

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT BLUEFIELD

LARRY L. KOGER,

Plaintiff,

v.

CIVIL ACTION NO. 1:08-0909

NORFOLK SOUTHERN RAILWAY
COMPANY,

Defendant.

MEMORANDUM OPINION AND ORDER

Pending before the court is plaintiff's motion in limine to bar the testimony of Dr. David Santrock and Dr. Jeffrey Greenberg. Plaintiff objects to allowing the testimony of both doctors, arguing that they were not timely disclosed as expert witnesses.

August 14, 2009, was the "discovery completion date" in the instant case by which all discovery, including the disclosures required by Fed. R. Civ. P. 26(a)(1), (2) and (5) were to be completed. Seven days later, defendant identified Dr. Santrock as an expert witness. By Order entered September 1, 2009, Magistrate Judge VanDervort granted defendant's motion to compel a Rule 35 examination of plaintiff by Dr. Santrock on September 22, 2009, the earliest date Dr. Santrock had available. It bears noting that defendant notified plaintiff on August 5, 2009, that Dr. Santrock would be the doctor performing the IME but that it could not be scheduled until September 22, 2009. Plaintiff's objection to the September 22, 2009, date

necessitated the filing of the aforementioned motion to compel. The examination on September 22, 2009, went forward and shortly thereafter, plaintiff was provided with a copy of Dr. Santrock's report.

The court finds that defendant has proffered a good excuse for the late disclosure, if any,* of Dr. Santrock and his report. While the defendant should have sought leave of the court for the late disclosure, the court finds it plausible that defendant believed it was protected by the orders of Magistrate Judge VanDervort. Accordingly, the motion in limine to bar Dr. Santrock's testimony is DENIED.

As to Dr. Greenberg, defendant contends that the disclosure as to him was not untimely because he will be testifying as a fact witness, not an expert. For this reason and as the court informed the parties at the pretrial conference, the motion to bar Dr. Greenberg's testimony is DENIED.

The Clerk is directed to send copies of this Memorandum Opinion and Order to all counsel of record.

IT IS SO **ORDERED** this 10th day of November, 2009.

ENTER:



David A. Faber

Senior United States District Judge

* The court recognizes defendant's position that its disclosure of Dr. Santrock was not untimely. However, because of the court's ruling, it is unnecessary to reach this issue.