IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

PETER T. JULKA

Plaintiff,

v.

STANDARD INSURANCE COMPANY,

Defendant.

ORDER

09-cv-534-slc

In this pro-se civil case brought pursuant to the civil enforcement provision of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1132(a)(1)(B), plaintiff Peter Julka contends that defendant Standard Insurance Company's misconduct caused the denial of disability benefits promised to plaintiff under the terms of a group disability insurance policy in which he participated. A court trial is scheduled currently for September 13, 2010. The purpose of this order is to explain pretrial procedures.

READ THIS ENTIRE ORDER AS SOON AS POSSIBLE. Both sides must review the order very carefully; it contains important instructions and may answer many questions about the trial.

A. Plaintiff's ERISA Claim

Because neither party moved for summary judgment in this case and the record has not been developed, the court is not fully informed as to the major legal and factual issues in this case. My tentative understanding of plaintiff's claim is that plaintiff was a participant in a group disability insurance plan, he became disabled and defendant wrongfully denied his claim. Also, plaintiff alleges that defendant's representative told plaintiff that he could file his appeal after the established deadline, plaintiff relied on that representation and failed to file an appeal and defendant later declined to accept plaintiff's late appeal.

At the trial, it will be the plaintiff's job to prove that he is entitled to relief under ERISA. Plaintiff must put in his evidence first. In order to avoid having his case dismissed before defendant puts in its defense, plaintiff must present enough evidence to allow the court to find that each legal element of his claim has been proven.

To prove each element of his claim, plaintiff will need to provide evidence. In determining what evidence to provide, plaintiff should remember:

- **All factual evidence offered at trial must meet the requirements of the Federal Rules of Evidence.**[1]

Although it is impossible to predict which rules may be important in a given trial, the most commonly cited rules are those relating to hearsay (Rules 801-807), relevance (Rules 401 and 402), unfair prejudice (Rule 403), character evidence (Rules 404 and 608) and prior statements of witnesses (Rule 613). If one party asks questions or offers an exhibit that does not comply with these rules or any other Federal Rule of Evidence, the other party may raise an objection with the court.

- **The Federal Rules of Evidence limit the testimony of witnesses.**

Witnesses may give testimony on any relevant matter about which they have personal knowledge. However, witnesses generally cannot give hearsay testimony, that is, a witness cannot testify about what someone else said outside the courtroom, since the accuracy of such

[1] *Available at* www.uscourts.gov/rules/EV2008.pdf

a statement cannot be tested by the opposing party. There are a number of exceptions to this general rule that are set out in Rules 803 and 804.

- **Documentary evidence will not be admissible unless the document is "authenticated."**

To be "authenticated," evidence must be shown to be an accurate copy by a witness who has personal knowledge of the document, Federal Rule of Evidence 901, or its authenticity may by stipulated to by the opposing party. The court strongly encourages the parties to stipulate to the authenticity of documents before trial. If the parties cannot agree in advance of trial on the admissibility of a proposed document or other piece of evidence, the party wishing to introduce the evidence must produce a copy of the document and a witness who can testify from his or her own knowledge that the document is what it appears to be.

- **A party may not introduce affidavits into evidence or read from them at trial.**

At trial, affidavits are hearsay statements made outside the courtroom. Similarly, statements that plaintiff made under penalty of perjury in a complaint or grievance are not evidence of the truth of those statements. However, a person who has completed an affidavit may appear in person to testify as a witness if he or she can offer testimony that is relevant to the lawsuit. Also, if at trial a witness testifies to facts that are inconsistent with statements the witness made in an earlier affidavit, a party may use statements in the witness's affidavit to show that the witness's testimony is inconsistent with the witness's earlier sworn statements.

- **Orders or opinions from this court, the court of appeals or the Supreme Court are not evidence.**

Plaintiff may refer to this court's orders and other case law in deciding how to prove his case, but he may not submit them as exhibits.

B. Preparing for Trial

As this case has progressed, plaintiff should have been collecting the information necessary to prove his claim by following the Federal Rules of Civil Procedure. Those rules explained the proper way to obtain documents that cannot be obtained through an informal request, and how to question potential witnesses. In preparing for trial, plaintiff should note that he cannot expect any employee of defendant Standard Insurance Company to be present at trial. If he wishes to call any of defendant's representatives as witnesses at trial, he should ask defendant's counsel whether the representatives will agree to be called as witnesses by plaintiff without a subpoena. If counsel does not agree, plaintiff will have to follow the attached procedures for calling witnesses if he wishes to obtain testimony from them.

C. Trial Materials and Motions

The parties received an "Order in Non-Jury Cases Assigned to Magistrate Judge Crocker," attached to the Preliminary Pretrial Conference Order, dkt. 16, at 45-48. Another copy is also attached to this order. The parties should reread this order so that they understand the pretrial submissions required for a court trial. These submissions are important, because they will clarify the legal and factual issues at dispute in the case for the court and the parties. The parties are

to adhere to the current deadlines for conducting pretrial conferences and submitting pretrial materials:

- **Names and addresses of all trial witnesses** – August 23, 2010
- **Motions In Limine** – August 27, 2010
- **Response to Motions In Limine** – September 3, 2010

A party might file a motion in limine to exclude improper evidence that the party believes the other side may try to submit. Motions in limine are not intended to resolve disputes regarding all pieces of evidence; most evidentiary objections about individual documents can be made during trial. However, in some cases in which there are disputes regarding evidence having a potentially significant impact on the course of trial, it may be appropriate to seek a ruling in advance.

- **Conference between plaintiff and defendant's counsel** – No later than August 30, 2010
- **Pretrial statement by plaintiff** – September 6, 2010
- **Statement of facts by both parties** – September 6, 2010
- **Proposed special verdict form** – September 6, 2010
- **Exhibit list and complete set of all of exhibits to be used at trial** – September 6, 2010
- **Trial briefs (optional)** – September 7, 2010

Although plaintiff has already received a copy of this court's "Procedures for Trial Exhibits in Cases Assigned to Magistrate Judge Crocker," another copy of the procedures is attached to this order.

In addition to following the exhibit procedures, the parties should exchange copies of their trial exhibits *in advance* of trial for two reasons. First, it will insure that each party considers carefully what documentary evidence they will need to prove the elements of the claims for which they carry the burden of proof at trial and to obtain authentication of the documents before coming to trial, if necessary. Second, it will promote the efficient conduct of the trial by allowing each party to examine the opposing parties' exhibits in advance of trial so that objections to the admissibility of the documents may be taken up at the final pretrial conference. The parties should be prepared to explain at the final pretrial conference their grounds for objecting to a particular exhibit.

Note well: The parties should keep the original copies of their exhibits in their possession so that they have them at the time of trial.

ORDER

It is ORDERED that

(1) NOT LATER THAN August 23, 2010, the parties are to file and serve the names and addresses of all trial witnesses.

(2) NOT LATER THAN August 27, 2010, the parties are to file and serve any motions in limine they wish to file. Responses to those motions are due September 3, 2010.

(3) NOT LATER THAN August 30, 2010, the parties are to confer for the purposes described in the "Order in Non-Jury Cases Assigned to Magistrate Judge Crocker," attached to dkt. 16, at 45, and attached to this order.

(4) NOT LATER THAN September 6, 2010, plaintiff is to file and serve a pre-trial statement.

(5) NOT LATER THAN September 6, 2010, the parties are to file and serve (a) a statement of facts; (b) a proposed form of special verdict; and (c) a copy of all exhibits and an exhibit list.

(6) The court retains the discretion to refuse to entertain special verdict forms or other pretrial submissions not submitted on time, unless the subject of the request is one arising in the course of trial that the party could not reasonably have anticipated before trial.

(7) If any party wants to submit a trial brief before trial, he must serve a copy of the brief on the opposing party and the court NOT LATER THAN September 7, 2010.

Entered this 27TH day of July, 2010.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge

PROCEDURES FOR CALLING WITNESSES TO TRIAL IN CASES ASSIGNED TO MAGISTRATE JUDGE CROCKER

At trial, plaintiff will have to be ready to prove facts supporting his claims against the defendants. One way to offer proof is through the testimony of witnesses who have personal knowledge about the matter being tried. If a party wants witnesses to be present and available to testify on the day of trial, the party must follow the procedures explained below. ("Party" means either a plaintiff or a defendant.) These procedures must be followed whether the witness is:

1) A defendant to be called to testify by a plaintiff; or

2) A plaintiff to be called to testify by a defendant; or

3) A person not a party to the lawsuit to be called to testify by either a plaintiff or a defendant.

I. PROCEDURES FOR OBTAINING ATTENDANCE OF INCARCERATED WITNESSES WHO AGREE TO TESTIFY VOLUNTARILY

An incarcerated witness who tells a party that he is willing to attend trial to give testimony cannot come to court unless the court orders his custodian to let him come. The Court must issue an order known as a writ of habeas corpus ad testificandum. This court will not issue such a writ unless the party can establish to the court's satisfaction that

1) The witness has agreed to attend voluntarily; and

2) The witness has actual knowledge of facts directly related to the issue to be tried.

A witness's willingness to come to court as a witness can be shown in one of two ways.

a. The party can serve and file an affidavit declaring under penalty of perjury that the witness told the party that he or she is willing to testify voluntarily, that is, without being subpoenaed. The party must say in the affidavit when and where the witness informed the party of this willingness;

OR

b. The party can serve and file an affidavit in which *the witness* declares under penalty of perjury that he or she is willing to testify without being subpoenaed.

The witness's actual knowledge of relevant facts may be shown in one of two ways.

a. The party can declare under penalty of perjury that the witness has relevant information about the party's claim. However, this can be done only if the *party* knows first-hand that the witness saw or heard something that will help him prove his case. For example, if the trial is about an incident that happened in or around a plaintiff's cell and, at the time, the plaintiff saw that a cellmate was present and witnessed the incident, the plaintiff may tell the court in an affidavit what happened, when and where the incident occurred, who was present, and how the witness was in a position to see or hear what occurred;

OR

b. The party can serve and file an affidavit in which *the witness* tells the court what happened, when and where the incident occurred, who was present, and how the witness was in a position to see or hear what occurred.

Not later than four weeks before trial, a party planning to use the testimony of an incarcerated witness who has agreed to come to trial must serve and file a written motion for a court order requiring the witness to be brought to court at the time of trial. The motion must

1) State the name and address of the witness; and

2) Come with an affidavit described above to show that the witness is willing to testify and that the witness has first-hand knowledge of facts directly related to the issue to be tried.

When the court rules on the motion, it will say who must be brought to court and will direct the clerk of court to prepare the necessary writ of habeas corpus ad testificandum.

II. PROCEDURE FOR OBTAINING THE ATTENDANCE OF INCARCERATED WITNESSES WHO REFUSE TO TESTIFY VOLUNTARILY

If an incarcerated witness refuses to attend trial, TWO separate procedures are required. The court will have to issue a writ of habeas corpus ad testificandum telling the warden to bring the witness to trial and the party must serve the witness with a subpoena.

Not later than four weeks before trial, the party seeking the testimony of an incarcerated witness who refuses to testify voluntarily must file a motion asking the court to issue a writ of habeas corpus ad testificandum and asking the court to provide the party with a subpoena form. (All requests from subpoenas from pro se litigants will be sent to the judge for review before the clerk will issue them.)

The motion for a writ of habeas corpus ad testificandum will not be granted unless the party submits an affidavit

1) Giving the name and address of the witness; and

2) Declaring under penalty of perjury that the witness has relevant information about the party's claim. As noted above, this can be done only if the *party* knows first-hand that the witness saw or heard something that will help him prove his case. In the affidavit, the party must tell the court what happened, when and where the incident occurred, who was present, and how the witness was in a position to see or to hear what occurred.

The request for a subpoena form will not be granted unless the party satisfies the court in his affidavit that

1) The witness refuses to testify voluntarily;

2) The party has made arrangements for a person at least 18 years of age who is not a party to the action to serve the subpoena on the witness; or

3) The party is proceeding in forma pauperis, has been unable to arrange for service of the subpoena by a person at least 18 years of age who is not a party to the action and needs assistance from the United States Marshal or a person appointed by the court.

If the court grants the party's request for a subpoena for an incarcerated witness, it will be the party's responsibility to complete the subpoena form and send it to the person at least 18 years of age who will be serving the subpoena or to the United States Marshal, if the court has ordered that the subpoena be served by the Marshal. The address of the United States Marshal is 120 N. Henry St., Suite 440, Madison, Wisconsin, 53703. If the subpoena is not received by the marshal at least two weeks in advance of trial, the marshal may not have enough time to serve the subpoena on the party's witness.

III. UNINCARCERATED WITNESSES WHO AGREE TO TESTIFY VOLUNTARILY

It is the responsibility of the party who has asked an unincarcerated witness to come to court to tell the witness of the time and date of trial. No action need be sought or obtained from the court.

IV. UNINCARCERATED WITNESSES WHO REFUSE TO TESTIFY VOLUNTARILY

If a prospective witness is not incarcerated, and he or she refuses to testify voluntarily, no later than four weeks before trial, the party must serve and file a request for a subpoena form. All parties who want to subpoena an unincarcerated witness, even parties proceeding in forma pauperis, must be prepared to tender an appropriate sum of money to the witness at the time the subpoena is served. The appropriate sum of money is a daily witness fee and the witness's mileage costs. In addition, if the witness's attendance is required for more than one trial day, an allowance for a room and meals must be paid. The current rates for daily witness fees, mileage costs and room and meals may be obtained either by writing the clerk of court at P.O. Box 432, Madison, Wisconsin, 53703, or calling the office of the clerk at (608) 264-5156.

Before the court will grant a request for a subpoena form for an unincarcerated witness, the party must satisfy the court by affidavit declared to be true under penalty of perjury that

1) The witness refuses to testify voluntarily;

2) The party has made arrangements for a person at least 18 years of age who is not a party to the action to serve the subpoena on the witness; or

3) The party is proceeding in forma pauperis, has been unable to arrange for service of the subpoena by a person at least 18 years of age who is not a party to the action and needs assistance from the United States Marshal or a person appointed by the court; and

4) The party is prepared to tender to the marshal or other individual serving the subpoena a check or money order made payable to the witness in an amount necessary to cover the daily witness fee and the witness's mileage, as well as costs for room and meals if the witness's appearance at trial will require an overnight stay.

If the court grants the party's request for a subpoena for an unincarcerated witness, it will be the party's responsibility to complete the subpoena form and send it to the person at least 18 years of age who will be serving the subpoena or to the United States Marshal, if the court has ordered that the subpoena be served by the marshal, together with the necessary check or money order. The address of the United States Marshal is 120 N. Henry St., Suite 440, Madison, Wisconsin, 53703. If the subpoena is not received by the marshal at least two weeks in advance of trial, the marshal may not have enough time to serve the subpoena on the party's witness.

V. SUMMARY

The chart below may assist in referring you to the section of this paper which sets forth the appropriate procedure for securing the testimony of witnesses in your case.

WITNESSES

INCARCERATED		UNINCARCERATED	
VOLUNTARY	**INVOLUNTARY**	**VOLUNTARY**	**INVOLUNTARY**
A court order that the witness be brought to court is required. Papers are due 4 weeks before trial.	**A court order that the witness be brought to court and a subpoena are required. A motion must be served & filed 4 weeks before trial. Subpoena forms must be completed 2 weeks before trial.**	**Nothing need be sought or obtained from the court.**	**Pro se parties must obtain an order granting issuance of a subpoena. Papers are due 4 weeks before trial. Completed forms and fees are due 2 weeks before trial.**

CURRENT SUBPOENA RATES
(as of January 2010)

Daily Witness Fee - $40
Milage - $0.50
Room and Meals (Per Diem) - $149

PROCEDURES FOR TRIAL EXHIBITS
IN CASES ASSIGNED TO MAGISTRATE JUDGE CROCKER

Before trial, the parties are to label all exhibits that may be offered at trial. Before the start of trial, the parties are to provide the deputy clerk with a list of all exhibits. Exhibits for use at trial are not subject to the electronic filing procedures, but are to be filed conventionally. Counsel are to retain the original exhibits following trial.

1. Each party is to label all exhibits.

2. If more than one defendant will be offering exhibits, that defendant should add an initial identifying the particular defendant to the label.

3. Each party is to submit a list of their exhibits. The party should state to whom the exhibits belong, the number of each exhibit and a brief description.

4. Each party is to provide the court with the original exhibit list and a copy of each exhibit that may be offered for the judge's use.

5. As a general rule, the plaintiff should use exhibit numbers 1-500 and the defendant should use exhibit numbers 501 and up.

6. Each party is to maintain custody of his or her own exhibits throughout the trial.

7. At the end of trial, each party is to retain all exhibits that become a part of the record. It is each party's responsibility to maintain his or her exhibits and to make arrangements with the clerk's office for inclusion of the exhibits in the appeal record, if there is an appeal.

8. Each party should be aware that once reference is made to an exhibit at trial, the exhibit becomes part of the record, even though the exhibit might not be formally offered or might not be received.

Any questions concerning these instructions may be directed to the clerk's office at (608) 264-5156.

ORDER IN NON-JURY CASES
ASSIGNED TO MAGISTRATE JUDGE CROCKER

Counsel are hereby directed to observe the following requirements in preparing for the trial to the court in this case:

1. No later than TWO WEEKS IN ADVANCE OF THE TRIAL counsel are to confer for the following purposes:

A. To enter into comprehensive written stipulations of all uncontested facts in such form that they can be offered at trial as the first evidence presented by the party desiring to offer them. If there is a challenge to the admissibility of some uncontested facts that one party wishes included, the party objecting and the grounds for objection must be stated.

B. To make any deletions from their previously-exchanged lists of potential trial witnesses.

C. To enter into written stipulations setting forth the qualifications of expert witnesses.

D. To examine, mark, and list all exhibits that any party intends to offer at trial. (A copy of this court's procedures for marking exhibits is contained in this packet.)

E. To agree as to the authenticity and admissibility of such exhibits so far as possible and note the grounds for objection to any not agreed upon.

F. To agree so far as possible on the contested issues of law.

G. To examine and prepare a list of all depositions and portions of depositions to be read into evidence and

agree as to those portions to be read. If any party objects to the admissibility of any portion, the name of the party objecting and the grounds shall be set forth.

H. To explore the prospects of settlement.

It shall be the responsibility of plaintiff's counsel to convene the conference between counsel and, following that conference, to prepare the Pretrial Statement described in the next paragraph.

2. No later than ONE WEEK PRIOR TO THE TRIAL, plaintiff's counsel shall submit a Pretrial Statement containing the following:

A. The parties' comprehensive written stipulations of all uncontested facts.

B. The probable length of trial.

C. The names of all prospective witnesses. Only witnesses so listed will be permitted to testify at the trial except for good cause shown.

D. The parties' written stipulation setting forth the qualifications of all expert witnesses.

E. Schedules of all exhibits that will be offered in evidence at the trial, together with an indication of those agreed to be admissible and a summary statement of the grounds for objection to any not agreed upon. Only exhibits so listed shall be offered in evidence at the trial except for good cause shown.

F. An agreed statement of the contested issues of law supplemented by a separate statement by each counsel of those issues of law not agreed to by all parties.

G. A list of all depositions and portions of depositions to be offered in evidence, together with an indication of those agreed to be admissible and summary statements of the grounds for objections to any not so agreed upon. If only portions of a deposition are to be offered,

> counsel should mark the deposition itself with colored markers identifying the portions each party will rely upon.

3. No later than ONE WEEK PRIOR TO TRIAL, each counsel shall file with the court and serve upon opposing counsel a statement of all the facts that counsel will request the court to find at the conclusion of the trial. In preparing these statements, counsel should have in mind those findings that will support a judgment in their client's favor. The proposed findings should be complete. They should be organized in the manner in which counsel desire them to be entered. They should include stipulated facts, as well as facts not stipulated to but which counsel expect to be supported by the record at the conclusion of the trial. Those facts that are stipulated to shall be so marked.

4. Along with the proposed findings of fact required by paragraph 3 of this order, each counsel shall also file and serve a proposed form of special verdict, as if the case were to be tried to a jury.

5. Before the start of trial, each counsel shall submit to the court a complete set of counsel's pre-marked trial exhibits to be used by the judge as working copies at trial.

6. If counsel wish to submit trial briefs, they are to do so no later than THREE WORKING DAYS PRIOR TO TRIAL. Copies of briefs must be provided to opposing counsel.

Final pretrial submissions are to be filed as stated above with no exceptions. Failure to file or repeated and flagrant violations may result in the loss of membership in the bar of this court.