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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICHAEL VARIO,

Plaintiff,

v.

FIRST NATIONAL INSURANCE
COMPANY,

Defendant.

CASE NO. C16-1900RSM

ORDER GRANTING IN PART
DEFENDANT’S MOTION TO
COMPEL FRCP 35
EXAMINATION

I. INTRODUCTION

This matter is before the Court on Defendant First National Insurance Company’s (“FNIC”) motion to compel a Rule 35 physical examination of Plaintiff Michael Vario. Dkt. #25. Mr. Vario’s suit stems from his involvement in a three-car accident in which one driver was underinsured. Following the accident, Mr. Vario sued, and eventually settled, his claims against the underinsured driver and the insured driver. Mr. Vario subsequently filed an underinsured motorist claim with FNIC, his underinsured motorist insurance carrier; FNIC denied Mr. Vario’s claim and Mr. Vario sued FNIC. FNIC now seeks a Rule 35 physical

1 examination to address the issues of causation, the nature and extent of Mr. Vario’s injuries, as
2 well as Mr. Vario’s current and future prognosis. *Id.* at 9.

3 Mr. Vario does not agree with the scope of the Rule 35 examination FNIC requests, and
4 he argues good cause for a Rule 35 examination does not exist because he previously underwent
5 a Rule 35 examination in his underlying tort case against the two motorists involved in the
6 collision that allegedly injured him.¹ Dkt. #33 at 1–2. Mr. Vario reasons he will be unfairly
7 prejudiced if FNIC can rely on two Rule 35 physical examinations to address the question of
8 causation, and he proposes allowing a Rule 35 examination as long as FNIC’s chosen Rule 35
9 doctor does not rely upon or consider the previous Rule 35 doctor’s medical opinion. *Id.* at 2–3.

10 For the reasons discussed herein, Defendant’s motion to compel a Rule 35 examination
11 of Mr. Vario is GRANTED IN PART.

12 II. BACKGROUND

13 Mr. Vario was involved in a three-car accident on Interstate 5 in Whatcom County in May
14 2014. Dkt. #37 ¶¶ 9–14. At the time, Mr. Vario was a passenger in his co-worker’s car. *Id.* ¶ 12.
15 The two other drivers involved in the accident were Douglas McAcy and Homadokht Fattahi.
16 *Id.* ¶¶ 9–14. Mr. Vario alleges Mr. McAcy’s car struck the car he was in after Mr. McAcy
17 swerved to avoid hitting Ms. Fattahi’s car. *Id.* ¶¶ 13–14.

18 Because of the collision, Mr. Vario alleges he sustained “severe physical and mental pain
19 and suffering and injury,” and general damages (which includes “impairment of enjoyment of
20 life, disability and disfigurement”). *Id.* ¶ 15. Mr. Vario also alleges he has had to seek medical
21 treatment, has incurred transportation expenses to attend medical appointments, has incurred lost
22

23 ¹ Because Mr. Vario filed his Response two days late, FNIC asks the Court to strike Mr. Vario’s Response as
24 untimely. Dkt. #35 at 1–3. The Court declines to strike Mr. Vario’s Response, but reminds Mr. Vario that it is his
obligation to consult and comply with the Western District of Washington’s Local Civil Rules.

1 wages, and has incurred expenses for “essential services.” *Id.* Mr. Vario alleges that a proximate
2 cause of the collision was Mr. McAcy’s negligence. *Id.* ¶ 10. Mr. McAcy had a liability limit
3 of \$50,000. *Id.* ¶ 11.

4 After the accident, in January 2015, Mr. Vario sued Mr. McAcy and Ms. Fattahi. *See*
5 Dkts. #1, Ex. A at ¶¶ 14, 16 and #26, Ex. A. As part of Mr. Vario’s suit against Mr. McAcy and
6 Ms. Fattahi, Mr. Vario underwent a court-ordered Rule 35 independent medical examination.
7 *See* Dkt. #26, Ex. H. On February 17, 2016, Dr. James M. Blue, a neurosurgeon, conducted a
8 medical evaluation of Mr. Vario’s post-collision injuries and a directed neuro skeletal
9 examination. *Id.* at 2–3. Dr. Blue opined on whether he believed Mr. Vario’s injuries were
10 caused by the May 2014 collision, on whether Mr. Vario had pre-existing conditions, and on
11 Mr. Vario’s condition and prognosis at the time of the examination. *Id.* at 13–14.

12 In June 2015, because Mr. Vario’s co-worker’s underinsured motorist (“UIM”) policy
13 includes passengers as “covered person[s],” and because Mr. McAcy’s liability insurance policy
14 limit was less than the damages Mr. Vario claims Mr. McAcy caused him, Mr. Vario filed a UIM
15 claim with Allstate Fire & Casualty Insurance Company (“Allstate”) for the damages caused by
16 Mr. McAcy. *See* Dkts. #1, Ex. A ¶¶ 12–14 and #37 ¶¶ 3, 16. Allstate’s UIM policy limit was
17 \$100,000. Dkt. #37 ¶ 19. Allstate denied Mr. Vario’s UIM claim, and in November 2016,
18 Mr. Vario sued Allstate in the Superior Court of Washington for Whatcom County. *See* Dkt. #1,
19 Ex. A at 1. Allstate removed Mr. Vario’s suit to this Court in December 2016, and FNIC was
20 later granted leave to intervene. *See* Dkts. #1, #11 at 1, and #37 ¶¶ 3–4.

21 Mr. Vario’s claims against Allstate were eventually settled, and Allstate, FNIC, and
22 Mr. Vario agreed to a stipulation allowing Mr. Vario to amend his Complaint to name FNIC as
23 a defendant while dismissing Allstate from the matter. *See* Dkts. #31 at 2–3 and #37 ¶ 5.
24 Mr. Vario’s Amended Complaint alleges Mr. McAcy caused him damages in excess of \$150,000,

1 while the underinsured motorist policy issued by FNIC has a coverage limit of \$500,000. Dkt.
2 #37 ¶¶ 6, 16, 18, 19. Because the UIM claim Mr. Vario submitted to FNIC was denied, Mr. Vario
3 brought this action to recover UIM benefits he alleges FNIC is contractually obligated to cover.
4 *Id.* ¶¶ 20–22.

5 III. LEGAL STANDARD

6 If an action pending before the Court places the mental or physical condition of a party
7 in controversy, Rule 35 of the Federal Rules of Civil Procedure allows the Court to order a party
8 to submit to a mental or physical examination “by a suitably licensed or certified examiner.”
9 FED. R. CIV. P. 35(a)(1). However, the Court’s order “may be made only on motion for good
10 cause and on notice to all parties and the person to be examined,” and it must “specify the time,
11 place, manner, conditions, and scope of the examination, as well as the person or persons who
12 will perform it.” FED. R. CIV. P. 35(a)(2)(A)–(B). Parties requesting a Rule 35 examination
13 therefore must meet the following two requirements before a Rule 35 examination is ordered: (1)
14 establish that the physical or mental condition of a party is “in controversy”; and (2) establish
15 that “good cause” for ordering an examination exists. *Ragge v. MCA/Universal Studios*, 165
16 F.R.D. 605, 608 (C.D. Cal. 1995).

17 One purpose of Rule 35 is to “‘level the playing field’ between parties in cases in which
18 a party’s physical or mental condition is in issue.” *Id.* However, Rule 35 examinations may be
19 denied where additional relevant information will not be gained by the examination. *See*
20 *Schlagenhauf v. Holder*, 379 U.S. 104, 118 (1964) (“The ability of the movant to obtain the
21 desired information by other means is also relevant.”). “Because of the intrusive nature of [Rule
22 35] examinations, they are not granted as a matter of right, but rather as a matter of discretion.”
23 *Muller v. City of Tacoma*, No. 14-cv-05743-RJB, 2015 WL 3793570, at *2 (W.D. Wash. June
24

1 18, 2015) (citing Fed. R. Civ. P. 35(a); *Coca-Cola Bottling Co. v. Negron Torres*, 255 F.2d 149
2 (1st Cir. 1958)).

3 IV. DISCUSSION

4 FNIC and Mr. Vario disagree on the propriety of a Rule 35 physical examination for two
5 reasons. First, while FNIC contends it meets the two requirements necessary to warrant a Rule
6 35 examination, Mr. Vario appears to oppose the scope of the Rule 35 examination requested.
7 Second, if the Court agrees that a Rule 35 examination is proper, the parties disagree on the extent
8 FNIC’s Rule 35 doctor may rely on Dr. Blue’s prior Rule 35 medical evaluation. The Court
9 addresses each issue in turn.

10 A. Propriety of a Rule 35 Examination

11 According to FNIC, Mr. Vario has “put the question of causation, nature and extent of
12 his neck injury/disability, and future prognosis in controversy . . . thus warranting a current
13 physical exam . . . to address those issues.” Dkt. #25 at 9. Mr. Vario does not dispute that he
14 has placed his physical condition in controversy, but instead appears to oppose the requested
15 scope of FNIC’s proposed Rule 35 examination. *See* Dkt. #33 at 2–3. Mr. Vario argues that
16 FNIC fails to demonstrate “good cause” to allow its proposed Rule 35 doctor to opine, as
17 previously opined upon by Dr. Blue, on the question of causation. *Id.* at 1–3. The Court agrees
18 that to the extent FNIC seeks a Rule 35 examination to address what caused Mr. Vario’s alleged
19 neck injury, good cause to allow a Rule 35 examination is not established. However, the Court
20 finds that FNIC has established good cause to allow a Rule 35 examination that addresses the
21 current condition and future medical prognosis of Mr. Vario’s physical injuries.

22 As an initial matter, the Court notes that FNIC has demonstrated, and Mr. Vario does not
23 dispute, that Mr. Vario’s current physical condition is in controversy. Mr. Vario’s Amended
24 Complaint evidences as much, as it alleges general and specific damages caused as a result of the

1 injuries he allegedly incurred as a result of Mr. McAcy's negligence. *See Schlagenhauf*, 379
2 U.S. at 119 ("A plaintiff in a negligence action who asserts mental or physical injury . . . places
3 that mental or physical injury clearly in controversy and provides the defendant with good cause
4 for an examination to determine the existence and extent of such asserted injury.").

5 FNIC also establishes good cause exists to allow a Rule 35 examination to assess Mr.
6 Vario's current condition and future medical prognosis. The party moving for a Rule 35
7 examination can establish good cause by offering specific facts that justify the requested
8 discovery. *Gavin v. Hilton Worldwide, Inc.*, 291 F.R.D. 161, 165 (N.D. Cal. 2013) (citing *Haqq*
9 *v. Stanford Hosp. and Clinics*, No. C 06-05444 JW (RS), 2007 WL 1593224, at *1 (N.D. Cal.
10 June 1, 2007)). Courts have considered the following factors when determining if good cause
11 for a Rule 35 examination exists: "(1) the possibility of obtaining the desired information by
12 other means, (2) whether plaintiff plans to prove her claim through the testimony of expert
13 witnesses, (3) whether the desired information is relevant, and (4) whether plaintiff is claiming
14 an ongoing injury." *Bridgham-Morrison v. Nat'l Gen. Assurance Co.*, Case No. C15-927RAJ,
15 2016 WL 231284, at *4 (W.D. Wash. Jan. 19, 2016) (citing *Lopez v. City of Imperial*, No. CIV.
16 13-0597-BEN WVG, 2014 WL 232271, at *3-4 (S.D. Cal. Jan. 21, 2014)). Here, FNIC
17 demonstrates that each of these factors support allowing a Rule 35 examination to assess Mr.
18 Vario's current condition and future physical prognosis.

19 First, although the record indicates that Mr. Vario has been examined by his own doctors
20 and a prior Rule 35 independent medical examiner, the Court agrees those examinations, which
21 are over a year old, do not provide FNIC with the information it seeks about Mr. Vario's current
22 physical condition. Second, FNIC points out, and Mr. Vario does not dispute, that Mr. Vario
23 intends to call at least two medical experts at trial to testify about the extent of the damages
24 caused by his physical injuries. *See* Dkts. #25 at 9 and #33 at 1-3. Finally, Mr. Vario claims his

1 injuries, and the damages stemming from those injuries, are ongoing, thus making a medical
2 examination relevant. Consideration of these factors thus supports finding good cause exists to
3 allow a Rule 35 examination to assess Mr. Vario's current condition and future medical
4 prognosis.

5 However, FNIC does not establish good cause exists to allow its identified Rule 35 doctor
6 to opine on the question of causation of Mr. Vario's alleged injuries. As noted by Mr. Vario, and
7 as supported by the record, although the question of causation is relevant, FNIC does not try to
8 explain why it cannot rely on the opinions of Dr. Blue, the Rule 35 examining doctor who
9 previously examined Mr. Vario, to address the question of causation. Considering that Dr. Blue
10 has already opined on causation, FNIC has not demonstrated it cannot obtain an independent
11 assessment on this issue by other means. The scope of the Rule 35 examination requested by
12 FNIC will therefore be limited to an examination of Mr. Vario's current condition and future
13 medical prognosis.

14 In summary, because FNIC demonstrates that Mr. Vario's current physical condition is
15 in controversy, and because good cause exists for a medical assessment of Mr. Vario's current
16 and ongoing physical injuries, Defendant's motion to compel is GRANTED IN PART.

17 **B. Propriety of Imposing Limitations on the Information Considered by**
18 **FNIC's Rule 35 Doctor**

19 Finally, the Court does not agree that Mr. Vario may impose limitations on the
20 information FNIC's Rule 35 doctor considers or relies upon in forming his medical opinion.
21 Mr. Vario's request for imposing limitations appears motivated by the concern that FNIC's Rule
22 35 doctor will opine on causation. *See* Dkt. #33 at 2-3 ("If the Court allows Dr. Kline to conduct
23 the exam, Defendant FNIC will be allowed to have two different doctors challenging causation.
24 The solution is to allow the Defendant to choose: have Dr. Blue perform the second examination

1 or have Dr. Kline perform the second examination, but not use or rely on Dr. Blue's first report."').
2 However, as explained in section A., FNIC's Rule 35 doctor may not opine on the issue of
3 causation. Additionally, even if the scope of the Rule 35 examination included causation, Mr.
4 Vario does not cite to any authority to support the proposition that a Rule 35 doctor cannot rely
5 on or consider the findings of prior Rule 35 examinations. Consequently, the Court will not
6 impose limitations on the information FNIC's chosen Rule 35 doctor may consider in opining on
7 Mr. Vario's current physical condition and future prognosis.

8 V. CONCLUSION

9 Having reviewed the relevant pleadings, the declarations and exhibits attached thereto,
10 and the remainder of the record, the Court hereby GRANTS IN PART FNIC's motion to
11 compel a Rule 35 examination (Dkt. #25). The Court hereby finds and ORDERS:

- 12 1. Mr. Vario is ordered to attend a Rule 35 examination conducted by Dr. Steven
Klein, at a mutually agreeable place, on September 12, 2017 at 1:00 p.m.;
- 13 2. The scope of the physical examination is limited to an evaluation of
14 Mr. Vario's current physical condition and future medical prognosis in light of
his ongoing complaints of pain and disability; and
- 15 3. Mr. Vario may not impose limitations on the information Dr. Klein considers
16 during the Rule 35 examination.

17 DATED this 26 day of July, 2017.

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20 RICARDO S. MARTINEZ
21 CHIEF UNITED STATES DISTRICT JUDGE
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