

DCA Meeting – April 2, 2013

Civil Case Updates

Kingsley A. Simendinger v. National Union Fire Insurance Company v. Philadelphia Indemnity Insurance Company C.A. No. N10C-03-221 (March 2013)

The General Assembly has eliminated the ability of a workers' compensation insurer to assert a lien against the UIM payments made pursuant to the employer's UIM policy.

Two employees of Connections CSP, Inc. were involved in a fatal automobile collision during the course and scope of their employment. Employer, Connections, owned the vehicle and had purchased underinsured motorist insurance (UIM) for the vehicle and also workers' compensation insurance which covered the employees.

The UIM insurer paid policy limits of \$1,000,000 to the representatives of the decedents. The workers' compensation insurer paid \$38,711 to the representative of one decedent and \$31,754 to the representative of the other. The workers' compensation insurer then sought to enforce a lien upon the UIM payment equal to the workers' compensation benefits it paid. The UIM policy specifically excluded the direct or indirect benefit of any insurer or self-insurer under a workers' compensation claim. Notwithstanding this exclusion, the Superior Court enforced the lien based upon its interpretation of 19 Del. C. § 2363(e), which allows reimbursement of a workers' compensation carrier "from the third party liability insurer."

The Supreme Court reversed this ruling and remanded the case back to Superior Court. Citing their decision in Hurst v. Nationwide Mutual Insurance Co., which was decided after the 1993 amendments to the Workers' Compensation Act, the Court held that the General Assembly has eliminated the ability of a worker's compensation insurer to assert a lien against the UIM payments made pursuant to the employer's UIM policy. The Court reasoned that Section 2363(e) of the Workers' Compensation Act expressly limits reimbursement by providing that "reimbursement shall be had *only* from the third party liability insurer and shall be limited to the maximum amounts of the third party's liability insurance coverage awarded for the injured party, after the injured party's claim has been settled or otherwise resolved."

James Tsakalas v. Edward A. Hicks and James E. Veit C.A. No. 12C-04-270-JOH (February 2013)

Plaintiff's cases will not be dismissed for failure to produce a medical expert/opinion that the Defendant's negligence caused the Plaintiff's injury by the deadline set by the Court.

After a Plaintiff failed to produce an expert report relating the cause of Plaintiff's injuries to the negligence of the Defendants by the deadline set by the Court the Defendants filed a

Motion for Summary Judgment. Defendants argued that without an expert report relating the Defendant's negligence to the cause of the Plaintiff's injuries the Plaintiff cannot prove his case against Defendants and thus Plaintiff's case must be dismissed.

In denying Defendants' Motion for Summary Judgment the Court looked to the Drejka case along with the Christian case and its companion cases. Noting that dismissal is disfavored and pointing to the fact that Defense counsel never filed a Motion to Compel the production of these expert reports despite the fact that it was at the time three years after the accident the Court denied Defendants' Motion for Summary Judgment.

Workers' Compensation Case Updates

Estate of Philip Nelson v. State of Delaware, IAB No.: 1287588 (Jan. 9, 2013)

Compensation Rate for Death Benefits may be reduced if one of Claimant's children attains the age of majority and/or no longer qualifies as a "child" under §2330(c).

An employee (hereinafter "decedent") was involved in a fatal accident within the course and scope of his employment for the State of Delaware. The decedent was survived by a wife (hereinafter "Claimant") and two children. Claimant was entitled to death benefits at a compensation rate that was statutorily prescribed as 70% of decedent's average weekly wage.

The death benefits statute contains a schedule of benefits that varies depending on the number of surviving children. 19 Del. C. §2330(a). In this case, as there were two surviving children and a spouse, the compensation rate was 70% (one surviving child and a spouse would yield a compensation rate of 66 2/3% of the decedents average weekly wage under the statutory schedule). The statute defines a "child" as one who is either under eighteen years of age or under twenty-five years of age, but enrolled full-time in schooling. In the instant case, Employer argued that Claimant was no longer entitled to the 70% compensation rate as one of the surviving children no longer qualified as a "child" under the statute (one of the children had attained the age of majority and was no longer enrolled as a student). Accordingly, Employer argued that the appropriate compensation rate was 66 2/3% of the decedent's average weekly wage. Claimant argued that the 70% rate essentially vested at the time of death, and would continue for life, or until she remarried.

The Board agreed with the employer, holding that 19 Del. C. §2347 empowered the Board to review a compensation agreement, particularly with respect to a change in dependent status. Further, that the statute was unambiguous in its definition as to a qualifying "child" and that it was uncontested that Claimant no longer had two qualifying children as defined by the statute.

Accordingly, the Board modified the compensation agreement to reflect a compensation rate of 66 2/3% of the decedent's average weekly wage.

Francisco v. Natural House, Inc., IAB No.: 1349699 (Mar. 18, 2013)

Claimant's residency status is relevant "displaced worker" inquiry in the context of a termination petition.

Claimant sustained a compensable crush injury to his lower left arm. Employer sought to terminate ongoing total disability benefits. Claimant opposed the petition, claiming that he was a displaced worker.

The Board concluded that Claimant's residency status (undocumented) was relevant to the determination as to whether Claimant was a displaced worker. The Board correctly noted that undocumented status does not preclude a Claimant from receipt of workers' compensation benefits, but rather such status is instructive in a displaced worker analysis insofar that Claimant could obtain employment "but for" his or her undocumented status.

The Board first analyzed whether Claimant was a "prima facie" displaced worker (without reference to Claimant's residency status). The Board balanced the claimant's age and residual work capacity (he was under forty years of age and was released to work in a medium duty capacity) with his limited education, limited language skills and vocational history of that of a general laborer. Ultimately the Board was not convinced that claimant was a prima facie displaced worker.

The Board then determined that Claimant was not displaced as a result an unsuccessful job search. The Board did not find Claimant's limited attempts to look for a job to be a reasonable job search (Claimant made job search attempts on two occasions). Further Claimant's residency status precluded efforts by the Vocational Rehabilitation expert to place Claimant in a position as legal status was a requisite criterion for employment with respect to a number of jobs listed on Employer's labor market survey. The Board determined that Claimant could not show that he was unable to find employment because of his work injury and therefore was not a displaced worker.