



**TENNESSEE BUREAU OF WORKERS' COMPENSATION
IN THE COURT OF WORKERS' COMPENSATION CLAIMS
AT NASHVILLE**

James Carter,)	Docket No. 2015-06-0466
Employee,)	
v.)	
Ricoh America Corp.,)	State File No. 43734-2015
Employer,)	
And)	
New Hampshire Insurance Company,)	Judge Kenneth M. Switzer
Carrier.)	

ORDER GRANTING MOTION TO STRIKE

This case came before the Court on July 2 on Mr. Carter's motion to exclude Ricoh America's expert. Ricoh mainly cites the COVID-19 pandemic as its attorney's reason for missing an expert disclosure deadline, maintaining that its attorney's actions amounted to excusable neglect. For the following reasons, the Court is unpersuaded and grants Mr. Carter's motion.

Background

According to his June 2016 petition for benefit determination, Mr. Carter injured his back at work on June 5, 2015. A February 3, 2017 dispute certification notice listed permanent disability as an issue with the explanation "escape clause."

Since then, the Court has held a series of status hearings, monitoring the case's progress as Mr. Carter continued treating, and the parties prepared for a compensation hearing. Relevant to this motion, in May 2019, Mr. Carter's attorney stated that he reached maximum medical improvement, but the parties were waiting on an impairment rating. At a July status hearing, Mr. Carter confirmed he might pursue permanent total disability benefits. By October, the parties informed the Court that the sole issue was the extent of

Mr. Carter's disability, so the Court set discovery deadlines.¹ In January 2020, Mr. Carter's attorney reiterated that he is seeking permanent total disability benefits.

At an April 6, 2020 status hearing, Mr. Carter's counsel stated he had retained a vocational expert. After completion of the expert's evaluation and report, counsel sent a copy to Ricoh's attorney. Ricoh's counsel responded that she would probably want to depose Mr. Carter's vocational expert and had not decided whether Ricoh would hire its own expert. The Court ordered that she file a notice on or before April 15 identifying Ricoh's vocational expert.

On April 15, Ricoh's counsel filed a notice stating that she wanted to depose Mr. Carter's vocational expert. She further wrote that she intends to hire a vocational expert, adding:

Employer has not been able to retain an expert as of this date in light of lack of availability and issues relating to the Covid-19 pandemic and stay-at-home orders issued by the governor. Employer will continue to make attempts to secure a qualified expert so that the vocational evaluation can be performed as soon as possible.

On June 10 – fifty-six days after the disclosure deadline – Ricoh's counsel filed a notice identifying her vocational expert, Michelle McBroom Weiss. The disclosure occurred one day before employee's vocational expert's deposition. Ricoh's attorney explained that “the delay in doing so was caused by Covid-19 related restrictions, which would have prevented the expert from conducting a thorough evaluation (including in-person testing) on par with the one performed by employee's vocational expert.”

As Mr. Carter's counsel pointed out in his motion, the notice did not state when Ms. Weiss was first contacted or retained, why no attempt was made to evaluate Mr. Carter while social-distancing, and how the pandemic prevented Ricoh's counsel from disclosing its expert until that date.

In response, Ricoh's attorney stated that she was unable to find a vocational expert on or before April 15, so she filed a notice to that effect. Counsel wrote that she continued searching for an expert and spoke with Ms. Weiss on April 22, who told her that “in light of the COVID-19 related restrictions, she was uncertain as to when and how any vocational evaluations would be able to be performed,” and that she awaited guidance from her professional association on the question. Ricoh's attorney offered no proof of this conversation. According to Ricoh's attorney, several weeks later, and once public-health restrictions eased, Ms. Weiss agreed to perform the evaluation.

¹ Ricoh now contests compensability as well.

Ricoh's counsel attached copies of emails to her response. A June 2 email from Ricoh's attorney to Ms. Weiss reads, "I have been trying to reach you to set up this evaluation. Please advise if you're no longer available." In her same-day response, Ms. Weiss wrote that she did not receive a voicemail from Ricoh's attorney but was available for the evaluation and attached a retainer agreement. She explained that she had stopped performing in-person evaluations during the pandemic but had returned to performing them on June 1. A June 12 email to Ricoh's attorney from Ms. Weiss reads, "*I kept taking cases during the COVID-19 issue and now several are due[.]*" (Emphasis added.) She further wrote that she could possibly complete her report by the first week of August.

Law and Analysis

In *Smith v. The Newman Group*, 2015 TN Wrk. Comp. App. Bd. LEXIS 30, at *9 (Sept. 21, 2015), the Appeals Board held that trial courts have the discretion to control their dockets, and "judges in the Court of Workers' Compensation Claims possess discretion to control the pace of litigation in their courts to ensure equitable and efficient disposition[.]" Further, "Good trial judges set and enforce deadlines and also have the right to assume that the deadlines they set, as well as those imposed by the rules, will be honored." *Kenyon v. Handal*, 122 S.W.3d 743, 751 (Tenn. Ct. App. 2003).

Here, the Court set discovery deadlines in an attempt to bring finality to a case involving an alleged five-year-old work injury.

Rule 6.02 of the Tennessee Rules of Civil Procedure reads that when, by a court order, an act is required to be done within a specified time, "the court for cause shown may, at any time in its discretion, (1) with or without motion or notice order the period enlarged *if request therefor is made before the expiration of the period originally prescribed* or as extended by a previous order, or (2) *upon motion made after the expiration of the specified period* permit the act to be done, where the failure to act was the result of excusable neglect." (Emphasis added.) Stated another way, this rule gives counsel the option to request an extension before the expiration of the deadline, or to file a motion after its expiration where the failure to act was the result of excusable neglect.

Here, Ricoh's counsel never asked the Court for an extension, nor did she file a motion. Rather, she filed a notice on April 15 without requesting additional time, and she did not disclose her expert until six weeks later. Her response stated that the Court gave her just six days to find an expert, and her failure to do so was not due to "neglect" but rather "there was no specific vocational expert to identify."

These assertions are misleading. As to "six days," that purported timeframe overlooks the fact that as early as February 2017, when the dispute certification notice issued, permanent disability and "escape clause" were known issues. In the months before the April 6 order, at several status hearings, the parties discussed that permanent disability is disputed. Ricoh's counsel could have looked for an expert long before April 2020; she

did not do so. The Court is similarly skeptical about the claim that Ricoh's counsel simply could not find an evaluator before expiration of the deadline. Perhaps none would perform an in-person evaluation at the time, but it certainly remained possible to retain and disclose an expert.

Ricoh's attorney alternatively argued that the Court should deny Mr. Carter's motion on grounds of excusable neglect, which applies under Rule 6.02 after a party misses a deadline. This analysis requires a trial court to consider: "(1) the risk of prejudice to parties opposing the late filing, (2) the delay and its potential impact on proceedings, (3) the reasons why the filings were late and whether the reasons were within the filer's reasonable control, and (4) the good or bad faith of the filer." *Williams v. Baptist Mem'l Hosp.*, 193 S.W.3d 545, 551 (Tenn. 2006).

As to prejudice, Mr. Carter argued that the parties have already deposed his vocational expert without the benefit of having Ricoh's expert's report. Ricoh counters that they may reconvene his expert's deposition. This is true, but it will come at a cost to Mr. Carter. Had Ricoh's attorney timely disclosed its expert and obtained a vocational evaluation report, he would neither incur additional costs or delay. This factor weighs against finding excusable neglect.

As to the second factor, delay and its potential impact on the proceedings, as previously stated, the alleged injury occurred five years ago. This case has been pending for four years. Further, by failing to timely comply with the disclosure deadline and waiting six weeks to do so, Ricoh's attorney created a delay of at least two more months. In addition, per the June 12 email, the delay in retaining Ms. Weiss means her report will not be completed until early August, under a best-case scenario. Then, additional time would be needed to depose Ms. Weiss, resulting in more delay. In sum, the delay is significant, and this factor also weighs against finding excusable neglect.

As to the third factor, the reasons why the filings were late and whether the reasons were within the filer's reasonable control, the Court agrees that a pandemic is beyond anyone's control or imagination. Regardless, the pandemic was not the sole reason that Ricoh's counsel was unable to hire a vocational expert within the April 15 deadline. Despite working from home, Ricoh's attorney presumably was still working in early April and had the capability to communicate with and retain a potential expert. Moreover, she did not explain how the restrictions within the Governor's orders in any way hindered her ability to call or email a prospective expert from her home. Significantly, Ms. Weiss wrote in her June 12 email that she accepted cases during this time, undercutting counsel's assertion. This factor weighs against finding excusable neglect.

Finally, as to the "good or bad faith of the filer," Mr. Carter's attorney characterized Ricoh's attorney's actions as a strategic choice and part of a pattern of conduct throughout

the litigation.² However, the Court confines its analysis to the present issue. In that regard, the Court notes that Ricoh offered no affidavits to support counsel's assertions regarding difficulty obtaining an expert. In fact, in the April 22 conversation with Ms. Weiss, the discussion was about how to conduct the examination and interviews, not that Ms. Weiss was not accepting cases. This is bolstered by Ms. Weiss's e-mail to Ricoh's counsel where she clearly states that she accepted cases during the time in question. Further, the June 2 e-mail exchange suggests that Ms. Weiss would accept the assignment but that it would take time to finalize; yet, Ricoh did not provide notice of her retention until June 10 – one day before Mr. Carter's expert's deposition. This is gamesmanship and an attempt to hide behind the veil of a pandemic, when Ricoh's own documents demonstrate no reason for its noncompliance with the deadline. The Court finds Ricoh's attorney acted in bad faith. This factor weighs against a finding of excusable neglect as well.

In conclusion, the Court cannot find that Ricoh's counsel's failure to disclose Ms. Weiss as a vocational expert within the April 15 deadline was the result of excusable neglect. The Court excludes Ms. Weiss's testimony.

IT IS ORDERED.

Entered July 2, 2020.

Kenneth M. Switzer

JUDGE KENNETH M. SWITZER
Court of Workers' Compensation Claims

² Mr. Carter's attorney referenced other disputes between counsel, one of which was the subject of a previous motion. The Court need not recount that dispute.

CERTIFICATE OF SERVICE

I certify that a copy of this Order was sent as indicated on July 2, 2020.

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