

VIRGINIA:
IN THE WORKERS' COMPENSATION COMMISSION

Opinion by MARSHALL
Commissioner

Aug. 25, 2020

ESTHER K. MCCARTER v. PHILIP MORRIS USA INC
INDEMNITY INS CO OF N AMERICA (INA INS), Insurance Carrier
ESIS, INC, Claim Administrator
Jurisdiction Claim No. VA00001238692
Claim Administrator File No. C877C3017069
Date of Injury: August 22, 2016

Bryn Swartz, Esquire
For the Claimant.

Michael Salveson, Esquire
For the Defendants.

REVIEW on the record by Commissioner Marshall, Commissioner Newman, and Commissioner Rapaport at Richmond, Virginia.

The claimant requests interlocutory review of the Deputy Commissioner's July 10, 2020 Order. She assigns error to the limitation on her use of privileged documents produced by the defendants. We GRANT interlocutory review and VACATE.¹

I. Material Proceedings

The claimant sustained an August 22, 2016 accident. A November 3, 2016 Award Order granted lifetime medical benefits for "Laceration Left pinky finger, left knee sprain."²

A December 20, 2016 claim sought various benefits, including permanent disability. A February 16, 2018 Opinion held the permanent partial disability claim in abeyance.

¹ We deny the claimant's August 13, 2020 Motion for leave to file briefs on review. *See* Commission Rule 3.2.

²The claimant received indemnity benefits. We omit discussion as these are not relevant to the issue before us.

A November 4, 2019 Motion requested referral to the docket of the permanent partial disability claim. The Commission issued a December 10, 2019 on-the-record hearing notice. After extensions, both parties submitted initial position statements.

On May 14, 2020, the claimant filed a subpoena duces tecum to Dr. Marc Danziger and The Centers for Advanced Orthopaedics, LLC. It requested his complete file regarding his March 4, 2020 record review and May 1, 2020 addendum. The subpoena duces tecum requested any communications and “in addition to any financial records to, from, or by The Centers for Advanced Orthopaedics, LLC, and Michael N. Salveson, Esquire, Littler Mendelson, P.C. and/or Littler Global.”³ A deputy sheriff served the subpoena duces tecum on May 21, 2020.

On May 18, 2020, the defendants moved to quash the subpoena. They alleged communications between Dr. Danziger and defense counsel were protected by the attorney work

³ Excluding the claimant’s personal identifying information, which is redacted, the subpoena duces tecum specifically requested:

The complete records and/or “patient chart”, including, but not limited to: both sides of duplexed documents, all emails, electronic correspondence, notes, writings, correspondence, memoranda, telephonic notes, tests, medical records, hospital records (inpatient, outpatient, and testing), laboratory testing, nurses’ and doctors’ notes, progress notes, therapy notes, x-ray reports, intake sheets and/or questionnaires completed by the patient, billing, and any other documents of any kind, **OMITTING NOTHING**, submitted to or received from Michael N. Salveson, Esquire, or the law firm, Littler Mendelson, P.C., or their parent company, Littler Global, reviewed or consulted regarding the claimant, **ESTHER MCCARTER, DATE OF BIRTH: [.]**, **SOCIAL SECURITY NUMBER: XXX-XX-[.]**, and/or in connection with the medical records review of March 4, 2020 and addendum of May 1, 2020 concerning Esther McCarter.

All financial records, payment, billing, charge information, notes, correspondence, electronic correspondence, telephonic notes, writings, memoranda and/or letters related to charges or payment to, from, or by Michael N. Salveson, Esquire, or the law firm, Littler Mendelson, P.C., or their parent company, Littler Global, for opinions, consults, telephone conferences, in-person meetings, letters, questionnaires, and/or reports from January 1, 2015 through the present.

product privilege. By copy of the motion to Dr. Danziger, the defendants asked him and his practice to refrain from responding until the dispute was resolved.

The claimant responded to the Motion to Quash on June 10, 2020.⁴ She asserted a need for the documents due to the expense of deposing the physician, the extent to which his opinions may have been based upon written communication with defense counsel, and exploration of potential bias. The defendants responded on June 11, 2020. They argued the claimant's economic argument was speculative and queried why the claimant needed the communications if she did not intend to take Dr. Danziger's deposition. The claimant replied on June 11, 2020, noting Dr. Danziger's May 1, 2020 report revised his opinion that a right knee replacement was not causally related to the accident.

On June 15, 2020, the Deputy Commissioner directed the defendants to file a privilege log on or before June 29, 2020. The defendants requested clarification.

The Deputy Commissioner vacated her June 15, 2020 Order on June 17, 2020. She directed the medical provider to file the requested records with the Commission by July 8, 2020. She would then provide the records to the defendants to compile a privilege log. After in-camera review of the records and the privilege log, she would send non-privileged records to the claimant.

The defendants filed a July 1, 2020 privilege log. It listed three items: a February 26, 2020 letter from defense counsel to Dr. Danziger; an April 30, 2020 email from defense counsel to Dr. Danziger; and a May 1, 2020 email from defense counsel to Dr. Danziger.

The Deputy Commissioner issued a July 2, 2020 Order. She concluded the communications between Dr. Danziger and defense counsel were attorney work product and prepared in

⁴ The response was delayed by an unsuccessful attempt to resolve the dispute informally.

anticipation of litigation. She found the claimant demonstrated a substantial need for them. It did not appear the claimant could obtain them by other means. She explained her reasoning:

However, to the extent that Attorney Salveson provided documents or information to Dr. Danziger upon which Dr. Danziger's opinion testimony is based, and if the intention is to offer Dr. Danziger's testimony, as it clearly is, then the claimant is entitled to such documents or information. Dr. Danziger's opinions may be based, at least in part, on statements made by Attorney Salveson. Therefore, such information is relevant and important. The claimant cannot properly cross-examine Dr. Danziger about the basis for his opinions without having the documents upon which Dr. Danziger relied in forming his opinions.

On July 9, 2020, the defendants sought clarification of the July 2, 2020 Order. They understood the ruling limited the claimant's counsel's use of communications with Dr. Danziger to deciding whether to cross-examine Dr. Danziger, and if so, in cross examining him.

The Deputy Commissioner issued a July 10, 2020 Order clarifying her previous Order. She ruled: "The claimant's counsel's use of the defendants' communications with Dr. Danziger shall be limited to deciding whether to cross-examine Dr. Danziger and, if the claimant so chooses, cross-examining him."

The claimant thereafter requested review of the July 10, 2020 Order.

II. Findings of Fact and Rulings of Law

Generally, a right of review lies only to a final decision or award of the Commission granting or denying, or changing or refusing to change, some benefit payable or allowable under the Virginia Workers' Compensation Act and leaving nothing to be done except to superintend ministerially to the execution of the award. *Holly Farms Foods, Inc. v. Carter*, 15 Va. App. 29, 34, (1992) (quoting *Jewell Ridge Coal Corp. v. Henderson*, 229 Va. 266, 269, (1985)). However, the Commission possesses the discretionary authority upon a showing of good cause to allow

interlocutory review of evidentiary or procedural matters not involving final decisions or awards, where substantial prejudice might result from a contestable decision. *Echols v. Rite-Aid Corp.*, 78 O.W.C. 16 (1999). “The Commission usually declines interlocutory reviews on evidentiary or procedural matters except for good cause shown.” *Dancy v. Ga. Pac. Corp.*, 76 O.W.C. 446 (1997).

In the present case, we find good cause to grant interlocutory review. The claimant’s proposed use of the documents is unknown. At this stage of the proceedings, before the claimant has reviewed the documents, it was not reasonable to pre-emptively circumscribe her use of them.

The Deputy Commissioner retains discretion to rule on admissibility or make other evidentiary determinations in connection with the hearing process.

III. Conclusion

We GRANT interlocutory review and VACATE the Deputy Commissioner’s July 10, 2020 Order.

This matter is removed from the review docket.

APPEAL

Because this is an interlocutory issue, there is no right of appeal to the Court of Appeals of Virginia until the Commission has issued a final decision in this case.