

**APPELLATE PANEL  
DECISION AND ORDER  
OF THE  
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION  
W.C.C. FILE NO.: 1122484**

William W. Huggins, Jr., ..... Claimant, Respondent,

v.

City of Mullins and South  
Carolina Municipal Insurance Trust, ..... Defendants, Respondents,

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

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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

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APPEARANCES: DR. RAKESH CHOKSHI/APPELLANT represented by Carl E. Pierce,  
Esquire,  
  
CLAIMANT/RESPONDENT represented by Natalie Stevens-Graziani,  
Esquire,  
  
DEFENDANTS/RESPONDENTS represented by Grady L. Beard, Esquire

## STATEMENT OF THE CASE

Dr. Rakesh Chokshi, appeals the Decision and Order of Commissioner Andrea C. Roche dated January 27, 2014, granting the defendants', City of Mullins and South Carolina Municipal Trust's Motion to Compel Dr. Chokshi to provide his deposition pursuant to the fee schedule.

By way of background, this matter involves an admitted accident on September 19, 2011, resulting in an injury to the claimant's low back. Following the admitted injury, the defendants authorized medical care for the claimant's low back injury with Dr. Odom. Dr. Odom diagnosed the claimant with a low back sprain and eventually released the claimant to return to work full-duty on September 28, 2011. The defendants authorized a follow-up visit with Dr. Odom due to the claimant's complaints of continued low back pain. At this visit the claimant alleged a new complaint of right-sided neck pain. According to Dr. Odom's report, the neck pain developed 2-4 days after the accident and while the claimant was lying around the house. Via letter dated October 28, 2011, Dr. Odom opined that the claimant's neck spasm was not directly-related to the admitted accident. As such, the defendants denied the neck was causally-related to the admitted accident and declined to provide additional medical care.

In the meantime, the claimant also sought unauthorized medical care with his family care provider, Dr. Carroll, for neck and low back problems allegedly related to the admitted accident. Dr. Carroll eventually referred the claimant for an unauthorized evaluation with Dr. Chokshi for the alleged cervical problems. Dr. Chokshi treated the claimant on October 28, 2011, and November 20, 2011.

A Hearing was scheduled before Commissioner Melody S. James on July 17, 2013, to determine issues as raised on the Forms 50 and 51 filed on behalf of the parties. On July 8, 2013, the defendants received the claimant's Pre-Hearing Brief and APA Submissions and for the first time were made aware of questionnaires completed by Dr. Carroll and Dr. Chokshi at the request of opposing counsel dated January 18, 2013, and May 16, 2013, respectively. The defendants immediately sought to postpone the Hearing in

order to cross examine the opinions of Dr. Carroll and Dr. Chokshi and tentatively scheduled the deposition of Dr. Chokshi for August 14, 2013. Following a telephone conference with Commissioner James and opposing counsel, the parties agreed to enter into a Consent Order postponing the Hearing to allow the defendants additional time to depose Dr. Carroll and Dr. Chokshi.

On July 26, 2013, counsel for the defendants contacted Dr. Chokshi's office to confirm the deposition date and time. In addition, counsel for defendants sought to confirm that payment for same would be in the amount of \$400.00 for the first hour, and \$100 for each additional fifteen minutes thereafter as required by the SCWCC fee schedule. The defendants advised Dr. Chokshi that upon completion of a W9 a check would be issued as prepayment for the first hour. Dr. Chokshi's office manager issued a letter to counsel for the defendant on July 26, 2013, requesting \$1,000.00 per hour and each additional hour for \$500 as Dr. Chokshi did not treat the claimant under workers' compensation. The defendants refused to pay the exorbitant and illegal fee, and subsequently filed its Motion to Compel. A Motion Hearing was scheduled before the undersigned on October 28, 2013.

The defendants maintain Dr. Chokshi is being deposed in a workers' compensation claim. While he may not have treated the claimant for workers' compensation purposes per his office records, which actually supports the defendants' position that the condition is not work-related, he has now issued an opinion in a workers' compensation claim as outlined in a questionnaire completed at the request of the claimant's counsel. As such, the defendants take the position that Dr. Chokshi is only entitled to the deposition fee mandated by the SCWCC fee schedule in any pending workers' compensation claim, whether admitted or denied, and the defendants or defense counsel could be subject to sanctions if payment in excess of the fee schedule were made. The defendants request the undersigned Order Dr. Chokshi's deposition to be compelled at the compensation rates set forth in the fee schedule. To the contrary, Dr. Chokshi contends his treatment was at all times covered by group health insurance and the SCWCC has no jurisdiction over him to enforce his attendance at the deposition and pursuant to the

SCWCC Fee Schedule. Dr. Chokshi asserts the appropriate fee would be a "reasonable fee" as established between the parties under Rule 26, SCRPC. Dr. Chokshi further 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 defendants' Motion to Compel, the claimant sustained an admitted work-related accident on September 19, 2011. The defendants provided authorized medical care until Dr. Odom opined the claimant's condition was not work-related; at which time medical care was denied. The claimant obtained unauthorized care from Dr. Carroll for problems allegedly related to the work injury and was eventually referred to Dr. Chokshi. Counsel for the claimant issued a questionnaire to Dr. Chokshi related to this workers' compensation claim, and Dr. Chokshi issued an opinion regarding same. The fact that Dr. Chokshi may not have initially evaluated the claimant 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 and then Dr. Chokshi chose to issue an opinion 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 when he issued an opinion via questionnaire regarding the claimant's back and alleged neck problems. 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 workers' compensation questionnaire or refused to give any opinions related to the claimant. Because he did not, he has waived the right to complain and shall 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, SCRPC. 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, SCRPC (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 given the arguments made by his counsel at the Hearing, 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 neck complaint. 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.<sup>1</sup> 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 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); Manjla 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

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<sup>1</sup> 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).

*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 thinks 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, SCRCPP, 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 questionnaire opinions regarding a causal link between 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, which the undersigned does not believe to be the case, the South Carolina Workers' Compensation Commission, by implementing the fee schedule, has determined what constitutes reasonable costs for a deposition by a physician in a workers' compensation proceeding.*

#### **ORDER**

***IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the defendants' 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.***

***IT IS SO ORDERED.***

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 3, 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 defendants 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 the defendants submitted Briefs to the Full Commission Panel. 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 shall become, and hereby is, the law of the case and, therefore, the Order 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 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 for a doctor providing a deposition in a workers' compensation claim.

#### **ORDER**

**IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that 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***