BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

ANDRES URDANETA,	)	
	)	
Claimant,	)	
	)	
v.	)	Hearing No. 1419092
	)	
TRADER JOES,	)	
	)	
Employer.	)	

ORDER

This matter came before a hearing officer of the Board on a motion by Trader Joes ("Employer") for a continuance of a hearing on an initial Petition to Determine Compensation Due filed by Andres Urdaneta ("Claimant") on October 15, 2014. The hearing is currently scheduled for March 31, 2015.

Employer states that, despite the petition being filed in October of 2014, it was "unaware" of the claim until January 5, 2015, when a copy of the petition was faxed to Employer's insurance carrier (Gallagher Bassett). Employer tried to schedule Claimant for a medical examination with Dr. Andrew Gelman, but the earliest date that the doctor had available was April 15, 2015. To try to get Claimant examined earlier, the carrier arranged for an examination on March 5, 2015, but the doctor selected turned out to work in the same office of Claimant's medical expert. Because of this conflict, the carrier returned to Dr. Gelman who, by that point, had no available dates until April 22, 2015. For these reasons, Employer asserts that a continuance of the scheduled hearing should be granted to allow sufficient time for Employer to defend the claim.

Claimant opposes the motion. Claimant asserts that both Employer and its carrier were aware of the petition in October of 2014. Claimant's counsel represents that she called the

carrier on October 14 to obtain a claim number for the case, only to be informed that Employer had not reported the claim or filed a First Report of Injury ("FRI"). Claimant's counsel then sent a letter to Employer's human resources department requesting that it formally notify the carrier and file the FRI. A copy of the petition was included with this letter. Claimant's counsel states that, on October 17, she received a call from Karen Knopp, an adjuster at the carrier, seeking to arrange for a recorded statement from Claimant. Counsel spoke with Ms. Knopp on October 20 about the case and faxed a copy of the complaint to her.[1] Claimant also observes that the Department of Labor's Office of Workers' Compensation ("OWC") had been in touch with the carrier multiple times trying unsuccessfully to have somebody contact OWC about the claim. Despite all this, the carrier did not assign counsel to the case until January of 2015.[2]

Finally, Claimant points out that, while Employer cancelled a March 5 examination of Claimant because the medical expert (Dr. Dellose) was in the same practice with Claimant's expert, the expert that Employer has now scheduled to examine Claimant (Dr. Gelman) is also in the same practice and, presumably, would also be conflicted out. Thus, Claimant suggests that Employer has not taken effective steps to arrange for a medical examination.

By statute, petitions are to "be heard as expeditiously as practicable, but, absent compliance with subsection (h) hereof, in no case more than one hundred twenty (120) days from the date of Notice of Pre-Trial Conference to be issued by the Department." DEL. CODE ANN. tit. 19, § 2348(c). The reference to subsection (h) is to the applicable standards for granting a continuance. To grant an extension of the 120-day deadline, there must be a finding of "good cause." DEL. CODE ANN. tit. 19, § 2348(h)(1). The bases for "good cause" for a continuance can

[1] This October 20th fax was sent to Ms. Knopp's attention. The copy of the complaint faxed on January 5th was sent to Gail Cosperellis.

[2] In a January 14th e-mail to Claimant's counsel, Employer's counsel stated that she had just been assigned the case.

be found under the *Rules of the Industrial Accident Board for the State of Delaware* ("*Board Rules*"), Rule 12(B)(1).

Many of the bases are clearly inapplicable. The continuance request is not because a "previously scheduled" witness is unavailable (Rule 12(B)(1)(a);[3] nor is it because of the unavailability of an attorney because of a conflicting court appearance (Rule 12(B)(1)(b)); or the illness of a party/attorney/witness (Rule 12(B)(1)(c)); or a justifiable absence from the State of a party/attorney/witness (Rule 12(B)(1)(d)); or a justifiable substitution of counsel (Rule 12(B)(1)(e)).

One basis that is arguably applicable is if there is inadequate notice from the Department or Board which would justifiably prevent a party from having a full and fair hearing. While Employer argues that the carrier did not receive the complaint until January 2015, this does not appear to be true. Claimant's counsel personally contacted the carrier and provided a copy of the complaint in October. The Board's file reflects that a Notice of Pretrial was sent to Gallagher Bassett on October 17. The Board's file also reflects that, on the date of the Pretrial (November 25) OWC sent a fax to the carrier noting that OWC still had not been contacted by the carrier with information as to who would be representing the carrier.[4] Nevertheless, the carrier did not assign counsel to the case until January of 2015.

Based on this, I find no basis for the charge of insufficient notice from the Department. Notice was provided to Gallagher Bassett. The problem is that the carrier did not respond promptly to the notice that was given.

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[3] There is an issue with having Claimant examined by a medical expert, but that will be discussed later. For purposes of Rule 12(B)(1)(a) it is enough that no medical witness was actually scheduled by Employer for the hearing.

[4] This fax was sent to Therese Terral.

Other bases for "good cause" for a continuance involve the availability of medical epxerts. However, this presupposes "due and prompt diligence on the part of the requesting party." *Board Rules*, Rule 12(B)(1)(f). Once again, Employer's delay in arranging for a medical examination of Claimant is because of the carrier's own delay in assigning counsel to this case or in participating in the litigation process. It is not the fault of Claimant. As Claimant's counsel points out, the carrier is still being inefficient in arranging for medical testimony, as it has, again, arranged for Claimant to be examined by somebody who is in the same practice (Delaware Orthopaedic Specialists) with Claimant's doctor creating an unacceptable conflict situation.

For similar reasons, I find no "unforeseen circumstances beyond the control of the party seeking the continuance," *Board Rules*, Rule 12(B)(1)(h). Employer's difficulty in this case is self-created. By contrast, Claimant and Claimant's counsel have done nothing to cause a delay and Claimant's counsel took efforts to get the carrier engaged even before the filing of the petition. In addition, scheduling the hearing as late as March 31, 2015, has already been something of an accommodation to Employer. The Notice of Pretrial went out on October 17, which means that, normally, the hearing would have been scheduled for mid- to late February. Instead, because of the delay in participation from the carrier, the hearing was scheduled for the end of March.

For these reasons, I find no good cause for a continuance of the scheduled hearing in this case. Any problems that Employer and its carrier have with that date are self-created by their own delay in responding to Claimant's petition. The motion is denied.

IT IS SO ORDERED this 10th day of March, 2015.

INDUSTRIAL ACCIDENT BOARD

CHRISTOPHER F. BAUM
Workers' Compensation Hearing Officer

Mailed Date:

OWC Staff

Natalie Wolf, Esquire, for Claimant
Morgan A. Sack, Esquire, for Employer