

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES--GENERAL

Case No. 01-ML-1394-GAF(RCx)

Date: August 12, 2003

ALL RELATED CASES

Title: In Re Air Crash at Taipei, Taiwan on October 31, 2000

=====

DOCKET ENTRY

=====

HON. ROSALYN M. CHAPMAN, UNITED STATES MAGISTRATE JUDGE

Debra Taylor
Deputy Clerk

None
Court Reporter

ATTORNEYS PRESENT
FOR PLAINTIFFS:
Brian Panish
Frank Pitre
Don Nolan
Floyd A. Wisner
Juanita Madole
John Greaves

ATTORNEYS PRESENT
FOR DEFENDANT:
Frank Silane
Rod Margo
Debby Zajac

ATTORNEY PRESENT
FOR DEFENDANT GOODRICH:
Greg Hill

**PROCEEDINGS: DEFENDANT'S MOTION TO COMPEL RULE 35 EXAMINATIONS,
OR, ALTERNATIVELY, PLAINTIFFS' MOTION TO PROHIBIT SUCH
EXAMINATIONS**

On August 6 and 7, 2003, plaintiffs and defendant Singapore Airlines ("SIA") filed cross-memoranda of points and authorities, each with several declarations and exhibits, generally addressing whether the physical and mental examinations of plaintiffs should proceed at all, whether they should be recorded or videotaped, and whether they should have other conditions attached to them. A telephonic hearing was held before Magistrate Judge Rosalyn M. Chapman on August 12, 2003. Plaintiffs were represented by Brian Panish, Frank Pitre, Don Nolan, Floyd A. Wisner, Juanita Madole and John Greaves, attorneys-at-law, defendant SIA was represented by Frank Silane, Rod Margo and Debby Zajac, attorneys-at-law with the firm Condon & Forsyth, and defendant Goodrich was represented by Greg Hill, attorney-at-law.

DISCUSSION

Federal Rule of Civil Procedure 26(a)(5) provides that the parties may obtain discovery by "physical and mental examinations." Rule 35(a) sets forth the requirements for obtaining discovery by a physical or mental examination, as follows:

When the mental or physical condition . . . 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. . . . 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.

Fed. R. Civ. P. 35(a). "Under Rule 35, the party moving for a physical or mental examination must meet two requirements: first, the physical or mental condition of the party must be 'in controversy'; and second, 'good cause' for the examination must be established." Ragge v. MCA/Universal Studios, 165 F.R.D. 605, 608 (C.D. Cal. 1995)(citing Schlagenhauf vs. Holder, 379 U.S. 104, 117-20, 85 S.Ct. 234, 241-43, 13 L.Ed.2d 152 (1964)). "Each motion to compel a mental examination must be decided on a case by case basis, [considering] all the relevant circumstances." Ragge, 165 F.R.D. at 608. Here, there is no dispute that plaintiffs' physical or mental conditions have been placed "in controversy" by their complaints or that "good cause" exists for their physical or mental examinations.

In fact, federal courts have routinely ordered both physical and mental examinations of plaintiffs alleging personal injuries at the hands of defendants. See, e.g., Womack v. Stevens Transport, Inc., 205 F.R.D. 445, 447-48 (E.D. Pa. 2001) (ordering psychiatric examination when plaintiff allegedly suffered mental injuries in motor vehicle accident involving truck driven by defendant's employee); Cabana v. Forcier, 200 F.R.D. 9, 12 (D. Mass. 2001) (requiring plaintiff to submit to psychiatric examination when he allegedly suffered mental injuries due to exposure to toxic waste); Fischer v. Coastal Towing, Inc., 168 F.R.D. 199, 200-01 (E.D. Tex. 1996)(ordering physical examination and vocational-rehabilitation interview for injury allegedly

caused by defendants' negligence and unseaworthiness of vessel); Sauer v. Burlington Northern R.R. Co., 169 F.R.D. 120, 123-24 (D. Minn. 1996)(ordering orthopedic examination of plaintiff allegedly injured on job where two years had passed since original neurological examination); Eckman v. University of Rhode Island, 160 F.R.D. 431, 433-34 (D. R.I. 1995)(ordering mental examination of plaintiff alleging sexual assault although she had produced all medical records and her therapists had been deposed).

"One of the purposes of Rule 35 is to 'level the playing field' between the parties in cases in which a party's physical or mental condition is in issue." Ragge, 165 F.R.D. at 608; Tomlin v. Holecek, 150 F.R.D. 628, 632 (D. Minn. 1993); Looney v. Nat'l R.R. Passenger Corp., 142 F.R.D. 264, 265 (D. Mass. 1992). "Because [a] mental [or physical] examination provides one of the few opportunities for a defendant to have access to a plaintiff, and the only opportunity for a defendant to have a plaintiff examined by defendant's expert, some preference should be given to allowing the examiner to exercise discretion in the manner and means by which the examination is conducted, provided it is not an improper examination." Ragge, 165 F.R.D. at 609 (footnote omitted); Hertenstein v. Kimberly Home Health Care, Inc., 189 F.R.D. 620, 624 (D. Kan. 1999).

Nevertheless, Rule 26(c) provides authority for the imposition of appropriate conditions upon a mental or physical examination. Hertenstein, 189 F.R.D. at 630. A protective order should be granted when the moving party establishes "good cause" for the order and "justice requires [a protective order] to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. . . ." Fed. R. Civ. P. 26(c). "For good cause to exist, the party seeking protection bears the burden of showing specific prejudice or harm will result if no protective order is granted." Phillips v. General Motors Corp., 307 F.3d 1206, 1210-11 (9th Cir. 2002); Beckman Indus., Inc. v. Int'l Ins. Co., 966 F.2d 470, 476 (9th Cir.), cert. denied, 506 U.S. 868 (1992). "Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test." Beckman Indus., Inc., 966 F.2d at 476 (internal quotations marks omitted); see also Hertenstein, 189 F.R.D. at 630 ("[T]he party seeking the presence of a . . . recording device must carry the burden of convincing the court." (quoting Galieti v. State Farm Mut. Automobile Ins. Co., 154

F.R.D. 262, 265 (D. Co. 1994)).

Here, plaintiffs John Diaz, Harald Linke, Roeup Pork and David Ralph have raised objections to, and seek various orders regarding, their Rule 35 examinations. All plaintiffs request that, at a minimum, the Rule 35(a) examinations be audiotaped or recorded. Additionally, plaintiffs Diaz and Pork also request the presence of other persons at their examinations. Specifically, plaintiff Diaz requests a "third party medical observer," such as a registered nurse, "to insure the examinations are conducted in a manner to ensure compliance with standard techniques," or, alternately, that his examinations be videotaped. Oppo. at 16:4-9. Plaintiff Pork, who claims to have "no fluency in written or spoken English," requests the services of her husband or an interpreter, Oppo. at 6:28-7:10; Leigh Decl., Exh. 5, and that her physical examination be videotaped due to her lack of fluency in English.

Yet, "the majority of federal courts have rejected the notion that a third party should be allowed, even indirectly through a recording device, to observe a Rule 35 examination." Holland v. United States, 182 F.R.D. 493, 495 (D. S.C. 1998).¹ "Several factors militate against allowing any third person or recording device at the mental [or physical] examination of [a] plaintiff." Hertenstein, 189 F.R.D. at 630;² Holland, 182 F.R.D. at 495-96; Tomlin, 150 F.R.D. at 631-33. These factors include:

First, . . . the presence of a third party during the examination under Rule 35 "would lend a degree of artificiality to the interview technique which would be inconsistent with applicable professional standards."
[¶] Second, . . . one of the purposes of Rule 35 is "to provide a 'level playing field' between the parties in their respective efforts to appraise" the plain-

¹ The Court is, of course, aware of California Code of Civil Procedure § 2032(g)(2), regarding civil discovery in California, which allows both the examiner and examinee to record a mental examination; however, that statute, which is the result of the legislative process, is not persuasive here.

² "Whether to either allow a tape recorder or a third person at the examination of plaintiff raises only a single issue." Hertenstein, 189 F.R.D. at 628.

tiff's condition. Therefore, the party requesting the examination should be free from oversight by the opposing party. . . . [B]oth the plaintiff's and defendants' experts were "bound by the methodologies of their discipline and by the same formal or informal principles of professional integrity." [¶] Third, . . . [such an intrusion would] promote "the infusion of the adversary process into the . . . examining room[.]"

Holland, 182 F.R.D. at 495-96 (citations omitted); Hertenstein, 189 F.R.D. at 630-31; Tomlin, 150 F.R.D. at 631-34. Additionally, "the presence of a[n audiotape] could influence [plaintiff], even unconsciously, to exaggerate or diminish his reactions to [the examiner's] physical examination." Holland, 182 F.R.D. at 496; see Sreenivasan Decl., ¶¶ 4-5. Finally, the infusion of the adversary process into the examining room by a recording device is "inconsistent with the just, speedy and inexpensive resolution of civil disputes [under Rule 1], and with the dictates of Rule 35.'" Hertenstein, 189 F.R.D. at 631 (quoting Tomlin, 150 F.R.D. at 634).

The Court finds the above reasoning to be persuasive. "Weighing the concerns of the parties and the physicians, the court finds the presence of a mechanical recording device inappropriate under the facts of this case. Plaintiff[s] ha[ve] demonstrated no need for it. Its presence may invalidate the results of the examination[s], as it may consciously or unconsciously influence plaintiff[s] 'to exaggerate or diminish [their] reactions' to the examination[s]." Hertenstein, 189 F.R.D. at 631 (quoting Holland, 182 F.R.D. at 496).

Moreover, plaintiffs have presented only speculative and unfounded concerns to support their requests to audiotape or videotape their examinations and to have a third party observer at plaintiff Diaz's examinations. For example, Dr. Linke, who "has resided in the United States for more than thirty (30) years," Panish Decl., ¶ 8, claims an audiotape is necessary because "[h]e speaks English as a second language in a thick German accent[.]" Oppo. at 20:14-15, and plaintiff Pork claims a recording is the only "means by which to ensure that the translation is properly made." Oppo. at 8:19-23. Both plaintiffs Linke and Ralph complain that, without a record, they will not be able to remember what questions were asked of them

during their examinations. See Panish Decl., ¶ 6 (an audiotape of Dr. Ralph's IME "will greatly assist in the cross-examination of Dr. Eth at trial"). These are speculative, unfounded, and undocumented concerns about the examining process and the examining physicians. There is no evidence the examiners will act improperly or not follow standard procedures during the examinations, and the declarations of Dr. Eth, ¶ 3, Dr. Sreenivasan, ¶ 3, and Dr. O'Connor, ¶ 3, are to the contrary. In other words, it is insufficient "[t]hat defendant hired the examiner[s]. . . ." Hertenstein, 189 F.R.D. at 633.

Nevertheless, plaintiff Pork's deposition proceeded with a Cambodian interpreter, and if plaintiff Pork does not understand English very well, it is difficult to imagine her physical and mental examinations will go smoothly or be productive. Accordingly, she may have a Cambodian interpreter to assist her examinations; however, the interpreter shall be provided by SIA, not plaintiffs.

Further, it must be noted that "[c]ounsel for plaintiff[s] ha[ve] alternative methods [to a recording] . . . to obtain insight into the examination[s] and to prepare for the cross-examination of [the examiners]." Hertenstein, 189 F.R.D. at 632. Pursuant to Rule 35(b)(1), plaintiffs may request detailed written reports of the examiners "setting out the examiners' findings, including results of all tests made, diagnoses and conclusions. . . ." Fed. R. Civ. P. 35(b)(1). If an examiner is designated as a testifying expert, which is likely here, the examiner "must provide plaintiff a report containing 'a complete statement of all opinions to be expressed and the basis and the reasons therefore.'" Hertenstein, 189 F.R.D. at 632 (quoting Fed. R. Civ. P. 26(a)(2)(B)). That report must also contain "the data or other information considered by the [examiner] in forming the opinions." Fed. R. Civ. P. 26(a)(2)(B). If the examiner is designated as an expert whose opinions may be presented at trial, plaintiffs' attorneys may depose the examiner and inquire about the examination. Fed. R. Civ. P. 26(b)(4)(A). Finally, as noted in Ragge, "[i]f the examination is improper, it may be excluded at trial." Ragge, 165 F.R.D. at 609 n.5; see also Tomlin, 150 F.R.D. at 633 ("Ultimately, it is for the Court . . . to assure that the evaluatory framework of Rule 35 is not misused or abused.").

For all these reasons, the Court finds a recording device, videographer or third-person observer would constitute a distraction during the examinations and work to diminish the accuracy of the examination process, and plaintiffs have failed to show any special circumstances requiring the protections of Rule 26(c). Accordingly, the physical or mental examinations of plaintiffs should proceed without being recorded or videotaped by plaintiffs.

Plaintiff Diaz also seeks to place other limitations on his examinations. SIA proposes to conduct two physical examinations and two mental examinations of plaintiff Diaz: an orthopedic examination by Ronald Glousman, M.D.; a neurological examination by Edward J. O'Connor, M.D.; psychological testing by a psychologist, Shoba Sreenivasan, Ph.D.; and a mental evaluation by a psychiatrist, Thomas Garrick, M.D.³ Plaintiff Diaz seeks to prohibit the examiners from "extensively question[ing him] about his background or prior medical or emotional condition since [his] medical records have already been produced [to] provide this information" and requests this Court to limit his mental examination to a total of two hours. Oppo. at 19:3-4; 16:21-17:2. Plaintiff Diaz has offered no bases for these limitations, and

[t]o restrict a physician from questioning a patient during a physical [or mental] examination unduly restricts the physician's ability to obtain the information necessary to reach medical conclusions. The questioning of the plaintiffs by defense counsel during the taking of their depositions, the historical medical records, and the answers of the plaintiffs to interrogatories are no substitute for the answers to questions that a physician must pose to a patient during a physical examination.

Romano v. II Morrow, Inc., 173 F.R.D. 271, 273 (D. Ore. 1997); Hertenstein, 189 F.R.D. at 626. Moreover, when plaintiff Diaz objected to the length of the mental examinations originally proposed by SIA, SIA changed its examiners so the length of the psychological testing (by Dr. Sreenivasan) is reduced to 4 hours

³ Each of these doctors has filed a declaration regarding the nature of the examinations he or she will conduct.

and the psychiatric examination (by Dr. Garrick) is reduced considerably, to 2½-3½ hours. These time estimates, totaling approximately 7 hours, seem eminently reasonable for a complete mental evaluation, and plaintiff Diaz has not provided any persuasive reason why they are not.

Plaintiff Pork also objects to the location of her physical and mental examinations. Even though she initially agreed to attend the examinations in Los Angeles, she now requests the examinations take place in Minneapolis, claiming she is unable to travel by airplane. Generally, a plaintiff who has chosen the forum will be required to attend a physical or mental examination in the place where she filed suit, Matthews v. Watson, 123 F.R.D. 522, 523 (E.D. Pa. 1989); Costanza v. Monty, 50 F.R.D. 75, 76 (E.D. Wis. 1970), which is the Central District of California. Moreover, all parties have been aware for many months of the cut-off date(s) for the independent medical examinations; thus, plaintiff Pork could have arranged for alternate travel to Los Angeles.

Finally, we must address SIA's failure to give plaintiffs proper written notice of the Rule 35(a) examinations, as it should have.⁴ "Parties . . . risk denial of their motions [under Rule 35(a)] solely on grounds that they failed to provide adequate details of the examination." Hertenstein, 189 F.R.D. at 623; Shapiro v. Win-Sum Ski Corp., 95 F.R.D. 38, 39 (W.D. N.Y. 1982). Rule 35(a) requires the party requesting an examination to "specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made." Fed. R. Civ. P. 35(a).

Although plaintiffs object that SIA has not complied with the requirements of Rule 35(a), and that is so, the parties have had ongoing discussions over the past few months or so about the nature of plaintiffs' examinations, and during those discussions, specific details of some of the examinations were presented by SIA. For example, regarding plaintiff Diaz, SIA has clearly identified the physicians and psychologist who will examine plaintiff Diaz, as discussed above. Additionally, SIA advised

⁴ When counsel for plaintiffs and SIA appeared before the Court on July 30, 2003, this Court admonished SIA that written notice complying with Rule 35(a) is vital, and that this Court also preferred the examiner's curriculum vitae to be attached to such notice. Yet, SIA did not follow the Court's admonition.

plaintiff Diaz of the nature of tests the physicians might perform, the purpose of the examinations and the amount of time they might take. Zajac Decl., ¶¶ 5, 9, Exhs. D, H. Finally, SIA also advised plaintiff Diaz that "Dr. Garrick's psychiatric examination will focus on [his] claim for emotional stress and [post-traumatic stress disorder], and will consist of a brief pre-accident history with the main focus of the interview, or series of interviews, focusing on plaintiff Diaz's post-accident depression, psychiatric symptoms and treatment." Zajac Decl., Exh. H.

During discussions between plaintiff Pork and SIA, plaintiff Pork agreed to both physical and mental examinations, Skinner Decl., ¶ 6, Exh. G -- provided SIA complied with Rule 35(a)'s notice requirements! Although SIA has not complied with Rule 35(a),

[t]he failure to provide all particulars about the examination . . . does not necessitate denial of a motion for examination. The court may sustain the motion but "leave the specifics to be worked out by the parties." . . . Deferring this task to the parties permits them to better accommodate each other's interests, as well as the availability of the physician and the party to be examined.

Hertenstein, 189 F.R.D. at 623; Thiessen v. General Electric Capital Corp., 178 F.R.D. 568, 571 n.4 (D. Kan. 1998); Sauer, 169 F.R.D. 120, 124 n.4 (D. Minn. 1996).

Given the fact that the cut-off dates for the independent medical examinations have passed, or will pass this week, this Court will order SIA to serve written Rule 35(a) notices on plaintiffs **today**, and further order the parties to work out the details of the plaintiffs' examinations within the next 48 hours.

ORDER

1. The physical and/or mental examinations of plaintiffs shall proceed without being audiotaped or videotaped and without any third person being present, other than a Cambodian interpreter hired by Singapore Airlines to interpret for plaintiff Roeup Pork at her physical and mental examinations.

2. Defendant Singapore Airlines shall provide by facsimile written Rule 35(a) notices to plaintiffs John Diaz, Harald Linke,

Roeup Pork and David Ralph, no later than August 12, 2003, at 4:00 p.m. PDT, and counsel for defendant Singapore Airlines and those plaintiffs shall meet and confer telephonically, no later than August 14, 2003, at noon PDT, to resolve any disagreements regarding the nature of the physical and/or mental examinations noticed, including the time and place for the examinations. If the parties are not able to amicably resolve these matters, plaintiffs' liaison counsel, Juanita Madole, shall contact Judge Chapman's courtroom deputy to schedule a telephonic conference with Judge Chapman on August 15, 2003.

MDL1394\1394.15
8/12/03

Initials of Deputy Clerk_____