

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION

RICHARD T. STUCKEY, *et al.*,  
Plaintiffs,

vs.

Civil Action 2:10-CV-690  
Judge Watson  
Magistrate Judge King

JAMES O. DALE, *et al.*,  
Defendants.

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DAVID C. SEYMOUR, *et al.*,  
Plaintiffs,

vs.

Civil Action 2:10-CV-692  
Judge Watson  
Magistrate Judge King

CRST VAN EXPEDITED, INC., *et al.*,  
Defendants.

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ACTIVE USA, INC.,  
Plaintiff,

vs.

Civil Action 2:10-CV-702  
Judge Watson  
Magistrate Judge King

JAMES O. DALE, *et al.*,  
Defendants.

OPINION AND ORDER

These consolidated cases arise out of a single motor vehicle accident. It is alleged that defendant Dale, while under the direct control or supervision of the CRST defendants, operated a tractor-trailer in a negligent fashion, striking a vehicle driven by plaintiff Seymour in which plaintiff Stuckey was a passenger. Plaintiff Active USA, the employer of plaintiff Seymour, seeks recovery of amounts paid

by it pursuant to Ohio's Workers' Compensation laws; the spouses of plaintiffs Seymour and Stuckey assert loss of consortium claims. This matter is now before the Court on defendants' motion for an independent medical examination of plaintiff David C. Seymour, Doc. No. 29 (2:10-CV-690); Doc. No. 30 (2:10-CV-692); Doc. No. 25 (2:10-CV-702) [*Defendants' Motion*].

On February 17, 2011, counsel for defendants mailed to counsel for all plaintiffs in these consolidated actions a notice of the medical examinations of plaintiffs Richard Stuckey and David Seymour. Exhibit A, attached to *Defendants' Motion*. Mr. Seymour's examination was to be conducted by Martin J. Gottesman, M.D., on May 2, 2011. *Id.* Mr. Seymour failed to appear for his examination, Exhibit B, attached to *Defendants' Motion*, and Dr. Gottesman charged a \$325.00 cancellation fee, which defense counsel paid. *Id.* See also Exhibit attached to *Defendants' Reply Brief in Support of Motion for Independent Medical Examination*, Doc. No. 34 [*Reply*]. Defendants ask that Mr. Seymour be ordered to appear on May 31, 2011, at 11:00 a.m. for a physical examination by Joseph Schlonsky, M.D., in Columbus, Ohio. According to defendants, "Dr. Schlonsky will obtain a history from Plaintiff David Seymour and conduct a physical examination concerning any and all injuries claimed to have been caused by the subject automobile accident." *Defendants' Motion*, at 3. Defendants also ask that Mr. Seymour and/or his counsel reimburse the cancellation fee paid to Dr. Gottesman. *Id.*

In response, counsel for Mr. Seymour represents that his office files contain no notice of the May 2, 2011 examination by Dr. Gottesman. *Affidavit of C. Jay Schwart*, ¶8, attached to *Plaintiffs', David C. Seymour and Trudy Seymour, Response to Motion to Compel*

*Attendance at Defense Medical Examination*, Doc. No. 33 (2:10-CV-692) ["*Memo. Contra*"]. His client did not appear for the examination because he was "unaware that an examination was to take place." *Memo. Contra*, at 2. The Seymour plaintiffs argue that a Court order compelling the attendance of Mr. Seymour at the re-scheduled examination is unnecessary and contend that neither he nor his counsel should be required to bear the full cost of Dr. Gottesman's cancellation fee. *Memo. Contra*, at 4.

A court may order the physical examination, by a "suitably licensed or certified examiner," of a party whose physical condition is in controversy. Fed. R. Civ. P. 35(a)(1). Such an order

(A) may be made only on motion for good cause and on notice to all parties and the person to be examined; and

(B) must specify the time, place, manner, conditions, and scope of the examination, as well as the person or persons who will perform it.

Fed. R. Civ. P. 35(a)(2). Sanctions, including an order for payment of reasonable expenses caused by a party's failure to appear for examination, may be assessed if "a party . . . fails to obey an order to provide or permit discovery, including an order under Rule . . . 35 . . . ." Fed. R. Civ. P. 37(b)(2)(A), (C). Thus, a failure to appear for a physical examination may be the subject of sanctions under Rule 37 only if the examination is the subject of an order of the Court. Because the May 2, 2011 examination by Dr. Gottesman was not the subject of an order of this Court, this Court is without authority under Rule 37 to assess sanctions in connection with Mr. Seymour's failure to attend that examination.

However, the Court will issue an order requiring Mr. Seymour's participation in Dr. Schlonsky's examination. Because Mr. Seymour's

physical condition is in controversy in this action, defendants have established good cause for the requested examination. Furthermore, defendants have provided notice of this examination to all parties, including Mr. Seymour, through counsel. Thus, defendants are entitled to an order requiring the physical examination of Mr. Seymour.

Moreover, defendants are entitled to the requested order notwithstanding the representation that Mr. Seymour will voluntarily attend the scheduled examination by Dr. Schlonsky. Not only does Rule 35(a)(2) authorize such an order but, as noted *supra*, defendants would be without recourse, in the absence of a court order, should Mr. Seymour fail to participate in the examination.

Accordingly, *Defendants' Motion*, Doc. No. 29 (2:10-CV-690); Doc. No. 30 (2:10-CV-692); Doc. No. 25 (2:10-CV-702), is **GRANTED** in part. Plaintiff David C. Seymour is **ORDERED** to appear on Tuesday, May 31, 2011, at 11:00 a.m., for a medical examination concerning any and all injuries claimed to have been caused by the automobile accident at issue in this case, to be conducted by Joseph Schlonsky, M.D., 5969 East Broad Street, Suite 402, Columbus, Ohio 43213, and any necessary members of Dr. Schlonsky's staff.

To the extent that *Defendants' Motion* seeks a sanction in the form of reimbursement of the cancellation fee assessed in connection with Mr. Seymour's failure to attend an earlier scheduled appointment, the motion is **DENIED**.

s/Norah McCann King  
Norah M<sup>c</sup>Cann King  
United States Magistrate Judge

May 17, 2011