of Summary Judgment by the Trial Court finding that for Plaintiff to prevail in her negligence action she needed to establish that: "ICI owed her a duty of care; ICI breached that duty; and ICI's breach proximately caused [Plaintiff's] injury." Plaintiff argued that she and ICI had a legally significant relationship and that ICI recognized that an employer has a relationship with its employees' immediate family members when it published a manual for the benefit of employees and their families in 1966 and that ICI also recognized this relationship by providing health and benefits to their employees and their employees' spouses and children. ICI argued that it did not share a legally significant relationship with Plaintiff, wife of one of its employees. In affirming the Trial Court's grant of ICI's Motion for Summary Judgment, the Court found that ICI's occasional publication of a newsletter providing tips for its employees and their families to stay safe at home created no legally significant relationship between Plaintiff and ICI.

NEGLIGENCE/CONTRIBUTORY NEGLIGENCE/APPLICABLE MARYLAND LAW

Yoder v. Delmarva Power & Light Co., DeFAX Case No. D63510 (Del. Super., 11/26/08), Vaughn, J.

Plaintiff, a Delaware resident, was a self-employed laborer working in Maryland when he was positioned on an aluminum ladder and, while using a paint roller attached to an aluminum extension pole, the pole came into contact with a high voltage electrical wire with current traveling through Claimant who fell from the ladder onto the cement below with resulting severe injuries. Plaintiff brought a negligence action against the manufacturer of the extension pole and Delmarva Power & Light Company. Defendants moved for Summary Judgment arguing that Maryland law applied, Claimant was contributory negligent and,

under Maryland law, contributory negligence is an absolute bar to recovery in a negligence case. The Court granted Defendants' Motion for Summary Judgment based upon an interpretation of Maryland law and finding that Claimant failed to take reasonable precautions to protect himself when he disregarded a clear, conspicuous and easily understandable warning on the extension pole and placed the ladder near an unmistakable nest of electrical wires in plain view.

JWM/mar/445951