IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

ADAM F. MILLIUS, and IRENE MILLIUS	)	
Plaintiffs,	)	
	)	C.A. No. 05C-09-107 MJB
v.	)	
KING S. TILLMAN, and SWIFT TRANSPORTATION CO., INC.	)	
Defendants.	)	

Submitted: June 1, 2006
Decided: June 5, 2006

On Motion to Compel Vocational Examination of Plaintiff Adam Millius. **GRANTED**.

OPINION AND ORDER

Frederick S. Freibott, Esquire, The Freibott Law Firm, P.A., Wilmington, Delaware, Attorney for Plaintiffs.

David J. Soldo, Esquire, Reger, Rizzo, Kavulich & Darnall, LLP, Wilmington, Delaware, Attorney for Defendants.

BRADY, J.

Procedural History

This action was filed on September 13, 2005. This is a Motion to Compel Plaintiff Adam Millius ("Plaintiff") to submit to a Vocational Examination conducted by Jasen Walker, Ed.D filed by Defendants King S. Tillman and Swift Transportation Co., Inc. ("Defendants").

Relevant Facts

The instant dispute arises from injuries Plaintiff allegedly sustained in a motor vehicle collision on October 11, 2003. On or about March 13, 2006, Plaintiff's counsel forwarded a report from Plaintiff's vocational expert, Jose Castro. Mr. Castro's report states he met with Plaintiff to perform a wage earning capacity assessment. On or about May 8, 2006, Defendants noticed a vocational examination of Plaintiff on May 30, 2006 in the office of Jasen Walker to perform independent testing on Plaintiff to evaluate and assess his wage earning capacity. By letter dated May 10, 2006, Plaintiff's counsel indicated that Plaintiff would not appear for the vocational examination.

Contentions of the Parties

Defendants argue the vocational examination of Plaintiff was noticed solely in response to Plaintiff's vocational expert.[1] Defendants further argue in order to conduct a thorough investigation and assessment of Plaintiff's wage earning capacity, Defendants are entitled to conduct their own vocational examination that may refute the opinion of Plaintiff's vocational expert.

[1] Defendant Motion to Compel at 2.

Defendants next argues Superior Court Civil Rule 35(a) permits the examination of Plaintiff by a defense vocational expert in a case such as this. The pertinent language reads:

> [w]hen the mental or physical condition (including blood group) of a party or of a person in custody or under the legal control of a party, is in controversy, the Court in which the action is pending may order the party to submit to a physical or mental examination by a suitably licensed or certified ***examiner*** or to produce for examination the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions and scope of the examination and the person or persons by whom it is to be made. (Emphasis added.)

The rule was amended by the General Assembly in 1993, to substitute the word "examiner," for the previous term, "physician." Therefore, Defendants argue, the Rule was amended for expressly the situation that has arisen in the instant case. The Court may now order a party submit to an examination by an examiner, not just a physician. Defendants argue Jasen Walker is such a qualified examiner as contemplated under Rule 35(a).

Plaintiff argues the Defense expert Jasen Walker does not fit within the language of Rule 35(a) because the language only requires a party submit to a "mental" or "physical" examination by an examiner. Plaintiff argues the vocational examination to be conducted by Jasen Walker is not a "mental" or "physical" examination as those terms are intended in Rule 35(a).

Plaintiff further argues Rule 35(a) was amended to include the term "examiner" to include chiropractors; podiatrists; psychiatrists and psychologists, not vocational experts that opine on the financial condition of a party.

Applicable Law

Two questions must be answered in the affirmative for the Court to grant the Motion to Compel. Is a vocational specialist an "examiner" as that term is used in Rule 35? Is there good cause to order the Plaintiff submit to a vocational examination?

A. Is a Vocational Specialist an "examiner" as That Term is Used in Rule 35?

Both parties cite *Pitts v. Delaware Cooperative, Inc*.[2] as support for their position. The *Pitts* decision dealt with an issue similar to the case at bar, with one important difference—it interpreted the language of Rule 35(a) when the relevant term contained in the Rule was "physician," not, as it is now, "examiner." In *Pitts*, the defendant filed a motion to compel the plaintiff to submit to an examination by a vocational expert.[3] Defendant alleged plaintiff put his present and future employability in issue by alleging his background and skills, injuries and his home location made him virtually unemployable in the future.[4] The Court ruled the plaintiff did not have to submit to an examination by the vocational expert because

[2] 1991 WL 302638 (Del. Super.).
[3] *Id*.
[4] *Id*.

Rule 35(a) explicitly used the term "physician," and a vocational expert was not a physician.[5] However, the Court did note the language of the rule was outdated.[6]

Subsequently, and perhaps in response to the *Pitts* decision and the amendment of the Federal Rule of Civil Procedure 35(a),[7] in 1993 Delaware Superior Court Civil Rule 35(a) was amended to use the term "examiner," instead of "physician." It is clear the scope of Rule 35 was intended to be broadened.

No decision in Delaware has addressed whether the amended language in the Rule allows the Court to compel a party to submit to an examination by a vocational specialist. However, it is helpful to look at federal decisions that have dealt with this issue because Federal Rule of Civil Procedure 35 and Delaware Superior Court Civil Rule 35 are identical.[8] While there is not uniformity regarding the implication of the language of the Rule to a vocational examination, this Court is persuaded, as were the federal courts in this Circuit, that the better conclusion is that it does extend to include such an examination.

In *Cortenuto v. Emerson Electric Co.*,[9] the United States District Court for the Eastern District of Pennsylvania decided a similar issue as the case at bar. Defendants filed a motion to compel a vocational examination of plaintiff pursuant to Fed.R.Civ.P. 35. Plaintiff argued it was unnecessary since plaintiff was

[5] *Id* at *2.
[6] *Id*.
[7] Federal Rule of Civil Procedure 35 was amended in 1991 to substitute the term "examiner," for the term "physician."
[8] *Pitts* at *1.
[9] 1991 WL 111258 (D.P.A. 1991).

examined by his own expert whose report was provided to defendants.[10] Plaintiff also argued the request was impermissible because defendants wanted the examination done by a psychologist, rather than a physician.[11] The Court held the named examiner was a qualified professional under Fed.R.Civ.P. 35 and good cause was present (as required by the Rule) to order the examination because:

> It is not sufficient that plaintiff provided defendants with a copy of his expert's report, or that he has been deposed and responded to interrogatories. Defendants stand to be prejudiced if they are refused the right to conduct their own vocational examination of plaintiff and are limited to a cross-examination of plaintiff's expert.[12]

In *Jefferys v. LRP Publications, Inc*.,[13] the Eastern District of Pennsylvania again dealt with the issue of whether Fed.R.Civ.P. 35 provided the Court with authority to compel a party to submit to an examination by a vocational expert. Plaintiff argued Rule 35 did not permit defendants' expert to interview her because the expert was not a physician or psychologist and would not be conducting a physical or mental examination.[14] The Court noted that prior to the 1991 amendment to Fed.R.Civ.P. 35 only physicians were to make examinations under the Rule. However, in 1991 the Rule was amended to replace "physician" with "examiner," and the advisory committee notes state in relevant part:

> The rule was revised in 1988 by Congressional enactment to authorize mental examinations by licensed clinical psychologists. This [1991] revision extends that amendment to include other certified or licensed professionals, such as dentists or occupational

[10] *Id*.
[11] *Id*.
[12] *Id*.
[13] 184 F.R.D. 262 (D.P.A. 1999).
[14] *Id*.

> therapists, who are not physicians or clinical psychologists, but who may be well-qualified to give valuable testimony about the physical or mental condition that is the subject of dispute.[15]

The Court held the vocational examination was permitted under Fed.R.Civ.P. 35. Defendants' expert was found to be a "suitably licensed or certified professional" because he had an Ed.D degree, was a diplomate of the American Board of Vocational Experts, a certified rehabilitation counselor, and a certified vocational evaluator.[16] The Court concluded the type of examination sought by defendants was within the spirit of the rule as then written, because the 1991 amendment expanding the scope of Rule 35 was designed to overcome plaintiff's objection to defendant's request to conduct a vocational examination.[17]

In *Douris v. County of Bucks*,[18] the Eastern District Court again addressed whether to grant a motion to compel a vocational examination under Fed.R.Civ.P. 35. The Court noted: "…before an order for a vocational examination can be entered, there must be a showing that Plaintiff's qualification for employment are in controversy and that there [sic] good cause for an examination."[19] The Court held the plaintiff placed his vocational status in controversy when he alleged that he was qualified for and able to perform essential functions for the position he sought. In addition, good cause was shown because it was not sufficient to provide medical records to the opposing party in lieu of a personal examination:

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[15] *Id* at 263.
[16] *Id*.
[17] *Id*; *see also Smolinsky v. State Farm Ins. Co*., 1999 WL 1285824 (D.P.A. 1999) (In which the District Court for the Eastern District of Pennsylvania upheld a ruling by a Magistrate Judge to grant a motion to compel the plaintiff to submit to a vocational examination).
[18] 2000 WL 1358481 (D.P.A 2000).
[19] *Id* at *3.

"[D]efendants' stand to be prejudiced if they are refused the right to conduct their own vocational exam of Plaintiff."[20]

Other District Courts have come to similar conclusions as the Eastern District of Pennsylvania. In *Fischer v. Coastal Towing Inc.*,[21] the District Court for the Eastern District of Texas, Beumont Division, held

> [T]o avoid prejudice, Defendant must have its expert conduct an examination of Plaintiff to rebut the reports of Plaintiff's vocational-rehabilitation expert. Otherwise, Defendant's vocational rehabilitation expert has no way to adequately scrutinize the conclusion of the Plaintiff's expert.[22]

Similarly, in *Olcott v. LaFiandra*,[23] the Vermont District Court held the language of Fed.R.Civ.P. 35, after the amendment in 1991, extended the rule to vocational experts. The Court reasoned good cause for the examination was shown because the plaintiff had retained a vocational expert and defendant would be prejudiced if denied the opportunity to perform a similar vocational rehabilitation evaluation of the plaintiff.[24]

Plaintiff in the case at bar has retained the services of vocational specialist Jose R. Castro. Mr. Castro examined Plaintiff and issued a report with his findings. Defendants now seek an order from this Court to compel Plaintiff to submit to an examination of Plaintiff by a vocational specialist whom Defendants

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[20] *Id*.
[21] 168 F.R.D. 199 (D.T.X. 1996).
[22] *Id* at 201.
[23] 793 F.Supp. 487 (D.V.T. 1992).
[24] *Id* at 492.

selected. The Court believes the language of Superior Court Civil Rule 35 supports granting of the Motion to Compel.

The Court finds the term "examiner," as used in Superior Court Civil Rule 35 includes a vocational specialist such as Jasen Walker. The Court does not believe the language was meant to limit an "examiner" to a chiropractor, podiatrist, psychiatrist or psychologist as Plaintiff argues. The language in Rule 35 was amended in 1993 to mirror the federal language. The advisory committee notes for the federal rule, excerpted above, state the term "examiner" was substituted for "physician" to broaden the scope of the rule to include other certified or licensed examiners. The Court believes the broadened language includes vocational specialists.

B. <u>Is There Good Cause to Order the Plaintiff Submit to a Vocational Examination?</u>

The Court finds good cause exists to order Plaintiff to submit to a vocational examination. Plaintiff counsel argued Defendants had no good cause to examine Plaintiff because Defendants could have a vocational expert issue a report after examining the records of Plaintiff. The Court does not adopt this line of reasoning. This Court holds that, once the Plaintiff placed the ability of the Plaintiff to do certain tasks in issue and proposed the presentation of his own vocational expert, the Defendants would be unfairly prejudiced if not allowed to conduct their own vocational examination of Plaintiff.

The Court is aware that other Federal District Courts have ruled a vocational examination is not within the scope of the language in Fed.R.Civ.P. 35.[25] However, the Court declines to follow the reasoning in those opinions.[26] The Court is also aware of other Federal District Courts that have ruled good cause to compel a vocational examination is not present when the party moving to compel the examination has access to all of the relevant medical records of the party for whom the examination is sought.[27] However, the Court is under the belief that "good cause" is present in a case such as this, when one party retains a vocational expert and puts their ability for future work at issue. Defendants would be prejudiced if not allowed to rebut Plaintiff's expert opinion with an independent examination and opinion of their own expert.

Conclusion

For the reasons set forth herein, the Motion to Compel the Vocational Examination of Plaintiff Adam Millius is **GRANTED**.

IT IS SO ORDERED.

/s/
M. Jane Brady

[25] *Storms v. Lowe's Home Centers, Inc*., 211 F.R.D. 296 (D.W.V. 2002) (holding a vocational examination was not included in the language of Fed.R.Civ.P. 35 because the amendment explicitly expanded the scope of examiners to be covered, not the scope of examinations available under the Rule).

[26] This court finds the reasoning of *Douris*, cited herein, persuasive: ("Here, the requirement that the mental or physical condition of a party is in controversy is satisfied. Where a party asserts a physical or mental injury, a party thus places his condition in controversy").

[27] *Shumaker v. West*, 196 F.R.D. 454 (D.W.V. 2000) (denying motion to compel plaintiff to submit to a vocational examination because no "good cause" was shown by defendant, as there was access to ample medical evidence relating the condition of plaintiff at issue); *In re Falcon Workover Co., Inc*., 186 F.R.D. 352 (D.L.A. 1999) (denying motion to compel vocational examination because "[I]n the context of a vocational expert, there is often no need for an examination as such, particularly when the moving party is allowed access to all of the claimant's medical records, has the opportunity to depose the claimant, and is provided with the results of tests performed by claimant's vocational expert").