

Holland Inn of Court Group #6
Handout Materials

Fact Pattern and Nature of the Case

Dorothy Gale was the only female Electrician on the crew for installation and maintenance of all electric distribution lines, transformers and lighting at Oz Manufacturing Company, in Wilmington, DE. Her immediate team members were Ray Scarescrow and Tin Woodman.

Dorothy was depressed because she missed her Aunt Em in Kansas, who raised her. She was working long hours and was always very tired. On February 5, 2014 she was preparing to leave her shift at Oz.

Ray Scarescrow didn't have much of a brain, but he did feel really sorry that Dorothy was so depressed. So, before she left the building he offered Dorothy his flask of Scotch to warm her up this blistering cold night, and to help lift her spirits. She gladly accepted it, as the only other person next to her was her teammate, Tin Wooden. Tin was really heartless, and he couldn't care less if Dorothy was depressed or homesick. Tin was standing there drinking his own flask filled with Ketel One Vodka. After Dorothy finished her flask, and her shift, she clocked out. Dorothy left in a hurry, and in a fog, and forgot to take all her safety gear and equipment with her.

Dorothy was about to enter her car, when she looked up at the end of the parking lot and saw the electric wire she repaired just last week was hanging down again and flopping in the wind. Though she was very worried about scuffing her shiny new red Tory Burch shoes, she knew it was just too dangerous to allow that live wire to continue to blow around in the wind. So, even though she did not have her safety equipment and goggles, she climbed the fence to secure and repair the wire. She knew this action didn't quite comply with those outdated rules in her Oz policy manual, but she felt her action could save lives by securing the loose line.

Just as Dorothy was almost to the top, a magnificent tornado blew by. It caught Dorothy, the wire struck her, and she was knocked unconscious to the ground. The fierce wind forced the bows off of her pigtails and, she landed so hard on the ground that her shiny new red shoes flew off in the air.

Fortunately, her courageous friend and coworker, Bert Lion, an EMT was walking to his car. Bert rescued Dorothy and drove her to nearby Cripple Care Hospital. After numerous diagnostic tests, Dr Wikerd Witch, the Hospitalist told Dorothy the results showed she had spinal stenosis, severe degenerative disc disease, and a herniated disc. Surgery was recommended. Dorothy told Dr. Witch she would only have surgery in Kansas. She was transported to a Kansas Hospital the following week.

Aunt Em was happy to have Dorothy back in Kansas and to help take care of her. Following surgery, Dorothy was given a form by her Dr. indicating she was to remain totally out of work for six months, as a result of her fall at Oz Manufacturing Company. As part of her recovery, the Dr. prescribed Chinese herbal remedies and medicines, and biofeedback. Sadly, the Surgeon informed Dorothy she would never be able to work as an Electrician again.

Now Dorothy was so depressed she contemplated suicide by hanging from a tree. She had no money and was out of work for six months. She had a tall pile of huge medical bills on Aunt Em's dining room table (some of which she couldn't even read as they were written in Mandarin). To top it all off, she even had a big, red, jagged, ugly scar. She just knew she'd never be able to wear her favorite Kate Spade bikini again! Aunt Em and Uncle Henry suggested that Dorothy make an appointment with the Psychologist she had seen before in Kansas for many years to help her deal with her depression and pain.

Aunt Em and Uncle Henry also told Dorothy when she gets a little stronger she should think about going to Emerald City where there is a very wise and handsome man, who always helps people solve any problem. Dorothy decided she would telephone one of those many Delaware lawyers she saw ads for on bulletin boards, and the backs of buses. Dorothy was sure they would be able to help her because their ads noted they were Experts in Workers' Compensation law.

BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

DOROTHY GALE,)	
)	
Employee,)	
)	
v.)	Hearing No. 1233334
)	
OZ MANUFACTURING COMPANY,)	
)	
Employer.)	

JOINT STIPULATION OF FACTS

ISSUES TO BE DETERMINED

1. Is Claimant's symptomatic herniated disk causally related to the work accident?
2. If so, would the proposed lumbar spine surgery not be required at this time but for the work-related accident OR is the proposed lumbar spine surgery causally related exclusively to her preexisting condition?
3. Timing: If the proposed surgery is causally related, is proceeding with surgery at this time reasonable and necessary or should Claimant continue treating conservatively by undergoing a series of lumbar spine injections?
4. Has Claimant been totally disabled as of February 5, 2014 and ongoing as a result of the work accident? Employer contends Claimant was never totally disabled but alternatively contends that any total disability status would have terminated as of February 19, 2014 at which time Claimant could have returned to work without restrictions.

BACKGROUND

ACCIDENT and INJURY

1. On February 5, 2014, Claimant while employed by Employer climbed a fence to secure and repair a dangling live wire during a tornado. The wire struck Claimant knocking her unconscious to the ground.
2. Claimant immediately treated at the emergency room on February 5 2014 for low back complaints and was placed on total disability.

3. Total disability status has been ongoing per her family doctor and presently per Dr. L. Flying Monkey.
4. Claimant was diagnosed as having spinal stenosis, severe degenerative disk disease and a L5-S1 herniated disk.
5. Dr. L. Flying Monkey is recommending a lumbar spine surgery involving a microdiscectomy and laminectomy at L5-S1.

PROCEDURAL BACKGROUND

6. On November 1, 2015, Claimant filed a Petition to Determine Compensation Due in which she seeks the compensability of the symptomatic herniated disk and proposed lumbar spine surgery. She also seeks payment of: outstanding medical expenses; ongoing total disability benefits as of February 5, 2014; medical expert witness' fees; and a reasonable attorney's fee.
7. Claimant's average weekly wage at the time of the accident was \$850 yielding a weekly compensation rate of \$566.67.
8. After an evidentiary hearing on January 5, 2015, the Board determined that the accident occurred during the course and scope of employment; therefore course and scope are no longer at issue.
9. Employer contests as a result of the work accident: that Claimant sustained a herniated disk; that a formerly asymptomatic herniated disk became symptomatic; that surgery is reasonable, necessary or causally related to the work accident; and that Claimant is total disabled.

WITNESSES

10. Witnesses to be presented:

- Dr. L. Flying Monkey *via* deposition on behalf of Claimant
- Claimant on behalf of Claimant
- Dr. Mombi North *via* deposition on behalf of Employer

, Esquire
Attorney for Claimant

, Esquire
Attorney for Employer

BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

JONATHAN DOE,)
)
 Employee,)
)
 v.) Hearing No. 1233334
)
 OZ MANUFACTURING COMPANY,)
)
 Employer.)

JOINT STIPULATION OF FACTS

The parties in the above-captioned matter present to the Industrial Accident Board with the following stipulated facts:

1. Claimant was injured on January 7, 2013 during the course and scope of his employment at Employer.
2. The average weekly wage at the time of the work accident was \$1,270.01 with resulting compensation rate of \$645.01.
3. The cervical spine and right elbow injuries were acknowledged as compensable.
4. On September 12, 2014, Claimant underwent an anterior cervical discectomy with decompression and total disk replacement with nerve root decompression at C6-7.
5. Claimant now contends that his work injury involves thoracic outlet syndrome.
6. Claimant has been provided treatment by Dr. Douglas Palma, Dr. Douglas Patterson of Delaware Orthopaedic Specialists, Dr. Eric Taylor, Dr. Drew Brandon and Dr. Steven Travers of First State Orthopaedics, Dr. Edward King, Delaware Chiropractic and Christiana Care Health Services.
7. There are outstanding medical bills in the undisputed amounts of \$6,300 relating to the thoracic outlet syndrome and 10,352 relating to the right elbow.
8. There was a settlement offer that was declined.

PETITIONS

9. This Hearing addresses **multiple petitions**:

- a. Petition to Determine Compensation Due filed on [date] relating to compensability of the new diagnosis of thoracic outlet syndrome.
- b. Petition to Determine Additional Compensation Due filed on [date] relating to a permanent impairment to the cervical spine and disfigurement.
 - i. Claimant contends he sustained a 35% permanent impairment to the cervical spine based on the Diagnosis-Related Estimates method, Table 15-5 Category IV in the fifth edition of the *AMA Guides to the Evaluation of Permanent Impairment* (“*AMA Guides*”).
- c. Petition to Determine Additional Compensation Due filed on [date] relating to the compensability of additional medical treatment including a cubital tunnel release surgery performed on 6/12/15 relating to the right elbow and resulting closed period of temporary total disability from 6/12/15 through 8/24/15 as a result of such surgery.
- d. IN TOTAL, Claimant is seeking:
 - compensability of the thoracic outlet syndrome diagnosis;
 - payment of medical expenses relating to said diagnosis;
 - compensability of the proposed first rib removal and scalenectomy (“thoracic outlet surgery”);
 - payment of benefits related to a 35% permanent impairment to the cervical spine;
 - payment of disfigurement benefits relating to the cervical spine;
 - payment for additional medical treatment for the right elbow including a cubital tunnel release surgery; and
 - payment of temporary total disability benefits from 6/12/15 through 8/24/15.

EMPLOYER’S CONTENTIONS

10. Employer disputes the causal relationship of the thoracic outlet syndrome diagnosis and the reasonableness, necessity and causal relationship of thoracic outlet syndrome medical treatment including the proposed thoracic outlet surgery.
11. Employer contends that Claimant sustained a 23% permanent impairment to the cervical spine based on the Range of Motion method (“ROM”) in the fifth edition of the *AMA Guides*.
12. Employer denies the causal relationship of the additional medical treatment (including the cubital release surgery) to the compensable right elbow injury but does not dispute the reasonableness and necessity of such treatment.

13. Employer disputes the period of closed total disability and contends that Claimant was capable of returning to work with restrictions as of 7/15/15.
14. Two defense medical examinations were performed: 1) by Dr. Andrew Preston on 9/18/15, 2015; and 2) by Dr. Peter Gand on 3/15/14.

WITNESSES

1. Dr. Douglas Patterson *via* deposition conducted on 10/07/15 (Claimant)
2. Dr. Drew Brandon *via* deposition conducted on 10/13/15 (Claimant)
3. Claimant
4. Mr. Robert Taylor (Claimant)
5. Dr. Andrew Preston *via* deposition conducted on 10/23/15 (Employer)
6. Ms. Sally Mae (Employer)
7. Mr. Anthony More (Employer)

ISSUES TO BE DETERMINED

1. Compensability of thoracic outlet syndrome.
2. Compensability of the reasonableness, necessity and causal relationship of the medical treatment related to thoracic outlet syndrome including the proposed thoracic outlet surgery.
3. Permanent impairment to the cervical spine. Claimant contends 35%. Employer contends 23%.
4. Disfigurement of the cervical spine.
5. Reasonableness, necessity and causal relationship of the additional medical treatment relating to the right elbow including the cubital tunnel release surgery performed by Dr. Douglas Patterson on 6/12/15.
6. If the cubital tunnel release surgery is compensable, whether the closed period of temporary total disability beginning on 6/12/15 ended on 7/15/15 or on 8/24/15.

Claimant's Attorney's Firm Name

Employer's Attorney's Firm Name

Jane Smith, Esquire
Attorney for Claimant
Firm address

John Reynolds, Esquire
Attorney for Employer
Firm address

APPELLATE ADVOCACY BRIEF WRITING OUTLINE

BRIEFS

Importance of the Appellate Brief

- (a) The brief should be written on the assumption that there will be no oral argument. As the frequency and length of oral argument has diminished, the brief is becoming the central focus of an appeal.
- (b) The brief should provide the Court with the essential basis for a disposition in your client's favor.

Brief and Appendix Construction

- (a) Comply with the Court's rules.
- (b) Make each document self-contained.

Standards of Review. These are critical to the ultimate disposition.

- (a) **Issues of Fact.** Review is deferential.
 - (1) **Jury Trial.** Findings are conclusive if supported by evidence.
 - (2) **Bench Trial.** Clearly erroneous.
 - (3) **Witness credibility.** Enhanced deference.
 - (4) **Sufficiency of evidence.** Viewed in light most favorable to the State.
 - (5) **Directed verdict.** Review is *de novo*
- (b) **Questions of Law.** Review is *de novo* (plenary), not deferential.
- (c) **Mixed Question of Fact and Law.**
- (d) **Abuse of Discretion.** Review is deferential. *See Kern v. TXO Production Corp.*, 738 F.2d 968 (8th Cir. 1984). An abuse of discretion occurs:
 - (1) When a relevant factor that should have been given significant weight is not considered;
 - (2) When an irrelevant or improper factor is considered and given significant weight; and
 - (3) When all proper factors, and no improper ones, are considered, but the court, in weighing those factors, commits a clear error of judgment.
- (e) **Summary Judgment.** No deference.

- (f) **Plain Error.** Must be fundamental and undermine the integrity of the trial.
- (g) **Harmless Error.**
- (h) **Statutes.** Some statutes state a standard of judicial review.
- (i) **Industrial Accident Board.** The record is examined for errors of law and to determine whether substantial evidence exists to support the Board's finding of fact and conclusions of law On appeal, the Court will not weigh the evidence, determine questions of credibility, or make its own factual findings. Errors of law are reviewed de novo. Absent error of law or substantial evidence, the standard of review for a Board's decision is abuse of discretion. The Board has abused its discretion only when its decision has exceeded the bounds of reason in view of the circumstances.

Selecting Issues

- (a) Do preliminary research.
- (b) Exclude weak issues.
- (c) Develop a central theme.
- (d) An issue is waived if it is not fairly presented in the opening brief.
- (e) Standards of Review.
 - (1) Know degrees of deference.
 - (2) Legal issues are strongest.
- (f) Remember law of the case.
 - (1) After appeal.
 - (2) During trial.
- (g) Be able to withstand a Motion to Affirm.

Summary of Argument

- (a) One of first sections read.
- (b) Make summary appealing and not perfunctory.
- (c) Be convincing.
- (d) Expand summary beyond restatement of headings.
- (e) Highlight theme of brief.

Statement of the Facts

- (a) Write chronologically.
 - (1) Organize according to the theme.
 - (2) Disregard witness order at trial.
 - (3) Never write "The first witness testified, the second witness, etc."
- (b) Write with accuracy.
- (c) Write objectively.
 - (1) Do not argue. That comes in next section.
 - (2) Include weaknesses.
- (d) Write to persuade subtly.
- (e) Relate facts to issues on appeal.
- (f) Eliminate unnecessary details.
- (g) Design headings and subheadings.
 - (1) Headings are important.
 - (2) Draft headings.
 - (i) Short and concise.
 - (ii) Specific and topical.
- (h) Cite to appendix pages.
- (i) Facts should be comprehensible with first reading.
- (j) Opponent should have to acknowledge its accuracy.

Presentation of the Argument

- (a) Sequence of arguments:
 - (1) Chronologically, or
 - (2) Order of importance, *i.e.*, strongest issue first.
- (b) Design headings and subheadings.
 - (1) Headings are important.
 - (2) Draft headings.
 - (i) Short and concise.
 - (ii) Specific and topical.
- (c) Argument is appropriate here.
 - (1) Use a simple and direct writing style.
 - (2) Apply logic and persuasion techniques.
- (d) Using facts - apply law.
- (e) Using authorities - apply facts.
 - (1) Avoid string citations.
 - (2) Cite most recent decisions available.
 - (3) Cite highest authority possible.

- (4) List authorities in order of persuasiveness.
- (5) Apply cases relied upon.
- (6) Distinguish conflicting authorities.
- (7) Explain meaning of cases where necessary.
- (8) Misuse of authority.
 - (i) Out of context.
 - (ii) Lack of candor.
- (9) Review prior orders.
- (10) Identify majority and minority view.
- (11) Shepardize.
- (f) Using footnotes.
 - (1) No arguments.
 - (2) No new issues.
- (g) Using quotations.
 - (1) Short.
 - (2) Be candid about context.
- (h) Reference the record by citing to appendix pages.
- (i) Edit and proofread.

The Conclusion

- (a) Explain desired relief.
- (b) Propose alternative dispositions.
- (c) Be concise and direct.

Respondent's Brief

- (a) Answer all issues raised by appellant.
 - (1) Directly.
 - (2) In same order.
- (b) Correct errors in appellant's brief.
 - (1) Fact.
 - (2) Law.
- (c) Note omissions in appellant's brief.
 - (1) Fact.
 - (2) Law.
- (d) Self-contained document.
- (e) Posture the case for affirmance.
 - (1) Asserting "harmless" error.
 - (2) Use standards of appellate review.

- (f) Affirmance not limited to trial court rationale.
- (g) Note appellant's concessions.

Reply Brief

- (a) Limited scope.
- (b) No new issues.
- (c) Be responsive. Do not wait for oral argument,

Cross-appeal. Mandatory if appellee seeks affirmative relief.

Table of Contents. Should include:

- (a) Headings.
- (b) Subheadings.
- (c) Summary of Argument.

Amicus Curiae Brief

- (a) May only be filed if:
 - (1) Court grants motion;
 - (2) Upon Court's request *sua sponte*.
- (b) Motion for leave to file an amicus curiae brief.
 - (1) State the interest of the movant.
 - (2) State specific reasons why warranted.
- (c) Motion to participate in oral argument.
 - (1) Granted only in extraordinary cases.
 - (2) If motion is granted, time is often shared with party supported by the amicus curiae brief.
- (d) Content of Amicus Brief.
 - (1) No new issues.
 - (2) Not all issues.
 - (3) Not repetitive.

Multiple Parties

- (a) One brief may be filed.
- (b) Another party's brief may be adopted by reference.

Effective Use of an Appendix

- (a) Table of Contents.
- (b) Subdivisions.
- (c) Paginate carefully.
- (d) Legibility is critical.
- (e) All pertinent record parts.
- (f) Joint appendix.

Sanctions

- (a) Performance Deficiency.
- (b) Non-conforming Papers.

APPELLATE ADVOCACY ORAL ARGUMENT OUTLINE

In General

- (a) **Oral argument usually is allowed only by leave of the Court.**
- (b) **Oral argument held when:**
 - (1) The appeal presents a substantial or novel legal issue;
 - (2) The resolution of an issue presented by the appeal will be of institutional or precedential value;
 - (3) A Justice has questions to ask counsel to clarify a legal, factual or procedural point;
 - (4) A decision, legislative act, or another event subsequent to the filing of the last brief, may significantly bear on the case; or
 - (5) An important public policy issue is implicated.
- (c) **Oral argument not held when:**
 - (1) The issue is not novel and the briefs adequately cover the arguments; or
 - (2) The outcome of the appeal is clearly controlled by a decision of the United States Supreme Court or this Court; or
 - (3) The factual state of the record will determine the outcome and the sole issue is either sufficiency of the evidence, the adequacy of jury instructions, or discretionary rulings, and the briefs adequately refer to the record.
- (d) **Any party may file a motion requesting oral argument.**

Prior to Argument

- (a) **Notice.** The clerk of the Court will notify parties of the date set for oral argument.
- (b) **Continuance.** A case may be continued after being scheduled for argument, by order of the court for good cause.

Date of Oral Argument

- (a) Arrive early.
- (b) Listen to other arguments.

Purpose of Oral Argument

- (a) **Primary goals.**
 - (1) Focusing on "decisive" points.
 - (2) Presenting broader picture.

- (3) Identifying and addressing Court's concerns.
- (4) Answering Court's questions.
- (b) **Secondary goals.**
 - (1) Clarification.
 - (2) Augmentation of particular arguments.
 - (3) Discussion of post-briefing developments.
- (c) **Oral argument is NOT for:**
 - (1) Repetition of briefs;
 - (2) Raising new issues.

Waiver of Oral Argument

- (a) Deciding whether to waive.
 - (1) Appellant should not waive. A case worth appealing is worth arguing.
 - (2) Appellee might waive.
- (b) Waiver procedure is stipulation.

Preargument Preparation

- (a) Become reacquainted with the appeal by immersion.
 - (1) Facts.
 - (2) Law.
- (b) Update research.
- (c) Select limited topics for discussion.
- (d) Prepare responses to questions on all issues.
- (e) Outline remarks.
- (f) Prepare modular discussions of issues.
- (g) Budget argument time.
- (h) Organize argument materials.
 - (1) Notebook.
 - (2) Index cards.
 - (3) Tab appendix.
- (i) Anticipate Court questions and dialogue.
- (j) Anticipate opponent's arguments.
- (k) Become familiar with Court.
 - (1) Attend other arguments a week or so before.
 - (2) Read Internal Operating Procedures.
- (k) Practice your argument.
 - (1) Alone, or
 - (2) Moot court panel of colleagues.
- (l) Be able to apply precedent created if you prevail.

Delivery of Oral Argument

- (a) **Component parts of presentation:**
 - (1) **Opening.**
 - (i) Introduce yourself and colleagues.
 - (ii) Identify all issues to be argued.
 - (iii) Identify each issue as argued.
 - (2) **Prepared discussion.**
 - (i) Short Outline.
 - (ii) Long Outline.
 - (iii) Be flexible.
 - (iv) Welcome questions.
 - (3) **Response to Court questions and comments.**
 - (i) Include points you wish to make.
 - (a) Leading cases.
 - (b) Key facts.
 - (ii) Respond immediately and directly.
 - (iii) Correct or clarify if necessary.
 - (iv) Concessions and admissions enhance credibility.
 - (v) Dealing with inability to answer a question.
 - (a) Be candid.
 - (b) Offer to respond in writing.
 - (vi) Explore remedies.
 - (vii) Notice dynamics of the panel.
 - (a) Listen carefully to exchanges.
 - (b) Do not reject help.
- (b) **Appellee.**
 - (1) Be flexible.
 - (2) Answer questions left open by appellant.
 - (3) Do not address issues:
 - (i) If not argued, or
 - (ii) If not raised by Court *sua sponte*.
 - (4) Persuade Court to affirm.
 - (i) Trial judge was correct.
 - (ii) Standard of review is helpful.
 - (iii) Harmless error. Concede point not outcome.
 - (iv) Remember you prevailed at trial.
 - (5) Use record support.
- (c) **Appellant's rebuttal.**
 - (1) Refute appellee's argument, if necessary.
 - (2) Clarify your strongest argument.
 - (3) Conclude on positive note.

- (d) **Demeanor.**
 - (1) Conservative dress.
 - (2) Respectful style.
 - (3) No jury arguments.
- (e) **Reading.** Counsel should not read from briefs or decisions, except in very unusual circumstances.
- (f) **Exhibits.** May be used with the Court's prior permission.