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*DELAWARE AND PENNSYLVANIA BAR
*PENNSYLVANIA BAR ONLY

TO: ALL DELAWARE CLAIMS SUPERVISORS¹

FROM: HECKLER & FRABIZZIO

DATE: JUNE 13, 2005

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

A. WORKERS' COMPENSATION LAW:

Average Weekly Wage:

Lisa Parrish v. Petco Animal Supplies Inc., IAB Hearing No. 1259385 (4/29/05):
The Industrial Accident Board held that the average weekly wage for a pet groomer for Petco should be calculated at her hourly rate of pay multiplied by the average work week of the employer. Although the claimant received compensation based upon \$7.00 per hour or a 50% commission, whichever was more, the Board did not believe that the claimant's average weekly wage should be based upon her average of the six months of an "output employee." Instead, the Board determined that the employer's work week was 24 hours per week (3 days at 8 hours per day) multiplied by the hourly rate of pay of \$7.00. The Board noted the Superior Court case of Hacker stating that the average

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

work week can be less than 40 hours when the job is inherently part-time. [Ms. Ward of our office represented the Employer.]

Causation:

Rosado v. Star Enterprises, DeFAX Case No. D61882 (IAB Nov. 23, 2004): The Industrial Accident Board awarded the claimant benefits to include total disability and medical treatment expenses following a total hip replacement surgery where the medical evidence suggested that the claimant's use of steroid injections administered for work related problems to his back caused avascular necrosis in his hip. The Board accepted the testimony of the treating physician, Dr. D'Alonzo, over that of the employer's medical witness, Dr. Kalamchi, as to the consequence of the steroid injections to the low back causing the development of avascular necrosis. Dr. Kalamchi's opinion that the avascular necrosis was idiopathic was rejected.

Pye v. Vertical Blind Factory, DeFAX Case No. D62002 (IAB March 1, 2005): Although the claimant did not receive treatment for neck pain immediately after her work accident, the Industrial Accident Board found that "but for" the work accident, she would not have demonstrated her current neck symptoms. The Board noted that the claimant was injured on 12/29/00 with an acknowledged injury to the low back and resulting permanent impairment being paid. In 2004, the claimant filed a Petition for additional compensation due for neck injuries, not back injuries. The treating pain management specialist, Dr. Falco, testified that the claimant's neck complaints were related to the original work accident. The defense examining physician, Dr. Kamali, testified that if the accident had caused the claimant's neck injury, she would have had raised cervical complaints within the first month. However, on cross-examination, medical records were presented to Dr. Kamali referencing pain in the posterior portion of her neck in February 2001. Dr. Kamali then conceded that such information would change his opinion. The Board also noted that the claimant denied ever feeling "symptom-free" to the neck.

Proetzel v. Comcast Cable, IAB Hearing No. 1253620 (3/28/05): The Board adopted the opinion of the defense medical expert, Dr. Stephens, on causation of alleged injury to the lumbar spine. The Board held that a three-month delay in developing/reporting symptoms represented a "significant and unreasonable time period for the pre-existing degenerative condition to have been triggered or causally aggravated by the work accident." The medical records supported the claimant's failure to mention low back complaints for three months and there was no history of early radicular complaints. During that three-month period, claimant continued to perform his regular field installation communication duties, which included lifting and carrying weights over 50 lbs. [Mr. Frabizzio of our office represented the Employer.]

Thomas Baldridge v. Potts Welding & Boiler Repair, IAB Hearing No. 1229533 (4/19/05): The Hearing Officer ruled that the claimant's total disability from work and

medical treatment expenses obtained in 2004 for back complaints were not causally related to either an 8/17/01 work accident or a 12/9/02 work accident while employed for Potts Welding & Boiler Repair. In so holding, the Hearing Officer relied upon the testimony of Dr. Townsend, the defense medical neurologist, over Dr. Yalamanchili, the treating neurosurgeon. The Hearing Officer found the claimant's testimony as to continuing symptomatology from 2002 to be not credible in view of the absence of medical treatment to the low back for a period greater than a year. Medical records obtained during 2003 revealed treatment for work conditions unrelated to the back without history of back problems. Also, the medical records indicated the claimant reported an onset of low back pain in connection with hay baling activities performed at home on his 5-acre horse farm. [Ms. Newill of our office represented the Employer.]

Defense Medical Evaluations:

Johnson v. State of Delaware/Parkview Nursing Center, IAB Hearing No. 1245400 (3/1/05): The Industrial Accident Board denied the employer's application for a credit against future benefits for the claimant's failure to attend a Defense Medical Examination. Specifically, the Board stated that while they have the power to award such costs, there would have to be a finding of bad faith.

Employee/Independent Contractor:

Cain v. High Vue Logging, Inc., DeFAX Case No. D62029 (IAB March 31, 2005): The Industrial Accident Board declared an expert tree climber an independent contractor, not an employee, because of the factors in the manner in which the claimant performed work, to include having to provide his own specialty tools, being paid on an hourly basis with no taxes or benefits being withheld, being hired on an as-needed basis without a set lunch break or set time for the end of the day. The most important factor was the lack of control which the alleged employer, High Vue, had over the manner in which the claimant performed work. As a consequence, the alleged work accident was held not to be compensable under Worker's Compensation law.

Disfigurement:

Akers v. Ogden, DeFAX Case No. D62024 (IAB June 25, 2004): The Board awarded 16 weeks of benefits for an irregular shaped scar, indented and lighter in color than the claimant's normal skin. The Board noted the scar was particularly visible and offensive but not as severe as a burn scar or an amputation.

David Miller v. Daimler Chrysler, IAB Hearing No. 1232674 (1/27/05): A tattoo on a claimant's left upper extremity did not bar an Award for disfigurement for a small surgical scar. The Board awarded three weeks of benefits.

Lanham v. Garrison Lake Golf Course, DeFAX Case No. D62003 (IAB March 2, 2005): The Board awarded 10 weeks of benefits for a scar on his forehead shaped as a "Y" notwithstanding the fact that he changed his hairstyle to cover the scar. The claimant testified that the change in hairstyle was because of his embarrassment of the scar. The scar was approximately one and one quarter inches in width, three-quarters of an inch in length and slightly darker than the rest of the claimant's skin. [Ms. Newill of our office represented the Employer.]

Emmitt DeAscanis v. DeAscanis Masonry Inc., IAB Hearing No. 1220338 (3/22/05): The Board awarded 50 weeks disfigurement for claimant's Tracheostomy and Tracheostomy tube, 50 weeks for claimant's gastrostomy and PEG Tube, and 50 weeks for a Foley catheter tube as it was attached and visible on the claimant's left leg. The Board denied disfigurement benefits for the inability to walk and the inability to swallow as such benefits are better included as permanent impairment.

Medical Expenses:

Thomas v. AIG, DeFAX Case No. D61023 (IAB March 7, 2005): The claimant's Petition for medical treatment expenses was denied for failing to provide adequate evidence that such expenses were reasonable and necessary for work related problems. Specifically, the claimant, who was unrepresented by counsel, failed to provide expert medical testimony in support of his Petition to rebut the testimony of the employer's expert, Dr. Case, that claimant had a relatively normal examination and that no further active medical treatment was required. [Mr. Morgan of our office represented the Employer.]

Navert v. Superior Electric Service, IAB Hearing No. 1198254 (3/11/05). The Board held that VAX-D injection therapy (series of 24 injections at \$400.00 per injection) was reasonable and related treatment. The treatment was administered by chiropractor, Dr. Cammarata, and was supported through testimony of Dr. Falco, pain management expert, on behalf of the claimant. The opinion of the employer's expert, Dr. Stephens, was rejected. Dr. Stephens stated that he had learned "only a little" about the procedure and cited no medical studies critical of the procedure.

Mental Injury:

Englebrake v. CSI Enterprises, DeFAX Case No. D61898 (Del. Super. Dec. 22, 2004) Stokes, J.: The Superior Court upheld the Board's denial of benefits due to mental health problems/injuries. This claimant alleged that approximately 10 - 12 months after the work related accident in which she sustained physical injuries, she began suffering anxiety attacks. In relying upon the employer's expert psychiatrist, Dr. Kaye, the Board held that the claimant's anxiety was more likely due to marital problems, childhood abuse issues, and depression, not the work accident.

Occupational Disease:

DelPizzo v. Agilent Technologies, DeFAX Case No. D61880 (Del. Super. Nov. 16, 2004) Cooch, R. J.: In interpreting the "last injurious exposure rule," the Superior Court held that the last employer means the last in-state employer subject to the jurisdiction of the Worker's Compensation Act of Delaware. In so ruling, the Superior Court reversed the Industrial Accident Board's dismissal of the Petition finding that the last aggregate exposure occurred in Pennsylvania, not Delaware. The Superior Court explained that the last injurious exposure rule is not a jurisdictional rule to bar recovery but a way for the Board to determine which employer or insurance carrier was "on risk" for the claimant's injuries. The Court cited 34 A.L.R. 4th 958 (1984) stating that the last exposure with an employer subject to the jurisdiction of the Compensation Act must be taken into consideration to resolve the out-of-state employer problem in which the issue of the "last" unreachable employer is no longer an issue.

Sobolak, Sr. v. Potts Welding & Boiler Repair, IAB Hearing No. 1258092 (5/16/05): The Board denied the claimant's Petition in an occupational disease case. The claimant alleged that chronic exposure to chemicals, including benzene and other petrochemicals (the claimant never really clearly delineated the specific chemical), in the course of refurbishing heat exchangers at work caused his non-Hodgkin's lymphoma. The Employer denied chemical exposure in the course of employment other than occasional, limited amounts of toluene used as a degreaser. The claimant's expert witness never testified to any causal relationship between toluene and non-Hodgkin's lymphoma. After weighing the evidence presented, the Board concluded that the claimant failed to present substantial competent evidence of exposure to benzene or other petrochemicals in the workplace, except for toluene, and since the claimant's expert witness never offered any opinion connecting the claimant's use of toluene to his disease, he had not met his burden of proof. The Board concluded that only anecdotal information provided by the claimant about the chemicals he was exposed to while working on the heat exchangers was simply not enough for the Board to move forward and consider causal connection to the claimant's lymphoma. There was an absence of corroborating information from documents, data, or testimony from any witnesses, as well as conflicts in the testimony that was given between the claimant and the witnesses from Potts Welding with regard to the extent of exposure at the plant. Because the claimant did not prove that he was exposed to any chemicals to cause any harmful disease, the Board did not rule on the issue of whether there is any causal link between the use of benzene and other petrochemical solvents and non-Hodgkin's lymphoma. [Mr. Frabizzio of our office represented the Employer].

Permanent Impairment:

Kelley v. Christiana Care Health Services, DeFAX Case No. D61979 (IAB February 7, 2005): Although the claimant continued to have some symptoms in her low

back, the testimony of the employer's medical expert, Dr. Stephens, was found to be more persuasive than the claimant's expert, Dr. Rodgers, in denying the claimant's Petition for 9% permanent impairment. The Board agreed that the claimant fell into DRE Category I for the evaluation of lumbar permanency which provides no permanent impairment rating. [Ms. Newill of our office represented the Employer.]

Padilla v. NVF Corp., DeFAX Case No. D62004 (IAB March 30, 2005): The claimant was awarded 15% permanent impairment to the left shoulder relying upon Dr. Rodgers' testimony on behalf of the claimant over that of Dr. Gelman on behalf of the employer/carrier. The Board found Dr. Rodgers' use of the AMA Guidelines were more accurate than Dr. Gelman's as to the range of motion findings.

Recurrence/New Injury:

Zaimes v. State of Delaware/Adam Zaimes v. Prime Care Medical Transport, IAB Hearing Nos. 1236092 and 1250423 (9/24/04): The Industrial Accident Board relied upon the claimant's testimony that a stretcher which he lifted unexpectedly and suddenly drifted requiring him to recover his grip thereby sustaining further injury to his back sufficient to establish a new injury/accident. In so holding, the Board stated that a deviation from normal job duties such as an unexpected or sudden lunge or activity would constitute an "untoward event" for purposes of shifting liability to a subsequent carrier.

Smith v. Kent Construction Co., DeFAX Case No. D61881 (IAB Nov. 9, 2004): The Board found that the claimant did not sustain a new injury/accident, but rather a recurrence of a 1999 accident while employed with Kent Construction Company in awarding total disability and medical/surgical treatment expenses. In so holding, the Industrial Accident Board relied upon the claimant's treating physicians, Dr. DuShuttle, Dr. Godfrey, and Dr. Venkataramana in support of the issue of recurrence in total disability. At the time of the alleged recurrence, the claimant had returned to construction work and the allegation was that the claimant exceeded his restrictions resulting in a new injury/accident. The expert for the subsequent employer, Hopkins Contracting, Dr. Saltzman, stated that the claimant had a progressive back problem without any specific injury/accident. [Mr. Rimmer of our office represented employer Kent Construction Co.]

Res Judicata:

Wilson v. Acme Markets, Del. Super., C.A. No. 04A-08-006 PLA (April 21, 2005) (Ableman, J.): The Superior Court applied the doctrine of *res judicata* to bar the claimant's Petition to seek additional benefits following a prior Board Determination in which benefits were limited. The Superior Court noted that because the claimant failed to appeal the previous disability determination, such Order became final and thus bars the claimant's attempt to re-open. [Ms. Newill of our office represented the Employer.]

Statute of Limitations:

Brown v. State of Delaware, IAB Hearing No. 1256103 (5/4/05): The Board rejected the claimant's argument that the five year Statute of Limitations was tolled because there was not proper notice of the five year Statute of Limitations. The claimant relied upon 18 Del. C. § 3914 of the Insurance Code. In rejecting the claimant's argument, the Board noted that the claimant signed Final Receipts which noted that the claimant had the right within five years of the date of last payment to Petition for additional benefits. As the claimant did not file a Petition until six years after the last date on which benefits were paid, to include medical pay, it was barred by the Statute of Limitations.

Termination:

King v. James Malin Plumbing Inc., DeFAX Case No. D61879 (IAB Oct. 20, 2004): Employer was not entitled to terminate total disability benefits because the claimant had failed back syndrome and was unable to physically perform work. In so holding, the Board relied upon Dr. Bandera's testimony on behalf of the claimant over that of the employer's expert witness, Dr. Case. Dr. Bandera stated that the claimant was unable to work due to a nerve root impingement syndrome. Dr. Case testified that the claimant was capable of part-time sedentary work. Dr. Case conceded that the claimant could not return to his usual work as a plumber. The Board found that part-time sedentary work was not sufficient to warrant a termination of total disability in this case.

Williams v. E.I. duPont de Nemours & Co., Inc., DeFAX Case No. D61894 (IAB Dec. 6, 2004): In relying upon the objective results of recent pulmonary function testing which demonstrated severe limitation in functional capacity, the Board denied a Petition to Terminate stating that the claimant remained totally disabled. This claimant developed a compensable injury to the lungs as the result of exposure to silica dust while working at DuPont. The Board accepted the testimony of Dr. Patrick, pulmonologist, over that of Dr. Greenberg, stating that the claimant was totally disabled based upon inflammation in her lungs due to lymphedema resulting from exposure to the silica dust.

Loveless v. Bayhealth Medical Center, DeFAX Case No. D61987 (IAB Feb. 28, 2005): The Board allowed a Termination of total disability when both parties' experts, Dr. Keehn for the employer and Dr. Mavrakakis for the claimant, released the claimant for sedentary duty work. The claimant was awarded partial disability based upon the Labor Market Survey.

Greer v. Daimler Chrysler Corp., DeFAX Case No. D61986 (IAB March 3, 2005): The Board found that there was no change in circumstances since a 2003 ruling in which the claimant was held to be a displaced worker, to warrant a Termination of total

disability. Although the Board found that the claimant was physically capable of working within restrictions, it believed that the claimant remained a *prima facie* displaced worker based upon her limited education and no significant experience in the work force that qualifies her for work other than that of general laborer. The claimant was also noted to have other physical problems such as lymphoma and stress-related conditions which rendered employability questionable. Having found that the claimant was a *prima facie* displaced worker, the Board reviewed, but rejected, the Labor Market Survey for failure to timely produce the Survey and that the jobs in the Survey did not comply with the restrictions of Dr. Friedman, the doctor whom that Board relied upon regarding work capability.

Miller v. Layton Home, DeFAX Case No. D62022 (IAB March 14, 2005): The Board denied the employer/carrier's Petition to Terminate ongoing total disability benefits paid to the claimant after a low back injury occurring in 1992. The opinion of the employer's expert, Dr. Keehn, was rejected in favor of the treating physician, Dr. Falco. The Industrial Accident Board found that Dr. Keehn's testimony was confusing and unpersuasive in that he issued restrictions in 2002 which were considered permanent but changed those restrictions in 2004. If the 2002 restrictions remained applicable, many of the positions listed in the Job Survey Investigation would not have been appropriate. Dr. Falco testified that none of the job positions were able to be performed by the claimant.

French Morgan v. Danella Construction, DeFAX Case No. D62028 (IAB March 23, 2005): The Industrial Accident Board Terminated total disability benefits but awarded partial disability benefits at the same rate at which total disability was previously being paid because the Labor Market Survey was declared invalid for failing to take into consideration the claimant's restrictions or history in her educational background, electrical contracting business. Without the evidence and adequate return to work wage, the Board was unable to calculate a reduced earning capacity beyond the amount the claimant was presently receiving for total disability. The claimant was not a displaced worker given her educational/work background work capabilities and there was no dispute in her physical capability for work.

Termination of Partial Disability:

Burns v. Sirkin-Levin Dental Assocs., DeFAX Case No. D61988 (IAB March 7, 2005): The Board denied a Petition to Terminate partial disability benefits stating that the claimant's medical expert, Dr. Bandera, was better able to assess physical capabilities. Dr. Bandera testified that the claimant could not work more than 20 hours per week and as such could not perform full-time work. The claimant was a dental hygienist which required her to work with small instruments and stand while attending to patients. The claimant had been receiving partial disability benefits based upon returning to work at approximately 19 hours per week. Dr. Ger testified on behalf of the employer that the claimant was capable of full-time work without restriction.

B. LIABILITY AND CASUALTY LAW:

Evidence of Medical Bills - Admissibility - Special Damages

Rice v. The Chimes, Inc., Del. Super., C.A. No. 01-03-260 CLS (March 10, 2005) (Scott, J.): Plaintiff, received burn injuries while under the care of defendant. Bills for services received by plaintiff totaled at least \$960,000. Medicare and Medicaid discharged the bills through payments totaling \$119,000. The remainder was "written off" pursuant to the statutes and regulations governing the Medicare/Medicaid programs. Plaintiff attempted to introduce the full amount of the bills at trial, rather than the amount actually paid by Medicare/Medicaid. Defendant alleged that only those amounts actually paid were admissible. The Court, noting that the applicable statutes and regulations prohibited the providers from ever charging plaintiff for the "written off" amounts, ruled that only those amounts actually paid were admissible.

CGL Policy Exclusion for BI Caused by Owned Auto Enforceable

Scottsdale Indemnity Co. v. Lloyd et al., Del. Super., C.A. No. 04C-04-024 THG (January 21, 2005) (Graves, J.): In this declaratory judgement action, the Court upheld an automobile exclusion contained in a CGL policy. The case arose from a December 5, 2001 automobile accident involving a vehicle driven by Susan Whetstone, an employee of Scottsdale's insured Key Box, and owned by William Lloyd, another Key Box employee. Suit was filed by on behalf of those injured or killed in the accident. The Complaint alleged, that Lloyd had permitted Whetstone to use his auto in furtherance of Key Box's business interests, and that Key Box was liable under the doctrine of *respondeat superior*. Scottsdale attempted to avoid coverage, by relying on a provision in its policy excluding bodily injury arising out of the use of an automobile owned or operated by an insured. The Court agreed with Scottsdale, noting that automobile exclusions in general liability policies are enforceable. Key Box argued that plaintiffs had not proven that Whetstone and Lloyd were acting in the course and scope of Key Box's business at the time of the accident, and that the automobile exclusion might not apply. The Court rejected this argument as illogical. Plaintiff's only claim against Key Box was pursuant to the doctrine of *respondeat superior*. If Whetstone and Lloyd were not acting in the course and scope of Key Box' business, then plaintiff's claim would fail. Further, if Whetstone and Lloyd were not acting as employees of Key Box, there actions would not be covered under the Scottsdale policy in any event, even absent the automobile exclusion.

Declaratory Judgment - Additional Insured - Defense Costs

Consolidated Rail Corp. v. Liberty Mutual Ins. Co., Del. Super., C.A. No. 97C-10-001 CHT (March 16, 2005) (Toliver, J.): This declaratory judgment action arose from two wrongful death suits filed against Consolidated Rail Corp. ("Conrail") and James Julian,

Inc. Julian had contracted with the Delaware Department of Transportation (DelDOT) to perform certain improvements upon Delaware Route 15 in an area where Conrail had a right-of-way. During the course of construction, two motorists were killed when they collided with Conrail trains. Conrail filed cross-claims against Julian, alleging that it was entitled to contribution and indemnification due to (1) tortious behavior on the part of Julian and (2) Julian's failure to purchase "railroad protective public liability insurance" as required under its contract with DelDOT. Julian had purchased liability insurance, with Julian as the beneficiary, from Liberty Mutual. On April 30, 2004, the Court ruled that Conrail was not an "additional insured" under the Liberty Mutual policy. In its March 16, 2005 opinion, the Court ruled that, as potentially covered claims against Julian were present until the Court's April 30, 2004 decision, Liberty Mutual was required to pay Julian's defense costs until that date.

Mold Not Considered Pollutant - Cap on Damages Enforceable

McKnight v. USAA, Del. Super., C.A. No. 04C-09-134 SCD (March 22, 2005) (Del. PESCO, J.): Plaintiff's sought recovery for damage caused by mold under homeowner's policy. Policy capped damage caused by mold at \$4,500. Plaintiffs tried to circumvent cap by claiming that policy was ambiguous and that mold was a pollutant and therefore not subject to the cap. In support of plaintiff's contention, plaintiffs submitted documents from the Center for Disease Control regarding hazards associated with mold suggesting that mold was an irritant and contaminant. The Court noted that the policy clearly defined pollutants to include smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste and that by listing these pollutants, those not listed were necessarily excluded. The Court rejected the CDC information because it was not required to determine the issue since the language of the policy was not ambiguous. The Court refused to twist the words of the contract of insurance under the guise of interpreting the language. The mold cap was found to be not ambiguous.

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