

February 10, 2018

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LETTER DECISION AND ORDER

Katie Hruska
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RE: HF No. 65, 2016/17 – Lloyd Curtis Johnson v. Midwest Construction, Inc. and
Acuity Insurance

Dear Counselors:

This letter addresses the following submissions by the parties:

January 24, 2018 Employer/Insurer's Motion to Extend Deadlines

January 29, 2018 Claimant's Objection to Motion to Extend Deadlines

ISSUE PRESENTED: Is Employer/Insurer entitled to a 60-day extension of the deadlines previously established by the Department's Scheduling Order?

FACTS AND PROCEDURE

Claimant filed a petition seeking workers compensation benefits on October 15, 2016. The parties entered a joint proposed scheduling order October 3, 2017, which the Department adopted. Employer/Insurer has requested an extension of the deadlines established in the scheduling order in order to locate a vocational expert to interpret Claimant's functional capacities evaluation (FCE). Claimant was originally scheduled to travel to Rapid City, South Dakota, to obtain an FCE on January 4, 2018. Due to financial hardship, Claimant advised Insurer he would not be able to make the

journey without prepayment of his travel expenses. Insurer originally denied Claimant's request for expenses and Claimant was unable to attend the appointment.

Employer/Insurer ultimately decided to pay Claimant's travel expenses and scheduled an FCE for January 29, 2018, in Sioux Falls, South Dakota. However, a scheduling error at the facility where the FCE was to take place resulted in the appointment being pushed back to February 7, 2018.

Claimant resisted Employer/Insurer's motion for an extension arguing that an extension of the deadlines would result in further financial hardship for Claimant. Employer/Insurer terminated Claimant's temporary benefits in November 2017 and a motion to reinstate temporary benefits is currently pending before the Department.

ANALYSIS

The Department's authority to grant continuances is governed by ARSD 47:03:01:24. However, this rule provides no guidance on what factors to consider, stating only that "[t]he department may grant continuances in its discretion." In determining whether a continuance is warranted in a state court action, our Supreme Court has stated "the granting or refusal of a continuance is within the sound discretion of the circuit court, and its rulings will not be reversed absent a clear abuse of discretion." *People in Interest of E.D.J.*, 499 N.W.2d 130, 133 (S.D. 1993). By extension, the same rule is applicable to the Department. The Court has delineated four factors in determining whether a continuance is justified:

- (1) whether the delay resulting from the continuance will be prejudicial to the opposing party;
- (2) whether the continuance motion was motivated by procrastination, bad planning, dilatory tactics or bad faith on the part of the moving

party or his counsel; (3) the prejudice caused to the moving party by the trial court's refusal to grant the continuance; and (4) whether there have been any prior continuances or delays.

Meadowland Apartments v. Schumacher, 2012 S.D. 30, ¶ 17, 813 N.W.2d 618, 623.

1. Prejudice to Claimant

Claimant argues that extending deadlines in this case will burden him financially because it will extend the time until he may potentially receive an award of disability benefits. The Department notes that Employer/Insurer previously ceased payment of Claimant's temporary total disability benefits in this case, and Claimant has requested a hearing on reinstatement of these benefits. Any financial hardship experienced by Claimant is due more to the cessation of temporary benefits than to the extension of these deadlines. Claimant may prevail in his current motion to reinstate temporary benefits which would lessen any financial burden that would result in delaying these proceedings.

2. Motivation of Insurer for Continuance

Employer/Insurer, in requesting Claimant travel outside of Pierre, should have anticipated paying Claimant's travel expenses. However, there is no evidence that Employer/Insurer's actions were motivated by bad faith or a desire to delay these proceedings. After Claimant was unable to attend the first FCE, Employer/Insurer took steps to reschedule an FCE as quickly as possible, and a new appointment was set within a month. A scheduling mix-up by the FCE facility resulted in another delay in obtaining an FCE, for which Employer/Insurer cannot be faulted. This delay alone is not sufficient to deny Employer/Insurer's motion to extend deadlines.

3. Prejudice to Employer/Insurer

Employer/Insurer seeks more time to receive a functional capacities evaluation in this case. The Department acknowledges that the FCE is a crucial component of a workers compensation case. Employer/Insurer seeks to engage its own vocation rehabilitation expert which will require the completion of an FCE. Denial of an extension here may limit Employer/Insurer's expert to adequately prepare a defense, thus causing substantial prejudice to Employer/Insurer. The Supreme Court has previously noted,

"[A] party is entitled as a matter of right to a reasonable opportunity to secure evidence on his behalf." Thus, "[i]f it appears that due diligence has failed to procure it, and where a manifest injustice results from denial of the continuance, the trial court's action should be set aside."

Schumacher, supra. (internal citations omitted).

4. Prior delays

The record does not contain any evidence that Employer/Insurer has asked for any previous continuance or delays.

CONCLUSION

Employer/Insurer's motion to extend deadlines, while not motivated by malicious intent, was at least in part attributable to its failure to anticipate that Claimant would require financial assistance to attend the FCE. However, as this is Employer/Insurer's first request to extend deadlines and because the potential prejudice caused Employer/Insurer by not extending deadlines outweighs the prejudice caused to Claimant by such an extension, Employer/Insurer's motion is GRANTED. The Department shall adopt the amended scheduling order proposed by Employer/Insurer.

Sincerely,

 /s/ Joe Thronson
Joe Thronson
Administrative Law Judge