November 20, 2019

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LETTER DECISION AND ORDER

Kristi Geisler Holm
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RE: HF No. 4, 2018/19 – Jerri Noel v. Rapid City Area School District and Dakota Truck Underwriters

Dear Mr. Simpson and Ms. Geisler Holm:

This letter addresses the following submissions by the parties:

July 18, 2019	Employer/Insurer's Motion to Exclude Undisclosed and Untimely Expert Opinion or Testimony of Dr. Peter Vonderau
	Employer/insurer's Brief in Support of Motion
	Affidavit of Kristi Geisler Holm
August 29, 2019	Claimant's Brief in Response to Motion
	Affidavit of Michael Simpson
	Claimant's Motion to Reset Deadlines and Amend Scheduling Order
	Claimant's Motion re: Second Functional Capacitates Evaluation Ordered by Dr. Vonderau
September 16, 2019	Employer/Insurer's Reply Brief
	Supplemental Affidavit of Kristin Geisler Holm

ISSUE PRESENTED

DOES CLAIMANT'S DISCLOSURE OF DR. VONDERAU'S EXPERT OPINION AFTER THE DISCOVERY DEADLINE REQUIRE EXCLUSION OF THAT REPORT?

FACTS

The issue in this case revolves around the prospective opinion of Dr. Paul Vonderau, a physician treating Claimant since 2017. In December 2017, Dr. Vonderau requested a functional capacity evaluation (FCE). The FCE evaluator opined that he could not accurately assess Claimant's true musculoskeletal status or work abilities because Claimant had provided minimal effort during the evaluation. Based on the results of the FCE, Dr. Vonderau issued work restrictions limiting Claimant to occasional lifting of 25 pounds, frequent lifting of 12 pounds, and continual lifting of 5 pounds. He also limited Claimant to occasional bending and twisting. Dr. Vonderau did not place a restriction on the number of hours Claimant could work each day.

During a follow-up visit in July 2018, Claimant indicated to Dr. Vonderau that she had been terminated from her job because she could not fulfill the requirements. She also indicated that her back pain had worsened. Dr. Vonderau saw Claimant again on May 17, 2019. Claimant stated her symptoms had become significantly worse over time and that she was barely able to tolerate working four hours per day three days per week. On July 24, 2019, Dr. Vonderau ordered another FCE after Claimant's attorney inquired as to whether Claimant's original work restrictions needed to be modified.

Claimant filed a petition for a hearing on July 13, 2018, and Employer/Insurer filed an answer on August 20, 2018. According to the scheduling order issued by the Department, Claimant's designation of expert witnesses was due December 17, 2018.

At that time, Claimant designated Rick Ostrander, a vocational specialist. Claimant also reserved the right to designate any medical experts that had provided her care, though she did not specifically name Dr. Vonderau at that time. Claimant attempted to schedule a deposition of Dr. Vonderau for July 15, 2019. Claimant's counsel indicated that he believed Dr. Vonderau would testify that Claimant was only capable of working part time and had not been malingering during the previous FCE. However, Claimant's counsel canceled the deposition because she did not want to depose Vonderau twice. Instead, Claimant indicated to Employer/Insurer's counsel that she wanted to wait in the event that Employer/Insurer requested an IME and allow Dr. Vonderau an opportunity to review the IME before he testified. Employer/Insurer objected to Claimant's intention to have Dr. Vonderau testify. It pointed out that Claimant had failed to designate Dr. Vonderau as a witness by the December 17, 2019 deadline and filed a motion to exclude any testimony by Dr. Vonderau.

ANALYSIS

The Department's authority over discovery is found at ARSD 47:03:01:05.02, which provides in part: "[i]f any party fails to comply with the provisions of this chapter, the Division of Labor and Management may impose sanctions upon such party pursuant to SDCL 15-6-37(b)." Further, SDCL 15-6-37(b)(2) states:

> Sanctions by court in which action is pending. If a party or an officer, director, or managing agent of a party or a person designated under subdivision 15-6-30(b)(6) or § 15-6-31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under § 15-6-37(a) or 15-6-35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under § 15-6-35(a) requiring that party to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that that party is unable to produce such person for examination. It is uncontested that Claimant first indicated she anticipated Dr. Vonerderau would testify that she had not been malingering during the FCE in July 2019 nearly seven months after the deadline set by the Department's order. Claimant argues that she does not need to submit an expert report by Dr. Vonderau because he was Claimant's treating physician. While under the rules of evidence as they previously existed, a treating physician could be considered a lay witness and therefore need not submit an expert report. the Supreme Court amended SDCL 19-19-701 in 2011 to require a witness which may offer expert evidence to be treated as one. See *Veith v. Obrien* 2007 S.D. 88, ¶ 42, 739 N.W.2d 15, 27 As the Court later noted:

> [T]he 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… The amendment "also ensure[d] that a party will not evade the expert witness disclosure requirements set forth in Fed. R. Civ. P. 26 ...."

Weber v. Rains, 2019 S.D. 53, ¶ 33, 933 N.W.2d 471, 480 (internal citations omitted).

The Department therefore agrees with Employer/Insurer that Dr. Vondreau cannot be considered a lay witness in this case, but rather, must be classified as an expert. Therefore, Dr. Vonderau's testimony must be accompanied by a written report in accordance with SDCL 19-19-702.

Employer/Insurer argues Claimant's identification of Dr. Vondearau's testimony after the deadline, the proper remedy is exclusion. Employer/Insurer cites *Papke v. Harbert*, 2007 S.D. 87, 738 N.W.2d 510, in which the Supreme Court relied on three factors when determining whether to allow previously undisclosed expert testimony. These three factors are: "(1) the time element and whether there was bad faith by the party required to supplement; (2) whether the expert testimony or evidence pertained to a crucial issue; and (3) whether the expert testimony differed substantially from what was disclosed in the discovery process." *Id, at* ¶ 35 (citations omitted). Conversely, Claimant cites *Dudley v. Huizenga*, 2003 S.D. 84, 667 N.W.2d 644, to support its position that Dr. Vonderau's testimony should not be excluded. In that case, the Court relied on five different factors to determine whether a previously undisclosed expert's testimony should be excluded. In *Dudley*, claimant's attorney missed a deadline for designating an expert witness and the Department granted insurer's motion to strike the expert and motion for summary judgment. The circuit court upheld the summary judgment and Claimant then appealed to the Supreme Court. The Court reversed the

Department's original order granting summary judgment and considered the following factors to determine if striking the expert was justified:

> "(1) whether the party's failure to cooperate in discovery was attributable to willfulness, bad faith, or the fault of the client; (2) whether the adversary was prejudiced by the party's failure to cooperate in discovery; (3) whether there is a need for deterrence in a particular sort of noncompliance; (4) whether the party was warned that failure to cooperate could lead to dismissal; and (5) whether less drastic sanctions can be imposed before dismissal.

Id, at ¶ 15.

The Department finds that the facts of this case more closely resemble those of *Dudley* which is was a workers compensation case rather than *Papke*, a medical malpractice case. Though both cases involved analysis of SDCL 15-6-37(b), the Court in *Papke* also relied partially on analysis of SDCL 15–6–26(e)(1)) which is not applicable to workers' compensation hearings.

When analyzing the facts of this case under *Dudley*, the Department finds that exclusion of Dr. Vonderau's testimony is an extreme remedy. First, there is no indication that Claimant acted in bad faith when she sought Dr. Vonderau's testimony. Neither was a delay willful. Deposition of Claimant was delayed several months because of inclement weather and an attempt by the parties to mediate the case. In addition, Dr. Vonderau's change in opinion was based on facts made known to him after his initial diagnosis. It stands to reason he could not have provided one prior to the original deadline since he was unaware of the nature of Claimant's true condition. Second, Employer/Insurer will suffer very little prejudice if Dr. Vonderau's testimony is allowed. No hearing date has yet been set and there remains ample opportunity for Employer/Insurer to prepare a rebuttal to Dr. Vonderau's anticipated report. Unlike in

Papke, Claimant discussed his belief that Dr. Vonderau's opinion would be different and even postponed the deposition so that Employer/insurer could have the opportunity to conduct an IME. Next, as this is the first time this issue has come up in this case, the Department has not already warned the Claimant about the consequences of late disclosure of her experts. Likewise, there is not a need to deter future late disclosures. Finally, should the Department feel some form of sanction necessary, SDCL 15-6-37(b) provides a number of options less severe than exclusion, which the Court in *Dudley* supports. "Considering the remedial nature of workers' compensation, sanctions for discovery violations in administrative proceedings should have at least the same restraints as comparable sanctions for discovery violations in civil courts." Id, at ¶ 13.

Even under *Papke*, the Department finds that Dr. Vonderau's testimony must not be excluded. There, the Court has acknowledged that "the purpose of pretrial discovery is to allow "the parties to obtain the fullest possible knowledge of the issues and facts before trial." *Papke v. Harbert*, 2007 S.D. 87, ¶ 55, 738 N.W.2d 510, 529 (internal citations omitted). It also stated that "[m]ore drastic sanctions under SDCL 15–6–37(b) are appropriate when failure to comply is the result of willfulness, bad faith or fault*."* *Kaiser v. Univ. Physicians Clinic*, 2006 S.D. 95, ¶ 34, 724 N.W.2d 186, 195.

Employer/Insurer also argues that exclusion in this case would be less severe than that in *Dudley* because Claimant may still call Mr. Ostrander to testify on her behalf. The Department is not persuaded by this argument. Given the original findings of the FCE report, barring Dr. Vonderau from offering an opinion contradicting this report would place Claimant at a severe disadvantage. To be clear, at this point the Department gives no weight to the credibility of either the FCE or Dr. Vonderau's

anticipated testimony. Its opinion is simply that Claimant should have a reasonable opportunity to offer a rebuttal to the FCE. This case is still in an early enough stage that allowing Dr. Vonderau to offer an expert opinion about Claimant's condition is reasonable.

Finally, Claimant asks the Department to order approval of a new FCE which was requested by Dr. Vonderau. Vonderau requested a second FCE after two examinations in which Claimant alleged her pain had worsened and that she was unable to work under her current restrictions.

> Once notice has been provided and a physician selected or, as in the present case, acquiesced to, the employer has no authority to approve or disapprove the treatment rendered. It is in the doctor's province to determine what is necessary, or suitable and proper. When a disagreement arises as to the treatment rendered, or recommended by the physician, it is for the employer to show that the treatment was not necessary or suitable and proper.

Hanson v. Penrod Const. Co., 425 N.W.2d 396, 399 (S.D. 1988). In *Hanson*, the Court specifically upheld the Department's order that insurer pay for the claimant to undergo a nuclear magnetic resonance imaging exam as necessary to determine whether claimant had suffered soft tissue damage. *Id*. A similar situation exists in this case. Dr. Vonderau ordered another FCE to determine if Claimant's condition had worsened over time because she reported that she was not able to work under the previous restrictions. Employer/Insurer does not address Claimant's motion in its reply and therefore, the Department will grant Claimant's motion for a second FCE.

CONCLUSION

The Department finds that at this stage of litigation, exclusion of Dr. Vonderau's testimony is not proper. Employer/Insurer's Motion to Exclude this testimony is DENIED. Claimant's Motion to Reset Deadlines is GRANTED. Claimant's Motion for a Second Function Capacities Evaluation is also GRANTED. It is further ORDERED, that the parties shall submit new proposed scheduling orders as soon as is practical. This letter shall constitute the Department's Order on this matter.

SOUTH DAKOTA DEPARTMENT OF
LABOR & REGULATION

/s/ Joe Thronson
Joe Thronson
Administrative Law Judge