April 14, 2020

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DECISION AND ORDER

Thomas J. Von Wald
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RE: HF No. 37, 2016/17 – Cindy Whitcomb v. The Evangelical Lutheran Good Samaritan Society d/b/a Good Samaritan Society-Sioux Falls Village and Sentry Insurance, A Mutual Company

Dear Ms. Brahms and Mr. Von Wald:

This letter addresses the following submissions by the parties:

January 17, 2020	Employer/Insurer's Motion in Limine
	Affidavit of Thomas Von Wald
February 26, 2020	Claimant's Objection to Motion in Limine
	Affidavit of Laura Brahms
March 20, 2019	Employer/Insurer's Reply to Claimant's Objection

QUESTIONS PRESENTED:

SHOULD THE DEPARTMENT GRANT EMPLOYER'S MOTION IN LIMINE REGARDING EXPERT TESTIMONY PRESENTED AT CLAIMANT'S SOCIAL SECURITY DISABILTY HEARING?

FACTS AND PROCEDURAL HISTORY

The facts of the case have been previously detailed. On January 8, 2020, the Department denied Employer/Insurer's motion to extend the scheduling order deadlines so that it could order a new IME. Shortly thereafter, Claimant informed Employer/Insurer of her intention to introduce the expert opinions of Dr. Nick VenOsdel and Rick Ostrander. Neither VenOsdel nor Ostrander had been designated as an expert by Claimant. Claimant also sought to introduce a causation opinion by Dr. Jason Henry, DC and the affidavit of Clara Miller[1]. Henry was designated as an expert by Claimant, though the causation opinion was completed after the deadline and was not previously released to Employer/Insurer.

ANALYSIS

SDCL 19-19-801(c) defines hearsay as "a statement that: (1) The declarant does not make while testifying at the current trial or hearing; and (2) A party offers in evidence to prove the truth of the matter asserted in the statement." Employer/Insurer argues Claimant did not previously disclose VenOsdel or Ostrander as experts and their reports are therefore inadmissible hearsay. Though Dr. Henry was previously designated as an expert, Employer/Insurer argue his causation opinion is not admissible since it was not previously disclosed. However, SDCL 19-19-803.1 provides: "[a] report submitted by a party pursuant to § 19-19-803.2 is not excluded by § 19-19-802, even though the physician is available as a witness." Further, the South Dakota Rules of Evidence spell out the procedure for admission of a medical report:

[1] The inclusion of Ms. Mille's testimony was resolved prior to this decision.

> [I]n worker's compensation proceedings, the written report of any practitioner of the healing arts as defined in chapter 36-2 may be used for all purposes in lieu of deposition or in-court testimony of such practitioner of the healing arts provided that the report so offered into evidence has attached to it an affidavit signed by the practitioner of the healing arts issuing such report which verifies that the report constitutes all of his report, and that if called upon to testify he would testify to the same facts, observations, conclusions, opinions, and other matters as set forth in such report with reasonable medical probability. The affidavit shall include or incorporate an attached exhibit by reference the qualifications of the practitioner of the healing arts whose report is being offered.
> The report is not admissible unless the party offering it gives notice to all other parties of his intention to offer such report at least thirty days in advance of trial. Such notice shall be given to all parties together with a copy of any reports which are intended to be offered. 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. SDCL 19-19-803.2

Under this rule, reports are admissible if they are from medical professionals and were provided to Employer/Insurer at least thirty days before the hearing. Claimant provided her intent to offer these reports in January 2020, within the timeframe contemplated by SDCL 19-19-803.2. Dr. VenOsdel, and Dr. Henry also qualify as a medical professional under SDCL 19-19-803.2, and their reports are not excluded as inadmissible hearsay.

On the contrary, Mr. Ostrander is not a medical professional and his report is not admissible under SDCL 19-19-803.2. Since Claimant seeks to offer Ostrander's report to prove the assertion that she is unable to find suitable employment, it is hearsay. In order to be admissible, Ostrander's report must fall under one of the exceptions to the hearsay rule found in the South Dakota Rules of Evidence. Claimant argues that several exceptions of the hearsay rule allow for admittance of her Social Security Disability file, and by extension Ostrander's report, into evidence. The Department has determined that the medical records exception does not apply to Ostrander's report

since it is not a medical record. Claimant also argues that the business records exception should apply to Ostrander's report. In order to admit Ostrander's report as a business record, Claimant must present a custodian at the hearing to certify the report pursuant to SDCL 19-19-803(6)(D). Since Claimant has not presented a custodian under this statute to authenticate Ostrander's report as a business record, the report cannot be admitted as a business record. Claimant alternatively argues that the report should be admitted under the residual exception in SDCL 19-19-807. This statute provides:

> Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in § 19-19-803 or 19-19-804.
>
> (1) The statement has equivalent circumstantial guarantees of trustworthiness;
>
> (2) It is offered as evidence of a material fact;
>
> (3) It is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts, and
>
> (4) Admitting it will best serve the purposes of these rules and the interests of justice.

Specifically, under subsection 3, Ostrander's report admitted in this way is not the more probative than other evidence. There is no indication that Claimant sought to elicit Ostrander's or any other expert's testimony at the hearing. As no exception applies to Ostrander's report, it is inadmissible hearsay and will not be admitted.

Though an exception allows for the admission of the reports of medical professionals, Employer/insurer argues that it is prejudiced by the inclusion of Dr.

VenOsdel's and Dr. Henry's reports because it was not given an opportunity to cross-examine the authors. Claimant counters that Employer/Insurer knew of the existence of these reports well in advance of the hearing and had ample opportunity to cross-examine bother regarding their reports. It is undisputed that Employer/Insurer was aware of the pending Social Security Disability Hearing well in advance of Claimant's workers compensation hearing as evidenced by its questioning of Claimant during her deposition. Claimant also notified Employer/Insurer of Dr. VenOsdel's functional capacity evaluation (FCE) a year before the hearing. In a January 21, 2019 letter to Employer/Insurer, Claimant noted: "I am currently waiting for the results of a Functional Capacity Evaluation that my client had undergone… Without those reports, I don't believe that we can fairly evaluate my client's claim. If you have any objections to the delay while we wait for receipt of those reports, please contact me." Claimant later sent a settlement request letter to Employer/Insurer on March 6, 2019 in which she provided a detailed summary of Dr. VenOsdel's FCE and Dr. Henry's report. Employer/Insurer thus had ample opportunity to cross-examine these witnesses or prepare a defense to their reports.

While it is true that neither Dr. VenOsdel's or Dr. Henry's reports were disclosed by the deadlines set by the scheduling order, Employer/Insurer had ample notice of Claimant's intent to rely on them during her workers compensation hearing. To deny admission of the reports under these circumstances would be contrary to purpose of workers compensation hearings as an informal and relatively easy way to compensate injured employees. Our Supreme Court has noted:

> One of the primary purposes of the South Dakota Worker's Compensation Act is to provide an injured employee with a remedy which is both expeditious and

> independent of proof of fault. *Scissons v. City of Rapid City,* 251 N.W.2d 681, 686 (S.D.1977). In order to accommodate this purpose, worker's compensation procedure is "generally as summary and informal as is compatible with an orderly investigation of the merits." Larson, *Worker's Compensation Law* § 77A.00 (1993). "The whole idea is to get away from the cumbersome procedures ... and to reach a right decision by the shortest and quickest possible route." *Id.* at § 77A.10. This informality not only prevents the defeat of claims by technicalities, but simplifies and expedites the achievement of substantially just results. *Id.* at § 77A.46.

Sowards v. Hills Materials Co., 521 N.W.2d 649, 653 (S.D. 1994).

CONCLUSION

Employer/Insurer's Motion in Limine is DENIED as to the reports of Dr. VenOsdel and Dr. Henry. Employer/Insurer's Motion in Limine is GRANTED as to the report of Rick Ostrander. Claimant may introduce the reports of Dr. VenOsdel and Dr. Henry in accordance with the requirements set by SDCL 19-19-802. This letter shall constitute the Department's decision on this matter.

Sincerely,

/s/ Joe Thronson
Joe Thronson
Administrative Law Judge