IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JOHN M. WALKER,

ORDER

Plaintiff,

02-C-0651-C

v.

DARICK T. HUTCHINS, LEDAR TRANSPORT, INC., and UNDERWRITERS INSURANCE COMPANY,

Defendants,

and

ACUITY, A MUTUAL INSURANCE COMPANY,

Nominal Defendant.

- -

In this civil action for monetary damages, plaintiff John M. Walker contends that defendant Darick T. Hutchins negligently ran a stop sign while driving for his employer, defendant Ledar Transport, Inc. and collided with plaintiff's vehicle, causing plaintiff serious injuries and damages in excess of $75,000. The parties have stipulated to liability, leaving only the amount of damages for trial.

Diversity jurisdiction is present. 28 U.S.C. § 1332. The collision occurred in Grant County, Wisconsin, and venue is proper. 28 U.S.C. § 1391(a)(2). The case is before the court on the motion in limine filed by defendants Darick T. Hutchins, Ledar Transport, Inc. and Underwriters Insurance Company to bar plaintiff from introducing evidence of future damages and new physical restrictions because the evidence is untimely and unsupported by expert testimony.

Plaintiff filed his complaint on December 2, 2002. A preliminary pretrial conference was held on March 6, 2003, at which the magistrate judge set a discovery cutoff date of September 26, 2003 and a trial date of October 27, 2003.

A. Future Medical Costs

Pursuant to Fed. R. Civ. P. 26(a)(1)(C), which requires parties to provide "a computation of any category of damages claimed by the disclosing party," plaintiff filed an itemized list of medical expenses that included only past medical expenses and totaled $36,951.76, on September 17, 2003. On October 10, 2003, plaintiff's counsel sent a fax to defendants' counsel, outlining the cost of plaintiff's future medical expenses. Counsel identified four categories of future treatment: TENS unit patches, Celebrex prescription, Ultracet prescription and physician medication supervision. He multiplied the annual cost of each category of treatment by the number of years plaintiff is expected to live and came

up with a projected future cost of $106,329.68. He attached a pharmacy bill showing the monthly cost of both the Celebrex and Ultracet medications.

Defendants object to any claim of future damages because the expert testimony of plaintiff's treating physician, Dr. Eric Carlsen, does not show that these future treatments are necessary or reasonable, as required for recovery. Plaintiff must establish a reasonable medical probability that he will need future treatment and adduce evidence demonstrating the reasonably anticipated costs of such care. Metcalf v. Consolidated Badger Co-operative, 28 Wis. 2d 552, 563-64, 137 N.W.2d 457 (1965); Bash v. Employers Mutual Liability Insurance Co., 38 Wis. 2d 440,455 157 N.W.2d 634 (1968). Defendants assert that Dr. Carlsen never testified that plaintiff would need treatment for the rest of his life. In fact, Dr. Carlsen testified as follows, in response to questions from plaintiff's counsel:

> **Q** **And do you have an opinion as to whether or not the treatment[s] that we've been talking about . . . were reasonable and necessary as a result of that accident?**
>
> A Yes.
>
> **Q** **And do you have an opinion as to whether the injuries that you've described that - that John has to his back are permanent in nature?**
>
> A Yes, I believe they are.
>
> **Q** **And do you have an opinion as to whether the medication protocol that he's currently on, or a**

medication protocol similar to that, something with - with - to relieve pain, and something for anti-inflammatories, is something that he is likely to need *into the indefinite future*?

A Yes, I think it will.

Carlsen Dep. at 32. The treatments used for pain relief and anti-inflammation that Dr. Carlsen discussed previously in the deposition include the TENS unit patches, the Celebrex prescription, the Ultracet prescription and physician medication supervision. Id. at 20-24. However, in testifying that the treatment will be needed into the "indefinite future," Dr. Carlsen did not say that it will be required for the remainder of plaintiff's life. Instead, he testified that pain-controlling modalities are used in the initial phase after the injury and that therapy should later proceed to an exercise-based approach of muscle strengthening. Id. at 20.

As an alternative to their claim that the future damages are unsupported by expert opinion, defendants seek to bar the evidence as untimely. Defendants observe correctly that parties are under a continuing obligation to amend their Rule 26(a) disclosures at "appropriate intervals" when they learn that the information is materially incorrect or incomplete, Fed. R. Civ. P. 26(e)(1), and that district courts have discretion to exclude evidence as a sanction for violation of this obligation. Patel v. Gayes, 984 F.2d 214, 221 (7th Cir. 1993) (quoting Fed. R. Civ. P. 26(e), Advisory Committee Notes). I must

determine first whether the late provision of this information was a violation of the Rule 26(e) continuing discovery obligation and second, whether exclusion is an appropriate remedy.

Pursuant to Fed. R. Civ. P. 26, supplements to the initial discovery disclosures required by subsection (a) are timely if they are submitted at an "appropriate interval." In this case, the supplement was filed 23 days after the initial disclosure, 14 days after the discovery cut-off and 17 days prior to the trial date. Plaintiff does not explain the reason for the delay. It is true that plaintiff's treating physician (and expert witness) was not deposed until October 3, 2003, but the questions plaintiff's counsel asked in the deposition make it clear that counsel was aware before then of the types of treatment plaintiff was receiving. Further, the information needed to calculate the future claims amount is easily obtainable. Plaintiff should have known his monthly medication and TENS unit treatment costs and should have been able to give an estimate of the cost of physician medication monitoring. Plaintiff's supplement is untimely. Compare David v. Glemby Co. Inc., 717 F. Supp. 162, 171 (S.D.N.Y. 1989) (added damages claim timely when submitted within discovery period and earlier responses were not "evasively incomplete").

Fed. R. Civ. P. 37(c)(1) provides that "[a] party that without substantial justification fails to disclose information required by Rule 26(a) or 26 (e)(1) . . . is not, unless such failure is harmless, permitted to use as evidence . . . information not so disclosed." District courts

are entrusted with broad discretion to determine whether a Rule 26 violation is justified or harmless. Mid-America Tablewares, Inc. v. Mogi Trading Co., Ltd., 100 F.3d 1353, 1363 (7th Cir. 1996). The Court of Appeals for the Seventh Circuit has provided a list of factors a district court should consider in exercising this discretion: "(1) the prejudice or surprise to the party against whom the evidence is offered; (2) the ability of the party to cure the prejudice; (3) the likelihood of disruption to the trial; and (4) the bad faith or willfulness involved in not disclosing the evidence at any earlier date." David v. Caterpillar, Inc., 324 F.3d 851, 857 (7th Cir. 2003).

The claim for future medical costs should not have come as a complete surprise to defendants. Plaintiff attached an itemized list of his medical expenditures to his initial disclosure report, in which he attributed nearly $25,000 of the $36,951 total to "Marshfield Clinic (TREATMENT ONGOING) (11/1/00-8/14/03)." This designation should have made defendants aware that treatment would continue into the future and that plaintiff was seeking recovery for this treatment. Defendants should have been aware that plaintiff would seek some damages for some future medical costs.

However, defendants may not have been aware of the extent of the future damages that would be sought, and, in particular, that plaintiff would be claiming that he required ongoing treatment at the current rate for the rest of his life. Although they should have been aware that plaintiff would seek recovery for some future treatment and therefore had an

incentive to discover the probable duration of that treatment, their decision not to pursue this evidence may well have been reasonably calculated based on the original $36,951 damage estimate. The cost-benefit analysis for hiring an expert changes dramatically when the damage estimate quadruples. Defendants have been unfairly prejudiced because they were not reasonably apprised of the value of plaintiff's claim and therefore could not make well-informed decisions about the resources to expend in exploring it. Because the scheduled trial date is quickly approaching and defendants would not have the time necessary to investigate the question of the expected duration of plaintiff's treatment regimen, defendants are unable to cure this prejudice. David, 324 F.3d at 857. Accordingly, defendants' motion will be granted with respect to plaintiff's claims for future treatment costs.

B. New Physical Restrictions

On October 10, 2002, Dr. Carlsen filled out a workers' compensation injury report that had boxes opposite the "total hours work per day" question. The boxes corresponded to the following options: regular, 10 hours, 8 hours, 6 hours, 4 hours or "other." Dr. Carlsen checked the box marked "regular." Plaintiff disclosed this form to defendants during the discovery period. On August 14, 2003, still within the discovery period, but less than 90 days prior to trial, defendants disclosed to plaintiff's counsel the expert opinion of Ross Lynch that plaintiff could work 50-70 hours per week. Lynch reiterated this opinion when

defendants deposed him on October 6, 2003.

At Dr. Carlsen's October 3 deposition, he was asked about physical restrictions on plaintiff's ability to work, but not specifically about an hourly limitation. On October 10, 2003, plaintiff's counsel wrote to Dr. Carlsen to inform him of plaintiff's need to leave work early once a week on average because of back pain. Plaintiff's attorney asked Dr. Carlsen to fax him a letter giving his opinion about plaintiff's ability to work 50-70 hours a week. Dr. Carlsen replied on October 13, 2003, that plaintiff should be restricted to working no more than 40 hours a week. Plaintiff's counsel transmitted the opinion to defendants' counsel the following day. In an accompanying email, plaintiff's counsel told defendants' counsel that this new restriction is "necessitated by Lynch's ridiculous view that [plaintiff] . . . can somehow take on a second job." Plaintiff's counsel continues: "While I think that [Lynch's] opinion is not credible on its face, there is simply no reason not to stick a stake in the heart of it by obtaining the support of the treating physician."

Parties have a duty to identify documents or other exhibits they may offer at trial thirty days before the scheduled trial date, Fed. R. Civ. P. 26(a)(3), as well as an ongoing duty to supplement their disclosures at appropriate intervals when they learn that the information they have provided is incomplete. Fed. R. Civ. P. 26(e). Plaintiff did not disclose Carlsen's opinion to defendants until eighteen days after the discovery period had ended. Moreover, plaintiff did not ask Carlsen for an opinion until nearly two months after

his counsel had received Lynch's report. Plaintiff defends his timing by arguing that his counsel were unable to explore Lynch's opinion until October 6, 2003, because Lynch was unavailable until that time. This is not a persuasive argument. Obviously, plaintiff's counsel viewed Lynch's opinion as prejudicial to their client and needed, in their words, something that would put a "stake in the heart" of the opinion. They have not offered any good reason for failing to obtain that "stake in the heart" evidence earlier. I conclude that Carlsen's opinion is untimely.

Because "[a] party that without substantial justification fails to disclose information required by Rule 26(a) or 26 (e)(1) . . . is not, unless such failure is harmless, permitted to use as evidence . . . information not so disclosed," Fed. R. Civ. P. 37(c)(1), plaintiff will not be permitted to use this evidence. The imminent trial date does not allow defendants an opportunity to depose Dr. Carlsen about the basis for his opinion. Defendants would suffer an incurable, unfair prejudice if new restriction evidence were admitted. David, 324 F.3d at 857.

ORDER

IT IS ORDERED that the motion of defendants Derick T. Hutchins, Ledar Transport, Inc. and Underwriters Insurance Company to bar plaintiff John M. Walker from introducing evidence of future medical costs and Dr. Carlsen's October 13, 2003 opinion of

plaintiff's physical restrictions is GRANTED.

Entered this 22nd day of October, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge