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TO: ALL DELAWARE CLAIMS SUPERVISORS¹

FROM: HECKLER & FRABIZZIO

DATE: SEPTEMBER 2007

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

A. WORKERS' COMPENSATION LAW:

TERMINATION OF BENEFITS:

Melvin Phillips v. Delhaize America, Inc. T/A Food Lion, Del. Super., C.A. No. 06A-09001 (4/2/07).

Claimant failed to report for two medical examinations scheduled by Employer and also returned to work for Employer for nearly a week while on an open Agreement for total disability. Claimant refused to sign a Final Receipt concluding total disability benefit entitlement. A Legal Hearing was conducted by the Board on 8/16/06 pursuant to which the Board granted Employer's requests for sanctions as a result of the missed medical examinations and a Termination Order concluding total disability. On Appeal, citing due process concerns and the Administrative Procedures Act (APA) (19 Del.C. §2301A(d) and 29 Del.C. §10161), the Superior Court reversed the Board's Decision and remanded the case to the Board for the purpose of conducting an Evidentiary Hearing on whether Claimant consented to the termination of total disability by going back to

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

work. The Court found that the Board erred by not sending notice to the parties about what it intended to address during the Legal Hearing because of the case dispositive nature of the Termination Order. [Mr. Rimmer of our office represented the Employer/Carrier.]

Paula Cunningham v. Retailers Security & Investigation Group, Inc., IAB Hearing No. 1279917 (3/28/07).

Board granted Employer's Termination Petition, even though claimant testified that she thought she was not capable of returning to work, because the Board questioned the credibility of the claimant. Claimant injured her neck and low back in an acknowledged work accident during December 2005 and subsequently incurred further injury to her neck as a result of a March 2006 motor vehicle accident which occurred while she was receiving total disability benefits. The Board determined that the claimant was less than forthright when she reported for a defense medical examination wearing a neck brace which was prescribed to her as a result of the March 2006 motor vehicle accident and not mentioning the motor vehicle accident to the examining physician leaving the impression that the neck brace was prescribed to her as a result of the prior work accident. [Mr. Morgan of our office represented the Employer/Carrier.]

Gerald v. AETNA, Inc., De FAX Case Number D62679 (IAB: 9/9/06).

Accepting testimony of claimant's medical expert that claimant suffered from scapula inferior coracoid diskinesis (SICK scapula syndrome), the Board denied Employer's Petition to terminate partial disability benefits. Board agreed that claimant's condition is one that the medical community has only recently recognized. For treatment of the condition, the Board found that it was necessary for the claimant to be totally disabled.

Blankenship v. Walmart Stores, Inc., De FAX Case Number D62667 (IAB: 11/2/06).

The Board granted the Employer's Petition to Terminate total disability benefits after finding that the claimant, who had suffered a work related wrist injury, was able to return to work with restrictions. Dr. Grossinger testified for the Employer that the claimant was capable of returning to full-time work with restrictions on periods of standing and sitting, and limiting her to lifting no more than 5-lbs. with the right hand. Claimant worked as a Greeter for the Employer and Dr. Grossinger released her to return to her job. The store manager testified that the Greeter job remained available to the claimant but he agreed that the job description listed occasional lifting of up to 10-lbs. The claimant testified that her wrist was extremely painful and she did not believe she could return to work because she could not lift over 10-lbs. The Board concluded that the claimant was capable of returning to work as a Greeter because there was no evidence that claimant could not use her left hand for lifting occasionally up to 10-lbs.

MEDICAL EXPENSES - PAYMENT - HUFFMAN ACTION

Rawley v. J.J. White, Inc., De FAX Case Number D62683 (Del. Supr. En Banc, 12/15/06; revised 12/18/06) Ridgely, J.

The Delaware Supreme Court concluded that claimant's Huffman action was premature where Employer had not agreed to pay a specific medical expense and where claimant had not exhausted remedies under 19 Del.C. §2346. The Court noted that the General Assembly expressly anticipated that there may be disputes over the reasonableness of medical charges and that it created a process for the Board to resolve such disputes in §2346 and that a general agreement to pay for the expenses of a medical procedure does not preclude an employer from verifying a specific charge or disputing the reasonableness of the charge eventually submitted.

CAUSAL RELATION:

Maria Lara-Perez v. Perdue Farms, Inc., IAB Hearing No. 1291180 (4/17/07).

The Board denied Claimant's Petition ruling that she failed to establish the required causal connection between her alleged August 2005 work accident and her low back and leg condition. Claimant was not consistent regarding the mechanism of injury which was presented differently to multiple medical health care providers and through her testimony at the Board Hearing. The only medical expert to relate the injury to work stated that Claimant was injured moving a cart, which was not the history Claimant provided to the Board at the Hearing. The Board concluded that the pain which the claimant experienced was the result of a worsening degenerative condition rather than evidence of a work injury. [Mr. Frabizzio of our office represented the Employer/ Carrier.]

Burnett v. S & R Management, De FAX Case Number D62780 (IAB: 3/2/07).

Claimant filed two separate Petitions alleging low back injuries on April 3, 2006 and August 23, 2006. The Board found that the claimant lacked credibility and failed to prove the occurrence of either work accident noting that the claimant went to the emergency room on April 3, 2006 and complained of choking and breathing problems but no back problems.

Maria Klenk v. The Medical Center of Delaware, IAB Hearing No. 946781 (2/23/07).

The Board's Hearing Officer noted that a 1991 work accident was recognized as compensable but denied the claimant's 2006 Petition alleging recurrence of total disability, permanent impairment and medical/surgical expense benefit entitlement in a case where the claimant had lumbar spine fusion surgery performed during August 1996. The Hearing Officer accepted the medical testimony of the Employer's expert, Dr.

Edelsohn, over that of the claimant's medical experts, Dr. Davis, a neurosurgeon, and Dr. Rodgers, an occupational health physician. The Hearing Officer concluded that the 1996 back fusion surgery was unreasonable and unnecessary and constituted an "intervening event" which ended liability for the Employer for any consequences that resulted from the surgery including the recurrence of total disability and the permanent impairment alleged (67% impairment to the bladder and 16% increased permanent impairment to the lumbar spine over and above the 15% permanent impairment to the lumbar spine previously agreed upon as a result of the work accident and treatment prior to the 1996 surgery). [Ms. Newill of our office represented the Employer/Carrier.]

McMullen v. Hart to Hart Ambulance Service, Inc., IAB Hearing No. 1284177 (1/10/07).

The Board denied claimant's Petition alleging the happening of a specific work accident and resulting back injury and total disability benefit entitlement on the basis that the claimant lacked credibility and his testimony was inconsistent where the earliest available medical record following the alleged work accident was four days later and made no mention of a work accident but did mention that the claimant thought he might have a kidney problem. Claimant also testified that the medical records may have been inconsistent as to when he told various doctors that the work accident happened because he got confused as to which week the work accident happened, but the Board found this explanation not credible noting that it would be inconceivable that the claimant would confuse which week he was injured because his testimony was that the injury occurred on the last day of employment and before his employment was terminated. [Mr. Morgan of our office represented the Employer/Carrier.]

EMPLOYEE STATUS/EMPLOYEE INDEPENDENT CONTRACTOR:

Angelini v. ASA Transportation, De FAX Case Number D62791 (IAB: 3/19/07).

The Board found that the claimant was an employee, not an independent contractor, concluding that his signing an independent contractor agreement was outweighed by the factors the Board considered, including the control that the Employer exercised over claimant's work and the employment application the claimant was asked to complete.

MODIFICATION OF BENEFITS/OFFSET/CREDIT:

Guessford v. Atlantic Concrete, De FAX Case Number D62792 (IAB: 3/20/07).

The Board determined that an Employer is not entitled to a credit for unemployment compensation insurance benefits paid to a claimant who was also collecting partial disability benefits because there is no statutory authority to allow for such a credit. Citing 19 Del.C. §3313, the Board noted that unemployment benefits are reduced by any workers' compensation benefits received, however, there appears to be no comparable

provision of the Workers' Compensation Act reducing workers' compensation benefits by unemployment benefits received.

INTOXICATION DEFENSE:

Finocchiaro v. Domino's Pizza, Del. Super. C.A. No. 06A-05-003 (12/29/06).

The Board denied a claimant's Petition for benefits resulting from a motor vehicle accident on the basis of the testimony of the Employer's expert forensic pathologist who examined the medical records and concluded that the claimant's blood alcohol level at the time of the motor vehicle accident would have been about .135 rendering the claimant under the influence of alcohol and that his faculties would have been severely impaired at the time of the accident based upon the mixture of alcohol and opiates found in the blood. The doctor could not testify that the intoxication caused the accident and the claimant appealed. The Superior Courts rejected the claimant's argument that the Employer failed to show that the intoxication caused the accident finding that the Board had sufficient evidence to reach its conclusion and deny the Petition.

HORSEPLAY:

Grabowski v. Mangler, 2007 Del. LEXIS 301, (July 9, 2007).

A work place injury resulted from horseplay. Claimant applied for and received workers' compensation benefits and then filed a civil action against co-workers as a result of the same incident. The Superior Court noted that, in general, an employee who participates in horseplay may not recover workers' compensation benefits since the activity is outside the course and scope of employment; however, an employee not participating in horseplay may recover for injuries sustained as a result of another employee's horseplay. The Court granted co-workers summary judgment concluding that as the claimant was a non-participating victim he properly received workers' compensation insurance benefits, but he was precluded from maintaining the civil action against the co-employees because of the exclusive remedy provisions of 19 Del.C. §2304.

Claimant appealed and the Delaware Supreme Court held that the Superior Court erred in granting summary judgment because it failed to analyze, under the "Larson" test, whether co-workers' conduct was horseplay that was outside the course and scope of employment. The Court held that if horseplay was determined to be outside the course and scope of employment, then claimant was not prohibited by the exclusivity clause from bringing an action against co-workers as if they were third parties. The case was remanded for further proceedings.

DOCTOR'S "NO WORK" ORDER:

Smith v. James Thompson & Co., Del. Supr. #610, 2005 (2/28/07).

Claimant filed a Petition alleging recurrence of total disability two years after an acknowledged work accident because she received a note from her doctor indicating that she could not work even though her physical examination was, according to the doctor's testimony, the same as prior to the period of total disability alleged. The Board denied the Petition and the Superior Court affirmed. On Appeal, however, the Supreme Court found that the claimant would be entitled to total disability from the date of the note through the time of the Board's Hearing because she was relying on her doctor's opinion and there was no evidence that the doctor acted in bad faith in writing the disability note even though the doctor testified to the Board that the claimant was capable of working during the timeframe in question and not withstanding his own note to the contrary.

HUFFMAN SUITS AGAINST GOVERNMENTAL ENTITIES:

Arthur Turner v. City of Wilmington, Del. Supr. #480, 2006 (3/12/07).

Claimant filed an Huffman lawsuit in Superior Court against the City of Wilmington based upon a delay in the payment of workers' compensation benefits. The Superior Court granted Summary Judgment in favor of the City because the Wage Payment and Collection Act (WPCA) expressly exempts political subdivisions from damages under the Act. On Appeal to the Supreme Court, claimant argued that the City was not exempt because the claim was rooted in the Workers' Compensation Act. The Supreme Court affirmed the Superior Court's denial of Huffman damages finding that because the Workers' Compensation Act incorporates by reference the WPCA, any limitations of liabilities included in the WPCA are also incorporated, including the exclusion of municipalities.

DOCTRINE OF RES JUDICATA:

Paula Chavez v. David's Bridal, IAB Hearing No. 1266713 (2/1/07).

The Board dismissed the claimant's Petition for recurrence of total disability benefit entitlement from 5/2/06 and ongoing on the basis of the Doctrine of Res Judicata in that the same arguments had been addressed and decided by the parties in an August 2005 settlement agreement which barred all claims for total disability compensation arising after the date of such agreement between the parties. [Ms. Ward of our office represented the Employer/Carrier.]

STATUTE OF LIMITATIONS:

Joseph M. Levan v. Independence Mall, Inc., Del. Super., C.A. No. 06A-05-006, Johnston, J. (2/28/07).

The Superior Court considered claimant's Appeal of a Board Decision denying the payment of medical bills because the bills were submitted beyond the five year Statute of Limitations set forth in 19 Del.C. §2361(b). On Thursday, February 3, 2000 Employer issued and mailed a check to a medical service provider and this was the last payment made by the Employer relating to claimant. Claimant continued to receive medical treatment culminating in surgery on November 2, 2004. On February 9, 2005, claimant filed a Petition with the Board alleging entitlement to payment of medical expenses including those associated with the surgery. The Superior Court concluded that the Statute of Limitations shall not take effect until five years from the date of the making of the last payment and, in the absence of proof of the actual date of receipt of such payment, the date of receipt shall be deemed the date of mailing of the payment, plus three business days. As the Board found the date of mailing to be a Thursday, February 3, 2000, the Superior Court calculated the date of receipt to be February 7, 2000, the date of mailing plus three business days, so that the claimant's Petition filed on February 9, 2005, more than five years after February 7, 2000, is untimely. (This Decision was argued on Appeal before the Delaware Supreme Court on 9/5/07) [Mr. Batman of our office represented the Employer/Carrier.]

B. LIABILITY AND CASUALTY LAW:

PIP "STACKING":

Bowling v. Allstate, Del. Super. C.A. No. 05C-02-065 (10/30/06).

Plaintiff, who had personal PIP coverage with Allstate with a \$50,000.00 limit, was involved in an automobile accident and the car was owned by another individual with PIP coverage by Progressive. The Court determined that Allstate would be entitled to a credit for the \$25,000.00 already received by the Plaintiff from Progressive, but an additional \$25,000.00 in coverage would be applicable under the Allstate policy.

NOTICE REQUIREMENT FOR STATUTE OF LIMITATIONS

Harris v. Cochran Oil Co., Del. Super., C.A. No. 06C-02-245 (December 21, 2006).

In a claim for property damage and personal injury stemming from a delivery of fuel oil in September 2003 the Superior Court denied the Motion for Summary Judgment filed by Defendant oil company agreeing with Plaintiffs that the Defendant never sent notice of the Statute of Limitations, as required by 18 Del.C. §3914. The Court discussed the criteria set out in the statute: first, there must be notice of the claim to the "insurer";

second, the claim must be pursuant to a casualty insurance policy; third, the claim must be pending, and last, the insurer must have failed to give notice of the applicable period of limitation. In this case, the Court found that giving notice of the claim to the "agent" of the "insurer" was considered to be notice to the "insurer" triggering insurer's obligation to provide notice of the applicable period of limitations.

SOCIAL HOST AND TAVERN LIABILITY:

Shea v. Matassa, et al, Del. Supr. #211, 2006 (February 1, 2007).

Plaintiff's husband was killed by a drunk driver who had been at a dinner party where he had consumed alcohol and later went to a bar where he consumed more alcohol. Later that night he was involved in the accident which resulted in the death of the Plaintiff's husband. His blood alcohol level was .336. Plaintiff sued the host of the dinner party as well as the tavern. Previously Delaware had not recognized a cause of action under these circumstances and the Superior Court granted Summary Judgment to the social host and the tavern. The Delaware Supreme Court affirmed noting that these issues are to be left to the Legislature and the Court would not create a cause of action, despite the severe circumstances of this case.

JWM/mar/362683