LABOR & MANAGEMENT DIVISION
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February 23, 2022

Bram Weidenaar
Alvine Law LLP
809 West 10th Street
Sioux Falls, SD 57104

LETTER DECISION ON
MOTION TO EXCLUDE/MOTION IN LIMINE

Charles A. Larson
Boyce Law Firm, LLP
PO Box 5015
Sioux Falls, SD 57117-5015

RE: HF No. 125, 2012/13 – Brenda Vanderbroek v. Conway Freight and Ace Insurance Co.,

Dear Mr. Weidenaar and Mr. Larson:

This letter addresses Conway Freight and Ace Insurance Company's (Employer and Insurer) Motion to Exclude/Motion in Limine submitted February 3, 2022; Brenda Vanderbroek's (Vanderbroek) Brief in Opposition to Employer and Insurer's Motion to Exclude or Motion in Limine submitted February 18, 2022; and Employer and Insurer's Reply Brief in Support of Motion to Exclude or Motion in Limine submitted February 22, 2022.

Employer and Insurer move the Department of Labor & Regulation (Department) to quash Vanderbroek's notice of deposition of the undisclosed expert Dr. Michael Hanes and to exclude Dr. Hanes' testimony, reports, and opinions pursuant to ARSD 47:03:01:16 and SDCL 15-6-26(e). In the alternative, Employer and Insurer move the

Department to enter a prehearing order prohibiting Vanderbroek from proffering or referring to the expert opinions, reports, or testimony of Dr. Hanes at the hearing in this matter due to her failure to timely disclose, pursuant to ARSD 47:03:01:05:02, ARSD 47:03:01:15, ARSD 47:03:01:16, and SDCL 15-6-37(b). Alternatively, Employer and Insurer have also moved for an Order requiring Vanderbroek, her attorneys, or both to pay Employer and Insurer's reasonable expenses caused by her failure to timely disclose.

The Department entered a Fourth Scheduling Order and Notice of Telephonic Conference on March 15, 2021, which set Vanderbroek's deadline to disclose and identify her experts together with any expert reports to May 28, 2021. This matter is currently scheduled for hearing on March 9, 2022. Vanderbroek has not provided an expert disclosure since 2013, and Dr. Hanes was never disclosed as an expert, nor was any report by him given, nor was any disclosure made of his expected opinions. On February 3, 2022, Vanderbroek entered a Notice of Deposition of Dr. Hanes set for the day before the hearing.

Vanderbroek asserts that Employer and Insurer were aware that she was being treated by Dr. Hanes, because they had access to her medical records and knew she was treating in Florida where she now resides. Vanderbroek argues that Dr. Hanes is her treating physician, and though he is an expert, he is a fact witness as his testimony relates to his diagnosis and treatment. Vanderbroek has provided extra-jurisdictional citations in support of her argument. For example, the Superior Court of New Jersey held that treating doctors are experts but also fact witnesses. *Charchidi v. Iavicoli*, 412 N. J. Super. 374 (NJ App.2010). As a fact witness the treating doctor may testify about

his diagnosis and treatment of his patient's medical conditions that he evaluated and treated. *Supra.*

Vanderbroek further argues that Dr. Hanes will testify about her treatment since moving to Florida, and the nature, extent and duration of her medical conditions and chronic, severe, debilitating pain condition since 2018. She further asserts that Dr. Hanes and the Jax Spine & Pain Centers were identified as treating physicians/clinics since March 3, 2020. Therefore, she argues there is no surprise that she would continue to seek evaluation and treatment of her medical conditions with her Florida physician. Additionally, she asserts that Employer and Insurer may cross-examine Dr. Hanes at his deposition and make any objections to the foundation, relevance, and admissibility of Dr. Hanes' testimony. Vanderbroek also claims that Employer and Insurer will not experience prejudice from Dr. Hanes' testimony regarding his records and reports.

While Vanderbroek has provided case law from other states, South Dakota law specifically limits testimony from a nonexpert, lay witness. SDCL 19-19-701 provides,

> If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:
>
> (a) Rationally based on the witness's perception;
> (b) Helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
> (c) Not based on scientific, technical, or other specialized knowledge within the scope of § 19-19-702.

Vanderbroek has asserted that Dr. Hanes would testify to opinions that require medical expertise including, (1) diagnoses of medical conditions; (2) the necessity for ongoing

medical treatment; (3) the viability of future surgery; (4) the medical necessity for narcotic pain medication and an “intrathecal pain pump;” (5) opinions regarding Vanderbroek’s candidacy for implantation of spinal cord stimulators; (6) opinions regarding the success or failure of Vanderbroek’s prior medical procedures; and (7) the medical necessity of “PROMJS-29 Computer-administered psychological testing.” As a medical doctor and Vanderbroek’s treating physician, Dr. Hanes’ testimony would be based on his “scientific, technical, or other specialized knowledge,” and therefore, he is not a lay, nonexpert witness.

The South Dakota Supreme Court has clarified its intention that physicians shall not be considered lay witnesses.

> However, the current text of SDCL 19-19-701 no longer supports the view that treating medical witnesses, such as physicians, should be categorically treated as lay witnesses simply because they provide testimony based upon their perceptions. In 2011, we amended SDCL 19-19-701 relating to lay witnesses by unambiguously stating that lay witness testimony may “[n]ot [be] based on scientific, technical or other specialized knowledge within the scope of [SDCL 19-19-702].” SDCL 19-19-701(c). The reference to SDCL 19-19-702 relates, of course, to our rule of evidence concerning expert witnesses. Both SDCL 19-19-701 and SDCL 19-19-702 are modeled after corresponding Federal Rules of Evidence, and, in fact, Rule 701 of the federal rules was, itself, similarly amended in 2000. At the time, the Advisory Committee stated the change was intended to “eliminate the risk that the reliability requirements set forth in Rule 702 would be evaded through the simple expedient of proffering an expert in lay witness clothing.” Fed. R. Evid. 701 advisory committee's note to 2000 amendment. The amendment “also ensure[d] that a party will not evade the expert witness disclosure requirements set forth in Fed. R. Civ. P. 26 ....” *Id.*

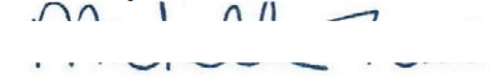
Weber v. Rains, 2019 S.D. 53, ¶ 33, 933 N.W.2d at 480. Pursuant to SDCL 19-19-701 and South Dakota case law, Dr. Hanes may not testify as a lay witness.

ARSD 47:03:01:12 provides, “A schedule may not be modified except by order of the Division of Labor and Management upon a showing of good cause.” As Dr. Hanes is

not a lay witness, and Vanderbroek failed to disclose him as an expert by the deadline set by the Fourth Scheduling Order nor has she provided good cause to extend the scheduling order, it is hereby ORDERED that Vanderbroek's notice of deposition of the undisclosed expert Dr. Hanes is quashed and Dr. Hanes' testimony, reports, and opinions are excluded pursuant to ARSD 47:03:01:16 and SDCL 15-6-26(e).

This letter shall constitute the order in this matter.

Sincerely,



Michelle M. Faw
Administrative Law Judge