DCA Meeting – March 1, 2016

CIVIL CASE LAW UPDATES

Delaware Supreme Court upholds Superior Court ruling precluding expert testimony that the Defendant was driving his vehicle in an unsafe or improper manner

Case v. Taylor, 2015 WL 98813 (Del. Super. Jan. 6, 2015) aff'd, 2016 WL 420511 (Del. Feb. 3, 2016)

On March 4, 2013, the Defendant was driving southbound in the far right lane of U.S. Route 13 in Dover, Delaware. On this particular stretch of Route 13, there were three southbound motor vehicle lanes. To the right of the rightmost motor vehicle lane was a southbound bike lane. To the right of the bike lane was a right turn lane. Ahead of the Defendant, there was a commercial van towing a flatbed trailer. The flatbed trailer contained some plywood, but both the driver of the van and Defendant testified that the trailer did not affect their view of the road. Defendant estimated he was traveling thirty miles per hour and about thirty to forty feet behind the van before entering the right turn lane. The posted speed limit was forty miles per hour.

The Defendant turned on his right turn signal and proceeded into the right turn lane. At the same time, Plaintiff was riding an adult tricycle northbound in the southbound bike lane. As Defendant checked his mirrors and entered the bike lane, which he had to cross to enter the turn lane, Plaintiff and Defendant collided and Plaintiff was severely injured. The Plaintiff was cited for traveling in the wrong direction on a divided highway and the Defendant did not receive a citation.

At trial, Plaintiff sought to introduce expert testimony that the Defendant was driving in an unsafe or improper manner based on violating the so-called "three-second rule" or "four-second rule" contained in the Delaware Driver's Manual (the "Manual"). In a part called "Sharing Space," the Manual discusses a three-second rule. It states that under the three-second rule, a driver should

stay at least three seconds behind the vehicle in front of him. It then continues with a four-second rule, under which the driver should stay four seconds behind when following a vehicle. It gives ten situations to which the four-second rule applies. One of the ten is subtitled, "When following drivers who cannot see you." It provides that "[t]he drivers of trucks, buses, vans or vehicles pulling campers or trailers may not be able to see [a driver] when [the driver is] directly behind them." It also provides that: "Large vehicles also block your view of the road ahead. Falling back allows you more room to see ahead and to be seen."

The Superior Court held that the Plaintiff's expert could not testify that Defendant's driving was improper or unsafe, and could not testify as to what or what were proper or improper, safe or unsafe, speeds or distances because that was for argument and jury determination based upon facts testified to by observing witnesses, not an opinion based upon the Manual. The Superior Court also ruled that Plaintiff's expert could not use the Manual to establish that the Defendant committed a driving violation. Superior Court did allow Plaintiff's expert to testify regarding his various mathematical calculations about following distances, speed, and line of sight. Ultimately, the jury returned a verdict for the Defendant, finding that it was the sole negligence of the Plaintiff that caused the accident. On appeal, the Superior Court's ruling and the jury verdict were affirmed.

Delaware Superior Court grant's Defendant's Motion for Summary Judgment based on Continuing Storm Doctrine

Demby v. Delaware Racing Ass'n, 2016 WL 399136 (Del. Super. Jan. 28, 2016)

Plaintiff filed her Complaint against Defendant seeking to recover damages for personal injuries sustained from a slip and fall on black ice at Delaware Park on December 14, 2013. Plaintiff alleges that Defendant was negligent in failing to take reasonable measures to make the premises safe for Plaintiff as a business invitee. In response, Defendant file a motion for summary

judgment arguing that it was entitled to judgment as a matter of law because the Continuing Storm doctrine suspended its duty to make the premises safe for business invitees until a reasonable time elapsed after the termination of an ongoing storm. Plaintiff contends that the Continuing Storm doctrine is inapplicable here because it was not snowing at the time of the alleged accident and therefore, Defendant had an affirmative duty to keep the premises reasonably safe but failed to do so.

It support of its motion, Defendant relied on a weather report documenting the weather at the Greater Wilmington Airport on December 14, 2013. The report indicated that a storm arrived in the afternoon of December 14, 2013 with weather conditions alternating between light snow, freezing rain, and heavy rain from 2:40 p.m. through the time of Plaintiff s fall at 8:41 p.m. and continued at least until midnight. Defendant also submitted a surveillance video that showed Plaintiff's fall and confirmed that there was freezing rain at the time of the fall. Plaintiff's only evidence to the contrary was her own affidavit stating that it was not snowing at the time of the accident. Plaintiff did not dispute that there was freezing rain at the time of the accident.

In granting Defendant's motion for summary judgment, the court held that generally, a landowner has an affirmative duty to its business invitees to keep its premises reasonably safe from the dangers created by the natural accumulation of snow and ice. The Continuing Storm doctrine creates a caveat to this general rule by providing, as a matter of law, that a landowner engages in reasonable conduct by waiting until the end of the storm before commencing snow removal operations. In other words, a business establishment is permitted to await the end of the storm and a reasonable time thereafter to remove ice and snow from an outdoor entrance walk, platform, or steps. The Court further held that the application of the Continuing Storm doctrine did not require it to be snowing at the time of an alleged incident but that mere drizzle is all that is required.

Plaintiff further argued that even if the Continuing Storm doctrine temporarily suspended Defendant's duty to remove snow and ice at the time of Plaintiff's fall, Defendant failed to take reasonable steps to eliminate the hazardous condition, i.e., rope off the icy patch to prevent patrons from traversing it. In rejecting this argument, the Superior Court held that in the case of a continuing storm, reasonable conduct *is* to await the storm's end. That is true whether successful or vain efforts to take some earlier action occurred. The court stated that even if Defendant was able to "rope off" hazards caused by icy conditions during a storm, its failure to do so was not unreasonable. Instead, the Continuing Storm doctrine provides that it is reasonable for Defendant to wait for the storm to come to an end before addressing hazardous conditions on the sidewalk. As such, Plaintiff's Complaint was dismissed.

WORKERS' COMPENSATION CASE LAW UPDATES

The Industrial Accident Board denies claimant's Petition to Determine Compensation Due holding that claimant failed to satisfy his burden of proof that an incident occurred at work in such a way to cause an injury.

Shannon Selby v. Talley Brothers, Inc., IAB Hearing No.: 1416856 (February 3, 2016).

Claimant filed a DCD Petition alleging that while working as a laborer for Talley Brothers, Inc. on the I-495 bridge construction, he sustained multiple injuries on July 6, 2014 when a rouge driver traveled in the closed southbound lanes of the highway. Claimant was working in a hole with several other workers and allegedly attached to a safety lanyard at the time of the incident. Claimant testified that he was dragged 15 feet when his safety lanyard was caught in the wheels of the rouge vehicle.

Claimant had a preexisting history of neck, back and right lower extremity symptoms, all of which were alleged injuries with regard to this incident.

The incident resulted in criminal charges against the driver of the rouge vehicle who plead guilty to several offenses including reckless endangerment first degree and vehicular assault in the second degree specifically related to claimant's injuries. The Corporal from the Delaware State Police who investigated the incident testified at the Hearing.

The focus of the Board's determination was when was the claimant released from his retractable safety lanyard; did he break through the wooden enclosure and was he dragged down the highway as alleged causing injuries. Multiple fact witnesses testified regarding this issue alone.

Testimony centered on the vehicle's tires making contact with the bridge harness wire and/or safety lanyard causing the driver to stop the vehicle while a member of the crew untangled the wire. There was also testimony from several witnesses that the vehicle's tires did not become entangled with the lanyard. The Board indicated that this case hinged on eye witness accounts that differed in many respects. Another member of claimant's crew testified that he saw the incident occur and claimant being pulled. A fact witness testified that he unhooked the safety lanyard from the vehicle, claimant was still attached following impact and appeared jolted. Contrary evidence was presented by another fact witness that claimant's safety harness was unhooked prior to the vehicle's impact. There was also testimony from the owner of Talley Brothers, Inc. who conducted an investigation after the incident that the safety lanyards were checked after the incident and it was determined that all fall protection indicators were intact and none of the shock indicators had been engaged. The barricade that claimant allegedly struck also did not sustain any damage.

The Hearing Officer concluded that although an incident occurred with the rouge driver on I-495, after weighing the conflicting testimony of the four fact witnesses Claimant failed to satisfy his initial burden of proof that an incident occurred while at work wherein he sustained an injury.

Although claimant's medical records consistently cited that he was dragged 15 feet and broke through a wooden enclosure on the date of the incident, there was no evidence in the treatment records of any abrasions or contusions, casting doubt on the claimant's recitation of how the accident occurred.

The Hearing Officer did find the testimony of the Corporal from the Delaware State Police credible however, witness statements provided to officer at time of his investigation were not done so under oath. The Hearing Officer concluded that the Board must make their determination based upon the sworn testimony at the time of the Hearing. Further, the Hearing Officer pointed out that the drivers plea deal with the Court was not determinative in the Board's analysis as there was no sworn testimony or charges proven beyond a reasonable doubt. After weighing all of the factual testimony, Claimant's injuries were determined to be unrelated to the incident and no benefits were awarded.

Superior Court affirms Industrial Accident Board's attorney fee award.

Robert LaRue v. Evraz Claymont Steel, C.A. No.: N15A-07-003 PRW (Del. Super. Ct. February 10, 2016)

Claimant's attorney appealed Industrial Accident Board's June 2015 Decision wherein the Board reduced a prior award of attorney's fees arising from a Petition to Determine Compensation Due. Claimant's attorney alleged that the Board failed to conduct a proper analysis and used an incorrect basis to revise the award.

Claimant was initially injured in 2007 in an explosion at a steel mill and sustained second and third degree burns and bilateral knee injuries. In March 2014, claimant filed a DACD Petition seeking payment for back treatment provided by Dr. Xing. Claimant was seeking acknowledgement of the back injury and payment of medical treatment expenses. The Board granted claimant's Petition and awarded payment of outstanding medical treatment expense.

Attorney fees were awarded as follows "the lesser of $9,400 or thirty percent of the value of the award".

Claimant's attorney sent employer's attorney a letter requesting $9,400.00 in attorney fees. Employer's attorney filed a Motion for Rearguement requesting a reduction of the attorney fee award as the outstanding medical bills at issue would only warrant an award of $617.87.

In considering the Motion for Rearguement, the Board only considered outstanding medical expenses of $2,095.58 instead of the $13,173.00 previously submitted at the filing of the Petition. A portion of the medical bill was not disputed and had been previously paid by the carrier. The Board modified the fee award to $5,417.87.

Claimant's attorney was not permitted to assert on appeal that the Board failed to properly apply the *Cox* factors as claimant previously admitted that the Board adequately analyzed the Cox factors in its January Decision. The Court found that this was the equivalent of a judicial admission that the claimant was now precluded from challenging.

The Superior Court held that the Board properly considered all appropriate factors and awarded attorney's fees on the appropriate amount, thus the Board's Decision was affirmed.