

CASE LAW UPDATES – February 3, 2015

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WORKERS' COMPENSATION CASE LAW UPDATE

Relying upon *Wyatt*, the Supreme Court affirms a Superior Court decision holding that a Claimant is not entitled to reimbursement for costs of surgery performed by a physician who is not certified under Delaware's workers' compensation health care payment system.

VanVliet v. D&B Transportation, --- A.3d ---, 2014 WL 6998114 (Del. Nov. 20, 2014).

Claimant, Howard Vanvliet, underwent a surgery performed by a Maryland surgeon who was not certified under §2322D of the Delaware Workers' Compensation Act. Additionally, the provider/Claimant did not seek preauthorization for the surgery. The Supreme Court held that Claimant's case could not be distinguished from *Wyatt v. Rescare Home Care*, 81 A.3d 1253, and that none of the limited statutory exceptions to the certification requirement applied. Claimant argued that *Wyatt* was wrongfully decided because there is no way to compel an out of state physician to become certified. The Court acknowledged that to be true, but noted that Claimant's surgeon was the only non-certified physician in her practice and that non-Delaware physicians have a clear economic incentive to become certified or to seek preauthorization if they wish to receive reimbursement under the Workers' Compensation Act.

In a footnote, the Court indicated that it was a close question whether *Wyatt*'s interpretation or the Superior Court's initial interpretation in this case was correct. See *VanVliet v. D&B Transp.*, 2012 WL 5964392 (Del. Super. Nov. 28, 2012) (holding that treatment from a non-certified physician could still be compensable, but that non-certified providers are not entitled to the presumption that the treatment is reasonable and necessary). The Court confirmed that it would adhere to *stare decisis*, and that any change to the law would necessarily have to come from the General Assembly.

Undocumented worker's immigration status, although a bar to employment, does not relieve Employers of their obligation to show job availability in the context of a termination petition.

Campos v. Daisy Constr. Co., --- A.2d ----, 2014 WL 7011818 (Del. Nov. 13, 2014)

Claimant, Jose Campos, suffered work-related injuries to his back and shoulder. After a compensable shoulder surgery he was unable to return to his employment with Daisy Construction. The workers' compensation carrier requested investigation into the validity of Claimant's social security number; that number turned out to be invalid. Employer offered Claimant light-duty work (consistent with his medical restrictions) at his pre-injury wage rate, if Claimant could cure his undocumented immigration status. The Board concluded that Employer had met its burden for termination of total disability benefits and declined to award partial disability benefits on the basis that Claimant's reduced earning capacity was unrelated to the work injury, but rather to his immigration status. Claimant appealed to the Superior Court and that Court affirmed the Board. Appeal was taken to the Delaware Supreme Court.

The Supreme Court (en banc) reversed. The Court concluded that Claimant was eligible for partial disability benefits. The Court reasoned that the Employer was not relieved of proving job availability and a corresponding residual earning capacity because of Claimant's undocumented status. The Court explained three bases for its decision.

First, consistent with *Delaware Valley Field Services v. Ramirez*, undocumented workers are considered employees within the statutory workers' compensation scheme in Delaware; thus, they are entitled to the full menu of benefits under the statute.

Second, consistent with federal immigration law (Immigration Reform and Control Act of 1986) employers have a positive obligation to verify immigration status of employees. By holding employers responsible for showing job availability – taking into account the undocumented status of the injured worker – employers are incentivized to follow federal immigration requirements. The Court analogized that were they to reach an alternate conclusion, employers would be able to hire undocumented workers, not verify their status and only after injury discharge their workers' compensation obligations by "discovering" that their employee was undocumented. The Court determined that such a holding would be inconsistent with federal policy and the aims of the Delaware workers' compensation statute.

Third, the Court explained that public policy dictates that the full costs of a work injury should be borne by employers. The Court reasoned that workplace safety for all Delaware workers would be improved if employers were held responsible for all work injuries, particularly in higher risk fields of employment (such as those typically employing undocumented workers).

The Court, in dicta, suggested that the burden of job availability may be relieved if an employer complied with the federal requirement and utilized immigration verification resources (such as E-Verify) and yet an employee was hired that turned out to be undocumented.

CIVIL CASE LAW UPDATES

Delaware Supreme Court Affirms Superior Court's holding that Plaintiff was not eligible for Personal Injury Protection Payments where the vehicle was not an active accessory of the injury

Friel v. Hartford Fire Ins. Co., 2014 WL 1813293 (Del. Super. May 6, 2014) *aff'd sub nom.* *Friel v. Hartford Fire Ins. Co.* (Del. Jan. 28, 2015)

Plaintiff was employed as a delivery driver by Southern Wine & Spirits ("SWS"). He delivered products to various customers, including Costco. Defendant Hartford Fire Insurance Company ("Hartford") insured SWS. Plaintiff made a "pallet stop" at Costco on October 25, 2010. At a pallet stop, the product to be delivered is on multiple pallets inside the truck. In preparation for a pallet stop, drivers are responsible for getting a set of chains and a claw from a milk crate in the SWS warehouse. The chains and the claw are then used to connect the pallets to the forklift during the unloading process. Costco provided the forklift to complete the delivery.

On October 25, 2010, Plaintiff obtained chains and a claw from the SWS warehouse and drove 12 or 13 pallets of product to Costco for the pallet stop. He arrived at Costco, parked the truck, applied the air brake, and turned off the truck. Plaintiff exited the truck, opened the back of the truck, and removed the load bar, and awaited the arrival of the forklift.

Plaintiff alleges he was injured during the unloading process. During the unloading process, he was standing in the back of the truck. While unloading approximately the tenth pallet of product, Plaintiff bent down to hook up the chains and “felt a pop” in his back. His injuries include lumbar strain and sprain, lumbar disc derangement at L4–5, and lumbar facet pain. In addition to a workers’ compensation claim, Plaintiff filed a claim for personal injury protection benefits (“PIP”), which was denied by Hartford because his injuries did not arise out of an automobile accident. In turn, Plaintiff filed suit to recover PIP from Hartford.

In granting Hartford’s Motion for Summary Judgment, the Superior Court applied a two-part test to determine if the Plaintiff was eligible for PIP. First, the Court had to determine if the Plaintiff qualified as an occupant of the vehicle. A person is an “occupant” of the vehicle if he or she is either: (a) within a reasonable geographic perimeter of the vehicle or (b) engaged in a task related to the operation of the vehicle. *Nat’l Union Fire Ins. Co. of Pittsburgh v. Fisher*, 692 A.2d 892 (Del. 1997). The Court found that Plaintiff was an occupant of the vehicle because he was standing in the truck at the time of his injury.

Next, did the *Kelty* analysis to determine (1) whether the vehicle was an active accessory in causing the injury; and (2) whether there was an act of independent significance that broke the causal link between use of the vehicle and the injuries inflicted. *Kelty v. State Farm Mut. Auto. Ins. Co.*, 73 A.3d 926, 932 (Del. 2013). The Superior Court held that the vehicle was the mere situs of the injury and was not an active accessory in causing the Plaintiff’s injury. The Superior Court held that the Plaintiff’s injury did not occur by virtue of the inherent nature of using a motor vehicle. Because the Plaintiff was unable to meet the first prong of *Kelty*, the Superior Court held that he was not entitled to PIP benefits as a matter of law.

On appeal, the Delaware Supreme Court affirmed the Superior Court’s grant of summary judgment for the reasons set forth in its opinion.

Delaware Supreme Court Reverses Superior Court’s Grant of Summary Judgment Based on Comparative Negligence and Primary Assumption of the Risk

Helm v. 206 Massachusetts Ave., LLC, --- A.2d ----, 2014 WL 7272771 (Del. 2014)

In this suit, the Plaintiff suffered a significant ankle fracture, requiring surgery, when she fell down the stairs at a beach rental in Lewes, Delaware. In Plaintiff’s complaint, she alleged that the Defendant/Property Owner was negligent in failing to provide adequate lighting of the stairwell. Plaintiff further alleged that her fall was caused by the poorly lit stairwell. Plaintiff later amended her complaint to include allegations that the banister in the stairwell was not “graspable” or code compliant and therefore prevented her from stopping her fall. Plaintiff had rented this same property for week long vacations in the two prior years to her fall and never lodged any complaints regarding the condition of the property.

At Plaintiff's deposition, she testified that as she approached the stairs, she noticed that it was extremely dark toward the bottom. Plaintiff further testified that she attempted the turn on the light in the foyer at the bottom of the stair but there was no light switch on the second floor that controlled the first floor lights. Most importantly, Plaintiff testified that she was aware, at the time just prior to descending the stairs, that they were unsafe because of the darkness. When asked why she did not have a family member assist her in descending the stairs, she testified that she did not want to expose them to the risk of descending the stairs in the dark. Despite recognizing the risk, Plaintiff descended the stairs. Plaintiff then testified that approximately two-thirds of the way down the stairs she paused because it became increasingly harder to see the stairs in front of her due to the darkness. Instead of turning around, Plaintiff continued down the stairs and ultimately fell, causing her injuries.

Defendant filed a Motion for Summary Judgment arguing that based on Plaintiff's testimony, it was clear that she was aware of the risk of descending the dark stairwell, that she appreciated that risk, and proceeded despite that risk. Therefore, Defendant argued, Plaintiff assumed the risk of falling and would not be entitled to recover from the Defendant for her injuries. In the Motion for Summary Judgment, the Defendant also argued that the Plaintiff's actions were negligent in an amount greater than 51%, which would bar recovery against the Defendant as a matter of law. In granting Defendant's Motion for Summary Judgment, the Superior Court agreed that Plaintiff was negligent in an amount greater than 51% as a matter of law and therefore could not recover from the Defendant. The Court also held that Plaintiff clearly recognized and appreciated the risk of descending the stairs and proceeded anyway. The Court held, therefore, that the Plaintiff primarily assumed the risk, which precluded her from recovering damages for her injuries against the Defendant.

The Delaware Supreme Court disagreed with the Superior Court's holdings. Specifically, the Supreme Court held that primary assumption of the risk is reserved for limited scenarios where a person has expressly relieved another of a legal duty. The Supreme Court referenced sporting events and sports activities as the applicable scenarios for the defense of primary assumption of the risk. The Supreme Court further held that only in rare cases should a trial judge grant summary judgment based on contributory negligence. The Court emphasized that the question of percentage of negligence should ordinarily be left to the jury as the finders of fact. The Court found that the facts of the present case were not the rare facts that warranted summary judgment based on contributory negligence and reversed the Superior Court's grant of summary judgment.