Workers Compensation

Howell v. Wilson Masonry, 2014 WL 1003587 (Del. Mar. 7, 2014).

The Supreme Court affirms Superior Court decision agreeing with IAB determination that the claimant was not a displaced worker.

In 2009, the claimant/appellant, Kenneth Howell, injured his left ankle while working for Wilson Masonry. He subsequently received workers compensation benefits in the form of medical costs and temporary total disability benefits. The employer filed a petition to terminate the claimant's receipt of TTD in 2012, arguing that he was no longer totally disabled. The Industrial Accident Board agreed, and issued a written decision finding that Howell was only partially disabled and entitled to $5 per week in temporary partial disability benefits. Further, the Board concluded that Howell was not p*rima facially* displaced or actually displaced. On appeal, the Superior Court affirmed the Board's decision. The claimant then appealed to the Supreme Court, asserting that the Board erred in concluding that he was not a displaced worker and could return to employment in some capacity.

Howell was forty-eight years old with a high school education and no history of mental incapacity. His own doctor believed he was capable of returning to work in a sedentary capacity, although the claimant had previously worked as a bricklayer and never in a sedentary work environment. The Supreme Court found that there was substantial evidence to support the Board's conclusion that Howell was not a displaced worker. In particular, the Court noted that his physical restrictions, age and education did not render him totally disabled (prima facie displacement) and that his limited job search was unsuccessful for reasons unrelated to his physical injuries (actual displacement).

The claimant raised two final contentions regarding the Board's decision. First, he argued that the Board should be required to consider his lack of training or experience in a sedentary work environment when determining whether he could return to the workforce. The Court noted that Howell offered no legal authority suggesting that the Board has any obligation to consider worker training. Howell's second contention was that, given his individual circumstances, it was unfair to assume that he could immediately transition into a sedentary position and that the Board

should have provided him with some kind of grace period following its conclusion that he was not a displaced worker. The Court cited the rule of law that there is no grace period past the cessation of disability and rejected Howell's fairness argument absent some basis in law or an erroneous factual determination. *Keeler v. Metal Masters Inc.*, 1997 WL 855721, at *5 (Del. Super. Dec. 31, 1997). The Superior Court's judgment was affirmed.

Spruill v. Delaware Transit Corp., IAB Hearing Nos. 1400928 & 1341876 (Mar. 24, 2014).

In a successive carrier liability case, the Board found that a second work accident was a superseding, untoward event that broke the causal chain to an earlier accident. The second accident caused a new injury to the thoracic spine and an aggravation of a prior injury to the lumbar spine, thus shifting liability to the insurance carrier providing coverage at that time.

The claimant, Joseph Spruill, a DART paratransit operator, suffered a compensable injury to his low back when he was involved in a work-related motor vehicle accident in July 2009. He was out of work for about a year and continued to receive treatment up to the time of his second work accident. On July 13, 2013, he felt a sharp back pain while reaching to help a passenger in a wheelchair with a seatbelt. He was out of work for approximately five months following this incident. The employer switched workers compensation' carriers from PMA to Liberty Mutual after the 2009 accident, but prior to the 2013 accident. Mr. Spruill filed petitions with the IAB against both PMA and Liberty Mutual for benefits related to back injuries suffered in the July 2013 work accident. The carriers agreed that the claimant's thoracic and lumbar spine conditions were work-related, so the issue before the Board was which carrier was responsible for payment of the benefits.

The Board relied upon *Standard Distributing Co. v. Nally*, 630 A.2d 640 (Del. 1993) to decide the case. Under *Nally*, to shift liability, it is the initial carrier's burden to prove to the Board that the new work accident was a superseding, untoward event that caused an aggravation of the claimant's physical condition or resulted in a new injury. If that burden is not carried, the injury is considered a recurrence and liability remains with the first carrier.

The Board concluded that Mr. Spruill had suffered an aggravation of his lumbar spine injury and a new injury to his thoracic spine as a result of his July 11, 2013 industrial accident. The Board explained that the claimant's symptoms and condition

worsened following the accident in several respects including: his subjective complaints regarding pain at new locations in his back, increased symptoms in the low back, a thoracic spine MRI with new findings consistent with his complaints and the mechanism of injury, his physical inability to work for months following the second accident, his need for new medication, his need for physical therapy, and the fact that a TENS unit and back brace were ordered for the first time. The Board also referenced his treating doctor's familiarity with Mr. Spruill's condition immediately before and after the industrial accident as compared to the single office visit with the DME doctor that occurred months after the second accident.

The Board held that Liberty Mutual was liable for medical expenses and total disability benefits related to the lumbar spine and thoracic spine injuries caused by the July 2013 accident.

Civil Litigation

Parker v. State of Delaware, **Del. Supr., *en banc*, (Feb 5, 2014).**

Supreme Court addressed the standard to be used to determine the admissibility of social media evidence.

Delaware Supreme Court upheld the Superior Court's adoption of the Texas approach to the admissibility of social media evidence at trial, and found that a trial judge may admit relevant social media posts where the proponent provides evidence sufficient to support a finding by a reasonable juror that the proffered evidence is what the proponent claims it to be.

The case involved claims of assault and terroristic threatening against Defendant Parker. The case arose from a physical altercation which began over a disagreement on Facebook related to a mutual love interest between the Defendant and another woman, Ms. Brown. Defendant Parker argued that her actions in the fight were justified as she was acting in self-defense, and the State sought to introduce Facebook entries that were allegedly authored by Parker after the altercation discrediting her self-defense argument. In support of its argument that the Facebook posts should be allowed into evidence, the State showed that the posts included the Defendant's picture, her name, and a time stamp for each entry.

The Court considered Delaware Rule Evidence 901(b) which describes the requirement of authentication for the admissibility of evidence. In relevant part, authentication of social media evidence can include: (1) testimony from a witness who states that the evidence is what it is claimed to be, (2) distinctive characteristics of the

evidence itself such as appearance, content, substance, internal patters or other characteristics taken in conjunction with the circumstances, or evidence that shows that the documentary evidence is accurately produced through a process or system. In considering two different approaches utilized by other states, the Delaware court found the better standard for determining admissibility of social media evidence is whether "a jury could reasonably find the proffered evidence authentic."

Applying this standard the Supreme Court found that the Superior Court properly concluded that the State had adequately authenticated the Defendant's social media posts through the use of witness testimony and circumstantial evidence.

Vohrer v. Kinnikin et al., **2014 WL 1203270 (Del. Super.).**

Superior Court addressed the necessity of liability expert for causation in electrical matters, as well as the inadmissibility of licensed clinical social worker's "expert" opinions on causation of an alleged medical condition.

The case involved claims of negligence, intention and negligent infliction of emotional distress, and loss of consortium against the Defendant Delaware State Housing Authority ("DSHA"), and it's former employee, Defendant Kinnikin arising out of alleged electrical shocks received from the stove in the plaintiffs rental unit owned/operated by DSHA, as well as alleged sexual harassment by its former employee, Kinnikin. Plaintiff alleged that she sustained electrical shocks (on 8 separate occasions) from the stove in the rental unit as a result of improperly "jury-rigging" a 3-prong plug into a 4-prong outlet. Defendant Kinnikin was sent on each occasion to check the stove and determine the source of the shocks. Despite replacing the burners and attempting to recreate the shocks, Kinnikin could never determine the source of the shocks. Plaintiff claims she was diagnosed with Chronic Regional Pain Syndrome as a result of these shocks. She also maintained a sexual harassment claim against the Defendants, allegedly arising out of lewd and vulgar images and text messages sent to her by Defendant Kinnikin.

Plaintiffs never identified a liability expert, although they advised that they would be calling employees of Solar Electric or Sears to testify. DSHA filed a motion to compel the identification of a liability expert, which the Court granted, but Plaintiffs still failed to I.D. a liability expert. DSHA moved for summary judgment arguing (1) that expert testimony is needed to establish the standard of care as to Kinnikin, because Kinnikin is a professional; (2) the testimony of a liability expert is needed in order to assist the jury in determining whether the jury-rigged plug/outlet setup of the stove was a dangerous condition that could cause an electric shock; and (3) that DSHA could

be liable under *respondeat superior* for Kinnikin's harassing conduct because such conduct is outside the scope of his employment. Two motions *in limine* were also filed by DSHA to exclude Plaintiff's medical expert (arguing that the med expert's report is insufficient under *Daubert* and is that his opinions were mere *ipse dixit*) and her psychiatric expert who was a licensed clinical social worker (arguing that he was not qualified to render an opinion as to causation or permanency of any alleged mental condition based on his lack of any formal training as a physician or psychiatrist).

The Court granted DSHA's motion for summary judgment on the negligence claim. First, however, the Court found that no expert testimony was required to establish the standard of care applicable to Defendant Kinnikin because he did not hold himself out as a specialist or expert in electrical work, nor did he receive any specialized training in order to work as an apartment maintenance worker. Nevertheless, the Court found Plaintiffs were required to have expert testimony to establish that the stove's plug set-up could have resulted in an electrical shock, and because they did not have an expert to do so, they were unable to make a *prima facie* showing of proximate cause. As such, summary judgment on the negligence claims.

The Court granted DSHA's Motion for summary judgment on the distress claims, holding that the alleged harassment by Kinnikin fell outside the scope of his employment with DSHA. The Court explained that even if the alleged conduct occurred while at work, the conduct was not of the type Kinnikin was hired to perform and was not motivated by a purpose to serve DSHA. The Court did deny summary judgment to defendant Kinnikin on the harassment claim, however, finding that there were issues of fact as to whether he in fact did the alleged conduct, whether his conduct was "outrageous," and whether Plaintiff Lisa Vohrer's distress was "severe."

The Court granted DSHA's motion *in limine* regarding Plaintiff's licensed clinical social worker's testimony as it relates to the distress claims. The Court noted that Mr. White's evaluation mentioned that Lisa Vohrer exhibited "anxiety and fear when discussing the flagrant sexual harassment by [Kinnikin]." The Court found these statements could be construed as an expert opinion on causation between Kinnikin's alleged harassment and Lisa's anxiety. The Court held that Mr. White's opinions were inadmissible for lack of qualification and lack of basis given he did not possess any specialized training in psychology or psychiatry and there was no evidence in the record of any particular skills or qualifications that would enable him to render an expert opinion on the causal link between Lisa's anxiety and Kinnikin's alleged harassment.