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2
3 UNITED STATES DISTRICT COURT
4 WESTERN DISTRICT OF WASHINGTON
5 AT TACOMA

6 PERRY A. WARD,

7 Plaintiff,

8 v.

9 EHW CONSTRUCTORS, et al.,

10 Defendants.

CASE NO. C15-5338 BHS

ORDER GRANTING
DEFENDANTS' MOTION TO
COMPEL RULE 35
EXAMINATION

11 This matter comes before the Court on Defendants EHW Constructors, American
12 Bridge Company, J.V., Nova Group, Inc., and Skanska USA Civil Southeast, Inc.'s
13 ("Defendants") motion to compel an independent medical examination (Dkt. 68). The
14 Court has considered the pleadings filed in support of and in opposition to the motion and
15 the remainder of the file and hereby grants the motion for the reasons stated herein.

16 **I. PROCEDURAL HISTORY**

17 On May 21, 2015, Plaintiff Perry Ward ("Ward") filed a complaint against
18 Defendants *in rem* and *in personam* for personal injury. Dkt. 1. Ward filed an amended
19 complaint on June 22, 2015. Dkt. 12 ("Comp.").

20 On June 16, 2016, Defendants filed the instant motion, seeking to compel an
21 independent medical examination pursuant to Federal Rule of Civil Procedure 35. Dkt.
22

1 68. On June 27, 2016, Ward responded. Dkt. 70. On June 30, 2016, Defendants replied.
2 Dkt. 71.

3 II. DISCUSSION

4 Defendants seek an order compelling Ward to attend an independent medical
5 examination administered by both an orthopedic surgeon and a neurosurgeon. Dkt. 68.
6 Ward does not object to Defendants' request for an exam by a neurosurgeon. Dkt. 70 at
7 1. Rather, Ward objects to Defendants' request to have an orthopedic surgeon present at
8 the exam as well. *Id.* at 2.

9 Under Rule 35, the Court "may order a party whose mental or physical
10 condition . . . is in controversy to submit to a physical or mental examination by a
11 suitably licensed or certified examiner." Fed. R. Civ. P. 35(a)(1). A defendant seeking a
12 Rule 35 exam must show that the plaintiff's physical or mental condition is "in
13 controversy" and that "good cause" exists for the requested exam. *See Houghton v. M &*
14 *F Fishing, Inc.*, 198 F.R.D. 666, 667 (S.D. Cal. 2001). The decision to order a Rule 35
15 exam is within the Court's discretion. *See* Fed. R. Civ. P. 35(a)(1); *see also Muller v.*
16 *City of Tacoma*, C14-5743-RJB, 2015 WL 3793570, at *2 (W.D. Wash. June 8, 2015).

17 Ward alleges he "suffered a severe neck and back injury" when EHW's foreman
18 negligently dropped a 400-pound pump on him. Comp. ¶ 3.2. According to Ward, he
19 experienced "immediate severe pain in my neck radiating down into [his] left arm" and
20 "immediate severe pain in [his] neck." Dkt. 30, Affidavit of Perry Ward at 4. Ward
21 previously submitted a medical examination from an osteopath that concluded Ward
22 suffered from a "cervical sprain with C6 radiculopathy." Dkt. 30-2 at 6. There is also

1 evidence in the record of previous spinal injuries. *See id.*; *see also* Dkt. 31, Declaration
2 of James Gooding, Ex. 1 at 4.

3 Based on these allegations and evidence, Ward has put his neck and back injuries
4 in controversy and there is good cause for Defendants' requested exam. *See*
5 *Schlagenhauf v. Holder*, 379 U.S. 104, 119 (1964) ("A plaintiff in a negligence action
6 who asserts mental or physical injury places that mental or physical injury clearly in
7 controversy and provides the defendant with good cause for an examination to determine
8 the existence and extent of such asserted injury." (internal citation omitted)). It also does
9 not appear that the requested exam will be unduly burdensome because the exam will not
10 include invasive testing or additional imaging and will be conducted in one day. *See* Dkt.
11 69, Declaration of Mark Krisher ¶ 9. For these reasons, the Court grants Defendants'
12 motion to compel.

13 III. ORDER

14 Therefore, it is hereby **ORDERED** that Defendants' motion to compel (Dkt. 68) is
15 **GRANTED**. Ward is ordered to attend an exam administered by board certified
16 neurosurgeon, Jeffery J. Larson, M.D., and board certified orthopedic surgeon, Spencer
17 Greendyke, M.D., located at Coeur D'Alene Spine Center, 3320 North Grand Mill Lane,
18 Coeur D'Alene, Idaho on July 19, 2016, beginning at 10:30 a.m.

19 Dated this 18th day of July, 2016.

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BENJAMIN H. SETTLE
United States District Judge