DELAWARE STATE BAR ASSOCIATION

CONTINUING LEGAL EDUCATION

Workers' Compensation Breakfast Seminar 2024

January 16, 2024, 8:30AM – 12:00PM

Live at Riverfront Events

Sponsored by the Workers' Compensation Section of the Delaware State Bar Association

3.3 Hours of CLE Credit for Delaware Attorneys

3.0 Hours of CLE Credit for Pennsylvania Attorneys

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Moderator

Jessica L. Welch, Esquire
Doroshow Pasquale Krawitz & Bhaya

Registration and Breakfast
8:00am-8:30am

Case Law Update
8:30am-9:00am

John J. Ellis, Esquire
Heckler & Frabizzio, P.A.

Cassandra Faline Roberts, Esquire
Elzufon Austin & Mondell, P.A.

Keynote Address
9:00am-9:45am

The Honorable Noel Eason Primos
Superior Court of the State of Delaware

Application of the PIP Carve-Out
9:45am-10:15am

Matthew R. Fogg, Esquire
Morris James LLP

Keri L. Morris-Johnston, Esquire
Marshall Dennehey, P.C

Break
10:15am-10:30am

Do The Math
10:30am-11:00am

Tara E. Bustard, Esquire
Doroshow Pasquale Krawitz & Bhaya

Andrew J. Carmine, Esquire
Elzufon Austin & Mondell, P.A.

Outside of the Box Injuries
11:00am-11:30am

Benjamin K. Durstein, Esquire
Marshall Dennehey, P.C.

Stephen T. Morrow, Esquire
Rhoades & Morrow LLC

"Give Me Some Credit"
Application of Credits Against Benefits
11:30am-12:00pm

Jennifer D. Donnelly, Esquire
Kimmel, Carter, Roman, Peltz & O'Neill, P.A.

Christopher T. Logullo, Esquire
Cobb & Logullo

OUT OF STATE CLE CREDIT INFO

Those attendees who wish to receive CLE credit, other than from Delaware or Pennsylvania, should contact their individual State's CLE Commission for credit. The Delaware State Bar Association can provide you with the Agenda (included in the Materials sent with your registration confirmation) and a Certificate of Attendance (upon completion of the webinar), which should meet the requirements of compliance.

Moderator

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DELAWARE WORKERS' COMPENSATION
Industrial Accident Board
CASELAW Update
& Appellate Outcomes

By John J. Ellis, Esq.
Cassandra Faline Roberts, Esq.
Caroline A. Kaminski, Esq.

DSBA ANNUAL WORKERS' COMP SEMINAR

January 16, 2024

IAB DECISIONS

ADJACENT SEGMENT DISEASE

Eric Starling v. Formosa Plastics, IAB #1471909 (5/5/23). Surgery awarded based on adjacent segment disease with Dr. Zaslavsky as Claimant's expert and Dr. Schwartz testifying as the defense expert. Employer was denying the compensability of a fourth lumbar procedure, having paid for the first three. [O'Neill/Gin]

Natalie Tursi v State, IAB #1329706 (5/3/23). Surgery awarded based on adjacent segment disease with Dr. Zaslavsky as Claimant's expert and Dr. Rushton testifying as the defense expert. Employer had already paid for lumbar spine surgeries in 2009, 2010, 2011, 2013, 2014, and 2017. Dr. Zaslavsky was given deference due to his 9-year relationship with Claimant, having taken over when Dr. Katz passed away, Dr. Katz having performed the initial surgeries. Even allowing for Dr. Rushton's opinion that age played a role in the spinal degeneration, under *Blake* and *Reese*, the surgery would still be compensable. [Morrow/Bittner]

Matthew Bowman v. Trans. Drivers, Inc. IAB #1402293 (12/4/23). Surgery awarded to a 73-year-old claimant, based on adjacent segment disease with Dr. Zaslavsky as Claimant's expert and Dr. Schwartz testifying as the defense expert. Employer was denying the compensability of a May 2023 surgery, noting prior surgeries in 2015 and 2017. Claimant presented highly credibly per the Board and even returned to work promptly following the 2023 surgery. [Welch/Gin]

CAUSATION

David Brooks v. Viking Pest Control, IAB #1532541 (10/19/23). Intervening event lifting weights at the gym does not break chain of causation for 2022 shoulder injury. Dr. Douglas Palma as the treating versus Dr. James Bonner for the DME. This case fits the standard of an injury following "as the direct and natural result of the work-related injury". [O'Neill/Silar]

COMMUTATION

Jeremiah Wiggins v. State, IAB #1513621 (ORDER) (5/5/23). The Board grants the State's Motion to Enforce a Termination Agreement consisting of consent to the Termination, a global commutation of $10,000 and the execution of a General Release to not seek re-hire. [Elgart/Skolnik]

COURSE & SCOPE

Kimberly Wallace v. Chester Co. Home Assocs., IAB #1535066 (11/14/23). Caregiver who leaves dementia patient home alone during her shift to go out and grab dinner is *not in course and scope* for purposes of an auto accident on the way back to her patient. Impacting the decision was a Policies and Procedures Handbook that dictated a patient should not be left alone without pre-approval by management and arrangements for a replacement, which claimant clearly violated. Reliance on *Spellman v. CCHS*, 74 A.3d 619 (Del. 2013). [Sharma/ Harrison]

Elvira Jimenez Gonzalez v. Selbyville Food Mart, IAB #1526724 (12/4/23). Assault by co-worker on Claimant, whose shift had ended several minutes prior to the attack *is deemed by be an injury in course and scope*. The argument that Claimant remained past her shift was unpersuasive, noting Claimant had regularly been requested to stay to provide coverage and assistance during transition of shifts. The Board also rejected a horseplay defense noting that it was the co-worker, if anyone, engaging in horseplay. Of note, a video of the assault was entertained by the Board to allow them to view the activities of the parties and any attendant provocation, or lack thereof. Also, Claimant and co-worker had no personal relationship beyond the work environment. [Stanley/Lukashunas]

DISCOVERY

Shawn Reynolds v. DHL Holding USA, IAB #1317151 (ORDER) (11/20/23). The Board grants Employer's Motion to Compel production of credit card and bank statements, along with travel documents, as being relevant to Claimant's activities including travel and recreation. The Board imposed a time limit, however, on the documents, from 1/1/2023 to the date of its 11/20/2023 Order. [Houser/Wilson/Boyle]

FORFEITURE – INTOXICATION

Timothy Willis v. UPS, IAB #1512050 (5/8/23). This was a single vehicle MVA where claimant's truck struck a guardrail, allegedly to avoid hitting a deer. Claimant refused a field sobriety test and medical treatment. Claimant pled not guilty to DUI charges in Maryland and was sentenced to probation before judgment. Employer raised a Section 2353 Intoxication defense. Of note, officers testified that Claimant threw three cold beer cans out of his truck, slurred his speech, and had trouble standing up. The beers in question were Miller Lite. According to the Board, the video of the event did not depict Claimant as "altered" as the police testimony suggested, nor did the audio. Pivotal to the outcome in Claimant's favor was the

fact that there *was* a heavy deer presence in the area of the accident (per the local police), along with witness testimony that to operate a Mack Pinnacle requires great skill and ample concentration. In denying the intoxication defense, the Board also rejected the reckless indifference defense and stated the employer did not meet its burden to establish intoxication as a proximate cause of the accident. [Marston/Herling]

Larry Smith v. New Castle County, IAB #1529319 (8/24/23). Intoxication defense fails and BAC is not controlling. Claimant was killed as a result of catastrophic injuries sustained in an MVA while driving a water jetting truck. The accident occurred with Claimant responding to an "on call" request at 10 p.m. on a Saturday evening, a request he had the option to decline. Claimant's truck was driving in the left lane, was cut off by another vehicle, and swerved sharply to avoid hitting that vehicle. Because Claimant's truck was loaded with water, the weight and shift caused the truck to overturn. A supervisory witness testified on Claimant's behalf that his job is to ensure safe transport of this water-filled vehicle and that before Claimant left with the truck, he did not appear to be impaired. There was also a co-worker passenger who testified similarly, stating "as a passenger in a water jetting truck, a vehicle that is particularly dangerous, she is putting her life in the driver's hands." She verified that they were cut off by another vehicle and she herself was seriously injured, having been ejected from the truck. A physician testified that Claimant's BAC was approximately 0.2, but stated that given the overwhelming inconsistent evidence, he could not deem the BAC obtained at the hospital to be reliable or valid. Benefits were awarded with the Board concluding that even if there were alcohol consumption, it did not play a role in the accident. [Kimmel/Norris]

MEDICAL TREATMENT

Demetrias Davis v. JP Morgan Chase, IAB #1462133 (8/7/23). Per Section 2322(f) the Employer must repair or replace a prosthetic device "for life." Claimant sustained a CDE injury to her right upper extremity, in tandem with an unrelated existing congenital injury to the left upper extremity, which ends at the wrist. In a prior ruling, the Board in December 2019 ordered Employer to pay for a prosthesis to allow more use of the non-injured limb. That prosthesis became damaged and required repair or replacement, denied by the Employer. The device in question provides claimant with a left hand to manipulate items. The defense expert testified that the claimant could experience complete resolution of her deQuervain's symptoms with a minute surgery. He observed that myoelectric prosthetics are expensive, not durable, and require a lot of maintenance. They are also difficult to use as the claimant testified. While suggesting they would have liked to have heard

from an expert in prosthetics in addition to Dr. Eichenbaum and Dr. Schwartz, they awarded the repair/replacement, citing Section 2322(f) as controlling. [Schmittinger/Simpson]

Two Farms, Inc. v. Bayhealth Med. Ctr., IAB #1535737 (ORDER) (9/13/23). The Board can enjoin a medical provider from billing private insurance. Despite having received multiple notices from the employer, the claimant and the TPA, Bayhealth continued to bill claimant's private insurance, which was subject to a $10,000 deductible. Claimant's Benefits Account was then depleted when claimant's minor daughter became ill and required treatment. Bayhealth was enjoined from further billing to the private carrier and ordered to reimburse the private insurance and bill Gallagher Bassett. Failure to do so will trigger a Section 2322F(g) fine and Employer's attorney's fees. [Andrews/Capocardo/Morris-Johnston]

PARTIAL DISABILITY

Erik Cuevas v. Best Buy, IAB #1501069 (4/26/23). The burden of proof on establishing the *Maxey/Wade* adjustment for temp partial rests with the claimant. Even allowing for a *Maxey/Wade* adjustment, claimant's transferrable skills are such that he could earn the same or more, and no TPD is awarded with regard to the Petition to Review. [Welch/Newill/Kelly]

Blanca Gonzalez v. Amazon.com, IAB #1524776 (11/7/23). Claimant is injured working full-time evenings for Amazon but also holds another full-time day job at Gainwell Technologies. On a Petition to Review, she is seeking partial disability at her TTD rate of $421.73. As of 6/23/23, Dr. Zaslavsky released claimant post-op for fulltime sedentary and the Amazon job exceeds that work tolerance level. Claimant relies on *Hoey v Chrysler*, arguing she is a displaced worker at Amazon and held a reasonable expectation of returning there. Additionally, she claims ongoing TTD due to the insufficiency of the labor market survey which fails to identify jobs that are full time *and* match her ability to work overnight and on weekends, given that the LMS jobs were admittedly offering an 8 am to 5 pm schedule. The *Hoey* entitlement is rejected due to the specific facts of this case. Looking at the second argument, the Hearing Officer invoked *Warner Corp. v. Slattery, 235 A.2d 633 (Del. Super. Ct. 1967)*, which would require Employer to present a LMS compatible with claimant's "available time and skills". Per the Hearing Officer, the LMS addresses claimant's skills but not her time availability. As such claimant was awarded temp partial at her TTD rate. [Greenberg/Starr/Kelly]

PRACTICE AND PROCEDURE

Donnalee Whitaker v. DART/State, IAB #1363910 (ORDER) (5/5/23). A letter from the treating physician releasing claimant to return to work is not a basis to force a signed Final Receipt. [Schmittinger/Klusman]

TOTAL DISABILITY

Tabre Nelson v. Prof'l Realty Mgmt., IAB#1520650 (5/4/23). On a Petition to Review, treating physician Dr. Grossinger is slammed for his bogus TTD testimony and PTR is granted. IAB does not buy Dr. Grossinger's explanation for a gap in treatment due to his own extended vacation in Florida, stating "Good for him; he could have easily referred claimant to another practitioner in his office." Additionally, given Dr. Grossinger's testimony as to claimant's severe-- but non-existent-- head injury, the Board adopted the RTW opinion of Dr. Matz and granted the Term. [Minuti/Bittner]

Erik Cuevas v. Best Buy, IAB #1501069 (4/26/23). The Board rules that reaching MMI is not a precondition to a return to work, commenting that Dr. Eskander has conflated return to work status with MMI in testifying that he wanted claimant to reach MMI, then be referred for an FCE, and then he would contemplate a RTW release. The Termination was granted per the DME testimony of Dr. Gelman. [Welch/Newill/Kelly]

APPELLATE OUTCOMES

State v. Williams, N22A-06-003 CEB (Del. Super. Ct. July 26, 2023). The State filed an appeal challenging a Board decision in claimant's favor that awarded permanency benefits. The claimant sustained a work injury to his head. The Board accepted the testimony of the claimant's expert over the defense expert and awarded benefits for permanency to four areas affected by the injury. The Board also found the claimant's ongoing condition work-related despite the defense expert testifying that psychiatric and pre-existing issues were responsible for the ongoing condition. The State appealed, contending that the Board failed to set forth the proper causation standard and that its finding that symptoms worsened after the work injury was unsupported by the record. The Superior Court affirmed. The Court was able to infer the Board's findings on causation from review of the facts section of the Decision. A remand was not appropriate just to ensure a more technically precise opinion. Next, the Board found there was sufficient evidence from medical expert testimony, on which the Board relied, to support that symptoms increased after the work injury. Finally, the Court found the Board did not need to address the Claimant's pre-existing condition in greater detail. A Decision does not need to address every shred of evidence or argument presented. Since both experts addressed the pre-existing condition, that was sufficient to support the Decision. [Klusman/Owen, Weeks]

This & That Service Co. Inc. v. Nieves, No. 441, 2022 (Del. 2023). The Supreme Court reversed a Superior Court opinion and reinstated a Board decision that granted Employer's UR appeal petition on narcotic medication. The Supreme Court first found that the employer timely filed an appeal directly from the Superior Court to the Supreme Court. It was not an interlocutory appeal as the Superior Court reversed the Board decision and its remand was only ministerial in nature. The Court then found that the Superior Court erred as a matter of law by determining that the employer's petition did not raise any justiciable issues. The Superior Court had found that unless the claimant submits bills to the employer for payment, the underlying treatment is not "at issue" and cannot be the subject of a UR challenge. The Supreme Court relied on statutory language to support that both 'provided' and 'proposed' treatment can be challenged via UR. The Superior Court also erred by finding the Board lacked jurisdiction because the employer did not file multiple applications for Utilization Review concerning narcotic medication. That conclusion was found inconsistent with the facts of the case, the purpose of UR to achieve prompt resolution of issues and a prior holding from the Superior Court in this case.

The employer was entitled to challenge ongoing treatment as it did in its UR application. [Ellis/Schmittinger]

Mullins (Deceased) v. City of Wilmington, N23A-01-004 CLS (Del. Super. Ct. Aug. 18, 2023). The issue before the Court was whether the Board erred by failing to give any weight to City determination to award a disability pension to the claimant. The claimant's widow had filed a petition alleging work-related ocular melanoma and entitlement to survivor benefits. The employer presented a medical expert in support of its causation defense. The claimant did not call a medical expert, but contended that the City was estopped from making any causation defense due to its decision to award a pension under the City Pension Code. The petition was denied as the claimant did not meet their burden of proof. The determination concerning the pension did not impact any defense as it was a distinct proceeding from worker's compensation and the City had legitimate reasons for paying the disability pension. On appeal, the claimant contended the Board erred by not giving any weight to the determination to pay the disability pension. This should have created an unrebutted presumption that the condition was work-related. The Superior Court disagreed. The standard and considerations for deciding entitlement to a disability pension differs from the causation standard before the IAB for worker's compensation benefits. The court indicated that the burden of proof was higher before the IAB. [Schmittinger/Bittner]

Ranstad Staffing v. Stansbury, N22A-06-001 CLS (Del. Super. Ct. July 14, 2023). The Superior Court addressed a challenge to the Board's decision to decline to enforce a commutation settlement. The claimant authorized her attorney to agree to a commutation for $22,000.00 and the parties reached settlement. The claimant then contacted her attorney to advise she did not want to move forward with the commutation. Her attorney responded that he would withdraw if she backed out from settlement. The attorney stated that the claimant then wished to move forward with the commutation while the claimant claimed this was not accurate. The attorney withdrew as counsel. The employer filed a motion to enforce the commutation. The Board denied the motion. While there was a settlement between the parties, the Board declined to enforce the settlement as being in the claimant's best interest. The employer appealed and contended that the 'best interest' standard was impermissibly vague. The Court disagreed. Section 2358(a) does not require the Board to concretely determine whether a commutation is in a claimant's best interest. It instead requires the Board focus on the appearance of the settlement. The Board was entitled to find the claimant's testimony credible as to why she did not believe the

settlement to be in her best interest. In contrasting this case with a similar case where the Board approved such a commutation, the Court suggested in the former case the claimant did not present evidence that there may have been an issue of inadequate representation. The Board's order was affirmed. [O'Brien/Greenberg]

Hawkins v. United Parcel Service, N22A-07-002 CLS (Del. Super. Ct. May 30, 2023). The employer contended that collateral estoppel and res judicata should have applied to support dismissal of a claimant's DACD petition. Similar petitions had been filed previously. The first was filed by Claimant in 2019 seeking total disability benefits and payment for two surgeries. After consolidation with a termination petition, the parties settled the petitions by agreeing to termination of total disability and initiation of partial disability benefits. As part of settlement, the claimant withdrew his petition. In 2021, the claimant filed a similar petition seeking total disability benefits dating back to date of surgery plus payment for two surgeries. That petition was withdrawn and refiled. The employer filed a motion to dismiss on the grounds that: the 2021 petition was dismissed with prejudice under the 'two dismissal' rule; the newest petition was barred by res judicata due to the prior dismissal with prejudice; and 3) the total disability claim was barred by collateral estoppel due to the termination stipulation and order signed in 2019. The Board denied the motion and the employer appealed. The court affirmed the order. Collateral estoppel did not apply since the prior stipulation and order did not address whether the claimant could have a change of condition supporting recurrence of total disability. Res judicata did not apply since none of the claimant's prior petitions were dismissed by the Board, let alone with prejudice. Finally, the 'two dismissal' rule did not apply as the Board was not required to apply that Superior Court rule. [Stewart/Herling]

Hunsucker v. Scott Paper Co., K22A-11-001 RLG (Del. Super. Ct. June 16, 2023). The claimant in this matter filed an appeal challenging the Board's decision to reduce his opioid intake following a six-month weaning program. The defense expert was deemed most credible. The OxyContin medication was not just unreasonable but the dosage was dangerously high. The claimant contended that the Board decision was not supported by substantial evidence as it mischaracterized the evidence which led to a faulty analysis. The Superior Court affirmed. The Board was entitled to choose between the competing expert opinions, and the relied-on testimony constitutes substantial evidence for purpose of appeal. [Pro Se/Morgan]

Shaffer v. Allen Harim Foods, LLC, S23A-03-003 MHC (Del. Super. Ct. Aug. 29, 2023). Claimant sustained injuries to her left thumb and both wrists in September 2018. Over the course of the next four years, Claimant underwent four surgeries and was receiving total disability benefits. Employer then filed a Petition for Review, alleging that Claimant was released to work and could work with some restrictions. The Board granted the Employer's Petition and terminated Claimant's total disability benefits. Claimant appealed the Board's decision, arguing that she remained totally disabled because she was a *prima facie* displaced worker. Claimant argued: (1) the Board's decision that she was no longer medically disabled was not supported by substantial evidence; (2) the Board's finding that she was not a *prima facie* displaced worker was an error of law and not supported by substantial evidence; and (3) the Board's decision that Employer met its burden of proof in proving available jobs is not based on substantial evidence. First, the Court held that it was "extremely clear" that the Board's finding that Claimant to be no longer medically disabled was supported by *all* the evidence as all three medical experts examined and/or worked with Claimant found her to be able to physically work full-time in at least a medium-duty capacity. Second, the Court's reliance on Employer's vocational expert was supported by substantial evidence as the labor market survey identified entry-level customer service jobs that Claimant was capable of working. Last, "Claimant's preference to work with her hands and testimony that she is quick to argue with people does not preclude her from working customer service-based positions." The Court held that the jobs listed on the LMS were appropriate and therefore, there was substantial evidence that Employer met its burden of showing the required job availability establishing that she was not a displaced worker. [Morrow/Baker]

Hudson v. Beebe Med. Ctr., K22A-11-022 NEP (Del. Super. Ct. Sept. 19, 2023). The Superior Court of Kent County, *sua sponte*, denied jurisdiction of Claimant/Appellant's IAB appeal. 19 Del. C. 2349 provides that appeals must be filed in "the Superior Court for the county in which the injury occurred…" Here, the alleged injury occurred in Sussex County, but the appeal was filed in Kent County. Therefore, the Superior Court of Kent County held it lacked jurisdiction to decide this appeal. [Donovan/Morris-Johnston]

Mabrey v. State, K22A-06-001 JJC (Del. Super. Ct. Sept. 21, 2023). Claimant sought compensation for permanent impairment to his cervical spine arising from a February 27, 2019 work incident. The parties stipulated that their competing experts had contrary opinions regarding the permanency: twenty percent (20%) impairment

to the cervical spine versus zero percent (0%). At the hearing, the evidence disclosed that Claimant had a prior work accident in 2014, where he suffered injuries to his right upper extremity. And, while no medical provider or retained expert diagnosed him with a cervical spine injury related to the 2014 work incident, his medical records referenced neck pain and radiculopathy dating back to 2014. In its decision, the Board found that Claimant's expert's testimony regarding causation of permanency unpersuasive. First, it discredited his opinion because it relied on the fact that Claimant had only a single positive Spurling's test finding in September 2019 when his treating physician performed seven Spurling's tests over the course of his treatment which produced all *negative* results. Second, the Board found that Claimant's expert assigned too little weight to the chiropractic reports that described the prior neck pain. Third, the Board took issue with the expert's "blanket discounting" of other cervical related entries in Claimant's early 2019 and 2018 medical records that predated the accident. On appeal, Claimant argued the Board committed legal error because it did not conclude that the 2019 accident aggravated his pre-existing injuries, and that the record required the Board to award at least a lower permanent impairment percentage even if Claimant failed to prove a 20% impairment. The Court first held that while there was evidence to support a finding of an aggravation of a pre-existing cervical condition, the record *also* contained substantial evidence to support the contrary - Claimant's medical history, Employer's expert's opinion that the accident caused no permanent impairment, and Claimant's recent chiropractic treatment immediately before the 2019 work incident. Second, the Court held that the Board did not commit legal error by not awarding some lesser percentage of permanent impairment. "[H]ad the record contained uncontroverted expert testimony that the accident had contributed (in a but for sense) to an increase in permanency, then the Board would have been required to either (1) determine the exact percentage of permanency to award by keeping within the expert's ranges, or (2) independently and clearly articulate the facts upon which it based a different conclusion." In this case, however, Employer's expert's opinion and the evidence regarding the pre-existing cervical complaints and limitations freed the Board to apply its judgment in favor of assigning weight to only Employer's expert. [Schmittinger/Lukashunas, Trayner]

Quality Assured Inc. v. David*, N22A-05-012 SKR (Del. Super. Ct. Dec. 6, 2022), *aff'd*, *No. 86, 2023 (Del. 2023). Claimant sustained a neck and low back injury as a result of a 2009 compensable work accident. Since then, Claimant had been engaged in active treatment for his low back, which included consistent epidural injections. In November 2021, Claimant sought payment of medical expenses for his treatment from September 2020 and ongoing, which consisted entirely of

injections directed to his low back. Claimant's physician, who began treating Claimant a couple months after the work accident and continues to treat him, testified that Claimant's treatment of his lumbar spine has not changed since 2009 which consists of typically one to three epidural injections per year. Claimant had one injection in 2019, three in 2020, and three in 2021. Claimant's physician opined that the injections were causally related to the 2008 work accident because Claimant has not had any lumbar injections before then and has been consistently receiving them at relatively the same frequency since the accident. Conversely, Employer's physician testified that the injections are not causally related but rather attributed to Claimant's pre-existing degenerative conditions. The Board found that the injections were causally related to the work accident, relying upon Claimant's physician's opinion who had been overseeing his care and administering the injections since 2009. The Board also cited that Employer had paid for injections administered prior to those at issue. On appeal, Employer argued that the Board applied a less stringent legal standard to Claimant's burden of proof; the Board should not have considered past payments of medical expenses; and the Board's decision to accept the testimony of Claimant's treating physician over Employer's physician was not supported by substantial evidence. While the Superior Court agreed that the Board's consideration of payments for previous injections in determining causation or compensability of present, disputed medical expenses improper, the Court did not find that, standing alone, rendered the Board's whole decision reversible and affirmed it. [Bittner/Crumplar].

Cline v. Nemours Foundation, N23A-11-003 FWW (Del. Super. Ct. Oct. 11, 2023)
The Board denied payment of Claimant's total knee replacement surgery based on the Health Care Practice Guidelines requiring *exhaustion of conservative treatment* as a precursor to surgical intervention, and Claimant "should have pursued some type of conservative treatment first… it may have helped." On appeal, Claimant argued: (1) the Board failed to consider the *Brittingham* factors and determine whether the total knee replacement was reasonable specifically for Ms. Cline – not generally for someone with the same condition; (2) the Board incorrectly applied the Guidelines in its application of review of Claimant's Petition when it held that "proceeding to a total knee replacement surgery without exhausting conservative care was not reasonable or necessary," and disregarded that the Guidelines specifically identify that a knee replacement is reasonable when there is "severe osteoarthritis and all *reasonable* conservative measures have been exhausted and other reasonable surgical options have been considered;" and (3) the Board's finding of Dr. Schwartz's medical testimony more credible than Dr. Rubano was not supported by substantial evidence because (1) Dr. Schwartz's opinion lacked a

factual foundation as he never reviewed the diagnostic films; (2) Dr. Schwartz offered contradictory and inconsistent opinions regarding Ms. Cline's diagnosis and treatment; and (3) Dr. Rubano's opinions regarding the diagnostic films were uncontradicted. On appeal, the Superior Court that the held Board failed to expressly apply the *Brittingham* standard that the necessity and reasonableness of a claimant's surgery is specific to that claimant. Specifically, the Court held that the Board failed to consider whether all reasonable conservative measures had been exhausted to that Claimant's treatment specifically; it failed to explain why it was willing to discount Dr. Rubano's testimony about what the actual films showed without having its stated interest in Dr. Schwartz's interpretation of the actual films satisfied; and it failed to explain how or even if it considered Claimant's pressing need to return to full-duty in its evaluation of the reasonableness of her surgery. Then, the Court held that the Board did not correctly apply the Guidelines when it stated that the Guidelines call for the "exhaustion of conservative treatment" – not *reasonable* conservative treatment. And, last, the Court held the Board's decision was not supported by substantial evidence as the Board "couched its decision in such a conclusory fashion" that the Court was unable to identify specific facts it relied upon in determining that Claimant's surgery was not reasonable or necessary. Moreover, the Board failed to explain why Dr. Rubano's medical opinion was discredited when he reviewed the diagnostic films and confirmed his readings of the films when he performed the TKR. [Welch/Morris-Johnston]

Fowler v. Perdue Farms, Inc., K23A-01-001 NEP (Del. Super. Ct. Oct. 18, 2023)
In this case's first appeal, the Superior Court reversed and remanded the Board's decision, holding the Board (1) improperly considered extrajudicial sources, (2) rejected unrebutted testimony of both experts and the claimant when it rejected claimant's claim that he contracted COVID-19 at his workplace, and (3) imposed a higher burden on claimant and essentially charged him with proving his claim beyond a reasonable doubt, rather than the appropriate "more likely than not" standard. On remand, the Board found (1) Claimant had proven by a preponderance of the evidence that he had contracted COVID-19 at the Perdue plant, but (2) that it was not an occupational disease in the context of his employment. On its second appeal, Claimant argued that because he contracted COVID-19 in the cafeteria at the Perdue Plant, where he faced a "heightened risk" of contracting the disease, his illness is an occupational disease. In response, Employer argued that the illness was not an occupational disease because it is not a natural incident of his particular occupation in such a way that it "attaches to his occupation a hazard distinct from and greater than the hazard attending employment in general." The Court held that while Claimant did face a "heightened risk" of contracting COVID-19 in the

cafeteria, his COVID-19 *did not result from the peculiar nature of his employment*, and for that reason the Board correctly determined that his COVID-19 did not qualify as an occupational disease. The Court explained that a finding of a compensable occupational disease requires the presence of a hazard not only "greater than" but also "distinct from" that attending employment in general. Citing *Air Mod Corp. v. Newton*, "[t]here must have been a recognizable link between COVID-19 and some distinctive feature of Claimant's job as a boxer at Perdue." Accordingly, the Court found that the hazard of contracting COVID-19 in the cafeteria was greater than that attending employment in general; *however*, Claimant's illness did not result from the peculiar nature of his employment. Therefore, under Claimant's circumstances, COVID-19 is not an occupational disease. [Schmittinger/Panico]

Hudson v. Beebe Med. Ctr., S23A-10-002 NEP (Del. Super. Ct. Jan. 3, 2024).
Claimant appealed the Board's decision that Claimant failed to prove by a preponderance of the evidence that (1) she contracted COVID-19 at the workplace of her employer and (2) COVID-19 was an occupational disease in the context of her employment at Beebe. On appeal, Claimant argued (1) the Board applied a higher burden of proof and required her to prove the exact date of infection; and (2) the Board's decision was not supported by substantial evidence. First, the Court held that the Board's analysis addressed more than the alleged date of contraction but also the possible timeline of exposure and symptom onset. The Board did not require Claimant to prove that any one specific exposure at work caused her illness - it required her only to prove that the COVID-19 exposure leading to her illness more likely than not, occurred at work. In addition, the Court held that there was substantial evidence to support the Board's decision. The Board considered the competing experts' opinions and data submitted, and adopted Employer's expert's conclusion that it was more likely that Claimant acquired COVID-19 from her son, rather than while working at Beebe. [Donovan/Morris-Johnston]

Keynote Address

The Honorable Noel Eason Primos
Superior Court of the State of Delaware

The Honorable Noel Eason Primos, Judge, Superior Court of Delaware

The Honorable Noel Eason Primos was appointed to the Superior Court of Delaware by Governor John C. Carney Jr. on June 1, 2017.

Prior to his appointment, Judge Primos practiced law for over 24 years with the Dover, Delaware, law firm of Schmittinger and Rodriguez. Judge Primos received his B.A. in English, summa cum laude, from Vanderbilt University in 1986, and his J.D. from Yale University in 1989. He was admitted to the Delaware Bar on December 17, 1992.

Following his graduation from law school, Judge Primos served as a judicial clerk to the Honorable William H. Barbour, Jr., Chief Judge of the United States District Court for the Southern District of Mississippi. Judge Primos has been an active member of the Delaware State Bar Association, the Kent County Bar Association, the Terry-Carey American Inn of Court, and the Randy J. Holland Delaware Workers' Compensation American Inn of Court. He is also a member of the American Bar Association and the American Bar Foundation. Prior to his appointment to the Superior Court, he served on the Board of Bar Examiners of the Delaware Supreme Court, the Preliminary Review Committee of the Board on Professional Responsibility, the United States District Court Lawyers' Advisory Committee, and the Third Circuit Lawyers' Advisory Committee.

Judge Primos resides in Milford, Delaware, with his wife, Andrea.

West's Delaware Code Annotated
Title 10. Courts and Judicial Procedure
Part I. Organization, Powers, Jurisdiction and Operation of Courts
Chapter 19. General Provisions Applicable to Courts and Judges
Subchapter I. Courts and Judges

10 Del.C. § 1907

§ 1907. Oath of attorneys-at-law

Currentness

Every attorney-at-law, upon admission to the Bar of this State, shall take and subscribe the following oath or affirmation:

"I do solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution of the State of Delaware; that I will behave myself in the office of an attorney within the Court according to the best of my learning and ability and with all good fidelity, as well to the Court as to the client; that I will use no falsehood, nor delay any person's cause through lucre and malice."

Credits
60 Laws 1975, ch. 182, § 1. Amended by 70 Laws 1995, ch. 186, § 1, eff. July 10, 1995.

Codifications: Rev. Code Del. 1852, § 438; Rev. Stat. Del. 1915, § 378; Rev. Code Del. 1935, § 347; 10 Del.C. 1953, § 1906

Notes of Decisions (1)

10 Del.C. § 1907, DE ST TI 10 § 1907
Current through ch. 240 of the 152nd General Assembly (2023-2024). Some statute sections may be more current, see credits for details. Revisions to 2023 Acts by the Delaware Code Revisors were unavailable at the time of publication.

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DELAWARE LAW REVIEW

UNCOVERING THE ROOTS: A BRIEF DISCUSSION OF THE HISTORY, POLICY AND PURPOSES OF DELAWARE'S WORKERS' COMPENSATION ACT

Christopher F. Baum*

A learned treatise on the law of workers' compensation has observed that:

> [a] correctly balanced underlying concept of the nature of workers' compensation is indispensable to an understanding of current cases and to a proper drafting and interpretation of compensation acts. Almost every major error that can be observed in the development of compensation law, whether judicial or legislative, can be traced either to the importation of tort ideas, or, less frequently, to the assumption that the right to compensation resembles the right to the proceeds of a personal insurance policy.[1]

The purpose of this article is to explain the basis, nature and development of Delaware's workers' compensation law so that practitioners may avoid such pitfalls.

I. CORE PHILOSOPHY

In the nineteenth century, before the first workers' compensation law was enacted in Delaware, an injured worker could only receive compensation for injuries received at the workplace through a personal injury action at common law. Under the "fellow-servant exception," however, an employer would not be liable to an injured worker if the injury was the result of a co-worker's negligence.[2] In addition, in cases when the employee could apprehend the possible danger of the employment, that employee, when injured, could not successfully sue the employer because he or she had "assumed the risk" of injury.[3] On top of this, at the time the harsh rule of contributory negligence applied; therefore, an injured worker could not be compensated for an accident if the injured worker was negligent to any degree.[4] Because the employer could only be found responsible if the employer itself was negligent, recovery could not be had in cases where a worker was injured as the result of an "Act of God," or when no party was found to be negligent.

As if the deck were not stacked enough against the injured worker, it must be kept in mind that the injured worker might easily be out of work because of the workplace injury. With no income, the worker would likely lack the financial

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* Christopher F. Baum has been the Chief Hearing Officer for the Industrial Accident Board of the State of Delaware since October of 2005. He was educated at Fordham University (B.A. 1982; J.D. 1985). He is a proud supporter of the Littleton and Jane Mitchell Fellowship Program for Civil Rights and Social Justice administered by the University of Delaware.

1. ARTHUR LARSON & LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW, DESK EDITION, § 1.02 (2014).

2. *Id.*, § 2.03. The injured worker could, in theory, bring a cause of action in tort against the coworker, but a fellow employee was unlikely to have great financial resources. Thus, even if the injured worker won, the recovery would, as a practical matter, be small and inadequate.

3. *Id.*

4. *Id.*

resources for a prolonged court battle even in those rare cases when recovery might theoretically be had against the employer.[5] This situation could easily put the injured worker and the worker's family into the poor house and/or dependent on State hospitals for medical care—in other words, becoming a charge upon the taxpayers rather than remaining productive members of society. It is little wonder that state governments sought a different approach to the problem of injured workers.

Like legislatures elsewhere in the United States, in the early twentieth century the Delaware General Assembly worked to rectify the situation. In 1917, the General Assembly enacted the original Delaware Workmen's Compensation Act ("the Act").[6] The original Act provided for compensation to injured workers regardless of the question of negligence, but limited the amount and types of compensation an injured worker could receive and prohibited the injured worker from suing a co-worker.

The Act removed workplace injuries from traditional personal injury law. An employee has "no rights to workers' compensation except for those granted by the Act."[7]

> Workers' compensation is fundamentally different from strict tort liability in its basic test of liability, which is work connection rather than fault; in its underlying philosophy of social protection rather than righting a wrong; in the nature of the injuries compensated; in the elements of damage; in the defenses available; in the amount of compensation; in the ownership of the award; and in the significance of insurance.[8]

The original version of the 1917 Act was "elective" in nature; however, both employer and employee were presumed to have elected to be bound by the provisions of the law unless, prior to the employee's injury or death, either party gave proper notice to the other that it did not intend to be bound. The purpose of this approach was to ensure the Act's constitutionality.[9] Eventually, court decisions across the country established the constitutionality of a compulsory act as a proper exercise of a state's inherent police powers to protect the citizenry.[10] The General Assembly made the Act compulsory in 1941.[11] Since then, with only a few narrow exceptions, every employer and employee is bound "to pay and to accept compensation for personal injury or death by accident arising out of and in the course of employment, *regardless of the question of negligence and to the exclusion of all other rights and remedies.*"[12] This exclusivity provision "precludes a suit for negligence

5. "One need only add that the usual witnesses of the accident, being co-employees, would naturally be reluctant to testify against the employer, to complete the picture of helplessness which characterized the position of the injured worker of the precompensation era." *Id.*, § 2.03.

6. 29 Del. Laws 233 (1917).

7. Ruddy v. I.D. Griffith & Co., 237 A.2d 700, 705 (Del. 1968).

8. LARSON, *SUPRA* NOTE 1, CHAPTER 1 "SCOPE."

9. *See* LARSON, *SUPRA* NOTE 1, § 2.07; HILL V. MOSKIN STORES, INC., 165 A.2D 447, 449 (DEL. 1960).

10. *Cf. Hill*, 165 A.2d at 449 (stating that the Act was "obviously" grounded in an exercise of the police powers).

11. 43 Del. Laws 269 § 2 (1941).

12. DEL. CODE ANN. tit. 19, § 2304 (2005) (emphasis added). Under certain circumstances, however, an employee may forfeit the right to benefits granted under the Act. For example, the Delaware Supreme Court held:

> Upon the basis of public policy, the authorities above discussed, and the principles of fairness and justice, we hold that an employee forfeits his right to benefits under the Delaware Workmen's Compensation Act if, in applying

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under the common law, even if the injury was caused by the gross, wanton, wilful, deliberate, reckless, culpable or malicious negligence, or other misconduct of the employer."[13] By the same token, compensation was available even if the injury was caused by the negligence of the injured employee or by a co-employee, and even if the injured employee had either expressly or impliedly assumed the risk of being injured.[14]

Thus, the core principle of Delaware's Workers' Compensation Act is "to eliminate questions of negligence and fault in industrial accidents, and to substitute a reasonable scale of compensation for the common-law remedies, which experience had shown to be, generally speaking, inadequate to protect the interest of those who had become casualties of industry."[15] As such, an employer would be required to pay benefits to an employee who was injured at work even though the employee's own negligence may have caused the injury, and even though the employer was in no way "at fault" for the injury. Clearly, this placed an additional burden on the employer. As a trade-off, the legislature restricted the benefits available to the employee. On the whole, the injured worker enjoyed the greatest benefit of the Act in that he or she was relieved of the expense and hazard of maintaining a lawsuit.

> Of course, in some cases, ... a recovery might be had at law exceeding the compensation payable under the act. But the policy of the law is to take the whole subject out of the field of negligence. The overall benefit to the employee is clear. For that benefit, he gives up the right to sue at law.[16]

Instead of a suit at law, an administrative board—the Industrial Accident Board ("IAB")—was created to have jurisdiction over cases arising under the Act and to hear disputes as to the compensation to be paid to an injured worker.[17]

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> for employment, the employee (1) knowingly and wilfully made a false representation as to his physical condition; and (2) the employer relied upon the false representation and such reliance was a substantial factor in the hiring; and (3) there was a causal connection between the false representation and the injury.

Air Mod Corp. v. Newton, 215 A.2d 434, 440 (Del. 1965) (citations omitted). All three elements must be present before benefits are forfeited. Mountaire of Delmarva, Inc. v. Glacken, 487 A.2d 1137, 1140 (Del. 1984). Other bases for forfeiture are listed in title 19, section 2353 of the Delaware Code.

13. Rafferty v. Hartman Walsh Painting Co., 760 A.2d 157, 159 (Del. 2000). The exclusivity provision pertains to the relationship between the employer, the employee and co-employees. The Act does not, however, prevent an injured worker from bring a traditional tort action against a third party. "Although the exclusivity provision prevents an injured employee from suing the employer for the employer's negligence, it does nothing to alter the injured party's right to bring a negligence action against a third-party tortfeasor." Stayton v. Clariant Corp, 10 A.3d 597, 600 (Del. 2010).

14. DEL. CODE ANN. TIT. 19, § 2314 (2005).

15. *Hill*, 165 A.2d at 451 (citation omitted).

16. *Hill*, 165 A.2d at 451.

17. DEL. CODE ANN. tit. 19, § 2301A(i) (2005). The current phrasing of the statute has caused some confusion. It states that the Board "shall have jurisdiction over cases arising under Part II of this title and shall hear disputes as to compensation to be paid under Part II of this title." DEL. CODE ANN. tit. 19, § 2301A(i). Some have assumed that the phrase "Part II of this title" refers only to subchapter II of chapter 23, namely sections 2321 to 2334, inclusive. This is a mistaken assumption. "Subchapter II of chapter 23" is not the same thing as "Part II of this title" as that phrased is used in section 2301A. In fact, the phrase means exactly what it says: Part II of this title, not "of this chapter." The "title" in question is title 19 of the Delaware Code. That title ("Labor") consists of four parts. Part I contains "General Provisions" (chapters 1 through 17 of the title). Part II pertains to Workers' Compensation and comprises

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II. THE EXPANSION OF BENEFITS TO INJURED WORKERS

The Delaware courts have acknowledged that the provisions of the Act should be construed liberally to fulfill the "twin purposes of providing a scheme of assured compensation for work related injuries without regard to fault and to relieve employers and employees of the expenses and uncertainties of civil litigation."[18] The first of these "twin purposes" is assured compensation to injured workers. "Workmen's compensation law is grounded in a public policy strongly in favor of employers making restitution to employees who are injured while working. Unlike tort claims acts, the point of workmen's compensation is to protect workers, not to shield employers."[19] Because the purpose of the Act is to benefit the injured worker, the courts have held that the Act is to be construed liberally and, in interpreting the statutory provisions, reasonable doubts are to be resolved in favor of the injured worker.[20]

It is also important to understand that the Act is not "based on eleemosynary principles, but upon the fundamentals of injury or death arising out of and in the course of employment, and reliance upon the employee's earnings for support. Indiscriminate awards of compensation, based on uncertain evidence, or on sympathy, are not in the public interest."[21] In other words, the Act is not an act of charity. It also should not be read so broadly that the Act is "transformed into a health insurance statute."[22] It is not intended to compensate an employee for every ailment that the employee may have, but only those that can fairly be said to have been caused by the employment. In addition, because the point of compensation is to replace periodic wages, an injured worker is generally not to be compensated with a lump sum payment for lost wages. Rather, wage replacement benefits are intended to be made periodically, as wages were payable prior to the accident.[23] The purpose of these periodic payments is to "preclude any possibility of an imprudent employee or dependent wasting the means provided for his [or her] support and thereby becoming a charge on society."[24]

The employer also gains from the compromise that resulted in the Act. The trade-off for removing workers' compensation from the field of negligence (and thus creating essentially a no-fault law) was to impose a "reasonable scale

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chapters 21, 23 and 26 (although currently there are no active provisions in chapters 21 and 26, so "Part II" is really just chapter 23 of title 19). Part III of title 19 pertains to Unemployment Compensation (chapters 31, 33 and 34). Part IV is the Workplace Fraud Act (chapter 35). In short, section 2301A's reference that the Board has jurisdiction over cases arising under "Part II of this title" means that the Board has jurisdiction over any action arising under all of the Workers' Compensation Act (chapter 23 of title 19), including all its subchapters.

18. New Castle County v. Goodman, 461 A.2d 1012, 1014 (Del. 1983); *see* Duvall v. Charles Connell Roofing, 564 A.2d 1132, 1133 (Del. 1989) (noting the "two primary purposes of [the Act] are to assure prompt compensation of injured employees without regard to fault and to obviate the need for litigation").

19. Barnard v. State, 642 A.2d 808, 819-20 (Del. Super. 1992).

20. Estate of Watts v. Blue Hen Insulation, 902 A.2d 1079, 1081 (Del. 2006) (citing Hirneisen v. Champlain Cable Corp., 892 A.2d 1056, 1059 (Del. 2006)).

21. Children's Bureau of Delaware v. Nissen, 29 A.2d 603, 609 (Del. Super. 1942).

22. *Air Mod Corp.*, 215 A.2d at 442.

23. *See* DEL. CODE ANN. TIT. 19, § 2360.

24. *See* Molitor v. Wilder, 195 A.2d 549, 551-52 (Del. Super. 1963).

of compensation" rather than permitting the compensation potentially available in common law tort.[25] "[T]here are no rights to workmen's compensation except those granted by the Act."[26] As such, the benefits that are available to an injured employee are only those expressly provided for in the Act and "the benefits of th[e] Act are intended to benefit the employee primarily."[27] Further, the Board is not a court of equity; it cannot create or fashion whatever "fair" remedy a litigant may wish. Unlike a tort recovery, benefits under workers' compensation were never meant to make the injured party whole.[28] In short, while the Act is to be interpreted broadly in favor of the injured worker, the trade-off for this is that the available benefits are deliberately limited in scope.

Over time, however, the benefits available to injured workers have steadily expanded. A few examples illustrate this trend.

A. Example: Occupational Disease

When it was enacted in 1917, the Act defined "personal injury" as only one that involved "violence to the physical structure of the body and such disease or infection as naturally results directly therefrom when reasonably treated."[29] Occupational "diseases not entailing direct physical damage to a bodily structure were not covered."[30] In 1937, this very restricted definition of "personal injury" was expanded to include twelve *specified* occupational diseases provided that the culpable exposure occurred during the period of employment and the disability manifested itself ("commenced") within five months after the termination of the exposure.[31] In 1949, the legislature removed the list of twelve specific diseases to allow recovery for "all occupational diseases arising out of and in the course of employment."[32] Finally, in 1974, the legislature removed the five-month-commencement requirement.[33] As the Delaware Supreme Court has observed, this evolution of coverage for occupational diseases parallels the development of workers' compensation laws elsewhere.[34] "[T]his evolution of statutory treatment of compensable occupational diseases—from no coverage, to schedule coverage, to general coverage—is not unusual."[35]

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25. *See Hill*, 165 A.2d at 451.

26. *Ruddy*, 237 A.2d at 705.

27. Magness Construction Co. v. Waller, 269 A.2d 554, 555 (Del. 1970).

28. *See Hill*, 165 A.2d at 451 (recognizing that a greater recovery might have been had by an injured worker in a personal injury action at law than is available under the Act); Witt v. Georgia-Pacific Corporation, No. 95A-08-002, 1996 WL 30250, at *7 (Del. Super. Jan. 24, 1996) (finding that a ruling under the Act may seem inequitable, but there are no additional rights to compensation except for those found in the Act).

29. 29 Del. Laws 233 (1917).

30. Champlain Cable v. Employers Mutual Liability Ins. Co., 479 A.2d 835, 839 (Del. 1984).

31. 41 Del. Laws 241 § 1 (1937).

32. 47 Del. Laws 270 § 1 (1949).

33. 59 Del. Laws 454 § 8 (1974).

34. *Air Mod Corp.*, 215 at 441.

35. *Id.*

B. Example: The Three-Day Rule

At one time, the Workers' Compensation Act provided:

> No compensation shall be paid for any injury which does not incapacitate the employee for a period of 3 days from earning full wages, and compensation shall begin on the fourth day of incapacity after the injury, unless the incapacity extends to 7 days, including the day of injury, or unless the incapacity results in hospitalization of the employee. In the case of incapacity for a 7 day period, amputation or hospitalization, the employee shall not be excluded from receiving compensation for the first 3 days of incapacity.[36]

This became known as the "three-day rule." The intent was to limit the payment of workers' compensation so that compensation was not paid for minor or transient injuries. As written, the three-day rule affected the payment of medical expenses: if an employee was hurt but could continue working (for example, if the employee was already working in a sedentary capacity), then medical expenses for treatment of the injury would not be paid unless that employee was actually hospitalized. This led both the Board and the courts to interpret the statute to avoid its occasionally harsh literal effect.

For example, in *M & M Hunting Lodge v. DiMaio,*[37] the employee injured his shoulder and was unable to perform his normal duties, but he returned to work "in a limited capacity driving a tractor."[38] He was paid his full wages. The employer argued that, because the employee had not lost wages, it was not required to pay his medical bills. The Board decided that the employer had paid the full wages as a gratuity (having given claimant a "specially created position") and that such a job could not serve to deprive the claimant of benefits. The Superior Court agreed, holding, "[i]f a claimant is truly incapacitated from earning full wages due to a work related injury and returns to work in a gratuitous situation, this should not effect [sic] his workmen's compensation benefits."[39]

Likewise, in *Streett v. State,*[40] the employee was incapacitated for seven days, which happened to coincide with a previously planned vacation. At the time, section 2321 stated that benefits were only paid if the injured worker was incapacitated from "earning full wages."[41] In this case, because the employee was on vacation, she received full vacation pay and lost no wages. As such, the employer argued that it was not required to pay the medical bills.[42] The Delaware

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36. DEL. CODE ANN. tit. 19, § 2321 (1985). An even earlier version of this provision was more draconian, not only requiring three days of incapacity from earning full wages, but also limiting the payment of medical expenses to "the first thirty (30) days of the injury" and limiting the total cost of such treatment to no more than $200.00. *See* 43 Del. Laws 269 §6 (1941). Even acknowledging that two hundred dollars went further in those days, this was an extremely limited amount of compensation available for medical expenses. While the current version of the Act provides for a fee schedule to control medical expenses, there is no flat limit on those costs. *See generally* DEL. CODE ANN. tit. 19, § 2322B.

37. No. 90A-JL-81991, 1991 WL 89802 (Del. Super. May 10, 1991).

38. *DiMaio*, 1991 WL 89802, at *2.

39. *Id.* at *2, 3.

40. 669 A.2d 9 (Del. 1995).

41. *Id.* at 12 (citing DEL. CODE ANN. TIT. 19, §2321 (1995)).

42. In fact, the employer *had* paid the medical expenses, but argued that it had done so "voluntarily" rather than because they were compensable under the Act. *See Streett*, 669 A.2d at 11.

Supreme Court found that an employee should not be penalized for the timing of the injury and should not be required to cancel a scheduled vacation just so she could "not go to work" because of her injury.[43] The Court therefore concluded that "vacation days may be used to satisfy the three-day waiting period."[44]

Finally, in *Aiken v. General Motors Corporation*,[45] the employee sought disfigurement benefits although she "did not lose any time from work, nor any wages as a result of [her] injury.[46] The Delaware Supreme Court held that the specific wording of section 2321 reflected the General Assembly's determination that the recovery of "*lost earnings*" required incapacity for at least three days.[47] Compensation for permanent injuries under the Act (including both permanent impairment and disfigurement), however, was specifically paid "'regardless of the earning power of the employee.'"[48] The Court held that such permanent injuries were compensable *per se*.[49] Accordingly, the Court concluded that the three-day rule, which was a condition on recovery of "lost earnings," was inapplicable to a claim for disfigurement.[50]

As these cases made their way through the courts, the legislature changed the statutory language. The General Assembly, deciding that medical expenses for work injuries should be paid even if "minor" in the sense of not resulting in any wage loss, re-wrote the three-day rule of section 2321, effective July 10, 1995, to provide:

> Surgical, medical and hospital services, medicines and supplies, and funeral benefits shall be paid from the first day of injury. Beginning with the fourth day of incapacity, all compensation otherwise provided by law shall be paid. If the incapacity extends to 7 days or more, including the day of injury, the employee shall receive all compensation otherwise provided by law from the first day of injury.[51]

This change allowed a claimant to receive compensation for medical treatment without the necessity of being incapacitated for three days. In other words, an injury that was so "minor" that it did not cause an employee to lose any time from work could still be deemed compensable under the Act for the reasonable and necessary medical expenses involved in treating the injury.

The legislature amended section 2321 once again in 1996, before *Aiken* was decided. The 1996 version, which remains in effect today, provides:

> Permanent injury relating to hearing or vision loss, surgical, medical and hospital services, medicines and supplies, and funeral benefits shall be paid from the first day of injury. Beginning with the fourth

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43. *Id.* at 13.

44. *Id.*

45. 687 A.2d 186 (Del. 1997).

46. *Aiken*, 687 A.2d at 188.

47. *Id.* (citing Smith v Feralloy Corp., 460 A.2d 516, 518 (Del. 1983)).

48. *Aiken*, 687 A.2d at 189 (quoting Ernest DiSabatino & Sons, Inc. v. Apostolico, 269 A.2d 552, 553 (Del. 1970)).

49. *Aiken*, 687 A.2d at 189.

50. *Id.* Presumably, the same rationale would also have applied to claims for permanent impairment under section 2326 of Title 19.

51. DEL. CODE ANN. TIT. 19, § 2321 (1995).

> day of incapacity, all compensation otherwise provided by law shall be paid. If the incapacity extends to 7 days or more, including the day of injury, the employee shall receive all compensation otherwise provided by law from the first day of injury.[52]

Not knowing how the Delaware Supreme Court would decide *Aiken*, the General Assembly included a statement that "[p]ermanent injury relating to hearing or vision loss" was to be paid from the first day of injury, thus statutorily excluding such permanent injuries from the effect of the three-day rule.[53]

Another change that further weakened section 2321's three-day rule and increased the benefits to injured workers addressed situations where an employee continued to work, but at less than full capacity. The original version of the three-day rule provided that no compensation was to be paid for any injury "which does not incapacitate the employee for a period of 3 days *from earning full wages*."[54] The 1995 revision quoted above (which stands today), deleted the phrase "from earning full wages" and merely noted that "all compensation otherwise provided by law shall be paid" beginning with "the fourth day of incapacity."[55] The term "incapacity" historically had been defined as an incapacity to work, i.e., loss of earning power.[56] With respect to the three-day rule, though, it can no longer be read as meaning an inability to earn full wages. The General Assembly deleted those specific words from the statute.[57] Because "[t]he courts may not engraft

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52. DEL. CODE ANN. TIT. 19, § 2331.

53. Ironically, by amending the statute before the decision issued in *Aiken*, the General Assembly ended up limiting the effect of the Court's decision. The current version of section 2321 arose from Senate Bill 289 ("SB 289"), introduced on January 24, 1996. As originally proposed, SB 289 only added the words "permanent injury" to the beginning of section 2321, thereby exempting all permanent impairments from the scope of the three-day rule—exactly what the Supreme Court would decide was how the original section should have been read. That this was the original intent of the legislature is confirmed by the stated purpose of the legislation, which noted that SB 289:

> would permit injured workers to receive benefits for permanent injury such as hearing loss or other cumulative non-incident loss even though they were not incapacitated for three days.
>
> The three day rule is a device to exclude minor injuries from the chapter and should not be used to avoid paying benefits for a permanent loss.

SB 289, "Synopsis." However, in May 1996, an amendment to the legislation ("SA 1 to SB 289") was drafted which added the specific phrase "relating to hearing or vision loss." According to its stated purpose, this amendment "clarifies the scope of the legislation." SA 1 to SB 289, "Synopsis." By specifically limiting the permanent impairments excluded from the operation of the three-day rule to those impairments "relating to hearing or vision loss," the implication is that the General Assembly intended for all other permanent impairment to be subject to the three-day rule. No other explanation of SA 1 to SB 289 is possible. As the General Assembly noted, the limiting language does clarify the scope of the legislation. Thus, although the Supreme Court stated in *Aiken* that section 2326 "is a legislative recognition that certain permanent specifically 'scheduled injuries' ... are compensable *per se*," *Aiken*, 687 A.2d at 189, the enactment of SB 289 as amended evinces a specific legislative intent that permanent injury (with the exception of those relating to hearing and vision loss) are to be covered by the three-day rule. Any other reading of the statute would render the clause "[p]ermanent injury relating to hearing or vision loss" meaningless.

54. DEL. CODE ANN. tit. 19, § 2321 (1985) (emphasis added).

55. DEL. CODE ANN. TIT. 19, § 2331.

56. *See, e.g.*, Wilmington Housing Authority v. Gonzalez, 333 A.2d 172, 175 (Del. Super. 1975) (noting that, while the term "incapacity" is not defined in the statute, it "is generally held to mean 'incapacity to work.'") (quotation omitted).

57. *See* 70 Del. Laws 205 § 1 (1995).

upon a statute language which has been clearly excluded therefrom by the Legislature,"[58] presumably the General Assembly intended that the three-day rule would no longer be conditioned solely on a loss of earnings—merely on "incapacity." The Board concluded therefore that "incapacity" for purposes of the three-day rule, while it must be an incapacity *from work* (in accordance with the historical reading of the term in workers' compensation law), did not need to be an incapacity that led to a loss of earning capacity; if an employee injured in a compensable accident is restricted to *less than full duty work*, such as being limited to light duty, that is an "incapacity" for purposes of the three-day rule even though that employee has suffered no loss of earnings.[59]

C. Example: Abatement After Death

Over time, dependent benefits following the death of a claimant also have expanded. The original 1917 version of the Act specified that, if an injured worker died as a result of the work injury, the benefits payable to the injured worker's dependents would be reduced based on the amount of benefits paid to the injured worker during the worker's lifetime, although no reduction was to be made based on the amounts that "may have been paid for medical, surgical and hospital services and medicines nor for the expenses of last sickness and burial."[60] This was in accord with the original intention of the Act to benefit the employee specifically, not his or her dependents.[61] This reduction of benefits based on what had been paid to the injured worker was eliminated in 1941.[62] Now section 2332 provides:

> Should the employee die as a result of the injury, no reduction shall be made for the amount paid for medical, surgical, dental, optometric, chiropractic or hospital services and medicines nor for the expense of last sickness and burial as provided in this chapter. Should the employee die from some other cause than the injury as herein defined, the claim for compensation shall not abate, but the personal representative of the deceased may be substituted for the employee and prosecute the claim for the benefit of the deceased's dependent or dependents only, but in the event an agreement for compensation or an award has theretofore been made, the full unpaid amount thereof shall be payable to the deceased employee's nearest dependent as indicated by § 2330 of this title and such payments may be made directly to a dependent of full age and on behalf of an infant to the statutory or testamentary guardian of any such

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58. Giuricich v. Emtrol Corp., 449 A.2d 232, 238 (Del. 1982) (*en banc*).

59. Marra v. Raytheon, No. 1120439, at 9 (Del. I.A.B., July 7, 1998).

60. *See* 29 Del. Laws 233 § 103(d) (1917) (setting forth new section 3193(j) of "Chapter 90 of the Revised Code of the State of Delaware").

61. *See* Magness Construction Co. v. Waller, 269 A.2d 554, 555 (Del. 1970).

62. *See* Estate of Watts v. Blue Hen Insulation, 902 A.2d 1079, 1082 (Del. 2006) ("When the statute was amended in 1941, the General Assembly eliminated the reduction for prior payments to workers who died from the industrial injury, but continued to deny benefits to workers who died of other causes..."). This statutory amendment, although removing the provision allowing for reduction of benefits to dependents, still continued to provide that "[s]hould the employee die as a result of the injury, no reduction shall be made for the amount which may have been paid for medical, surgical, and hospital services, and medicines, nor for the expense of last sickness and burial." 43 Del. Laws. 269 §8 (1941). Because the whole concept of any reduction was being removed from the statute, it is unclear why it was considered necessary to retain this provision. It seems to serve no useful purpose. Nevertheless, the language has remained in section 2322 to the present day. *See* DEL. CODE ANN. TIT. 19, § 2332.

> infant provided, however, that no payment or award under § 2324 [compensation for total disability] or § 2325 [compensation for partial disability] of this title shall continue or be ordered beyond the date of such injured employee's death.[63]

Prior to 1964, section 2332 was divided into subsections (a) and (b).[64] Subsection (a) provided, in language similar to the current section, that, if the death was related to the work injury, "no reduction shall be made for the amount paid for medical, surgical, dental, optometric or hospital services and medicines nor for the expense of last sickness and burial," but that, if death was *unrelated* to the work injury, then "liability for compensation, expense of last sickness, and burial of such employee, shall cease."[65] Section 2332 (b), on the other hand, provided that "[c]ompensation agreed upon or awarded to an injured employee who has died and which has not been paid at the time of his death, shall be paid to his nearest dependent as indicated by section 2330 of this title." [66] Unlike subsection (a), subsection (b) did not specify the cause of death--whether death was related to the work injury or not, agreements and awards that had been established prior to death were to be paid to the "nearest dependent" as defined by section 2330 ("section 2330 dependents").[67]

In *Moore v. Chrysler Corporation*,[68] the Delaware Supreme Court applied this pre-1964 version of section 2332 to a deceased employee's permanent impairment claim. In that case, the employee was injured in June 1962 and, as a result of this injury, his left leg was amputated in October 1962, and he died from causes unrelated to his injury in August 1963.[69] The employee made no claim for permanent impairment benefits prior to his death. "Accordingly, no compensation was 'agreed upon' by the parties or 'awarded' by the Board for such scheduled loss."[70] The employee left a surviving spouse, who filed a claim for permanency benefits. The Delaware Supreme Court held that the right to compensation for

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63. DEL. CODE ANN. tit. 19, § 2332. It should be noted that this section does not affect the award of death benefits (provided under DEL. CODE ANN. TIT. 19, § 2330), and burial expenses (provided under section DEL. CODE ANN. TIT. 19, § 2331). It only addresses the abatement or non-abatement of benefits that would otherwise have been payable if the injured worker was alive.

64. *See* DEL. CODE ANN. tit. 19, § 2332 (1953).

65. DEL. CODE ANN. tit. 19, § 2332(a) (1953). In 1955, "chiropractic" was added to the list of amounts paid for which there would be no reduction. *See* 50 DEL. LAWS 267 § 3 (1955).

66. DEL. CODE ANN. tit. 19, § 2332(b) (1953).

67. Such dependents are primarily the surviving spouse and children. Section 2330 currently provides that, if there are no surviving spouse or children, then the surviving parent(s) can be the section 2330 dependent(s) provided that they were "actually dependent" on the employee for at least fifty percent of their support. If there was also no surviving parent, then the surviving sibling(s) could be the section 2330 dependent(s) provided again that they were "actually dependent" on the employee for at least fifty percent of their support. *See* DEL. CODE ANN. tit. 19, § 2330(a). This provision is an example of a situation where the availability of benefits has been restricted since 1917. The original 1917 version of the Act allowed some compensation to a surviving parent or sibling (if there were no surviving spouse or children) if the parent or sibling was "dependent to *any* extent" upon the deceased employee for support. *See* 29 DEL. LAWS 233 § 104 (1917) (setting forth new section 3193(k) of "Chapter 90 of the Revised Code of the State of Delaware") (emphasis added). The requirement of fifty percent of support was not added to the statute until 1974 (which took effect on July 1, 1975). *See* 59 DEL. LAWS 454 § 14 (1974).

68. 233 A.2d 53 (Del. 1967)

69. *Id.* at 54.

70. *Id.*

the loss of the leg did *not* survive the employee's death.[71] The Court opined that the statute clearly stated that "liability for compensation ended if the employee died from a cause other than the industrial accident, except when compensation had been agreed upon or awarded to the employee prior to his death."[72] No such agreement or award had been reached; therefore, the right to compensation for the impairment ceased with the employee's death.

In 1964, section 2332 was amended to delete subsection (b).[73] The new section 2330, substantially as it exists today, was created.[74] Specific new "non-abatement" language was added to provide that "[s]hould the employee die from some other cause than the injury as herein defined, the claim for compensation shall not abate, but the personal representative of the deceased may be substituted for the employee and prosecute the claim for the benefit of the deceased's dependent or dependents only."[75] This provision was in addition to the "agreement or award" provision, which was carried over into the new section.

The Delaware Superior Court reviewed this non-abatement clause in *Witt v. Georgia-Pacific Corporation*.[76] In *Witt*, the injured employee filed a petition to determine permanent impairment and disfigurement benefits related to two separate work-related injuries.[77] Five days after he filed the petition, the employee died from causes unrelated to the work injury, leaving no surviving spouse or children.[78] His father, who survived him, acting as the deceased employee's personal representative, desired to pursue the claim filed by the deceased.[79] The primary issue for the case was whether there was a "dependency threshold" requiring the existence of section 2330 dependents in order to pursue benefits under the non-abatement clause.[80] In ruling that there was, the *Witt* Court indicated that the legislature intended to limit benefits available after an employee's death, finding that "[t]he purpose of Workers' Compensation is to compensate victims .... While parents suffer emotionally from the death of their child, the purpose of the statute is to compensate those who suffer *economically* from the employee's death."[81] This opinion followed the Delaware Supreme Court's view that "the benefits of this Act are intended to benefit the employee primarily."[82]

71. *Id.* at 55.

72. *Id.*

73. 54 Del. Laws 280 § 4 (1964).

74. 54 Del. Laws 280 § 3 (1964).

75. *Id.*

76. 1996 WL 30250.

77. *Id.*, at *1.

78. *Id.*

79. *Id.*

80. *Id.* The Court specified that the issue before it was not the factual question of whether the surviving parents fit the definition of "dependent," but rather the legal question of whether the Act required the presence of a dependent. *Id.*

81. *Id.*, at *4 (citation omitted; emphasis in original).

82. *Magness Construction Co.* , 269 A.2d at 555. Although the case did not involve a death, the Delaware Supreme Court in *Magness* observed that if the employee did not receive section 2326 permanent impairment benefits during his lifetime and the

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If the injured worker dies from the work-related injury itself, however, benefits can be paid to one who is not even a dependent of the deceased. The Delaware Supreme Court reached this conclusion in *Estate of Watts v. Blue Hen Insulation*.[83] In its analysis, the Court acknowledged the general application of title 10, section 3707 of the Delaware Code, which provides that a "statutory right of action or remedy against any officer or person, in favor of any person, shall survive to, or against the executor or administrator of such officer or person, unless it be specially restricted in the statute."[84] Workers' compensation benefits, of course, are purely statutory in nature.[85] The question in *Watts*, therefore, was whether the statute allows a permanent impairment claim to survive the death of a claimant.[86] Reviewing section 2332, the Court found that, in the case where a claimant dies *from the work accident*, nothing in section 2332 expressly abrogates a claim for permanency benefits.[87] The Court held that "[s]ince there is no express restriction on a post-death claim for permanent injuries by the estate of a worker who dies from his injuries, ... the worker's statutory right of action survives."[88]

III. CURRENT STATE OF THE LAW

Although the Act originally focused on compensating only injured employees and those who suffer economically from an injured employee's injury,[89] now the Act allows payment of permanent impairment benefits to a deceased worker's estate even if there was *nobody* who was economically dependent on that worker.[90] Taking this extension one step further, the Court has held that *the estate of* a claimant's "surviving spouse" was entitled to a full 400 weeks of "surviving spouse" benefits.[91]

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employee died without leaving a section 2330 dependent, then the employee "would lose all benefits under § 2326." *Id.* The Court did not specify that it was only talking about a situation where the employee's death was unrelated to the work accident; however, under the hypothetical that the Court was considering it is reasonable to assume that that was what the Court had in mind.

83. 902 A.2d 1079 (Del. 2006).

84. DEL. CODE ANN. TIT. 10, § 3707.

85. *See Ruddy* , 237 A.2d at 705 ("[T]here are no rights to workmen's compensation except those granted by the Act.").

86. *Watts*, 902 A.2d at 1081.

87. *Id.* at 1082.

88. *Id.* at 1083.

89. *Witt*, 1996 WL 30250 at *4.

90. The Board's decision on Charles Watt's claim provided additional background facts. *See* Estate of Charles Watts v. Blue Hen Insulation, No. 1209205, 1-2 (Del. I.A.B. Nov. 15, 2004). Charles Watts died at the age of 63. His surviving spouse, Verna Watts, was his sole beneficiary. Verna, on behalf of the Estate of Charles of Watts, filed the petition seeking permanent impairment benefits. She then died suddenly. The employer filed a petition to terminate the ongoing receipt of death benefits to Verna (or, rather, her estate). Verna's estate consisted only of *her* adult child and adult stepchildren, and it appears that none of these adult children were economically dependent on either Charles or Verna. *See Id.*

91. *Watts*, 902 A.2d at 1083-84. The Court found that the statute provided a surviving spouse benefits for a *minimum* of 400 weeks and not merely until the spouse dies or remarries. *Id.* at 1083 ("If the 400 weeks is not a minimum, then the statute need

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Thus, an Act that originally was enacted primarily to compensate an injured worker, rather than that worker's dependents, has evolved to the point where benefits can be paid to a deceased worker's estate even though there are no dependents to benefit from the award, and to a surviving spouse's estate even though the surviving spouse died leaving no dependents. This is truly an expansion of compensation under the Act far beyond the Act's original purpose. It also suggests, as Larson suggested in the excerpt cited at the beginning of this article, that considerations more properly associated with personal injury tort recovery have mistakenly influenced some legislative changes to workers' compensation.

Although the influence of common law tort recovery has increased workers' compensation benefits over time, the original concept that injured workers gave up their common law benefits has not been totally abandoned.[92] This is most clearly seen in the case of a worker who is employed in multiple jobs. With certain very limited exceptions, the Act does not recognize that a work injury incurred at one job might disable a claimant from multiple jobs.[93] Compensation for a work injury is based *solely on the wage loss from the job where the injury happened*.[94] If a claimant was working both full-time and part-time, compensation would only be based on the job where the injury happened, even if the consequence of the injury was that the claimant was unable to work both jobs.[95] Thus, a worker earning full-time wages at one job of $900 per week and earning part-time wages at another job of $350 per week would, if totally disabled as a result of an injury at the part-time job, only be compensated based on the wages received at the part-time job. In other words, the worker's weekly compensation would be two-thirds of $350, or $233.33 per week, quite a reduction for an injured worker who had

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not make any reference to time. . . . Thus, to give full effect to all of the language in the statute, the requirement that a surviving spouse be paid for 400 weeks should be interpreted as a minimum amount that must be paid regardless of the spouse's subsequent death.")

92. Other states have also addressed this balance between giving up common law rights in exchange for receiving statutory benefits. Recently, in Florida, a trend that was the opposite of Delaware's trend for expanding benefits was discussed. A judge from the Eleventh Circuit Court determined that Florida's version of workers' compensation had become an unconstitutional deprivation of due process because the workers' compensation benefits available under Florida law had been reduced to the point that the Florida law was no longer considered a "reasonable alternative remedy to the tort remedy it supplanted." Florida Workers' Advocates v. State of Florida, C.A. No. 11-13661, at 19 (Fla. Cir. Ct. Aug. 13, 2014). In other words, the court concluded that injured workers were giving up their rights to common law benefits but not getting adequate benefits in return. This decision is currently on appeal.

93. One notable exception is for a volunteer firefighter who, if injured working as a volunteer firefighter, is treated as if the firefighter were a State employee with compensation based on that firefighter's "wage received in regular employment." DEL. CODE ANN. tit. 19, § 2312. There are also special provisions for an employee who is in the "joint service" of two or more employers. *See* DEL. CODE ANN. tit. 19, § 2354(a). In such cases, the joint employers contribute to the employee's compensation in proportion to their wage liability to such employee, regardless of for whom the employee was actually working at the time of injury. *Id.* However, an employee is only deemed to be under "joint service" when the employee is (a) under the simultaneous control of both employers, (b) performs services simultaneously for both employers, and (c) the services performed for each are the same or closely related. *See* A. Mazzetti & Sons, Inc. v. Ruffin, 437 A.2d 1120, 1123 (Del. 1981). If an employee is under contract with two employers but (a) the employers act independently of each other, (b) a specific portion of the work time is separately allocated to each employer, (c) the services performed for each employer are clearly separable and independent, and (d) the employee does not perform simultaneously for both employers, then that is not "joint service" but is, rather "dual" or "concurrent" employment. *Id.* at 1123-24.

94. Compensation for an injury, such as for total disability, is based on a percentage of the injured employee's average weekly wage. *See* DEL. CODE ANN. tit. 19, § 2324. The term "average weekly wage" is defined in the Act to mean "the weekly wage earned by the employee at the time of the employee's injury *at the job in which the employee was injured*." DEL. CODE ANN. TIT. 19, § 2302(A) (EMPHASIS ADDED).

95. *See* Howard v. Peninsula United Methodist Homes, Inc., No. 03A-04-002RRC, 1996 WL 30250 (Del. Super. Nov. 17, 2003) (citing Peterman v. L.D. Caulk, Nos. 72, 1992, 82, 1992, 1992 WL 219072 (Del. Aug. 19, 1992)).

been making (from both jobs) $1,250 per week.[96] While this may seem unfair or harsh, it follows from the central point: that the only benefits available to an injured worker are those provided for in the Act.[97]

IV. SECOND PURPOSE OF THE ACT

The second of the twin purposes of the Act—to "relieve employers and employees of the expenses and uncertainties of civil litigation"—is just as important as the first.[98] *Both* parties gain from this second purpose, which has two related parts: cost saving and certainty.

A. Cost Savings

As compared to personal injury litigation in Superior Court, the litigation cost savings before and during a Board hearing are substantial. Formal pleadings are not required, which saves the expense of preparing a formal complaint or formal answer to a complaint.[99] While expert witness depositions may be taken to obtain testimony to be used at a hearing, "in lieu of personal appearance before the Board," the use and expense of "discovery depositions" is not provided for in the *Board Rules*.[100] The primary discovery method contemplated by the *Board Rules* is the Request for Production.[101]

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96. *See* DEL. CODE ANN. tit. 19, § 2324, providing that compensation for total disability is paid at 66 2/3% (or two-thirds) of the injured employee's wages. The Act further provides that compensation cannot exceed two-thirds of the statewide "average weekly wage" that is announced on an annual basis by the Secretary of the Department of Labor (the "DOL rate"). *Id.* On the other hand, a minimum compensation rate is set at 22 2/9% of that DOL rate. *Id.* If an injured employee's weekly wage at the time of injury was less than 22 2/9% of the DOL rate, then the employee receives the employee's full amount of wages as compensation. *Id.*

97. While it may seem harsh to the injured part-time worker who loses both the employee's part-time and full-time wage because of an injury at the part-time job, it would be a bizarre result indeed if a part-time employer had to pay an injured worker a higher weekly wage when injured than that employee would have received if healthy and working. It is "unrealistic to turn a part-time able-bodied worker into a full-time disabled worker." Spicer v. State, No. 91A-03-3, 1991 WL 190334, *2 (Del. Super. Aug. 23, 1991). In any event, as a practical matter it should be remembered that the part-time employer's insurance rates were likely calculated based on the actual wages paid to that employer's employees. It would be equally unfair (and financially crippling) for a small part-time employer to have to pay insurance premiums that are based on what some other full-time employer might be paying its employees. Nobody benefits if workers' compensation premiums are so high as to drive an employer out of business. As such, the Act intentionally limits benefits based on the wages that the employer was actually paying the injured worker.

98. New Castle County v. Goodman, 461 A.2d 1012, 1014 (Del. 1983).

99. *See Rules of the Industrial Accident Board for the State of Delaware* ("*Board Rules*"), Rule 6. The Board Rules are available at http://dia.delawareworks.com/workers-comp/documents/Rules%20of%20the%20Industrial%20Accident%20Board.pdf. Rule 6(A) states:

> No formal pleading or formal statement of claim or formal answer shall be required of any party to any action before the Board. However, each person making written request for a hearing shall file with the Department on forms to be promulgated by the Department ... a statement giving substantially the information requested on said forms.

100. *See Board Rules*, Rule 10 ("Depositions Upon Oral Examination"). Rule 10(C) states, "The taking of fact witness depositions may not proceed without Board approval." *Id.*

101. *See Board Rules*, Rule 11 ("Requests for the Production and Inspection of Documents And Other Evidence; Healthcare Authorizations And Copying or Photocopying").

In general, the parties are relieved of the expense of preparing and responding to burdensome interrogatories. In most cases, the Board even makes the pre-trial conference cost effective by allowing the scheduling conferences to be done telephonically or by e-mail, while the pre-trial memorandum can be prepared without the need for the attorneys to appear at the Department of Labor.[102]

Flexibility in the application of the rules of evidence also reduces the costs of litigation for the Board hearing itself. The Board is permitted to consider such evidence "which, in its opinion, possesses any probative value commonly accepted by reasonably prudent persons in the conduct of their affairs."[103] By allowing flexibility in applying the customary rules of evidence, such as with regard to hearsay testimony, the Board also saves the parties the time and expense of procuring witnesses to testify on the sort of tangential matters for which the Board customarily accepts hearsay testimony.[104] For example, the Board may properly consider information contained in medical records prepared by medical personnel and referenced in the testimony of other medical experts appearing before the Board. It has been held that the Board may properly conclude that such evidence has probative value that "reasonably prudent persons" would accept. Indeed, doctors normally do rely on such records supplied to them by hospitals or other doctors when treating a patient.[105] Thus, the parties do not need to go through the cost of bringing in to the case every medical expert who prepared a relevant medical record.

However flexible the rules of evidence, the Board must still conduct a fair hearing.[106] Trial by surprise is not favored in Delaware and is not endorsed by the Board. Litigants are required to deal fairly with each other and not engage in "'unhandsome dealing.'"[107] In litigation before the Board, each side must be given a fair opportunity to question the factual reliability of evidence presented. In exercising its flexibility in these matters, the Board recognizes that fundamental principles of justice, such as due process, need to be observed.[108] Thus, while parties are spared the expenses that attach

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102. *See Board Rules*, Rule 9 ("Pre-Trial Scheduling Conference and Pre-Trial Memorandum").

103. *Board Rules*, Rule 14(C). In full, Rule 14(C) states:

> The rules of evidence applicable to the Superior Court of the State of Delaware shall be followed insofar as practicable; however, that evidence will be considered by the Board which, in its opinion, possesses any probative value commonly accepted by reasonably prudent persons in the conduct of their affairs. The Board may, in its discretion, disregard any customary rules of evidence and legal procedures so long as such a disregard does not amount to an abuse of its discretion.

104. *See id.*; Thomas v. Christiana Excavating Co., No. 94A-03-009, 1994 WL 750325, *5-, his per. 1994 WL 750325, *5-e? If not, pleaesarch to make them all consistent.6 (November 15, 1994), *aff'd sub nom.* Thoma v. Christiana Excavating Co., 655 A.2d 309 (Del. 1995) ("Indeed, administrative boards ought not to be constrained by the rigid evidentiary rules which govern jury trial. On the contrary, all evidence which could conceivably throw light on the controversy should be heard.") (citation omitted).

105. *See id.* at *5-6.

106. *See* DEL. CODE ANN. tit. 19, § 2301A(i), which states (with emphasis added):

> The Board shall have jurisdiction over cases arising under Part II of [Title 19] and shall hear disputes as to compensation to be paid under Part II of [Title 19]. The Board may promulgate its own rules of procedure for carrying out its duties consistent with Part II of [Title 19] and the provisions of the Administrative Procedures Act [§ 10101 et seq. of Title 29]. Such rules shall be for the purpose of securing the just, speedy and inexpensive determination of every petition pursuant to Part II of [Title 19]. *The rules shall not abridge, enlarge or modify any substantive right of any party and they shall preserve the rights of parties* as declared by Part II of [Title 19].

107. *See* Delaware Home & Hospital v. Martin, No. K11A-07-001RBV, 2012 WL 1414083, at *2 (Del. Super. February 21, 2012).

108. *See* General Chemical Div., Allied Chemical & Dye Corp. v. Fasano, 94 A.2d 600, 601 (Del. Super. 1953).

to more formal litigation, this comes with an associated duty on the part of the litigants to deal fairly and above-board with each other.

B. Reducing Uncertainty

In addition to cost savings, the Act's second mutual benefit is avoiding the "uncertainties of litigation." There is a great benefit to all parties in having matters considered by an experienced administrative board rather than by an untrained jury. The United States Supreme Court recognized this benefit of administrative proceedings in connection with the Social Security Act:

> There emerges an emphasis upon the informal, rather than the formal. This, we think, is as it should be, for this administrative procedure, and these hearings, should be understandable to the layman claimant, should not necessarily be stiff and comfortable only for the trained attorney, be liberal and not strict in tone and operation. This is the obvious intent of Congress so long as the procedures are fundamentally fair.[109]

The reason this approach works is that an administrative board necessarily develops experience and skill within its sphere of operation:

> [A]dministrative boards have been developed to allow individuals who have expertise and knowledge in the board's unique area of jurisdiction to initially attempt to resolve disputes. This unique setting is different than a courtroom where jurors, who are usually not trained in the area, need to be educated on the basic grounds of the litigation.[110]

Having such expertise and knowledge allows the Board to give more predictable results than could be obtained from a less trained jury such as would be faced in tort actions. This leads to greater certainty as to the application of the statutes of the Act and the regulations promulgated by the Board. When the parties have greater certainty as to the consistent application of the provisions of the Act and the regulations, it is easier for them to reach agreement as to the application of the law to their set of facts, thereby avoiding the cost of unnecessary litigation.

It is precisely because the Board is experienced in considering matters that arise under the Act that proceedings can be less formal.[111] For example, the purpose of "the rule against hearsay ... is to keep from an untrained trier of fact material whose reliability is untrustworthy ... [but] the Board, with its background and expertise, is able to evaluate evidence without the restrictions and safeguards imparted by the formal rules of evidence."[112]

On appeal, "when factual determinations are at issue," an appellate court "shall take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency has acted."[113] It

109. Richardson v. Perales, 402 U.S. 389, 400-01 (1971).

110. Irish Hunt Farms, Inc. v. Stafford, 2000 WL 972656, *6 (Del. Super. Apr. 28, 2000).

111. *See* Torres v. Allen Family Foods, 672 A.2d 26, 31 (Del. 1995); Standard Distributing Co. v. Nally, 630 A.2d 640, 647 (Del. 1993).

112. *Torres*, 672 A.2d at 31 (citation omitted).

113. DEL. CODE ANN. TIT. 29, § 10142(D).

is, of course, the courts that ultimately determine the proper interpretation or construction of the workers' compensation statutes and regulations.

> Statutory interpretation is ultimately the responsibility of the courts. A reviewing court may accord due weight, but not defer, to an agency interpretation of a statute administered by it. A reviewing court will not defer to such an interpretation as correct merely because it is rational or not clearly erroneous.[114]

Respect should be given, however, to an administrative board's interpretation of its own statutes, regulations, rules and procedures. It is no more anomalous to give such respect and weight to an administrative tribunal's legal rulings than it would be to give respect and weight to the opinion of a medical specialist over that of a general practitioner on a matter within the specialist's field. Administrative tribunals are specialists within their field, dealing with the day-to-day application of the statutes and regulations under their charge. If an administrative board renders an opinion about the application of the law within the scope of its specialization and that opinion is rational and not clearly erroneous, then, while an appellate court certainly is not bound by and need not defer to that interpretation, the court should respect that interpretation and only overturn it with great caution and reluctance.

V. CONCLUSION

This brings us back once again to Larson's point cited at the beginning of this paper: that almost every major error in the development of workers' compensation law can be traced to the importation of concepts from other areas of law. It is only by truly understanding and remembering the guiding policies and purposes underlying workers' compensation that the proper interpretation and application of the Workers' Compensation Act can be achieved.

114. Public Water Supply Co. v. DiPasquale, 735 A.2d 378, 382-83 (Del. 1999) (footnotes omitted).

Application of the PIP Carve-Out

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Professional Affiliations

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Delaware State Bar Association

- Workers' Compensation Section, Past Chair
- Tort's Section, Member

Delaware Trial Lawyers Association, 2003-Present

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Delaware Personal Injury Law

MARSHALL DENNEHEY

KERI L. MORRIS-JOHNSTON

SHAREHOLDER

AREAS OF PRACTICE

Workers' Compensation
Employment Law

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ADMISSIONS

Delaware
2005

U.S. District Court for the District of Delaware
2005

U.S. Court of Appeals 3rd Circuit
2005

EDUCATION

Widener University School of Law (J.D., 2003)

University of Delaware (B.A., 1998)

HONORS & AWARDS

Best Lawyers in America©, Workers' Compensation Law - Employers
2023-2024

Top Lawyer, Workers' Compensation Employer Defense, Delaware Today Magazine
November 2022

Top Lawyer, Workers' Compensation for Employers, Delaware Today Magazine
November 2020

OVERVIEW

Keri's practice is devoted to Delaware workers' compensation and employment law defense (including discrimination and whistleblower protection), in addition to federal employment law defense. Throughout her legal career, she has represented clients including automobile assembly plants, nursing homes, hospitals, security companies and retailers in matters pertaining to workers' compensation and employment law. She is also experienced in handling matters for non-profits and fast food franchises, and advising clients in relation to owner controlled insurance policies. Keri is especially adept at assisting and educating small employers on issues pertaining to workers' compensation.

In addition to managing the Workers' Compensation Department in the Wilmington office, Keri is also a member of the firm's Executive Committee Advisory Council, a distinguished group of firm leaders whose purpose is to enhance the communication between the Executive Committee and younger members of the firm's professional ranks, including associates, special counsel and junior shareholders.

While attending Widener University School of Law, Keri worked for the Delaware Department of Labor, where she handled a wide variety of employment, labor and civil rights issues. Keri investigated allegations of employment discrimination and wage and hour violations, including alleged prevailing wage violations and child labor violations.

Keri is a graduate of the University of Delaware, where she received a Bachelor of Arts degree in Criminal Justice. She remains involved with her alma mater, serving as an advisor for the Alpha Sigma Alpha sorority.

ASSOCIATIONS & MEMBERSHIPS

Associated Builders and Contractors, associate member, Legislative and Legal Rights Committee

Delaware State Bar Association; chair, Workers' Compensation Section

Pennsylvania Bar Association

Randy J. Holland Delaware Workers' Compensation Inn of Court

YEAR JOINED

2005

THOUGHT LEADERSHIP

In order to qualify for unemployment benefits, the unemployed individual must be able and available to work.

Wilmington
Employment Law
July 1, 2023
The plaintiff had been out of work for medical reasons for several months. Case Law Alerts, 3rd Quarter, July 2023 is prepared by Marshall Dennehey to provide information on recent developments of interest to our readers.

What's Hot in Workers' Comp - Special DE Alert

Wilmington
Workers' Compensation
June 15, 2023
New Workers' Compensation Rate Effective July 1, 2023 What's Hot in Workers' Comp – Special DE Alert – June 16, 2023,

Four Marshall Dennehey Attorneys Selected 2022 "Top Lawyers" by Delaware Today Magazine

Health Care Liability
Workers' Compensation
November 1, 2022
Marshall Dennehey announced today that four attorneys from the firm's Wilmington, Delaware office have been selected 2022 "Top Lawyers" by Delaware Today magazine. The recognized attorneys are Bradley J. Goewert and Thomas J. Marcoz, Jr.
Read More

What's Hot in Workers' Comp, Vol. 24, No. 6, June 2020

Workers' Compensation
June 1, 2020

Workers' Compensation Hot Tips From Delaware

Wilmington
Workers' Compensation
June 1, 2020
If an injured worker's average weekly wage is lower than the state minimum rate, the inju What's Hot in Workers' Comp is prepared by Marshall Dennehey Warner Coleman & Goggin to provide information on recent legal develop

(e) If, following a hearing, the Board determines that the employer or its insurance carrier failed in its responsibilities under subsection (a), (b), (c) or (d) of this section, it shall assess a fine no less than $500 and no more than $2,500. The fine shall be payable to the Workers' Compensation Fund.

Code 1915, § 3193j; 29 Del. Laws, c. 233 (https://legis.delaware.gov/SessionLaws?volume=29&chapter=233); 30 Del. Laws, c. 203, § 3 (https://legis.delaware.gov/SessionLaws?volume=30&chapter=203); Code 1935, § 6080; 47 Del. Laws, c. 160, § 4 (https://legis.delaware.gov/SessionLaws?volume=47&chapter=160); 19 Del. C. 1953, § 2362; 50 Del. Laws, c. 339, § 20 (https://legis.delaware.gov/SessionLaws?volume=50&chapter=339); 58 Del. Laws, c. 531, § 4 (https://legis.delaware.gov/SessionLaws?volume=58&chapter=531); 70 Del. Laws, c. 95, § 2 (https://legis.delaware.gov/SessionLaws?volume=70&chapter=95); 70 Del. Laws, c. 186, § 1 (https://legis.delaware.gov/SessionLaws?volume=70&chapter=186); 71 Del. Laws, c. 84, § 9 (https://legis.delaware.gov/SessionLaws?volume=71&chapter=84); 73 Del. Laws, c. 196, § 1 (https://legis.delaware.gov/SessionLaws?volume=73&chapter=196);

§ 2363. Third person liable for injury; right of employee to sue and seek compensation; right of employer and insurer to enforce liability; notice of action; settlement and release of claim and effect thereof; amount of recovery; reimbursement of employer or insurer; expenses of recovery; apportionment; compensation benefits.

(a) Where the injury for which compensation is payable under this chapter was caused under circumstances creating a legal liability in some person other than a natural person in the same employ or the employer to pay damages in respect thereof, the acceptance of compensation benefits or the taking of proceedings to enforce compensation payments shall not act as an election of remedies, but such injured employee or the employee's dependents or their personal representative may also proceed to enforce the liability of such third party for damages in accordance with this section. If the injured employee or the employee's dependents or personal representative does not commence such action within 260 days after the occurrence of the personal injury, then the employer or its compensation insurance carrier may, within the period of time for the commencement of actions prescribed by statute, enforce the liability of such other person in the name of that person. Not less than 30 days before the commencement of suit by any party under this section, such party shall notify, by certified mail at their last known address, the Industrial Accident Board, the injured employee or, in the event of the employee's death, the employee's known dependents or personal representative or the employee's known next of kin, the employee's employer and the workers' compensation insurance carrier. Any party in interest shall have a right to join in said suit.

(b) Prior to the entry of judgment, either the employer or the employer's insurance carrier or the employee or the employee's personal representative may settle their claims as their interest shall appear and may execute releases therefor.

(c) Such settlement and release by the employee shall not be a bar to action by the employer or its compensation insurance carrier to proceed against said third party for any interest or claim it might have, and such settlement and release by the employer or its compensation insurance carrier shall not be a bar to action by the employee to proceed against said third party for any interest or claim the employee may have.

(d) In the event the injured employee or the employee's dependents or personal representative shall settle their claim for injury or death, or commence proceedings thereon against the third party before the payment of workers' compensation, such recovery or commencement of proceedings shall not act as an election of remedies and any moneys so recovered shall be applied as provided in this section.

(e) In an action to enforce the liability of a third party, the plaintiff may recover any amount which the employee or the employee's dependents or personal representative would be entitled to recover in an action in tort. Any recovery against the third party for damages resulting from personal injuries or death only, after deducting expenses of recovery, shall first reimburse the employer or its workers' compensation insurance carrier for any amounts paid or payable under the Workers' Compensation Act to date of recovery, and the balance shall forthwith be paid to the employee or the employee's dependents or personal representative and shall be treated as an advance payment by the employer on account of any future payment of compensation benefits, except that for items of expense which are precluded from

being introduced into evidence at trial by § 2118 of Title 21, 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 available for the injured party, after the injured party's claim has been settled or otherwise resolved.

(f) Expenses of recovery shall be the reasonable expenditures, including attorney fees, incurred in effecting such recovery. Attorney fees, unless otherwise agreed upon, shall be divided among the attorneys for the plaintiff as directed by the court. The expenses of recovery above mentioned shall be apportioned by the court between the parties as their interests appear at the time of said recovery.

Code 1915, § 3193ll; 29 Del. Laws, c. 233 (https://legis.delaware.gov/SessionLaws?volume=29&chapter=233); Code 1935, § 6108; 19 Del. C. 1953, § 2363; 50 Del. Laws, c. 339, § 21 (https://legis.delaware.gov/SessionLaws?volume=50&chapter=339); 50 Del. Laws, c. 465, § 3 (https://legis.delaware.gov/SessionLaws?volume=50&chapter=465); 69 Del. Laws, c. 116, § 1 (https://legis.delaware.gov/SessionLaws?volume=69&chapter=116); 70 Del. Laws, c. 172, §§ 3, 4 (https://legis.delaware.gov/SessionLaws?volume=70&chapter=172); 70 Del. Laws, c. 186, § 1 (https://legis.delaware.gov/SessionLaws?volume=70&chapter=186); 71 Del. Laws, c. 422, § 2 (https://legis.delaware.gov/SessionLaws?volume=71&chapter=422);

§ 2364. [Reserved.]

§ 2365. Employee entitled to exercise rights; relief to be granted.

It shall be unlawful for any employer or the duly authorized agent of any employer to discharge or to retaliate or discriminate in any manner against an employee as to the employee's employment because such employee has claimed or attempted to claim workers' compensation benefits from such employer, because such employee reported an employer's noncompliance with a provision of this chapter, or because such employee has testified or is about to testify in any proceeding under this chapter. Any claim of an employee alleging such action by an employer shall be filed with the Superior Court within 2 years of the employer's alleged action. If the Court, after hearing, finds in favor of the employee, the employee shall be restored to employment or to the position, privilege, right or other condition of employment denied by such action and shall be compensated for any loss of compensation and damages caused thereby, as well as for all costs and attorney's fees, as fixed by the Court, except that if the employee shall cease to be qualified to perform the duties of employment, the employee shall not be entitled to such restoration and compensation. An employer who violates this section shall be liable to pay a penalty of not less than $500 and not more than $3,000, as may be determined by the Court and which shall be paid to the Workers' Compensation Fund. Any party shall have the right to appeal as in other cases before the Court, but if the employee's claim ultimately is sustained, the employer also shall be liable for all costs and attorney's fees on appeal.

69 Del. Laws, c. 370, § 1 (https://legis.delaware.gov/SessionLaws?volume=69&chapter=370); 71 Del. Laws, c. 84, § 9 (https://legis.delaware.gov/SessionLaws?volume=71&chapter=84);

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maximum legal limit, whichever is less; which fine shall be suspended, if within 5 days of the offense the court is presented with a valid registration card for the gross weight at the time of the offense for the maximum legal limit for such vehicle.

(b) (1) Notwithstanding the provisions of subsection (a) of this section, whoever violates § 2115(1)-(5) of this title shall, for the first offense, be fined not less than $50 nor more than $200, be imprisoned not less than 30 days nor more than 90 days, or be penalized by both fine and imprisonment. For each subsequent like offense, such person shall be fined not less than $100 nor more than $300, be imprisoned not less than 90 days nor more than 6 months, or be penalized by both fine and imprisonment.

(2) Any owner or operator of a vehicle which requires a registration fee which is calculated upon the gross weight of the vehicle, and any load thereon, and who violates § 2115(1)-(5) of this title, shall be fined at a rate double that which is set forth in this subsection, or be imprisoned as provided herein, or be both fined and imprisoned. In addition, such person shall also be fined an amount which is equal to the costs of registering the vehicle either at its gross weight at the time of the offense, or at the maximum legal limit, whichever is less. Such fine shall be suspended if, within 5 days of the offense, the court is presented with a valid registration card for the actual gross weight of the vehicle at the time of the offense.

(c) This section shall not apply to violations for which a specific punishment is set forth elsewhere in this chapter.

(d) For any violation of the registration provisions of § 2102 or § 2115 of this title and in absence of any traffic offenses relating to driver impairment, the violator's copy of the traffic summons shall act as that violator's authority to drive the vehicle involved by the most direct route from the place of arrest to either the violator's residence or the violator's current place of abode.

36 Del. Laws, c. 10, § 32 (https://legis.delaware.gov/SessionLaws?volume=36&chapter=10); 37 Del. Laws, c. 10, §§ 10, 11 (https://legis.delaware.gov/SessionLaws?volume=37&chapter=10); Code 1935, § 5570; 21 Del. C. 1953, § 2116; 59 Del. Laws, c. 332, §§ 1, 2 (https://legis.delaware.gov/SessionLaws?volume=59&chapter=332); 64 Del. Laws, c. 207, § 2 (https://legis.delaware.gov/SessionLaws?volume=64&chapter=207); 69 Del. Laws, c. 307, §§ 1, 3, 4 (https://legis.delaware.gov/SessionLaws?volume=69&chapter=307);

§ 2117. Refunds of fees paid for certain unused registrations.

Upon the surrender to the Department of the number plates or plate issued for a vehicle registered under this title, and the furnishing of proof satisfactory to the Secretary and the State Treasurer that (1) the owner of the vehicle entered the armed forces of the United States after such vehicle was registered or (2) that the owner of such vehicle is 65 years of age or older and that the owner voluntarily surrendered such owner's operator's license following the attainment of such age and the registration or reregistration of such vehicle, and that the registration of such vehicle is in full effect, there shall be refunded to such owner, from the General Fund of this State, from funds not otherwise appropriated, a sum equal to as many twelfths of the fee paid for the registration of the vehicle as there are full calendar months in the registration year following the date of the receipt of the number plates or plate, less the sum of $1.00.

21 Del. C. 1953, § 2117; 57 Del. Laws, c. 632 (https://legis.delaware.gov/SessionLaws?volume=57&chapter=632); 70 Del. Laws, c. 186, § 1 (https://legis.delaware.gov/SessionLaws?volume=70&chapter=186);

§ 2118. Requirement of insurance for all motor vehicles required to be registered in this State; penalty [For application of this section, see 82 Del. Laws, c. 160, § 5].

(a) No owner of a motor vehicle required to be registered in this State, other than a self-insurer pursuant to § 2904 of this title, shall operate or authorize any other person to operate such vehicle unless the owner has insurance on such motor vehicle providing the following minimum insurance coverage:

(1) Indemnity from legal liability for bodily injury, death or property damage arising out of ownership, maintenance or use of the vehicle to the limit, exclusive of interest and costs, of at least the limits prescribed by the Financial Responsibility Law of this State.

(2) a. Compensation to injured persons for reasonable and necessary expenses incurred within 2 years from the date of the accident for:

1. Medical, hospital, dental, surgical, medicine, x-ray, ambulance, prosthetic services, professional nursing and funeral services. Compensation for funeral services, including all customary charges and the cost of a burial plot for 1 person, shall not exceed the sum of $5,000. Compensation may include expenses for any nonmedical remedial care and treatment rendered in accordance with a recognized religious method of healing.

2. Net amount of lost earnings. Lost earnings shall include net lost earnings of a self-employed person.

3. Where a qualified medical practitioner shall, within 2 years from the date of an accident, verify in writing that surgical or dental procedures will be necessary and are then medically ascertainable but impractical or impossible to perform during that 2-year period, the cost of such dental or surgical procedures, including expenses for related medical treatment, and the net amount of lost earnings lost in connection with such dental or surgical procedures shall be payable. Such lost earnings shall be limited to the period of time that is reasonably necessary to recover from such surgical or dental procedures but not to exceed 90 days. The payment of these costs shall be either at the time they are ascertained or at the time they are actually incurred, at the insurer's option.

4. Extra expenses for personal services which would have been performed by the injured person had they not been injured.

5. "Injured person" for the purposes of this section shall include the personal representative of an estate; provided, however, that if a death occurs, the "net amount of lost earnings" shall include only that sum attributable to the period prior to the death of the person so injured.

b. The minimum insurance coverage which will satisfy the requirements of subparagraph a. of this paragraph is a minimum limit for the total of all payments which must be made pursuant to that subparagraph of $15,000 for any 1 person and $30,000 for all persons injured in any 1 accident.

c. The coverage required by this paragraph shall be applicable to each person occupying such motor vehicle and to any other person injured in an accident involving such motor vehicle, other than an occupant of another motor vehicle.

d. The coverage required by this paragraph shall also be applicable to the named insureds and members of their households for accidents which occur through being injured by an accident with any motor vehicle other than a Delaware insured motor vehicle while a pedestrian or while occupying any registered motor vehicle other than a Delaware registered insured motor vehicle, in any state of the United States, its territories or possessions or Canada.

e. The coverage required in this paragraph shall apply to pedestrians only if they are injured by an accident with any motor vehicle within the State except as to named insureds or members of their households to the extent they must be covered pursuant to paragraph (a)(2)d. of this section.

f. The owner of a vehicle may elect to have the coverage described in this paragraph written subject to certain deductibles, waiting periods, sublimits, percentage reductions, excess provisions and similar reductions offered by insurers in accordance with filings made by such insurers with the Department of Insurance; applicable to expenses incurred as a result of injury to the owner of a vehicle or members of the owner's household; provided that the owner of a motorcycle may elect to exclude from such coverage expenses incurred as a result of injury to any person riding such vehicle while not on a highway and in any case of injury when no other vehicle was involved by actual collision or contact. This election must be made in writing and signed by the owner of the vehicle; insurers issuing such policies may not require such reductions. For all policies having a deductible pursuant to this paragraph the insured shall receive in writing as a separate document a full explanation of all deductible options available, and the insured shall sign such written explanation acknowledging receipt of a copy of same. In addition the insured shall sign a separate statement acknowledging the specific deductible the insured is selecting and the related cost for the policies with such deductible. An insured person may not plead

and introduce into evidence in an action for damages against a tortfeasor the amount of the deductible; however, insurers shall recover any deductible for their insureds or their household members pursuant to subsection (g) of this section. Any notices or documents required under this section may be delivered in compliance with the provisions of § 107 of Title 18.

g. The coverage required by this paragraph shall be considered excess over any similar insurance for passengers, other than Delaware residents, when the accident occurs outside the State.

h. Insurers shall notify injured persons covered under this section that the coverage is for 2 years from the date of the accident, and that it is only extended for compensation related to surgical or dental procedures that are related to the accident and that were impossible or impractical to perform within the 2-year period. Such surgical or dental procedures must be verified in writing, within 2 years of the accident, by a qualified medical practitioner.

i. 1. Expenses under paragraph (a)(2)a. of this section shall be submitted to the insurer as promptly as practical, in no event more than 2 years after they are received by the insured.

2. Payments of expenses under paragraph (a)(2)a. of this section shall be made as soon as practical after they are received during the period of 2 years from the accident. Expenses which are incurred within the 2 years but which have been impractical to present to an insurer within the 2 years shall be paid if presented within 90 days after the end of the 2-year period.

(3) Compensation for damage to property arising as a result of an accident involving the motor vehicle, other than damage to a motor vehicle, aircraft, watercraft, self-propelled mobile equipment and any property in or upon any of the aforementioned, with the minimum limits of $10,000 for any 1 accident.

(4) Compensation for damage to the insured motor vehicle, including loss of use of the motor vehicle, not to exceed the actual cash value of the vehicle at the time of the loss and $10 per day, with a maximum payment of $300, for loss of use of such vehicle.

The owner of the motor vehicle may elect to exclude, in whole or in part, the coverage described in this paragraph by the use of certain deductibles and exclusions in accordance with filings made by the insurer with the Department of Insurance.

(b) No owner of a motor vehicle being operated in this State shall operate in this State, or authorize any other person to operate such vehicle in this State, unless the owner has insurance on such motor vehicle equal to the minimum insurance required by the state or jurisdiction where said vehicle is registered. If the state or jurisdiction of registration requires no minimum insurance coverage, then such owner must have insurance on such motor vehicle equal to the minimum insurance coverage required for motor vehicles registered in this State. However, an owner shall not be convicted under this subsection if, prior to conviction, the owner shall produce to the court in which the offense is to be tried the insurance identification card or in lieu thereof other sufficient proof of insurance showing such insurance to be in full force and effect at all pertinent times when the motor vehicle was being operated in this State. The Justice of the Peace Court may permit an operator charged under this subsection to provide proof of insurance to the Court by mail or facsimile transmission in lieu of a personal appearance. Proof of insurance shall be as prescribed by the Court and shall be sent to the Court directly from the operator's insurer or the insurer's agent or broker. It shall be the responsibility of the operator to ensure that proof of insurance is received and accepted by the Court. When proof of insurance is sent by mail or fax, the Court may also accept a guilty plea by mail or fax for any accompanying charge for which a voluntary assessment is permitted under § 709(e) of this title. A guilty plea so accepted shall have the same force and effect as if the operator had made the plea in open court. The Justice of the Peace Court shall enact court rules to implement the handling of such cases by mail or facsimile transmission. Where proof of insurance is provided by facsimile, the operator's insurer or the insurer's agent or broker must confirm the information by mail and the Justice of the Peace Court must confirm by telephone that the facsimile was sent by the operator's insurer or the insurer's agent or broker.

(c) Only insurance policies validly issued by companies authorized to write in this State all the kinds of insurance embodied in the required coverages shall satisfy the requirements of this section.

(d) Nothing in this section shall be construed to prohibit the issuance of policies providing coverage more extensive than the minimum coverages required by this section or to require the segregation of such minimum coverages from other coverages in the same policy.

(e) Policies purporting to satisfy the requirements of this section shall contain a provision which states that, notwithstanding any of the other terms and conditions of the policy, the coverage afforded shall be at least as extensive as the minimum coverage required by this section.

(f) The coverage described in paragraphs (a)(1)-(4) of this section may be subject to conditions and exclusions customary to the field of liability, casualty and property insurance and not inconsistent with the requirements of this section, except there shall be no exclusion to any person who sustains bodily injury or death to the extent that benefits therefore are in whole or in part either payable or required to be provided under any workers' compensation law.

(g) Insurers providing benefits described in paragraphs (a)(1)-(4) of this section shall be subrogated to the rights, including claims under any workers' compensation law, of the person for whom benefits are provided, to the extent of the benefits so provided.

(1) Such subrogated rights shall be limited to the maximum amounts of the tortfeasor's liability insurance coverage available for the injured party, after the injured party's claim has been settled or otherwise resolved, except that the insurer providing benefits shall be indemnified by any workers' compensation insurer obligated to make such payments to the injured party.

(2) Any settlement made with an injured party by a liability insurer shall not be challenged or disputed by any insurer having subrogated rights.

(3) Disputes among insurers as to liability or amounts paid pursuant to paragraphs (a)(1)-(4) of this section shall be arbitrated by the Wilmington Auto Accident Reparation Arbitration Committee or its successors. Any disputes arising between an insurer or insurers and a self-insurer or self-insurers shall be submitted to arbitration which shall be conducted by the Commissioner in the same manner as the arbitration of claims provided for in subsection (j) of this section.

(4) No insurer or self-insurer shall join or be joined in an action by an injured party against a tortfeasor for the recovery of damages by the injured party and/or the recovery of benefits paid by the insurer or self-insurer.

(5) Nothing contained herein shall prohibit a liability insurer from paying the subrogated claim of another insurer prior to the settlement or resolution of the injured party's claim. However, should the amount of such settlement or resolution, in addition to the amount of any subrogated claim, exceed the maximum amount for the tortfeasor's liability insurance coverage available for the injured party, then any insurer who has been paid its subrogated claim shall reimburse the tortfeasor's liability insurer that portion of the claim exceeding the maximum amount of the tortfeasor's liability insurance coverage available for the injured party.

(6) Unless specifically excepted by this subsection, this subsection shall also apply to self-insurers.

(h) Any person eligible for benefits described in paragraph (a)(2) or (3) of this section, other than an insurer in an action brought pursuant to subsection (g) of this section, is precluded from pleading or introducing into evidence in an action for damages against a tortfeasor those damages for which compensation is available under paragraph (a)(2) or (3) of this section without regard to any elective reductions in such coverage and whether or not such benefits are actually recoverable.

(i) Nothing in this section shall be construed to require an insurer to insure any particular risk. Nothing herein shall limit the insurer's obligation pursuant to the Delaware Automobile Plan.

(j) Every insurance policy issued under this section shall require the insurer to submit to arbitration, in the manner set forth hereinafter, any claims for losses or damages within the coverages required under paragraph (a)(2) of this section and for damages to a motor vehicle, including the insured motor vehicle, including loss of use of such vehicle, upon request of the party claiming to have suffered a loss or damages within the above-described coverages of paragraph (a)(2) of this section or to such a motor vehicle. Such request shall be in writing and mailed to the Insurance Commissioner.

(1) All arbitration shall be administered by the Insurance Commissioner or the Insurance Commissioner's nominee.

(2) The Insurance Commissioner or the Insurance Commissioner's nominee shall establish a panel of arbitrators consisting of attorneys authorized to practice law in the State and insurance adjusters licensed to act as such in the State.

(3) The Insurance Commissioner, or the Insurance Commissioner's nominee, shall select 3 individuals from the panel of arbitrators, at least 1 of whom shall be an attorney authorized to practice law in the State, to hear each request for arbitration.

(4) The Insurance Commissioner, or the Insurance Commissioner's nominee, shall promulgate all rules and regulations necessary to implement this arbitration program.

(5) The right to require such arbitration shall be purely optional and neither party shall be held to have waived any of its rights by any act relating to arbitration and the losing party shall have a right to appeal de novo to the Superior Court if notice of such appeal is filed with that Court in the manner set forth by its rules within 30 days of the date of the decision being rendered.

(6) The Insurance Commissioner shall establish a schedule of costs of arbitration; provided, however, the arbitrator's fee shall not exceed $25 per arbitrator for any 1 arbitration.

(7) The cost of arbitration shall be payable to the State Department of Insurance, and shall be maintained in a special fund identified as the "Arbitration Fund" which shall be administered by the Insurance Commissioner. These funds under no circumstances shall revert to the General Fund. All costs of arbitration including administrative expenses of the Insurance Department and the arbitrator's fee shall be payable from this Fund.

(8) The applicant may be reimbursed the cost of filing arbitration as a part of the award rendered by the arbitration panel. If an insurer should pay an applicant damages in advance of a hearing, they shall include with those damages the cost to the applicant of filing the arbitration.

(9) This subsection shall also apply to self-insurers.

(k) Every insurance company authorized to transact the business of motor vehicle liability insurance in this State shall file with the Insurance Commissioner as a condition of its continued transaction of such business within this State a form approved by the Insurance Commissioner stating that its motor vehicle liability policies, on Delaware registered vehicles wherever issued, shall be deemed to provide the insurance required by this section. A nonadmitted insurer may file such a form.

(*l*) A motor vehicle registration shall not be issued or renewed for any vehicle not covered by a vehicle insurance policy meeting the requirements of this title. All insurers shall send to the Division of Motor Vehicles notice, in written or electronic form per the direction of the Division, of any cancellations or terminations of private passenger automobile insurance under § 3904(a)(1) of Title 18 for any private passenger automobile policies which are final and occur within the first 6 months after such policies are issued. The Insurance Commissioner may further change the timeframe for notification by regulation. All insurers shall send notice to the named insured when a motor vehicle insurance policy is canceled pursuant to the provisions of § 3905 or § 3920 of Title 18.

(m) A motor vehicle owner shall, upon request of the Division of Motor Vehicles, offer proof of insurance in full force and effect as a condition of registration or continued registration of a motor vehicle. The Division of Motor Vehicles, upon proof from its records or other sufficient evidence that the required insurance has not been provided or maintained or has terminated or otherwise lapsed at any time, shall immediately suspend the registration of the uninsured vehicle. The registration shall remain suspended until:

(1) The required insurance is obtained or replaced and the vehicle owner submits evidence of insurance on a form prescribed by the Division of Motor Vehicles and certified by the insurer or its agent; and

(2) An uninsured motorist penalty fee is paid to the Division of Motor Vehicles.

(n) (1) Except as provided in subsection (p) of this section, within 5 days of the notice of suspension from the Division of Motor Vehicles, the owner will surrender to the Division of Motor Vehicles the vehicle's certificate of registration and the registration plate.

(2) The Division of Motor Vehicles will promulgate rules and/or regulations to cover those circumstances in which there is an allegation of lost or stolen tags.

(3) Each insurer shall report to the Division of Motor Vehicles, within 30 days on a form prescribed by the Division of Motor Vehicles, the name of any person or persons involved in an accident or filing a claim who is alleged to have been operating a Delaware registered motor vehicle without the insurance required under this chapter. At a minimum, the insurer shall provide the name, address and description of the vehicle alleged to be uninsured. Each insurer shall take reasonable care when reporting potential violations of this section, but in no case shall an insurer, provider or any of its employees or agents incur any liabilities for erroneous reports of a violation.

(4) In addition to any other penalty provided for in the Delaware Motor Vehicle Law, if the required insurance for a vehicle terminates or otherwise lapses during its registration year, the Division of Motor Vehicles shall assess the owner of the vehicle with a penalty of $100 for each vehicle without the required insurance for a period of up to 30 days. When a penalty fee is assessed, beginning on the thirty-first day of the penalty period, the penalty fee shall increase by a rate of $5.00 for each subsequent day until the insurance is replaced, tags are surrendered to the Division of Motor Vehicles, or the registration expires, whichever occurs first. The Division of Motor Vehicles shall also charge a registration reinstatement fee of $50. When the Division of Motor Vehicles assesses a vehicle owner with a penalty under this subsection, the Division shall not reinstate a registration suspended under this section until the penalty is paid, and the owner has also paid a registration reinstatement fee of $50.

(o) "Insurance identification card" shall mean a card issued by or on behalf of an insurance company or bonding company duly authorized to transact business in this State which states in such form as the Insurance Commissioner may prescribe or approve that such company has issued a vehicle insurance policy meeting the requirements of this title. If the insured and insurance company both consent, the insurance identification card may be produced in electronic format. Acceptable electronic formats include display of electronic images on a cellular phone or any other type of portable electronic device. The Insurance Commissioner shall require all insurance companies transacting business within this State to provide with each vehicle insurance policy an insurance identification card describing the vehicle covered. The insurance identification card shall be valid for a period not to exceed 6 months. Notwithstanding this limitation, an insurance identification card may be issued for a period of 12 months if premium has been paid for the 12-month period. If an owner shall have filed a financial security deposit, or shall have qualified as a self-insurer, the term "insurance identification card" shall mean a card issued by the Office of the Insurance Commissioner which evidences that such deposit has been filed or that such owner has so qualified.

(p) (1) The insurance identification card issued for a vehicle required to be registered under this title shall at all times, when the vehicle is being operated upon a highway within this State, be in the possession of the operator thereof or carried in the vehicle and shall be produced upon the request of a police officer or any other party involved in an accident with the insured. If the operator of a motor vehicle is unable to produce an insurance identification card at the time of a traffic stop or an accident the operator shall be issued a summons to appear in court. If the operator is convicted under this subsection and has not provided proof of insurance in effect as of the date of conviction, the court shall, in addition to any other penalties imposed, notify the Division of Motor Vehicles of the lack of insurance. The Division of Motor Vehicles shall promptly suspend the vehicle's registration pursuant to the provisions of subsection (m) of this section.

a. Presentation of proof of insurance in electronic format shall not constitute consent for law enforcement or other state officials to access other contents of the cellular phone or other portable electronic device, and shall not expand or restrict authority to conduct a search or investigation.

b. Law-enforcement officers and other state officials shall not be liable for any damage to a cellular phone or portable electronic device resulting from its use to present satisfactory proof of motor vehicle liability insurance coverage.

c. A police officer may require the operator to electronically forward the proof of insurance to a specified location provided by the officer. The electronic insurance information would then be viewed in a setting which is safe for the officer to verify that all the information is valid and accurate.

(2) An operator shall not be convicted under this subsection if, prior to conviction, the operator shall produce to the court in which the offense is to be tried the insurance identification card or in lieu thereof other sufficient proof, including but not limited to an automobile, garage keeper's or other commercial or personal insurance policy, showing that there was insurance in full force and effect at all pertinent times covering or which would cover the said motor vehicle or the operation of the said motor vehicle by the operator charged under this subsection.

(3) Subject to paragraph (p)(2) of this section above, the Justice of the Peace Court may permit an operator charged under this subsection to provide proof of insurance to the Court by mail or facsimile transmission or other Court approved method in lieu of a personal appearance. Proof of insurance shall be as prescribed by the Court and shall be sent to the Court directly from the operator's insurer or the insurer's agent or broker. It shall be the responsibility of the operator to ensure that proof of insurance is received and accepted by the Court. When proof of insurance is accepted by the court by any means other than personal appearance, the Court may also accept a guilty plea in absentia for any accompanying charge for which a voluntary assessment is permitted under § 709(e) of this title. A guilty plea so accepted shall have the same force and effect as if the operator had made the plea in open court. The Justice of the Peace Court shall enact court rules to implement the handling of such cases by means other than personal appearance of the operator.

(4) Where the individual is charged with violating this section, and at the time of the alleged offense, the individual was operating a vehicle owned or leased by the individual's employer in the course and scope of the individual's employment, the individual shall not be convicted of violating this section unless the individual knew or should have known that the employer's vehicle failed to meet the requirement of this section.

(q) (1) The Division of Motor Vehicles shall annually select for verification on a random sample basis not less than 10% of vehicle registrations subject to the insurance required by this section. This verification will be made through the insurers as reflected in the Division's records.

(2) Any vehicle owner identified by the Division as a possible uninsured shall submit proof of insurance within 30 days of the Division's request for such proof, to the Division of Motor Vehicles on a form prescribed by the Division and certified by an insurer or agent.

(3) The failure of a vehicle owner to submit the required proof under this section within a 30-day period shall be prima facie evidence that the vehicle is uninsured and the owner shall be subject to the penalties as prescribed in subsections (*l*) and (m) of this section.

(4) With respect to any vehicle which has:

a. Had its registration suspended by the Division of Motor Vehicles pursuant to subsection (m) of this section,

b. Had transfer of custody of its license plate ordered by the Justice of the Peace Court pursuant to subsection (p) of this section, or

c. Failed to produce proof of insurance in a timely fashion pursuant to this subsection (q) of this section,

an officer of the Delaware State Police or member of the Department of Insurance's Fraud Prevention Bureau ("the Fraud Bureau") may confiscate the registration plate of that vehicle at any time absent affirmative proof that the vehicle is currently insured. Prior to any confiscation pursuant to this subsection, the registered owner of a vehicle shall receive notice at least 7 days prior to confiscation by regular and certified mail that such confiscation is to occur, and shall be provided a means to prove that the vehicle has current insurance prior to the indicated confiscation date. The Division of Motor Vehicles and the Justice of the Peace Court shall provide information to the Fraud Bureau and Delaware State Police sufficient to allow those organizations to enforce this subsection. Registration plates confiscated pursuant to this subsection shall be turned over to the Division of Motor Vehicles,

which shall follow procedures established pursuant to and consistent with subsection (m) of this section for return of said plates. The Fraud Bureau shall provide its members with sufficient training to ensure safe enforcement of this subsection.

(r) In the event of a suspension of a driver's license pursuant to this section, the Department may issue an occupational license during a period of suspension upon application by the applicant upon a form prescribed by the Department and sworn to by the applicant; provided, that the applicant sets forth in said application that the suspension of such license has created an extreme hardship and that no prior occupational license has been issued within the preceding 12 months; provided, however, that no such occupational license shall be issued until the applicant demonstrates proof of liability insurance on all motor vehicles owned by such applicant or spouse. If the suspension of the driver's license resulted from the arrest and conviction of a person stemming from an incident in which property damage or personal injury occurred, an occupational license shall not be issued, the other provisions of this subsection to the contrary notwithstanding.

(s) (1) Whoever violates any subsection of this section shall be fined for the first offense not less than $1,500 nor more than $2,000 and shall have that person's driving license and/or privileges suspended for 6 months. For each subsequent offense occurring within 3 years of a former offense, that person shall be fined not less than $3,000 nor more than $4,000 and shall have that person's driver's license and/or driving privilege suspended for 6 months. The minimum fine levied for a violation of subsection (a), (b), or (p) of this section may be suspended, in whole or in part, by the Court if evidence is presented that the defendant has secured insurance between the date of charge and the date of sentencing.

(2) Failure of the owner or operator to produce an insurance identification card for insurance which is in full force and effect at the time of the offense shall be presumptive evidence that such person is operating such person's vehicle without having insurance required by this title.

(3) Notwithstanding the penalties specified above, anyone convicted of driving without minimum insurance as required in this section shall have such person's privileges of driving suspended in this State until such time as such person has furnished proof of insurance to the Division of Motor Vehicles.

(t) (1) The Division of Motor Vehicles shall periodically select for verification of the required insurance all vehicles owned, individually or jointly, by a person who has been previously convicted of violating the provisions of this subchapter.

(2) The Division of Motor Vehicles may determine the accuracy of information relating to the proof of required insurance satisfying the provisions of this section.

(u) (1) The Division of Motor Vehicles may require evidence that any motor vehicle registered in a person's name, individually or jointly, is covered by the insurance required by this chapter, at a conference, hearing or interview:

a. As a result of point accumulation on the owner's motor vehicle driving record pursuant to the rules and regulations of the Division of Motor Vehicles; or

b. To show cause why the person's license should not be suspended or revoked pursuant to the laws of this State or the rules and regulations of the Division of Motor Vehicles.

(2) The Division of Motor Vehicles may require evidence that any vehicle registered in a person's name, individually or jointly, is covered by the insurance required by this chapter, at the time of reinstatement of driving privileges.

(3) The evidence of insurance shall be on a form prescribed by the Division of Motor Vehicles and certified by an insurer or its agent.

(4) Failure to submit the required proof under this section shall be prima facie evidence that any vehicle registered in that person's name, either individually or jointly, is uninsured and the owner shall be subject to the penalties as prescribed in subsections (*l*) and (m) of this section.

(v) (1) If a person has been issued an equipment inspection notice pursuant to § 2144 of this title, the person shall send within 30 days to the Division of Motor Vehicles the evidence of insurance or security required by this chapter on a form prescribed by the Division and certified by an insurer or agent.

(2) A failure to submit the evidence required by paragraph (v)(1) of this section shall result in the suspension of the registration of the vehicle cited and the assessment of the uninsured motorist penalty fee under this section.

(w) The Division of Motor Vehicle shall conduct a study or cause such study to be conducted to assess the feasibility and costs of establishing a direct computer link between the Division of Motor Vehicle's registration files and the insurance companies' data bases for the purposes of allowing the Division to conduct "real time" status reports of uninsured motorists. The Division of Motor Vehicles shall also conduct a study or cause such study to be conducted to analyze the ramifications of implementing an uninsured motorist program in the State similar to that of Virginia's Uninsured Motorist Program.

(x) Notwithstanding any contrary provisions of the Code, there shall be established a special fund of the State to be known as the D.M.V.T. Fund. The Secretary of Finance shall, commencing upon July 18, 1995, and commencing at the beginning of each fiscal year thereafter, cause to be deposited into the D.M.V.T. Fund amounts received as payments of fines and costs assessed by the Justice of the Peace Courts and/or the Court of Common Pleas under this section, until the amount deposited in said fiscal year shall equal $150,000.

(y) The purpose of the D.M.V.T. Fund is to provide for the administrative costs associated with this Act. Any balance in the D.M.V.T. Fund as of the last day of the fiscal year in excess of $15,000 shall be deposited to the General Fund. The Secretary of Finance shall make deposits to the D.M.V.T. Fund as required under this section commencing after August 1, 1995.

(z) The Director of the Division of Motor Vehicles may adopt such rules and regulations, not inconsistent with this title, as are necessary to enforce this section.

21 Del. C. 1953, § 2118; 58 Del. Laws, c. 98, § 1 (https://legis.delaware.gov/SessionLaws?volume=58&chapter=98); 58 Del. Laws, c. 353, § 1 (https://legis.delaware.gov/SessionLaws?volume=58&chapter=353); 58 Del. Laws, c. 443 (https://legis.delaware.gov/SessionLaws?volume=58&chapter=443); 59 Del. Laws, c. 179, §§ 1-3 (https://legis.delaware.gov/SessionLaws?volume=59&chapter=179); 59 Del. Laws, c. 574, §§ 1, 3 (https://legis.delaware.gov/SessionLaws?volume=59&chapter=574); 60 Del. Laws, c. 337, §§ 1, 2 (https://legis.delaware.gov/SessionLaws?volume=60&chapter=337); 60 Del. Laws, c. 433, § 2 (https://legis.delaware.gov/SessionLaws?volume=60&chapter=433); 61 Del. Laws, c. 66, § 1 (https://legis.delaware.gov/SessionLaws?volume=61&chapter=66); 61 Del. Laws, c. 292, §§ 1-3 (https://legis.delaware.gov/SessionLaws?volume=61&chapter=292); 61 Del. Laws, c. 320, § 1 (https://legis.delaware.gov/SessionLaws?volume=61&chapter=320); 61 Del. Laws, c. 417, §§ 1, 2 (https://legis.delaware.gov/SessionLaws?volume=61&chapter=417); 62 Del. Laws, c. 280, § 1 (https://legis.delaware.gov/SessionLaws?volume=62&chapter=280); 63 Del. Laws, c. 149, § 1 (https://legis.delaware.gov/SessionLaws?volume=63&chapter=149); 63 Del. Laws, c. 405, § 1 (https://legis.delaware.gov/SessionLaws?volume=63&chapter=405); 64 Del. Laws, c. 198, §§ 1, 2 (https://legis.delaware.gov/SessionLaws?volume=64&chapter=198); 64 Del. Laws, c. 356, § 1 (https://legis.delaware.gov/SessionLaws?volume=64&chapter=356); 65 Del. Laws, c. 177, § 1 (https://legis.delaware.gov/SessionLaws?volume=65&chapter=177); 65 Del. Laws, c. 324, § 1 (https://legis.delaware.gov/SessionLaws?volume=65&chapter=324); 65 Del. Laws, c. 503, § 4 (https://legis.delaware.gov/SessionLaws?volume=65&chapter=503); 67 Del. Laws, c. 177, §§ 1, 2 (https://legis.delaware.gov/SessionLaws?volume=67&chapter=177); 68 Del. Laws, c. 331, §§ 1-4 (https://legis.delaware.gov/SessionLaws?volume=68&chapter=331); 68 Del. Laws, c. 336, § 1 (https://legis.delaware.gov/SessionLaws?volume=68&chapter=336); 69 Del. Laws, c. 116, § 3 (https://legis.delaware.gov/SessionLaws?volume=69&chapter=116); 69 Del. Laws, c. 155, §§ 1, 2 (https://legis.delaware.gov/SessionLaws?volume=69&chapter=155); 69 Del. Laws, c. 197, § 1 (https://legis.delaware.gov/SessionLaws?volume=69&chapter=197); 69 Del. Laws, c. 413, § 1 (https://legis.delaware.gov/SessionLaws?volume=69&chapter=413); 70 Del. Laws, c. 186, § 1 (https://legis.delaware.gov/SessionLaws?volume=70&chapter=186); 70 Del. Laws, c. 247, §§ 1-3

2023 WL 3789445
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Delaware.

AMGUARD INSURANCE COMPANY
a/s/o Richard E. Cleveland, Plaintiff,
v.
DONEGAL MUTUAL INSURANCE COMPANY, Defendant.

C.A. No. N22C-08-428 SKR
|
May 31, 2023

Attorneys and Law Firms

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MEMORANDUM ORDER

Sheldon K. Rennie, Judge

***1** This 31st day of May, 2023, upon consideration of the defendant, Donegal Mutual Insurance Company's ("Defendant" or "Donegal") Motion to Dismiss,[1] briefing from the parties, and the record in this case, it appears to the Court that:

FACTUAL AND PROCEDURAL BACKGROUND

1. This matter arises from an insurance dispute following a motor vehicle collision in which an employee, covered under both workers' compensation and personal injury protection ("PIP") insurance, suffered injuries.

2. On August 23, 2022, AmGuard Insurance Company ("Plaintiff" or "AmGuard"), a **worker's compensation** insurer, brought suit against Donegal, the **PIP** insurer, for subrogation of workers' compensation benefits paid to the injured employee, Richard Cleveland.[2]

3. On December 15, 2022, Defendant filed a Motion to Dismiss pursuant to Delaware Superior Court Civil Rule 12(b)(6). Defendant asserts that AmGuard's claim for subrogation contradicts the explicit language of 19 *Del.C.* § 2363(e) and 21 *Del.C.* § 2118(g), and therefore, does not state a valid claim for relief.[3]

4. On February 9, 2023, AmGuard filed an Answering Brief asserting its right to seek reimbursement from the PIP carrier.[4] On February 28, 2023, Donegal filed its Reply Brief contesting AmGuard's position and providing further justification for dismissal.[5]

PARTIES' CONTENTIONS

5. Donegal argues that AmGuard's claim is in direct contravention to the statutory language of 19 *Del.C.* § 2363(e) ("§ 2363(e)"), which specifies that a workers' compensation carrier may only seek reimbursement from the third-party liability insurer, not the no-fault PIP insurer. Donegal contends that AmGuard, in its assertion that a **worker's compensation** carrier can seek reimbursement from a **PIP** carrier for payments made under the **worker's compensation** policy, misconstrues the amendments made to § 2363(e) in 1993 and contradicts the Court's well-established precedent.

6. In support of its asserted statutory interpretation of § 2363(e), Donegal further points out that 21 *Del.C.* § 2118 (g)(1) ("§ 2118(g)(1)") authorizes the no-fault **PIP** insurer to seek indemnification from any **worker's compensation** insurer obligated to make payments to the injured party.[6] Hence, Donegal argues that allowing AmGuard, as a **worker's compensation** carrier, to pursue subrogation against it, as the **PIP** insurer, would lead to an absurd result, where Donegal could simply turn around and counterclaim against AmGuard for indemnification under § 2118(g)(1).[7]

***2** 7. Donegal also posits that AmGuard, in an attempt to support its position, conflates the issue of primary and ultimate payer. Despite no-fault benefits being referred to as "primary" in terms of first in sequence, Donegal contends that Delaware case law makes clear that the **worker's**

compensation carrier is the ultimate payer, when **worker's compensation** and **PIP** benefits overlap.[8]

8. In response, AmGuard asserts that its right to subrogation is supported by the 1993 amendments to § 2363(e) and Delaware case law.[9] AmGuard contends that the 1993 amendments were crafted to maximize a Plaintiff's recovery by allowing the **worker's compensation** carrier to look to the **PIP** carrier, as opposed to the Plaintiff's recovery, for reimbursement. AmGuard also argues that the issue of primary and ultimate payer is irrelevant because AmGuard maintains a right to reimbursement from the PIP carrier.[10]

STANDARD OF REVIEW

9. When deciding a motion to dismiss a complaint for failure to state a claim, made pursuant to Superior Court Civil Rule 12(b)(6), all well-pleaded allegations must be accepted as true.[11] Dismissal of a complaint under Rule 12(b)(6) must be denied if the plaintiff could recover under "any reasonably conceivable set of circumstances susceptible of proof under the complaint."[12] A claim may be dismissed if "allegations in the complaint ... effectively negate the claim as a matter of law."[13] "In deciding a motion to dismiss, the trial court cannot choose between two differing reasonable interpretations of ambiguous provisions".[14] Dismissal, pursuant to Rule 12(b)(6), is proper only if the defendants' interpretation is the *only* reasonable construction as a matter of law.[15]

ANALYSIS

10. Section 2363(e) expressly states that a worker's compensation carrier seeking subrogation may only obtain reimbursement from the third-party liability insurer. By implication, this means that reimbursement shall not be sought against the no-fault insurer.[16] AmGuard appears to erroneously read "third-party liability insurer" and "no-fault insurer" to be one and the same. This Court's decision in *Titus v. Nova. Cas. Co.*, refutes such an interpretation.[17] In *Titus*, the Court was faced with the issue of whether a worker's compensation carrier that paid out proceeds to its injured employee could thereafter seek reimbursement from the UM/UIM carrier. The Court construed the language in § 2363(e) and found that the phrase "third party liability insurer" as used in § 2363(e) was clear and unambiguous and did not refer to a UM/UIM carrier.[18] The Court granted summary judgment against the worker's compensation carrier and held that it could only seek reimbursement against the third-party liability insurer, which was the insurance carrier of the tortfeasor.[19] Applying the well-reasoned statutory construction in *Titus*, this Court concludes that AmGuard's position is at odds with the express language of § 2363(e) which limits AmGuard's right to reimbursement to an action against the tortfeasor's liability insurer.

***3** 11. Moreover, a related statutory provision refutes the notion that reimbursement can be sought by the **worker's compensation** carrier against the **PIP** no-fault carrier. Title 21 *Del.C.* § 2118 makes clear that it is the **PIP** insurer that is entitled to indemnification from the **worker's compensation** insurer as opposed to the other way around.[20] Hence, the Court agrees with Donegal, that construing § 2363(e) to "allow[ ] AmGuard to pursue subrogation would lead to an absurd result where Donegal [c]ould then [simultaneously] counterclaim for indemnification under § 2118(g)(1)."[21] Such an absurd result could not have been the intent of the legislature when considering these two statutory provisions juxtaposed to each other.

12. Finally, this Court's holdings are resolute in finding a reimbursement obligation by the worker's compensation carrier to the no-fault carrier when benefits from both carriers have been paid out to the insured. For example, in *Pennsylvania Manufacturers Association Co. v. Oliphant*,[22] the Court found that in this overlap situation, both no-fault and worker's compensation insurers are liable to the injured worker.[23] Notably, however, the Court stated that "the **worker's compensation** insurer ultimately reimburses the **PIP** carrier for payment of those benefits which are required to be paid under the [**worker's**] **compensation** statute."[24] In that case, the Court specifically held that the **PIP** insurer is entitled to assert a reimbursement claim against the **worker's compensation** insurer.[25]

13. Similarly, in *Cicchini v. State*,[26] this Court again analyzed the interplay between no-fault benefits and worker's compensation benefits, and reiterated that the no-fault carrier has the right to subrogation against the worker's compensation carrier.[27] The Court in *Cicchini* outlined the no fault insurer's subrogation rights under the express language of § 2118(g)(1) as follows:

> [H]ad the claims been processed under the PIP policy, as Plaintiffs advocate, the PIP carrier would be able to recoup all monies paid to the Plaintiffs by exercising its subrogation rights against the tortfeasor to the extent available after paying any claims by the Plaintiffs. If the tortfeasor had no insurance, or if it had been exhausted, the PIP carrier could seek indemnification from the workmen's compensation carrier.[28]

14. Having carefully reviewed the statutes and various Delaware cases that have interpreted them, the Court concludes that AmGuard's claim directly contradicts the clear language of 19 *Del.C.* § 2363(e) and 21 *Del.C.* § 2118(g) and cannot be sustained as a viable cause of action.

CONCLUSION

***4** Based on the foregoing, the Court finds that the Plaintiff, AmGuard, cannot recover under any reasonably conceivable set of circumstances susceptible of proof. Therefore, Defendant Donegal's Motion to Dismiss is hereby **GRANTED.**

IT IS SO ORDERED.

All Citations

Not Reported in Atl. Rptr., 2023 WL 3789445

Footnotes

1 Def.'s Mot. to Dismiss (Trans. ID. 68622505) ("Def.'s Mot.").

2 *See*, Pl.'s Compl. (Trans. ID. 67962769) ("Compl.").

3 Def.'s Mot. at 1.

4 Pl.'s Resp. (Trans. ID. 69113013) ("Pl.'s Resp.").

5 Def.'s Reply (Trans. ID. 69230333) ("Def.'s Reply").

6 Section 2118(g)(1) provides that an "[i]nsurer providing [no fault benefits] shall be subrogated to the rights, including claims under any **worker's compensation** law, of the person for whom benefits are provided ..."; *see also*, *Pennsylvania Manufacturers Association Co. v. Oliphant*, 1986 Del. Super. Lexis 1527 (Del. Super. Sept. 10, 1986) ("[i]t remains, however, that the **worker's compensation** insurer ultimately reimburses the **PIP** carrier for payment of those benefits which are required to be paid under the [**worker's**] **compensation** statute").

7 Def.'s Reply at 4.

8 Def.'s Reply at 6; *see also*, *Johnson v. Fireman's Fund Ins. Co.*, 1983 Del. LEXIS 762 (Del. Super., Nov. 21, 1983) (illustrating a no-fault carrier's right to indemnification from the workers' compensation carrier).

9 Pl.'s Resp. at 6-9.

10 *Id.*

11 *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978).

12 *Spence*, 396 A.2d at 968 (*citing* Klein v. Sunbeam Corp., 94 A.2d 385, 391 (Del. 1952)).

13 *VLIW Technology, LLC v. Hewlitt-Packard Co.*, 840 A.2d 606, 614-615 (Del. 2003).

14 *Id.* at 615.

15 *Id.* (emphasis in original).

16 19 *Del.C.* § 2636(e) ("*reimbursement shall be had only from the third party liability insurer*") (emphasis in original).

17 2012 WL 6755476 (Del. Super. Oct. 26, 2012).

18 *Id.*

19 *Id.*

20 *See* 21 *Del.C.* § 2118 (g)(1) ("Insurer providing [no fault] benefits shall be indemnified by any workers' compensation insurer obligated to make such payments to the injured party").

21 Def.'s Mot. at 8.

22 1986 Del. Super. Lexis 1527 (Del. Super. Sept. 10, 1986) ("*Oliphant*").

23 *Oliphant* at *5.

24 *Id.*

25 *Id.* at 8.

26 640 A.2d 650 (Del. Super. Jul. 12, 1993) ("*Cicchini*").

27 *Cicchini* at 653.

28 *Id.*; *see also, Lane v. Home Ins. Co.*, 1988 WL 40013, *4 (Del. Super. Apr. 14, 1988) ("The Delaware no-fault statute establishes the priorities for recovery of benefits and the right of the **PIP** insurer for reimbursement against the workmen's compensation carrier"); ***but see***, *Accident Fund Ins. Co. of Am. v. Zurich Am. Ins. Co.*, 2013 WL 6039914, *1 (Del. Super. Oct. 31, 2013) (considering the interplay between the no-fault and **worker's compensation** laws and holding that the **worker's compensation** insurer was entitled to reimbursement from the proceeds received by the employee for uninsured motorist benefits from the no-fault policy). Notwithstanding *Accident Fund Ins. Co. of Am.*, the Court here finds that the circumstances of this case fall in line with the majority of cases which rule that a **worker's compensation** carrier's only right to reimbursement is the third-party liability insurer and not the **PIP** insurer.

End of Document

304 A.3d 552
Supreme Court of Delaware.

HORIZON SERVICES, INC. and Eastern Alliance Insurance Company, Plaintiffs Below, Appellants,

v.

John HENRY and the Cincinnati Insurance Company, Defendants Below, Appellees.

No. 172, 2022
|
Submitted: June 7, 2023
|
Decided: September 1, 2023
|
Corrected: September 6, 2023

Synopsis

Background: Employer and its workers' compensation insurance carrier brought action against employee and insurer that issued underinsured motorist (UIM) policy covering employer's vehicle, seeking declaratory judgment that employer and workers' compensation carrier were permitted to assert lien against any recovery that employee, who had been injured in automobile accident with nonparty tortfeasor while driving employer's vehicle, might obtain for injuries already compensated under workers' compensation act. The Superior Court, Brennan, J., 2022 WL 1316236, granted insurer's and employee's motion for judgment on the pleadings. Employer and carrier appealed.

Holdings: The Supreme Court, Abigail M. LeGrow, J., held that:

[1] workers' compensation act generally allowed employer or workers' compensation carrier to assert subrogation lien against employee's recovery of benefits under employer-purchased UIM policy, overruling *Simendinger v. National Union Fire Ins. Co.*, 74 A.3d 609, but

[2] it was premature to determine whether employee's recovery under UIM policy would be subject to lien.

Reversed and remanded.

See also 212 A.3d 285.

West Headnotes (13)

[1] **Appeal and Error** ⇐ Judgment on the pleadings

On appeal from a trial court decision granting a motion for judgment on the pleadings, the Supreme Court reviews the trial court's decision de novo to determine whether the trial court committed legal error in formulating or applying legal precepts.

[2] **Workers' Compensation** ⇐ Right of Action of Employee or Representative Generally

Workers' Compensation ⇐ Right of Employer or Insurer to Remedy of Employee or Employee's Representative

The exclusive-remedies provision of the workers' compensation act does not distinguish between claims an employee may maintain and those an employer may maintain. 19 Del. Code § 2304.

[3] **Workers' Compensation** ⇐ Action by or on Behalf of Employer or Insurer

In the provision of the workers' compensation act governing the enforcement by an employer or its workers' compensation insurance carrier of a third-party tortfeasor's liability for injuries to an employee, the clause limiting an employer's or carrier's reimbursement for "items of expense which are precluded from being introduced into evidence at trial by" the statute requiring motor vehicles to be insured, such 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 available for the injured party," applies to personal injury protection (PIP) expenses that are not boardable; such non-boardable expenses include those that were or could have been paid by a PIP policy. 19 Del. Code § 2363(e); 21 Del. Code § 2118.

[4] **Insurance** ⇐ Workers' compensation

Workers' Compensation ⇐ Lien of employer or insurer

Except as to non-boardable personal injury protection (PIP) expenses excluded from evidence at trial under the statute requiring motor vehicle insurance, the provision of the workers' compensation act addressing the enforcement of a third-party tortfeasor's liability for an employee's injuries by an employer or its workers' compensation insurance carrier gives an employer and its carrier a right to assert a subrogation lien against an employee's recovery of benefits under an employer-purchased underinsured motorist (UIM) policy; overruling *Simendinger v. National Union Fire Ins. Co.*, 74 A.3d 609. 19 Del. Code § 2363(e); 21 Del. Code § 2118.

[5] **Damages** ⇐ Nature and theory of compensation

As a general matter, Delaware's public policy seeks to avoid allowing a plaintiff to recover twice for the same injury.

[6] **Damages** ⇐ Benefits incident to injury

The "collateral source rule" allows double recovery for the same injury in some contexts, under the theory that a tortfeasor has no interest in, and therefore no right to benefit from, monies received by the injured person from sources unconnected with the defendant.

[7] **Workers' Compensation** ⇐ Purpose of legislation

The public policy supporting the workers' compensation act is to compensate an injured worker for lost wages and medical expenses for work-related injuries, regardless of fault. 19 Del. Code § 2301 et seq.

[8] **Insurance** ⇐ Uninsured or Underinsured Motorist Coverage

The public policy motivating the uninsured and underinsured motorist statute is to permit an insured to protect himself from an irresponsible driver causing death or injury. 18 Del. Code § 3902.

[9] **Workers' Compensation** ⇐ Subrogation or assignment in general

Under the contractual analysis for determining an employer's subrogation rights in the context of a workers' compensation proceeding in which underinsured motorist (UIM) benefits may also be awarded to an injured worker, the extent to which the collateral source rule should be applied to permit double recovery depends on the contractual expectations that underlie the collateral source payment; if the insured has paid consideration for recovery from a collateral source, then recovery should be allowed, but if the collateral payments are received gratis, then their receipt should bar recovery. 19 Del. Code § 2363(e).

[10] **Insurance** ⇐ Workers' compensation

Workers' Compensation ⇐ Subrogation or assignment in general

An employer who purchases underinsured motorist (UIM) coverage for its vehicles and the employees who drive them should be entitled to assert a subrogation lien when that UIM policy reimburses the employee for injuries already compensated under the workers' compensation act; in such a case, the employer has contracted for the supplemental protection and the employee should not receive a double recovery from a fund for which the employee did not contract. 19 Del. Code § 2363(e).

[11] **Insurance** ⚷ Workers' compensation

Workers' Compensation ⚷ Subrogation or assignment in general

Where an employee has been injured by a third-party tortfeasor, neither an employer nor its workers' compensation carrier has a right to a subrogation lien against the employee's recovery from his or her own underinsured motorist (UIM) policy; by purchasing his or her own policy, the employee has contracted for recovery from a collateral source, and double recovery should be permitted.

[12] **Insurance** ⚷ Uninsured or Underinsured Motorist Coverage

Delaware's public policy, as set forth in the uninsured and underinsured motorist statute, permits an insured to contract for supplemental protection against losses caused by drivers who carry less liability coverage. 18 Del. Code § 3902.

[13] **Declaratory Judgment** ⚷ Scope and extent of review in general

It was premature for Supreme Court, on employer's and its workers' compensation insurance carrier's appeal from judgment on the pleadings in their action for declaratory judgment that workers' compensation act authorized them to place subrogation lien on any benefits paid to employee under employer's uninsured or underinsured motorist (UIM) policy, to resolve issue of whether exclusions and limitations of underinsured motorist (UIM) policy covering employer's vehicle precluded employee from recovering UIM benefits for injuries already paid under workers' compensation act, such that no recovery under UIM Policy would be subject to lien; trial court was entitled to opportunity to interpret policy language and decide its enforceability, and further factual development was necessary. 19 Del. Code § 2363(e).

***554** Court Below: Superior Court of the State of Delaware, C.A. No. N21C-10-044

Upon appeal from the Superior Court of the State of Delaware. **REVERSED AND REMANDED**.

Attorneys and Law Firms

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William A. Crawford, Esquire (argued), FRANKLIN & PROKOPIK, Newark, Delaware, for Appellee Cincinnati Insurance Company.

Before SEITZ, Chief Justice; VALIHURA, TRAYNOR, LEGROW, and GRIFFITHS, Justices, constituting the Court en banc.

Opinion

LEGROW, Justice:

***555** This appeal requires us to interpret a section of the workers' compensation act that addresses when an employer or its workers' compensation insurance carrier may assert a lien against benefits an injured employee recovers from other sources. In a previous action between these parties, we addressed whether the exclusive-remedies provision in the workers' compensation act precluded an injured employee from pursuing recovery from an uninsured motorist policy. After we held that the exclusive-remedies provision did not apply, the employer and its workers' compensation carrier sought a declaratory judgment that they are permitted to assert a lien against any recovery the employee might obtain for injuries already compensated under the workers' compensation act.

The employee and the uninsured motorist insurer contend that any such lien is barred by statute, relying on this Court's decision in *Simendinger v. National Union Fire Insurance Co.*[1] The Superior Court followed that binding precedent as

it was required to do and dismissed the declaratory judgment claim. We now conclude, however, that *Simendinger* was decided in error. We therefore reverse the Superior Court's decision and hold that the workers' compensation act expressly allows the employer and its workers' compensation carrier to assert a subrogation lien against benefits paid to the employee under the employer's uninsured motorist policy.

I. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND[2]

Appellee John Henry sustained injuries in an automobile accident caused by a non-party. At the time of the accident, Henry was traveling in a vehicle owned by his employer, Appellant Horizon Services, Inc. ("Horizon"), and was acting in the course of his employment.

Henry received over $584,000 in workers' compensation benefits from Horizon and its workers' compensation insurance carrier, Appellant Eastern Alliance Insurance Company ("Eastern"). Henry also pursued damages from the non-party tortfeasor, who held a $50,000 liability insurance policy. Henry ultimately settled with the tortfeasor's insurance carrier for the policy limit. After deducting attorneys' fees and costs, Henry reimbursed the remainder of his recovery from the tortfeasor's policy to Appellants pursuant to Delaware's Workers' Compensation Act, 19 *Del. C.* §§ 2301–2396 (the "WCA").[3]

A. Henry's UIM Action

The Horizon vehicle Henry operated at the time of the accident was covered by an underinsured motorist ("UIM") insurance policy issued by Cincinnati Insurance Company ("Cincinnati") that named Horizon ***556** as the insured. Henry also had a personal automobile liability policy issued by State Farm Mutual Automobile Insurance Company ("State Farm") that provided UIM coverage (the "State Farm Policy").[4] After recovering the tortfeasor's policy limit, Henry filed claims with Cincinnati and State Farm for UIM benefits under each carrier's policy.[5] When both carriers denied Henry's claims, Henry and his wife filed separate actions in the Superior Court against Cincinnati and State Farm, which the court later consolidated into one action (the "UIM Action").[6]

1. Cincinnati's Motion to Dismiss and Henry's Appeal

Cincinnati moved to dismiss Henry's complaint on the ground that 19 *Del. C.* § 2304, the WCA's exclusive-remedies provision, precluded him from recovering UIM benefits under Cincinnati's policy.[7] The accident at issue occurred in September 2015. At the time of the accident, the WCA's exclusive-remedies provision provided as follows:

> Every employer and employee, adult and minor, except as expressly excluded in this chapter, shall be bound by this chapter respectively to pay and to accept compensation for personal injury or death by accident arising out of and in the course of employment, regardless of the question of negligence and to the exclusion of all other rights and remedies.[8]

In 2016, after the accident, the General Assembly amended the exclusive-remedies provision by adding the following italicized language:

> Except as expressly included in this chapter and *except as to uninsured motorist benefits, underinsured motorist benefits, and personal injury protection benefits*, every employer and employee, adult and minor, shall be bound by this chapter respectively to pay and to accept compensation for personal injury or death by accident arising out of and in the course of employment, regardless of the question of negligence and to the exclusion of all other rights and remedies.[9]

In his opposition to Cincinnati's motion to dismiss, Henry argued that the amended exclusive-remedies provision applied and permitted employees to recover both workers' compensation benefits and UIM benefits under an employer's insurance policy.[10]

The Superior Court agreed with Cincinnati and dismissed Henry's UIM claims. First, the Superior Court found that the pre-amendment version of the exclusive-remedies provision applied because it was in effect at the time of the accident.[11] Second, the court concluded that, under ***557** that version of Section 2304, Henry was precluded "from receiving both workers' compensation benefits and UIM benefits under [Horizon's] insurance policy."[12] Henry appealed.

By opinion dated June 11, 2019 ("*Henry I*"),[13] this Court reversed. The Court agreed with the Superior Court's conclusion that the pre-amendment version of Section 2304

applied to Henry's claim.[14] This Court, however, held the pre-amendment version of the exclusive-remedies provision did not preclude Henry from recovering against Cincinnati, who, as the provider of Horizon's UIM coverage, did not fall within the scope of the statute's definition of "employer."[15] Rather, this Court reasoned, when Cincinnati is sued in its capacity as UIM-coverage provider, "Cincinnati steps into the shoes of the alleged tortfeasor."[16] And because Cincinnati was being sued in that capacity, which is "permi[ssible] under 19 *Del. C.* § 2363," the exclusive-remedies provision did not provide Cincinnati with a defense.[17]

2. The Proceedings on Remand

After Henry's claims were reinstated on remand, Eastern and Horizon moved to intervene to assert a lien against any UIM benefits that Henry recovers from Cincinnati. The Superior Court denied the motion, holding that "there is no statutory right of recovery for a worker's compensation lien against UIM insurance coverage."[18] Relying on this Court's decisions in *Simendinger v. National Union Fire Insurance Co.*[19] and *Adams v. Delmarva Power & Light Co.*,[20] the Superior Court concluded that "decisional law is settled":

> A worker's compensation lien may not be asserted against recovery from UIM benefits regardless of whether that insurance coverage is secured by an employee or an employer. Therefore, since neither [Horizon] nor [Eastern] has a lien against UIM benefits paid to Henry, neither has a statutory right to intervene in this action.[21]

The Superior Court also held that *Henry I* did not overrule *Adams* or *Simendinger*.[22] In the Superior Court's view, when this Court observed that a UIM insurance carrier "steps into the shoes of the alleged tortfeasor," it merely "addressed burdens of proof and the requirement to establish fault" and did not open the door for employers to seek reimbursement through an employee's recovery of UIM benefits.[23] Horizon and Eastern moved for certification of an interlocutory appeal, which the Superior Court denied.[24] In refusing certification, the Superior Court reasoned that interlocutory review would not be efficient and there were other avenues of relief available to Horizon and Eastern, including "pursuing a separate ***558** declaratory judgment action."[25] This Court dismissed Horizon and Eastern's appeal in the UIM Action on June 10, 2021.[26]

B. This Declaratory Judgment Action

On October 6, 2021, Horizon and Eastern filed this declaratory judgment action seeking a declaration that "any recovery of damages paid to [Henry]" in the UIM Action "shall, after deducting legal expenses, first reimburse [Horizon and Eastern] pursuant to 19 *Del. C.* § 2363(e)."[27] The complaint in this action expressly disclaims "a reimbursement right against [Henry's] recovery from his own underinsured motorist carrier, ... consistent with Delaware's collateral source doctrine and *Adams*."[28]

Cincinnati, later joined by Henry,[29] moved for judgment on the pleadings. Advancing arguments largely mirroring those made in its opposition to the motion to intervene in the UIM Action, Cincinnati argued that Horizon and Eastern were not statutorily entitled to UIM benefits recovered by Henry under Cincinnati's policy. Cincinnati also argued that exclusions in the UIM policy barred Henry—and by extension, Horizon and Eastern—from recovering damages previously paid by another insurer, including a workers' compensation carrier. In response, Horizon and Eastern argued that the 2016 amendment to the exclusive-remedies provision and this Court's decision in *Henry I* permitted their assertion of a lien against any UIM benefits Henry might recover from Cincinnati.

The Superior Court entered judgment in favor of Cincinnati and Henry. Relying on this Court's decisions in *Hurst v. Nationwide Mutual Insurance Co.*[30] and *Simendinger*,[31] the court held that 19 *Del. C.* § 2363(e) precludes an employer or its workers' compensation carrier from recovering UIM benefits that an employee receives under an employer-owned UIM policy. The court also concluded that the plain language of Section 2363(e) limits Horizon's right to reimbursement for workers' compensation benefits to the damages recovered from the non-party tortfeasor.

The Superior Court also concluded, once again, that *Henry I* did not overrule *Simendinger*. At the trial court level, Appellants argued that *Henry I* deemed Cincinnati to be a third-party insurer for purposes of Section 2363(e) and, as a result, impliedly overruled *Simendinger*. The Superior Court disagreed, stating: "This court reads the reference to Cincinnati standing in the shoes of an alleged third-party tortfeasor as dicta, intending to be illustrative of why Cincinnati could not invoke the [exclusive-remedies] provision, as opposed to impliedly overruling a well-settled

principle of law."[32] The Superior Court therefore granted Appellee's motion for judgment on the pleadings without reaching the issue of whether Cincinnati's policy excludes Appellants' claims.

This appeal followed.

***559 C. The Parties' Contentions on Appeal**

Appellants ask us to reverse the Superior Court's judgment, arguing that Section 2363(e) permits employers to assert a lien against an employee's recovery from an employer-owned UIM policy.[33] Appellants argue that this Court's reasoning and holding in *Henry I* compels this conclusion. According to Appellants, because *Henry I* found that employees may pursue UIM benefits under Section 2363(a) on the ground that the UIM carrier stands in the shoes of the third-party tortfeasor, the employer has a right to subrogate against those benefits under Section 2363(e).[34] That conclusion, Appellants acknowledge, would conflict with *Simendinger*, which held that "an employer's [workers'] compensation carrier [may not] assert a priority lien against an injured employee's right to payment pursuant to the employer's uninsured motorist coverage."[35] Appellants therefore ask us to overrule *Simendinger*.[36]

Appellees respond that the Superior Court correctly concluded that "well-established" decisional law precludes Appellants from recovering any UIM proceeds that Henry might recover from Cincinnati.[37] Appellees point to an exception at the end of Section 2363(e), asserting, as did the Superior Court, that Section 2363(e) "limits an employer's right to reimbursement 'only from the third party liability insurer.' "[38] Because Cincinnati is not a "third party liability insurer," Appellees argue, Horizon may not recover reimbursement from Henry's recovery against Cincinnati.[39]

Appellees further argue that the Superior Court's judgment may be affirmed on the alternative basis that Cincinnati's policy excludes Appellants' claim.[40] In response, Appellants argue that the enforceability of the policy's exclusionary provisions are being litigated in the UIM Action and, because Appellants' claims for UIM benefits under the policy are derivative of Henry's claims, the enforceability and effect of the exclusionary provisions should be fully litigated in the UIM Action first.[41] The Superior Court did not address the policy exclusions in its ruling.

II. STANDARD OF REVIEW

[1] On appeal from a trial court decision granting a motion for judgment on the ***560** pleadings, this Court reviews the trial court's decision *de novo* to determine "whether the court committed legal error in formulating or applying legal precepts."[42]

III. ANALYSIS

The primary issue before us is whether an employer or its workers' compensation insurance carrier may assert a lien against UIM benefits paid to an employee under the employer's UIM policy for injuries previously compensated under the WCA. Because we conclude such a lien is statutorily permitted, we also briefly address the Appellee's alternative argument that the language of the UIM policy precludes the Appellants from maintaining a lien in this case.

A. Section 2363 of the WCA allows an employer or its workers' compensation insurer to assert a lien against benefits recovered from the employer's UIM policy.

The issue raised on appeal requires this Court to interpret 19 *Del. C.* § 2363(e), which expressly addresses claims against a third-party tortfeasor relating to work-related injuries compensable under the WCA. The parties, however, devoted a substantial portion of their briefing and argument to Section 2304, the WCA's exclusive-remedies provision, and specifically which version of Section 2304 applies in this case. We therefore briefly address why Section 2304 is not dispositive of the issue on appeal before turning to the interpretation of Section 2363(e).

1. The WCA's exclusive-remedies provision does not address subrogation liens.

The parties' focus on the exclusive-remedies provision is misplaced. In *Henry I*, we held that Section 2304 does not bar an employee from recovering UIM benefits under a policy purchased by the employer from a third-party insurance provider.[43] The exclusive-remedies provision expressly applies to employers and employees, and we concluded in *Henry I* that a UIM insurer is not an "employer"

for purposes of the WCA.[44] Instead, the UIM insurer "steps into the shoes of the alleged third-party tortfeasor."[45]

[2] Having previously resolved the effect of the WCA's exclusive-remedies provision, that section does not inform our analysis in this appeal. The exclusive-remedies provision does not distinguish between claims an employee may maintain and those an employer may maintain. Accordingly, because we already concluded the exclusive-remedies provision does not bar Henry from asserting a UIM claim against Cincinnati, the provision likewise cannot bar Horizon or Eastern from asserting a lien against any benefits paid for such a claim. Rather, the right to assert a lien is governed by 19 *Del. C.* § 2363(e).

***561 2. Except for "PIP-eligible expenses," Section 2363(e) allows an employer or its workers' compensation insurer to assert a lien against benefits paid from an employer-purchased UIM policy.**

The Superior Court, relying on this Court's holding in *Simendinger*, concluded that Section 2363(e) does not permit an employer to assert a lien on UIM benefits. The Superior Court correctly followed *Simendinger* as binding precedent. But the issues raised on appeal require us to revisit *Simendinger* and its reasoning. Although we do not lightly overturn precedent,[46] we are compelled to conclude that *Simendinger*'s interpretation of Section 2363 is not consistent with the statute's terms. We reach that conclusion based on the statute's language and history as well as our decisions that pre-date *Simendinger*.

Section 2363 was adopted in 1955,[47] and this Court interpreted that section 30 years later in *Harris v. New Castle County*.[48] At the time *Harris* was decided, Section 2363(e) provided:

> In an action to enforce the liability of a third party, the plaintiff may recover any amount which the employee or his dependents or personal representative would be entitled to recover in an action in tort. Any recovery against the third party for damages resulting from personal injuries or death only, after deducting expenses of recovery, shall first reimburse the employer or its workmen's compensation insurance carrier for any amounts paid or payable under the [WCA] to date of recovery, and the balance shall forthwith be paid to the employee or his dependents or personal representative and shall be treated as an advance payment by the employer on account of any future payment of compensation benefits.[49]

In *Harris*, we held that an employer has a statutory right under Section 2363(e) to assert a subrogation lien against an employee's recovery of benefits under a UIM policy maintained by his employer.[50]

In 1993, Section 2363(e) was amended to limit an employer's right to assert a subrogation lien with respect to benefits payable under 21 *Del. C.* § 2118(h).[51] The 1993 amendment to Section 2363(e) added the following emphasized language:

> (e) In an action to enforce the liability of a third party, the plaintiff may recover any amount which the employee or the employee's dependents or personal representative would be entitled to recover in an action in tort. Any recovery against the third party for damages resulting from personal injuries or death only, after deducting expenses of recovery, shall first reimburse the employer or its workmen's compensation insurance carrier for any amounts paid or payable under the Workmen's Compensation Act to date of recovery, and the balance shall forthwith be paid to the employee or his dependents or personal representative and shall be treated as an ***562** advance payment by the employer on account of any future payment of compensation benefits, *except that for items of expense which are precluded from being introduced into evidence at trial by 21 Del. C. § 2118, 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 available for the injured party, after the injured party's claim has been settled or otherwise resolved.*[52]

Two years later, in *Hurst*, this Court stated in a footnote that "[w]e note that the General Assembly has eliminated the ability of an employer's workmen's compensation carrier to assert a priority lien against an injured employee's right to payment pursuant to the employer's uninsured motorist coverage."[53] This observation, which was not accompanied by any explanation, was *obiter dictum*; the sole issue raised in *Hurst* was whether an injured employee's personal UIM insurance carrier was entitled to a set-off against its policy limits for payments made under the employer's UIM policy.[54] To answer that question, this Court was required to interpret the Uninsured Motorist statute, 18 *Del. C.* § 3902. The issue raised in *Hurst* did not require the Court to interpret

Section 2363 of the WCA, although that is what the footnote purported to address.[55]

In *Simendinger*, however, this Court adopted *Hurst*'s dictum as the correct interpretation of Section 2363(e).[56] *Simendinger* involved two employees who died in a motor vehicle collision during the course of their employment. The employees' estates received workers' compensation payments and filed claims against the employer's UIM insurance policy. The workers' compensation insurer sought to impose a subrogation lien on any UIM benefits paid to the employees' estates. This Court reversed the Superior Court's decision enforcing the lien under Section 2363(e) and adopted *Hurst*'s statement that the 1993 amendment to Section 2363(e) "eliminated the ability of an employer's work[ers'] compensation carrier to assert a priority lien against an injured employee's right to payment pursuant to the employer's uninsured motorist coverage."[57] Significantly, the decision in *Simendinger* relied on—and expressly quoted—the portion of the 1993 amendment that states "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."[58]

That quotation excluded the portion of the 1993 amendment that limited its scope to "items of expense which are precluded from being introduced into evidence at trial by 21 *Del. C.* § 2118."[59] The statutory language *Simendinger* overlooked is fundamental to understanding the 1993 amendment. By failing to consider the 1993 amendment's prefatory clause limiting the amendment to certain expenses ***563** under Section 2118, the *Simendinger* Court misconstrued the statute.

[3] Section 2363's reference to "items of expense" that cannot be introduced at trial under 21 *Del. C.* § 2118 applies to personal injury protection ("PIP") expenses that are not "boardable." Under Section 2118, "non-boardable" expenses include those that were or could have been paid by a PIP policy.[60] An injured party in a tort action may not present evidence of those expenses as part of any requested damages award.[61] Therefore, the 1993 amendment to Section 2363(e) prevented an employer from obtaining a subrogation lien against an employee for PIP-eligible expenses, since the employee could not present evidence of those damages at a trial against a tortfeasor or a UIM insurer.[62] Under the lien exception added to Section 2363(e) in 1993, the only recourse available to an employer or its workers' compensation insurer for reimbursement of PIP-eligible expenses is the third-party tortfeasor's insurer, and it is available only after the employee's claim against the tortfeasor is settled or resolved.[63]

[4] Other than limiting the right to obtain a lien for non-boardable expenses under 21 *Del. C.* § 2118, the 1993 amendment did not otherwise alter Section 2363(e). In *Harris*, this Court held that the pre-amendment version of Section 2363 allowed an employer or its workers' compensation insurer to assert a subrogation lien against an employee's recovery of benefits under a UIM policy maintained by his employer.[64] The dicta in *Hurst* and the express ruling in *Simendinger* did not recognize the limited scope of the 1993 amendment and instead mistakenly interpreted the statutory change as entirely eliminating an employer's ability to obtain a lien against benefits paid under an employer-purchased UIM policy. We therefore overrule *Simendinger* and hold that, except as to expenses excluded from evidence at trial under the PIP statute, Section 2363(e) gives an employer and its workers' compensation insurer a right to assert a subrogation lien against an employee's recovery of benefits under an employer-purchased UIM policy.

[5] **[6]** **[7]** **[8]** The interpretation of Section 2363(e) that we now adopt also is consistent with Delaware public policy. As a general matter, Delaware's public policy seeks to avoid allowing a plaintiff to recover twice for the same injury.[65] The collateral source rule, however, allows double recovery in some contexts under the theory that "a tortfeasor has no interest in, and therefore no right to benefit from, monies received by the injured person from sources unconnected with the defendant."[66] In addition, there are policies underlying the WCA and the UIM statute that must be considered. The public policy supporting ***564** the WCA is to compensate an injured worker for lost wages and medical expenses for work-related injuries, regardless of fault.[67] And the policy motivating the UIM statute is to "permit an insured to protect himself from an irresponsible driver causing death or injury."[68]

Those policies do not always align, and balancing the competing policies requires the Court to consider the nature of the case and the interests at issue. In the context of workers' compensation proceedings in which UIM benefits may also be awarded to an injured worker, this Court has applied

contract principles to resolve an employer's subrogation rights.[69] That focus on contractual expectations is consistent with both the WCA and the UIM statute, which are based on benefits secured by contract rather than the fault-based analysis fundamental to tort cases.[70]

[9] Under this contractual analysis, the extent to which the collateral source rule should be applied to permit double recovery depends on "the contractual expectations that underlie the collateral source payment."[71] As we previously explained in the analogous context of no-fault insurance:

> [T]he conditions under which double recovery should be allowed may best be determined by examining the consideration that has been paid. If the insured has paid consideration for recovery from a collateral source, then recovery should be allowed. If the collateral payments are received *gratis*, then their receipt should bar recovery under the no-fault policy. In the latter instance, the insured has lost nothing, neither wages nor consideration paid to a collateral source for wage compensation. Accordingly, the insured has no loss for which his insurer should provide compensation.[72]

[10] **[11]** **[12]** It follows that an employer who purchases UIM coverage for its vehicles and the employees who drive them should be entitled to assert a subrogation lien when that UIM policy reimburses the employee for injuries already compensated under the WCA. In such a case, the employer has contracted for the supplemental protection and the employee should not receive a double recovery from a fund for which the employee did not contract.[73] The interpretation of Section 2363(e) that we adopt today achieves this result.

In issuing its decision in this case, the Superior Court was required to apply ***565** *Simendinger*. Because we are now reversing our holding in *Simendinger*, we also must reverse the Superior Court's decision granting judgment in favor of Cincinatti and Henry with respect to Horizon and Eastern's statutory right to assert a lien. Section 2363(e) does not prohibit—and in fact expressly allows—an employer and its workers' compensation carrier to obtain a subrogation lien on UIM benefits paid from an employer-purchased policy, other than PIP-eligible expenses under 21 *Del. C.* § 2118.

B. The question of whether the UIM Policy precludes Appellants from asserting a lien cannot be resolved on the record before us.

[13] In their motion for judgment on the pleadings, Appellees alternatively argued that Appellants' declaratory judgment action should be dismissed because, even if the statute permits a lien, Cincinnati's policy prevents Henry from recovering benefits that would be subject to a lien. Because the trial court concluded that the statute and *Simendinger* precluded Appellants from asserting a lien, the court did not reach this alternative argument. Appellees renewed the argument on appeal as an alternative basis to affirm the trial court's ruling. We conclude, however, that addressing this issue on an incomplete record is neither efficient nor helpful to the law's development in this area.

Appellees contend that two provisions in the UIM policy prohibit Henry—and, by extension, Appellants—from obtaining coverage for any claims already paid under the WCA. The Policy's Exclusions section states:

> This insurance does not apply to any of the following:
>
> 1. With respect to an "uninsured motor vehicle" any claim settled with the person(s) or organization(s) legally responsible for the "accident" or the insurer or legal representative of such person(s) or organization(s) insurer or legal representative without our consent, if the settlement prejudices our rights to recover payment.
>
> 2. The direct or indirect benefit of any insurer or self-insurer under any, workers' compensation, disability benefits or similar law.[74]

In addition, Appellees rely on the Policy's "Limit of Insurance" section, which states, in pertinent part:

> No one will be entitled to receive duplicate payments for the same elements of "loss" under this endorsement and any Liability Coverage Form or Medical Payments Coverage Endorsement attached to this Coverage Form.
>
> We will not make a duplicate payment under this coverage endorsement for any element of "loss" for which payment has been made by or for anyone who is legally responsible, including all sums paid under the policy's Covered Autos Liability Coverage.
>
> We will not pay for any element of "loss" if a person is entitled to receive payment for the same element of "loss"

> under any workers' compensation, disability benefits or similar law.[75]

Appellees maintain that these provisions are enforceable under Delaware law, and they reason that any recovery Henry obtains under the Cincinnati policy will not include claims previously paid under the WCA, so there will be nothing for Appellants to lien. Appellees acknowledge that ***566** Henry's complaint against Cincinnati in the UIM Action demands compensation for injuries already paid under the WCA,[76] but they argue that Henry has since conceded that he is not seeking recovery for any previously compensated injuries.[77]

It is possible that once Henry's UIM claim against Cincinnati is resolved, there will be no recovery that would be subject to a lien under Section 2363(e). But we believe the prudent course is to allow those facts to develop through litigation in the trial court rather than asking this Court to issue a hypothetical ruling in the first instance. Moreover, the trial court should have an opportunity to interpret the policy language and resolve Appellants' contention that it is unenforceable under Delaware law. Appellate review, to the extent it becomes necessary, will be more effective after the parties present these factual and legal issues to the trial court on a fully developed record. The parties and the trial court may determine the appropriate procedural posture in which to raise and address those arguments.

IV. CONCLUSION

For the foregoing reasons, we reverse the Superior Court's May 2, 2022 Opinion granting Appellees' motion for judgment on the pleadings. This case is remanded to the Superior Court for further proceedings consistent with this opinion. Jurisdiction is not retained.

All Citations

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Footnotes

1 74 A.3d 609 (Del. 2013).

2 Unless otherwise noted, the recited facts are taken from the Superior Court's May 2, 2022 opinion. *See Horizon Servs., Inc. v. Henry*, 2022 WL 1316236 (Del. Super. May 2, 2022).

3 *See* 19 *Del. C.* § 2363(e).

4 *See Henry v. Cincinnati Ins. Co.*, 2021 WL 1545765, at *1 (Del. Super. Apr. 19, 2021). Appellants do not seek reimbursement from any UIM benefits Henry might receive under the State Farm Policy. *See* App. to Answering Br. at B2 (Compl. ¶ 4). At oral argument in this appeal, counsel for Appellants represented that they were precluded by law from seeking reimbursement under the State Farm Policy. Video of Oral Argument, *Delaware Courts*, at 04:58–05:21 (June 7, 2023) [hereinafter Oral Argument], https://tinyurl.com/yck365mx.

5 *See Henry*, 2021 WL 1545765, at *1.

6 *See id.* at *1 n.5.

7 *See Henry v. Cincinnati Ins. Co.*, 2018 WL 3640835, at *1 (Del. Super. July 31, 2018).

8 19 *Del. C.* § 2304 (2016).

9 80 Del. Laws, ch. 420, § 1 (2016) (codified at 19 *Del. C.* § 2304) (emphasis added).

10 *See Henry*, 2018 WL 3640835, at *1.

11 *See id.* at *3–4.

12 *Id.* at *4 (citing *Simpson v. State*, 2016 WL 425010, at *4 (Del. Super. Jan. 28, 2016)).

13 *Henry v. Cincinnati Ins. Co.* ("*Henry I*"), 212 A.3d 285 (Del. 2019).

14 *Id.* at 289–90.

15 *Id.*

16 *Id.* at 290.

17 *Id.* at 290–91.

18 *Henry*, 2021 WL 1545765, at *4.

19 74 A.3d 609 (Del. 2013).

20 575 A.2d 1103 (Del. 1990).

21 *Henry*, 2021 WL 1545765, at *3.

22 *Id.*

23 *Id.*

24 *Henry v. Cincinnati Ins. Co.*, 2021 WL 1923710, at *3 (Del. Super. May 13, 2021).

25 *Id.*

26 *E. All. Ins. Co. v. Henry*, 254 A.3d 396, 2021 WL 2418979, at *2 (Del. June 10, 2021) (TABLE).

27 App. to Answering Br. at B14.

28 *Id.* at B2 (Compl. ¶ 4).

29 *See* App. to Answering Br. at B25–26.

30 652 A.2d 10, 15 n.2 (Del. 1995) ("We note that the General Assembly has eliminated the ability of an employer's workmen's compensation carrier to assert a priority lien against an injured employee's right to payment pursuant to the employer's uninsured motorist coverage.") (citing 19 *Del. C.* § 2363).

31 74 A.3d at 611 (adopting the interpretation of Section 2363 set forth in *dicta* in *Hurst*).

32 *Henry*, 2022 WL 1316236, at *4.

33 A significant portion of the Appellants' briefs asserted that the 2016 version of the exclusive-remedies provision allowed Appellants to assert a lien against UIM benefits recovered by Henry. *See* Am. Opening Br. at 17–27; Reply Br. at 2–7. At oral argument, however, Appellants clarified that their right to subrogate against Henry's UIM recovery flows from Section 2363, regardless of which version of the exclusive-remedies provision applies. *See* Oral Argument, *supra*, at 07:37–09:42, 13:30–15:10

34 Oral Argument, *supra*, at 13:30–15:10; *see* Am. Opening Br. at 23–27.

35 *Simendinger*, 74 A.3d at 611 (quoting *Hurst*, 652 A.2d at 15 n.2).

36 In their briefs, Appellants argued that the 2016 amendment to the exclusive-remedies provision "impliedly overruled *Simendinger*." Am. Opening Br. at 23. At oral argument, however, counsel for Appellants asked us to overrule *Simendinger*. Oral Argument, *supra*, at 11:00–11:55.

37 Answering Br. at 16.

38 *Id.* (emphasis omitted).

39 Oral Argument, *supra*, at 25:40–27:35.

40 Answering Br. at 17–19.

41 *See* Reply Br. at 10–11; Oral Argument, *supra*, at 11:55–13:30, 40:20–41:08. Appellants concede that they "will recover nothing" if the exclusivity provisions are enforced to preclude Henry from any recovery. Reply Br. at 10; Oral Argument, *supra*, at 13:00–13:13.

42 *Weinberg v. Waystar, Inc.*, 294 A.3d 1039, 1043 (Del. 2023) (quoting *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P.*, 624 A.2d 1199, 1204 (Del. 1993)).

43 *Henry I*, 212 A.3d at 289–90. In *Henry I*, the parties disputed which version of the exclusive-remedies provision applied. *Id.* at 289. We concluded that even the pre-amendment version of the statute allows an employee to recover UIM benefits under an employer-purchased policy. *See id.* (citing *Robinson v. State*, 2017 WL 1363894, at *1–2 (Del. Super. Apr. 11, 2017), ***aff'd***, 176 A.3d 1274, 2017 WL 6422370 (Del. Dec. 18, 2017) (TABLE), in which the Superior Court held that the 2016 amendment to Section 2304 was not retroactive and did not apply to injuries occurring before its effective date).

44 *Id.* at 289–90.

45 *Id.* at 290.

46 *See Brookfield Asset Mgmt., Inc. v. Rosson*, 261 A.3d 1251, 1278 (Del. 2021) (observing that "the development of and adherence to precedent is an essential feature of common law systems, and as such, precedent should not be lightly cast aside.") (internal citation omitted).

47 50 Del. Laws, ch. 339, § 21 (1955); *see* Am. App. to Opening Br. at A36–42.

48 513 A.2d 1307 (Del. 1986).

49 50 Del. Laws, ch. 339, § 21 (1955); *see* Am. App. to Opening Br. at A41–42.

50 *Harris*, 513 A.2d at 1309.

51 69 Del. Laws, ch. 116, § 1 (1993); *see* Am. App. to Opening Br. at A43–45.

52 *Compare* 50 Del. Laws, ch. 339, § 21 (1955), *with* 69 Del. Laws, ch. 116, § 1 (1993).

53 *Hurst*, 652 A.2d at 15 n.2 (citing 19 *Del. C.* § 2363).

54 *Id.* at 11.

55 We expressly stated in *Simendinger* that this statement in *Hurst* was dicta. *See Simendinger*, 74 A.3d at 611.

56 *Id.*

57 *Id.* (quoting *Hurst*, 652 A.2d at 15 n.2).

58 *Id.* at 612 (quoting 19 *Del. C.* § 2363(e)). In the decision at issue in this case, the Superior Court relied on the same incomplete statutory quotation relied on in *Simendinger*.

59 69 Del. Laws, ch. 116, § 1 (1993); *see* 19 *Del. C.* § 2363(e).

60 *See* 21 *Del. C.* § 2118(h); Robert K. Beste, Jr. & Robert K. Beste, III, *Automobile Injury and Insurance Claims: Delaware Law and Practice* § 15.02 (rev. ed. 2019).

61 21 *Del. C.* § 2118(h); *see* Beste & Beste, *supra*, § 15.02.

62 *See* Beste & Beste, *supra*, § 15.02(b) (citing *Caruso v. Prudential Prop. & Cas. Ins. Co.*, C.A. No. 85-708 (D. Del. Nov. 20, 1986)); *Brown v. Comegys*, 500 A.2d 611, 614 (Del. Super. 1985).

63 *See* 19 *Del. C.* § 2363(e).

64 *Harris*, 513 A.2d at 1309.

65 *See, e.g.*, *Mt. Pleasant Special Sch. Dist. v. Gebhart*, 378 A.2d 146, 148 (Del. Ch. 1977); *cf. Brookfield Asset Mgmt., Inc.*, 261 A.3d at 1277 ("The double recovery rule prohibits a plaintiff from recovering twice for the same injury from the same tortfeasor.").

66 *Yarrington v. Thornburg*, 205 A.2d 1, 2 (Del. 1964).

67 *Aetna Cas. & Sur. Co. v. Kenner*, 570 A.2d 1172, 1175–76 (Del. 1990).

68 *Frank v. Horizon Assurance Co.*, 553 A.2d 1199, 1205 (Del. 1989).

69 *Adams*, 575 A.2d at 1106–07; *accord State Farm Mut. Auto. Ins. Co. v. Nalbone*, 569 A.2d 71, 75 (Del. 1989) (holding that "the policy goals of no-fault insurance can best be served by application of principles of contract rather than tort law").

70 *Adams*, 575 A.2d at 1106–07; *Harris*, 513 A.2d at 1309.

71 *Nalbone*, 569 A.2d at 75.

72 *Id.*

73 In contrast, and as Appellants acknowledged in this action, neither an employer nor its workers' compensation carrier has a right to a lien against an employee's recovery from his or her own UIM policy. *See Adams*, 575 A.2d at 1107–08. Delaware's public policy, as set forth in the UIM statute, permits an insured to contract for "supplemental" protection against losses caused by drivers who carry less liability coverage. *Aetna Cas. & Sur. Co.*, 570 A.2d at 1175–76. In the case of an employee-purchased policy, the employee has contracted for recovery from a collateral source, and double recovery should be permitted. *See Nalbone*, 569 A.2d at 75. The employer and workers' compensation insurer have no right to benefit from the employee's policy.

74 Complaint Ex. B at 4, *Horizon Servs. v. Henry*, C.A. No. N21C-10-044 (Del. Super.) (D.I. 1).

75 *Id.*

76 App. to Answering Br. at B12–13.

77 *See* Am. App. to Opening Br. at A17 (oral argument transcript).

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Dec 17

Lien on me... and on Scott & Andy for a Section 2363 Holiday Insight

Today we have two very special guest bloggers, Andy Carmine and Scott Mondell, who – if they were holiday figurines – would be The Elf on the Shelf and the Mensch on the Bench (can't you just see Andy in tights and Scott in a tallit?) So join us for a very special analysis below one of the most recent rulings from our Supremes - *ACW Corp. v. Maxwell* - which addresses the interplay between the commutations under Section 2358 and subrogation and lien reimbursement entitlement under Section 2363.

Once every several years the Delaware Supreme Court renders a decision that causes the workers' compensation community to re-think a certain aspect of its practice. Cases like *Duvall* (do most of you even recall the usual exertion doctrine?), *Cephas* (do you recall thinking that every Delawarean would go out on a stress claim, collapsing the local economy and the workers' compensation system?) and *Watson* (would this be the end of Labor Market Surveys?) come to mind. Each of these cases seems to have resulted in a temporary Chicken Little "The sky is falling, the sky is falling!" moment.

After a thorough read of the Supreme Court's decision in *ACW Corp. v. Maxwell*, it is our conclusion that the same will hold true after our community has had a moment to review and reflect upon the Court's holding. In other words, as in the cases of *Duvall*, *Cephas* and *Watson*, the way we practice lien and subrogation law will not be substantially effected by and will essentially return to the stasis that existed prior to the Supreme Court's decision.

This blog submission will address (1) what the Supreme Court's decision did not do and (2) what the Supreme Court's decision did.

The following have **not** been affected by the Supreme Court's decision:

1. There has been **no effect at all** on the fact that an employer/carrier may collect its lien in its entirety against a claimant's third-party recovery (subject to the PIP carve out clause) and such lien recovery includes "any amounts paid or payable under the Workers' Compensation Act."

2. The employer/carrier's PIP carve out recovery against the liability carrier has not been **affected at all**. Under the PIP carve out clause, an employer/carrier cannot collect such portion of its lien directly against the claimant, but can collect that portion of its lien against the liability carrier (only if there are available liability limits left). This is because, by definition, any benefits the employer/carrier paid that could have been paid under available Delaware PIP coverage are, by definition, wage loss and medical bills, i.e., benefits recoverable "in an action in tort."

3. In a subrogation action against the liability carrier, the employer/carrier can still recover any benefits recoverable "in an action in tort." Therefore, an employer/carrier's recovery of previously paid medical bills and wage loss against a liability carrier has **not been affected at all**.

4. Similarly, in a subrogation action against the liability carrier seeking to recover commuted benefits that are identified as future medical bills or wage loss, the employer/carrier **can** still recover any such benefits (with appropriate evidence).

To the extent an employer/carrier previously paid permanency or disfigurement benefits or to the extent a commutation is comprised of specific permanency or disfigurement benefits, it **might** still be able to recover such benefits from a liability carrier in a subrogation action if the employer/carrier is able to convince the trier of fact with appropriate specific testimony, that such benefits are recoverable "in an action in tort," even if not called "permanency" or "disfigurement" in the tort context.

To reiterate the foregoing, the employer/carrier retains all lien recovery rights against a claimant for any benefits paid under the Workers' Compensation Act (i.e., specifically to include permanency, disfigurement and benefits paid pursuant to a commutation).Thus, it is our opinion that the impact of the Supreme Court's decision is very narrow since it does not impact lien rights, nor the vast majority of subrogation rights. The very narrow impact is upon an employer's/carrier's ability to pursue subrogation rights against a liability carrier for benefits payable under the Workers' Compensation Act, but not recoverable "in an action in tort." Arguably, those benefits include permanency and disfigurement and some benefits paid pursuant to a commutation.

So, the question remains: what can a workers' compensation carrier do to lessen the impact of the *ACW Corp. v. Maxwell* decision. Of course, the decision only impacts cases in which there is a potential third-party recovery. In such instances, one obvious strategy is for a carrier to refuse to waive its lien against the claimant's third-party recovery in cases in which it has paid permanency or disfigurement or in which a commutation includes a component representing same.

The Supreme Court's decision makes clear that a lien remains recoverable in full from a claimant, whereas a subrogation interest may be only partially recoverable against a liability carrier. Thus, it is the authors' belief that any impact as a result of this case will be felt primarily by claimants since workers' compensation carriers may be reluctant to commute cases with lien waivers.

Ultimately, it is our belief that, as history has shown following other Supreme Court decisions, our community and practice will find a reasonable stasis.

Scott Mondell & Andy Carmine

Subrogation • Lien • Section 2363 • Third-Party Tort Claim • Delaware Supreme Court • Appeal • Insurance • Section 2358 • Commutation • Lien Reimbursement

〈 The Henry Saga Continues: No Comp Lien Against Recovery of UIM Benefits Secured By Employee or Employer

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Do The Math

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“DO THE MATH”

AVERAGE WEEKLY WAGE AND COMPENSATION RATES UNDER THE DELAWARE WORKERS’ COMPENSATION ACT

TARA E. BUSTARD, ESQ.

ANDREW J. CARMINE, ESQ.

19 DEL.C. §2302

- § 2302. Wages: definition and computation; valuation of board and lodging.
- (a) ‘Average weekly wage’ means the weekly wage earned by the employee at the time of the employee’s injury at the job in which the employee was injured, including overtime pay, gratuities and regularly paid bonuses (other than an employer’s gratuity or holiday bonuses) but excluding all fringe or other in-kind employment benefits. The term ‘average weekly wage’ shall include the reasonable value of board, rent, housing or lodging received from the employer, which shall be fixed and determined from the facts in each particular case.

UNPACKING § 2302(A):

- "at the job in which the employee was injured"
  - Do not include concurrent employment
  - "As a matter of worker's compensation law, a claimant may not combine wages from concurrent jobs for the purpose of calculating a claimant's workers compensation rate." Peterman v. Caulk, 612 A.2d 159 (Del. 1992).
-

YES = "OVERTIME, GRATUITIES, REGULAR PAID BONUSES"

The following factors may be considered in determining whether a bonus is included: (1) whether the bonus amount was specified in worker's employment contract; (2) whether the bonus was for extraordinary services; (3) whether the worker's wages were so low as to require a conclusion that the bonus must be wages; and (4) whether the bonus regularly constituted a portion of compensation on a regular basis.

- Sniadowski v. Pulte Homes, No. 06A-04-008 MMJ, 2007 Del. Super. LEXIS 377 (Super. Ct. Dec. 4, 2007)

NO = "EMPLOYER'S GRATUITIES OR HOLIDAY BONUSES"

- Fringe benefit is an employment benefit such as a pension or a paid holiday that has a monetary value but does not affect basic wage rates. Personal time, holiday time, vacation time, sick time, vacation sell back time are benefits granted by employer that have a monetary value but, but do not affect his basic wage rates, nor are they payment for time when he "actually worked" or performed work. Therefore, these amounts are not included in Claimant's AWW calculation. The proper gross amount of wages in this case therefore included "extra duty pay, regular pay, overtime, shift differential pay, court straight pay, training pay, and compensatory time used). Musemici v. City of Dover, IAB Hearing No.: 1468435 (May 25, 2018) citing to Taylor v. Diamon State Port Corp. 14 A.3d 536 (Del. 2011) and Crouse v. Hy-Point Dairy Farms, Inc., No. C.A. S14A-12-002 RFS, 2015 WL 4485559, at *6 (Del. Super. Ct. July 22, 2015)

NO = "FRINGE OR IN-KIND EMPLOYMENT BENEFITS"

- Do not include partial disability benefits in AWW calculation. "The General Assembly, if it desired, could have defined AWW to be calculated by first combining gross earnings and lost wage benefits, if any, it did not." Crouse v. Hy-Point Dairy Farms, Inc., No. C.A. S14A-12-002 RFS, 2015 WL 4485559, at *6 (Del. Super. Ct. July 22, 2015).
- Do not include vacation pay, but do not include that week in the divisor. Crouse v. Hy-Point Dairy Farms, Inc., No. C.A. S14A-12-002 RFS, 2015 WL 4485559, at *6 (Del. Super. Ct. July 22, 2015).
- No distinction for probationary period. Section 2302 recognizes no distinction between "regular" or "probationary" employees. You simply take the average of the weeks worked. Gertrude Kollock v. Allen Harim Foods, LLC., 2014 WL 5395759 (Del. Super. Ct. Oct. 7, 2014, Bradley, J.).

YES AND NO = "THE REASONABLE VALUE OF BOARD, RENT, HOUSING OR LODGING RECEIVED FROM THE EMPLOYER" CASE BY CASE BASIS.

- Room and Board- YES
- Tractor-trailer involved- fiscal relationship between role as owner of tractor and driver for company. When claimant was injured he lost all income related to his relationship with Allied, he received no lease payments for the tractor and no pay as a driver. Board determined that claimant's status as driver for Allied and as owner of the tractor were so interwoven that it is appropriate to consider payments under the lease as part of Claimant's wages as an employee of Allied. Diclementi v. Allied Systems, Del. IAB Hearing No. 1341178, (February 14, 2011).

APPLYING § 2302(B)(1) & (2):

- (1) if the employee worked less than twenty-six (26) weeks, but at least thirteen (13) weeks, in the employment in which the employee was injured, the average weekly wage shall be based upon the total wage earned by the employee in the employment in which the employee was injured, divided by the total number of weeks actually worked in that employment;

APPLYING § 2302(B)(1) & (2):

- (2) if an employee sustains a compensable injury before completing his first thirteen (13) weeks, the average weekly wage shall be calculated as follows:
- a. if the contract was based on hours worked, by determining the number of hours for each week contracted for by the employee multiplied by the employee's hourly rate;
- b. if the contract was based on a weekly wage, by determining the weekly salary contracted for by the employee; or
- c. if the contract was based on a monthly salary, by multiplying the monthly salary by twelve (12) and dividing that figure by fifty-two (52); and
- d. if the hourly rate of earnings of the employee cannot be ascertained, or if the pay has not been designated for the work required, the average weekly wage, for the purpose of calculating compensation, shall be taken to be the average weekly wage for similar services performed by other employees in like employment for the past twenty-six (26) weeks.

TAYLOR V. DIAMOND STATE PORT CORP., DEL. 14 A.3D 536 (2011)

- AWW is based on weeks actually worked, not employment tenure.
- "subsection (b)(2) applies to those employees injured before completing their "first" 13 weeks of work within the 26 week period preceding their injuries";
- "subsection (b)(1) applies to those employees injured before completing their "second" 13 weeks of work within that 26 week period";
- "section (b) applies to those employees who performed work each week across the entire period."
- In Taylor, the claimant was a 12 year employee of Diamond State, but had only worked during 16 of the 26 weeks preceding her injury – therefore, 2302(b)(1) applies to calculate her average weekly wage

MISTAKES ? WHAT DO YOU DO ? AMENDING AGREEMENT

- Unilateral v. Mutual Mistake
  - Mutual- Reform- Ohrt v. Kentmere Home, Del. Super. C.A. No. 96C-01-005, 1996 WL 527213
  - Unilateral- Vazquez v. F&S Boatworks, No. 1416276 (Del. I.A.B. May 18, 2015), "the proper procedure for contesting the compensation rate should be through a motion seeking reformation and not through a unilateral decision to pay a lower rate until the stipulated rate can be changed through litigation." Followed by Amrhein v. Baxter Enterprises IAB Hearing No.: 1477037 (May 20, 2020) where claimant's counsel filed a motion to compel payment of TTD under the agreed upon rate of an approved agreement as employer was making lesser payments due to "mistake" and Board awarded underpayment and attorneys fees.

REFORMATION AND OVERPAYMENT- WHY CALCULATING AWW CORRECTLY IS SO IMPORTANT!

- When reforming an agreement that Board must exercise its discretion and decide whether or not the modifications will be retroactive or prospective in effect. Garcia-Espinoza v. American Bread Company LLC (IAB Hearing No. 1491086, May 21, 2021) citing Ohrt.

REFORMATION AND OVERPAYMENT- WHY CALCULATING AWW CORRECTLY IS SO IMPORTANT!

- Overpayment involving DIGA- Gant v. Phenix Steel Corp, Del. Super. C.A. No. 94A-04-002, 1995 WL 562142 (August 8, 1995)- when claimant admitted he noticed the overpayment when it began and brought it to attorney's attention, and attorney contacted DIGA but DIGA took no action, credit awarded.

REFORMATION AND OVERPAYMENT- WHY CALCULATING AWW CORRECTLY IS SO IMPORTANT!

- Where claimant, represented by counsel, realized he had been underpaid on three separate agreements Board declined to make reformation retroactive noting that claimant and his original counsel were at fault for not checking the rate during the period in question claimant bears burden for past underpayment. Dale v. Tire Sales & Service Del. IAB Hearing No. 1302219 (April 24, 2009)

REFORMATION AND OVERPAYMENT- WHY CALCULATING AWW CORRECTLY IS SO IMPORTANT!

- Where information about AWW provided by claimant himself was incorrect, resulting in overpayment, full overpayment awarded to carrier. Simms v. Luxe Communications Del. IAB Hearing No. 1381043 (October 24, 2013)

- CAN YOU NEGOTIATE AN AWW?

- -Yes. In those situations when both parties know that there is an ambiguity as to the proper rate and intentionally reach a compromise rate. *C.F.S. Air Cargo*, at P 4; *Greenly v. Kent Construction Co.*, Del. Supr., No. 112, 1986, Moore, J. (November 21, 1986)(ORDER).
- -If you do, memorialize it!
  - -adjusters and attorneys change

CALCULATING COMPENSATION RATES: § 2324. COMPENSATION FOR TOTAL DISABILITY:

- For injuries resulting in total disability occurring after July 1, 1975, the compensation to be paid during the continuance of total disability shall be $66^2/_3\%$ of the wages of the injured employee, as defined by this chapter, but the compensation shall not be more than $66^2/_3\%$ of the average weekly wage per week as announced by the Secretary of the Department of Labor for the last calendar year for which a determination of the average weekly wage has been made, nor less than $22^2/_9\%$ of the average weekly wage per week. If at the time of the injury the employee receives wages of less than $22^2/_9\%$ of the average weekly wage per week, then the employee shall receive the full amount of such wages per week, as compensation. Nothing in this section shall require the payment of compensation after disability ceases.

MAXIMUM AND MINIMUMS

- -19 Del.C. §2302(3): In any event, the weekly compensation allowed shall not exceed the maximum or be less than the minimum provided by law.
- -19 Del.C. §2324: …the compensation shall not be more than $66^{2}/_{3}\%$ of the average weekly wage per week as announced by the Secretary of the Department of Labor for the last calendar year for which a determination of the average weekly wage has been made, nor less than $22^{2}/_{9}\%$ of the average weekly wage per week. If at the time of the injury the employee receives wages of less than $22^{2}/_{9}\%$ of the average weekly wage per week, then the employee shall receive the full amount of such wages per week, as compensation.

MAXIMUMS AND MINIMUMS

- If 66 2/3% of claimant's AWW is greater than the maximum comp rate applicable at the time of the injury, then claimant only receives the maximum comp rate.
- If 66 2/3% of claimant's AWW is less than the minimum comp rate applicable at the time of the injury, then the claimant receives the minimum comp rate.
- If the claimant's AWW is less than the minimum comp rate applicable at the time of the injury, claimant's AWW is her comp rate.

MAXIMUMS AND MINIMUMS

- Example: DOL 8/2023 - AWW = $300.00. 66 2/3% of $300 = $200. Minimum is $289.18. Claimant receives minimum comp rate.
- Example: DOL 8/2023 – AWW = $215.00. This is less than applicable $289.18 minimum. Claimant's comp rate = $215.00.
- Claimants never receive more on WC than they would working their regular job.

"Do the Math"

Average Weekly Wage and Compensation Rates under the Delaware Workers' Compensation Act

Tara E. Bustard, Esq.
Andrew J. Carmine, Esq.

19 Del.C. §2302

§ 2302. Wages: definition and computation; valuation of board and lodging.

(a) 'Average weekly wage' means the weekly wage earned by the employee at the time of the employee's injury at the job in which the employee was injured, including overtime pay, gratuities and regularly paid bonuses (other than an employer's gratuity or holiday bonuses) but excluding all fringe or other in-kind employment benefits. The term 'average weekly wage' shall include the reasonable value of board, rent, housing or lodging received from the employer, which shall be fixed and determined from the facts in each particular case.

(b) The average weekly wage shall be determined by computing the total wages paid to the employee during the twenty-six (26) weeks immediately preceding the date of injury and dividing by twenty-six (26), provided that:

(1) if the employee worked less than twenty-six (26) weeks, but at least thirteen (13) weeks, in the employment in which the employee was injured, the average weekly wage shall be based upon the total wage earned by the employee in the employment in which the employee was injured, divided by the total number of weeks actually worked in that employment;

(2) if an employee sustains a compensable injury before completing his first thirteen (13) weeks, the average weekly wage shall be calculated as follows:

a. if the contract was based on hours worked, by determining the number of hours for each week contracted for by the employee multiplied by the employee's hourly rate;

b. if the contract was based on a weekly wage, by determining the weekly salary contracted for by the employee; or

c. if the contract was based on a monthly salary, by multiplying the monthly salary by twelve (12) and dividing that figure by fifty-two (52); and

d. if the hourly rate of earnings of the employee cannot be ascertained, or if the pay has not been designated for the work required, the average weekly wage, for the purpose of calculating compensation, shall be taken to be the average weekly wage for similar services performed by other employees in like employment for the past twenty-six (26) weeks.

(3) In any event, the weekly compensation allowed shall not exceed the maximum or be less than the minimum provided by law."

Unpacking § 2302(a):

- "at the job in which the employee was injured"
    - Do not include concurrent employment
    - "As a matter of worker's compensation law, a claimant may not combine wages from concurrent jobs for the purpose of calculating a claimant's workers compensation rate." Peterman v. Caulk, 612 A.2d 159 (Del. 1992).
- YES = "overtime, gratuities, regular paid bonuses"
    - The following factors may be considered determining whether a bonus is a tip or gratuity: (1) whether the bonus amount was specified in worker's employment contract; (2) whether the bonus was for extraordinary services; (3) whether the worker's wages were so low as to require a conclusion that the bonus must be wages; and (4) whether the bonus regularly constituted a portion of compensation on a regular basis.
      Sniadowski v. Pulte Homes, No. 06A-04-008 MMJ, 2007 Del. Super. LEXIS 377 (Super. Ct. Dec. 4, 2007)
- NO = "employer's gratuities or holiday bonuses"
    -
- NO = "fringe or in-kind employment benefits"
    - Do not include partial disability benefits in AWW calculation. The General Assembly, if it desired, could have defined AWW to be calculated by first combining gross earnings and lost wage benefits, if any, it did not. Crouse v. Hy-Point Dairy Farms, Inc., No. C.A. S14A-12-002 RFS, 2015 WL 4485559, at *6 (Del. Super. Ct. July 22, 2015).
    - Do not include vacation pay, but do not include that week in the divisor. Crouse v. Hy-Point Dairy Farms, Inc., No. C.A. S14A-12-002 RFS, 2015 WL 4485559, at *6 (Del. Super. Ct. July 22, 2015).
    - No distinction for probationary period. Section 2302 recongnizes no distinction between "regular" or "probationary" employees. You simply take the average of the weeks worked. Gertrude Kollock v. Allen Harim Foods, LLC., 2014 WL 5395759 (Del. Super. Ct. Oct. 7, 2014, Bradley, J.).

Mistakes ? What do you do ? Amending Agreement

The Delaware Workers' Compensation Act provides that an agreement signed by the parties and approved by the Board "shall be final and binding unless modified as provided in § 2347 of this title." Del. Code Ann. tit. 19, § 2344. The Superior Court has held that an approved agreement is essentially a consent judgment, which is treated similarly to a contract between the parties. [*30] Joyner v. News Journal, No. 95A-12-004, 1996 WL 659005, at *3 (Del. Super. Ct. Aug. 27, 1996). Such a "contract" is binding "absent some mutual mistake or some allegation that the stipulation does not reflect the true agreement." Id. The courts have permitted the reopening of an agreement for fraud or mutual mistake. See, e.g., Barber v. F.W. Woolworth's Co., C.A. No. 96A-05-007, 1996 WL 769221, *5 (Del. Super. Ct. Nov. 15, 1996). The discretion to reopen or review an agreement rests with the Board. Id. at *6 (citing Del. Code Ann. tit. 19, § 2347). 2020 Del. Workers' Comp. LEXIS 48

This would not apply, of course, in those situations when both parties know that there is an ambiguity as to the proper rate and intentionally reach a compromise rate. Such a deliberate compromise is not a mutual mistake and reformation will not be permitted. *See C.F.S. Air Cargo*, at P 4; *Greenly v. Kent Construction Co.*, Del. Supr., No. 112, 1986, Moore, J. (November 21, 1986)(ORDER).

Maximum and Minimums

19 Del.C. §2302(3): In any event, the weekly compensation allowed shall not exceed the maximum or be less than the minimum provided by law.

19 Del.C. §2324: Compensation to be paid during the continuance of total disability shall be $66^2/_3$% of the wages of the injured employee, as defined by this chapter, but the compensation shall not be more than $66^2/_3$% of the average weekly wage per week as announced by the Secretary of the Department of Labor for the last calendar year for which a determination of the average weekly wage has been made, nor less than $22^2/_9$% of the average weekly wage per week. If at the time of the injury the employee receives wages of less than $22^2/_9$% of the average weekly wage per week, then the employee shall receive the full amount of such wages per week, as compensation.

- If 66 2/3% of claimant's AWW is greater than the maximum comp rate applicable at the time of the injury, then claimant only receives the maximum comp rate.
- If 66 2/3% of claimant's AWW is less than the minimum comp rate applicable at the time of the injury, then the claimant receives the minimum comp rate.
- If the claimant's AWW is less than the minimum comp rate applicable at the time of the injury, claimant's AWW is her comp rate.
- Example: DOL 8/2023 - AWW = $300.00. 66 2/3% of $300 = $200. Minimum is $289.18. Claimant receives minimum comp rate.
- Example: DOL 8/2023 – AWW = $215.00. This is less than applicable $289.18 minimum. Claimant's comp rate = $215.00.

- Claimants never receive more on WC than they would working their regular job.

Outside of the Box Injuries

Benjamin K. Durstein, Esquire
Marshall Dennehey, P.C.

Stephen T. Morrow, Esquire
Rhoades & Morrow LLC

"Give Me Some Credit"
Application of Credits Against Benefits

==========

Jennifer D. Donnelly, Esquire
Kimmel, Carter, Roman, Peltz & O'Neill, P.A.

Christopher T. Logullo, Esquire
Cobb & Logullo

Application of Credits and Benefits

Christopher T. Logullo, Esquire

Jennifer Donnelly, Esquire

2022 Delaware Code
Title 19 - Labor
Chapter 23. Workers' Compensation
Subchapter III. Determination and Payment of Benefits; Procedure
§ 2363. Third person liable for injury; right of employee to sue and seek compensation; right of employer and insurer to enforce liability; notice of action; settlement and release of claim and effect thereof; amount of recovery; reimbursement of employer or insurer; expenses of recovery; apportionment; compensation benefits.

Universal Citation: 19 DE Code § 2363 (2022)

§ 2363. Third person liable for injury; right of employee to sue and seek compensation; right of employer and insurer to enforce liability; notice of action; settlement and release of claim and effect thereof; amount of recovery; reimbursement of employer or insurer; expenses of recovery; apportionment; compensation benefits.

(e) In an action to enforce the liability of a third party, the plaintiff may recover any amount which the employee or the employee's dependents or personal representative would be entitled to recover in an action in tort. Any recovery against the third party for damages resulting from personal injuries or death only, after deducting expenses of recovery, shall first reimburse the employer or its workers' compensation insurance carrier for any amounts paid or payable under the Workers' Compensation Act to date of recovery, and the balance shall forthwith be paid to the employee or the employee's dependents or personal representative and shall be treated as an advance payment by the employer on account of any future payment of compensation benefits, except that for items of expense which are precluded from being introduced into evidence at trial by § 2118 of Title 21, 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 available for the injured party, after the injured party's claim has been settled or otherwise resolved.

Relevant & Noteworthy Case Law regarding Credits/Offsets/Liens

- ***Simendinger v. National Union*** **: 74 A3d 609 (Del. 2013)—overturned by *Horizon Services v. Henry & Cincinnati Insurance (*discussed below)**

Two employees of Connections were killed in a work-related motor vehicle accident during the course and scope of their employment. Employer Connections purchased an underinsured motorist policy (UIM) from Philadelphia Insurance Company for the vehicle in question.

The Estate of a deceased employee filed a worker's compensation claim against National Union, and also a personal injury action against Philadelphia Insurance Company for UIM benefits. Philadelphia paid its policy limits of $1,000,000. National Union, moved to intervene in the personal injury action to enforce its worker's compensation lien.

National Union was substituted as a real party in interest and moved for summary judgment in the Superior Court action based upon 19 Del.C. section 2363 (e), which allows reimbursement of a worker's compensation lien from a third-party liability insurer. That motion was granted. The Estate of the deceased employee appealed to the Delaware Supreme Court.

The Delaware Supreme Court ruled that National Union was not permitted to assert a priority lien against the UIM benefits received by the deceased employee's estate. The Supreme Court determined that the Delaware legislature prohibited the worker's compensation insurer from asserting its lien against a UIM policy.

In this case, Philadelphia's UIM policy contained an exclusion: "This insurance does not apply to any of the following … (2) the direct or indirect benefit of any insurer or self-insurer under any worker's compensation, disability benefits, or similar lar". National contended that this exclusion was invalid because it contradicted 19 Del.C. section 2363(e), which provided that an Employer or its worker's compensation insurance carrier has a priority lien against the proceeds of a third-party liability lawsuit for the worker's compensation benefits it has paid out, and any a credit for any balance left over that would apply towards the future payments of worker's compensation benefits.

In overturning the Superior Court's decision, the Supreme Court noted that it ruled in dicta in *Hurst v. Nationwide*, 652 A.2d 10 (Del. 1995) that, "the General Assembly has eliminated the ability of an employer's worker's compensation carrier to assert a priority lien against an injured employee's right to payment

pursuant to the employer's uninsured motorist coverage". The Court noted that in *Adams v. Delmarva Power & Light*, 575 A.2d 1103 (Del. 1990), it held that an employer's worker's compensation carrier was not entitled to a set off against UIM benefits that were purchased by an employee. Finally, the Court noted that 19 Del.C. section 2363 (e) limited the reimbursement against only a liability insurer and the maximum amounts of the third-party liability insurance coverage awarded to the injured party.

- ***Horizon Services v. Henry & Cincinnati Insurance*, 2023 WL 5659812 (Sept 1, 2023)**

This Supreme Court decision overrules *Simendinger*. Procedurally, Horizon Services filed a declaratory judgment action against Henry, an injured employee, and Cincinnati Insurance, a UIM carrier, to assert its worker's compensation lien against any recovery Henry received. The Superior Court, citing *Simendinger*, granted Henry and Cincinnati's motion for judgment on the pleadings. Horizon appealed to the Delaware Supreme Court.

The Supreme Court determined that *Simendinger* was erroneous and reversed the Superior Court's decision.

Henry sustained injuries in a worker's compensation related motor vehicle accident. He received $584,000 in worker's compensation benefits from Horizon and its carrier, Eastern Alliance. Henry filed a personal injury claim against the tortfeasor and recovered $50,000 against his liability policy. After deducting fees and costs, it paid the balance of the liability recovery to Eastern, pursuant to 19 Del.C. section 2363.

Henry was covered for UIM with Cincinnati under a policy provided by Horizon and had a personal UIM policy with State Farm. He filed for UIM benefits against both carriers. Eastern only sought recovery against the Cincinnati UIM policy as that was paid for by Horizon, Henry's employer.

There was a procedural issue regarding Henry's claim against Cincinnati for UIM benefits as it objected to payment of UIM under an exclusive-remedies provision. This prohibited Henry from receiving both worker's compensation and UIM benefits under Horizon's insurance policy. That issue was litigated, and the Supreme Court held that Henry was not precluded from recovering against Cincinnati's UIM policy, as it did not meet the statutory definition of an employer and also because as the UIM carrier, it, "steps into the shoes of the alleged

tortfeasor". Because Cincinnati was being sued in that capacity, the exclusive-remedies provision did not provide it with a defense to a UIM claim.

In the appeal on the declaratory judgment action, the Supreme Court noted that 19 Del.C. section 2363 (e) expressly addresses claims against a third-party tortfeasor regarding work related injuries. In reconsidering *Simendinger*, the Supreme Court noted that it did not address the prefatory language found in the amendments to 19 Del.C. section 2363 (e) that dealt with the PIP preclusion and only focused on the limitation of recovery against a tortfeasor's liability policy.

The Court then examined Delaware public policies of the worker's compensation act and the UIM statute. It examined the contractual nature of same and the collateral source rule and noted that, "an employer who purchases UIM coverage for its vehicles and the employees who drive them should be entitled to assert a subrogation lien when the UIM policy reimburses the employee for injuries already compensated under the WCA [Worker's Compensation Act]. In such a case, the employer has contracted for the supplemental protection and the employee should not receive a double recovery from a fund for which the employee did not contract." The Court found that 19 Del.C. section 2363 (e) " expressly allows an employer and its worker's compensation carrier to obtain a subrogation lien on UIM benefits paid from an employer-purchases policy …"

Please note the distinction regarding an Employer UIM policy vs. a personal UIM policy.

- **McDougall v. Air Products & Chemical 2005 WL 2155230 (Del. Super. August 31, 2005**

In July of 1990, McDougall was involved in a work-related motor vehicle accident when he drove his tractor trailer over a curb and into a ditch. He struck his head on the roof of the cab of his truck, which resulted in various injuries, including a dissected vertebral artery.

In November of 1990, McDougall relocated to Florida. In July of 1993, he filed a medical malpractice action in Florida alleging that his neurologist failed to discovery and treat the dissected vertebral artery, which eventually ruptured and resulted in a stroke. McDougall also sued the emergency room doctor that treated him when he suffered the stroke. In May of 1994, McDougall settled his medical malpractice action for $1,065,000 and his net recovery was $580,166.78.

In January of 1994, McDougall filed a petition to determine additional compensation due, alleging that the stroke was causally related to the work accident. The Board ultimately determined that the stroke was related, specifically finding that the vertebral artery dissection suffered in the accident caused the stroke. Medical expenses and lost wages relating to the stroke were awarded to McDougall.

Before that decision was issued, McDougall filed a bad faith action against National Union regarding its handling of his worker's compensation claim. In 1997, that matter was amended to allege a Huffman claim due to National Union's failure to pay medical expenses and lost wages awarded by the Board as a result of the petition for additional compensation due. The Superior Court ultimately determined that National Union did not act in bad faith, but it was found responsible for the Huffman claim and damages in the amount of $924,529.02 were awarded.

In April of 2000, Air Products filed a petition, pursuant to 19 Del.C. section 2363 to determine the amount of its credit. That matter was stayed pending the outcome of the underlying bad faith/Huffman claim. In September of 2001 that matter was heard before the Board. In deciding the case, the Board addressed the following issues:

1. Whether Air Products' petition to determine the amount of the credit owed was not in the proper procedural posture because a petition to establish the existence of a credit should have been filed first;
2. Whether the doctrine of res judicata barred the Board's consideration of the credit because the Delaware Supreme Court denied the existence of a credit;
3. Whether the elements of 19 Del.C. section 2363 have been met because the Florida Action resulted in a settlement and there was no finding of legal liability
4. Whether Air Products released its claim for a credit.

Ultimately, the Board awarded a credit in the amount of $333,834.04. Claimant appealed to the Superior Court.

On appeal, the Superior Court ruled that the award of a credit was not conditional upon a judicial admission or factual determination of negligence on the part of a settling party. The Court noted that 2 elements must be satisfied: (1) there

must be a third party who is legally liable in tort for the injury; (2) there must be a recovery as a result of that liability, which creates a fund in excess of the compensation paid (or payable).

The Court noted that worker's compensation is generally permitted for the direct and natural consequences of the injury caused by a compensable accident. This extends to an aggravation of the original compensable injury by subsequent medical or surgical treatment and that the fault of a physician does not break the chain of causation.

A third-party settlement does not preclude reimbursement under 19 Del.C. section 2363(e) for an employer. McDougall tried to argue that since there was not a finding of liability and the malpractice case was settled without an admission of fault, no credit should be allowed. The Court ruled that the only issue to determine was whether the stroke was causally related to the work accident. Generally, worker's compensation benefits are permitted for the direct and natural consequences of an injury caused by a compensable industrial accident and to an aggravation of the original compensable injury by subsequent medical treatment.

The doctrine of *res judicata* does not bar the credit pursuant to 19 Del.C. section 2363. McDougall argued that because the 1995 decision was final and contained no statement of the credit, the credit was not recoverable. The court considered a five factor test on the issue of res judicata :

1. The court making the prior adjudication had jurisdiction.
2. The parties in the present action are the same, or in privity with he parties from the prior adjudication.
3. The cause of action must be the same in both or the issues decided in the prior action must be the same as those raised in the present case
4. The issues in the prior action must be decided adversely to the plaintiff's contentions in the instant case; and
5. The prior adjudication must be final.

The Court ruled that Air Products was seeking a credit for future/prospective worker's compensation benefits that could not have been raised during prior hearings and therefore res judicata did not apply.

McDougal argued that the issue of the credit was denied by the Supreme Court in the Huffman action, thus barring same. The Superior Court disagreed as it did not appear that the Supreme Court addressed whether a credit was available.

Finally, the Court rejected a statute of limitations argument as it was not raised as a defense to the petition for the credit.

With regard to the issue of a release, McDougall argued that Air Products released the claim of a credit in September of 1994. In defense of same, Air Products argued that it did not execute the release as it was executed in favor of its health care provider, that was seeking reimbursement of medical expenses it paid for. The Court ruled that the release did not act as a general release that would affect the worker's compensation lien.

McDougall next argued that Air Products waived its entitlement to a credit by failing to assert same until 2000. The Court noted that 19 Del.C. section 2353 does not require an employer to give notice of a potential lie, but it could be possible for it to waive its rights if the employer knowingly engaged in conduct inconsistent with its assertion of rights. The Court found no extenuating circumstances in this case to indicate that a waiver occurred.

- **Potts Welding v. Zakrewski 2002 WL 144273 (Del. Super. January 11, 2002)**

Failing to raise the issue of a credit at the underlying hearing resulted in the waiver of a credit raised (for the first time) on appeal.

Claimant Zakrewski was injured while working for Potts Welding. Potts began payment of total disability. Claimant returned to work but a final receipt was not executed. He then sought partial disability benefits for the difference between his reduced return to work wages and his pre-accident wage.

Employer contested the petition, arguing that Zakrewski had wrongfully refused a modified job that would not have entitled him to partial disability benefits. During closing argument, Plaintiff raised the issue of Employer not obtaining a final receipt. The Board advised the parties to issue supplemental argument in writing based upon same. The Board ultimately concluded that Employer failed to properly terminate Claimant's total disability benefits and awarded him total disability despite working part-time for Employer.

Employer appealed. On appeal, Employer raised the issue of a credit for the wage benefits paid to Claimant. The Court refused to hear same, finding that Employer did not raise the issue of a credit below (at oral argument during

closings, in supplemental arguments ordered by the Board, or in a motion for re-argument).

In Zakrewski's briefing, he argued that the Board can only award a credit statutorily, when there is a third-party recovery stemming from a tortfeasor.

The Court noted that Employer waived the issue of a credit for failing to raise the issue below.

- **Garcia-Espinoza v. American Bread Company: IAB Hearing No.: 1491086**

Employer filed a motion seeking a credit against future benefits due to an overpayment of total disability paid to Claimant. Employer erroneously overpaid Claimant's total disability benefits by mistakenly calculating her average weekly wage. On the Agreement, it listed her AWW as $1,070.05 when it should have been $515.05. Two agreements were executed in this fashion (one acknowledging the injury and a second for a recurrence of total disability). At the time the Agreements were executed, Claimant was pro-se. The error resulted in an overpayment of $24,367.13.

Employer had an adjuster testify on its behalf. She discussed how it calculated average weekly wages and it was noted that there was human error in inputting wage information that resulted in the AWW and compensation rate being calculated incorrectly. Employer's witness noted that there were instances where a claimant may call to question a wage rate and in this case, Claimant, who was Spanish speaking, never did so.

When Claimant became represented, counsel requested wage information, which was provided. Counsel did not contact Employer to discuss the error.

The Board noted that there was no dispute that an error occurred and that the AWW/CR were inaccurate. The question was whether the Board should change the prior Agreements so that Employer could assert a credit against future benefits for the overpayment.

The Board noted that in reforming an Agreement, the Board "must exercise its discretion and decide whether or not the modifications will be retroactive or prospective". The Board noted that the exercise of its discretion on reformation of an Agreement is highly factually dependent.

In this case, Claimant was paid more in TD than she would have earned if she was not injured. However, she was unsophisticated and there was no reason to think that she would know how worker's compensation benefits are calculated. She was not represented by counsel when the Agreements were executed. The carrier is sophisticated and does such calculations on a regular basis. It issued 2 erroneous Agreements that were no fault of the Claimant.

Claimant had retained counsel and it had her wage records. Counsel did not notice the overpayment and there was no active litigation pending that would necessitate her to recalculate the AWW/CR from the production of wage records. The Board also noted that Employer was diligent in trying to reform the Agreement once the error was discovered.

In its decision, the Board found that to grant a full credit would be inequitable because it would completely absolve the Carrier of its self-created error. By the same token, to deny a full credit would be inequitable because the extent of the overpayment was significant (i.e. the Claimant was making more in total disability than she was earning while working).

The Board declined to assess an overpayment of 50/50 between the parties as it felt that the primary fault rested with the Carrier. It apportioned fault 75% to the Carrier and 25% to the Claimant. In doing so, it awarded a credit of $6,091.73 towards future permanency and disfigurement.

- **The Rock Pile v. Rischitelli, 2019 WL 2515533 (Superior Court, June 15, 2019):--*also* overturned by *Simendinger?***

Superior Court held that Employer was not entitled to a credit against future workers' compensation benefits from UIM policy recovery paid to Claimant based upon 2363(e) and *Simendinger* precedent. But now that *Simendinger* has been overturned by the Supreme Court, presumably UIM benefits recovered by Claimant will serve as a credit or "advance payment" by Employer only from Employer-paid UIM policies.

- **Kelley v. Perdue Farms, 123 A.3d 150 (Del. Super. Oct. 8, 2015)**

Superior Court held the IAB properly granted an offset of 50% to Employer/WC where it contributed 50% of Short-term disability costs/premiums which were paid to Claimant. Superior Court examined the facts underlying who paid for the short-term disability benefits (in Kelley's case, 50% by her and 50% by Perdue) and contrasted that payment system with that seen in the case of **State v. Calhoun** (discussed below). Superior Court found that both Employer and Employee were entitled to "reap the rewards of their investments" by contributing to the policy that provided Kelley with benefits after her injury—thus upholding the IAB's 50% offset of TTD benefits.

- **State v. Calhoun, 634 A.2d 335 (Del. Supr. Dec. 15, 1993)**

A State of Delaware employee was injured in an automobile accident in the course of his employment. His injuries required that he retire on a disability pension under 29 *Del. C.* § 5524. The State reduced the employee's weekly workers' compensation payment by the amount he received in disability payment. The employee petitioned the IAB to reinstate his full workers' compensation award, but the Board ruled it was against public policy to allow two recoveries for a single wage loss. In affirming the Superior Court's reversal of the IAB ruling, the Court reiterated the holding in *Adams.* "The Court reasoned that since the employee had paid an independent consideration for additional protection against injury, he was entitled to the benefit of his insurance contract." The employee's right to a disability pension was "based on his participation in, and contributions to, the State Employees' Pension Plan." The Court noted that "[a]lthough the plan is legislatively established, it is contractual in nature and, when vested, confers a constitutionally protected property right" that cannot be forfeited by implication. The Court held the vested pension right was the result of a contractual arrangement supported by employee consideration and thus an offset was not proper.

Distinction from Kelley v. Purdue

Key difference between the employee contribution in *Calhoun* and the employee contribution in Kelley was, in *Calhoun,* the parties were contributing to a statutorily created instrument. Once the employee chose to participate in the pension plan, State contributions were mandatory. Although legislatively established, the plan was contractual in nature. An employee would become vested after participating in the plan for five years, and thereafter would have a constitutionally protected property right in the pension. Kelley's circumstance is distinguishable in that the disability insurance plan was voluntarily established by Perdue, Perdue's contributions to the insurance plan were voluntary, and there was

no vesting in the plan. If Perdue decided to discontinue the program, Kelley would have had no constitutionally protected property rights. Therefore, Kelley's argument that *Calhoun* is controlling based on funding similarities between Perdue's insurance plan and the State's pension plan fails.

- **National Union Fire Ins. Co. v. McDougall, 773 A.2d 388 (Del. Supr. March 28, 2001)**

Supreme Court upheld Superior Court's award of statutory/*Huffman* damages to a claimant for failure to pay a final IAB award despite the Employer arguing there was a *bona fide* dispute as to the applicability of a credit that would have reduced the Employer's payments to Claimant pursuant to the IAB award for medical expenses.

Claimant recovered over $1 million (net recovery of just over $500k) from a medical malpractice suit stemming from an industrial accident. National Union argued that the third-party recovery should offset amounts owed to claimant; however, in two petitions to terminate filed, Employer argument that Claimant's stroke/medical treatment was not work-related. The IAB found the stroke and expenses were compensable and awarded over $300k as reimbursement for past medical expenses. The IAB order made NO mention of a credit in connection with the malpractice settlement. For over a year the Employer appealed on various grounds, with procedural errors. Ultimately, the Superior Court ordered *Huffman* payment of over $900k for statutory damages related to the unpaid medical reimbursement order. The Court found that because the 1995 IAB Order did not mention any credit (despite National Union's view on the topic) and had become final there was no basis for nonpayment by National Union and Claimant was entitled to the statutory damages for their failure to pay.

- **BRIAN ZOLADKIEWICZ, Claimant, v. NORTH EAST CONTRACTORS, INC., Employer, IAB 1506783 (Dec. 2, 2022)**

Employer/Carrier is entitled to forfeiture as a credit against future benefits in the amount of $ 3,600.00 for the "no show" in curred as a result of the failure to appear for the 04/27/21, 07/21/21, and 10/19/21 examinations (Claimant's counsel was unable to reach the claimant to ascertain the reasons for the missed examinations) and claimant's Petition to Determine Compensation Due is hereby dismissed for failure to prosecute and any rescheduled Hearing be cancelled.

- **WILLIAM EVERETT, Employee, v. PEPSI BOTTLING VENTURES, LLC., Employer, IAB #1455826 (July 21, 2022)**

Claimant was injured in a compensable work accident on March 10, 2017. His average weekly wage was $ 582.16 per week, resulting in a compensation rate of $ 388.10 per week. However, Employer's TPA instead paid Claimant total disability at the rate of $ 582.00 per week from June 2, 2017, through April 4, 2018. The parties were able between themselves to fix this overpayment. Claimant then was placed on an agreement for partial disability from August 31, 2018, through February 17, 2022. As it happens, the TPA ended up underpaying Claimant for this period in the amount of $178.76. Claimant then had a recurrence of total disability effective February 18, 2022. Despite the history of the case, the TPA again began to pay Claimant for total disability at the rate of $ 582.00 per week until the error was once again caught. Employer sought an order granting a credit in the amount of the recent overpayment of total disability, reduced by the amount of the acknowledged underpayment of partial disability.

The IAB recognized that, when parties enter into an agreement for compensation that contains a mistaken average weekly wage or compensation rate, the Board has the authority to reform the agreement to reflect the correct wage and rate. However, when doing that, "the Board must exercise its discretion and decide whether or not the modifications will be retroactive or prospective in effect." Ohrt v. Kentmere Home, Del. Super., C.A. No. 96C-01-005, Cooch, J., 1996 WL 527213 at *8 (August 9, 1996). Full restitution or correction of any overpayments (or underpayments) is not mandated but is commended to the sound exercise of the Board's discretion. In this case, the IAB found it was not a situation where the agreement itself was faulty. Employer represents that the agreement did state the correct compensation rate of $ 388; 10 per week. It is just that that is not what the TPA paid. While the Board understands that mistakes happen and the Board will occasionally take actions to remedy such mistakes, in this case it was too much. The TPA mis-paid Claimant for total disability. That error was then caught and corrected. The TPA then mis-paid partial disability. The TPA then mis-paid total again, paying the same amount as the error it had previously made (which had been caught and corrected). Exercising its discretion, the Board stated it was satisfied that the only way to get the TPA to fix its processes to ensure that proper payments are timely made to injured workers is to make the TPA bear the burden of its own blunders. The request for a credit was denied.

 KeyCite Red-Striped Flag - Overruled in Part
Overruled by Horizon Services, Inc. v. Henry, Del.Supr., September 1, 2023

74 A.3d 609
Supreme Court of Delaware.

Kingsley A. SIMENDINGER, Individually and as Administratrix of the Estate of Christopher Sturmfels, and Kingsley A. Simendinger, as Next Friend of Beck Sturmfels, a minor child, Plaintiff Below–Appellant,
v.
NATIONAL UNION FIRE INSURANCE COMPANY, Intervenor Below–Appellee,
and
Philadelphia Indemnity Insurance Company, Defendant Below.

No. 553, 2011.
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Submitted: Jan. 10, 2013.
|
Decided: March 19, 2013.

Synopsis

Background: Estate of deceased employee brought personal injury action against defendant driver. Employer intervened seeking to enforce a lien upon underinsured motorist (UIM) benefits paid to estate in the amount of the **workers' compensation** benefits paid by **workers' compensation** insurer. **Workers' compensation** insurer was substituted as the real party in interest and moved for summary judgment. The Superior Court, New Castle County, granted insurer summary judgment. Estate appealed.

[Holding:] The Supreme Court, Ridgely, J., held that **workers' compensation** insurer was not permitted to assert a priority lien against UIM benefits received by deceased employee's estate pursuant to employer's UIM policy.

Reversed and remanded.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Headnotes (3)

[1] **Appeal and Error** De novo review
Appeal and Error Summary Judgment

Supreme Court reviews the superior court's grant of summary judgment de novo to determine whether, viewing the facts in the light most favorable to the nonmoving party, the moving party has demonstrated that there are no material issues of fact in dispute and that the moving party is entitled to judgment as a matter of law.

[2] **Insurance** **Workers' compensation**
Workers' Compensation Lien of employer or insurer

Employer's **workers' compensation** carrier was not entitled to assert a priority lien in the amount of **workers' compensation** benefits paid against underinsured motorist (UIM) benefits received by deceased employee's estate pursuant to employer's UIM policy following fatal automobile accident in the course of employee's employment; policy expressly prohibited underinsured motorist coverage from applying to claim by **workers' compensation** carrier. 19 West's Del.C. § 2363(e).

7 Cases that cite this headnote

[3] **Workers' Compensation** Lien of employer or insurer

General Assembly has eliminated the ability of an employer's workmen's compensation carrier to assert a priority lien against an injured employee's right to payment pursuant to the employer's uninsured motorist coverage. 19 West's Del.C. § 2363(e).

5 Cases that cite this headnote

Attorneys and Law Firms

***609** Gary S. Nitsche, Esquire, of Weik, Nitsche & Dougherty, Wilmington, Delaware for Appellant.

Daniel L. McKenty, Esquire (argued), and Katherine L. Hemming, Esquire, of Heckler & Frabizzio, Wilmington, Delaware for Appellee.

Before STEELE, Chief Justice, and HOLLAND, BERGER, JACOBS, and RIDGELY, Justices, constituting the court en Banc.

Opinion

***610** RIDGELY, Justice.

Two employees of Connections CSP, Inc. ("Connections") were killed in an automobile collision during the course and scope of their employment. Connections owned the vehicle and had purchased underinsured motorist insurance ("UIM") for the vehicle and also **worker's compensation** insurance which covered the employees.

The UIM insurer paid its policy limit of $1,000,000. The **worker's compensation** insurer also paid benefits to the representatives of the decedents. The **worker's compensation** insurer then sought to enforce a lien upon the UIM payment equal to the **worker's compensation** benefits it paid. But the UIM policy specifically excludes the direct or indirect benefit of any insurer or self-insurer under a **worker's 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 **worker's compensation** carrier "from the third party liability insurer." We hold that he 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. Because the Superior Court erred as a matter of law in enforcing a lien, we REVERSE and REMAND this matter for further proceedings.

Facts and Procedural History

This matter arises from a two-vehicle collision on Route 13. Decedents Christopher Sturmfels and Michael Kriner ("Decedents") suffered fatal injuries during the course and scope of their employment for Connections when its vehicle was struck by a car driven by Mark Bednash. Connections provided **workers' compensation** insurance coverage to its employees through a policy with National Union Insurance Company ("National"). National approved and paid benefits to the Decedents' personal representatives in the amount of $38,711 for Sturmfel and $31,754 for Kriner.

Connections also has purchased a UIM policy for the vehicle through Philadelphia Indemnity Insurance Company ("Philadelphia Indemnity"), with coverage limits of $1,000,000. The UIM Policy expressly provides that it does not apply to benefits obtained through **worker's compensation** insurance.

Kingsley A. Simendinger, acting as administrator of the estate of Christopher Sturmfels and Next Friend of Beck Sturmfels, a minor child, filed a personal injury action on behalf of Decedents against Bednash, *et al.* Philadelphia Indemnity tendered and interpled the policy limits of $1,000,000. Connections intervened in the litigation, seeking to enforce a lien in the amount of the **workers' compensation** benefits paid by National. National was substituted for Connections as the real party in interest. National then moved for summary judgment in its favor.

The Superior Court granted National's motion, concluding that the exclusion in the UIM Policy was unenforceable as a matter of law. The court found the exclusion to conflict with 19 *Del. C.* § 2363(e) and held that "an employer-payor has a statutory right to recover **worker's compensation** benefits from any recovery to which its employee is entitled," including UIM benefits. The court explained that, as a matter of public policy, it saw "no reason why an employer should be penalized for their efforts to protect their employees." Philadelphia Indemnity's motion for reargument was denied. This appeal followed.

Discussion

[1] We review the Superior Court's grant of summary judgment *de novo* "to ***611** determine whether, viewing the facts in the light most favorable to the nonmoving party, the moving party has demonstrated that there are no material issues of fact in dispute and that the moving party is entitled to judgment as a matter of law." [1]

[2] "Delaware courts have consistently applied principles of contract to a subrogation claim in the context of a workmen's compensation proceeding, when that claim originated with

the act of a third party tortfeasor."[2] The UIM Policy contains the following policy exclusion:

> This insurance does not apply to any of the following: ... (2) the direct or indirect benefit of any insurer or self-insurer under any **worker's compensation**, disability benefits, or similar law.

National contends—as it did below—that this provision is unenforceable because it contravenes Section 2363(e), which provides:

> In an action to enforce the liability of a third party, the plaintiff may recover any amount which the employee or the employee's dependents or personal representative would be entitled to recover in an action in tort. *Any recovery against the third party for damages resulting from personal injuries or death only, after deducting expenses of recovery, shall first reimburse the employer or its **workers' compensation** insurance carrier for any amounts paid or payable under the **Workers' Compensation** Act to date of recovery, and the balance shall forthwith be paid to the employee or the employee's dependents or personal representative and shall be treated as an advance payment by the employer on account of any future payment of compensation benefits, except that for items of expense which are precluded from being introduced into evidence at trial by § 2118 of Title 21, 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 available for the injured party, after the injured party's claim has been settled or otherwise resolved.*[3]

This section of the **Workers' Compensation** Act was amended to the present version in 1993.[4] We find no merit to National's argument.

[3] In *Hurst v. Nationwide Mut. Ins. Co,*[5] we considered Section 2363 after the 1993 amendments. We noted in *dicta* "that the General Assembly has eliminated the ability of an employer's workmen's compensation carrier to assert a priority lien against an injured employee's right to payment pursuant to the employer's uninsured motorist coverage."[6] We adopt this same interpretation of Section 2363 in this case. Since the *Hurst* decision, the General Assembly has amended other provisions of the **Workers Compensation** Act, but not § 2363(e).

In *Adams v. Delmarva Power & Light Co.,* we construed a pre–1993 version of Section 2363 and held that an employer's **worker's compensation** carrier was not entitled to a set off against UIM benefits ***612** purchased by an employee.[7] The UIM coverage in that case contained a provision similar to the one here, that "preclude[ed] its applicability to claims made by workmen's compensation carriers."[8] Nothing in the current version of § 2363(e) distinguishes that circumstance from one where an employer either pays for or reimburses an employee for the very same coverage. Moreover, Section 2363(e) 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."[9]

National relies upon *Harris v. New Castle County*[10] and other opinions issued by this Court prior to the 1993 amendments to support its position. These cases stood for the proposition that the then-statutory scheme conferred a right of reimbursement from the UIM benefits received by an employee under a policy paid for by the employer.[11] All of these cases are distinguishable today because of the 1993 amendments.

Conclusion

The judgment of the Superior Court is REVERSED, and this matter is REMANDED for further proceedings consistent with this opinion.

All Citations

74 A.3d 609

Footnotes

1 *State Farm Mut. Auto. Ins. Co. v. Patterson,* 7 A.3d 454, 456 (Del.2010) (*quoting* *Brown v. United Water Delaware, Inc.,* 3 A.3d 272, 275 (Del.2010)).

2 *Adams v. Delmarva Power & Light Co.,* 575 A.2d 1103, 1106 (Del.1990) (citations omitted).

3 19 *Del. C.* § 2363(e) (emphasis added).

4 1993 Delaware Laws Ch. 116 (S.B.26) (emphasis added to indicate changed language).

5 *Hurst v. Nationwide Mut. Ins. Co.,* 652 A.2d 10 (Del.1995).

6 *Id.* at n. 2.

7 *Adams,* 575 A.2d at 1107.

8 *Id.*

9 19 *Del. C.* § 2363(e) (emphasis added).

10 *Harris v. New Castle County,* 513 A.2d 1307, 1308–09 (Del.1986).

11 *See* *Guy J. Johnson Transportation Co. v. Dunkle,* 541 A.2d 551, 552 (Del.1988); *Travelers v. E.I. DuPont De Nemours & Co.,* 9 A.2d 88, 90–91 (Del.1939); *State v. Donahue,* 472 A.2d 824, 827–28 (Del.Super.1983)

2023 WL 5659812
Only the Westlaw citation is currently available.

Supreme Court of Delaware.

HORIZON SERVICES, INC. and Eastern Alliance Insurance Company, Plaintiffs Below, Appellants,
v.
John HENRY and the Cincinnati Insurance Company, Defendants Below, Appellees.

No. 172, 2022
|
Submitted: June 7, 2023
|
Decided: September 1, 2023
|
Corrected: September 6, 2023

Synopsis

Background: Employer and its workers' compensation insurance carrier brought action against employee and insurer that issued underinsured motorist (UIM) policy covering employer's vehicle, seeking declaratory judgment that employer and workers' compensation carrier were permitted to assert lien against any recovery that employee, who had been injured in automobile accident with nonparty tortfeasor while driving employer's vehicle, might obtain for injuries already compensated under workers' compensation act. The Superior Court, Brennan, J., 2022 WL 1316236, granted insurer's and employee's motion for judgment on the pleadings. Employer and carrier appealed.

Holdings: The Supreme Court, Abigail M. LeGrow, J., held that:

[1] workers' compensation act generally allowed employer or workers' compensation carrier to assert subrogation lien against employee's recovery of benefits under employer-purchased UIM policy, overruling *Simendinger v. National Union Fire Ins. Co.*, 74 A.3d 609, but

[2] it was premature to determine whether employee's recovery under UIM policy would be subject to lien.

Reversed and remanded.

See also 212 A.3d 285.

Procedural Posture(s): On Appeal; Motion for Judgment on the Pleadings.

West Headnotes (13)

[1] **Appeal and Error** Judgment on the pleadings

On appeal from a trial court decision granting a motion for judgment on the pleadings, the Supreme Court reviews the trial court's decision de novo to determine whether the trial court committed legal error in formulating or applying legal precepts.

[2] **Workers' Compensation** Right of Action of Employee or Representative Generally

Workers' Compensation Right of Employer or Insurer to Remedy of Employee or Employee's Representative

The exclusive-remedies provision of the workers' compensation act does not distinguish between claims an employee may maintain and those an employer may maintain. 19 Del. Code § 2304.

[3] **Workers' Compensation** Action by or on Behalf of Employer or Insurer

In the provision of the workers' compensation act governing the enforcement by an employer or its workers' compensation insurance carrier of a third-party tortfeasor's liability for injuries to an employee, the clause limiting an employer's or carrier's reimbursement for "items of expense

which are precluded from being introduced into evidence at trial by" the statute requiring motor vehicles to be insured, such 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 available for the injured party," applies to personal injury protection (PIP) expenses that are not boardable; such non-boardable expenses include those that were or could have been paid by a PIP policy. 19 Del. Code § 2363(e); 21 Del. Code § 2118.

[4] **Insurance** Workers' compensation

Workers' Compensation Lien of employer or insurer

Except as to non-boardable personal injury protection (PIP) expenses excluded from evidence at trial under the statute requiring motor vehicle insurance, the provision of the workers' compensation act addressing the enforcement of a third-party tortfeasor's liability for an employee's injuries by an employer or its workers' compensation insurance carrier gives an employer and its carrier a right to assert a subrogation lien against an employee's recovery of benefits under an employer-purchased underinsured motorist (UIM) policy; overruling *Simendinger v. National Union Fire Ins. Co.*, 74 A.3d 609. 19 Del. Code § 2363(e); 21 Del. Code § 2118.

[5] **Damages** Nature and theory of compensation

As a general matter, Delaware's public policy seeks to avoid allowing a plaintiff to recover twice for the same injury.

[6] **Damages** Benefits incident to injury

The "collateral source rule" allows double recovery for the same injury in some contexts, under the theory that a tortfeasor has no interest in, and therefore no right to benefit from, monies received by the injured person from sources unconnected with the defendant.

[7] **Workers' Compensation** Purpose of legislation

The public policy supporting the workers' compensation act is to compensate an injured worker for lost wages and medical expenses for work-related injuries, regardless of fault. 19 Del. Code § 2301 et seq.

[8] **Insurance** Uninsured or Underinsured Motorist Coverage

The public policy motivating the uninsured and underinsured motorist statute is to permit an insured to protect himself from an irresponsible driver causing death or injury. 18 Del. Code § 3902.

[9] **Workers' Compensation** Subrogation or assignment in general

Under the contractual analysis for determining an employer's subrogation rights in the context of a workers' compensation proceeding in which underinsured motorist (UIM) benefits may also be awarded to an injured worker, the extent to which the collateral source rule should be applied to permit double recovery depends on the contractual expectations that underlie the collateral source payment; if the insured has paid consideration for recovery from a collateral source, then recovery should be allowed, but if the collateral payments are received gratis, then their receipt should bar recovery. 19 Del. Code § 2363(e).

[10] **Insurance** Workers' compensation

Workers' Compensation Subrogation or assignment in general

An employer who purchases underinsured motorist (UIM) coverage for its vehicles and the employees who drive them should be entitled to assert a subrogation lien when that UIM policy reimburses the employee for injuries already compensated under the workers'

compensation act; in such a case, the employer has contracted for the supplemental protection and the employee should not receive a double recovery from a fund for which the employee did not contract. 19 Del. Code § 2363(e).

[11] **Insurance** Workers' compensation

Workers' Compensation Subrogation or assignment in general

Where an employee has been injured by a third-party tortfeasor, neither an employer nor its workers' compensation carrier has a right to a subrogation lien against the employee's recovery from his or her own underinsured motorist (UIM) policy; by purchasing his or her own policy, the employee has contracted for recovery from a collateral source, and double recovery should be permitted.

[12] **Insurance** Uninsured or Underinsured Motorist Coverage

Delaware's public policy, as set forth in the uninsured and underinsured motorist statute, permits an insured to contract for supplemental protection against losses caused by drivers who carry less liability coverage. 18 Del. Code § 3902.

[13] **Declaratory Judgment** Scope and extent of review in general

It was premature for Supreme Court, on employer's and its workers' compensation insurance carrier's appeal from judgment on the pleadings in their action for declaratory judgment that workers' compensation act authorized them to place subrogation lien on any benefits paid to employee under employer's uninsured or underinsured motorist (UIM) policy, to resolve issue of whether exclusions and limitations of underinsured motorist (UIM) policy covering employer's vehicle precluded employee from recovering UIM benefits for injuries already paid under workers' compensation act, such that no recovery under UIM Policy would be subject to lien; trial court was entitled to opportunity to interpret policy language and decide its enforceability, and further factual development was necessary. 19 Del. Code § 2363(e).

More cases on this issue

Court Below: Superior Court of the State of Delaware, C.A. No. N21C-10-044

Upon appeal from the Superior Court of the State of Delaware. **REVERSED AND REMANDED**.

Attorneys and Law Firms

H. Garrett Baker, Esquire (argued), Francis D. Nardo, Esquire, ELZUFON AUSTIN & MONDELL, P.A., Wilmington, Delaware, for Appellants Horizon Services, Inc. and Eastern Alliance Insurance Company.

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William A. Crawford, Esquire (argued), FRANKLIN & PROKOPIK, Newark, Delaware, for Appellee Cincinnati Insurance Company.

Before SEITZ, Chief Justice; VALIHURA, TRAYNOR, LEGROW, and GRIFFITHS, Justices, constituting the Court en banc.

Opinion

LEGROW, Justice:

***1** This appeal requires us to interpret a section of the workers' compensation act that addresses when an employer or its workers' compensation insurance carrier may assert a lien against benefits an injured employee recovers from other sources. In a previous action between these parties, we addressed whether the exclusive-remedies provision in the workers' compensation act precluded an injured employee from pursuing recovery from an uninsured motorist policy. After we held that the exclusive-remedies provision did not apply, the employer and its workers' compensation carrier sought a declaratory judgment that they are permitted to assert a lien against any recovery the employee might obtain for injuries already compensated under the workers' compensation act.

The employee and the uninsured motorist insurer contend that any such lien is barred by statute, relying on this Court's decision in *Simendinger v. National Union Fire Insurance Co.* [1] The Superior Court followed that binding precedent as it was required to do and dismissed the declaratory judgment claim. We now conclude, however, that *Simendinger* was decided in error. We therefore reverse the Superior Court's decision and hold that the workers' compensation act expressly allows the employer and its workers' compensation carrier to assert a subrogation lien against benefits paid to the employee under the employer's uninsured motorist policy.

I. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND [2]

Appellee John Henry sustained injuries in an automobile accident caused by a non-party. At the time of the accident, Henry was traveling in a vehicle owned by his employer, Appellant Horizon Services, Inc. ("Horizon"), and was acting in the course of his employment.

Henry received over $584,000 in workers' compensation benefits from Horizon and its workers' compensation insurance carrier, Appellant Eastern Alliance Insurance Company ("Eastern"). Henry also pursued damages from the non-party tortfeasor, who held a $50,000 liability insurance policy. Henry ultimately settled with the tortfeasor's insurance carrier for the policy limit. After deducting attorneys' fees and costs, Henry reimbursed the remainder of his recovery from the tortfeasor's policy to Appellants pursuant to Delaware's Workers' Compensation Act, 19 *Del. C.* §§ 2301–2396 (the "WCA"). [3]

A. Henry's UIM Action

The Horizon vehicle Henry operated at the time of the accident was covered by an underinsured-motorist ("UIM") insurance policy issued by Cincinnati Insurance Company ("Cincinnati") that named Horizon as the insured. Henry also had a personal automobile liability policy issued by State Farm Mutual Automobile Insurance Company ("State Farm") that provided UIM coverage (the "State Farm Policy"). [4] After recovering the tortfeasor's policy limit, Henry filed claims with Cincinnati and State Farm for UIM benefits under each carrier's policy. [5] When both carriers denied Henry's claims, Henry and his wife filed separate actions in the Superior Court against Cincinnati and State Farm, which the court later consolidated into one action (the "UIM Action"). [6]

1. Cincinnati's Motion to Dismiss and Henry's Appeal

***2** Cincinnati moved to dismiss Henry's complaint on the ground that 19 *Del. C.* § 2304, the WCA's exclusive-remedies provision, precluded him from recovering UIM benefits under Cincinnati's policy. [7] The accident at issue occurred in September 2015. At the time of the accident, the WCA's exclusive-remedies provision provided as follows:

> Every employer and employee, adult and minor, except as expressly excluded in this chapter, shall be bound by this chapter respectively to pay and to accept compensation for personal injury or death by accident arising out of and in the course of employment, regardless of the question of negligence and to the exclusion of all other rights and remedies. [8]

In 2016, after the accident, the General Assembly amended the exclusive-remedies provision by adding the following italicized language:

> Except as expressly included in this chapter and *except as to uninsured motorist benefits, underinsured motorist benefits, and personal injury protection benefits*, every employer and employee, adult and minor, shall be bound by this chapter respectively to pay and to accept compensation for personal injury or death by accident arising out of and in the course of employment, regardless of the question of negligence and to the

> exclusion of all other rights and remedies. [9]

In his opposition to Cincinnati's motion to dismiss, Henry argued that the amended exclusive-remedies provision applied and permitted employees to recover both workers' compensation benefits and UIM benefits under an employer's insurance policy. [10]

The Superior Court agreed with Cincinnati and dismissed Henry's UIM claims. First, the Superior Court found that the pre-amendment version of the exclusive-remedies provision applied because it was in effect at the time of the accident. [11] Second, the court concluded that, under that version of Section 2304, Henry was precluded "from receiving both workers' compensation benefits and UIM benefits under [Horizon's] insurance policy." [12] Henry appealed.

By opinion dated June 11, 2019 ("*Henry I*"), [13] this Court reversed. The Court agreed with the Superior Court's conclusion that the pre-amendment version of Section 2304 applied to Henry's claim. [14] This Court, however, held the pre-amendment version of the exclusive-remedies provision did not preclude Henry from recovering against Cincinnati, who, as the provider of Horizon's UIM coverage, did not fall within the scope of the statute's definition of "employer." [15] Rather, this Court reasoned, when Cincinnati is sued in its capacity as UIM-coverage provider, "Cincinnati steps into the shoes of the alleged tortfeasor." [16] And because Cincinnati was being sued in that capacity, which is "permi[ssible] under 19 *Del. C.* § 2363," the exclusive-remedies provision did not provide Cincinnati with a defense. [17]

2. The Proceedings on Remand

***3** After Henry's claims were reinstated on remand, Eastern and Horizon moved to intervene to assert a lien against any UIM benefits that Henry recovers from Cincinnati. The Superior Court denied the motion, holding that "there is no statutory right of recovery for a worker's compensation lien against UIM insurance coverage." [18] Relying on this Court's decisions in *Simendinger v. National Union Fire Insurance Co.* [19] and *Adams v. Delmarva Power & Light Co.*, [20] the Superior Court concluded that "decisional law is settled":

> A worker's compensation lien may not be asserted against recovery from UIM benefits regardless of whether that insurance coverage is secured by an employee or an employer. Therefore, since neither [Horizon] nor [Eastern] has a lien against UIM benefits paid to Henry, neither has a statutory right to intervene in this action. [21]

The Superior Court also held that *Henry I* did not overrule *Adams* or *Simendinger*. [22] In the Superior Court's view, when this Court observed that a UIM insurance carrier "steps into the shoes of the alleged tortfeasor," it merely "addressed burdens of proof and the requirement to establish fault" and did not open the door for employers to seek reimbursement through an employee's recovery of UIM benefits. [23] Horizon and Eastern moved for certification of an interlocutory appeal, which the Superior Court denied. [24] In refusing certification, the Superior Court reasoned that interlocutory review would not be efficient and there were other avenues of relief available to Horizon and Eastern, including "pursuing a separate declaratory judgment action." [25] This Court dismissed Horizon and Eastern's appeal in the UIM Action on June 10, 2021. [26]

B. This Declaratory Judgment Action

On October 6, 2021, Horizon and Eastern filed this declaratory judgment action seeking a declaration that "any recovery of damages paid to [Henry]" in the UIM Action "shall, after deducting legal expenses, first reimburse [Horizon and Eastern] pursuant to 19 *Del. C.* § 2363(e)." [27] The complaint in this action expressly disclaims "a reimbursement right against [Henry's] recovery from his own underinsured motorist carrier, ... consistent with Delaware's collateral source doctrine and *Adams*." [28]

Cincinnati, later joined by Henry, [29] moved for judgment on the pleadings. Advancing arguments largely mirroring those made in its opposition to the motion to intervene in the UIM Action, Cincinnati argued that Horizon and Eastern were not statutorily entitled to UIM benefits recovered by Henry under

Cincinnati's policy. Cincinnati also argued that exclusions in the UIM policy barred Henry—and by extension, Horizon and Eastern—from recovering damages previously paid by another insurer, including a workers' compensation carrier. In response, Horizon and Eastern argued that the 2016 amendment to the exclusive-remedies provision and this Court's decision in *Henry I* permitted their assertion of a lien against any UIM benefits Henry might recover from Cincinnati.

***4** The Superior Court entered judgment in favor of Cincinnati and Henry. Relying on this Court's decisions in *Hurst v. Nationwide Mutual Insurance Co.*[30] and *Simendinger*,[31] the court held that 19 *Del. C.* § 2363(e) precludes an employer or its workers' compensation carrier from recovering UIM benefits that an employee receives under an employer-owned UIM policy. The court also concluded that the plain language of Section 2363(e) limits Horizon's right to reimbursement for workers' compensation benefits to the damages recovered from the non-party tortfeasor.

The Superior Court also concluded, once again, that *Henry I* did not overrule *Simendinger*. At the trial court level, Appellants argued that *Henry I* deemed Cincinnati to be a third-party insurer for purposes of Section 2363(e) and, as a result, impliedly overruled *Simendinger*. The Superior Court disagreed, stating: "This court reads the reference to Cincinnati standing in the shoes of an alleged third-party tortfeasor as dicta, intending to be illustrative of why Cincinnati could not invoke the [exclusive-remedies] provision, as opposed to impliedly overruling a well-settled principle of law."[32] The Superior Court therefore granted Appellee's motion for judgment on the pleadings without reaching the issue of whether Cincinnati's policy excludes Appellants' claims.

This appeal followed.

C. The Parties' Contentions on Appeal

Appellants ask us to reverse the Superior Court's judgment, arguing that Section 2363(e) permits employers to assert a lien against an employee's recovery from an employer-owned UIM policy.[33] Appellants argue that this Court's reasoning and holding in *Henry I* compels this conclusion. According to Appellants, because *Henry I* found that employees may pursue UIM benefits under Section 2363(a) on the ground that the UIM carrier stands in the shoes of the third-party tortfeasor, the employer has a right to subrogate against those benefits under Section 2363(e).[34] That conclusion, Appellants acknowledge, would conflict with *Simendinger*, which held that "an employer's [workers'] compensation carrier [may not] assert a priority lien against an injured employee's right to payment pursuant to the employer's uninsured motorist coverage."[35] Appellants therefore ask us to overrule *Simendinger*.[36]

***5** Appellees respond that the Superior Court correctly concluded that "well-established" decisional law precludes Appellants from recovering any UIM proceeds that Henry might recover from Cincinnati.[37] Appellees point to an exception at the end of Section 2363(e), asserting, as did the Superior Court, that Section 2363(e) "limits an employer's right to reimbursement 'only from the third party liability insurer.' "[38] Because Cincinnati is not a "third party liability insurer," Appellees argue, Horizon may not recover reimbursement from Henry's recovery against Cincinnati.[39]

Appellees further argue that the Superior Court's judgment may be affirmed on the alternative basis that Cincinnati's policy excludes Appellants' claim.[40] In response, Appellants argue that the enforceability of the policy's exclusionary provisions are being litigated in the UIM Action and, because Appellants' claims for UIM benefits under the policy are derivative of Henry's claims, the enforceability and effect of the exclusionary provisions should be fully litigated in the UIM Action first.[41] The Superior Court did not address the policy exclusions in its ruling.

II. STANDARD OF REVIEW

[1] On appeal from a trial court decision granting a motion for judgment on the pleadings, this Court reviews the trial court's decision *de novo* to determine "whether the court committed legal error in formulating or applying legal precepts."[42]

III. ANALYSIS

The primary issue before us is whether an employer or its workers' compensation insurance carrier may assert a lien against UIM benefits paid to an employee under the employer's UIM policy for injuries previously compensated

under the WCA. Because we conclude such a lien is statutorily permitted, we also briefly address the Appellee's alternative argument that the language of the UIM policy precludes the Appellants from maintaining a lien in this case.

A. Section 2363 of the WCA allows an employer or its workers' compensation insurer to assert a lien against benefits recovered from the employer's UIM policy.

The issue raised on appeal requires this Court to interpret 19 *Del. C.* § 2363(e), which expressly addresses claims against a third-party tortfeasor relating to work-related injuries compensable under the WCA. The parties, however, devoted a substantial portion of their briefing and argument to Section 2304, the WCA's exclusive-remedies provision, and specifically which version of Section 2304 applies in this case. We therefore briefly address why Section 2304 is not dispositive of the issue on appeal before turning to the interpretation of Section 2363(e).

1. The WCA's exclusive-remedies provision does not address subrogation liens.

The parties' focus on the exclusive-remedies provision is misplaced. In *Henry I*, we held that Section 2304 does not bar an employee from recovering UIM benefits under a policy purchased by the employer from a third-party insurance provider.[43] The exclusive-remedies provision expressly applies to employers and employees, and we concluded in *Henry I* that a UIM insurer is not an "employer" for purposes of the WCA.[44] Instead, the UIM insurer "steps into the shoes of the alleged third-party tortfeasor."[45]

***6** **[2]** Having previously resolved the effect of the WCA's exclusive-remedies provision, that section does not inform our analysis in this appeal. The exclusive-remedies provision does not distinguish between claims an employee may maintain and those an employer may maintain. Accordingly, because we already concluded the exclusive-remedies provision does not bar Henry from asserting a UIM claim against Cincinnati, the provision likewise cannot bar Horizon or Eastern from asserting a lien against any benefits paid for such a claim. Rather, the right to assert a lien is governed by 19 *Del. C.* § 2363(e).

2. Except for "PIP-eligible expenses," Section 2363(e) allows an employer or its workers' compensation insurer to assert a lien against benefits paid from an employer-purchased UIM policy.

The Superior Court, relying on this Court's holding in *Simendinger*, concluded that Section 2363(e) does not permit an employer to assert a lien on UIM benefits. The Superior Court correctly followed *Simendinger* as binding precedent. But the issues raised on appeal require us to revisit *Simendinger* and its reasoning. Although we do not lightly overturn precedent,[46] we are compelled to conclude that *Simendinger*'s interpretation of Section 2363 is not consistent with the statute's terms. We reach that conclusion based on the statute's language and history as well as our decisions that pre-date *Simendinger*.

Section 2363 was adopted in 1955,[47] and this Court interpreted that section 30 years later in *Harris v. New Castle County*.[48] At the time *Harris* was decided, Section 2363(e) provided:

> In an action to enforce the liability of a third party, the plaintiff may recover any amount which the employee or his dependents or personal representative would be entitled to recover in an action in tort. Any recovery against the third party for damages resulting from personal injuries or death only, after deducting expenses of recovery, shall first reimburse the employer or its workmen's compensation insurance carrier for any amounts paid or payable under the [WCA] to date of recovery, and the balance shall forthwith be paid to the employee or his dependents or personal representative and shall be treated as an advance payment by the employer on account of any future payment of compensation benefits.[49]

In *Harris*, we held that an employer has a statutory right under Section 2363(e) to assert a subrogation lien against an employee's recovery of benefits under a UIM policy maintained by his employer.[50]

In 1993, Section 2363(e) was amended to limit an employer's right to assert a subrogation lien with respect to benefits payable under 21 *Del. C.* § 2118(h).[51] The 1993 amendment to Section 2363(e) added the following emphasized language:

> (e) In an action to enforce the liability of a third party, the plaintiff may recover any amount which the employee or the employee's dependents or personal representative would be entitled to recover in an action in tort. Any recovery against the third party for damages resulting from personal injuries or death only, after deducting expenses of recovery, shall first reimburse the employer or its workmen's compensation insurance carrier for any amounts paid or payable under the Workmen's Compensation Act to date of recovery, and the balance shall forthwith be paid to the employee or his dependents or personal representative and shall be treated as an advance payment by the employer on account of any future payment of compensation benefits, *except that for items of expense which are precluded from being introduced into evidence at trial by 21 Del. C. § 2118, 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 available for the injured party, after the injured party's claim has been settled or otherwise resolved.*[52]

***7** Two years later, in *Hurst*, this Court stated in a footnote that "[w]e note that the General Assembly has eliminated the ability of an employer's workmen's compensation carrier to assert a priority lien against an injured employee's right to payment pursuant to the employer's uninsured motorist coverage."[53] This observation, which was not accompanied by any explanation, was *obiter dictum*; the sole issue raised in *Hurst* was whether an injured employee's personal UIM insurance carrier was entitled to a set-off against its policy limits for payments made under the employer's UIM policy.[54] To answer that question, this Court was required to interpret the Uninsured Motorist statute, 18 *Del. C.* § 3902. The issue raised in *Hurst* did not require the Court to interpret Section 2363 of the WCA, although that is what the footnote purported to address.[55]

In *Simendinger*, however, this Court adopted *Hurst*'s dictum as the correct interpretation of Section 2363(e).[56] *Simendinger* involved two employees who died in a motor vehicle collision during the course of their employment. The employees' estates received workers' compensation payments and filed claims against the employer's UIM insurance policy. The workers' compensation insurer sought to impose a subrogation lien on any UIM benefits paid to the employees' estates. This Court reversed the Superior Court's decision enforcing the lien under Section 2363(e) and adopted *Hurst*'s statement that the 1993 amendment to Section 2363(e) "eliminated the ability of an employer's work[ers'] compensation carrier to assert a priority lien against an injured employee's right to payment pursuant to the employer's uninsured motorist coverage."[57] Significantly, the decision in *Simendinger* relied on—and expressly quoted—the portion of the 1993 amendment that states "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."[58]

That quotation excluded the portion of the 1993 amendment that limited its scope to "items of expense which are precluded from being introduced into evidence at trial by 21 *Del. C.* § 2118."[59] The statutory language *Simendinger* overlooked is fundamental to understanding the 1993 amendment. By failing to consider the 1993 amendment's prefatory clause limiting the amendment to certain expenses under Section 2118, the *Simendinger* Court misconstrued the statute.

[3] Section 2363's reference to "items of expense" that cannot be introduced at trial under 21 *Del. C.* § 2118 applies to personal injury protection ("PIP") expenses that are not "boardable." Under Section 2118, "non-boardable" expenses include those that were or could have been paid by a PIP policy.[60] An injured party in a tort action may not present evidence of those expenses as part of any requested damages award.[61] Therefore, the 1993 amendment to Section 2363(e)

prevented an employer from obtaining a subrogation lien against an employee for PIP-eligible expenses, since the employee could not present evidence of those damages at a trial against a tortfeasor or a UIM insurer. [62] Under the lien exception added to Section 2363(e) in 1993, the only recourse available to an employer or its workers' compensation insurer for reimbursement of PIP-eligible expenses is the third-party tortfeasor's insurer, and it is available only after the employee's claim against the tortfeasor is settled or resolved. [63]

***8** **[4]** Other than limiting the right to obtain a lien for non-boardable expenses under 21 *Del. C.* § 2118, the 1993 amendment did not otherwise alter Section 2363(e). In *Harris*, this Court held that the pre-amendment version of Section 2363 allowed an employer or its workers' compensation insurer to assert a subrogation lien against an employee's recovery of benefits under a UIM policy maintained by his employer. [64] The dicta in *Hurst* and the express ruling in *Simendinger* did not recognize the limited scope of the 1993 amendment and instead mistakenly interpreted the statutory change as entirely eliminating an employer's ability to obtain a lien against benefits paid under an employer-purchased UIM policy. We therefore overrule *Simendinger* and hold that, except as to expenses excluded from evidence at trial under the PIP statute, Section 2363(e) gives an employer and its workers' compensation insurer a right to assert a subrogation lien against an employee's recovery of benefits under an employer-purchased UIM policy.

[5] **[6]** **[7]** **[8]** The interpretation of Section 2363(e) that we now adopt also is consistent with Delaware public policy. As a general matter, Delaware's public policy seeks to avoid allowing a plaintiff to recover twice for the same injury. [65] The collateral source rule, however, allows double recovery in some contexts under the theory that "a tortfeasor has no interest in, and therefore no right to benefit from, monies received by the injured person from sources unconnected with the defendant." [66] In addition, there are policies underlying the WCA and the UIM statute that must be considered. The public policy supporting the WCA is to compensate an injured worker for lost wages and medical expenses for work-related injuries, regardless of fault. [67] And the policy motivating the UIM statute is to "permit an insured to protect himself from an irresponsible driver causing death or injury." [68]

Those policies do not always align, and balancing the competing policies requires the Court to consider the nature of the case and the interests at issue. In the context of workers' compensation proceedings in which UIM benefits may also be awarded to an injured worker, this Court has applied contract principles to resolve an employer's subrogation rights. [69] That focus on contractual expectations is consistent with both the WCA and the UIM statute, which are based on benefits secured by contract rather than the fault-based analysis fundamental to tort cases. [70]

[9] Under this contractual analysis, the extent to which the collateral source rule should be applied to permit double recovery depends on "the contractual expectations that underlie the collateral source payment." [71] As we previously explained in the analogous context of no-fault insurance:

> [T]he conditions under which double recovery should be allowed may best be determined by examining the consideration that has been paid. If the insured has paid consideration for recovery from a collateral source, then recovery should be allowed. If the collateral payments are received *gratis,* then their receipt should bar recovery under the no-fault policy. In the latter instance, the insured has lost nothing, neither wages nor consideration paid to a collateral source for wage compensation. Accordingly, the insured has no loss for which his insurer should provide compensation. [72]

***9** **[10]** **[11]** **[12]** It follows that an employer who purchases UIM coverage for its vehicles and the employees who drive them should be entitled to assert a subrogation lien when that UIM policy reimburses the employee for injuries already compensated under the WCA. In such a case, the employer has contracted for the supplemental protection and the employee should not receive a double recovery from a fund for which the employee did not contract. [73] The interpretation of Section 2363(e) that we adopt today achieves this result.

In issuing its decision in this case, the Superior Court was required to apply *Simendinger*. Because we are now reversing our holding in *Simendinger*, we also must reverse the Superior Court's decision granting judgment in favor of Cincinatti and Henry with respect to Horizon and Eastern's statutory right to assert a lien. Section 2363(e) does not prohibit—and in fact expressly allows—an employer and its workers' compensation carrier to obtain a subrogation lien on UIM benefits paid from an employer-purchased policy, other than PIP-eligible expenses under 21 *Del. C.* § 2118.

B. The question of whether the UIM Policy precludes Appellants from asserting a lien cannot be resolved on the record before us.

[13] In their motion for judgment on the pleadings, Appellees alternatively argued that Appellants' declaratory judgment action should be dismissed because, even if the statute permits a lien, Cincinnati's policy prevents Henry from recovering benefits that would be subject to a lien. Because the trial court concluded that the statute and *Simendinger* precluded Appellants from asserting a lien, the court did not reach this alternative argument. Appellees renewed the argument on appeal as an alternative basis to affirm the trial court's ruling. We conclude, however, that addressing this issue on an incomplete record is neither efficient nor helpful to the law's development in this area.

Appellees contend that two provisions in the UIM policy prohibit Henry—and, by extension, Appellants—from obtaining coverage for any claims already paid under the WCA. The Policy's Exclusions section states:

This insurance does not apply to any of the following:

1. With respect to an "uninsured motor vehicle" any claim settled with the person(s) or organization(s) legally responsible for the "accident" or the insurer or legal representative of such person(s) or organization(s) insurer or legal representative without our consent, if the settlement prejudices our rights to recover payment.

2. The direct or indirect benefit of any insurer or self-insurer under any, workers' compensation, disability benefits or similar law. [74]

In addition, Appellees rely on the Policy's "Limit of Insurance" section, which states, in pertinent part:

***10** No one will be entitled to receive duplicate payments for the same elements of "loss" under this endorsement and any Liability Coverage Form or Medical Payments Coverage Endorsement attached to this Coverage Form.

We will not make a duplicate payment under this coverage endorsement for any element of "loss" for which payment has been made by or for anyone who is legally responsible, including all sums paid under the policy's Covered Autos Liability Coverage.

We will not pay for any element of "loss" if a person is entitled to receive payment for the same element of "loss" under any workers' compensation, disability benefits or similar law. [75]

Appellees maintain that these provisions are enforceable under Delaware law, and they reason that any recovery Henry obtains under the Cincinnati policy will not include claims previously paid under the WCA, so there will be nothing for Appellants to lien. Appellees acknowledge that Henry's complaint against Cincinnati in the UIM Action demands compensation for injuries already paid under the WCA, [76] but they argue that Henry has since conceded that he is not seeking recovery for any previously compensated injuries. [77]

It is possible that once Henry's UIM claim against Cincinnati is resolved, there will be no recovery that would be subject to a lien under Section 2363(e). But we believe the prudent course is to allow those facts to develop through litigation in the trial court rather than asking this Court to issue a hypothetical ruling in the first instance. Moreover, the trial court should have an opportunity to interpret the policy language and resolve Appellants' contention that it is unenforceable under Delaware law. Appellate review, to the extent it becomes necessary, will be more effective after the parties present these factual and legal issues to the trial court on a fully developed record. The parties and the trial court may determine the appropriate procedural posture in which to raise and address those arguments.

IV. CONCLUSION

For the foregoing reasons, we reverse the Superior Court's May 2, 2022 Opinion granting Appellees' motion for judgment on the pleadings. This case is remanded to the

Superior Court for further proceedings consistent with this opinion. Jurisdiction is not retained.

All Citations

--- A.3d ----, 2023 WL 5659812

Footnotes

1 74 A.3d 609 (Del. 2013).

2 Unless otherwise noted, the recited facts are taken from the Superior Court's May 2, 2022 opinion. *See Horizon Servs., Inc. v. Henry*, 2022 WL 1316236 (Del. Super. May 2, 2022).

3 *See* 19 *Del. C.* § 2363(e).

4 *See Henry v. Cincinnati Ins. Co.*, 2021 WL 1545765, at *1 (Del. Super. Apr. 19, 2021). Appellants do not seek reimbursement from any UIM benefits Henry might receive under the State Farm Policy. *See* App. to Answering Br. at B2 (Compl. ¶ 4). At oral argument in this appeal, counsel for Appellants represented that they were precluded by law from seeking reimbursement under the State Farm Policy. Video of Oral Argument, *Delaware Courts*, at 04:58–05:21 (June 7, 2023) [hereinafter Oral Argument], https://tinyurl.com/yck365mx.

5 *See Henry*, 2021 WL 1545765, at *1.

6 *See id.* at *1 n.5.

7 *See Henry v. Cincinnati Ins. Co.*, 2018 WL 3640835, at *1 (Del. Super. July 31, 2018).

8 19 *Del. C.* § 2304 (2016).

9 80 Del. Laws, ch. 420, § 1 (2016) (codified at 19 *Del. C.* § 2304) (emphasis added).

10 *See Henry*, 2018 WL 3640835, at *1.

11 *See id.* at *3–4.

12 *Id.* at *4 (citing *Simpson v. State*, 2016 WL 425010, at *4 (Del. Super. Jan. 28, 2016)).

13 *Henry v. Cincinnati Ins. Co.* (“*Henry I*”), 212 A.3d 285 (Del. 2019).

14 *Id.* at 289–90.

15 *Id.*

16 *Id.* at 290.

17 *Id.* at 290–91.

18 *Henry*, 2021 WL 1545765, at *4.

19 74 A.3d 609 (Del. 2013).

20 575 A.2d 1103 (Del. 1990).

21 *Henry*, 2021 WL 1545765, at *3.

22 *Id.*

23 *Id.*

24 *Henry v. Cincinnati Ins. Co.*, 2021 WL 1923710, at *3 (Del. Super. May 13, 2021).

25 *Id.*

26 *E. All. Ins. Co. v. Henry*, 254 A.3d 396, 2021 WL 2418979, at *2 (Del. June 10, 2021) (TABLE).

27 App. to Answering Br. at B14.

28 *Id.* at B2 (Compl. ¶ 4).

29 *See* App. to Answering Br. at B25–26.

30 652 A.2d 10, 15 n.2 (Del. 1995) ("We note that the General Assembly has eliminated the ability of an employer's workmen's compensation carrier to assert a priority lien against an injured employee's right to payment pursuant to the employer's uninsured motorist coverage.") (citing 19 *Del. C.* § 2363).

31 74 A.3d at 611 (adopting the interpretation of Section 2363 set forth in *dicta* in *Hurst*).

32 *Henry*, 2022 WL 1316236, at *4.

33 A significant portion of the Appellants' briefs asserted that the 2016 version of the exclusive-remedies provision allowed Appellants to assert a lien against UIM benefits recovered by Henry. *See* Am. Opening Br. at 17–27; Reply Br. at 2–7. At oral argument, however, Appellants clarified that their right to subrogate against Henry's UIM recovery flows from Section 2363, regardless of which version of the exclusive-remedies provision applies. *See* Oral Argument, *supra*, at 07:37–09:42, 13:30–15:10

34 Oral Argument, *supra*, at 13:30–15:10; *see* Am. Opening Br. at 23–27.

35 *Simendinger*, 74 A.3d at 611 (quoting *Hurst*, 652 A.2d at 15 n.2).

36 In their briefs, Appellants argued that the 2016 amendment to the exclusive-remedies provision "impliedly overruled *Simendinger*." Am. Opening Br. at 23. At oral argument, however, counsel for Appellants asked us to overrule *Simendinger*. Oral Argument, *supra*, at 11:00–11:55.

37 Answering Br. at 16.

38 *Id.* (emphasis omitted).

39 Oral Argument, *supra*, at 25:40–27:35.

40 Answering Br. at 17–19.

41 *See* Reply Br. at 10–11; Oral Argument, *supra*, at 11:55–13:30, 40:20–41:08. Appellants concede that they "will recover nothing" if the exclusivity provisions are enforced to preclude Henry from any recovery. Reply Br. at 10; Oral Argument, *supra*, at 13:00–13:13.

42 *Weinberg v. Waystar, Inc.*, 294 A.3d 1039, 1043 (Del. 2023) (quoting *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P.*, 624 A.2d 1199, 1204 (Del. 1993)).

43 *Henry I*, 212 A.3d at 289–90. In *Henry I*, the parties disputed which version of the exclusive-remedies provision applied. *Id.* at 289. We concluded that even the pre-amendment version of the statute allows an employee to recover UIM benefits under an employer-purchased policy. *See id.* (citing *Robinson v. State*, 2017 WL 1363894, at *1–2 (Del. Super. Apr. 11, 2017), *aff'd*, 176 A.3d 1274, 2017 WL 6422370 (Del. Dec. 18, 2017) (TABLE), in which the Superior Court held that the 2016 amendment to Section 2304 was not retroactive and did not apply to injuries occurring before its effective date).

44 *Id.* at 289–90.

45 *Id.* at 290.

46 *See Brookfield Asset Mgmt., Inc. v. Rosson*, 261 A.3d 1251, 1278 (Del. 2021) (observing that "the development of and adherence to precedent is an essential feature of common law systems, and as such, precedent should not be lightly cast aside.") (internal citation omitted).

47 50 Del. Laws, ch. 339, § 21 (1955); *see* Am. App. to Opening Br. at A36–42.

48 513 A.2d 1307 (Del. 1986).

49 50 Del. Laws, ch. 339, § 21 (1955); *see* Am. App. to Opening Br. at A41–42.

50 *Harris*, 513 A.2d at 1309.

51 69 Del. Laws, ch. 116, § 1 (1993); *see* Am. App. to Opening Br. at A43–45.

52 *Compare* 50 Del. Laws, ch. 339, § 21 (1955), *with* 69 Del. Laws, ch. 116, § 1 (1993).

53 *Hurst*, 652 A.2d at 15 n.2 (citing 19 *Del. C.* § 2363).

54 *Id.* at 11.

55 We expressly stated in *Simendinger* that this statement in *Hurst* was dicta. *See Simendinger*, 74 A.3d at 611.

56 *Id.*

57 *Id.* (quoting *Hurst*, 652 A.2d at 15 n.2).

58 *Id.* at 612 (quoting 19 *Del. C.* § 2363(e)). In the decision at issue in this case, the Superior Court relied on the same incomplete statutory quotation relied on in *Simendinger*.

59 69 Del. Laws, ch. 116, § 1 (1993); *see* 19 *Del. C.* § 2363(e).

60 *See* 21 *Del. C.* § 2118(h); Robert K. Beste, Jr. & Robert K. Beste, III, *Automobile Injury and Insurance Claims: Delaware Law and Practice* § 15.02 (rev. ed. 2019).

61 21 *Del. C.* § 2118(h); *see* Beste & Beste, *supra*, § 15.02.

62 *See* Beste & Beste, *supra*, § 15.02(b) (citing *Caruso v. Prudential Prop. & Cas. Ins. Co.*, C.A. No. 85-708 (D. Del. Nov. 20, 1986)); *Brown v. Comegys*, 500 A.2d 611, 614 (Del. Super. 1985).

63 *See* 19 *Del. C.* § 2363(e).

64 *Harris*, 513 A.2d at 1309.

65 *See, e.g.*, *Mt. Pleasant Special Sch. Dist. v. Gebhart*, 378 A.2d 146, 148 (Del. Ch. 1977); *cf. Brookfield Asset Mgmt., Inc.*, 261 A.3d at 1277 ("The double recovery rule prohibits a plaintiff from recovering twice for the same injury from the same tortfeasor.").

66 *Yarrington v. Thornburg*, 205 A.2d 1, 2 (Del. 1964).

67 *Aetna Cas. & Sur. Co. v. Kenner*, 570 A.2d 1172, 1175–76 (Del. 1990).

68 *Frank v. Horizon Assurance Co.*, 553 A.2d 1199, 1205 (Del. 1989).

69 *Adams*, 575 A.2d at 1106–07; *accord State Farm Mut. Auto. Ins. Co. v. Nalbone*, 569 A.2d 71, 75 (Del. 1989) (holding that "the policy goals of no-fault insurance can best be served by application of principles of contract rather than tort law").

70 *Adams*, 575 A.2d at 1106–07; *Harris*, 513 A.2d at 1309.

71 *Nalbone*, 569 A.2d at 75.

72 *Id.*

73 In contrast, and as Appellants acknowledged in this action, neither an employer nor its workers' compensation carrier has a right to a lien against an employee's recovery from his or her own UIM policy. *See Adams*, 575 A.2d at 1107–08. Delaware's public policy, as set forth in the UIM statute, permits an insured to contract for "supplemental" protection against losses caused by drivers who carry less liability coverage. *Aetna Cas. & Sur. Co.*, 570 A.2d at 1175–76. In the case of an employee-purchased policy, the employee has contracted for recovery from a collateral source, and double recovery should be permitted. *See Nalbone*, 569 A.2d at 75. The employer and workers' compensation insurer have no right to benefit from the employee's policy.

74 Complaint Ex. B at 4, *Horizon Servs. v. Henry*, C.A. No. N21C-10-044 (Del. Super.) (D.I. 1).

75 *Id.*

76 App. to Answering Br. at B12–13.

77 *See* Am. App. to Opening Br. at A17 (oral argument transcript).

2005 WL 2155230
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Superior Court of Delaware.

William MCDOUGALL, Employee-Appellant,
v.
AIR PRODUCTS & CHEMICALS,
INC., Employer-Appellee.

No. Civ.A. 02A-02-008WCC.
|
Submitted April 14, 2005.
|
Decided Aug. 31, 2005.

Appeal from Industrial Accident Board. Denied.

Attorneys and Law Firms

William D. Fletcher, Jr., Craig T. Eliassen, Dover, DE, for Employee-Appellant.

Scott R. Mondell, H. Garrett Baker, Wilmington, DE, for Employer-Appellee.

OPINION

CARPENTER, J.

I. Introduction

***1** Before this Court is William McDougall's ("Appellant" or "McDougall") appeal from two decisions of the Industrial Accident Board ("Board"), [1] where Air Products & Chemicals, Inc. ("Appellee" or "Air Products") petitioned the Board to determine whether Air Products was entitled to setoff its liability for **workers' compensation** benefits pursuant to 19 *Del. C.* § 2363 resulting from Appellant's recovery in a third-party medical malpractice action. Upon review of Appellant's Opening Brief and Reply Brief, Appellee's Answering Brief and oral arguments by both parties, it appears to this Court that Appellant's appeal should be DENIED, but the Court will modify the amount of the **credit** awarded by the Board.

II. Background

The facts presented are taken in large part from the two Board decisions from which this appeal originates. While McDougall was employed by Air Products, he suffered a compensable one-vehicle accident on July 18, 1990 when he drove a tractor-trailer over a curb and into a ditch. In the course of this accident, McDougall struck his head against the roof of the cab, which resulted in various injuries, including a mild concussion, cervical strain, a head contusion, a dissected vertebral artery, related psychological problems and loose teeth. In November 1990, McDougall relocated to Florida. Shortly thereafter, Air Products entered into an agreement with McDougall under which Air Products agreed to accept the vehicle accident as compensable under the **Workers' Compensation** Act. In turn, McDougall would receive temporary total disability ("TTD") benefits in the amount of $297.21, plus medical benefits paid through Air Products' compensation carrier. In April 1991, McDougall suffered a stroke.

On July 13, 1993, McDougall filed a medical malpractice action in Florida ("Florida Action"), alleging that his neurologist negligently failed to discover and treat the dissection of his left vertebral artery, which ultimately ruptured and resulted in his stroke. McDougall also alleged negligence against the emergency room doctor who treated him when he suffered the stroke. In May 1994, McDougall settled the action for $1,065,000.00, but his net recovery, after a reduction for costs, fees and expenses, equaled $580,166.78.

In January 1994, McDougall filed a Petition to Determine Additional Compensation Due requesting that the Board find the stroke was causally related to the July 18, 1990 work accident and require Air Products to pay stroke-related medical benefits. The Board held hearings on May 22 and June 2, 1995 to determine whether the stroke was causally related to the July 18, 1990 work accident (the "work accident"). Following the hearing, the Board determined that the stroke was causally related to the work accident specifically finding that the vertebral artery dissection suffered by McDougall precipitated the stroke. [2] The Board's decision ("1995 Decision") awarded stroke-related medical expenses and lost wages to McDougall. [3]

***2** Before the 1995 Decision, McDougall filed suit against National Union & Fire Insurance Company ("National

Union"), Air Products' carrier, alleging bad faith handling of the Delaware **workers' compensation** claim.[4] The complaint was later amended in September 1997 to include a claim pursuant to the Wage Payment and Collection Act for *Huffman*[5] damages resulting from National Union's nonpayment of the medical expenses and lost wages awarded by the 1995 Decision. In April 2000, the Delaware Superior Court found that National Union did not act in bad faith, but it was still liable for *Huffman* damages and attorney's fees in the amount of $924,529.02. In March 2001, the Delaware Supreme Court affirmed this decision, agreeing that the good faith belief of Air Products or National Union was irrelevant and finding that the nonpayment was "wrongful" simply because it contravened the 1995 Decision.[6]

On April 27, 2000, Air Products petitioned the Board to determine, pursuant to 19 *Del. C.* § 2363, the amount of its **credit**, and the Board held a hearing on August 3, 2000 to consider the petition. However, at that time, McDougall's bad faith and *Huffman* damages claims were pending before the Supreme Court and consequently, the Board issued an Interim Order staying the consideration of Air Products' petition pending final disposition of the appeal. As mentioned above, the Supreme Court issued its decision in March 2001 and subsequently the stay of Air Products' petition before the Board was lifted.

On September 6, 2001, the Board reconvened to determine the merits of Air Products' petition. Thereafter, the Board issued a decision on November 16, 2001. The Board considered the following issues: (1) whether Air Products' petition to determine the amount of **credit** owed was not in the proper procedural posture because a petition to establish the existence of a **credit** should have been filed first; (2) whether the doctrine of res judicata barred the Board's consideration of the issue before it be cause the Delaware Supreme Court had previously denied the existence of a **credit**; (3) whether the elements of 19 *Del. C.* § 2363 have been met because the Florida Action resulted in a settlement and there has been no formal finding of a third-party's legal liability in the malpractice action; and (4) whether Air Products released its claim to a 19 *Del. C.* § 2363 **credit**.[7] The Board rejected McDougall's legal arguments and concluded that Air Products was entitled to a **credit** in the amount of $333,834.04.[8]

III. Standard of Review

On appeal from the Industrial Accident Board, the function of the Superior Court is to determine whether the Board's decision is supported by substantial evidence and free from legal error.[9] Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[10] The Court is not the trier of fact nor has the authority to weigh evidence or determine questions of credibility[11] but rather, this Court merely determines if the evidence is legally adequate to support the Board's factual findings.[12] The case *sub judice* solely involves an issue of law. Therefore, this Court's review is *de novo*.[13] The Court will first address the legal issues raised by McDougall and then turn to the **credit** calculation made by the Board.

IV. Discussion

A. Award of **credit**-setoff was not conditional upon a judicial admission or factual determination of negligence on the part of settling party and was consistent with Delaware's public policy.

***3** McDougall argues that the Board erred as a matter of law when it determined that Air Products satisfied the requirements of 19 *Del. C.* § 2363 thus entitling them to a "**credit**-setoff" against **workers' compensation** benefits paid to McDougall. When addressing whether a party is entitled to a "**credit**-setoff" under 19 *Del. C* . § 2363, the Supreme Court has found that two elements must be satisfied. First, Section 2363(a) requires that there must be a third party who is legally liable in tort for the injury or disease requiring compensation and second, Section 2363(e) requires that there must be a recovery as a result of that liability which creates a fund in excess of the paid or currently payable compensation.[14] Subsequent cases have since extrapolated the requirements set forth by the *Moore* court. It has been held that "an objective of § 2363(e) is to provide reimbursement to the employer for payments made as required under the **Workers' Compensation** Act insofar as recovery from the third-party tortfeasor compensates for a condition for which workmen's compensation has been paid or is payable."[15] Further, workmen's compensation is generally permitted for the direct and natural consequences of the injury caused by a compensable industrial accident.[16] "This principle extends to an aggravation of the original compensable injury by subsequent medical or surgical treatment .... [f]ault on the part of the physician does not break the chain of causation and hence workmen's compensation extends to the results of the

faulty medical treatment." [17] Further, it is clear that a third-party settlement does not preclude reimbursement under § 2363(e) for the employer. [18] The court in *Esterling* held,

[o]ur cases show reimbursement of **workers' compensation** payments can come from a settlement. *Moore v. General Foods,* 459 A.2d 126 (Del.1983), allows future compensation payments to be **credited** against a settlement. *Harris v. New Castle County,* 513 A.2d 1307 (Del.1986), allows reimbursement to the carrier from a settlement under an uninsured motorist's policy. The language of *Harris* clearly interprets the language "any recovery" to intend subrogation to be all-inclusive; that is, to include indirect as well as direct recovery of damages from a third-party.... Therefore, under Delaware law, the "any recovery" language of § 2363(e) includes settlement recovery. [19]

McDougall's argument, with respect to section 2363(a), is that there was no formal finding of legal liability as to the defendants in the Florida medical malpractice action because the suit ended in a settlement, which contained no admission of liability. As a result, the elements of 19 *Del. C.* § 2363, specifically § 2363(a), cannot be satisfied. In other words, McDougall argues that there is no third-party who shares the same legal liability in tort with Air Products for the "proximate cause" of McDougall's injury because the Florida doctors were liable for negligent diagnosis, which was not the proximate cause of the injury. McDougall argues that he entitled to both the **workers' compensation** benefits and the settlement proceeds because in its 1995 Decision, the Board did not determine that "but for" the actions of the settling parties in Florida, McDougall would have never had a stroke. [20]

***4** Air Products argues that *Moore* [21] does not stand for the proposition that an admission or finding of fault is a prerequisite for a **credit** in favor of Air Products. [22] It contends that McDougall incorrectly argued that the **Workers' Compensation** Act requires a determination of tort liability before an employer may claim a § 2363 **credit**. Rather, they assert that the *Moore* court found that the purpose of the subrogation provision is to "prevent[ ] a double recovery by the employee for any one industrial injury and permit[ ] the employer to recoup its compensation payments ." [23] In *Moore,* the court ruled that the third-party settlement served as a **credit** for all injuries sustained by the claimant as a result of the work accident and was not limited to those covered by the third-party settlement. [24]

In regards to this issue the Court must agree with Air Products. The only relevant issue before the Board was whether the stroke was causally related to the 1990 work accident. The Board noted that the negligence of the Florida doctors was not legally material to the issue before them. [25] The Board did not consider the Florida doctors' negligence because Air Products was liable for the stroke, even if caused by malpractice, as long as the work accident set the chain of events in motion. Generally, **workers' compensation** benefits are permitted for the direct and natural consequences of an injury caused by a compensable industrial accident and this principle extends to an aggravation of the original compensable injury by subsequent medical or surgical treatment. [26] A physician's negligence does not break the chain of causation and as a result, **workers' compensation** benefits cover the results of faulty medical treatment. [27]

In addition, the Court cannot find anything in *Moore* to support McDougall's position. There, the third-party claim at issue was resolved by settlement and not by judgment. Moreover, there is no indication that the third-party defendant admitted any liability regarding the settlement. In addition, the Supreme Court decision of *Harris v. New Castle County* [28] made clear that "an employer's right to reimbursement is broader than just recoveries in tort action." [29] There, the court stated that the "obvious purpose of [§ 2363] is that the recipient of compensation benefits shall not collect both the statutory compensation and also the full damages for the injury." [30] Further, the court stated that the public policy against the claimant recovering twice for a single loss requires that the "underlying legislative intent take[ ] precedence over a literal interpretation of statutory language that arguably supports a contrary result." [31] The claimant in *Harris* put forth similar arguments as McDougall and the court did not find in his favor. It is significant that the court found despite the language in the first sentence of § 2363(e), which references a "tort recovery," the "decisive language of subsection (e) with respect to the breadth of an employer's right of subrogation is found within the second sentence of subsection (e)." [32] This subsection provides in part, "[a]ny recovery against the third party for damages resulting from personal injuries" requires reimbursement to the employer for any amounts payable under the **Workers' Compensation** Act and any balance is treated as an advance

payment against future compensation benefits. As such, the Court finds, as did the Supreme Court in *Harris,* that the scope of an employer's recovery can be found in the settlement of tort litigation and does not require the formal finding of liability argued by McDougall. [33]

B. The doctrine of *res judicata* does not bar Air Products from seeking a **credit**-setoff pursuant to 19 *Del. C.* § 2363.

***5** McDougall's next argument that the **credit** awarded by the November 16, 2000 Board decision is barred by the doctrine of *res judicata* is two-fold. First, McDougall argues that the 1995 Decision is final and contains no statement of **credit** in favor of Air Products. In support of this, McDougall points to the Delaware Supreme Court decision where the court stated that the 1995 Decision was "final, and the Board lost continuing jurisdiction to revisit the issue. Any further action by the Board was a nullity." [34] Under 19 *Del. C.* § 2347, the Board can consider a request to modify a final order only "upon proof of subsequent change of condition," [35] and only under "specifically delineated ... circumstances." [36] McDougall argues that none of the specifically delineated § 2347 change(s) occurred in this case to support Air Products' Petition for Review filed on April 28, 2000 and therefore it follows that the Board did not have the authority to decide the issue of a **credit**-setoff. Accordingly, McDougall contends that the Board erred as a matter of law when it decided that *res judicata* was not a proper defense to the assertion of a **credit**.

Under Delaware law, a party claiming that the doctrine of res judicata bars a subsequent action must demonstrate the presence of the following five elements: (1) the court making the prior adjudication had jurisdiction; (2) the parties in the present action are either the same parties or in privity with the parties from the prior adjudication; (3) the cause of action must be the same in both cases or the issues decided in the prior action must be the same as those raised in the present case; (4) the issues in the prior action must be decided adversely to the plaintiff's contentions in the instant case; and (5) the prior adjudication must be final. [37]

McDougall contends that the facts support a finding that the doctrine of res judicata prevents the Board from considering Air Products' entitlement to a **credit**-setoff. Specifically, (1) the Board had jurisdiction to decide the issue of a **credit**-setoff in the 1995 and 1998 hearings and Air Products had knowledge of the potential availability of a **credit**-setoff because the Florida settlement occurred in 1994; (2) the parties involved in the 2000 and 2001 reimbursement hearings were the same parties as in the 1995 and 1998 hearings; (3) the reimbursement issue, raised in the 2000 and 2001 hearings, could have been raised in the 1995 and 1998 hearings; (4) the issues in the 1995 and 1998 orders were decided adversely to Air Products; and (5) the 1995 and 1998 Board decisions are final.

As to the third element, McDougall asserts that "res judicata extends to all issues which might have been raised and decided in the first suit as well as to all issues that actually were decided." [38] Res judicata "is available if the pleadings framing the issues in the first action would have permitted the raising of the issue sought to be raised in the second action, and if the facts were known, or could have been known to the plaintiff in the second action at the time of the first action." [39] According to McDougall, by January 1994, he filed a petition seeking payment of medical expenses in excess of $350,000 and any alleged **credit** arising from the 1994 settlement to setoff this medical liability was required to be asserted in 1995 and/or 1998.

***6** The Court finds McDougall's argument is without merit. This appeal arises from a Petition filed by Air Products on April 27, 2000, where Air Products requested that the Board determine, pursuant to 19 *Del. C.* § 2363, the amount of its **credit** with respect to *future* **workers' compensation** claim benefits. Air Products acknowledges that the award from the 1995 decision is final and has been paid as a result of the Supreme Court's ruling in April 2000. Air Products only seeks a **credit** for benefits paid through their **workers' compensation** carrier to McDougall from the Board decision on November 16, 2001 prospectively. At the hearing, which led to the 1995 Decision, Air Products assumed, albeit incorrectly, that McDougall, through his counsel, conceded the existence of a § 2363 **credit** with respect to the benefits that were the subject of the 1995 Decision. Air Products used this incorrect assumption as a defense in the *Huffman* action. Since the issue of a **credit** was raised at that hearing, it does not necessarily follow that *res judicata* bars Air Products from forever raising the issue of another **credit**. Air Products' petition in 2000 is not related to any benefits from the 1995 Decision because it seeks a determination as to prospective payments only. The issue of the **credit** currently sought could not have been raised by Air Products at the 1995 and 1998 hearings because at the time, the issue was not ripe for adjudication. Accordingly, this Court cannot find that the doctrine of *res judicata* bars Air Products' 2000 petition.

The second *res judicata* argument advanced by McDougall contends that the Delaware Supreme Court already denied the existence of a **credit** and as a result, the Board was barred by the doctrine of *res judicata* from considering the issue of a **credit**-setoff. At the May 22, 1995 Board hearing, which resulted in the 1995 Decision, an exchange occurred between the attorneys regarding a "**credit**." [40] Subsequent to the 1995 Decision, Air Products failed to pay any money to McDougall in part because Air Products believed McDougall, through his counsel, conceded the existence of a **credit**. Air Products asserted this as part of its defense in the "Huffman" action. In a bench ruling, the Superior Court, on cross-motions for summary judgment, rejected McDougall's bad faith claim against National Union and granted summary judgment to McDougall on the "Huffman" claim. Thereafter, National Union appealed the award of summary judgment to McDougall. The Delaware Supreme Court affirmed the Superior Court's ruling, observing that the **credit** issue was never presented to the Board. [41] McDougall argues that based on the Supreme Court decision, the Board could not later address whether Air Products was entitled to a **credit** because the Supreme Court previously determined that one was not available. The Court disagrees as it does not appear that the Supreme Court ruled on whether a **credit** was available, but rather they only considered whether the Board had awarded one. As a result, the doctrine of *res judicata* does not prevent the Board from determining whether Air Products is entitled to a § 2362 **credit**.

C. The issue of the statute of limitations does not bar Air Products from seeking a **credit**-setoff.

***7** McDougall argues that Air Products' petition for a **credit**-setoff is barred by the statute of limitations. The statute of limitations is an affirmative defense, which must be set forth in a "pleading to a preceding pleading" pursuant to Superior Court Civil Rule 8(c) . [42] The failure to timely assert an affirmative defense constitutes waiver of the right to do so. [43] In administrative proceedings, an affirmative defense is raised when a fair presentation was made to the agency. [44] Furthermore, "[a] casual statement by counsel is not tantamount to a serious attempt to argue an issue and even by relaxed administrative procedures will not amount to fair presentation of an issue." As stated previously, the role of this Court on an appeal from agency decision is to determine whether the Board's decision is supported by substantial competent evidence free from errors of law. [45]

The record below reflects that two hearings occurred before the Board and McDougall failed to raise the statute of limitations affirmative defense in both hearings. However, at the close of the initial hearing, the Board inquired, on its own, as to whether either party "had any knowledge of any case law that regards timing of a request for **credit** to the Industrial Accident Board." [46] McDougall relied, "[w]e're not aware of any authority that allows you to consider a **credit** five years after a hearing." [47] The remaining record is silent as to any further references to a statute of limitations issue. Air Products contends and the record reflects that the Board's decision does not address the affirmative defense because the issue was not presented to them. Further, McDougall filed a Motion for Reargument, in which he failed to raise this affirmative defense. As previously stated, a casual statement by counsel does not amount to a fair presentation of an issue for purposes of an appeal.

McDougall failed to properly raise the statute of limitations affirmative defense as provided under Superior Court Civil Rule 8(c) and he failed to fairly present this defense at the Board hearings. It appears to the Court that McDougall made a comment, in passing, to the Board after the Board initiated the discussion. The Court is not persuaded by McDougall's assertion that he was prevented from raising this defense. Additionally, contrary to McDougall's claim that the Board has a "duty" to give full effect to the statutes contained in Title 19 of the Delaware Code, the Board has no duty to present affirmative defenses on behalf of any party. As such, the Court rejects McDougall's statute of limitations argument as being without merit.

D. Air Products has not released its statutory entitlement to a **credit**

Next, McDougall contends that Air Products released any potential claim under § 2363 because Air Products executed the "Release of All Claims" ("Release") on September 12, 1994. McDougall argues that the Release is applicable to "any and all liability by way of [a] lien ... through ... statutory subrogation," [48] which means Air Products is precluded from asserting a claim for a statutory subrogation **credit**.

***8** Generally, releases fall into two categories, specific and general. McDougall contends that the Release at issue is an unqualified general release, which must be upheld regardless of any subjective, unspoken intent of the employer, here Air Products, then or now. [49] He argues that the Release applies to Air Products as the "statutory subrogation **credit**

is clearly controlled by the above language." There is no requirement that a release "specifically identify each and all of the obligations it extinguishes."[50] A "general release" extinguishes all claims owed by the released party to the releasor, including claims that either party did not have in mind at the time the release was executed and it must be upheld regardless of any subjective, unspoken intent of a party.[51] Conversely, a "specific release" identifies each of the intended extinguished claims.[52]

McDougall contends that the Release is silent as to the claims owed by McDougall to Air Products. Therefore, the Court should find that the language of the Release shows a clear intention that the Release covers Air Products' statutory claim. Moreover, McDougall contends that Air Products was reimbursed for its expenses through the Release where McDougall paid $150,000.00 and Air Products should be precluded from seeking additional settlement proceeds.

Air Products argues in response that the Release was signed on behalf of their health care carrier and as a result, they contend that the Release does not apply to the **credit** currently sought. They claim the Release purports to release only claims under Air Products' "Medical Plan" and not to release Air Products' lien with respect to **workers**' **compensation** coverage. Therefore, they contend that the Release on its fact is inapplicable to Air Products' statutory entitlement to a **credit**.[53]

The Release, executed subsequent to the Florida settlement, was executed by J.P. McAndrew, who is the Vice President of Human Resources at Air Products. Through the Release, McDougall reimbursed Air Products' health care insurance carrier, CIGNA, $150,000 for the stroke-related medical expenses it had paid. In exchange for this, Air Products' health insurance carrier executed a document that purports to release, among others, McDougall and the doctors involved in the Florida malpractice action, from

> any and all liability by way of lien or claim through common law or statutory or contractual right of subrogation or reimbursement, or any other claim or lien of whatsoever kind and nature under the Air Products and Chemicals, Inc. Medical Plan for Hourly Employees and Air Products and Chemicals, Inc. through Integrated Behavioral Health Plan, CIGNA Health Plan, and any other Healthcare Plans, if any there be, of Air Products and Chemicals, Inc., in connection with benefits and services provided ...[54]

The Board noted, "[t]his negotiated released was in lieu of the healthcare plans seeking reimbursement out of the settlement proceeds and the specific reference to the healthcare plans makes it clear that this was not meant as a general release affecting a **workers**' **compensation** lien pursuant to Section 2363."[55]

***9** The Court must agree with the Board's findings. Despite McDougall's arguments to the contrary, the Court interprets the document as a release specifically relating to the claims under Air Products' health care plans. The language of the Release is clear and unambiguous and it is apparent to the Court that it is only in relation to the payments made by the health care providers. This was in lieu of the health care plans seeking reimbursement out of the settlement proceeds, as the health care plans had paid a portion of McDougall's medical expenses. Consequently, the Court finds the Release is not a general release and has not released Air Products' claims for a **credit** pursuant to 19 *Del. C.* § 2363.

After the Board's decision McDougall filed a Motion for Reargument and in deciding this Motion, the Board reviewed and reiterated its findings concerning the Release. The Court agrees with the Board's findings. Upon review of the Release, the Board did not err in finding that the Release, on its face, was not a general release of all claims, but rather the Release pertained to any and all liability under Air Products' medical plan, the Integrated Behavioral Health Plan and CIGNA Health Plan. The language specifically releases the aforementioned parties and their claims, but it clearly does not release all claims in general or any claims for a **workers**' **compensation** lien.

E. Air Products has not waived its statutory entitlement to a **credit**

Essentially, McDougall argues that Air Products strategically held back the assertion of its statutory entitlement to a **credit**, which amounts to a wavier of said **credit**. Waiver is defined as the "voluntary relinquishment of a known right or conduct

such as to warrant an inference to that effect. It implies knowledge of all material facts and of one's rights, together with a willingness to refrain from enforcing those rights." [56] McDougall asserts that Air Products' strategy was as follows: In 1994, Air Products knew of its entitlement to a § 2363 **credit** upon receipt of $150,000 in settlement funds, but Air Products failed to assert its right to the **credit** until April 18, 2000. During the hearings in 1995, held to determine whether the stroke was causally related to the work accident, Air Products did not assert its right to a **credit**. Similarly, in the 1998 hearings regarding McDougall's osteoporosis, Air Products again failed to raise its right to a **credit**. Thereafter, in the 1998 bad-faith litigation, McDougall asserts that Air Products manipulated the issue of whether a **credit** exists to extend discovery deadlines and postpone trial.

In response, Air Products explains that McDougall is essentially arguing that Air Products is barred by the doctrine of equitable estoppel from asserting a **credit** against McDougall's third-party recovery. Air Products maintains that equitable estoppel was not an issue raised before the Board and as a result, the issue was not properly preserved for appeal. Further, Air Products counters that at the time of the Florida Action, the relationship of McDougall's stroke to the work accident had not been established. It follows that Air Products had no entitlement to a **credit** until the stroke was found to be a component of the work accident.

***10** While § 2363 does not require that an employer give notice of a potential lien, it is possible for an employer to waive its § 2363 rights if the employer knowingly engages in conduct inconsistent with its continued assertion of those rights. [57] The Board found and this Court agrees that there are no extenuating circumstances in this case that indicate such waiver occurred. The facts supporting this are that the Florida Action, filed in 1993, was settled in May of 1994 and McDougall did not file a **workers' compensation** petition until January of 1994 alleging that Air Products was liable to pay stroke-related benefits. Air Products was not found liable for the stroke-related benefits until the 1995 Decision and until such liability was established, Air Products did not have a § 2363 claim against future **workers' compensation** benefits. As such, Air Products' failure to give notice of its potential § 2363 does not amount to a waiver of its right to a § 2363 **credit**.

F. The amount of **credit** to which Air Products is entitled

The Board calculated Air Products' Section 2363 **credit** against **workers' compensation** benefits as follows: McDougall's total settlement recovery from the Florida Action was $1,065,000.00 of which $484.833.00 was paid to satisfy attorneys' fees and costs. Air Products paid a total of $612,855.43 in benefits, which constitutes approximately 57.55 percent of McDougall's total settlement recovery. The Board explained that Air Products must be charged with 57.55 percent of McDougall's attorneys' fees and costs, which were $484.833.00 and 57.55 percent of this amount equals $279,021.39. This number was then subtracted from the amount of Air Products' payment and the remainder equals $333,834.04. It is this amount that the Board found to represent Air Products' Section 2363 **credit** against **workers' compensation** benefits. [58]

It is this portion of the Board's decision that the Court has struggled most to understand. Frankly, the way the settlement decisions were handled in Florida and the disjunctive manner the malpractice and **workers' compensation** matters were litigated contributed significantly to this confusion. The Court held two oral arguments and required counsel to submit supplemental briefing in litigation that is normally heard simply upon written submissions. The Court appreciates the patience of counsel and the excellent presentations they made to assist the Court in untangling the factual underpinnings of this litigation. When one moves beyond the procedural quagmire of this litigation, several critical facts surface.

(1) The Florida litigation relating to the medical malpractice conduct asserted as damages the medical expenses relating to McDougall's care and treatment while in Florida. These expenses totaled $367,697.66.

(2) In settlement of the medical malpractice suit, Mr. McDougall received $1,065,000.00 of which he had to pay as costs and counsel fee $484,833.00. This left a distribution of $580,167.00 to Mr. McDougall.

***11** (3) As a result of Air Products' health plan paying for at least some of the medical expenses from Florida, a lien of $150,000.00 was recognized and subsequently paid by McDougall to Air Products' health care providers.

(4) McDougall then obtained a decision from the Board determining that the medical expenses from Florida were related to the accident and Air Products was forced to pay to McDougall $367,697.66 relating to the same Florida medical expenses.

When the Court looks at these facts, it is clear that Mr. McDougall received a double recovery relating to these medical expenses which is prohibited by 11 *Del. C.* § 2363. In other words, his malpractice suit requested damages for medical expenses relating to his treatment in Florida. These expenses would have been included in the million dollar settlement that was obtained as a result of the Florida litigation. In addition, he was then able to convince the Board that the stroke-related injuries that occurred in Florida were connected to his work-related accident and therefore were compensable under his **workers' compensation** coverage. So he again received the amount of these expenses from Air Products and that distribution has been made.

However, once the Court attempts to go beyond this clear set of facts it cannot find substantial evidence to support the additional **credit** calculation established by the Board. At best, their calculation is based upon assumptions unsupported by the evidence presented at the hearing and is made without any attempt to correlate what Mr. McDougall received in the Florida litigation to that already paid in the **workers' compensation** claim. The parties have consistently emphasized to the Court that the purpose of 11 *Del. C.* § 2363 is to prevent a double recovery. However, to award a **credit**, credible evidence, not assumptions or speculations, must be provided to the Board to establish this double recovery has occurred. The Court finds that beyond the $367,697.66 relating to medical expenses, this has not occurred, and the Board's decision regarding the amount of the **credit** is simply not supportable. As a result, the Court finds the Board's decision relating to the appropriate amount of the **credit** is only supportable up to the amount of $200,284.83. This amount was calculated in the same manner as that performed by the Board except the starting point was $367,677.66 and not the $612,855.43 used by the Board in its decision. $367,677.66 represents 34.53% of the total amount awarded to McDougall in his Florida litigation, and this percentage relating to the fees and costs of that litigation equals $167,412.83. When these amounts are subtracted, the **credit** becomes the difference of $200,284.83. [59]

Finally, the Court appreciates this final conclusion will in all likelihood not be favored by either party. This however may be a good sign that it may be a fair resolution of the matter. However, regardless of counsels' desires or opinions in this matter, it is clearly time for the sake of your clients to stop this litigation. Simply, enough is enough. By this decision, each of your clients have gained something. It is time for the attorneys in this litigation to perform a lawyer's historical responsibility of providing wise and reasonable "counsel" to their client and to tell them to stop bickering. It is in the finest tradition of the Delaware bar that counsel are not simply litigation mouthpieces barking the orders of their clients but Delaware lawyers have for centuries been looked upon by their community to be wise and reasonable counsel. It is time to perform that responsibility and bring this litigation to an end.

V. Conclusion

***12** Therefore, for the reasons stated above, McDougall's appeal from the Board is DENIED with a modification to the amount of the **credit** ordered by the Court consistent with this Opinion.

IT IS SO ORDERED.

All Citations

Not Reported in A.2d, 2005 WL 2155230

Footnotes

1 IAB decisions dated November 16, 2001 and January 30, 2002.

2 *See McDougall v. Air Products & Chemicals, Inc.,* Del. IAB, Hearing No. 917985, slip op. (June 2, 1995).

3 Subsequent to the 1995 Decision, McDougall did not receive any money from Air Products or from their insurance carrier, National Union & Fire Insurance Company. Significantly, the damages awarded by the Board in the 1995 Decision were the same damages at issue in the Florida Action.

4 McDougall did not join Air Products as a party to the suit.

5 The claim for *Huffman* damages was premised on the decision of *Huffman v. C.C. Oliphant & Son, Inc.,* 432 A.2d 1207 (Del.1981).

6 *See National Union Fire Ins. Co. v. McDougall,* 773 A.2d 388, 393 (Del.2001).

7 McDougall failed to fully present an argument on this issue. The Board opined that McDougall's failure might be grounds to consider the argument abandoned. *See Feralloy Industries v. Wilson,* 1998 WL 442937, at ----3 (Del.Super.1998). Nevertheless, the Board evaluated the merits of this issue.

8 For a detailed explanation of how the Board arrived at the amount of the § 2362 **credit**, refer to section F of this Opinion.

9 *See Devine v. Advanced Power Control, Inc.,* 663 A.2d 1205, 1209 (Del.Super.Ct.1995) (citing *General Motors Corp. v. Freeman,* 164 A.2d 686, 688 (Del.1960); *Johnson v. Chrysler Corp. .,* 213 A.2d 64, 66 (Del.1965); *General Motors Corp. v. Jarrell,* 493 A.2d 978, 980 (Del.Super.Ct.1985)).

10 *See Oceanport Indus., Inc. v. Wilmington Stevedores, Inc.,* 636 A.2d 892, 899 (Del.1994).

11 *See Johnson v. Chrysler Corp.,* 213 A.2d 64 (Del.1965).

12 *See* DEL.CODE ANN. tit. 29, § 10142(d) (2003).

13 *See Stevens v. State,* 802 A.2d 939, 944 (Del.Super.Ct.2002) (citing *State of Delaware v. Worsham,* 638 A.2d 1104, 1106 (Del.1994)).

14 *See Moore v. General Foods,* 459 A.2d 126, 128-29 (Del.1983). Section 2363(e) requires that once the claimant recovers against a third party for damages resulting from person injuries or death, the claimant, after deducting expenses of recovery, must first reimburse his employer or its **workers compensation** carrier for any amounts paid or payable under the **Workers**' **Compensation** Act. The remaining balance is "treated as an advance payment by the employer on account of any future payment of compensation benefits." DEL.CODE ANN. tit. 19, § 2363(e) (2003).

15 *Stevenson v. Haveg Industries,* 1985 WL 188996, at *2 (Del.Super.) (citing 1 Larson, *The Law of Workmen's Compensation* § 13 .11, p. 3-348.91, § 13.21, p. 3-407)).

16 *See id.* (citing 1 Larson, *The Law of Workmen's Compensation* § 13.11, p. 3-415).

17 *Id.* at *2 (citations omitted).

18 *See Esterling v. Board of Trustees,* 1998 WL 77774, at *3 (Del.Super.).

19 *Id.*

20 *See* Opening Brief at 20.

21 *Moore v. General Foods,* 459 A.2d 126 (Del.1983).

22 *See* Reply Brief at 13.

23 *Moore,* 459 A.2d 126, 127-28.

24 *See id.* at 128-29.

25 *See* Opening Brief, App. 5 at 15-16.

26 *See Stevenson v. Haveg,* 1985 WL 188996, at *2 (Del.Super.) (citing 1 Larson, *The Law of Workmen's Compensation* § 13 .11, p. 3-348.91, § 13.21, p. 3-407)).

27 *See id.* (citing 1 Larson, *The Law of Workmen's Compensation* § 13.11, p. 3-415).

28 *Harris,* 513 A.2d at 1308 (quoting *Travelers Ins. Co. v. E.I. du Pont de Nemours and Co.,* 9 A.2d 88 (Del.1939)).

29 Board Decision, 11/16/01 at 12.

30 *Harris,* 513 A.2d at 1308 (quoting *Travelers Ins. Co. v. E.I. du Pont de Nemours and Co.,* 9 A.2d 88 (Del.1939)).

31 *Id.*

32 *Id.* at 1309.

33 *See id.*

34 *Air Products & Chemicals, Inc. v. McDougall,* 1999 WL 734666, at ----1 (Del.Supr.) (citations omitted).

35 *Harris v. Chrysler Corp.,* 1988 Del. LEXIS 127, at *2, 1988 WL 44783 (Del.Supr.).

36 *Betts v. Townsends, Inc.,* 765 A.2d 531 (Del.2000).

37 *Bailey v. City of Wilmington,* 766 A.2d 477, 481 (Del.2001) (citations omitted).

38 *Cassidy v. Cassidy,* 689 A.2d 1182, 1185 (Del.1997) (quoting *Foltz v. Pullman, Inc.,* 319 A.2d 38, 40 (Del.Super.Ct.1974)).

39 *Ezzes v. Ackerman,* 234 A.2d 444, 445-46 (Del.1967).

40 *See* Board Decision, 11/16/01 at 5-6.

41 *See National Union Fire Insurance Comp. of Pittsburgh v. McDougall,* 773 A.2d 388, 392 (Del.2001).

42 Super. Ct. Civ. R. 8(c) (2004). *See Feralloy Indus. v. Wilson,* 1998 WL 442937 (Del.Super.).

43 *See Cannelongo v. Fidelity Am. Small Bus. Invest. Co.,* 540 A.2d 435, 440 (Del.1988).

44 *See Feralloy Indus.,* 1998 WL 442937, at *3 (citing *Smith v. Pa. Workmen's Comp. Appeal Bed.,* 543 Pa. 295, 670 A.2d 1146 (Pa.1995)).

45 *See State v. Cephas,* 637 A.2d 20, 22-23 (Del.1994); *Johnson v. Chrysler Corp.,* 100 R.I. 175, 212 A.2d 64, 66 (Del.1965).

46 Opening Brief, App. 37 at 45.

47 *See id.* at 46, 212 A.2d 64.

48 Opening Brief, App. 25.

49 *See Chakow v. Outboard Marine Corp.,* 429 A.2d 984, 986 (Del.1981).

50 *Corp. Prop. Assocs. v. Hallwood Group Inc.,* 792 A.2d 993, 1007 (Del.Ch.2002).

51 *See id.*

52 *See id.* at 1007-08.

53 *See Clark v. Brooks,* 377 A.2d 365, 372-73 (Del.Super.Ct.1977).

54 App. 25.

55 Board Decision, 11/16/01 at 15.

56 *Delaware Express Shuttle, Inc. v. Older,* 2002 WL 31458243, at *10 (Del.Ch.) (citations omitted).

57 *See* Board Decision, 11/16/01 at 17 (*citing Baio v. Commercial Union Ins. Co.,* 410 A.2d 502, 507-08 & n. 5 (Del.1979)).

58 *See* Board Decision, 11/16/01 at 19-20.

59 The Court finds the $150,000.00 payment that McDougall made to the medical carriers to satisfy their lien does not affect this calculation. Put another way, McDougall received $367,677.66 from the medical malpractice case but of this amount $150,000.00 was paid by these carriers to hospitals, doctors, etc. relating to these same medical expenses. Therefore McDougall's net recovery from the medical malpractice litigation relating to medical expenses was $217,677.66. The subsequent award by the Board of $367,677.66 therefore also included the reimbursement of $150,000.00 and as a result McDougall has been made whole for the total amount of medical expenses incurred.

2002 WL 144273
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Delaware.

POTTS WELDING & BOILER REPAIR CO., INC., Employer Below/Appellant,
v.
Waldemar ZAKREWSKI, Employee Below/Appellee.

No. CIV.A. 01A-04-001JOH.
|
Submitted: Sept. 25, 2001.
|
Decided: Jan. 11, 2002.

Synopsis

Employer appealed from decision of the Industrial Accident Board awarding total disability benefits to **workers' compensation** claimant. The Superior Court, Herlihy, J., held that employer waived claim of entitlement to **credit** for part time wages paid to claimant for same time period for which claimant was granted total disability benefits.

Affirmed.

West Headnotes (1)

[1] **Workers' Compensation** Wages and fringe benefits generally

Employer waived claim of entitlement to **credit** for part time wages paid to **workers' compensation** claimant for same time period for which claimant was granted total disability benefits, where employer raised claim for first time on appeal.

2 Cases that cite this headnote

Appeal from a Decision of the Industrial Accident Board-Appeal-Dismissed-Decision-Affirmed.

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MEMORANDUM OPINION

HERLIHY, J.

***1** Employer Potts Welding and Boiler Repair Co., Inc., has appealed an Industrial Accident Board decision awarding total disability benefits to a former employee, Waldemar Zakrewski. Potts and Zakrewski agreed that he was injured on the job. Potts started paying total disability benefits during the time he did not work. Several months later, he returned to work, but on an part-time basis. That was as much as his physician permitted. Upon his return to work, Potts terminated all his benefits, but without seeking Board approval or obtaining a final receipt from Zakrewski.

Zakrewski later filed for partial disability benefits and ten months after returning to work was fired. After several hearings, the Board awarded the continuation of total disability benefits. It ruled Potts had not petitioned to terminate them or obtained a final receipt from Zakrewski, allowing for termination. The Board did not off-set that award with **credit** for the part-time wages Potts paid to Zakrewski during those ten months. But, Potts never asked the Board to give it that **credit**.

Potts raises that **credit** issue for the first time on appeal. Based on the record below, the issue is whether Potts waived being able to raise that issue for the first time on appeal. This Court holds that it did. The appeal is, therefore, DISMISSED and the Board's decision is AFFIRMED.

FACTUAL BACKGROUND

Zakrewski suffered a work-related injury on December 5, 1999. Because he was unable to do any work, Potts began paying him total disability benefits. His pre-injury rate of pay was $404.25 per week and Potts paid him $296.37 per week in benefits. Potts and Zakrewski did not enter into a formal agreement concerning these payments.

On February 11, 2000, Zakrewski returned to work at Potts, but on a part-time basis. That is all his doctor cleared him to do. Potts paid him for that part-time work but also ceased making disability payments. It did not get any receipt or release from Zakrewski when it did so. Nor did Potts petition the Board to review or cease benefits.

Potts petitioned the Board on July 29, 2000 to determine additional compensation due for partial disability benefits and medical expenses. Potts did not file its own petition with the Board. It terminated Zakrewski's employment on December 4, 2000.

The Board held an initial hearing on January 5, 2001 to consider Zakrewski's petition, the only matter before it. He sought partial disability benefits for the difference between his average weekly wage before the accident, $404, and his part-time wage when he returned to work of $9.52 per hour for 20 hours a week. The claim covered the period from the date that he returned to work on a part-time basis, February 11, 2000, forward. During this hearing, Zakrewski raised in argument the issue of Potts' wrongfully terminating his total disability benefits that by law should continue to be paid. Potts initially argued that a partial disability claim was never agreed upon or ever paid by Potts, and that Zakrewski refused a reasonable job offer in December 2000, therefore, forfeiting **worker's compensation** benefits.

***2** After the hearing, the Board issued an order granting in part Zakrewski's petition for additional compensation by awarding him the medical expenses he claimed. It also awarded expert witness and attorney's fees. But, the Board recognized that Zakrewski had raised a new issue, that of wrongful cessation of total disability payments, and that Potts needed an opportunity to respond. The Board said:

> Disability. Based upon the foregoing, it appears that Potts improperly stopped payments of [Zakrewski]'s total disability benefits. The relevant code section provides that:
>
> > "[c]ompensation payable to an employee, under this chapter, shall not terminate until and unless the Board enters an award ending the payment of compensation after a hearing upon review of an agreement or award, provided that no petition for review, hearing or an order by the Board shall be necessary to terminate compensation where the parties to an award or an agreement consent to the termination."
>
> 19 *Del.C.* § 2347. [Zakrewski] made this agreement in his closing statement. Perhaps because of the way the matter was pleaded, Potts did not respond to the § 2347 argument in its closing statement.
>
> The Board's Rules provide that formal pleading is not required. Rule 6(A) of the *Rules of the Industrial Accident Board of the State of Delaware* (Mar. 10, 1998). However, because of the way the matter was pleaded and because the § 2347 issue may result in a better result for [Zakrewski] than an award of partial disability benefits, the Board concludes that fuller discussion of the issue is appropriate. The Board therefore directs the parties to file briefs addressing the § 2347 issue. [1]

Following up on this directive, Potts submitted its brief February 12, 2001 and Zakrewski submitted his brief February 27, 2001. Potts, however, did not argue that to award total disability benefits would overcompensate Zakrewski, since he had already been paid part-time wages for the same period covered by the disability benefits he was seeking.

After this briefing, on March 26, 2001, the Board issued its decision which is the one now being appealed. It found that on February 11, 2000, Zakrewski returned to work part-time in compliance with his doctor's orders. When he returned to work part-time, Potts ceased paying Zakrewski total disability benefits. At the time the benefits were terminated, Potts had not received a signed receipt from Zakrewski, a forfeiture order from the Board, or filed a petition with the Board for review seeking to terminate benefits. When Potts terminated benefits, after Zakrewski returned to work part-time, Zakrewski filed a petition to determine additional compensation due seeking disability benefits to supplement his part-time employment. Potts countered the petition by arguing that the unilateral termination of benefits was due to Zakrewski forfeiting his entitlement to those benefits.

The Board determined that an agreement was reached between the employee and employer that Zakrewski was entitled to total disability benefits, and "[t]herefore, Potts cannot legally stop paying those benefits until the Board

enters an award ending the payment of compensation, the parties consent to termination of [Zakrewski]'s benefits, or Potts obtains a forfeiture order from the Board."[2] It went on to state that since it did not enter an award ending payments or order granting forfeiture, the issue before the Board was whether Zakrewski consented to the termination of total disability benefits.

***3** As to that issue, the Board referred to its own Rule 19(B), which provides that in the absence of a final receipt, compensation benefits cannot be ended except as provided in 19 *Del.C.* § 2347.[3] The pertinent portion of § 2347 provides:

> Compensation payable to an employee, under this chapter, shall not terminate until and unless the Board enters an award ending the payment of compensation after a hearing upon review of an agreement or award, provided that no petition for review, hearing or an order by the Board shall be necessary to terminate compensation where the parties to an award or an agreement consent to the termination. No petition for review shall be accepted by the Department unless it is accompanied by proof that a copy of the petition for review has been served by certified mail upon the other party to the agreement or award. Within 5 days after the filing of a petition for review, the Department shall notify each party concerned of the time, date and place scheduled for the hearing upon the petition.[4]

In short, the Board is saying its Rule 19(B) defines consent as a signed receipt. Absence such a receipt, there can only be cessation of compensation with Board approval. The Board concluded, therefore, that Potts, on February 11, 2000, had improperly ceased making total disability payments to Zakrewski and ordered Potts to immediately pay those benefits to him. It did not decide the issue of partial disability benefits that were requested at the January 5, 2001 hearing. It further stated:

> The Board finds that Potts, on February 11, 2000, improperly ceased making total disability payments to [Zakrewski] and orders Potts to immediately pay those benefits to [Zakrewski]. The Board is aware that, for a period beginning February 11, 2000, [Zakrewski] received part-time wages for his part-time work. The Board is therefore aware of a potential inequity to Potts. However, this problem was entirely created by Potts. Potts could have filed a Petition for Review or required [Zakrewski] to sign a receipt before allowing him to return to work.
>
> The foregoing decision moots [Zakrewski]'s Petition to Determine Additional Compensation Due.[5]

PARTIES'CLAIMS

Potts appealed the decision to this Court, initially raising three issues: Zakrewski's voluntary consent to termination, the Board's failure to acknowledge a **credit**, and a violation of 19 *Del .C.* § 2353(c) in that Zakrewski refused suitable work disqualifying him from further benefits. Subsequently, Potts amended its appeal, voluntarily dismissing the first and third issue.[6] Potts' remaining claim is that the Board erred in failing to acknowledge or grant a **credit** for the wages Zakrewski was paid when he returned to work part-time. It argues that Zakrewski was awarded total disability benefits from February 11, 2000 through December 4, 2000, even though he had returned to work part-time and was paid for that part-time work. Potts asserts that, at best, Zakrewski is entitled to partial disability benefits. Potts argues that this issue was not waived because it was first raised in the Board's March 26, 2001 decision.

***4** Zakrewski claims that Potts waived this argument because it failed to raise it during trial or post-trial briefing, even when alerted to the issue in the Board's first opinion. He contends he was legally entitled to total disability benefits under the **worker's compensation** statute, the Board recognized this, and found in his favor. Also, he claims that the **worker's compensation** statute permits only one type of **credit** against **worker's compensation** benefits due, and that is for third-party recovery and there was no such recovery here.

APPLICABLE STANDARD

Ordinarily, the duty of this Court on an appeal from the Board is to determine whether the Board's decision is supported by substantial evidence and free from legal error.[7] But, when the Court acts in its appellate capacity on an appeal from an administrative agency, it is limited to the record, and will not consider issues not raised before that agency.[8]

DISCUSSION

The only petition pending before the Board was Zakrewski's petition for partial disability benefits. In summation, at the initial hearing, he raised the issue of Potts' alleged wrongful termination of his total disability benefits. Specifically, he stated, "there was no consent to the termination of total disability, there was no signed final receipt, and we all know there was no hearing before the Board. Those benefits by law had to continue to be paid." [9] Potts, in its summation, did not respond to this argument nor assert there should be, in any event, a **credit** for the part-time wages it paid.

In its January 22, 2001 order, the Board recognized the issue that Potts may have improperly terminated the benefits and ordered additional briefing, stemming from Zakrewski's argument in summation:

> Based upon the foregoing, it appears that Potts improperly stopped payments of [Zakrewski]'s total disability benefits.... [Zakrewski] made this agreement in his closing statement. Perhaps because of the way the matter was pleaded, Potts did not respond to the § 2347 [employer's requirements to terminate employee compensation] argument in its closing statement.
>
> However, because of the way the matter was pleaded and because the § 2347 issue *may result in a better result for [Zakrewski] than an award of partial disability benefits,* the Board concludes that fuller discussion of the issue is appropriate. The Board therefore directs the parties to file briefs addressing the § 2347 issue. [10]

With that, both parties briefed the issue. On February 12, 2001, Potts submitted its brief and on February 27, 2001, Zakrewski submitted his brief. Potts did not raise the **credit** issue in its brief, despite Zakrewski's oral argument, and did not address it in briefing, despite the Board's order quoted above. On March 26, 2001, the Board rendered its decision ordering Potts to pay Zakrewski the total disability benefits unilaterally and improperly terminated by Potts on February 11, 2001. Potts did not ask the Board for a rehearing or reargument on the **credit** issue. Instead, it appealed the decision raising the **credit** issue for the first time.

***5** In its January order, the Board stated that it appeared that Potts improperly terminated total disability benefits, following up on Zakrewski's argument that the benefits should continue. Potts, therefore, was or should reasonably have been aware that the Board was considering awarding total disability benefits because of its improper termination. This notice is especially clear, as illustrated by the Board's statement, that the issue may entitle Zakrewski to a better award than the award of partial disability benefits that he claimed.

Potts was well aware that Zakrewski was working part-time and paid him for ten months for part-time work. Yet, it never argued to the Board that total disability benefits, without **credit**, were improper on the basis that Zakrewski would be unfairly overcompensated. Potts' policy argument, raised for the first time in this Court, of unfair or overcompensation falls on unfertile ground. As the Supreme Court has recently said, "[t]he employer may not unilaterally terminate the benefits, even if the employer acts in good faith." [11]

It is settled Delaware law that an issue is waived for appeal if it was not raised below. [12] Potts' denies it waived the **credit** issue for appeal purposes because the issue was only raised by the Board's second decision. But, that was a decision from which it never sought relief before the Board. Potts had three opportunities to raise the issue: at oral argument at the initial hearing, in its brief submitted before the second decision, and by requesting reargument on the Board's second decision. [13] Potts did none of these. This Court will not hear the **credit** issue on appeal, and the remaining issues have been voluntarily dismissed by Potts. Its argument was not presented to the appropriate tribunal, the Board; therefore, the Court is without jurisdiction to hear the issue on appeal. [14] This leaves no other issues on appeal to decide.

CONCLUSION

Based on the foregoing, the appeal of Potts Welding & Boiler Repair Co., Inc., is DISMISSED and the decision of the Industrial Accident Board of March 26, 2001 is AFFIRMED.

IF IT IS SO ORDERED.

All Citations

Not Reported in A.2d, 2002 WL 144273

Footnotes

1 Board Order (January 22, 2001) at 1-2.

2 Board Decision (March 26, 2001) at 3.

3 *Id.* at 4.

4 19 *Del.C.* § 2347.

5 Board Decision at 4-5.

6 Counsel letter to Court (November 19, 2001), Docket No. 14.

7 *General Motors Corp. v. Jarrell,* Del.Super., 493 A.2d 978 (1985).

8 *See Tatten Partners LP v. New Castle County Board of Assessment Review,* Del.Super., 642 A.2d 1251, 1262 (1993); *Wilmington Trust Co. v. Connor,* Del.Supr., 415 A.2d 773, 781 (1980).

9 Board Transcript (January 5, 2001) at 229-30.

10 Board Order (January 22, 2001) at 1-2 [Emphasis added].

11 *Blue Hen Lines, Inc. v. Turbitt,* Del.Supr., --- A.2d ---- (2001) (mem.op.) at 9.

12 *Connor,* 415 A.2d at 780.

13 If it had sought reargument and been denied it, there could be an abuse of discretion issue. But there is not. There is no argument that Potts would have been barred from seeking reargument of the second decision.

14 *O'Brien v. Unemployment Ins.App. Bd.,* Del.Super., C.A.No. 92A-11-005, Gebelein, J. (October 20, 1993).

BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

THELMA GARCIA-ESPINOZA,	)	
	)	
Employee,	)	
	)	
v.	)	Hearing No. 1491086
	)	
AMERICAN BREAD COMPANY LLC,	)	
	)	
Employer.	)	

ORDER

This matter came before the Board on April 22, 2021, on a motion by American Bread Company LLC ("Employer") seeking a credit against future benefits for an overpayment of benefits paid to Thelma Garcia-Espinoza ("Claimant").[1]

Background: The following facts are undisputed: Claimant was injured at work on September 23, 2019, when a case of soup fell onto her left hand. The injury was accepted as compensable and has led to two surgeries.

Employer, through its workers' compensation carrier ("Carrier"), entered into an Agreement as to Compensation with Claimant and began to pay total disability on September 24, 2019. The Agreement listed Claimant's average weekly wage as $1,070.05, and the compensation rate was listed as $713.36 per week.

This Agreement was terminated on December 8, 2019, when Claimant attempted to return to work. She was then placed on a new Agreement as to Compensation for a recurrence of total

[1] There had also been a motion seeking reformation of the Agreement as to Compensation concerning Claimant's average weekly wage and compensation rate. By the time of this motion, Claimant no longer opposed the reformation. It is agreed that Claimant's average weekly wage should be $515.05, with a compensation rate of $343.36 per week. The sole issue to be decided concerns whether a credit for overpayment should be awarded.

disability on December 13, 2019. The Agreement again recited her average weekly wage as $1,070.05 with a compensation rate of $713.36 per week.

During the time that these two Agreements were entered into, Claimant was unrepresented by counsel. Claimant did not become represented by counsel until March 27, 2020.

As a result of the error in the average weekly wage and compensation rate, the Carrier calculates that it has overpaid Claimant by $24,367.13.

Testimony: Janet Coster testified that she is a critical claims representative for the Carrier. She has been with the Carrier for over twenty-five years. She currently is the adjuster assigned to Claimant's case, but she was not the adjuster assigned to the matter originally.

Ms. Coster explained that the Carrier's intent is to calculate an injured worker's wages accurately. When an employee is injured, the Carrier gets information concerning the gross wages from the employer. That is then sent to the "wage team" which calculates the average weekly wage and compensation rate for the employee in accordance with the rules for the applicable jurisdiction. They then put that information into the system's Wage & Rate screen and an Agreement as to Compensation is drafted. Whatever wage/rate is inputted stays there until it is adjusted. As a result, if a second Agreement is issued, it just takes the same wage/rate information from the screen as the first Agreement.

The calculation of the wage and compensation rate is done automatically. The "wage team" puts the numbers into a spreadsheet, which then runs the calculation. In Claimant's case, there was human error in inputting the wage information (an extra number was added). As a result, the average weekly wage and compensation rate were calculated incorrectly.

Ms. Coster testified that there have been occasions when an injured worker will call to question their compensation rate (some because it seems too much; others because they think it is

too little). Claimant never called the Carrier to question her wage or rate. Ms. Coster understands that Claimant is a Spanish-speaker, but the Carrier does have translators available if a Spanish caller should call in. For example, the Carrier uses a Spanish-speaking nurse case manager for Claimant.

Ms. Coster noted that in April of 2020 they received a letter of representation from Claimant's counsel in which she did ask for wage information and other documents. These were sent to counsel a few days later by the Operations Department (which just gathers the records and sends them out). Claimant's counsel also never contacted the Carrier about Claimant's wage or compensation rate.

Ms. Coster explained that she was assigned to the file on December 14, 2020. She then reviewed the file and ran an audit of it. In the process of doing this, she discovered the problem with Claimant's average weekly wage (and, hence, the compensation rate). She sent it back to the "wage team" to recalculate and it was discovered then that they had erred in the original calculation

Analysis: In this case, there is no dispute that the average weekly wage ($1,070.05) and the compensation rate ($713.36) recited on the two Agreements as to Compensation are inaccurate. The weekly wage should be reformed to $515.05, with a compensation rate changed to $343.36 per week. There is no dispute that all current and future Agreements as to Compensation are to use the correct wage and rate. That is not the dispute in this case. The question is whether the Board should make this change *retroactive* for the two prior agreements so that Employer can claim a credit against future benefits for an overpayment based on the reformed agreements.

It has been held that, when reforming an agreement, "the Board must exercise its discretion and decide whether or not the modifications will be retroactive or prospective in effect." *Ohrt v. Kentmere Home*, Del. Super., C.A. No. 96C-01-005, Cooch, J., 1996 WL 527213 at *8 (August 9,

1996). In *Ohrt*, the claimant was injured on June 2, 1992. The injury was acknowledged and the claimant was put on an open agreement for total disability. The agreement, prepared by the employer's carrier, contained an inaccurate average weekly wage and a corresponding inaccurate compensation rate. The error was not discovered by either party until January of 1994. At that time, the employer sought reformation. *See Ohrt*, 1996 WL 527213 at *1. The Board denied reformation on the basis that it was a unilateral mistake by the carrier. The Board also observed that, because of the time that had elapsed since the total disability agreement had started, it would be inequitable to permit the employer to recover the overpaid funds retroactively. *See Ohrt*, 1996 WL 527213 at *7-*8. On appeal, the Court disagreed with the Board about a "unilateral" mistake, finding that it was a mutual mistake and that, therefore, the Board should have reformed the existing agreement so that future benefits were paid at the legally correct rate. *See Ohrt*, 1996 WL 527213 at *8. However, the Court also held that the question of whether to make the modification retroactive was committed to the sound exercise of the Board's discretion. *Id.*

The issue has arisen in a variety of circumstances over the years. In *Gant v. Phoenix Steel Corp.*, Del. Super., C.A. No. 94A-04-002, Bifferato, J., 1995 WL 562142 (August 8, 1995), a carrier began to make an overpayment in 1982. In 1993, the carrier became insolvent and the account was transferred to Delaware Insurance Guaranty Association ("DIGA") which continued to make the excessive payments. However, by July 8, 1993, DIGA discovered the error and filed a petition seeking (among other things) a credit for the overpayment. At the hearing, the claimant testified that he noticed the overpayment when it began and he had brought it to his attorney's attention. His attorney contacted the carrier twice about it, but the carrier took no action.[2] The claimant admitted that his attorney had warned him that he would eventually have to repay the

[2] As noted, this carrier subsequently became insolvent.

money. *See Gant*, 1995 WL 562142 at *1. Under those circumstances, a credit for the overpayment was granted to DIGA.

In *Hall v. Wilmington Housing Authority*, Del. IAB, Hearing No. 1302219 (April 24, 2009)(ORDER), the employer managed to understate the claimant's average weekly wage, but still ended up paying too high of a compensation rate. While the agreement was reformed to state the correct wage and compensation rate, the Board declined to make the change retroactive (and thus declined a credit) on the basis that the employer was primarily responsible for the error and the claimant's mistake was only in assuming that the employer had checked the accuracy of its calculations. *See Hall*, at 4.

In *Dale v. Tire Sales & Service*, Del. IAB, Hearing No. 1244445 (March 23, 2010)(ORDER), the claimant, who was represented by counsel, entered into three Agreements as to Compensation from November 2004 to April 2008. Each of these agreements recited a weekly wage of $658.10 and a compensation rate of $438.74. In 2010, the Board found that the claimant's average weekly wage should have been $799.69 and the compensation rate for total disability would be capped at the applicable legal maximum rate of $506.81 per week. Although it found that the claimant had been underpaid under all three agreements, the Board declined to make the reformation retroactive, noting that the claimant and his original counsel were at fault for not checking the rate at any time during the period in question and the claimant's delay in challenging the rate (until a time after the employer's ownership had changed) made the issue harder to research because pertinent evidence was no longer available. For these reasons, the Board, in its discretion, decided that the claimant should bear the burden for the past underpayment. *See Dale*, at 8-9.

In *Cruz v. Star Building Services, Inc.*, Del. IAB, Hearing No. 1318869 (July 19, 2011)(ORDER), the claimant, beginning in 2008, was paid total disability at the rate of $267.32

per week, based on an average weekly wage of $400.97. In 2009, following a hearing, the Board terminated total disability and awarded partial disability benefits at the rate of $100.31 per week based on a loss of earning capacity compared to the average weekly wage of $400.97. After the Board's decision, the employer then moved for reargument alleging that the average weekly wage was wrong. The Board, in December of 2009, denied the reargument, noting that that was not an issue raised at the termination hearing, and directing the employer to request an evidentiary hearing on the issue at which evidence could be presented. Instead of doing this, the employer waited until October 27, 2010, to file another termination petition and, in connection with this, asked for reformation of the average weekly wage and compensation rate. *See Cruz*, at 2. The Board eventually found that the claimant's true average weekly wage was $183.17, which (because it was below the applicable minimum rate) was also her compensation rate. *See Cruz*, at 12. In deciding whether to make the reformation retroactive and award a credit, the Board observed that it was "hard to imagine" that the claimant did not notice that she was being paid more in total disability than she would have received if she continued working. As such, she bore some fault for not recognizing the overpayment, although the Board also accepted that the claimant likely did not know how workers' compensation benefits were to be calculated. On the other hand, the employer did not check or challenge the rate until after a full termination hearing and then, when told to file an evidentiary hearing on the subject, waited about a year before seeking to have the agreement reformed. Weighing these factors, the Board denied a credit, finding that the employer had rested on its rights too long. *See Cruz*, at 13-14.

In *Simms v. Luxe Communications*, Del. IAB, Hearing No. 1381043 (October 24, 2013)(ORDER), the claimant was compensated at the rate of $622.05 per week when he should have only received $294.95 per week. The total overpayment came to $17,336.30. In this case,

though, the claimant was also co-owner (with his wife) of the employer. The incorrect wage information that the carrier relied on came from the claimant himself. The Board awarded the full credit to the carrier, stating that, under the circumstances, the claimant should not be permitted to benefit from the errors that were made. *See Simms*, at 11-12.

Thus, it is clear that the exercise of the Board's discretion as to whether to make a reformation retroactive is highly factually dependent. In the present case, as in *Cruz*, Claimant ended up being paid more for total disability than she would have earned if she was uninjured. On the other hand, Claimant is unsophisticated and there is no reason to think that she would know how workers' compensation benefits are calculated. Unlike the claimant in *Dale*, she was unrepresented by counsel when the Agreements as to Compensation were entered into. By contrast, the Carrier is a sophisticated professional organization who does such calculations as a regular part of its business. It issued not one, but two Agreements as to Compensation to Claimant with the incorrect information. Unlike the claimant in *Simms*, the fact that that information was incorrect was no fault of Claimant.

Having said this, it is also true that Claimant obtained counsel on March 27, 2020, and, by early May of 2020, Claimant's counsel had the wage records for Claimant. Counsel also did not notice the overpayment despite having the agreements and the pertinent wage records. Still, in fairness to counsel, there was no active litigation going on in the case that would necessarily cause her to recalculate the wage or compensation rate from the documents. The first petition filed in this matter was Employer's Petition for Review filed on January 5, 2021.[3]

[3] It should be noted that total disability benefits have been paid by the Workers' Compensation Fund since the filing of the petition, but they have been paid at the correct compensation rate of $343.36 per week, based on the correct average weekly wage of $515.05.

The Board also takes into account that, unlike the employer in *Cruz*, Employer/Carrier here did not delay on bringing the reformation issue to the Board's attention once the error was found. It is also worth noting that Claimant has received the benefit of these overpayments such that she is in a better financial position now than if the wage and compensation rate were calculated correctly. Granting a credit would not, in that sense, be causing her any financial harm.

Taking all of this into consideration, the Board makes the following observations: to grant a credit in the full amount of the overpayment would be inequitable because it would completely absolve Carrier of all responsibility for an error that was totally self-created. By the same token, though, to fully deny a credit would be inequitable because the extent of the overpayment (receiving more in workers' compensation than Claimant would have got if she were uninjured) is difficult to ignore. While Claimant may not have recognized the significance of the overpayment early on before she had counsel, it is more difficult to justify her continued ignorance of a significant overpayment once she had counsel and counsel received the pertinent records. Dividing the overpayment fifty-fifty between the parties would also be inequitable because that would suggest that both parties were equally at fault throughout. Clearly, though, the primary fault rests with Carrier.

Weighing all these factors, in the exercise of its discretion, the Board apportions the fault 75% to Carrier and 25% to Claimant. The total overpayment was $24,367.13. Carrier is entitled to a credit against future benefits in 25% of this amount, or $6,091.78. In light of her low income, Claimant requests that this credit only be applied against future permanent impairment and disfigurement benefits and the Board agrees that that is appropriate.

IT IS SO ORDERED this 21st day of May, 2021.

INDUSTRIAL ACCIDENT BOARD

Idel M. Wilson/cw
IDEL M. WILSON

Vincent D'Anna/cw
VINCENT D'ANNA

I, Christopher F. Baum, Hearing Officer, hereby certify that the foregoing is a true and correct decision of the Industrial Accident Board.

CMW
OWC Staff

Mailed Date: 5/24/21

Tara E. Bustard, Esquire, for Claimant
Wade A. Adams, III, Esquire, for Employer
Kevin R. Slattery, Esquire, for the Workers' Compensation Fund

2019 WL 2515533
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Delaware.

The ROCK PILE, Employer/Appellant,

v.

John RISCHITELLI, Claimant/Appellee. [1]

C.A. No. N18A-10-005 RRC

|

Submitted: May 6, 2019

|

Decided: June 14, 2019

On Appeal from the Industrial Accident Board. **AFFIRMED.**

Attorneys and Law Firms

Nicholas E. Bittner, Esquire, and William D. Rinner, Esquire, Heckler & Fabrizio, Wilmington, Delaware, Attorneys for Appellant The Rock Pile.

Walt F. Schmittinger, Esquire, Schmittinger & Rodriquez, P.A., Dover, Delaware, Attorney for Appellee Renee Rischitelli.

MEMORANDUM OPINION

COOCH, R.J.

I. INTRODUCTION

This is The Rock Pile's ("Employer") [2] appeal from a September 27, 2018, decision of the Industrial Accident Board ("Board") which held that Employer was not entitled to apply the amount of John Rischitelli's Underinsured Motorist ("UIM") recovery as a **credit** against future **workers' compensation** benefits paid to Mr. Rischitelli's surviving spouse Renee Rischitelli. Mr. Rischitelli was killed in a motor vehicle accident with a third-party tortfeasor. The UIM coverage became available once Renee Rischitelli had exhausted the third-party tortfeasor's policy limits. Employer argues that the Board erred as a matter of law by denying Employer a **credit** for UIM benefits, that New Jersey law should apply, and that the Board's decision is not supported by substantial evidence.

After review of the parties' contentions and the record, the Court concludes that the Board's decision was supported by substantial evidence and that the Board otherwise committed no error of law. Accordingly, the decision of the Board is affirmed.

II. FACTS AND PROCEDURAL HISTORY [3]

John Rischitelli, the Claimant-Below/Appellee, died in an automobile accident in New Jersey on August 7, 2014, while driving a tractor trailer owned and insured by Employer. In prior proceedings before the IAB, the parties litigated the compensability of a claim brought by Mr. Rischitelli's surviving spouse, Renee Rischitelli, for **workers' compensation** death benefits pursuant to 19 *Del. C.* § 2330. The Industrial Accident Board issued a decision dated June 12, 2017, holding that Mr. Rischitelli was an employee at the time of the accident, and Mrs. Rischitelli was owed death benefits. Mrs. Rischitelli has been receiving ongoing death benefits at the rate of $333.35 per week since that time. Mrs. Rischitelli also filed a lawsuit in New Jersey against the third-party tortfeasor in relation to the motor vehicle accident that killed Mr. Rischitelli. That litigation settled in October 2017 with a policy limits recovery from the tortfeasor's insurance coverage in the amount of $15,000.00.

At the time of the settlement of the New Jersey tort claim, the Employer had paid Mrs. Rischitelli $55,382.77 in benefits and was continuing to pay the ongoing death benefits. Mrs. Rischitelli pursued an underinsured motorist ("UIM") claim against the carrier insuring the vehicle Mr. Rischitelli was operating at the time of his death. The UIM policy had been paid for by Employer. Mrs. Rischitelli recovered the UIM policy limit of $300,000. Mrs. Rischitelli conceded that Employer was entitled to proportionate reimbursement of death benefits from the third-party recovery of $15,000.00 in the amount of $9,474.74 pursuant to 19 *Del. C.* § 2363(e). Employer later sought a **credit** against Mrs. Rischitelli's UIM recovery of $300,000.00 to apply to future death benefits, the issue now before this Court.

***2** Employer argued to the Board that when an employer has paid for a UIM policy the employer is entitled to a **credit**/setoff in the amount of the UIM recovery against any future **worker's compensation** payouts. Claimant contended that

19 *Del. C.* § 2363(e) states that there can be no **workers' compensation** lien against UIM policies, and the statute had been specifically amended in 1993 to exclude UIM recoveries from the lien provisions of § 2363. Claimant also contended that the Employer's insurance carrier and counsel waived any interest in the UIM policy, on the basis that the Employer's counsel permitted counsel for Claimant to escrow the $15,000.00 liability insurance payout alone.

The Board issued its written decision on September 27, 2018, in which it agreed with Claimant and thus denied Employer any **credit** or lien in connection with the UIM recovery. The Board found that the General Assembly made it clear through amendments to Title 19, Chapter 23 that UIM benefits are to be treated differently from other types of non-**workers' compensation** recoveries by injured workers. The Board noted that "the Supreme Court has recognized [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.' "[4] The Board further rejected Employer's attempt at distinguishing a reimbursement from a **credit** under 19 *Del. C.* § 2363(e), stating that "the difference is only one of timing[,]"[5] and that Employer's interpretation "conflicts with the clear intent of the General Assembly, as shown by its statutory amendments specifically designed to permit an injured worker to recover UIM benefits from an employer's policy."[6] This appeal followed.

III. THE PARTIES' CONTENTIONS[7]

A. Employer's Contentions

First, Employer contends that the Board erred as a matter of law in denying Employer a **credit**/offset from Mrs. Rischitelli's recovery under the UIM policy. Employer argues that the Board's decision relied upon an allegedly erroneous conclusion that 19 *Del. C.* § 2363 does not allow employers to derive any benefit from UIM policies purchased by employers themselves. Employer argues that a **credit**/offset is applicable when the source of the secondary benefits—the UIM Policy—is solely funded by the Employer, allegedly resulting in the Employer funding a double recovery which Employer contends is improper. Employer maintains that a **credit** is permissible even when a reimbursement is not available.

Second, Employer contends that the Board erred in failing to address the alternative arguments/grounds for relief set forth by Employer. Specifically, Employer argues that New Jersey law should apply, and that New Jersey law allows a **credit**/setoff from the Claimant's UIM recovery. Employer alleged that Claimant opened the door to the application of New Jersey law by referencing same in settlement discussions in connection with the lien calculation on the recovery from the tortfeasor. Employer contended that this justified the Employer's reliance upon New Jersey law as to the UIM recovery. Employer maintains that the Board's failure to address this additional ground for relief requires a remand to allow the Board to address the issue directly, assuming that this Court does not find the **credit** to be available under Delaware law. Lastly, Employer contends that the Board's decision is not supported by substantial evidence.

B. Claimant's Contentions

***3** Claimant contends that the Board's decision is properly grounded in the statute and case law, in particular Delaware Supreme Court's 2013 decision in *Simendinger v. National Union Fire Ins. Co.*[8] Claimant argues that *Simendinger* establishes that a **workers' compensation** carrier's entitlement to a **credit** or a reimbursement is limited to recovery against the third-party tortfeasor's liability insurer, and that a carrier may not assert a lien of any kind against UIM benefits. Claimant contends that there is no distinction between a reimbursement under 19 *Del. C.* § 2363(e) and a **credit**. Claimant contends that both a reimbursement and a **credit** emanate from the same statutory language and both constitute a lien, the only difference being one of timing. Claimant asserts that a reimbursement is for benefits previously paid by the compensation carrier, and a **credit** is for benefits not yet paid by the compensation carrier. Claimant further contends that Delaware law controls this Delaware **workers' compensation** claim between Delaware parties, brought by the carrier in Delaware pursuant to a Delaware insurance policy that was formed under Delaware law, and where the claimants reside in Delaware.

IV. STANDARD OF REVIEW

In reviewing a decision of the Board, "[t]he function [of this] Court is limited to determining whether substantial evidence supports the Board's decision regarding findings of fact and conclusions of law and is free from legal error."[9] Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[10] This Court does not sit as trier of fact, nor should this

Court replace its judgment for that of the Board.[11] "The Court, when factual determinations are at issue, shall take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency has acted."[12] Further, where the issues raised involve only questions of law, the Court's review is *de novo.*[13] If the Board's decision is free from legal error and supported by substantial evidence, this Court must sustain the Board's decision even if this Court might have decided the case differently if it had come before it in the first instance.[14] "The burden of persuasion is on the party seeking to overturn a decision of the Board to show that the decision was arbitrary and unreasonable."[15] In this process, "the Court will consider the record in the light most favorable to the prevailing party below."[16]

V. DISCUSSION

A. Delaware law applies.

The balance of factors here weighs heavily in favor of the application of Delaware law. The balance is so skewed that it would be a purely academic exercise to remand this case for the Board to restate the analysis. When undertaking a choice of law analysis, Delaware courts follow the "most significant relationship" test as articulated in the Restatement (Second) of Conflict of Laws. Section 145(1) of the Restatement provides that the law of the state with the most significant relationship to the occurrence and the parties under the principles stated in Restatement § 6 is the governing law.[17] Section 6(2) provides that the following seven factors are relevant in conducting a choice of law inquiry:

> (a) the needs of the interstate and international systems,
>
> (b) the relevant policies of the forum,
>
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
>
> ***4** (d) the protection of justified expectations,
>
> (e) the basic policies underlying the particular field of law,
>
> (f) certainty, predictability and uniformity of result, and
>
> (g) ease in the determination and application of the law to be applied.[18]

Section 145(2) also instructs that when applying the § 6 factors, courts should take into account the following four contacts: "(a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered."[19] Finally, § 146 provides that the law of the state where the injury occurred generally applies "unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties."[20]

In this case, Delaware has such a significant relationship to, and interest in, the parties and the issues that it outweighs the considerations of New Jersey's interests in the matter. Mrs. Rischitelli is a Delaware resident, and Employer is a Delaware company that purchased insurance to cover its Delaware employees, including Mr. Rischitelli. The insurance policy was issued in Delaware under Delaware law, and the parties' relationship is one of employment primarily within Delaware.[21] The only connections to New Jersey are the site of the accident and the third-party tortfeasor liability action that has been resolved. Furthermore, the proper amount of the proportionate reimbursement from the third-party recovery was determined under Delaware law. Given the limited connection to New Jersey at the current stage of this case, and the more numerous connections to Delaware, Delaware law should apply. Remand with an instruction for the Board to reconduct this simple analysis would merely be an academic exercise because the Board ultimately and correctly applied Delaware law.

B. The Board correctly determined that 19 Del. C. § 2363(e) prohibits an employer from seeking a credit against UIM benefits.

The Board correctly determined that Delaware law prohibits Employer from asserting a **credit** against UIM benefits. Title 19 Section 2363 sets forth the law regarding the right of an employer and an insurer to reimbursement from any recovery an injured employee receives from a third-party tortfeasor. The general intent of § 2363(e) is to prevent a "double recovery" by an employee for any one injury.[22] Section 2363(e) provides:

> In an action to enforce the liability of a third party, the plaintiff may recover any amount which the employee or the employee's dependents or personal representative would be entitled to recover in an action in tort. Any recovery against the third party for damages resulting from personal injuries or death only, after deducting expenses of recovery, *shall first reimburse the employer or its* ***workers' compensation*** *insurance carrier for any amounts paid or payable* under the **Workers' Compensation** Act to date of recovery[.] [23]

***5** After the employer has been reimbursed for any amounts previously paid to the injured employee, the remainder of the injured employee's third-party recovery is then "treated as an advance payment by the employer on account of any future payments of compensation benefits." [24] The Board determined that any advance payment on account of future payments amounted to "a **credit** for the employer against future **worker's compensation** benefits." [25]

Employer contends that the general rule of § 2363(e) should apply to Mrs. Rischitelli's UIM recovery, and that the funds should be treated as a **credit**, or, in the language of the statute, as an "advance" payment. This argument is unavailing for several reasons. First and foremost, the plain language of § 2363(e) contradicts Employer's assertions. The right to reimbursement "shall be had *only* from the third-party insurer and shall be limited to the maximum amounts of the third party's liability insurance coverage available for the injured party[.]" [26] Any attempt by Employer to seek reimbursement of benefits already paid from UIM benefits is therefore impermissible. Contrary to Employer's arguments, this is true even though Employer alone purchased the UIM coverage.

In *Adams v. Delmarva Power and Light Co.*, the Delaware Supreme Court held that an employer is not permitted to offset **workers' compensation** benefits when an employee receives additional benefits paid by an insurance policy purchased by the employee. [27] In *Simendinger v. National Union Fire Insurance Co.,* the Delaware Supreme Court extended the *Adams* holding to apply to UIM benefits purchased solely by the employer. The *Simendinger* Court stated that, prior to 1993, § 2363(e) provided a right of reimbursement from UIM benefits received by an employee if the policy was purchased solely by the employer. However, in 1993 the General Assembly amended § 2363(e). Applying the language of 1993 Amendment, the *Simendinger* Court explicitly held that "the General Assembly has eliminated the ability of an employer's workmen's compensation carrier to assert a priority lien against an injured employee's right to payment pursuant to the employer's uninsured motorist coverage." [28] The *Simendinger* Court explained that § 2363(e) did not distinguish between UIM coverage purchased by an employee versus UIM coverage solely paid for by the employer. [29] As such, an employer cannot assert a lien against any UIM policy for reimbursement.

Employer argues that it is not seeking a lien or reimbursement, which § 2363 and *Simendinger* explicitly disallow as explained above. Instead, Employer argues it merely seeks a **credit** which, Employer contends, *Simendinger* did not address and is thus implicitly permitted. Employer argues that a **credit** is wholly different from a reimbursement. Employer's contention is merely a distinction without a difference, and if adopted would circumvent the General Assembly's will by preventing Claimant from recovering both UIM payments and **workers' compensation** payments together. A reimbursement applies to **workers' compensation** benefits already received, whereas a **credit** applies to benefits that will be received. Continuing logically, a lien against past benefits is a reimbursement, whereas a lien against future benefits is a **credit**. The difference is merely a matter of timing. *Simendinger* held that there can be no lien against UIM benefits. *Simendinger* explicitly prohibits Employer from recouping **workers' compensation** benefits already paid with a lien against UIM benefits. To allow Employer to recoup **workers' compensation** benefits that will be paid in the future with a lien/**credit** against UIM benefits would be an "unreasonable" consequence. [30]

***6** Employer is correct that Delaware law generally disfavors double recovery in personal injury scenarios. [31] However, the General Assembly has made it clear that UTM benefits are an exception to that general rule. This exception is not just evident within § 2363(e) as was described in *Simendinger.* In response to the Superior Court's decision

in *Simpson v. State,* in which an injured worker could not avail herself of an employer's UIM policy because of the exclusivity provision contained in 19 *Del. C.* § 2304,[32] the General Assembly quickly amended § 2304 to specifically exempt UIM policies from the exclusivity provision.[33] The General Assembly took action to ensure that UIM benefits would be available to injured employees in conjunction with **workers' compensation** benefits. However, Employer argues that the § 2304 legislative history reveals that the General Assembly somehow intended the opposite throughout the whole of Title 19. This argument is unpersuasive.

Employer's assertion that the non-exclusivity amendment to § 2304 was only meant for "state employees[,]" based on the stated purpose within the legislative history of the bill, is contradicted by the fact that the applicable version of the statute applies to "every employer and employee[.]"[34] Section 2304 makes no distinction between state employees and non-state employees. Second, Employer's argument that "there is nothing within the legislative history that suggests an interest in preventing employers from pursing **credits** against UIM benefits" is belied by the existence of § 2363(e). Section 2363(e) does more than simply suggest that employers may not seek a **credit** against UIM. Section 2363(e) establishes that an employer may not seek a lien against UIM benefits, especially given the holding in *Simendinger,* and a **credit** is merely a lien against future benefits.

Employer in effect asks this Court to usurp the plain language of the statutes and precedential case law because the General Assembly at one point considered "concerns ... about the [then-proposed amendment to § 2304] language in term of issues with opening **worker's compensation** exclusivity and allowing employees to collect duplicate benefits for one injury."[35] Employer seeks this Court to prevent recovery in the instant case because the General Assembly previously had mere concerns about "duplicate benefits" (in a separate statute than the one truly at issue in this case).[36] This ignores the fact that despite these concerns the General Assembly enacted § 2304 with plain language that permits recovery of both **workers' compensation** benefits and UIM benefits together. The plain language of § 2363(e) is also clear. Reimbursement and advance payment are not permitted against UIM benefits.

VI. CONCLUSION

For the foregoing reasons, the decision of the Industrial Accident Board is **AFFIRMED.**

IT IS SO ORDERED.

All Citations

Not Reported in Atl. Rptr., 2019 WL 2515533

Footnotes

1 John Rischitelli died on August 7, 2014, in an automobile accident. Renee Rischitelli, as his surviving spouse, brought the underlying action. Although the IAB kept John Rischitelli's name in the case caption, Renee Rischitelli is actual the Claimant/Appellee. The Court will use the IAB's case caption for consistency.

2 The exact name of the business entity is unclear from the record.

3 The facts and procedural history are derived from the parties' joint stipulation of facts. *See* Parties' Stipulated Statement of Facts and Parties' Contentions at 1–4, *The Rock Pile v. Rischitelli*, N18A-10-005 RRC, D.I. 16 (May 6, 2019).

4 Board Decision at 6, *Rischitelli v. The Rock Pile,* IAB Hearing No. 1444274 (Sept. 27, 2018) (citing *Simendinger,* 74 A.3d at 610).

5 *Id.*

6 *Id.* at 7.

7 The Parties' Contentions are derived from the parties' joint stipulation. *See* Parties' Stipulated Statement of Facts and Parties' Contentions, at 5-6.

8 *Simendinger v. National Union Fire Ins. Co.,* 74 A.3d 609 (Del. 2013).

9 *Holowka v. New Castle Cty. Bd. of Adjustment,* 2003 WL 21001026, at *3 (Del. Super. Ct. Apr. 15, 2003) (citing 29 *Del. C.* § 10142).

10 *Forrey v. Sussex Cty. Bd. of Adjustment, 20*17 WL 2480754, at *3 (Del. Super. Ct. June 7, 2017).

11 *Holowka,* 2003 WL 21001026, at *4.

12 29 *Del. C.* § 10142(d).

13 *See Kelley v. Purdue Farms,* 123 A.3d 150, 153 (Del. Super. Ct. 2015).

14 *Id.*

15 *Forrey,* 2017 WL 2480754, at *3 (quoting *Mellow v. Bd. of Adjustment of New Castle Cty.,* 565 A.2d 947, 955 (Del. Super. Ct. 1988)).

16 *Holowka,* 2003 WL 21001026, at *4 (quoting *Gen. Motors Corp. v. Guy,* 1991 WL 190491, at *3 (Del. Super. Ct. Aug. 16, 1991)) (internal brackets omitted).

17 Restatement (Second) of Conflict of Laws § 145(1) (1971).

18 *Id.* at § 6(2).

19 *Id.* at § 145(2).

20 *Id.* at § 146.

21 *See* Tr. of Evidentiary Hearing at 19, Appellant's Opening Br. Ex. A.

22 *Moore v. General Foods*, 459 A.2d 126, 127 (Del. 1983); *see Duphily v. Delaware Electric Cooperative, Inc.* 662 A.2d 821, 834 (Del. 1995) (“[T]he law prevents double recovery by the employee and permits the employer or its insurer to recoup its compensation payments.”).

23 19 *Del. C.* § 2363(e) (emphasis added).

24 *Id.*

25 Board's Decision at 3, *John Rischitelli v. The Rock Pile,* IAB Hearing No. 1444274 (Sept. 27, 2018).

26 19 *Del. C.* § 2363(e) (emphasis added).

27 *See Adams v. Delmaiwa Power & Light Co.,* 575 A.2d 1103, 1107 (Del. 1990).

28 *Simendinger,* 74 A.3d at 610 (quoting *Hurst v. Nationwide Mut. Ins. Co.,* 652 A.2d 10, n.10 (Del. 1995)).

29 *Id.* at 612.

30 *Coastal Barge Corp. v. Coastal Zone Industrial Control Bd.,* 492 A.2d 1242, 1246 (Del. 1985) (“Ambiguity may also arise from the fact that giving a literal interpretation to words of the statute would lead to such

unreasonable or absurd consequences as to compel a conviction that they could not have been intended by the legislature."); *see* *Keeler v. Harford Mutual Ins. Co.,* 672 A.2d 1012, 1014 (Del. 1996) (citing *Cannon v. Container Corp. of Am.,* 282 A.2d 614, 616 (Del. 1971)) (referencing the "distribution of any balance to the employee, to be **credited** against any future benefits[.]").

31 *See* Appellant's Opening Br. at 11.

32 *See* *Simpson v. State,* 2016 WL 425010, at *4 (Del. Super. Ct. Jan. 28, 2016) (finding that the phrase "exclusion of all rights and remedies" in 19 *Del. C.* § 2304 prohibited the plaintiff from gaining access to her employer's UM/UIM policy).

33 *See* 19 *Del. C.* § 2034 (Compensation as exclusive remedy) ("... except as to uninsured motorist benefits, underinsured motorist benefits, and personal injury protection benefits").

34 19 *Del C.* § 2304 ("every employer and employee, adult and minor, shall be bound by this chapter").

35 Appellee's Answ. Br. at 15.

36 *Id.*

123 A.3d 150
Superior Court of Delaware,
IN AND FOR KENT COUNTY.

Lisa KELLEY, Claimant Below–Appellant,
v.
PERDUE FARMS, Employer Below–Appellee.

C.A. No. K15A–02–001 WLW
|
Submitted: July 1, 2015
|
Decided: October 8, 2015

Synopsis

Background: Workers' compensation claimant appealed decision of Industrial Accident Board (IAB) that granted employer's request for offset representing 50% of short term disability payments made to claimant.

[Holding:] The Superior Court, Kent County, Witham, R.J., held that as a matter of first impression, employer was entitled to offset workers' compensation benefits by 50% of short term disability benefits that had been paid to claimant under disability insurance policy.

Affirmed.

West Headnotes (24)

[1] Workers' Compensation ⚷ In general; questions of law or fact

Workers' Compensation ⚷ Substantial evidence

Superior Court reviews an Industrial Accident Board (IAB) decision in a workers' compensation proceeding for legal errors and to determine whether the decision is supported by substantial evidence.

1 Case that cites this headnote

[2] Workers' Compensation ⚷ In general; questions of law or fact

Where the issue raised on appeal from a decision of the Industrial Accident Board (IAB) in a workers' compensation proceeding involves only a question of proper application of the law, the Superior Court's review is de novo.

[3] Workers' Compensation ⚷ Discretion

Absent an error of law, the standard of review for a decision of the Industrial Accident Board (IAB) in a workers' compensation proceeding is abuse of discretion.

[4] Workers' Compensation ⚷ Substantial evidence

Where the issue raised on appeal from a decision of the Industrial Accident Board (IAB) in a workers' compensation proceeding involves abuse of discretion, the reviewing court will determine whether substantial evidence exists to support the IAB's findings of fact and conclusions of law.

[5] Workers' Compensation ⚷ Weight of evidence and credibility of witnesses

Workers' Compensation ⚷ Rendering final or independent judgment

Superior Court does not weigh the evidence, determine questions of credibility, or make its own factual findings when reviewing a decision of the Industrial Accident Board (IAB) in a workers' compensation proceeding.

11 Cases that cite this headnote

[6] Workers' Compensation ⚷ Discretion

Reviewing court will find that the Industrial Accident Board (IAB) has abused its discretion in a workers' compensation proceeding only when the IAB's decision has exceeded the bounds of reason in view of the circumstances.

[7] **Workers' Compensation** 🔑 Deductions and Offsets

Employer is entitled to an offset of **workers' compensation** benefits when the claimant has received payment from an employer-provided insurance policy or benefits program.

1 Case that cites this headnote

[8] **Workers' Compensation** 🔑 Deductions and Offsets

Workers' compensation claimant cannot secure double recovery for a single loss where both sources of recovery emanate from the employer.

1 Case that cites this headnote

[9] **Workers' Compensation** 🔑 Payments from other sources

Employer is not entitled to an offset of **workers' compensation** benefits when the claimant has received payment from a private insurance policy that has been purchased by the claimant.

[10] **Workers' Compensation** 🔑 Payments from other sources

Setoffs regarding **workers' compensation** benefits are prohibited if the second type of benefits arise from a source which exists by reason of the employee's payment of separate consideration; in other words, if the claimant has paid consideration for recovery from a collateral source, then double recovery should be allowed.

[11] **Workers' Compensation** 🔑 Purpose of legislation

The twin purposes of the **workers' compensation** statute are to provide a scheme for assured compensation for work-related injuries without regard to fault and to relieve employers and employees of the expenses and uncertainties of civil litigation. 19 Del. Code. § 2301 et seq.

2 Cases that cite this headnote

[12] **Workers' Compensation** 🔑 Payments from other sources

Although a **workers' compensation** claimant is required to accept compensation under the **workers' compensation** statute as an exclusive remedy against his employer, public policy does not prohibit a risk-averse claimant from contracting for additional recovery. 19 Del. Code. § 2301 et seq.

1 Case that cites this headnote

[13] **Workers' Compensation** 🔑 Payments from other sources

When a **workers' compensation** claimant has contracted for an additional recovery from a collateral source, the collateral source doctrine will allow for a double recovery.

[14] **Damages** 🔑 Matter of mitigation; collateral source rule in general

Collateral-source rule is designed to strike a balance between two competing principles of tort law: (1) a plaintiff is entitled to compensation sufficient to make him whole, but no more, and (2) a defendant is liable for all damages that proximately result from his wrong.

More cases on this issue

[15] **Damages** 🔑 Matter of mitigation; collateral source rule in general

Collateral source doctrine is predicated upon the theory that a tortfeasor has no interest in, and therefore no right to benefit from, monies received by the injured person from sources unconnected with the defendant.

More cases on this issue

[16] **Damages** 🔑 Nature and theory of compensation

Damages Matter of mitigation; collateral source rule in general

Extent to which double recovery should be allowed under the collateral source doctrine depends upon the contractual expectations that underlie the collateral source payment.

More cases on this issue

[17] **Insurance** **Credits**, Deductions, and Offsets

Even in a scenario involving no-fault insurance, an insured may receive a double recovery when he has contracted and given consideration for coverage through a collateral source.

[18] **Workers' Compensation** Disability insurance benefits

Employer was entitled to offset **workers' compensation** benefits by 50% of short term disability benefits that had been paid to claimant under disability insurance policy, where policy had been jointly purchased by employer and claimant, and employer and claimant had each paid 50% of the premiums.

[19] **Statutes** Common or civil law

General Assembly is presumed to know the effect of the common law on its statutes.

[20] **Statutes** Common or Civil Law

General Assembly's failure to amend a well established common law rule must be taken as the General Assembly's intent to retain that rule.

[21] **Common Law** Application and operation

Where the General Assembly has not defined a right, remedy, or obligation, courts should apply the common law.

[22] **Constitutional Law** Nature and scope in general

Responsibility of amending or repealing a law that is questioned as unjust lies with the General Assembly.

[23] **Constitutional Law** Making, Interpretation, and Application of Statutes

A judge's personal predilections as to what the law should be has no place in the interpretation of laws, and judges must take the law as they find it.

[24] **Constitutional Law** Making, Interpretation, and Application of Statutes

It is the court's responsibility to interpret existing laws, and the execution of this responsibility should not be misconstrued as legislating.

***152** Upon an Appeal from the Decision of the Industrial Accident Board. *AFFIRMED.*

Attorneys and Law Firms

Craig T. Eliassen, Esquire of Schmittinger & Rodriguez, P.A., Dover, Delaware; attorney for the Appellant.

Anthony M. Frabizzio, Esquire and John J. Ellis, Esquire of Heckler & Frabizzio, Wilmington, Delaware; attorney for the Appellee.

OPINION

WITHAM, R.J.

Before the Court is Appellant/Claimant Lisa Kelley's ("Kelley") appeal from a decision of the Industrial Accident Board ("IAB" or "Board") granting Appellee/employer Perdue Farm's ("Perdue") request for an offset representing fifty percent of short term disability payments made to the Claimant. The issue before the Court is whether an employer is entitled to an offset of **workers' compensation** benefits when an employee has received benefits from a short term disability policy for which the employer and the employee have each paid fifty percent of the policy premium. For the reasons set forth below, the decision of the Board is affirmed.

BACKGROUND

Perdue acknowledged that Kelley suffered from right wrist tendonitis caused by repetitive work duties. The injury manifested on April 30, 2014. Kelley earned $422.29 per week prior to the injury, which is equal to a compensable rate of $281.54 per week. The total disability period encompassed ninety days from May 6, 2014 through August 3, 2014. At the time of the injury, Perdue and Kelley each paid one half of the premium for a short term disability insurance policy. Under this policy, Kelley was paid short term disability benefits of $2,163.71 during the period of disability.

Kelley was subsequently awarded temporary total disability benefits under Perdue's **workers' compensation** policy. In December 2014, Perdue filed a request with the IAB for an offset equal to 50 percent of the short term disability payments made under the short term disability policy. After a January 2015 hearing, the IAB issued an order granting the offset. In February 2015, Kelley filed this appeal of the Board's order.

STANDARD OF REVIEW

[1] [2] [3] [4] [5] [6] We review an Industrial Accident Board decision for legal errors and to determine whether the decision is supported by substantial evidence.[1] Where ***153** the issue raised involves only a question of proper application of the law, our review is *de novo.*[2] "Absent an error of law, the standard of review for a Board's decision is abuse of discretion."[3] Where the issue raised involves abuse of discretion, we will determine "whether substantial evidence exists to support the Board's findings of fact and conclusions of law."[4] Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion.[5] This Court does not weigh the evidence, determine questions of credibility or make its own factual findings,[6] and will find "the Board has abused its discretion only when its decision has 'exceeded the bounds of reason in view of the circumstances.' "[7]

DISCUSSION

[7] [8] [9] [10] An employer is entitled to an offset of **workers' compensation** benefits when the claimant has received payment from an employer provided insurance policy or benefits program.[8] Stated differently, "an employee cannot secure double recovery for a single loss where both sources of recovery emanate from the employer."[9] Conversely, an employer is not entitled to an offset of **workers' compensation** benefits when the claimant has received payment from a private insurance policy that has been purchased by the claimant.[10] "Setoffs are prohibited if the second type of benefits 'arise from a source which exists by reason of the employee's payment of separate consideration.' "[11] In other words, "if the insured has paid consideration for recovery from a collateral source, then double recovery should be allowed."[12]

[11] [12] [13] The Delaware **workers' compensation** statute provides a process to replace an employee's lost earnings and to cover an employee's medical expenses that result from a work related injury.[13] The twin purposes of the statute are "to provide a scheme for assured compensation for work-related injuries without regard to fault and to relieve employers and employees of the expenses and uncertainties of ***154** civil litigation."[14] Although an employee is required to accept compensation under the statute as an exclusive remedy against his employer,[15] Delaware public policy does not prohibit "a risk-averse insured from contracting for additional recovery."[16] When an employee has contracted for an additional recovery from a collateral source, the collateral source doctrine will allow for a double recovery.[17] In the case *sub judice,* this Court is asked to determine who benefits from a policy when the premiums are paid in equal proportions by the employer and the employee.

The Collateral Source Doctrine

Payments made or benefits conferred independent of the tortfeasor, and that the tortfeasor had no part in creating, are known as collateral source benefits.[18] The collateral source rule allows an injured person to recover full damages regardless of compensation received from sources unrelated to the tortfeasor.[19] This rule advances a public policy that a tortfeasor has no right to mitigation when the plaintiff has received a benefit from an independent source.[20] The rule also encourages "citizens to purchase and maintain insurance for personal injuries and for other eventualities."[21] When a plaintiff purchases insurance, "he has established a fund

meant to protect his family from want, not to immunize" the tortfeasor from expense.[22] If a tortfeasor were allowed to mitigate damages with payments from a plaintiff's collateral source, "the plaintiff would be in a position inferior to that of having bought no insurance, because his payment of premiums would have earned no benefit."[23] Thus, courts generally have held that benefits received by a plaintiff from a source independent of and collateral to the wrongdoer will not diminish otherwise recoverable damages.[24]

[14] **[15]** In 1964, the Delaware Supreme Court recognized the collateral source rule as being "firmly embedded" in Delaware Law.[25] The rule is "designed to strike a balance between two competing principles of tort law: (1) a plaintiff is entitled to compensation sufficient to make him whole, but no more; and (2) a defendant is liable for all damages that proximately result from his wrong."[26] However, because the law must favor one windfall over the other, it favors the victim of the wrong.[27] As the Court explained in ***155** *Yarrington*: "[t]he collateral source doctrine is predicated upon the theory that a tortfeasor has no interest in, and therefore no right to benefit from, monies received by the injured person *from sources unconnected with the defendant*."[28] If a risk averse insured has contracted and paid consideration for a double recovery, then the recovery should be allowed.[29]

[16] **[17]** In a no-fault insurance context, the Delaware Supreme Court recognized that "the policy goals of no-fault insurance can best be served by applications of principles of contract rather than tort law."[30] The extent to which double recovery should be allowed under the collateral source doctrine "depends upon the contractual expectations that underlie the collateral source payment."[31] "In the Court's view, any consideration that has been paid will support recovery, so long as it is not based on speculation."[32] Stated differently, even in a scenario involving no-fault insurance, an insured may receive a double recovery when he has contracted and given consideration for coverage through a collateral source.

The IAB Properly Granted an Offset for Fifty Percent of the Short–Term Disability Proceeds.

[18] This case presents an interesting issue not previously presented to this Court. At issue is whether an employer is allowed to offset **workers' compensation** benefits when the employee receives additional benefits paid by an insurance policy which has been jointly purchased by the employer and employee. Established case law provides for the following general propositions: (1) an employer is allowed to offset **workers' compensation** benefits when an employee receives additional benefits paid by an insurance policy or benefit plan purchased by the employer, (2) an employer is not allowed to an offset of **workers' compensation** benefits when an employee receives additional benefits paid by an insurance policy purchased by the employee. These propositions are found in *Guy J. Johnson Transportation Co. v. Dunkle*[33] and *Adams v. Delmarva Power and Light Co.*[34]

Under the first proposition, an employer is allowed to offset **workers' compensation** payments by amounts paid to an employee by an insurance policy or benefits program that emanates from the employer. In *Dunkle,* an employee sought total disability benefits after he suffered a work-related heart attack. The employer appealed a Board award of $26,403.80 in hospital and physician charges. The employer argued that the challenged medical expenses had been paid on its behalf by its medical insurance carrier, through policies which were paid for solely by the employer. The Delaware Supreme Court held that an offset of the employee's **workers' compensation** claim was allowed because the employer had paid for the medical insurance policy, which in turn paid the employee's medical bills. The Court found that allowing an offset of a **workers' compensation** ***156** award did not violate the collateral source doctrine when the insurance or benefit program had been paid for by the employer. In so finding, "the Court refused to accept the contention that there could be no offset in the absence of express legislative authority permitting subrogation."[35] Thus, an offset is proper when an employee's loss has been covered by an employer supplied insurance or benefit program.

Under the second proposition, an employer is not allowed to offset **workers' compensation** payments by amounts paid to an employee pursuant to an insurance policy which exists by reason of the employee's payment of separate consideration. In *Adams,* the Delaware Supreme Court considered an employer's request for an offset when a claim was asserted against an insurance policy that had been purchased by the employee. While operating the employer's motor vehicle and during the course of employment, an employee was injured in an automobile accident caused by another driver. The tortfeasor's insurance company paid the employee the tortfeasor's insurance policy limit of $25,000. The employee

had independently purchased underinsured motorist coverage which paid the employee an additional $175,000.[36] The employer's **workers' compensation** insurer sought an offset for wages it had paid as a result of the accident. Although the **workers' compensation** insurer was entitled to an offset against the $25,000 recovered from the third party tortfeasor,[37] the Court held the carrier was not entitled to an offset from a collateral source for which the employee had paid consideration.

Although both propositions are well established, the Delaware Supreme Court has found exceptions. In *State v. Calhoun,*[38] a State of Delaware employee was injured in an automobile accident in the course of his employment. His injuries required that he retire on a disability pension under 29 *Del. C.* § 5524.[39] The State ***157** reduced the employee's weekly **workers' compensation** payment by the amount he received in disability payment. The employee petitioned the IAB to reinstate his full **workers' compensation** award, but the Board ruled it was against public policy to allow two recoveries for a single wage loss. In affirming the Superior Court's reversal of the IAB ruling, the Court reiterated the holding in *Adams.* "The Court reasoned that since the employee had paid an independent consideration for additional protection against injury, he was entitled to the benefit of his insurance contract."[40] The employee's right to a disability pension was "based on his participation in, and contributions to, the State Employees' Pension Plan."[41] The Court noted that "[a]lthough the plan is legislatively established, it is contractual in nature and, when vested, confers a constitutionally protected property right" that cannot be forfeited by implication.[42] The Court held the vested pension right was the result of a contractual arrangement supported by employee consideration and thus an offset was not proper.

Additionally, in *Simendinger v. National Union Fire Insurance Co.,*[43] the Court extended the rule in *Adams* to include employer purchased UIM benefits, but this holding is limited to cases involving third-party tortfeasors.

Kelley argues that Perdue's short-term disability program is funded much like the Delaware State Employee Pension Plan discussed in *Calhoun,* and therefore *Calhoun* is dispositive. She argues that her separate contributions to the short term disability policy premiums are analogous to the employee's separate contributions to the Delaware State Employee Pension plan. It is Kelley's contention that the *Dunkle* "no windfall" principle does not apply when duplicate benefits arise from a contractual arrangement *supported* by employee-furnished consideration. She argues that Perdue's short term disability program is funded much like the Delaware State Employee Pension Plan, and that *Calhoun* therefore prohibits an offset of the type awarded in this case.

Kelley's argument misses a key difference between the employee contribution in *Calhoun* and the employee contribution in the case at bar. In *Calhoun,* the parties were contributing to a statutorily created instrument. Once the employee chose to participate in the pension plan, State contributions were mandatory. Although legislatively established, the plan was contractual in nature. An employee would become vested after participating in the plan for five years, and thereafter would have a constitutionally protected property right in the pension. Kelley's ***158** circumstance is distinguishable in that the disability insurance plan was voluntarily established by Perdue, Perdue's contributions to the insurance plan were voluntary, and there was no vesting in the plan. If Perdue decided to discontinue the program, Kelley would have had no constitutionally protected property rights. Therefore, Kelley's argument that *Calhoun* is controlling based on funding similarities between Perdue's insurance plan and the State's pension plan fails.

Dunkle and *Adams* establish that employers are generally entitled to an offset when the employer has provided a collateral source of compensation, and that the employer is not entitled to an offset when the employee has provided the collateral source of compensation. Whether an employer is entitled to an offset when **both** employer and employee have contributed to the purchase of a collateral source of compensation is an issue of first impression in Delaware, but this issue has been addressed in other states. The Supreme Court of Alabama addressed the issue in *Ex Parte City of Birmingham*[44] in determining whether the city of Birmingham was allowed to offset an employee's **workers' compensation** award by an amount paid by collateral source funded by both the city and the employee. Although this case involved a question of statutory interpretation,[45] the court found that because the city had contributed fifty percent to the collateral source, the city was entitled to receive an offset equal to fifty percent of the payments made from that source. The Commonwealth Court of Pennsylvania came to a similar conclusion in *Frank v. W.C.A.B (Marathon Physical Therapy, Inc.).*[46] Here, the court noted that "the crucial factor is the identity of the party who is paying for the insurance benefit,"

and based on the employer's fifty percent contribution to the premium for sickness and accident benefits, granted an offset equivalent to fifty percent of the benefits paid.

Both employer and employee are entitled to reap the rewards of their investments. In this case, both employer and employee contributed to a policy that provided benefits to Kelley after she became injured. The IAB ruled that each side would benefit in proportion to their contribution. Kelley argues that the collateral source at issue in this case would not exist without Kelley's contribution, but neither would the collateral source exist without Perdue's contribution. The IAB's decision to allow the offset is proper and well grounded in existing common law.

Interpretation of Existing Common Law is not Legislating

[19] **[20]** **[21]** **[22]** **[23]** **[24]** The General Assembly is presumed to know the effect of the common law on its statutes.[47] Thus, failure to amend a well established common law rule must be taken as the General Assembly's intent to retain that rule.[48] Additionally, "where the General Assembly has not defined a right, remedy, or obligation ..., ***159** courts should apply the common law."[49] The responsibility of amending or repealing a law that is questioned as unjust lies with the General Assembly.[50] A Judge's personal predilections as to what the law should be has no place in the interpretation of laws,[51] and "Judges must take the law as they find it,"[52] However, it is the Court's responsibility to interpret existing laws, and the execution this responsibility should not be misconstrued as legislating.[53] The collateral source rule has been firmly embedded in Delaware law for more than fifty years. There has been no clear statutory mandate to change the rule, and absent such a mandate, "[t]his Court will not do by judicial implication what the General Assembly itself has declined to do by express legislation."[54]

Kelley contends that the IAB was improperly legislating because the offset at issue was not specifically provided for by the General Assembly. Kelley argues that it is up to the General Assembly, and not an administrative tribunal, to provide for an offset in connection with a co-funded insurance program. However, the Delaware Supreme Court has stated that they "do not accept the contention that there may be no offset of claimed benefits in the absence of express legislative authority" and that "[n]o statutory authority is required to deny recovery for losses which did not, in fact, occur or expenses not, in fact, sustained."[55]

Kelley argues that the IAB is legislating in this matter and that it is up to the General Assembly to provide for an offset in connection with a co-funded short term disability insurance program. Kelley's view is impractical and thwarts generally accepted rules of statutory construction. A broad application of Kelley's argument would require the General Assembly to predict every possible scenario under which a new law might be applied, and if a specific scenario was not contemplated, the law would not apply despite the General Assembly's intent. The IAB properly considered existing common law and applied it to the scenario presented in the current case. In considering this appeal, this Court has also properly considered existing common law, law which has not been abrogated by legislative fiat, and applied it to the scenario presented in this case.

CONCLUSION

Both employer and employee are entitled to reap the rewards of their investments. In this case, both employer and employee contributed to a policy that provided benefits to Kelley after she became injured. The IAB ruled that each side would benefit in proportion to their contribution. Kelley argues that the collateral source at issue in this case would not exist without Kelley's contribution, but neither would the collateral source exist without Perdue's contribution. Thus, for the foregoing reasons, the decision of the Board is **AFFIRMED**.

IT IS SO ORDERED.

All Citations

123 A.3d 150

Footnotes

1 *Conagra/Pilgrim's Pride, Inc. v. Green,* 954 A.2d 909 (Del.2008) (citing *LeVan v. Independence Mall, Inc.,* 940 A.2d 929, 931–32 (Del.2007)).

2 *Vincent v. E. Shore Markets,* 970 A.2d 160, 163 (Del.2009) (citing *Baughan v. Wal–Mart Stores,* 2008 WL 1930576, at *2 (Del. May 2, 2008)).

3 *Boone v. Syab Servs./Capitol Nursing,* 2013 WL 3777153, at *1 (Del. July 16, 2013) (citing *Person–Gaines v. Pepco Holdings, Inc.,* 981 A.2d 1159, 1161 (Del.2009)).

4 *Boone,* 2013 WL 3777153, at *1 (citing *Person–Gaines,* 981 A.2d at 1161).

5 *Person–Gaines,* 981 A.2d at 1161 (quoting *Olney v. Cooch,* 425 A.2d 610, 614 (Del.1981)).

6 *Bullock v. K–Mart Corp.,* 1995 WL 339025, at *2 (Del.Super. May 5, 1995) (citing *Johnson v. Chrysler Corp.,* 213 A.2d 64, 66–67 (Del.1965)).

7 *Stanley v. Kraft Foods, Inc.,* 2008 WL 2410212, at *2 (Del.Super. Mar. 24, 2008) (quoting *Willis v. Plastic Materials Co.,* 2003 WL 164292, *1 (Del.Super. Jan. 13, 2003)).

8 *Briggs v. DuPont,* 1998 WL 110037, at *8 (Del.Super. Jan. 20, 1998) (citing *Guy J. Johnson Transp. Co. v. Dunkle,* 541 A.2d 551, 553 (Del.1988)).

9 *State v. Calhoun,* 634 A.2d 335, 338 (Del.1993).

10 *Id.* at 337.

11 *State v. Brown,* 2000 WL 33225298, at *4 (Del.Super. Aug 7, 2000) *aff'd sub nom. Brown v. State, Dep't of Corr.,* 768 A.2d 467 (Del.2001) (quoting *Calhoun,* 634 A.2d at 337).

12 *Adams v. Delmarva Power and Light Co.,* 575 A.2d 1103, 1106 (Del.1990) (citing *State Farm Mut. Auto. Ins. Co. v. Nalbone,* 569 A.2d 71, 75 (Del.1989)).

13 *Guy J. Johnson Transp. Co. v. Dunkle,* 541 A.2d 551, 552 (Del.1988).

14 *Kofron v. Amoco Chemicals Corp.,* 441 A.2d 226, 231 (Del.1982).

15 19 *Del. C.* § 2304.

16 *Adams,* 575 A.2d 1103, 1106 (Del.1990) (citing *Nalbone,* 569 A.2d at 75).

17 *Adams,* 575 A.2d at 1106 (citing *Nalbone,* 569 A.2d at 75).

18 *2 Stein on Personal Injury Damages Treatise § 13:5* (3d ed.) (2015); *Restatement (Second) of Torts § 920A* (1979).

19 *Restatement (Second) of Torts § 920A* (1979).

20 *Restatement (Second) of Torts § 920A* (1979).

21 77 A.L.R.3d 415 (1977) (citing *Helfend v. S. Cal. Rapid Transit Dist.,* 2 Cal.3d 1, 84 Cal.Rptr. 173, 465 P.2d 61, 77 (1970)).

22 *2 Stein on Personal Injury Damages Treatise § 13:5* (3d ed.) (2015).

23 77 A.L.R.3d 415 (1977) (citing *Helfend,* 84 Cal.Rptr. 184, 465 P.2d at 77).

24 77 A.L.R.3d 415 (1977).

25 *Yarrington v. Thornburg,* 205 A.2d 1, 2 (Del.1964).

26 *Mitchell v. Haldar,* 883 A.2d 32, 38 (Del.2005) (internal citations omitted).

27 *Stayton v. Delaware Health Corp.,* 117 A.3d 521, 526 (Del.2015).

28 *Fisher v. Beckles,* 2014 WL 703755, at *2 (Del.Super. Feb. 10, 2014).

29 *State Farm Mut. Auto. Ins. Co. v. Nalbone*, 569 A.2d 71, 75 (Del.1989).

30 *Nalbone,* 569 A.2d at 73.

31 *Ameer–Bey v. Liberty Mut. Fire Ins.,* 2003 WL 1847291, at *1 (Del.Super. Apr. 7, 2003).

32 *Ameer–Bey,* 2003 WL 1847291, at *4 (citing *Nalbone,* 569 A.2d at 76) (internal quotations omitted).

33 *Guy J. Johnson Transportation Co. v. Dunkle,* 541 A.2d 551, 553 (Del.1988).

34 *Adams v. Delmarva Power and Light Co.,* 575 A.2d 1103 (Del.1990).

35 *State v. Brown,* 2000 WL 33225298, at *5 (Del.Super. Aug. 7, 2000).

36 The employee's underinsured motorist policy expressly prohibited the benefits paid under the policy from applying for the benefit of a claim by any **workers**; **compensation** carrier. *Adams,* 575 A.2d at 1104–05.

37 19 *Del. C.* § 2363(e) states:

> In an action to enforce the liability of a third party, the plaintiff may recover any amount which the employee or the employee's dependents or personal representative would be entitled to recover in an action in tort. Any recovery against the third party for damages resulting from personal injuries or death only, after deducting expenses of recovery, shall first reimburse the employer or its **workers**' **compensation** insurance carrier for any amounts paid or payable under the **Workers**' **Compensation** Act to date of recovery, and the balance shall forthwith be paid to the employee or the employee's dependents or personal representative and shall be treated as an advance payment by the employer on account of any future payment of compensation benefits....

38 *State v. Calhoun,* 634 A.2d 335 (Del.1993).

39 29 *Del. C.* § 5524 (1993) stated:

> (a) An employee who has 5 years of **credited** service, exclusive of service **credited** under § 5501(b)(4), (5) and (12) of this title, and becomes disabled shall become eligible to receive a disability pension beginning with the fourth month following the inception of his or her disability provided that such pension shall not be calculated under § 5527(a)(1)(i) of this title, unless a pension would have been payable under this chapter in effect immediately prior to the effective date of the 1976 Pension Act. Such individual shall cease to be eligible at the end of the month in which he or she recovers from disability and is again offered employment as an employee, if such recovery and offer of employment occurs before his or her attainment of age 60.

(b) Such an employee shall be kept on the active payroll and receive **credited** service from the inception of his disability to the end of the third month following and shall receive payments at the same rate of compensation he received before he became disabled.

(c) An employee shall be deemed disabled for the purposes of this section if he has a physical or mental disability which prevents him from performing the duties of his position.

40 *Calhoun,* 634 A.2d at 338.

41 *Id.*

42 *Id.*

43 *Simendinger v. National Union Fire Ins. Co.,* 74 A.3d 609 (Del.2013) (holding that the ability of a **workers**' **compensation** insurer to assert a lien against the UIM payments made pursuant to the employer's UIM policy had been eliminated by the 1993 revisions to 19 *Del. C.* § 2363(e), and noting that reimbursement had been expressly limited by a provision providing that "reimbursement shall be had only from the third party liability insurer....").

44 *Ex Parte City of Birmingham,* 988 So.2d 1035 (Ala.2008).

45 The Alabama Supreme Court interpreted a section of the Alabama **Workers**' **Compensation** Act as requiring a proportional offset.

46 *Frank v. W.C.A.B (Marathon Physical Therapy, Inc.),* 2013 WL 3960970, at *4 (Pa.Commw.Ct. Mar. 4, 2013).

47 *Progressive N. Ins. Co. v. Mohr,* 47 A.3d 492, 512 (Del.2012) (citing *Makin v. Mack,* 336 A.2d 230 (Del. Ch.1975)).

48 *Associated Transp. v. Pusey,* 118 A.2d 362, 364 (Del.Super. 1955).

49 *CML V, LLC v. Bax,* 28 A.3d 1037, 1045 (Del.2011).

50 *Id.*

51 *Leatherbury v. Greenspun,* 939 A.2d 1284, 1292 (Del.2007) (citing *Ewing v. Beck,* 520 A.2d 653, 658 (Del.1987)).

52 *Id.*

53 *Id.*

54 *State v. Fletcher,* 974 A.2d 188, 194 (Del.2009).

55 *Dunkle,* 541 A.2d at 553.

634 A.2d 335
Supreme Court of Delaware.

STATE of Delaware, Appellant,
v.
Theodore CALHOUN, Appellee.

175, 1993
|
Submitted: Nov. 2, 1993.
|
Decided: Dec. 14, 1993.

Synopsis

Injured state employee appealed decision by Industrial Accident Board which allowed state to offset employee's disability retirement benefits against his **workers' compensation** benefits. On appeal by employee, the Superior Court, New Castle County, determined that such benefits were not to be offset, and state filed interlocutory appeal. The Supreme Court, Walsh, J., held that employee was entitled to both disability retirement benefits and **workers' compensation** benefits.

Affirmed.

Procedural Posture(s): On Appeal.

West Headnotes (3)

[1] **Workers' Compensation** Pensions

State could not offset **workers' compensation** benefits paid to injured state employee by amount of disability benefits received by employee under state pension plan; employee was entitled to both types of benefits because both **workers' compensation** statute and statute governing pension plan were to be liberally construed, neither statute provided for offsetting of awards, employee had contractual right to pension benefits, and, even receiving both types of benefits, employee would not receive full amount of wage earned prior to accident. 19 Del.C. §§ 2363(e), 2301 et seq.; 29 Del.C. §§ 5501 et seq., 5524.

12 Cases that cite this headnote

[2] **Workers' Compensation** Deductions and Offsets

State has no basis for imputing double recovery of state employee's **workers' compensation** benefits if second benefit arises from source which exists by reason of employee's payment of separate consideration. 19 Del.C. § 2363(c).

11 Cases that cite this headnote

[3] **Public Employment** Property rights and interests

States Revocation, suspension, or termination

Although state pension plan is legislatively established, plan is contractual in nature and, when vested, confers constitutionally protected property right, and vested right will not be forfeited by implication. 29 Del.C. § 5524(a).

4 Cases that cite this headnote

Attorneys and Law Firms

***336** Sean A. Dolan, Tybout, Redfearn & Pell, Wilmington, for appellant.

Brian P. Murphy, Middletown, for appellee.

Before VEASEY, C.J., WALSH and HOLLAND, JJ.

Opinion

WALSH, Justice:

In this interlocutory appeal, we review a Superior Court decision which determined that a State of Delaware employee's **workers' compensation** benefits could not be offset by disability benefits received under the State Pension Plan. We conclude that the two benefit plans serve separate purposes and, as a matter of legislative intent, retirement disability benefits may not be **credited** against an award of **workers' compensation** benefits. Accordingly, we affirm.

I

The underlying facts are undisputed. In December, 1984, the appellee, Theodore Calhoun ("Calhoun"), was injured in a motor vehicle accident in the course of his employment with the State of Delaware Department of Transportation ("the State"). His injuries eventually required that he retire on a disability pension under the provisions of 29 *Del.C.* § 5524. [1] His retirement became effective September 1, 1987.

In the meantime, Calhoun had pursued other claims for his injuries. He obtained a recovery from a third-party tortfeasor responsible for the work-related accident. Calhoun also filed a claim for **workers' compensation** which resulted in a monthly award of temporary total disability benefits. When Calhoun effected his recovery against the tortfeasor, he reimbursed the State for the amount previously received as **workers' compensation** benefits, as required by 19 *Del.C.* § 2363(e). [2] This amount totaled $50,877.

Upon Calhoun's disability retirement on September 1, 1987, the State claimed a further **credit** against future **workers' compensation** benefits. It sought to offset Calhoun's disability retirement benefits, calculated monthly but equaling $76.81 per week, against the $221.12 weekly payment of **workers' compensation**. Calhoun petitioned the Industrial Accident Board ("Board") for the ***337** reinstatement of the full amount of his **workers' compensation** benefit but the Board ruled that it was contrary to legislative intent to permit an injured worker to secure two recoveries for a single wage loss.

On appeal to the Superior Court, the Board's ruling was reversed. The court ruled that an offset of disability retirement benefits against **workers' compensation** benefits is permitted only when there is an express legislative mandate to coordinate wage loss benefits. Since neither statute implicated in Calhoun's situation refers to a corresponding offset, the Superior Court concluded that no offset was authorized. This appeal followed.

II

The State argues that while Calhoun is entitled to compensation for his wage loss, he is not entitled to look to duplicate sources of compensation if those sources are legislatively based. A coordination of these benefits may be achieved, the argument runs, by permitting the deduction of Calhoun's disability retirement payments from his **workers' compensation** benefits. To the contrary, Calhoun maintains that, given the liberal interpretation accorded compensation statutes, no offset can be implied and none authorized in the absence of legislative direction.

[1] The question of offsetting State disability pension payments against **workers' compensation** is an issue of first impression, although coordination of benefits decisions abound. In *Miller v. City of Wilmington,* Del.Ch., 285 A.2d 443 (1971), *aff'd,* Del.Supr., 293 A.2d 574 (1972), the Court of Chancery ruled that a municipal police officer was entitled to receive both a disability pension and **workers' compensation** benefits. The court reasoned that the awards are independent of each other and, in the absence of a legislative prohibition against the receipt of dual benefits, the award could not be offset. Any decision to force government employees to choose between **workers' compensation** benefits and pension benefits, the court noted, "should be legislatively and not judicially made." 285 A.2d at 445. The rationale of *Miller* has been adopted in subsequent cases involving the coordination of employee benefits. *See Choma v. O'Rourke,* Del.Ch., 300 A.2d 39 (1972); *Bramble v. State Board of Pension Trustees,* Del.Super., 579 A.2d 1131 (1989).

The State concedes that the pertinent statutes conferring benefits upon Calhoun, the State Employees' Pension Plan, 29 *Del.C.* Ch. 55, and the **Workers' Compensation** Act, 19 *Del.C.* Ch. 23, contain no express prohibition against the receipt of benefits for an injury attributable to a common cause. To construe either statute as impliedly restricting the receipt of benefits would be counter to the usual rules of statutory construction. *State ex rel. State Board of Pension Trustees v. Dineen,* Del.Ch., 409 A.2d 1256 (1979) (statute vesting State employee pension rights should be liberally construed); *Children's Bureau v. Nissen,* Del.Super., 29 A.2d 603 (1942) (**Workers' Compensation** Act should be liberally construed to achieve its beneficial purpose).

The **Workers' Compensation** Act does expressly preclude the receipt of certain duplicate benefits. Indeed, the purpose underlying 19 *Del.C.* § 2363(e) is to prevent the employee from receiving compensation for wage losses from a third-party tortfeasor when the losses have already been compensated through **workers' compensation**. The offset provision of that statute has already been applied to Calhoun's

third-party recovery in this case and has resulted in a reimbursement of previous compensation paid by the State. Had the General Assembly intended further **credits** it clearly could have so stated. In the absence of such further declaration of offset, we decline to imply them.

[2] The imputation of offset in this case is not justified in terms of fundamental fairness. While it is true that Calhoun will receive payment for the same loss from two distinct sources, the sum of these payments will not equal the amount of his State compensation prior to the accident. Moreover, there is no basis for imputing double recovery of **workers' compensation** benefits if the second benefit arises from a source which exists by reason of the employee's payment of a separate consideration. In ***338** *Adams v. Delmarva Power & Light Co.,* Del.Supr., 575 A.2d 1103 (1990), this Court ruled that a **workers' compensation** carrier could not invoke the set-off provisions of 19 *Del.C.* § 2363(e) to secure reimbursement of compensation benefits from an injured employee's recovery under an underinsured motorist policy. The Court reasoned that since the employee had paid an independent consideration for additional protection against injury, he was entitled to the benefit of his insurance contract. In *Adams,* this Court distinguished earlier cases permitting governmental subrogation under § 2363, *Harris v. New Castle County,* Del.Super., 513 A.2d 1307 (1986); *State v. Donahue,* Del.Super., 472 A.2d 824 (1983), on the ground that subrogation was recognized where the separate insurance coverage had been provided by the employer.

[3] The *Adams* analysis is pertinent here. Calhoun's entitlement to a disability pension is based on his participation in, and contributions to, the State Employees' Pension Plan, 29 *Del.C.* Ch. 55. Although the plan is legislatively established, it is contractual in nature and, when vested, confers a constitutionally protected property right. *In re State Employees' Pension Plan,* Del.Supr., 364 A.2d 1228 (1976). As an employee with more than five years of service, Calhoun became "eligible to receive a disability pension." 29 *Del.C.* § 5524(a). That vested right will not be forfeited by implication. *Dineen,* 409 A.2d at 1260. The State's effort to offset Calhoun's **workers' compensation** benefits by the amount received from his contractually secured disability pension benefits would clearly work a forfeiture of such benefits through implication. The Superior Court correctly ruled that such a result is impermissible in the absence of clear legislative direction.

Finally, the State contends that the offset of **workers' compensation** benefits is sanctioned by this Court's decision in *Guy J. Johnson Transp. Co. v. Dunkle,* Del.Supr., 541 A.2d 551 (1988) which involved an injured employee's attempt to recover medical expense pursuant to 19 *Del.C.* § 2322(a) after those expenses had been paid by the employer's medical insurance carrier. The holding in *Johnson* is inapposite. *Johnson* represents a clear instance of double recovery in which an employee sought to recover for medical expenses which he had not, in fact, sustained. *Johnson* stands for the proposition that an employee cannot secure double recovery for a single loss where both sources of recovery emanate from the employer. That holding cannot be read to encompass a situation where, as here, the asserted duplicate benefits result from a contractual arrangement supported by employee furnished consideration. Moreover, as previously noted, even with receipt of both **workers' compensation** benefits and disability retirement payments, Calhoun will still not achieve the wage level in effect at the time of his injury.

In refusing the offset of benefits, the Superior Court correctly interpreted the applicable legislative provisions which control the award of benefits to an injured State employee with vested disability pension rights. Accordingly, we AFFIRM that judgment.

All Citations

634 A.2d 335

Footnotes

1 **§ 5524. Eligibility for disability pension.**

(a) An employee who has 5 years of **credited** service, exclusive of service **credited** under § 5501(b)(4), (5) and (12) of this title, and becomes disabled shall become eligible to receive a disability pension beginning with the fourth month following the inception of his or her disability provided that such pension shall not be

calculated under § 5527(a)(1)(i) of this title, unless a pension would have been payable under this chapter in effect immediately prior to the effective date of the 1976 Pension Act. Such individual shall cease to be eligible at the end of the month in which he or she recovers from disability and is again offered employment as an employee, if such recovery and offer of employment occurs before his or her attainment of age 60.

(b) Such an employee shall be kept on the active payroll and receive **credited** service from the inception of his disability to the end of the third month following and shall receive payments at the same rate of compensation he received before he became disabled.

(c) An employee shall be deemed disabled for the purposes of this section if he has a physical or mental disability which prevents him from performing the duties of his position.

2 19 *Del.C.* § 2363(e) provides:

* * *

(e) In an action to enforce the liability of a third party, the plaintiff may recover any amount which the employee or his dependents or personal representative would be entitled to recover in an action in tort. Any recovery against the third party for damages resulting from personal injuries or death only, after deducting expenses of recovery, shall first reimburse the employer or its workmen's compensation insurance carrier for any amounts paid or payable under the Workmen's Compensation Act to date of recovery, and the balance shall forthwith be paid to the employee or his dependents or personal representative and shall be treated as an advance payment by the employer on account of any future payment of compensation benefits.

KeyCite Yellow Flag - Negative Treatment
Distinguished by Rawley v. J.J. White, Inc., Del.Supr., December 15, 2006

773 A.2d 388
Supreme Court of Delaware.

NATIONAL UNION FIRE INS. CO. OF PITTSBURGH, PENNSYLVANIA, Defendant Below, Appellant,
v.
William S. McDOUGALL, Plaintiff Below, Appellee.

No. 212, 2000.
|
Submitted: Feb. 13, 2001.
|
Decided: March 28, 2001.
|
Reargument/Rehearing En Banc Denied June 29, 2001.

Synopsis

Claimant alleged **workers' compensation** insurer's bad faith refusal to pay Industrial Accident Board's award of medical benefits, and sought compensatory and statutory damages arising from the non-payment. The Superior Court, Kent County, granted summary judgment to insurer on the bad faith claim, but granted summary judgment to claimant on the statutory claim. Insurer appealed. The Supreme Court held that the trial court's finding of lack of bad faith did not preclude insurer from incurring liability for statutory damages, under the **Workers' Compensation** Act and the Wage Payment and Collection Act, for failing to pay the award of medical benefits.

Affirmed.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Headnotes (7)

[1] **Workers' Compensation** Determination; award; judgment

Trial court's finding that **workers' compensation** carrier's failure to pay the Industrial Accident Board's award of medical benefits to claimant was not a breach of the implied contractual obligation of good faith and fair dealing did not preclude the carrier from incurring liability for statutory damages, under the **Workers' Compensation** Act and the Wage Payment and Collection Act, for failing to pay an amount due to claimant. 19 Del.C. §§ 1113(a), 2357.

5 Cases that cite this headnote

[2] **Workers' Compensation** Unfair Practices; Bad Faith; Penalties

Workers' compensation insurer owed a duty of good faith to claimant, because claimant was a third-party beneficiary of the insurance contract between insurer and employer.

1 Case that cites this headnote

[3] **Workers' Compensation** Delay

Workers' Compensation Termination of benefits

A **workers' compensation** insurer violates its contractual duty of good faith to the claimant when it delays or terminates payment of a claim in bad faith.

[4] **Workers' Compensation** Reasonable cause to dispute or deny

Workers' Compensation Delay

To show a breach of the **workers' compensation** insurer's contractual duty of good faith, the claimant must show that the insurer acted without reasonable justification in delaying or refusing payment.

1 Case that cites this headnote

[5] **Workers' Compensation** Hearing, findings, and original and supplemental awards

Workers' compensation insurer's obligation to pay Industrial Accident Board's award of medical benefits to claimant attached when Board's award became final.

[6] **Estoppel** Claim inconsistent with previous claim or position in general

Statements allegedly made by claimant's counsel, during Industrial Accident Board's hearings on **workers' compensation** insurer's petition to terminate payments and claimant's petition to collect additional payments for medical expenses, that insurer would be entitled to a **credit** for claimant's third-party recovery in a medical malpractice action, did not estop claimant from bringing statutory claims, under the **Workers' Compensation** Act and the Wage Payment and Collection Act, against insurer for failing to pay Board's award of medical expenses; insurer had not petitioned for a **credit** and the order awarding medical benefits made no mention of a **credit**. 19 Del.C. §§ 1113(a), 2357.

4 Cases that cite this headnote

[7] **Workers' Compensation** Proceedings to Enforce Payment or Compliance

Claimant's amendment of its complaint against **workers' compensation** insurer, adding a count seeking statutory damages, under the **Workers' Compensation** Act and the Wage Payment and Collection Act, against insurer for failing to pay Industrial Accident Board's award of medical expenses, met the requirement of making a proper demand on insurer before claimant pursued statutory remedies. 19 Del.C. §§ 1113(a), 2357.

2 Cases that cite this headnote

***389** Court Below: Superior Court of the State of Delaware in and for Kent County. 94C–03–040–HDR.
Upon Appeal from the Superior Court. **AFFIRMED.**

Attorneys and Law Firms

Christopher J. Sipe, of Bailey & Wetzel, P.A., Wilmington, for Appellant.

Scott R. Mondell (argued), and H. Garrett Baker, of Elzufon & Austin, Wilmington, for Amicus Curiae Air Products and Chemical Company.

William D. Fletcher, Jr. (argued), Craig T. Eliassen, and Donna L. Harris, of Schmittinger & Rodriguez, Dover, for Appellee.

Before VEASEY, C.J., BERGER and STEELE, JJ.

Opinion

PER CURIAM:

This case involves the question whether an employer (or its insurance carrier) can be held liable under the provisions of the **Workers' Compensation** Act [1] and the Wage Payment and Collection Act [2] for failure to pay an award made by the Industrial Accident Board, notwithstanding a finding that the failure to pay does not amount to a breach of the implied contractual obligation of good faith and fair dealing. Because we hold that an employer can be held liable under the Acts in question even when nonpayment of an award was not in bad faith, we affirm the ruling of the Superior Court.

Contentions of the Parties

National Union Fire Ins. Co. of Pittsburgh, Pennsylvania ("National Union"), has appealed from the Superior Court's grant of summary judgment in favor of William S. McDougall on Count IV of McDougall's Amended Complaint seeking statutory damages and attorney's fees arising from nonpayment of an award of medical expenses made by the Industrial Accident Board (the "Board"). McDougall cross-appeals from the grant of summary judgment in favor of National Union on Counts I–III. These counts allege National Union's bad faith in the handling and non-payment of benefits owed to McDougall. [3] After hearing argument by the parties, the Superior Court entered an order awarding McDougall damages under Count IV of his complaint and dismissing Counts I–III. National Union's primary contention on appeal is that it was legal error for the ***390** Superior Court to find liability on Count IV in light of its resolution of the good faith claim in Count III in its favor.

Count IV of McDougall's complaint sought damages under the provisions of the **Workers' Compensation** Act [4] and the Wage Payment and Collection Act. [5] In *Huffman v. Oliphant* [6] this Court explained how these provisions confer jurisdiction on the Superior Court to award damages

against employers for wrongful suspension or nonpayment of benefits.

Title 19, section 2357 of the Delaware Code provides: "If default is made by the employer for 30 days after demand in the payment of any amount due under this chapter, the amount may be recovered in the same manner as claims for wages are collectible." Claims for wages are made under 19 *Del. C.* § 1113(a), which provides: "A civil action to recover unpaid wages and liquidated damages may be maintained in any court of competent jurisdiction." [7]

Thus, in cases of wrongful nonpayment of an amount due under the **Workers' Compensation** Act, the Superior Court has jurisdiction to order the relief set forth in 11 *Del. C.* § 1103(b), which provides that "if the employer, without any reasonable grounds for dispute," fails to pay amounts due, "the employer shall ... be liable to the employee for liquidated damages in the amount of 10 percent of the unpaid wages for each day, except Sunday and legal holidays, upon which such failure continues after the day upon which payment is required or in an amount equal to the unpaid wages, whichever is smaller...." As noted above, the Superior Court found National Union liable for failing to pay an award made by the Board where that award has become final under these provisions.

Count III of McDougall's complaint concerns nonpayment of the same award of medical expenses that is the subject of Count IV. Specifically, Count III alleges that this nonpayment was in bad faith. As explained more fully below, the Superior Court found that National Union did not act in bad faith. National Union argues that summary judgment should not have been granted in favor of McDougall on Count IV of his complaint because, for the purposes of Count III, the Superior Court found that National Union acted in good faith when it failed to pay the award. National Union argues that this finding of good faith cannot be reconciled with the finding of liability on the *Huffman* claim in Count IV, and that in light of the dismissal of the bad faith claim, the Superior Court committed legal error in resolving Count IV against National Union.

In effect, National Union argues that good faith is a defense to liability on Count IV. We disagree. Because we affirm the judgment against National Union on Count IV, we do not reach McDougall's cross-appeal from the grant of summary judgment for National Union on Counts I–III. [8]

391** ***Facts and Proceedings Below

We begin with a summary of the basic facts necessary to an understanding of the disputed issues. McDougall was injured in a work-related accident on July 18, 1990, while employed by Air Products & Chemicals, Inc. ("Air Products"). National Union, Air Products' insurer, began paying temporary total disability benefits, and payment of total disability benefits later continued under an agreement concluded between McDougall and National Union and approved by the Board. [9] In April 1991, McDougall suffered a severe stroke. Following this stroke, McDougall sued his doctors in Florida, apparently for failing to diagnose the condition that led to the stroke. The suit was settled for over $1 million, resulting in a net recovery by McDougall of $580,166.78. As explained more fully below, National Union offers this settlement as an explanation for failing to compensate McDougall for his medical expenses on the basis that this third-party recovery should offset the amounts owed McDougall.

In December 1992, National Union, on behalf of Air Products, filed a petition to terminate disability benefits on the basis that McDougall's stroke-related disability was not related to the work accident. In an order dated August 17, 1993, the Board dismissed the petition because National Union had not met its burden of showing that McDougall's disability was not related to the industrial accident. In November 1993, National Union filed a second petition to terminate benefits, again on the ground that McDougall's stroke was not a work-related injury. McDougall also petitioned the Board for payment of additional benefits, primarily medical expenses associated with the stroke, on the ground that the condition causing the stroke occurred at the time of the work accident.

The Board held hearings on the parties' petitions. At the hearings, the Board heard conflicting medical testimony concerning whether McDougall's stroke was related to the accident. In an Opinion and Order dated September 22, 1995 (the "1995 Order"), the Board found that McDougall's stroke had its origin in the industrial accident, and that consequently McDougall's medical expenses were compensable. Accordingly, National Union's petition was denied, and McDougall's petition was granted. McDougall was awarded $367,697.66 as reimbursement for past medical expenses. The Order makes no mention of a **credit** in connection with the Florida settlement.

Air Products filed a motion for reargument of the 1995 Order, which the Board dismissed as untimely by order dated March 21, 1996. Air Products did not appeal this dismissal to the Superior Court but instead made further filings with the Board requesting reconsideration of its timeliness ruling. Nearly two years later the Board issued an order dated June 19, 1998, indicating that it would hold an evidentiary hearing on the timeliness issue. McDougall filed a motion for reargument of this order, contending that the Board lacked jurisdiction to reconsider the finality of its timeliness decision of March 21, 1996, which National Union had not appealed. The Board granted McDougall's motion by order dated August 6, 1998. National Union appealed that order to the Superior Court. The Superior Court summarily dismissed this appeal. This Court affirmed, holding that Air Products' failure to appeal the March 21, 1996 denial of the motion for reargument meant that the Board's denial of the motion was "final," ***392** and that further actions by the Board were a "nullity" since it lacked jurisdiction. [10]

Before the 1995 Order, McDougall had filed a complaint in Superior Court alleging bad faith handling of his compensation claims. In September 1997, McDougall filed an amended complaint. A Count III was added, alleging bad faith non-payment of the award of medical expenses in the amount of $367,697.66 made by the Board in the 1995 Order. As described above, a Count IV was added seeking compensatory and statutory damages. The parties filed cross-motions for summary judgment. The Superior Court rejected the bad faith claim but granted McDougall summary judgment on his *Huffman* claim. Accordingly, the Superior Court ordered payment to McDougall of $924,529.02, an amount reflecting primarily the 1995 award and statutory damages. National Union appeals that order.

The Superior Court's Rejection of the Bad Faith Claim Does Not Preclude Statutory Liability for Nonpayment of the Award

[1] **[2]** **[3]** **[4]** As noted above, Count IV of McDougall's complaint sought damages under the provisions of the **Workers' Compensation** Act and the Wage Payment and Collection Act. In this case, the Superior Court properly found National Union liable for failing to pay to McDougall the "amount due" under the 1995 Order. The Superior Court awarded appropriate damages under 19 *Del. C.* § 1103. At the same time, the court rejected McDougall's bad faith claim, because it found that there was a "bona fide dispute as to the applicability of a **credit**" that, if it existed, would reduce National Union's payments to McDougall. The dispute over a **credit** stems from National Union's view that under 19 *Del. C.* § 2363(e) [11] its payments to McDougall should be offset by the amount McDougall recovered in his settlement with his Florida doctors. Although the issue of a **credit** has never been presented to the Board, National Union argues that it "enjoys" a **credit** under section 2363(e) based on the settlement recovery. National Union also points to apparent concessions made by McDougall's counsel at a hearing indicating that a **credit** might exist. In light of these arguments, the Superior Court found that National Union's nonpayment of benefits was not in bad faith. [12] Accordingly, summary judgment was entered for National Union on Count III of the Amended Complaint.

National Union argues that this finding precludes liability for nonpayment of benefits under *Huffman.* National Union focuses on language in *Huffman* stating that liability is based on "*wrongful*" non-payment, [13] ***393** and also on the provisions of section 1103(b), which predicates liability on non-payment "without any reasonable grounds for dispute." National Union argues that if the Superior Court found a "bona fide" dispute concerning the amounts due, then nonpayment cannot have been wrongful or unreasonable for the purposes of Count IV.

[5] This argument fails because, as this Court stated in *Huffman,* "the alleged 'good faith' belief of an employer or insurer that the employee is no longer entitled to compensation is irrelevant under this statute." [14] National Union's obligation to pay attached when the Board's September 22, 1995 award became final. [15] Thus, the decision not to pay the award was "wrongful" because it contravened a final order of the Board, notwithstanding a bona fide dispute sufficient to defeat McDougall's claim that National Union was not acting in good faith.

Failure to pay an amount due can be "wrongful" in a sense that does not necessarily imply bad faith. In light of the unappealed 1995 Order, which does not establish a **credit**, there is no basis for National Union's refusal to pay the medical expenses that would preclude awarding statutory damages to McDougall. The award under the Board's 1995 Order is an "amount due" [16] under the Act regardless of National Union's good faith objections based on its view that a **credit** existed. National Union's attempt in this case to relitigate whether it truly owes a Board award that has become

final is incompatible with the statutory remedy outlined in *Huffman.*

[6] Similarly, we agree with the Superior Court's rejection of National Union's contention that McDougall is estopped from suing for statutory damages. This estoppel argument is based on several statements made by McDougall's counsel allegedly indicating that there would be a **credit**.[17] Based on our review of the record we find support for the Superior Court's rejection of the estoppel argument. The 1995 Order and related hearings concerned two petitions, one by National Union to terminate payments and one by McDougall to collect additional payments. National Union did not petition for a **credit**, and it was not an issue at the hearings. The 1995 Order makes no mention of a **credit**, and no **credit** is reflected in the award. National Union did not appeal the resulting award. Based on the record before us, we agree with the decision of the Superior Court that McDougall is not estopped from suing for damages.

[7] National Union also challenges whether a valid demand was made.[18] The Superior Court found that the complaint satisfies the demand requirement as a matter of law. The addition of Count IV was noticed to National Union in September 1997. Count IV cites *Huffman,* the relevant statutory bases for liability, and ***394** the 1995 Order. We agree with the Superior Court that this is a "proper demand."

Conclusion

The Superior Court's rejection of the claim of bad faith made against National Union in Count III of McDougall's complaint does not preclude liability for statutory damages under Count IV. The Superior Court properly found National Union liable for statutory damages for failure to pay a final award of the Board. Accordingly, we affirm the judgment of the Superior Court.

All Citations

773 A.2d 388

Footnotes

1 19 *Del. C.* ch. 23.

2 19 *Del. C.* ch. 11.

3 Counts I and II of McDougall's complaint are not relevant to our resolution of the issues presented in National Union's appeal.

4 19 *Del. C.* ch. 23.

5 19 *Del. C.* ch. 11.

6 Del.Supr., 432 A.2d 1207, 1210–11 (1981); *see also Holden v. Gaico,* Del.Supr., 736 A.2d 202, 203 (1999).

7 "This Court has held that to give effect to provisions in Section 2357, the reference to 'wages' in Section 1113(a) 'must be construed to included claims based on unpaid workmen's compensation benefits....' " *Holden,* 736 A.2d at 203 (*citing Huffman,* 432 A.2d at 1210). Accordingly the provisions of section 1113(c) permit recovery of "any amount due under the **Workers**' **Compensation** statute." *Holden* at 203.

8 McDougall represents in his brief that he is cross-appealing the Superior Court's judgments on Counts I–III only in the event that this Court reverses the judgment in his favor on Count IV.

9 Air Products & Chemicals, Inc. was the named party in certain of the proceedings referred to below, and has filed an *amicus curiae* brief in National Union's appeal.

10 *Air Products & Chemicals, Inc. v. McDougall,* Del.Supr., No. 209, 1999, 1999 wl 734666, Berger, J. (August 25, 1999) (ORDER).

11 § 2363(e) provides in relevant part that a "recovery against [a] third party for damages ... shall first reimburse the employer or its **workers**' **compensation** insurance carrier for any amounts paid or payable under the **Workers**' **Compensation** Act to date of recovery, and the balance shall forthwith be paid to the employee...."

12 National Union owes a duty of good faith to McDougall. This duty arises out of National Union's insurance contract with Air Products, of which McDougall is the third-party beneficiary. *See Pierce v. International Ins. Co. of Ill.,* Del.Supr., 671 A.2d 1361, 1366 (1996). An insurer violates this duty when "it delays or terminates payment of a claim in bad faith." *Id.* (citation omitted). To show breach of the obligation of good faith, the plaintiff must show that the insurer acted without "reasonable justification in delaying or refusing payment." *T ackett v. State Farm Fire & Cas. Co.,* Del.Supr., 653 A.2d 254, 264 (1995).

13 432 A.2d at 1210 (emphasis added).

14 *Huffman,* 432 A.2d at 1209.

15 *See Holden v. Gaico,* Del.Supr., 736 A.2d 202, 204 (1999); *Keeler v. Metal Masters Food Service Equip. Co.,* Del.Super., 768 A.2d 979, Ridgely, P.J., (1999), *aff'd.* Del.Supr., 755 A.2d 389 (2000) (holding that unappealed Board awards become final and establish liability under *Huffman*).

16 19 *Del. C.* § 2357.

17 The parties dispute the context and meaning of the alleged stipulations.

18 *See Huffman,* 432 A.2d at 1210 (stating than an employee may pursue statutory remedies "after proper demand has been made").

2022 Del. Workers' Comp. LEXIS 55

Industrial Accident Board of the State of Delaware

December 2, 2022

Hearing No.: 1506783

Reporter
2022 Del. Workers' Comp. LEXIS 55 *

BRIAN ZOLADKIEWICZ, Claimant, v. NORTH EAST CONTRACTORS, INC., Employer,

Core Terms

claimant, medical examination, carrier, reschedule, failure to appear, attend

Counsel

Frederick S. Freibon, Esq., for the Claimant
[*1] Nicholas E. Bittner, Esq., for the Employer/Carrier

Opinion By: Vince D'Anna; Charles Freel

Opinion

BEFORE THE INDUSTRIAL ACCIDENT BOARD OF THE STATE OF DELA WARE IN AND FOR NEW CASTLE COUNTY

ORDER

WHEREAS, this matter is before the Industrial Accident Board and currently being scheduled following a continuance of the 10/11/21 Hearing upon the claimant's Petition to Determine Compensation Due seeking acknowledgment of an 04/24/20 alleged work accident claiming injuries to the low back with ongoing total disability;

WHEREAS, the Employer/Carrier, scheduled the claimant for Defense Medical Examination with Dr. Lawrence Piccioni on 04/27/21 at 3:00 p.m. to respond to the Petition referenced above in accordance with the provisions of 19 Del. C. § 2343 (a), with proper notification to the claimant;

WHEREAS, the claimant failed to appear for Dr. Piccioni's 04/27/21,3:00 p.m. examination which was scheduled in accordance with the provisions of 19 Del. C. § 2343(a);

WHEREAS, Dr. Piccioni's examination was rescheduled to occur on 07/21/21 at 9:00 a.m., the next available date; **[*2]**

WHEREAS, the claimant failed to appear for Dr. Piccioni's 07/21/21,9:00 a.m. examination which was scheduled in accordance with the provisions of 19 Del. C. § 2343(a);

WHEREAS, a Stipulation and Order was signed by both parties and submitted on 08/31/21 compelling the claimant to attend Dr. Piccioni's next medical examination or face additional sanctions including, but not limited to, dismissal of the Petition with prejudice;

WHEREAS, Dr. Piccioni's examination was rescheduled to occur on 10/19/21 at 4:00 p.m., the next available date;

WHEREAS, the claimant failed to appear for Dr. Piccioni's 10/19/21, 4:00 p.m. examination which was scheduled in accordance with the provisions of 19 Del. C. § 2343(a);

WHEREAS, claimant's counsel has been unable to reach the claimant to ascertain the reasons for the missed examinations;

WHEREAS, the Employer/Carrier has now incurred fees for failure to appear for the 04/27/21, 07/21/21, and 10/19/21 Defense Medical Examinations in the amount of $ 3,600.00 (a $ 1,200.00 fee for each no show);

WHEREAS, the Employer/Carrier is entitled, pursuant to 19 Del. C. § 2343, to a Defense **[*3]** Medical Examination in order to respond a Petition/claim and, further, obtain the results of same in sufficient time to conduct any further necessary investigations in order to provide a full and fair opportunity to present a defense at Hearing, and otherwise comply with the provisions of the 30-day Rule of our Statute;

WHEREAS, the claimant's failure to attend any of the scheduled examinations constitutes a lack of prosecution of his Petition;

THEREFORE, it is hereby ORDERED that:

1. That the Employer/Carrier is entitled to forfeiture as a ***credit*** against future benefits in the amount of $ 3,600.00 for the "no show" incurred as a result of the failure to appear for the 04/27/21, 07/21/21, and 10/19/21 examinations;

2. That the claimant's Petition to Determine Compensation Due is hereby dismissed for failure to prosecute and any rescheduled Hearing be cancelled.

SO ORDERED, this 2nd day of December 2021.

INDUSTRIAL ACCIDENT BOARD

OWC STAFF: OR

DATE OF MAILING: 12-3-2021

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2022 Del. Workers' Comp. LEXIS 80

Industrial Accident Board of the State of Delaware

July 21, 2022

Hearing No. 1455826

Reporter
2022 Del. Workers' Comp. LEXIS 80 *

WILLIAM EVERETT, Employee, v. PEPSI BOTTLING VENTURES, LLC., Employer

Core Terms

claimant, total disability, compensation rate, overpayment, partial disability, weekly wage, mis-paid, catch

Counsel

Michael I. Silverman, Esquire, for Claimant
[*1] Robert S. Hunt, Jr., Esquire, for Employer

Opinion By: Idel M. Wilson; Peter W. Hartranft

Opinion

BEFORE THE INDUSTRIAL ACCIDENT BOARD OF THE STATE OF DELAWARE

ORDER

This matter came before the Board on July 21, 2022, on a motion by Pepsi Bottling Ventures, LLC ("Employer") seeking a ***credit*** against future benefits in the amount of an alleged overpayment of total disability benefits to William Everett ("Claimant").

Claimant was injured in a compensable work accident on March 10, 2017. His average weekly wage was $ 582.16 per week, resulting in a compensation rate of $ 388.10 per week. However, Employer's third-party administrator ("TPA") instead paid Claimant total disability at the rate of $ 582.00 per week from June 2, 2017, through April 4, 2018. [1] The parties were able between themselves to fix this overpayment.

Claimant then was placed on an agreement for partial disability from August 31, 2018, through February 17, 2022. As it happens, the TP A ended up underpaying Claimant for this period in the amount of **[*2]** $ 178.76.

Claimant then had a recurrence of total disability effective February 18, 2022. Despite the history of the case, the TPA again began to pay Claimant for total disability at the rate of $ 582.00 per week until the error was once again caught. As of May 13, 2022, Claimant was being paid at the rate of $ 388.10 per week. Employer seeks an order

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[1] This rate was not only the Correct compensation rate, but technically was also not the same as the average weekly wage.

granting a ***credit*** in the amount of the recent overpayment of total disability, reduced by the amount of the acknowledged underpayment of partial disability.

It has long been recognized that, when parties enter into an agreement for compensation that contains a mistaken average weekly wage or compensation rate, the Boyd has the authority to reform the agreement to reflect the correct wage and rate. However, when doing that, "the Board must exercise its discretion and decide whether or not the modifications will be retroactive or prospective in effect." *Ohrt v. Kentmere Home*, Del. Super., C.A. No. 96C-01-005, Cooch, J., 1996 WL 527213 at *8 (August 9, 1996). Full restitution or correction of any overpayments (or underpayments) is not mandated, but is commended to the sound exercise of the Board's discretion.

In the present case, it is not a situation where the agreement itself **[*3]** is faulty. Employer represents that the agreement did state the correct compensation rate of $ 388; 10 per week. It is just that that is not what the TPA paid. While the Board understands that mistakes happen and the Board will occasionally take actions to remedy such mistakes, in this case it is a bit much. The TPA mis-paid Claimant for total disability. That error was then caught and corrected. The TPA then mis-paid partial disability. The TPA then mis-paid total again, paying the same amount as the error it had previously made (which had been caught and corrected). Exercising its discretion, the Board is satisfied that, in this case, the only way to get the TPA to fix its processes to ensure that proper payments are timely made to injured workers is to make the TPA bear the burden of its own blunders. The request for a ***credit*** is denied.

IT IS SO ORDERED this 21st day of July, 2022.

INDUSTRIAL ACCIDENT BOARD

IDEL M. WILSON

PETER W. HARTRANFT

I, Christopher F. Baum, Hearing Officer, hereby certify that the foregoing is a true and correct decision of the Industrial Accident Board.

Mailed Date: July 25, 2022

OWE Staff

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