APPELLATE PANEL
DECISION AND ORDER
OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
W.C.C. FILE NO.: 1209379

Chris Chapman,.. Claimant, Respondent,

v.

Georgia-Pacific, Self-Insured Employer.....................................Defendant, Respondent,

Rakesh Chokshi, M.D..Non-Party Appellant.

Appellate Panel Review Hearing
scheduled in Columbia, South Carolina,
on June 9, 2014, per notices
timely and properly served upon
all parties of interest.

Appellate Panel Decision and Order

filed, September 3, 2014

APPEARANCES: DR. RAKESH CHOKSHI/APPELLANT represented by Carl E. Pierce, Esquire,

CLAIMANT/RESPONDENT represented by E. Hood Temple, Esquire,

DEFENDANT/RESPONDENT represented by Grady L. Beard, Esquire.

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STATEMENT OF THE CASE

Dr. Rakesh Chokshi, appeals the Decision and Order of Commissioner Andrea C. Roche dated January 27, 2014, granting the defendant Georgia Pacific's Motion to Compel Dr. Chokshi to provide his deposition pursuant to the fee schedule.

By way of background this matter involves an admitted work-related accident on July 23, 2012, resulting in an injury to his chest. The claimant thereafter alleged injuries to his ribs, low back, and radiculopathy in the left leg, all of which the defendant denied. On May 9, 2013, the defendant received a Form 14B completed by Dr. Chokshi, indicating the claimant had 0% impairment to the spine, could work without restrictions, and would more likely than not need pain medication or physical therapy.

On May 23, 2013, however, the defendant received a second Form 14B and questionnaire from claimant's counsel purportedly completed by Dr. Chokshi that was different in substance than the original questionnaire. The defendant sought to depose Dr. Chokshi in order to cross-examine him on his opinions and obtain clarification as to the different opinions he provided on the Forms 14B. The defendant advanced Dr. Chokshi $400.00 for the first hour of his deposition and agreed to pay $100.00 for each additional fifteen minutes thereafter, as required by the SCWCC fee schedule. Prior to the deposition, Dr. Chokshi demanded $1,000.00 per hour for his deposition. Defendant refused to pay the deposition fee, contending that it was not only exorbitant but that it was also in excess of the SCWCC fee schedule and thus illegal by statute. After contacting Dr. Chokshi about the fee, the defendant filed its Motion to Compel Dr. Chokshi's deposition compelling him to provide it for a fee in accordance with the fee schedule. The Motion Hearing was scheduled before the undersigned on October 28, 2013.

In support of its position, the defendant maintains that Dr. Chokshi is subject to the SCWCC fee schedule and his deposition should be compelled by the Commission at the compensation rates set forth in the fee schedule. On the other hand, Dr. Chokshi contends because he was never authorized by the defendant to treat the claimant, he was never put on notice that his deposition would be controlled by the

fee schedule. Dr. Chokshi asserts that because he was treating the claimant under his group health insurance, the appropriate fee would be a "reasonable fee" as established between the parties under Rule 26, SCRCP. The claimant argues that if the carrier denies the treatment in question is related to a workers compensation injury then the Commission has no jurisdiction over the matter and Dr. Chokshi's fee is not covered by the statute.

By way of Decision and Order dated January 27, 2014, Commissioner Roche granted the defendant's Motion to Compel Dr. Chokshi to provide his deposition pursuant to the South Carolina Workers' Compensation Fee Schedule and issued the following Order:

ANALYSIS

As noted in the Motion to Compel, the claimant sustained an admitted work-related accident on July 23, 2012, resulting in an injury to his chest. The claimant later contended that he suffered injuries to his ribs, low back, and suffers from radiculopathy in the left leg, all of which the defendant denied. Dr. Chokshi subsequently treated the claimant for low back complaints and eventually even performed low back surgery. Following this, Dr. Chokshi willingly completed a Form 14B, which would have obviously informed him that his treatment had been done pursuant to an alleged workers' compensation injury, even if it was denied by the Defendant. Moreover, Dr. Chokshi advised he would not prepare the Form 14B without the $64.00 payment to him personally in advance. This is the amount allowed by the SCWCC fee schedule for preparing such forms. There is no doubt that by filling out the Form 14B, and charging $64 for it, Dr. Chokshi was fully aware that he was subjecting himself to the jurisdiction of the SCWCC.

The fact that Dr. Chokshi may not have realized that his treatment of claimant was being done in connection with an alleged workers' compensation injury is irrelevant. Dr. Chokshi became subject to the fee schedule under the SCWCC when the claimant and his attorney alleged that Dr. Chokshi's treatment of the claimant was causally related to the claimant's work-related injury or that any impairment rating Dr. Chokshi chose to give was used by the claimant in his workers' compensation proceeding. It is the

claimant's workers' compensation claim under which Dr. Chokshi was subpoenaed and under which his testimony is sought. This is the only forum in which Dr. Chokshi can be compelled to provide testimony. To claim now that he is not subject to the fee schedule is without merit, as the subpoena was issued pursuant to an existing workers' compensation claim.

Moreover, even if there were some doubts as to whether Dr. Chokshi was subject to the jurisdiction of the SCWCC merely because the claimant alleged the injury was work related, such doubts were resolved when Dr. Chokshi voluntarily inserted himself into the workers' compensation case. Prior to his deposition being scheduled, Dr. Chokshi chose to fill out and return two Form 14B's and a questionnaire from claimant's counsel. Dr. Chokshi did not prepare the Form 14B's for free; he demanded and accepted the $64.00 fee provided for under the SCWCC fee schedule. Accordingly, at that point, Dr. Chokshi became subject to the fee schedule due to his own actions and waived any right to argue that his deposition was not subject to the fee schedule. Had Dr. Chokshi wished to avoid being deposed pursuant to the SCWCC fee schedule, he should have simply refused to complete the Form 14B's, refused to fill out any questionnaires, and refused to give any opinions related to the claimant's workers' compensation claim. Because he did not, he has waived the right to complain and should be compelled to give his deposition pursuant to the fee schedule as set forth in South Carolina Code section 42-15-90.

Dr. Chokshi also argues that he is an "expert witness" and his fee should be governed by Rule 26, SCRCP. This argument is wholly without merit.

Rule 26(b)(4) states, in relevant part:

> *(A) Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule* ***and acquired or developed in anticipation of litigation or for trial****, may be obtained by any discovery method subject to subdivisions (b)(4)(B) and (C) of this rule, concerning fees and expenses.*
>
> *(B) A party may discover facts known or opinions held by an expert* ***who has been retained or specially employed by another party in anticipation of litigation or preparation for trial*** *and who is not*

expected to be called as a witness at trial, only as provided in Rule 35(b) ....

> *(C) Upon the request of the party seeking discovery, unless the court determines otherwise for good cause shown, or the parties agree otherwise,* ***a party retaining an expert*** *who is subject to deposition shall produce such expert in this state for the purpose of taking his deposition, and the party seeking discovery shall pay the expert a reasonable fee for time and expenses spent in travel and in responding to discovery and upon motion the court may require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.*

Rule 26, SCRCP (emphasis added).

In interpreting the Rules of Civil Procedure, courts must use the same rules of construction as interpreting any statute or contract. Green v. Lewis Truck Lines, Inc., 314 S.C. 303, 304, 443 S.E.2d 906, 907 (1994) (citations omitted) ("In interpreting the language of a court rule, we apply the same rules of construction used in interpreting statutes."). Additionally, the words of the Rules of Civil Procedure must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the rule. Id.

Rule 26, by its clear and unequivocal language, applies only to opinions that are developed by expert witnesses who have been retained or employed specifically by a party and who are paid by that party for the purpose of generating opinions for use at trial. See Rule 26(b)(4) (noting the rule applies only to opinions ***acquired or developed in anticipation of litigation or for trial****, that the rule applies only to an expert* ***who has been retained or specially employed by another party in anticipation of litigation or preparation for trial****, and that* ***a party retaining an expert*** *must produce said expert for a deposition). By definition, the word "retain" means "to keep in one's pay or service; specifically* ***to employ by paying a retainer****." Dr. Chokshi is a treating physician. To the undersigned's knowledge, no one has retained or employed Dr. Chokshi in this case. Dr. Chokshi, by his own admission, had no idea that his treatment was*

rendered in conjunction with litigation so it defies logic that he could be a retained or specially employed expert for purposes of this claim when he had no idea a workers' compensation claim even existed.

Because he was not retained, the plain language of Rule 26 regarding fees for expert testimony does not apply to him; he is simply not entitled to compensation under Rule 26. Rather, Dr. Chokshi is merely a lay fact witness in this matter. He treated the claimant for a lower back injury. It is his treatment that is at issue in this case and the reason for which his deposition is sought — not because of any opinions Dr. Chokshi was employed by claimant's counsel to give. Dr. Chokshi has confused the fact that he may be qualified by reason of his training, education, or experience to offer an opinion at trial under Rule 702 of the South Carolina Rules of Evidence. However, merely being a witness who is allowed to offer an opinion under the rules of evidence is not the standard set forth in Rule 26 which speaks ***only to retained or specially employed experts****. A plumber who repairs a faulty leak that resulted in property damage may be entitled to give an opinion as to the cause of the leak; however, his opinions as to the cause do not convert him to a retained expert on behalf of a party, entitling the plumber to an expert fee under Rule 26. Dr. Chokshi is no different.*

Other jurisdictions have reached a similar conclusion. For example, in State ex rel. Montgomery v. Whitten, 262 P.3d 238 (App. 2011), the Arizona Court of Appeals was faced with the same decision and determined that treating physicians were entitled only to the same witness fee every other witness was entitled to.[1] *In that case, the court held that "[a] fact witness typically testifies about information he or she has acquired independent of the litigation, the parties, or the attorneys." Thus, the court concluded, a medical fact witness would be one who did not have to perform additional work in order to answer questions other than reviewing his own records. The court further noted that merely because the treating physicians may "educate" the jurors by explaining terms and procedures in a manner more understandable*

[1] While Whitten was a criminal case, it was subsequently applied to civil cases via the Rules of Civil Procedure Sanchez v Gama, ___ P 3d ___, 2013 WL 4430914 (Ariz App Div. 1 2013)

for the trier of fact does not constitute expert testimony. Whitten at 243. The court contrasted this with the testimony of a physician who has been asked to review records or testimony of another health care provider or to opine regarding the standard of care or treatment given by another provider." Whitten at 242. See also McDermott v. FedEx Ground Sys., Inc., 247 F.R.D. 58, 60–61 (D.Mass. 2007) (holding that the treating physician is entitled to no more than that provided under the statutory witness compensation scheme); Mangla v. Univ. of Rochester, 168 F.R.D. 137, 139 (W.D.N.Y.1996) (deposition questions concerning treating physicians' opinions based on their examination of a patient are a necessary part of the treatment of a patient and "do not make the treating physicians experts"); Baker v. Taco Bell Corp., 163 F.R.D. 348, 349 (D.Colo.1995) (treating physician "testimony is based upon their personal knowledge of the treatment of the patient and not information acquired from outside sources for the purpose of giving an opinion in anticipation of trial"); Clair v. Perry, 66 So.3d 1078, 1079 n.1 (Fla.Dist.Ct.App.2011) (citing Frantz v. Golebiewski, 407 So.2d 283, 285 (Fla.Dist.Ct.App.1981)) (a treating physician is not generally an expert witness because "a treating doctor ... while unquestionably an expert, does not acquire his expert knowledge for the purpose of litigation but rather simply in the course of attempting to make his patient well"); Brandt v. Med. Def. Assocs., 856 S.W.2d 667, 673 (Mo.1993) ("The treating physician is first and foremost a fact witness, as opposed to an expert witness. In personal injury litigation, the treating physician is likely to be the principal fact witness on the issue of damages...."); Nesselbush v. Lockport Energy Assocs., L.P., 647 N.Y.S.2d 436, 437 (N.Y.Sup.Ct. 1996) (citing Sipes v. United States, 111 F.R.D. 59, 61 (S.D.Cal. 1986)) ("[I]t is improper to name treating physicians as expert witnesses where the information and opinions possessed by said physicians [were] obtained by virtue of their roles as actors or viewers of the transactions or occurrences giving rise to the litigation....") Davoll v. Webb, 194 F.3d 1116, 1138 (10th Cir.1999) (a treating physician "is not considered an expert witness if he or she testifies about observations based on personal knowledge, including the treatment of the party"); Fisher v. Ford Motor Co., 178 F.R.D. 195, 197 (N.D.Ohio 1998) ("Courts consistently have found that treating physicians are not expert

witnesses merely by virtue of their expertise in their respective fields."); Beaty v. St. Luke's Hosp. of Kansas City, *298 S.W.3d 554, 559 (Mo.Ct.App.2009) (a treating physician "is first and foremost a fact witness";* Donovan v. Bowling, *706 A.2d 937, 941 (R.I.1998) (testimony by a treating physician is " entirely different from that of an expert retained solely for litigation purposes because a treating physician is like an eye-witness to an event and will be testifying primarily about the situation he or she actually encountered and observed while treating the patient.").*

In his memorandum in opposition to the Motion to Quash, Dr. Chokshi has given no rational basis why he, as a fact witness is entitled to more than the same $25.00 witness fee that every other profession is entitled. Dr. Chokshi believes it is appropriate to carve out, for himself and other doctors, an exception to the rule that fact witnesses are not paid for giving testimony. Other professions aside from physicians provide an equal benefit to society as doctors and yet no court allows them to demand any fee, other than that allowed by rule. Courts should not create a special class of fact witnesses who are entitled to expert witness fees while excluding others, as there is no basis for a court to weigh the burdens and costs of one profession versus another. This sentiment is best summed up in Demar v. United States, *199 F.R.D. 617, 619–20 (N.D.Ill. 2001) wherein the court held:*

> *While physicians certainly have significant over-head costs and a special expertise, so do a myriad of other professions. For instance, should fact witnesses who happen to be engineers, attorneys, accountants or consultants—professions also with special expertise and significant overhead costs—similarly be allowed more than the statutory fee prescribed by [the local rule]? If the answer is in the affirmative, then does [the local rule] merely apply to less prestigious professions? Who decides what professions fall under [the rule] versus the more lucrative "reasonable fee" under [Rule] 26(b)(4)(C)? This Court declines to set precedent in this jurisdiction that, essentially, singles out physicians for special treatment. Rather, the more prudent course of action is to follow the unambiguous tenets of [Federal Rule of Civil Procedure] 26(b)(4)(C) and [the local rule], which provide that expert witnesses—independent of their profession—obtain compensation at a "reasonable fee", while fact witnesses—independent of their profession—receive compensation at the statutory fee of $40. If Congress wishes to single out certain professions*

> *for higher compensation, that is certainly its prerogative, but this Court declines to enter that arena, which is, essentially, a slippery slope.*

Demar v. United States, 199 F.R.D. 617, 619–20 (N.D.Ill.2001); see also McDermott, 247 F.R.D. at 61 (there is no "logical explanation as to why [a special] ... rule applies to physicians and no other class of professional or otherwise with 'specialized knowledge' about the testimony to be provided"); Mangla, 168 F.R.D. at 140 (physicians will "suffer no more inconvenience than many other citizens called forward to be deposed or testify as a trial witness in a matter in which they have first hand factual knowledge"); cf. Irons v. Karceski, 74 F.3d 1262, 1263–64 (D.C.Cir.1995) (holding that an attorney fact witness was not entitled to be paid his hourly billing rate and not unduly burdened by being compensated the statutory rate for an expected three day deposition).

Additionally, Dr. Chokshi's alleged entitlement to the witness fee under Rule 26 is not only inconsistent with the plain language of Rule 26, SCRCP, but also inconsistent with the Federal Rules of Civil Procedure, upon which our rules are based. The Advisory Committee Notes to Federal Rule of Civil Procedure 26(b)(4) recognized the distinction, stating, "[an] expert whose information was not acquired in preparation for trial but rather because he was an actor or viewer with respect to transactions or occurrences that are part of the subject matter of this lawsuit ... should be treated as an ordinary witness." Under both the language and the intent of the rule, Dr. Chokshi is an ordinary witness, as his deposition is sought only for his treatment of the claimant. Rule 30 does not make an exception for Dr. Chokshi or anyone in his profession.

CONCLUSION

After listening to the oral arguments presented by each counsel, and considering the positions of both parties as set forth in the Motion and Memoranda filed on behalf of the parties, the undersigned exercises her discretion and determines a treating physician's deposition in a workers' compensation case is subject to the fee schedule regardless of whether the case is admitted or not. Furthermore, Dr. Chokshi

had a reasonable expectation that his opinions via questionnaire regarding the claimant's treatment and the claimant's workers' compensation claim would be subject to questioning by deposition. Dr. Chokshi inserted himself in the case by offering his opinion. Finally, even if Rule 26 somehow applied here, the South Carolina Workers' Compensation Commission, by implementing the fee schedule, has determined what constitutes reasonable costs of a doctor providing a deposition in a workers' compensation claim.

ORDER

***IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that the defendant's Motion to Compel Dr. Chokshi to provide his deposition pursuant to the South Carolina Workers' Compensation Fee Schedule is granted. Dr. Chokshi shall make himself available for a deposition immediately following the execution of this Order.*

By and through his attorney of record, Dr. Rakesh Chokshi timely appealed the Decision and Order of Commissioner Roche to the Full Commission via Form 30 filed on February 11, 2014, raising the following grounds for appeal:

1. Whether a physician is bound under Title 42 of the South Carolina Code of Laws to the SCWCC Fee Schedule for his deposition fee in a non-admitted workers' compensation matter when the employer or insurance carrier never authorized the physician's treatment of the alleged claimant.

2. Whether a physician's completion of a medical questionnaire used in a workers' compensation matter confers the jurisdiction of Title 42 of the South Carolina Code of Laws over the physician to bind him to the fee outlined in the SCWCC Fee Schedule for his deposition in the workers' compensation matter.

3. Whether the Respondent's advance payment to Dr. Chokshi for attendance at a deposition in a workers' compensation matter under the SCWCC Fee Schedule is proper under Title 42 of the South Carolina Code of Laws.

4. Whether Dr. Chokshi is entitled to a reasonable fee for his attendance at a deposition in a workers' compensation matter under Rule 26. SCRCP.

The defendant requested the Full Commission affirm the Order of the Hearing Commissioner in its entirety.

All proffered testimony has been taken. Such, together with all documentary evidence, has been delivered by oral argument to the undersigned members of the Full Commission and has since been under study and consideration. Additionally, both Dr. Chokshi and defendants submitted Briefs to the Full Commission. In an appellate review, the Appellate Panel shall, pursuant to S.C. Code Ann. § 42-17-50 (1985), review the Award, weigh the evidence as presented at the initial Hearing and, if good grounds be shown therefore, make its own Findings of Fact and reach its own Conclusions of Law consistent with or inconsistent with those of the Single Commissioner. After careful review in the instant case of all grounds raised by Dr. Chokshi in his appeal, oral arguments, and the briefs presented by the parties, the Commission, by unanimous vote, has determined that the Hearing Commissioner's Order granting the defendant's Motion to Compel the deposition of Dr. Chokshi to provide his deposition pursuant to the SCWCC fee schedule is correct as stated. Accordingly, the Order of Commissioner Roche is **AFFIRMED IN FULL**.

CONCLUSION

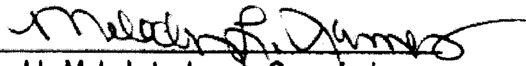
The Full Commission Appellate Panel finds and concludes that a treating physician's deposition in a workers' compensation case is subject to the fee schedule regardless of whether the case is admitted by an employer. Furthermore, Dr. Chokshi had a reasonable expectation that his opinions via the completion of his questionnaire regarding the claimant's treatment/workers' compensation claim would be subject to questioning by the defendant via deposition. Dr. Chokshi inserted himself in the case by offering his opinion on a SCWCC form. Finally, even if Rule 26 somehow applied here, the South Carolina Workers' Compensation Commission, by implemention of the fee schedule, has determined what constitutes a reasonable fee for a doctor providing a deposition in a workers' compensation claim.

ORDER

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED Commissioner Roche's Order granting defendant's Motion to Compel Dr. Chokshi to provide his deposition pursuant to the South Carolina Workers' Compensation Fee Schedule is **AFFIRMED IN FULL**.

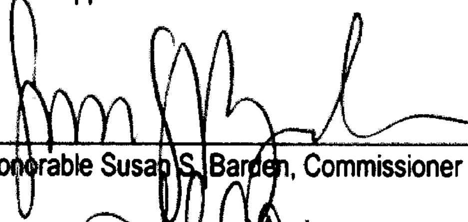
AFFIRMED IN FULL.

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION



Honorable Melody L. James, Commissioner for the Appellate Panel

CONCUR:



Honorable Susan S. Barden, Commissioner

Honorable Aisha Taylor, Commissioner

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

By Kim Falls on September 3, 2014