

**STEPHEN BURNETT, Claimant,**  
**v.**  
**PERDUE FARMS, INC., Employer.**

**INDUSTRIAL ACCIDENT BOARD OF THE STATE OF DELAWARE**

**Hearing No. 1353516**

**Mailed Date: August 4, 2014**  
**August 1, 2014**

**ORDER**

This matter came before the Board on July 24, 2014, on a motion by Perdue Farms, Inc. ("Employer") seeking to compel the deposition of Dr. A. Lee Osterman at a reasonable time and place.

Pending is a Petition to Determine Additional Compensation Due filed by Stephen Burnett ("Claimant") seeking the payment of surgical expenses (the surgery having been performed by Dr. Osterman) and compensation for a recurrence of total disability from the date of surgery and ongoing. Claimant identified Dr. Osterman as his medical expert for the purpose of providing medical testimony in support of Claimant's petition. The petition is scheduled to be heard on November 19, 2014.

Rather than have the doctor appear in person at the hearing, the parties have agreed to take the deposition of Dr. Osterman and are willing to take the deposition at the doctor's office to minimize disruption of his practice. However, Dr. Osterman's office has informed Claimant's counsel that, due to the doctor's busy schedule, the doctor is only able to be deposed at 9:00pm. No times have been offered for a deposition for any day at any time prior to 9:00pm.

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Employer's counsel objects that scheduling a deposition to begin at such a late hour is not reasonable and unduly burdensome. Employer requests an order compelling the scheduling of the deposition at a mutually convenient date and time, starting no later than 7:00pm.

This Board has always been very accommodating to expert witness in workers' compensation hearings. For example, even though it would be more beneficial to the Board to have the medical expert appear for in-person testimony at the hearing so that the Board could question the witness as to issues on which it needs clarification, the Board has freely permitted the use of depositions instead. Thus, a medical expert can give testimony at his or

her convenience for use at the hearing and minimize the disruption to the doctor's practice. In addition, the Board has frequently granted continuances of hearings because of the unavailability of a medical expert to even be deposed. Although the Workers' Compensation Act seeks to have hearings heard within about 120 days of filing, *see* DEL. CODE ANN. tit. 19, § 2348(c), the Board has freely allowed that time to be extended to provide medical experts with more time to schedule their depositions. Indeed, it is not an overstatement to say that the majority of continuances granted by the Board are given as a courtesy to the schedule of medical witnesses, to the detriment of the Board's own schedule.

There is, however, a limit. The Board has previously observed that, in its opinion, a doctor "has a professional and ethical obligation to his own patient's needs, including that patient's needs pertaining to legal action related to his medical condition. If the doctor intends to provide medical care to patients in workers' compensation cases, part of his professional duty to his patients is to cooperate with the workers' compensation legal process." *Hudson v. Templeo USA, Inc.*, Del. IAB, Hearing No. 1166137, at 2 (May 19, 2004)(ORDER). *See also Williamson v. DaimlerChrysler Corporation*, IAB Hearing No. 1282513, at 3-4 (April 25, 2007)(ORDER).

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This is particularly true for a treating doctor who, like Dr. Osterman, is a certified workers' compensation practitioner pursuant to section 2322D, title 19 of the Delaware Code. By gaining that certification a health care provider agrees, among other things, to comply "with Delaware workers' compensation laws and rules." DEL. CODE ANN. tit. 19, § 2322D(a)(2)a.

The Board observes that, as the treating doctor, Dr. Osterman is actually providing a service to his patient by making himself reasonably available for deposition to assist his patient in securing payment of the medical bills and compensation for the resulting period of incapacity resulting from the surgery. The Board also notes that the doctor will be paid for his time. In that sense, an appointment to provide deposition testimony for Claimant is little different than scheduling an appointment to see Claimant as a patient. The Board doubts that the doctor would insist that Claimant had to schedule his medical appointments for 9:00pm.

The Board agrees with Employer that a strict 9:00pm start time for a deposition is unduly burdensome and, in light of the flexibility and courtesy that the Board has traditionally given to medical witnesses, the Board believes that Dr. Osterman should similarly extend flexibility and courtesy to the Board by making himself available at a more reasonable time. Employer has offered to start the deposition as late as 7:00pm, to try to

minimize the disruption to the doctor's normal office hours, and the Board finds this to be appropriate.

Accordingly, the Board orders that Dr. Osterman provide a time that is more mutually acceptable and reasonable to all the participants to conduct this deposition. If the doctor should fail to do this, the Board will entertain a motion from Employer to have the doctor's certification as a Delaware workers' compensation practitioner revoked and possibly make referral to the doctor's governing medical society or board for further action.

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**IT IS SO ORDERED** this 1st day of August, 2014.

**INDUSTRIAL ACCIDENT BOARD**

/s/ \_\_\_\_\_

LOWELL L. GROUNDLAND

/s/ \_\_\_\_\_

JOHN D. DANIELLO

Mailed Date: 8-4-14

/s/ \_\_\_\_\_

OWC Staff

cc: James R. Donovan, Esquire, for Claimant

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