

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Robert M. Dow, Jr.	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	08 C 2785	DATE	1/17/2012
CASE TITLE	Fowler vs. United States		

DOCKET ENTRY TEXT

For the reasons stated below, Plaintiff James Fowler's motion to compel [53] is granted in part and denied in part.

■ [For further details see text below.]

Docketing to mail notices.

STATEMENT

In his motion, Plaintiff Fowler asks the court to allow the previously disclosed testimony and opinions of Dr. David Zoellick. With the exception of a small portion of Dr. Zoellick's deposition testimony that deals with injuries Plaintiff suffered other than those to Plaintiff's left knee (Plaintiff's Ex. D. at 28:25-30:12), Defendant does not oppose the motion. Under *Banister v. Burton*, 636 F.3d 828, 833 (7th Cir. 2011); *Meyers v. Nat'l Railroad Passenger Corp.*, 619 F.3d 729, 734-35 (7th Cir. 2010), it is clear that Dr. Zoellick is a treating physician who plainly made his determinations as to the causes of the injuries to Plaintiff's left knee in the course of providing treatment. That determination was included in Plaintiff's initial Rule 26(a)(1) disclosures and has been known to Defendant throughout this litigation. For these reasons, the Court grants Plaintiff's motion with regard to all of Dr. Zoellick's testimony dealing with the treatment of the Plaintiff's left knee injury.

With regard to the injuries to Plaintiff's right knee and left hip that Dr. Zoellick discussed during his deposition (Plaintiff's Ex. D. at 28:25-30:12), the Court reserves its ruling until it has additional information. Plaintiff submits that, in contrast to *Meyers*, "there is evidence in this case that Dr. Zoellick had previously considered or determined the cause of plaintiff's injuries **during** the course of his treatment of plaintiff." That assertion is demonstrably true as to the alleged injuries to Plaintiff's left knee, but not self-evident as to any other alleged injuries. If Plaintiff wishes to elicit testimony from Dr. Zoellick as to injuries to Plaintiff's right knee and left hip, Plaintiff must produce evidence that the doctor reached these conclusions in the course of treating Plaintiff. See *Meyers*, 619 F.3d at 734-35 ("A treating physician who is offered to provide expert testimony as to the cause of the plaintiff's injury, but who did not make that determination in the course of providing treatment, should be deemed to be one 'retained or specially employed to provide expert testimony in the case,' and thus is required to submit an expert report in accordance with Rule 26(a)(2)."). However, if Dr. Zoellick never examined or treated Plaintiff's right knee and/or left hip, then he is an expert – not a treating physician – as to any opinion on causation of injuries to those parts of Plaintiff's body. To allow Dr. Zoellick to testify as a treating physician without evidence that he assessed Plaintiff's right knee and left hip in the course of providing treatment would constitute an end run around *Meyers* and *Banister* and the lines drawn by those cases in regard to testimony that can be offered without the submission of an expert

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report. If either party wishes to obtain a pre-trial ruling on the permissible scope of Dr. Zoellick's testimony, that party may submit a further motion *in limine* that takes into account the foregoing discussion and the pertinent case law cited above.