

CASE PREPARATION

PRACTITIONERS' PERSPECTIVE FROM
1ST DAY OF ENGAGEMENT WITH CLIENT
TO CLOSING ARGUMENT

AND

SUPERIOR COURT AND LAW CLERK
OVERVIEW ON APPEAL

Claimant's Preparation of the Case

1.) What is the issue?

- a. Claim denied
 - i. No accident
 - ii. Injuries not causally related
 - iii. Not in the course and scope
 - iv. Forfeiture 19 Del. C. 2353

Have client complete a DCD petition and file it with the IAB

- b. Medical bills not paid
 - i. Forms completed properly
 - ii. Doctor not certified
 - iii. Body part has not been accepted
 - iv. Need pre-approval

File DCAD petition

- c. Medical bills not paid/UR decision
 - i. File appeal if you are w/in the 45 period
 - ii. Add doctor/provider as a party

- d. Termination petition
 - i. Have a detailed discussion with the client
 - ii. Enter appearance if not done so
 - iii. Send letter to defense counsel

- e. Lack of communication
 - i. Explain all of the benefits to the client
 - ii. Call the adjuster
 - iii. Call the doctor's office

2.) Gathering information

- a. Request medical records
 - i. Teleconference with the doctor
- b. Speak to any lay witnesses

1. Employees of the defendant (?)
- c. Request for production
 - i. Standard
 - ii. Fact specific
- 3.) Pretrial Memorandum
- a. Make sure you know the issue
 - i. If not, call the defense attorney
 - ii. ID each issue on the pre-trial
 - iii. Displaced worker doctrine may apply
 - b. Check off medical expenses/transportation expenses
 - c. Decide which medical expert to use
 - i. May be obvious
 - ii. Do you need more than 1 doctor
 1. \$\$\$\$
 2. Will it help or hurt
 3. Think about the big picture
 - iii. May change before the 30 day Rule
 - iv. If in doubt, name the more than one and decide which to call closer to the hearing date
 - d. Do I need a Vocational expert?
 - i. Temporary partial disability claim
 - ii. Displaced worker claim
 - e. Lay witnesses
 - i. No discovery
 - ii. Speak with them ahead of time
 - iii. Beware of "my buddy will back me up"
 - iv. Do you need multiple witness who will give the same testimony
 - v. Ask the client if they know the defense witnesses
 1. Are there any personal issues
 2. What can they say?
 - f. How much time is needed
 - g. Can you have an evidentiary hearing instead of a hearing with medical testimony
 - h. Mediation 19 Del. C. 2348A
 - i. 30 days after pretrial
 - ii. Commutation
 - iii. Permanency
 - iv. Contested claim settled by commutation
- 4.) Hearing notice
- a. Schedule the medical expert
 - b. If provider is a party, offer to schedule their deposition
 - c. Send the expert all records, labor market surveys, surveillance videos etc.

- d. Advise client in writing to send any bills, mileage or name of witnesses at least 45 days before the hearing

5.) 30 day Date

- a. Have all bills been submitted?
- b. Do I have the correct doctor?
- c. Watch out for a cancellation fee from the medical expert
- d. Subpoena witnesses?

DEFENSE PREPARATION OF CASE

1. Case Assignment

- **Need to do conflict check**
- **May need to call IAB for E/A if you get pretrial as 1st notice – 1/2 days before**

2. Formal Petition

- **Letter by claimant's counsel to IAB with cc to defense counsel**
- **Notice of Pretrial**

3. Request file from carrier

- **Make sure to get claims notes**
- **Not really as import as liability matter**
- **Request employment file, either directly from employer or from carrier**
- **Review file to prepare analysis report to carrier**
- **E/A**
- **RFP – do for both DCD / DACD**
- **Request for copy of public documents**
- **Subpoena for medical records - with copy to carrier and claimants counsel**
- **Use Claims file / statement of facts**

4. Check with Employer / Carrier about witnesses

- **Contact them ASAP**
- **Do not wait to last minute**
- **Unavailability - IAB does not like deposition of fact witnesses**

5. Experts

- **Check with carrier about setting up DME**
- **Some have preferred vendors**
- **Time is limited – do ASAP**
- **If carrier sets up will need to check till done**
- **If carrier sets up – make sure you also send notice to claimant's counsel**
- **Also need to get times / dates for depositions**

- **Try to schedule as close to hearing**

Tricky part – want to get DME report and Deposition dates, but you do not want to incur cancellation fees for carrier

6. Pre-trial Memorandum

- **From defense side – most information should come from claimant and claimant's counsel**
- **Always make sure to check SOL and Displaced Worker sections**
- **Other defenses should include HCPS issues and reasonable/necessary wording**
- **Witnesses – Make sure to list all that you know or expect**
- **Can list DME doctor and Vocational Rehabilitation Specialist generically at first**
- **Defense – Advantage of stipulation to hearing Officer**

7. 30-Day Date

- **Will make 2-4 days before actual 30 day date**
- **Making settlement offer – if warranted**
- **Will do separate letter to IAB with specific names and use of surveillance**
- **If problems exist – contact claimant's counsel and resolution is better than filing Motion with IAB**

WC Inn of Court presentation outline
Heather Long
Wade Adams

Prepping for expert depositions

- * review files 60 days out, subpoena any necessary records (defense can find gold mines in the prior records, which should be produced immediately to claimant's counsel)
- * What gets sent to the doctor
- * how do you send it- do doctors have certain preferences
- * How much do they charge and how do you deal with ones that charge in excess of \$2000? (example provided of letter asking dr to keep charge under \$2k)
- * What goes on during the prep
 - * pick out records that you think the dr will be cross examined on. Make sure they can give valid and sound reasons to advance your position
 - * If you don't know the answer to a question, make sure you ask it in prep.
 - * Understand your doctor. Doctors like to read from records. Make them stop, ask them questions to explain the diagnosis or a finding.
 - * raise the white flag if the doctor can't help you
 - * Surveillance- Make sure your doctor has seen it.

Prepping for lay witnesses

- * how many is too many lay witnesses (27 witnesses listed by an employer) "too many cooks in the kitchen"
- * Employer- cut down to 1 or 2
 - *if more than 2 witnesses, the hearing lasts too long, loose board's interest and increases chance of something backfiring on cross examination. The more witnesses the more the story differs.
- * be sure that you take your witness list into account when telling the board how much time is needed for the hearing
- * be sure to tell the board in advance of your hearing if there are certain witnesses that you can cross off the list, this way they won't have to list them on the internal documents
- * What goes on during the prep?
- * If you need to depose a lay witness ahead of time, review procedure
 - * legal hearing for permission
- * notify board ahead of time for interpreter concerns

Prepping for the client to testify

- * formulate your theory of liability
- * do your questions serve to advance your position? if not, then do you really need them?
- * explain the value of an "I don't recall" or "I don't know" answer on cross exam
- * arrange for final prep day of the hearing for 15-30 minutes

Surveillance

- * good to ask for this/ identify this early
- * could be used as a settlement tool
- * decide if it will really help your case
- * claimant's side, make sure the individual investigators are DE licensed

Social Media

- Great info found on Facebook, twitter, you tube, Instagram etc. Find it and share it with O/C. I search every claimant online. I've found claimants stating they are unable to walk post pictures of Disney land retreats, skiing adventures etc.

Stipulation of Facts

- * sample provided
- * keep it vanilla
- * Identify who will be testifying on each side
- * List AWW and WC rates
- * List agreed upon issues
 - Can we agree that an injury happened, if yes, can we agree on the body part?
- * Stipulate to LMS?
- * carve out the issues you want the board to decide
- * can be a tool for board to follow in complex legal-issue intensive cases (sample)

Prep for a disfigurement hearing

- * take photos/video
- * provide extra copies to the board
 - *cuts down on the feeling of "show and tell" if someone has to get up and show their boo boos
- * photos and video should be entered as exhibits on the record that way if there is an appeal there will be something for the Superior Court to review.

Preparation for the Hearing Itself

One Claimant's Attorney's Perspective

- Opening
 - Expert testimony
 - Other witness prep
 - Surveillance
 - Closing
- Be very very brief. Say what you'll prove.
How to make the Board happy
Vocational, fact, employer, eye witness
You & your expert should view it
Be very very brief. Say, "I proved it".
- Cite to pages of the deposition.
- Quote the claimant or witnesses exactly
- You cannot prepare for what is said at hearing. Know the outline for closing but make sure the evidence supports it. Make sure your opponent does the same.

Main Focus Should be the Claimant and His/Her Testimony

The List of Claimant Instructions

- Don't wear sweatpants, t-shirt, hat
- Don't roll your eyes or sigh
- Don't bring loud angry family members
- Don't guess
- Don't cry if at all possible
- Don't argue with the records
- Don't wear braces/assistive devices you do not normally use
- Don't ramble
- Don't lie
- Don't lie
- Don't lie

The List of Claimant's Attorney Instructions

- Know your case
- Know the records. Read every medical record. Every one.
- Know what battles are worth fighting
- Know your opponent

DEFENSE ATTORNEYS' PERSPECTIVE

OUTLINE

- Logical Framework
 - Deductive Reasoning

REFERENCES

Industrial Accident Board Rules 10, 13, 14, 15, and 17

BIBLIOGRAPHY

EXPERT WITNESSES: DIRECT AND CROSS-EXAMINATION

William G. Mulligan, Member of New York and New Jersey Bars
Copyright 1987

CROSS-EXAMINATION: SCIENCE AND TECHNIQUES

Larry D. Pozner and Roger J. Dodd
Copyright 1993

TRYING CASES TO WIN: Anatomy of a Trial (Herbert Stern and Stephen Saltzburg)

- Opening Statements
- Direct Examination
- Cross-Examination
- Closing Statements
- Relevance/Authentification/Motions in Limine/ Voir Dire/Depositions
- Hearsay/Confrontation (Stern, Saltzburg & Daniel J. Capra)

MY LIFE IN COURT

Louis Nizer

REFLECTIONS WITHOUT MIRRORS

Louis Nizer

THINKING FAST AND SLOW

Daniel Kahneman, Winner of Nobel Prize
In Economics

CASE PREPARATION

Segment 4

Industrial Accident Board Perspective

How can a well prepared case assist your client before the Board or how to have a smooth and painless hearing?

- 1) Client preparation and case planning to the 30 day rule.
 - a) First Report of Injury and Statement of Facts.
 - i) FRI rules and statutory basis.
 - ii) Effects of incomplete SOF.
 - b) Pretrial Conference and the Pretrial Memorandum.
 - i) What documentation must be provided?
 - ii) Narrow the issues and provide notice of defenses.
 - iii) Initial Witness list.
 - iv) Length of hearing
 - v) Discussion of IAB Rule 9 and case law.
 - (1) "30 Day Rule"
 - c) Discovery and Motion Practice issues.
 - i) Motions to Compel
 - ii) Motions to Dismiss
 - iii) When to bring an evidentiary hearing?
 - iv) Discussion of IAB Rule 11 and case law.
- 2) Witness Preparation
 - a) Have you narrowed down your witness list?
 - i) Provide updated list to the Board.
 - ii) Make sure they have documents/file needed for testimony.
 - b) Effective deposition preparation
 - i) IAB Rule 10 and depositions of fact witnesses.
 - ii) Do you have the correct expert?
 - iii) Does your expert have the records?
 - iv) Narrow the issues.
 - v) Can your lay witnesses provide evidence on the core issues
- 3) Hearing Preparation
 - a) Security and the difficult client
 - b) IAB Rule 14 Stipulation of Facts
 - i) Narrow the issues.
 - c) Exhibits and copies
 - d) Case law or when not to bring a notebook
 - i) Don't bring basic citations, i.e.; burden of proof

- ii) Copies of all Board decisions and unreported cases
- iii) Do provide your opponent a copy
- e) When all the preparation fails: Continuance requests
- 4) Board's Hearing Preparation and tips
 - a) Hearing decorum
 - i) Rules of Professional Conduct
 - b) Thoughts from the Board members

Randy J. Holland Delaware Workers' Compensation American Inn of Court

February 11, 2015

Group 1 Presentation: "Case Preparation"

Segment 5: Appellate Review Perspective

What does Superior Court see in terms of case preparation and hearing execution? The Court can distinguish sloppy preparation from well-prepared and presented cases. Here are some observations and tips.

- Standard of Review
 - The lens through which we view the record
 - Review limited to record Board relied in making its decision¹
 - On Board's factual determinations, take Board's experience and specialized competence into account²
 - Determine whether Board's decision is supported by substantial evidence³
 - Substantial evidence: "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion"⁴
 - May only overturn Board decision where no satisfactory proof to support Board's factual finding⁵
 - Fact driven process – be sure the facts you need are in the record and clearly presented
- Brief Writing Tips
 - First audience is the law clerk
 - Write the Statement of Facts section as you would like it to appear in the Order or Opinion
 - Keep a professional tone
- Statistics from Prothonotary
 - Number of IAB appeals filed in 2014 in each county
- Survey of Judges' and Law Clerks' Perspectives
 - We surveyed some Superior Court judges and law clerks, asking them what they would like to see more of on IAB appeals, and to give examples of things they thought were well done
 - Some judges will read everything in the record, some will not
 - Request oral argument on special issues
 - (more perspectives to come as we complete our survey)

¹ *Davenport v. D&L Constr. & Solid Walls, LLC*, 2014 WL 5649756, at *4 (Del. Super. Oct. 27, 2014).

² DEL. CODE ANN. tit 29, § 10142(d).

³ *See Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965); *E.I. DuPont De Nemours & Co. v. Faupel*, 859 A.2d 1042, 1046 (Del. Super. Ct. 2004).

⁴ *Person-Gaines v. Pepco Holdings, Inc.*, 981 A.2d 1159, 1161 (Del. 2009) (quoting *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981)).

⁵ *Johnson*, 213 A.2d at 67.

BEFORE THE INDUSTRIAL ACCIDENT BOARD

OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

Jane Doe, :
 :
 Claimant, :
 : IAB No.: 1400307
 V. :
 :
 Delaware Employer, :
 :
 Employer. :

Issues for Resolution by Board

A. Is the Claimant's left hip injury and proposed left hip replacement surgery reasonable, necessary, and related to her industrial accident?

B. If the left hip is not compensable, can the claimant return to work, and if so, in what capacity?

Stipulated Facts

1. The Claimant is Jane Doe, DOB: 06/18/1970.
2. The Claimant was involved in an industrial accident with the Employer on June 25, 2013.
3. The Claimant's Average Weekly Wage is \$443.10, with a corresponding Compensation Rate of \$295.40.

4. The Claimant sustained a right hip injury attributable to the industrial accident and has undergone a right hip replacement as a result of her injury.

5. The Claimant is seeking approval for a left hip replacement surgery.

6. The parties agree that the left hip replacement surgery is medically reasonable. The parties dispute the left hip surgery's causal relationship to the Claimant's June 25, 2013 Industrial Accident.

7. The Parties agree that Dr. Brady's most recent restrictions given to claimant on 1/12/15 are related to the left hip.

8. The Parties agree that if the left hip is not related to the industrial accident, then the Labor Market Survey conducted by Danny O'neal is valid and there are sedentary jobs in the labor market resulting in no wage loss for the claimant.

9. The Parties further agree that if the Industrial Accident Board finds the left hip compensable, claimant will remain on TTD and she will undergo hip replacement surgery within two months of the Industrial Accident Board's decision.

Heather Long, Esq.
Attorney for Claimant

Wade A. Adams, Esq.
Attorney for Employer

Dated: