

March 20, 2018

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**LETTER DECISION AND ORDER**

J. G. Shultz  
Woods, Fuller, Shultz & Smith PC  
P.O. Box 5027  
Sioux Falls, SD 57117-5027

RE: HF No. 28, 2014/15 – Amie R. Keller v. Safeway Inc. and Zurich Insurance Co.

Dear Mr. Beardsley and Mr. Shultz:

This letter addresses the following submissions by the parties:

January 3, 2018	Claimant's Objection to Employer/Insurer's Intention to Offer Medical Report
January 22, 2018	Employer/Insurer's Resistance to Claimant's Objection to Offer Medical Report  Affidavit of Dr. Richard Strand, M.D.
January 31, 2018	Claimant's Brief in Response to Employer/Insurer's Intention to Offer Medical Report

In addition, the Department held a telephonic hearing on Claimant's objection on February 21, 2018 to hear further argument on the matter. Claimant appeared through her counsel of record, Steven Beardsley. Employer/Insurer appeared through its counsel of record, Jeff Shultz.

## **ISSUE PRESENTED**

**Is the independent medical examination (IME) performed by Dr. Richard Strand admissible?**

## **FACTS**

Claimant was injured while working for Employer in 2008. Employer treated Claimant's injury as compensable and began paying her benefits. Over the course of the next six years, Claimant made several attempts to return to work. In 2014, Employer/Insurer consulted Dr. Richard Strand to conduct an independent medical examination (IME) on Claimant. Strand opined that Claimant's work injury was not a major contributing cause of her disability. Employer/Insurer provided notice of its intent to offer Dr. Strand's IME on November 15, 2016. Claimant objects to the admission of Dr. Strand's IME arguing that it lacks proper foundation, is speculative, and not relevant.

## **ANALYSIS**

### **I. Improper Foundation**

"An objection based on a lack of foundation is a general objection which applies to several specific types of questions, such as failure to authenticate a document, failure to establish that a document qualifies as a business record, failure to establish that a witness is qualified to give an opinion, lack of a foundation to impeach a witness, and lack of first-hand knowledge."

§ 43:10.Objections relating to substance of evidence—Lack of foundation, 4 Litigating Tort Cases § 43:10

Our Supreme Court has noted, "[b]ecause of the various meanings that can be derived from the 'lack of foundation' meaning, without a more specific explanation for the missing foundation element, both the trial judge and this Court are faced with mere

speculation and guesswork as to what the objection counsel's issue is.” *Rogen v. Monson*, 2000 S.D. 51, ¶ 15, 609 N.W.2d 456, 459.

To support her objection to Dr. Strand’s IME, Claimant relies on SDCL 19-19-803.2, which provides in relevant part:

Any party may object to the receipt into evidence at trial of such report or any portion thereof on any legal ground other than hearsay. Nothing in this section restricts any party from deposing the practitioner of the healing arts whose report is sought to be offered or otherwise conducting discovery or calling such practitioner as a witness at trial.

While SDCL 19-19-803.2 allows for the exclusion of evidence from the record, it does not provide a basis for which to exclude Dr. Strand’s IME. For that, Department must look to SDCL 19-19-702:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) The testimony is based on sufficient facts or data;
- (c) The testimony is the product of reliable principles and methods; and
- (d) The expert has reliably applied the principles and methods to the facts of the case.

When examining Dr. Strand’s IME under the provisions of SDCL 19-19-803.2, it meets the requirements of expert testimony. First, Dr. Strand is highly qualified to give an opinion on whether Claimant’s injury was a major contributing cause of her disability. Dr. Strand is a board-certified Orthopedic surgeon with over forty years of experience treating patients. Second, Dr. Strand reaching his conclusion by personally examining

Claimant and reviewing her medical records. Third, reviewing medical records and personally examining a patient is a method widely used in workers compensation cases.

Claimant argues because Dr. Strand's report came nearly six years after Claimant's injury, it lacks the necessary foundation for admissibility. Employer/Insurer counter that Claimant's argument goes to the weight of Dr. Strand's report and not to its admissibility. The Department agrees with Employer/Insurer. Timeliness is not a basis for a foundation objection. The extent to which a six-year gap affects the reliability of Dr. Strand's IME, if at all, is a question Claimant will have the opportunity to pose at a full hearing. "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *State v. Guthrie*, 2001 S.D. 61, ¶ 38, 627 N.W.2d 401, 417. (Quoting *Vigorous Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 596, 113 S. Ct. 2786, 2798, 125 L. Ed. 2d 469 (1993)). Indeed, at the telephonic hearing Claimant indicated that her medical expert, Dr. Christopher Dietrich, was prepared to offer testimony to that effect.

## **II. Speculation**

Claimant next argues that Dr. Strand has no evidence that Claimant had a preexisting condition prior to her workplace injury and that the IME is not based on "reasonable medical probability," which she contends renders the IME too speculative. The Department first notes that "reasonable medical probability" is a standard which applies to Claimant and not Insurer. See *Tischler v. United Parcel Serv.*, 1996 S.D. 98, ¶ 42, 552 N.W.2d 597, 604. The burden of proving every element of her case belongs

to Claimant. Employer/Insurer is not required to prove some alternate causality for Claimant's condition.

Additionally, Claimant argues that Dr. Strand's use of the terms "may" renders his opinion uncertain. To adopt Claimant's position would hold Employer/Insurer to an impossibly high standard of admissibility. The United States Supreme Court, in considering the admissibility of expert testimony, opined:

Of course, it would be unreasonable to conclude that the subject of scientific testimony must be "known" to a certainty; arguably, there are no certainties in science... Instead, it represents a *process* for proposing and refining theoretical explanations about the world that are subject to further testing and refinement" (emphasis in original).

*Daubert* 509 U.S. at 590, 113 S. Ct. at 2795, 125 L. Ed. 2d at 469.

It is unnecessary for Dr. Strand to prove with 100 percent certainty that Claimant's injury was not a major contributing cause of her condition, and highly improbable that Dr. Strand could do so. Claimant is free to argue the limitations of Dr. Strand's IME at a subsequent hearing. However, since Claimant challenges neither Dr. Strand's qualifications as an expert, nor the methodology by which he reached his diagnosis, whether Dr. Strand's IME is reliable has no bearing on its admissibility.

### **III. Relevance**

In her brief, Claimant argues that the fact that Dr. Strand does not support his IME with specific evidence means the IME is inadmissible under SDCL 19-19-403. Claimant contends that SDCL 19-19-403 "mandates that evidence be relevant, reliable and not based on speculation." Claimant's reliance on SDCL 19-19-403 is misplaced. The statute provides: "The court may exclude relevant evidence if its probative value is

substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”

This statute presumes that a piece of evidence is relevant and provides for its exclusion based on other grounds. Here, Claimant does not claim that Dr. Strand’s IME violates any of the conditions contained in SDCL 19-19-403.

### **CONCLUSION**

For the reasons discussed here, Claimant’s objection to the admission of Dr. Strand’s IME is OVERRULED. The IME is hereby admitted. This letter shall constitute the order of the department on this matter.

Sincerely,

/s/ Joe Thronson  
Joe Thronson  
Administrative Law Judge