

May 30, 2024

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LETTER DECISION ON MOTION TO STRIKE

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RE: HF No. 11, 2022/23– Ricky Crihfield v Underground Solutions Inc. and First
Dakota Indemnity Company

Greetings:

This letter addresses Underground Solutions Inc. and First Dakota Indemnity Company's (Employer and Insurer) Motion to Strike and Objection to Claimant's Designation of Expert Witnesses Mark Nelson Beard, MD and Sarah Fuerstenberg, CNP. All responsive briefs have been considered.

Employer and Insurer have moved to strike Dr. Beard and CNP Fuerstenberg, because their disclosure as experts was not timely. On September 19, 2023, the

Department of Labor & Regulation (Department) entered a Scheduling Order and Notice of Telephonic Prehearing conference which set a deadline of November 1, 2023, by which Ricky Crihfield (Crihfield) was to disclose his experts. On that same day, Crihfield filed his designation of expert witnesses, identifying Dr. Adil Shaikh as his expert witness. Employer and Insurer filed their expert disclosure on December 1, 2023. The Scheduling Order set the deadline for filing discovery requests as January 3, 2024, and the deadline for completion of discovery as February 1, 2024.

Employer and Insurer served discovery requests to Crihfield on September 9, 2022, which he answered on February 16, 2023. Interrogatory 39 requested Crihfield to identify each expert witness he would expect to call to testify at hearing. In his answer, Crihfield stated, in relevant part, "Plaintiff advises that it is undetermined at this time who will be called as a potential witness. It is reasonably expected that the treating doctors may be called to testify."

On February 12, 2024, Crihfield submitted a Designation of Expert Witness listing Dr. Beard as the expert witness he was expecting to call at trial. On March 19, 2024, Crihfield filed an additional Designation of Expert Witness listing CNP Fuerstenberg as an expert witness. Employer and Insurer assert they were not made aware of Dr. Beard's intent to offer a causation opinion until February 12, 2024, and they were not made aware of CNP Fuerstenberg's opinion until March 19, 2024.

Crihfield argues that Dr. Beard and CNP Fuerstenberg are his treating physicians and therefore, were disclosed as potential experts in his answers to interrogatories. He further argues that Employer and Insurer are not prejudiced by his February 12, and March 19, 2024, disclosures. The hearing is set for September 12, 2024, and he

believes Employer and Insurer have time to address the opinions. He asserts that both Dr. Beard and CNP Fuerstenberg could be called to the hearing as treating providers and would provide the same testimony as they expressed in their letters. Crihfield concludes that Employer and Insurer are receiving a benefit by knowing what their opinions would be prior to hearing.

Crihfield further argues that Dr. Beard and CNP Fuerstenberg's opinion letters are admissible under SDCL § 19-19-703, which states,

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

Dr. Shaikh wrote a letter agreeing with the causation opinion of Dr. Beard and CNP Fuerstenberg. Crihfield argues that a retained expert would rely on the opinions of treating physicians. Therefore, he believes the letters should be admitted pursuant to SDCL § 19-19-703.

The Scheduling Order states, "The deadline for Claimant to disclose and identify its expert(s), together with the expert's report is November 1, 2023." Therefore, Crihfield was required by the Scheduling Order to both disclose his experts and their reports by that date, or they would be untimely. The only expert who was disclosed by the deadline was Dr. Shaikh. The Scheduling Order may only be modified by order of the Department upon a showing of good cause, and Crihfield has not offered a good cause for his failure to disclose Dr. Beard and CNP Fuerstenberg by the deadline. Both expert opinions were disclosed months after the deadline had passed. Merely stating that

treating providers *may* be called as witnesses in answer to interrogatories does not meet the requirement of the Scheduling Order expert and expert report disclosure deadline. Further, Employer and Insurer do suffer prejudice by the late disclosure as they would have to spend additional time and resources to respond to opinions submitted after both disclosure dates have passed. Therefore, the Department finds that the opinion letters of Dr. Beard and CNP Fuerstenberg were untimely and are hereby struck from the record along with the April 11, 2024, opinion of Dr. Shaikh referring to the untimely opinions. Crihfield's medical records and the September 19, 2023, disclosure of Dr. Shaikh have not been objected to by Employer and Insurer.

Employer and Insurer's Motion to Strike is GRANTED. This letter shall constitute the Department's Order on this Motion.

Sincerely,

A handwritten signature in blue ink that reads "Michelle Faw". The signature is written in a cursive, flowing style.

Administrative Law Judge