SUPERIOR COURT OF THE STATE OF DELAWARE

E. SCOTT BRADLEY
JUDGE

1 The Circle, Suite 2 GEORGETOWN, DE 19947

November 26, 2013

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RE: Julie T. Jackson v. Decrane Aerospace, Inc. C.A. No. S12A-12-002-ESB

Date Submitted: August 13, 2013

Dear Counsel:

This is my decision on Julie T. Jackson's appeal of the Industrial Accident Board's dismissal of her Petition to Determine Compensation Due. Jackson worked for Decrane Aerospace, Inc. Jackson alleges that she injured her head, neck, and back when she slipped and fell at work on December 21, 2009. Jackson filed a Petition to Determine Compensation Due on April 15, 2010, but then withdrew it. Jackson filed a second Petition to Determine Compensation Due on December 16, 2011. A hearing was scheduled for April 20, 2012, but was continued for 100 days, per stipulation of the parties, because Jackson had not yet retained a medical expert to testify. A second hearing was scheduled for July 26, 2012. Ten days before the hearing, Jackson

requested a continuance of the hearing because she still had not retained a medical expert to testify. Decrane agreed to the request and the Board granted a second 100-day continuance, but stated that any additional continuances "should only be granted upon a finding of both good cause and extraordinary circumstances." The Board also noted that in cases involving an extension beyond 180 days, "the Board is to consider whether remedial action should be taken against the party whose lack of diligence caused the delay, including dismissing the petition or provisionally granting the relief requested." A third hearing was scheduled for November 1, 2012.

At the start of the hearing on November 1, 2012, Jackson orally requested another continuance so that her treating physician, Jay Dave, D.O., a neurologist who had been treating her for about five months and had performed an MRI and EMG on her, could have more time to determine whether he could testify as to whether or not her injuries were related to her accident at work. Decrane objected to the third continuance. The Board denied Jackson's request for a third continuance because, in its opinion, she did not satisfy the requirements of "good cause" and "extraordinary circumstances" as required by 19 *Del.C.* § 2348(h)(2) and Industrial Accident Board Rule 12. The Board then dismissed Jackson's Petition to Determine Compensation

¹ IAB Order Dated July 16, 2012 at 2.

² *Id.* at 3.

Due because she did not have a medical expert at the hearing who could testify that her injuries were caused by her fall at work.³ Jackson then filed an appeal with this Court.

STANDARD OF REVIEW

"A discretionary ruling by a trial court or administrative body on a motion for a continuance will not be set aside unless that decision is unreasonable or capricious." Jackson has the burden of proving that the Board's denial of her continuance request was arbitrary or unreasonable.

DISCUSSION

Jackson argues that the Board erred as a matter of law and fact when it denied her request for a third continuance because when doing so the Board did not first consider the six-factor analysis set forth in *Drejka v. Hitchens Tire Service*. I have concluded that the decision to grant or deny a continuance request of a hearing before the Board is governed by 19 *Del. C.* §2348(h) and Industrial Accident Board Rule 12

³ Happy Harry's Discount Drugs v. Soltis, 2003 WL 1903775, at *3. (Del. Super. March 21, 2003).

⁴ Fairwinds Shopping Center v. Board of Adjustment of New Castle County, 1993 WL 258801 (Del.Super. June 4, 1993).

⁵ *Id*.

⁶ 15 A.3d 1221 (Del. 2010).

and not *Drjeka*. *Drjeka* dealt with the rules adopted by the Superior Court governing discovery and case management for cases being litigated in that court. 19 *Del. C.* §2348(h), by its plain and unambiguous language, governs how requests for continuances in matters before the Board are to be handled by the Board. Thus, given that *Drjeka* dealt with rules for how the Superior Court is to conduct its proceedings and that there is different statutory authority for how the Board is to conduct its proceedings, it would appear that *Drjeka* is simply not applicable to the matter at hand. Indeed, to apply *Drjeka* to the matter at issue in this case would require me to completely re-write Section 2348(h). There is no reason for me to do that. Section 2348(h) states:

Requests for continuance may be granted only upon good cause shown by the party requesting the continuance. Good cause shall be set forth in the Rules of Procedure of the Industrial Accident Board. A request for continuance may be granted or denied by the Department. If a party objects to the Department's decision or another party's motion, it may, by motion, seek Board review and the Board shall determine the matter.

(1) With respected to any extension of the 120-day hearing deadline established by subsection (c) of this section, a written motion requesting the continuance shall be filed setting forth the basis for a good cause continuance pursuant to the Rules of Procedure of the Industrial Accident Board which, in the movant's opinion, justify such relief. With respect to such an extension request, the Board shall issue a written order specifying that good cause for such an extension exists under a specific Rule of Procedure of the Industrial Accident Board.

- (2) With respect to any request for an extension of a hearing beyond 180 days from the date of the petition, the party seeking the continuance must demonstrate that good cause for such an extension exists under a specific rule of the Industrial Accident Board and extraordinary circumstances exist which warrant the award of such continuance in the interests of justice. If such extension is to be granted, the Board's order shall be accompanied by the following:
 - a. A specific finding stating that good cause for such an extension exists under a Rule of Procedure of the Industrial Accident Board and stating the reasons why a continuance, rather than the use of other case management measures (including, but not limited to, precluding the presentation of certain witnesses or other evidence by the party responsible for the delay), is necessary in the interests of justice;
 - b. In any instance where such a continuance is sought by the petitioner, a specific finding that the petitioner has demonstrated that the petitioner has prosecuted its petition with due diligence; and
 - c. With respect to any party whose lack of diligence caused the need for a continuance, an order of such remedial action as is consistent with Rules of Procedure of the Board and is just under the circumstances.

Where a petitioner's or respondent's lack of diligence has caused the motion for a continuance, to remedy such lack of diligence and to ensure a speedy, efficient and just resolution of the matter, the Board shall consider dismissing the petition or provisionally awarding the relief sought by the petition.

IAB Rule 12 is the rule adopted by the IAB to comply with Section 2348(h).

It is titled "Continuances" and states:

(A) A request for continuance shall be in writing, include a proposed form of order, and provide notice that a copy was sent to the opposing party. A request for continuance may be granted upon showing of cause under 19 *Del. C.* §2348.

Should a party object to the decision, it may by motion seek reargument. Upon such motion, the Department shall then set the matter for a legal hearing as expeditiously as possible before the Board or a Hearing Officer who heard the original request.

Once a hearing on the merits has begun, a continuance may only be granted should it become necessary to continue the case in order to prevent a miscarriage of justice.

(B) For purposes of determining whether a requesting party had made the required showing of "good cause" or "extraordinary circumstances," under 19 *Del. C.* §2348, the Board shall use the following definitions of those terms:

(1) "Good Cause" shall include:

- (a) the unavailability of a previously scheduled medical or other material witness;
- (b) the unavailability of an attorney for a party due to a conflicting court appearance;
- (c) the illness of a party, a party's attorney or a material witness (including, if appropriate, illness which affects the ability of necessary persons to participate in the deposition of a medical or other material witness);
- (d) justifiable absence from the State of a party, a party's attorney or a material witness;
- (e) a justifiable substitution of counsel for one party (this shall not include a transfer of files within a law firm);

- (f) the unavailability of a medical witness whose deposition cannot be scheduled despite due and prompt diligence on the part of the requesting party;
- (g) inadequate notice from the Department and/or the Board which would justifiably prevent a party from having a full and fair opportunity to be heard; and
- (h) any other unforeseen circumstances beyond the control of the party seeking the continuance which would prevent the party from having a full and fair hearing.
 - (2) "Extraordinary Circumstances" shall include:
- (a) the sudden unavailability of a previously scheduled medical or other material witness;
- (b) an emergency mandatory court appearance which precludes the appearance of a party's attorney at the hearing;
- (c) a serious personal or medical emergency on the part of a party or a party's attorney;
- (d) any other unforeseen circumstance beyond the control of the party seeking the continuance which would prevent the party from having a full and fair hearing.

The Board may grant a continuance to a date more than 180 days after the filing of the petition only if the party requesting the continuance can demonstrate "good cause" and "extraordinary circumstances." "Good cause" is defined as, among other things, "the unavailability of a previously scheduled witness." "Extraordinary

⁷ *Id*.

circumstances" includes situations where there are "unforeseen circumstance[s] beyond the control of the party seeking the continuance which would prevent the party from having a full and fair hearing."

Jackson's third request for a continuance placed her well beyond the 180 day time frame set forth in 19 *Del.C.* § 2348(h). For "good cause," Jackson told the Board that her treating physician needed more time in order to determine if he could testify for her. For "extraordinary circumstances," Jackson told the Board that she suffers from post-concussion syndrome. Although not stated, Jackson's condition presumably impaired her ability to retain a medical expert in a timely manner. The Board concluded that these reasons were not sufficient to grant a third continuance, reasoning that Jackson had been given two continuances totaling 200 days and that her failure to obtain a medical expert to testify was an example of her not pursuing her claim with due diligence. I have concluded that the Board's ruling denying Jackson's request for a third continuance was not unreasonable, arbitrary, or capricious. Jackson was given an extra 200 days to obtain a medical expert to testify.

⁸ Pepsi Bottling Group, Inc., v. Meadow, 2009 WL 3532274, at *3 (Del.Super. Aug. 28, 2009).

⁹ Transcript of Board Hearing at 6 (November 1, 2012).

¹⁰ *Id*.

¹¹ 19 Del. C. §2348(h)(2)(b).

When she was given the second continuance, the Board told Jackson that she would have to show both "good cause" and "extraordinary circumstances" in order to get another continuance. Despite this admonition, Jackson appeared at the hearing without a medical expert to testify for her and orally requested a third continuance without complying with IAB Rule 12 by submitting a written request for a continuance to the Board and establishing that it had been served on Decrane within the required period of time. ¹² Jackson was injured on December 21, 2009. Her third hearing was scheduled for November 1, 2012. Thus, Jackson had almost three years to prepare for her hearing, but she never did get prepared. Jackson has no legitimate reason to complain about the Board's decision.

After the Board denied Jackson's request for a continuance, she was still entitled to proceed with the hearing, but she could not do so because she did not have a medical expert ready to testify. Without expert medical testimony to link her injury to her fall at work, she could not prove causation. Without proving causation, Jackson could not succeed on her petition. Since the statute of limitations had run, the Board's dismissal of Jackson's petition was the end of the matter. The Board's finding that Jackson could not prove that her injuries were causally related to her fall

¹² Industrial Accident Board Rule 12; 19 Del. C. §2348.

 $^{^{13}}$ Tenaglia-Evans v. St. Francis Hospital, 2006 WL 3404651, at *3 (Del. Super. May 1, 2006).

at work is based upon substantial evidence and free from legal error.¹⁴

Jackson also argues that the Board abused its discretion when considering her request for a continuance because it did not exclude certain allegedly inflammatory and prejudicial statements made by Decrane's attorney. These statements are as follows:

- 1. "(The claimant has) gone through two lawyers now. She's on her second lawyer."
- 2. Although the claimant is claiming a "traumatic brain injury as a result of the alleged slip and fall...approximately one month after this slip and fall my clients had her surveilled and she was videotaped giving a 50 minute lecture at Villanova University. And that this is the evidence that will come into this case at some point in time if this goes forward."
- 3. "There is also testimony from her own treating doctor, according to medical records, Dr. James Langan who did neuropsychological testing in April of 2012. And in his reports, he found her testimony to be invalid and suggestive of secondary gain."
- 4. There are no medical witnesses in this case to causally relate an injury to this alleged incident."
- 5. "This matter should be dismissed with prejudice. It's not (underlying claimant's attorney's) fault that the doctor's aren't coming forward to relate an injury in this case. If they're not willing to testify and they're not doing that, then this matter should be dismissed with prejudice. The rule should be followed.

¹⁴ General Motors v. McNemar, 2002 A.2d 803, 805 (Del. 1964); General Motors v. Freeman, 164 A.2d 686 (Del. 1960).

I have concluded that there is no merit to this argument. While it is true that

Decrane's attorney made these statements and that some parts of them are irrelevant

to Jackson's request for a continuance, there is no evidence that the Board was

influenced by them. Indeed, the Board's decision makes no reference to them at all.

CONCLUSION

The Industrial Accident Board's decision is **AFFIRMED**.

IT IS SO ORDERED.

Very truly yours,

/s/ E. Scott Bradley

E. Scott Bradley

ESB/sal

cc: Prothonotary

Industrial Accident Board

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