May 6, 2014 – Case Law Updates

Tybout, Redfearn & Pell

By: Robert D. Cecil, Jr.

WORKERS' COMPENSATION CASE LAW UPDATES

Employer Responsible For the Modification Costs Associated With Making a Vehicle Wheelchair Accessible For Claimant

Luckenbach v. Schiff Farms, Inc., IAB No. 1204737 (Feb. 7, 2014) Reargument (March 11, 2014)

Claimant sustained an injury on January 16, 2002, in a compensable industrial accident. The accident necessitated a variety of spine surgeries to the low back, mid back and neck. Claimant was essentially rendered wheelchair-bound as a result.

Since being confined to a wheelchair, Claimant's wife has been his primary caretaker, despite working full-time. She aided Claimant in transporting him outside the home in the family's leased SUV. This required Claimant's wife to physically assist Claimant into the vehicle and lift his wheelchair into the vehicle.

On October 18, 2012 Claimant's wife was involved in a motor vehicle accident and sustained injury to her neck and hip that required surgery. Claimant's wife was left with a ten-pound lifting restriction. Accordingly, Claimant's wife was unable to assist Claimant with travel in the family's SUV.

Since Claimant's wife's accident, Claimant had essentially become homebound with the exception of attendance at medical appointments. Claimant's longtime physician, Dr. Irene Mavrakakis, testified as to the difficulties experience by Claimant and the psychological harm imposed upon him from being rendered homebound.

Claimant filed a petition to determine additional compensation due with the Industrial Accident Board. It was Claimant's contention, supported by Dr. Mavrakakis, that he should be provided with a wheelchair-accessible vehicle to improve his quality of life. Claimant's wife testified that the family vehicle could not be modified for wheelchair-accessibility and that the vehicle had three years remaining on the lease. Claimant sought provision of a new wheelchair accessible van. Employer contested the petition on the basis, among others, that the statute did not specifically provide for an award of wheelchair accessible transportation under 19 Del. C. §2322(a), which provides for the types of medical services available to claimants.

The Board determined that it had authority to authorize the request based upon the broader statutory authority of §2322(c) that authorizes the Board to determine the character of medical services to be supplied. The Board's analysis noted that this issue was not extensively addressed in Delaware, but adopted the model adopted by Michigan to address the issue. The Board held that modification costs were appropriate but that Employer was not obligated to supply a brand new vehicle.

On reargument the Board affirmed its ruling but did revisit the issue of attorney's fees.

Employer Is Not Obligated to Pay for Claimant's Medical Expenses by a Non-Certified Provider, When Such Treatment Is Not Preauthorized.

D&B Transportation v. Vanvliet, C.A. No.: 13A-06-002 (April 30, 2014)

Claimant sustained a compensable industrial accident in February 2001. Claimant underwent an initial spine surgery in 2001. In 2010, Claimant underwent a second spine surgery under the care of a Maryland doctor (Dr. Sonti). Claimant filed a petition with the Industrial Accident Board seeking retroactive preauthorization of the second surgery, as Dr. Sonti was not a certified provider under the Delaware Healthcare Payment System. The Board granted Employer's motion to dismiss, finding that the healthcare expenses were not compensable as a result of the non-certification of the provider and that retroactive preauthorization was insufficient

The Superior Court initially reversed that determination (Nov. 28, 2012) holding that the statute, regarding certification, was ambiguous and merely provided a presumption of reasonableness and necessity. As such, a Claimant was not barred from seeking compensability of medical services that were not preauthorized and that were performed by a non-certified provider if they could prove that the services were reasonable and necessary before the Board.

The Superior Court reevaluated that contention in light of the Supreme Court's recent holding in *Wyatt v. Rescare Home Care*, 81 A.3d 1253 (Del. 2013). *Wyatt* held that the statute was unambiguous in its dictates and that non-preauthorized care that was not performed by a certified provider was not compensable as a matter of law, absent falling within one of the narrow statutory exceptions. The Superior Court, following the holding in Wyatt, and noting that no statutory exceptions were raised by the Claimant, held that Dr. Sonti's treatment was not compensable.

CIVIL CASE LAW UPDATES

Superior Court Denies PIP Carrier's Motion to Dismiss Workers' Compensation Carrier's Complaint for Reimbursement of First $15,000.00 in Medical Expense and Lost Wages

Accident Fund Ins. Co. of Am. v. Zurich Am. Ins. Co., 2013 WL 6039914 (Del. Super. Oct. 31, 2013)

On December 3, 2010, Vaughn Hruska ("Hruska") and Rodney Bethea ("Bethea") sustained injuries as occupants of a vehicle involved in a motor vehicle accident in Delaware. The vehicle was insured under a motor vehicle insurance policy issued by Zurich and registered in South Carolina, which did not include minimum PIP coverage. Under Delaware law, owners operating motor vehicles in Delaware, which are registered in another state or jurisdiction that does not require minimum insurance coverage, are required to have insurance on the motor vehicle equal to the minimum, i.e. $15,000.00.

Accident Fund provided workers' compensation benefits to Hruska and Bethea because they were injured in the course and scope of their employment. Hruska and Bethea submitted claims for workers' compensation. Accident Fund then paid $10,340.68 to Hruska and $35,239.63 to Bethea in benefits, which were PIP eligible. On December 5, 2012, Accident Fund submitted a written request for payment to Zurich, but Zurich made no payments.

Accident Fund filed suit against Zurich seeking reimbursement of the first $15,000.00 paid on behalf of Hruska and Bethea. Zurich filed a motion to dismiss arguing that the workers' compensation carrier is primary and PIP is secondarily liable.

In denying Zurich's motion to dismiss, the court analyzed its prior decision in *Lane v. Home Ins. Co.*, 1988 WL 40013 (Del. Super. Apr. 14, 1988). In *Lane*, the Superior Court held that "the priority of responsibility falls upon the no-fault insurer and even if the workmens' compensation benefits are available to an insured, the insured PIP benefits under an automobile liability policy are still primary." The court also looked to *Cicchini v. State*, 640 A.2d 650 (Del. Super. July 12, 1993) aff'd, 642 A.2d 837 (Del. 1994), which ruled that PIP coverage was primary and that "its interaction with the coverage provided under the Workmen's Compensation Act must be managed in such a fashion that the injured employee receives the maximum benefits available under both."

Zurich subsequently filed a motion for reargument, which was denied and an application for certification of interlocutory appeal, which was also denied.

Superior Court Grants Defendant's Motion in Limine to Exclude Plaintiff's PIP Eligible Special Damages Base on 21 *Del. C.* § 2118 (b) and (h) Where Plaintiff's Vehicle was Registered in a State that does not have Minimum PIP Coverage

Gurol v. Deleon, 2009 WL 806589 (Del. Super. Feb. 26, 2009)

While driving a car that was registered and insured by Nationwide in North Carolina, Plaintiff was hurt in a collision on October 6, 2006, on Route 13 in Delaware. Defendant was a Delaware

resident. Her vehicle registration and insurance were issued here. Plaintiff's Nationwide insurance policy does not provide PIP coverage and North Carolina does not require it. The policy does, however, contain an extraterritoriality clause extending coverage for injuries sustained in a state requiring coverage, such as Delaware.

Plaintiff filed a motion in limine seeking to admit PIP damages at trial. Plaintiff claimed that because he is a North Carolinian, Delaware's No-Fault statute does not apply to him and he is not eligible for insurance; therefore, he is not prohibited from introducing his PIP damages under 21 *Del. C.* § 2118(h).

Defendant asserted that Plaintiff is precluded from admitting PIP damages because, although Plaintiff's policy was issued in a state that does not require minimum PIP coverage, Plaintiff is nonetheless eligible for benefits under § 2118(b)4 and, as such, Nationwide must insure Plaintiff with minimum coverage equal to that required for a Delaware resident. Further, Defendant contended that because Plaintiff's policy includes an extraterritoriality clause, Nationwide is required to pay Plaintiff PIP benefits in accordance with § 2118. Therefore, Plaintiff is subject to the same limitations found within § 2118 as though Plaintiff were a Delaware resident.

In denying Plaintiff's motion in limine and precluding the introduction of PIP eligible benefits, the court stated that Plaintiff's insurance policy provides that Nationwide will extend coverage, if necessary, above the amounts purchased in order to comply with another state's compulsory insurance law. They stated that "Plaintiff's insurance policy jibes with North Carolina's and Delaware's laws. There is no reason to introduce Plaintiff's PIP-style damages because he has, or he should have had, coverage under prevailing Delaware law."