February 23, 2016

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Re: HF No. 169, 2014/15 – Jimmy Hobbs v TJ Trucking, Inc. d/b/a Johnson Trucking, and EMC Insurance Companies

Counsel:

Claimant filed a Motion to Compel Discovery dated December 9, 2015, to which Employer/Insurer responded on January 11, 2016. Claimant replied to that response on January 25, 2016. ALJ Sarah Harris remains assigned to this case; I am assisting with this Motion only.

The parties have asserted the following facts in their submissions:

1. Claimant asserts on October 4, 2014, he fell off the frame of a semi and hurt his left shoulder.

2. Claimant was examined at a Gillette, WY emergency room the day of his fall and again on October 6, 2014. He switched to the Spearfish, SD Hospital Emergency Room on October 10, 2014, as Gillette informed him it could no longer see him. Claimant was referred to Dr. Kipp Gould, an orthopedic surgeon from Spearfish.

3. Dr. Gould opined Claimant sustained a rotator cuff injury from the fall; on October 22, 2014, he scheduled shoulder surgery for November 25, 2014.

4. On or about October 31, 2014, Insurer sent Claimant's medical records to Dr. Richard Strand in Minneapolis for a record review.

5. On November 11, 2014, Dr. Strand concluded the shoulder problem pre-existed the fall and did not relate to it.

6. On November 20, 2014, based on Dr. Strand's review, Insurer sent a letter to Claimant denying his claim and refusing to authorize his shoulder surgery.

7. On December 10, 2014, Dr. Gould wrote a letter to Insurer disagreeing with Dr. Strand's conclusions and explaining his reasons based on his findings.

8. Dr. Gould has since given the opinion that enough time has passed that shoulder surgery will no longer alleviate Claimant's rotator cuff problems, and his shoulder condition is permanent.

9. Claimant sent a Petition for Hearing to the Department on April 14, 2015, which was filed April 16, 2015, claiming workers' compensation benefits to which he may be entitled in connection with his claimed injury.

10. Dr. Gould's deposition was scheduled for July 29, 2015; after the deposition was scheduled, an independent medical examination was set up with Dr. Strand on the same day.

11. Dr. Strand issued his IME report on August 7, 2015; his findings and opinions remained the same as those in his November, 2014 review.

12. Claimant served his Second Set of Interrogatories and Requests for Production of Documents to Employer/Insurer related to Dr. Strand on August 24, 2015. These requests focused on Dr. Strand's income and practice.

13. Employer/Insurer responded to these discovery requests on September 23, 2015; it answered some of the questions, but asserted the information for others was unavailable to it, and noted objections to the rest on the grounds they exceeded the proper scope of discovery by seeking information that was unlikely to lead to the discovery of admissible evidence, was overly burdensome, and excessively intrusive.

14. On September 29, 2015, Claimant wrote a letter to Employer/Insurer's counsel requesting further answers to these discovery requests; Employer/Insurer's counsel replied that there would be no response.

15. On October 15, 2015, Claimant sent a subpoena duces tecum to Employer/Insurer, who forwarded it to Dr. Strand in Minnesota. Dr. Strand's attorney rejected the subpoena, while acknowledging Dr. Strand has not treated any patients within the last year, has not done any IME's on behalf of plaintiffs in the last ten years, and before that may have done 3 or 4.

16. Claimant's Subpoena Duces Tecum asked for the following information:

a. Dr. Strand's tax returns for 2012 through 2014.
b. His W2s and/or 1099s for 2012 through 2014.
c. A list of reports done in 2012 through 2014 for insurers and defense attorneys.
d. A list of the days worked other than preparing reports or conducting exams for insurers or defense attorneys in 2012 through 2014.
e. Records showing earnings for work other than preparing reports or conducting exams for insurers or defense attorneys in 2012 through 2014.
f. Dr. Strand's invoices for his work related to Claimant.
g. The initial letter Insurer or OHARA sent to Dr. Strand requesting the records review.
h. Files, records, documents, etc. in Dr. Strand's files in regard to Claimant.

Additional facts may be discussed in the analysis below.

Claimant's Motion asks the Department to require Employer/Insurer to answer those questions in Claimant's Second Set of Interrogatories and produce those documents in his Request for Production of Documents that Claimant believes may tend to impeach him as an expert witness. Claimant also asks that Dr. Strand be required to produce the documentation in his possession or to which he is believed to have access in Claimant's Subpoena Duces Tecum and other discovery requests, or be barred from acting as Employer/Insurer's expert.

Discovery in South Dakota workers' compensation cases is governed by SDCL 1-26-19.2: "Each agency and the officers thereof charged with the duty to administer the laws and rules of the agency shall have power to cause the deposition of witnesses residing within or without the state or absent therefrom to be taken or other discovery procedure to be conducted upon notice to the interested person, if any, in like manner that depositions or witnesses are taken or other discovery procedure is to be conducted in civil actions pending in circuit court in any matter concerning contested cases."

Discovery rules are designed "to compel the production of evidence and to promote, rather than stifle, the truth finding process." *Magbuhat v. Kovarik, 382 N.W.2d 43, 45 (S.D.1986) (citing Chittenden & Eastman Co. v. Smith, 286 N.W.2d 314, 316 (S.D.1979))*.

There is no South Dakota authority directly addressing the appropriateness of discovery into an expert's financial information. As was the case in *Primm v Isaac, 127 S.W.3d 630, 632 (Ky. 2004)*, the issue here is whether a physician "can be compelled, prior to testifying, to produce his income tax records and other financial documents for examination by the opposing party's attorney for possible impeachment at trial … this case presents us with an issue that balances a litigant's need for discovery of impeachment evidence against a

nonparty witness's perceived right of privacy with respect to his or her financial records."

In *Primm, Id*., the Kentucky court acknowledged previous decisions had "extended pretrial discovery, by proper means, and admission into evidence of: (1) the number of examinations and evaluations performed by the expert doctor on behalf of employers, insurance companies, and other defendants in the previous twelve months as compared to the number of patients seen for treatment purposes during the same period; (2) the expert's charge for each examination; and (3) the expert's charge for each deposition given as a result of an examination." (citations omitted.) Plaintiffs served Dr. Primm, who had conducted an independent medical examination in a workers' compensation matter that subsequently devolved into a wrongful termination and employment discrimination lawsuit, *Primm, Id.,* a subpoena duces tecum demanding his tax documents for his medical practice over the three years leading up to the filing of the suit, as well as copies of all the IMEs he had performed in those years and the billing invoices he had issued. *Primm at 632-33.*

After acknowledging the well-established standards that discovery rules are to be liberally construed to provide both parties with relevant information, and wide latitude must be given a cross-examiner concerning an expert witness's bias or interest, the *Primm* court also put limits on the scope of such inquiries: "the mere fact that such information may fall within the scope of discovery does not mean that parties are entitled to unfettered discovery of impeachment evidence by whatever means they seek. Legitimate issues are raised concerning the extent of discovery sought in this case and the potential harm that could result from compelling a nonparty to produce perhaps sensitive financial documents." *Primm at 634*.

In the effort to find the line between fair disclosure and prejudicial and even damaging intrusiveness, the *Primm* Court reasoned "an expert can be questioned not only as to the percentage of income attributable to IME and other litigation-related services, but also the total amount of income derived from such activities. However … an expert's gross income, billing practices and other financial documents should not be subject to routine disclosure." *Primm at 637*.

The *Primm* Court added two useful caveats in this vein: "First, we do not intend by our decision today to preclude discovery of a nonparty witness's financial documents. There may be cases where tax returns and other documents relating to expert's activities should be compelled upon a trial court's finding that the witness has been less than forthcoming about the information. If, after taking the deposition, a party can demonstrate that additional information is necessary to undertake reasonable bias impeachment, it may seek leave of court to take additional discovery. Further, should the trial court determine that the witness has not provided complete and unevasive answers to the deposition questions, or has falsified, misrepresented, or obfuscated the required data, the aggrieved

party may move to exclude the witness from testifying or move to strike that witness's testimony and, or further, move for the imposition of costs and attorney's fees in gathering the information necessary to expose the miscreant expert. Second … it is important to recognize that the issue herein affects plaintiffs and defendants alike. Thus, our opinion will provide protection to experts for both plaintiffs and defendants by preventing the unnecessary and overly burdensome disclosure of personal financial information and by forestalling any chilling effect on the availability of expert witnesses." *Primm at 639* (supporting citations omitted.)

This is clearly an evolving area of law, and each case must be viewed individually, but the Primm analysis provides an even-handed and workable approach. It is observed that fewer doctors licensed in our state are willing to do IMEs each year, the unique nature of workers' compensation as a medical-legal hybrid makes physicians an integral part of the process, and physicians would only be discouraged further from being involved should they have their personal financial information demanded.
In this case, Dr. Strand has acknowledged he has retired from a patient-based practice; his entire practice over the last year has consisted exclusively in conducting IMEs for insurers; and whatever IMEs he has performed over the last ten years have been for insurers.

Rulings will now be made on the motion relative to the disputed items:

Interrogatory 2: *Objection sustained. Employer/Insurer has agreed to provide cost information following Dr. Strand's deposition, if any is taken*.

Interrogatory 3: *Objection overruled.*

Interrogatory 4: *Objection sustained as not within the knowledge of EMC or its attorney.*

Interrogatory 5: *Objection sustained, as not within the knowledge of EMC or its attorney.*

Interrogatory 6: *Objection sustained as not within the knowledge of EMC or its attorney.*

Interrogatory 7: *Objection sustained as irrelevant and not within the knowledge of EMC or its attorney.*

Interrogatory 8: *Objection sustained as sufficiently answered (Dr. Strand's CV has already been supplied.)*

Interrogatory 9: *Objection overruled as to any 1099s issued by Employer/Insurer's defense firm; otherwise sustained as not within the knowledge of EMC or its attorney.*

Interrogatory 11: *Objection sustained as not within the knowledge of EMC or its attorney.*

Interrogatory 12: *Objection sustained as subject to attorney work product and/or attorney-client privileges.*

Interrogatory 13: *Objection sustained as irrelevant, not anticipated to lead to the discovery of admissible evidence, and not within the knowledge of EMC or its attorney.*

Interrogatory 24: *Sufficiently answered as not within the knowledge of EMC or its attorney*

Interrogatory 25: *Sufficiently answered as not within the knowledge of EMC or its attorney.*

Production Request 3: *Objection sustained as not available to EMC or its attorney.*

Production Request 4: *Objection sustained as not available to EMC or its attorney.*

Production Request 5: *Objection sustained as not available to EMC or its attorney.*

Production Request 6: *Objection overruled as to any 1099s issued by Employer/Insurer's defense firm; otherwise sustained as not available to EMC or its attorney.*

As Dr. Strand is not a party to this proceeding, it is only necessary to address the subpoena duces tecum to the degree disclosures or the lack thereof affect Employer/Insurer's ability to call him as a witness. In that context, the request for Dr. Strand's tax returns, W2s or 1099s (from anyone other than Employer/Insurer's defense firm) is too intrusive, as there is no indication that Dr. Strand has provided false, misrepresented, or evasive legitimate inquiries into his relationship with Employer/Insurer. On the contrary, his attorney has already acknowledged Dr. Strand's entire recent practice has consisted of IMEs for insurers. The demands for his list of reports and days worked preparing reports is irrelevant His invoices for the work he has done in connection with Claimant's case should be produced if they have not been already. The demand for his earnings outside preparing reports or conducting exams is too intrusive. OHARA's letter has already been provided. His other file information developed

in this case should be provided unless the documents represent attorney work-product or attorney-client privileged information.

Claimant shall reimburse Employer/Insurer and/or Dr. Strand for the reasonable cost of providing the information required to be disclosed by this ruling.

This letter shall constitute the order on Claimant's Motion in this matter.

Sincerely,

James E. Marsh
Director