BOX THEM IN AND PIN THEIR EARS BACK

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By the time of the formal hearing before an administrative law judge, the parties discovery should be closed, the issues narrowed, and the hearing should go forward without "trial by ambush." Unfortunately, without the requisite discovery being propounded by the claimant (and fully responded to by the employer/carrier), all may be lost, when succinct, well tailored discovery tools could very well snatch victory from the jaws of defeat.

This paper will explore the various tools available to a claimant seeking to "box in the employer/carrier and pin their ears back," to provide the necessary evidence to support each element of your claim and to defend against any "land mines" that the defense (and/or your client) has laid out to destroy your case.

In *Baez-Eliza, Instituto Psicoterapeutico de Puerto Rico,* 275 F.R.D. 65, 69 (D. Puerto Rico 2011) the District Court Judge eloquently recites the history of discovery practices before the changes to the Federal Rules of Civil Procedure and thereafter.

Prior to *Hickman v. Taylor*, 329 U.S. 495, 500 (1947):

> "The rules at that time afforded litigants limited means to discovery information necessary to prepare for trial.
>
> In fact the prior rules were premised on the idea that 'a judicial proceeding was a battle of wits rather than a search for the truth[;] [thus] each side was protected to a large extent against disclosure of its case.' 8 C. Wright, A. Miller & R. Marcus, Federal Practice and Procedures §2001 at p.16 (3d ed. 2010). The new regime the current rules ushered in, however, require the parties to put all their cards on the table. Today litigation is 'less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent. *United States v. Proctor & Gamble Company*, 356 U.S. 677, 682-683 (1958). In this way, the current rules seek to streamline the litigation process in order to 'secure the

just, speedy and inexpensive determination of every action and proceeding.' Fed. R. Civ. P. 1; *see also Nelson v. Adams, U.S.A., Inc.*, 529 U.S. 460, 465 (2000).

Rule 26 unequivocally establishes that the scope of discover is broad:

'[p]arties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense . . . . 'Fed. R. Civ. P. 26(b); *Baez-Eliza* at 69-70. "And the term 'relevant' encompasses any matter which may lead to admissible evidence at trial. Id. Although such a broad scope undoubtedly comports with the main purpose of the rules, it also presents unscrupulous litigants with the means to manipulate the process to their advantage. Indeed, instances of abuse are well documented Jean Cary, Rambo Depositions: Controlling an Ethical Cancer in Civil Litigation, 25 Hofstra L. Rev. 561, 565 (1996); Debra L. Rhode, Ethical Prospectives on Legal Practice, 37 Stan. L. Rev. 589, 597-98, 628 (1985).

DISCOVERY METHODS

Pursuant to 29 C.F.R.§18.13, the Rules Of Practice And Procedure For Administrative Hearings Before The Office Of Administrative Law Judges ("The ALJ Rules") provide for the following discovery methods: depositions upon oral examination or written questions; written interrogatories; production of documents or other evidence for inspection and other purposes; and requests for admission. (Subpoenas from non-party are issued by the Chief Administrative Law Judge, or the presiding Administrative Law Judge, 29 C.F.R. §18.24).

The frequency or sequence of these methods is not limited unless otherwise ordered by the administrative law judge. The current Rules do not specify the maximum number of interrogatories, requests for admissions, request for production or depositions. All that may change shortly once the revised Rules come into effect. See, Rules of Practice and Procedure for Hearings before the Office of Administrative Law Judges, 29 C.F.R. 18 Vol. 77 FR 243 (proposed December 4, 2012) (renumbered interrogatories 18

C.F.R. §18.60; producing documents, electronically stored information and tangible things, or entering onto land for inspection and other purposes §18.61; Requests for Admissions §18.63; Depositions by oral examination §18.64; Depositions upon Written Questions §18.65).

Oftentimes, as practitioners before the ALJ we cite to the Federal Rules of Civil Procedure in defining the scope of discovery. However, 29 C.F.R. §18.14 of the Rules does not reference the Federal Rules of Civil Procedure in defining the scope of discovery. C.F.R. 18.19(c)(4) "Thus, the absence of a specific reference to the Federal Rules of Civil Procedure or to Rule 26(b)(4)(b) permits an interpretation that the framers of §18.14 did not intend for the rule to apply to the scope of discovery." *Cline, Sr., v. Westmoreland Coal Co.*, 1987 WL738417, at *4. (BRB) Although this was a "Black Lung case", the BRB's decision cites to the parallel Code of Federal Regulation §20 C.F.R. §725.455(b) as applicable to proceedings under the Longshore and Harbor Worker's Compensation Act, 20 C.F.R. §702.339 formal hearing; evidence:

> In making an investigation or inquiry or conducting a hearing, the Administrative Law Judge shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by 5 U.S.C. §554 and these regulations; but may make such investigation or inquiry or conduct such hearing in such a manner as to best ascertain the rights of the parties.

However, the pretrial hearing orders issued by most of the ALJs contain provisions mandating compliance with Fed. R. Civ. P. Rule 26.

RULE 30(b) (6) DEPOSITION

Depositions pursuant to Fed.R.Civ.P.30(b)(6) designed in part to streamline litigation, imposes burdens upon both parties. The party seeking discovery is required to

describe, with reasonable particularity, the matter(s) for examination. The responding entity must then produce one or more witnesses who can testify as to the corporation's knowledge of the specified topics. *Great Am. Ins. of New York v. Vegas Constr. Co.*, 251 F.R.D. 534, 538 (D.Nev.2008). This "enables the deposing party to gather information from [the] corporation by way of a human being named by that corporation to serve as the corporation's voice." *Bracco Diagnostics, Inc. v. Amersham Health, Inc.*, 2005 WL6714281, at*1 (D.N.J.Nov.7,2005).

Moreover, the person(s) designated to testify represents the collective knowledge of the corporation, not of the individual deponents. As the corporation's "voice" the witness does "not simply testify about matters within his or her personal knowledge, but rather is 'speaking for the corporation.'" Rainey v. Amer. Forest & Paper Ass'n. 26 F.Supp.2d 82, 94 (D.D.C.1998) (citing *U.S. v. Taylor*, 166 F.R.D. 356, 361 (N.D.N.C.1996)). Put simply, the corporation appears vicariously through its designees. Taylor, 166 F.R D. at 361.

As the "voice" of the entity, the witness is required to testify about information known or reasonably available to the organization. FRCP 30(b)(6). "The [organization] must prepare the designee to the extent matters are reasonably available, whether from documents, past employees, or other sources." *Brazos River Auth. v. GE Ionics, Inc.*, 469 F.3d 416, 433 (5th Cir.2006). That preparation must enable the designee to "give complete, knowledgeable, and binding answers on behalf of the corporation." *Marker v. Union Fid. Life Ins. Co.*, 125 F.R D. 121, 126 (N.D.N C.1989). "If the deponent cannot answer questions regarding the designated subject matter, the corporation has failed to comply with its obligation and may be subject to sanctions... ." *King v. Pratt & Whitney, Div. of United Tech. Corp.*, 161 F.R.D. 475, 476 (S.D.Fla.1995).

The rule does not require - or for that matter even contemplate - that the corporation produce the witness with the "most knowledge" on the specified topic(s), and the witness is not required to possess any personal knowledge at all. See Ecclesiastes 9:10-11–12, *Inc. v. Capital LMC Holding Co.*, 497 F.3d 1135, 1146 (10th Cir. 2007); Federal Civil Rules Handbook 2012 Ed. at page 838. ("The individual will often testify to matters outside the individual's personal knowledge."); see also *PPM Finance, Inc. v. Norandal USA, Inc.*, 392 F.3d 889, 894–95 (7th Cir.2004) (Rule 30(b)(6) witness is "free to testify to matters outside his personal knowledge as long as they are within the corporate rubric.") In fact, a corporation may have good reason not to produce the "most knowledgeable" witness as its Rule 30(b)(6) designee, see *QBE Ins. Corp. v. Jorda Enterprises, Inc.*, 277 F.R.D. 676, 688–89 (S.D.Fla.2012), an example being a case such as this where the person with the "most knowledge" may not totally embrace the corporation's position.

Utilized properly, Rule 30(b)(6) streamlines the discovery process and gives the corporation being deposed more control by permitting it to select and prepare a witness to testify on its behalf. See Taylor, 166 F.R.D. at 361. In exchange for that control the entity is required to "have the right person present at the deposition." King, 161 F.R.D. at 476. This of course benefits the requesting party as it prevents the corporation from frustrating the "opposing party's discovery by simply playing 'ping-pong' with him: the first official would disclaim knowledge, as will the second, and so on." *Plantation-Simon, Inc. v. Bahloul*, 596 So. 2d 1159, 1160 (Fla. 4th DCA 1992).

When a Rule 30(b)(6) deposition is properly noticed and conducted, the testimony of the designee "is deemed to be the testimony of the corporation itself." *State Farm Mut.*

Auto Ins. Co. v. New Hope Horizont, Inc., 250 F.R.D. 203, 212 (E.D. Pa.2008). As such, the testimony is binding on the entity. See, *Resolution Trust Corp. v. Farmer*, 1994 WL317458, at *1 (E.D. Pa. June 24, 1994) ("The purpose behind Rule 30(b)(6) is to create testimony that will bind the corporation.") That does not, however, mean that the testimony is akin to a judicial omission which conclusively establishes a fact and estops the corporate party from offering other evidence on the matter. See State Farm Mut. Auto. Ins. Co., 250 F.R.D. at 212. Rather, "testimony given at a Rule 30(b)(6) deposition is evidence which, like other deposition testimony, can be contradicted." *Industrial Hard Chrome, Ltd. v. Hetran, Inc.*, 92 F.Supp.2d 786, 791 (N.D. Ill. 2000). As one court put it: "it is true that a corporation is 'bound' by its Rule 30(b)(6) testimony, in the same sense that any individual deposed under Rule 30(b)(1) would be 'bound' by his or her testimony. All this means is that the witness has committed to a position at a particular point in time. It does not mean that the witness has made a judicial admission that formally and finally decides an issue." *W. R. Grace & Co. v. Viscasi Corp.,* 1991 WL 211647, at *2 (N.D.Ill. Oct.15, 1991); see also *Trunnell v. Advance Stores Co. Inc.*, 2012 WL 629527, at *2 (N.D.Fla.Feb. 28, 2012) (internal citations omitted). *Id.*

The fact that Rule 30(b)(6) testimony is not conclusive does not mean that the corporation "may retract prior testimony with impunity." *State Farm Mut. Auto. Ins. Co.,* 250 F.R.D. at 212. And any litigant, even a corporate party when met by a motion for summary judgment, may not repudiate or contradict by affidavit its previous deposition testimony so as to create a jury issue. But, a witness may change their testimony at trial subject to the risk of having their credibility impeached with prior deposition testimony that was given pursuant to a Rule 30(b)(6) deposition. *Id.*

WRITTEN INTERROGATORIES

§18.18 provides:

(a) Any party may serve upon any other party written interrogatories to be answered in writing by the party served, or if the party served is a public or private corporation or a partnership or association or governmental agency, by any authorized officer or agent, who shall furnish such information as is available to the party. A copy of the interrogatories, answers and all related pleadings shall be served on all parties to the proceeding. Copies of interrogatories and responses thereto shall not be filed with the Office of Administrative Law Judges unless the presiding judge so orders, the document is being offered into evidence, the document is submitted in support of a motion or a response to a motion, filing is required by specialized rule where there is some other compelling reasons for its submission.

In relevant part, 29 C.F.R. §18.14 (a) provides:

> "Unless otherwise limited by order of the administrative law judge in accordance with these rules, the parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding. . . ."

Under §18.18(b):

> Each interrogatory is to be answered separately and fully in writing under oath or affirmation, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers and objections shall be signed by the persons making them. The party upon whom the interrogatories were served shall serve a copy of the answer and objections upon all parties to the proceeding within thirty (30) days after service of the interrogatories, or within such shorter or longer period as the administrative law judge may allow.

The key here is that you must send a jurat page to the employer/carrier requiring that the answers be verified under oath or affirmation and signed by the party. (Emphasis added.) It is insufficient for defense counsel to answer the interrogatories and sign them under oath, as they are not "a party," as defined by 29 C.F.R. §18.18.

In this author's experience, there have been countless times where the employer/carrier has the interrogatories "answered" (usually preceded by innumerable

objections-some of which are completely invalid) by the attorney, and then conveniently failed to be answered under oath or affirmation. Prior to filing a motion to compel, a good faith effort to "remind" opposing counsel of their obligation to have the party answer the interrogatories and sign them under oath is necessary. (Attached in Appendix A, are sample interrogatories with a form jurat.)

§18.19(c) takes care of the common misperception by defense counsel that an interrogatory, which is otherwise proper, is objectionable because an answer to the interrogatory involves an opinion or contention that relates to fact **or** the application of law to fact-with the proviso that the administrative law judge may order such an interrogatory need not be answered until after designated discovery has been completed or until a prehearing conference or other later time. A party's opinions and contentions about a fact or the application of law to a fact are generally discoverable. *See* FRCP 26(b)(1).

The party resisting discovery has the burden to plead its objections FRCP 33(b)(4), (interrogatories). No matter how improper the discovery request, the party to whom the request is addressed must timely object (within 30 days of service), or else it waives any objections. In re U.S., 864 F.2d 1153, 1156 (5th Cir.1989); *See* FRCP 33(b)(4). The party resisting discovery must object at or before the time to respond to the discovery requests, or the objection is waived. *Marx v. Kelly, Hart & Hallman*, P.C., 929 F.2d 8, 12 (1st Cir.1991); *Davis v. Fendler*, 650 F.2d 1154, 1160 (9thCir.1981*); U.S. v. 58.16 Acres of Land*, 66 F.R.D. 570, 572 (E.D Ill.1975); *Willner v. University of Kansas,* 848 F.2d 1023, 1027 (10th Cir.1988). An untimely objection is waived unless the court excuses the failure for good cause shown. FRCP 33(b)(4).

OBJECTIONS TO INTERROGATORIES AND WHAT TO DO ABOUT THEM

Attached in Appendix B are the typical "boilerplate" objections and nonresponsive answers we all routinely see. I have also attached a letter to opposing counsel detailing a good faith effort for the basis for a proposed Motion to Compel answers to interrogatories and responses to Requests for Production. (The name of the offending attorneys have not been redacted to protect their innocence.) Instead, I am hoping that as a group we will show the ALJ's that it is a routine practice of certain defense attorneys to deny, delay and obstruct discovery.

VALID OBJECTIONS TO DISCOVERY REQUESTS

A party can object to a discovery request for the following reasons:

1. **Not relevant**. The discovery request asks for information that is not relevant to the claim or defense of any party. FRCP 26(b)(1).

2. **Cumulative or duplicative**. The discovery request is unreasonably cumulative or duplicative, or the information can be obtained from another source that is more convenient, less burdensome, or less expensive. FRCP 26(b)(2)(C)(i); In re: *Malev Hungarian Airlines*, 964 F.2d 97, 102 (2d Cir.1992); *See also Thompson v. Department of Hous. & Urban Dev.*, 199 F.R.D. 168, 171 (D.Md2001).

3. **Ample opportunity to discover**. The discovery requests ask for information that the requesting party has had ample opportunity to discover on its own. FRCP 26(b)(2)(C)(ii); *Avirgan v. Hull*, 932 F.2d 1572, 1580 (11thCir.1991).

4. **Undue burden.** The discovery request places a burden or expense on the party that outweighs its likely benefit. FRCP 26(b)(2)(C)(iii). A court weighing the burdens

and benefits should take into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the case. *See Nugget Hydroelectric, L.P. v. Pacific Gas & Elec. Co.*, 981 F.2d 429, 438-39 (9th Cir.1992).

5. **Overly broad request**. The discovery request is overly broad; that is it inquires into matters that go beyond what is relevant to the parties' claims or defenses. *See* FRCP 26(b)(1); *see Mack v. Great Atlantic and Pacific Tea Co.*, 871 F.2d 179, 187 (1st Cir.1989).

6. **Improper procedure**. The discovery request is improper. If a party makes an improper discovery request, the other party may file either an objection or a motion for protective order before the response is due, stating why the request is improper. *See e.g., Rahn v. Hawkins*, 464 F.3d 813, 821-22 (8th Cir.2006) (Defendants filed first motion to quash deposition by written questions based on improper notice and improper questions and second motion to quash oral deposition based on unreasonable notice).

INVALID OBJECITONS TO DISCOVERY REQUESTS

The following objections to discovery are not valid.

1. **Not admissible**. Inadmissibility is not a ground for objecting to discovery. As long as information appears "reasonably calculated" to lead to the discovery of admissible evidence, it is discoverable. FRCP 26(b)(1); *Oppenheimer Fund, Inc., v. Sanders*, 437 U.S. 340, 351-52 (1978).

2. **Fishing expedition**. An objection that a request is a "fishing expedition" is not sufficient. However, the objection may be sufficient if it is tied to a valid objection,

usually relevance. *Hofer v. Mack Trucks, Inc.*, 981 F.2d 377, 380 (8th Cir.1992); *Mircro Motion, Inc., v. Kane Steel Co.*, 894 F.2d 1318, 1327-28 (Fed.Cir.1990).

OBJECTIONS THAT REQUIRE MORE THAN MERE ASSERTION

3. **Vague and Ambiguous**. As the party objecting to discovery as vague or ambiguous, the defendant has the burden to show such vagueness or ambiguity. *W. Res. Inc. v. Union Pac. R.R. Co.*, 2002 U.S. Dist. LEXIS 1004 at *12 (D.Kan.Jan.21 2002).

4. **Overly Broad and Unduly Burdensome.** "A general statement that discovery is unduly burdensome, without more, is simply not enough to prohibit discovery of otherwise relevant information." *Steede v. General Motors*, LLC 2012 WL 2089755, at *2 (W.D.Tenn.June 8, 2012). To assert a proper objection on the basis that a request is "overly broad" or "unduly burdensome", one must do more than 'simply' intone the familiar litany that the interrogatories are burdensome, oppressive or overly broad." *Compagnie Francaise d'Assurance Pour le Commerce Exterieur v. Phillips Petroleum Co.*, 105 F.R.D. 16, 42 (S.D.N.Y.1984).

"As the party objecting to discovery, defendant has 'the burden of showing facts justifying their objection by demonstrating that the time or expense involved in responding to requested discovery is unduly burdensome'". *Moss v. Blue Cross and Blue Shield of Kansas, Inc.*, 241 F.R.D. 683, 689 (D.Kan.2007).

In *Moss*, "[D]efendant has failed to provide 'an affidavit or specific supporting information' to substantiate its overly broad and unduly burdensome objections [to interrogatories]. Thus, defendant has not met its 'obligation to provide sufficient detail and explanation about the nature of the burden in terms of time, money, and procedure required to produce the requested documents'" *Id.* However, the failure to specify the

party's potential burden is not dispositive of its objection. An objecting party's "failure to meet its evidentiary burden is not necessarily fatal to its claim that the requests are unduly burdensome" because "an exception . . . applies when the discovery request is unduly burdensome on its face." *Aikens v. Deluxe Fin. Servs.*, 217 F.R.D. 533, 537-38 (D.Kan.2003). The use of the term 'relating to' and 'regarding' with respect to a general category or group of documents has been held to be unduly burdensome on its face. *Aikens* at 537-38. "Courts often ask whether the request's wording 'requires the answering party to engage in mental gymnastics to determine what information may or may not be remotely responsive." *Aikens*, at 538.

If, the Claimant can show that a specific coding could easily be searched by computer, the mere fact that it would take a review of 1800 files to answer an interrogatory is not necessarily overly broad or unduly burdensome on its face. *Moss v. Blue Cross,* at 690. For example, a Claimant could propound an interrogatory requesting that the employer: Identify all employees who have contracted a specific disease or condition as a result of an exposure at work (e.g. Silicosis, carpal tunnel syndrome, "Iraq Afghanistan War Lung Injury", brain cancer, etc.). *See Culkin v. Pitney Bowes, Inc.*, 225 F.R.D. 69, 71-73 (D.Conn.2004).

In cases involving retaliation for filing an LHWCA claim or termination following the filing of such claim, the following request should not be unduly burdensome and is relevant to a claim that asserts such conduct occurred: All documents in which the employer is a party and/or named in any administrative action or lawsuit [in the chosen forum as cited to in its employment agreement] involving a claim of retaliation against an employee for filing an LHWCA claim for the past 3 years.

5. **Blanket Assertions of Privilege**.

Blanket assertions of privilege are insufficient to satisfy the employer/carrier's burden that the material sought to be inquired of is work product. Burns v. Imagine Films Entertainment, Inc., 164 F R.D. 589, 593 (W.D.N.Y.1996).

The party objecting to discovery must state a specific objection or assert an appropriate privilege for each item it wants to exclude from discovery. *See Panola Land Buyers Ass'n. v. Shuman,* 762. F.2d 1550, 1559 (11th Cir.1985).

The party resisting discovery must notify the other parties that it is withholding information subject to a claim of privilege or work product. *See* FRCP 26(b)(5)(A). Withholding information without notice to the other parties is sanctionable conduct under FRCP 37(b)(2) and may result in a waiver of a privilege or protection. *Dorf & Stanton Communications, Inc. v. Molson Breweries,* 100 F.3d 919, 923 (Fed.Cir.1996).

The party must serve a response that includes information sufficient to allow the requesting party to evaluate the applicability of the claimed privilege or protection. *See* FRCP 26(b)(5)(A)(ii). The party must assert a specific privilege for each item or group of items withheld. *See* FRCP 26(b)(5)(A)(i).

5 a. **Description of the privileged information**. In the privilege log, the party must describe the nature of the documents, communications, or tangible things withheld, without revealing the privileged information itself. FRCP 26(b)(5)(A)(ii); s*ee Horton v. U.S,* 204 F.R.D. 670, 673 (D.Colo.2002) (privilege log must state specific reasons why each document or communication is subject to asserted privilege). Cursory descriptions and comments about the documents are not sufficient to support a claim of privilege. *See U.S. v. Construction Prods. Research, Inc.,* 73 F.3d 464, 473 (2nd Cir.1996).

WHAT MUST A PRIVILEGE LOG INCLUDE

Although FRCP 26(b)(5)(A)(ii) does not specify what information must be provided, the privilege log should generally include a document number, ("Bates number") author or source, recipient, persons receiving copies, date, document title, document type, number of pages, and any other relevant non-privileged information. *See Alleyne v. New York State Educ. Dept.*, 248 F.R.D. 383, 386 (N.D.N.Y.2008) (information provided in privilege log must be sufficient to enable court to determine whether each element of asserted privilege is satisfied); Horton 204 F.R.D. at 673. *See also Gerber v. Down E. Cmty. Hosp.*, 266 F.R.D. 29, 36 (D.Me.2010) (courts disagree whether privilege log must identify names of each witness from whom parties seek a statement; plaintiffs could categorically identify communications with witnesses without including witnesses' names). When privileged e-mails are at issue, courts disagree on whether a privilege log should include separate entries for multiple e-mails within the same e-mail chain. Compare *Muro v. Target Corp.*, 250 F.R.D. 350, 362-63 (M.D. Ill. 2007) (each part of e-mail chain does not need to be itemized separately, even though one e-mail is not privileged, second e-mail that forwards the prior e-mail might be privileged in its entirely), *aff'd*, 580 F.3d 485 (7th Cir.2009); In re: *Universal Service Fund Telephone Billing Practices Litig.*, 232 F.R.D. 669, 674 (D.Kan.2005) (each part of e-mail chain should be itemized separately).

> "In determining whether a privilege log sufficiently allows a judge to make discreet fact-findings needed to determine whether a privilege/protection was properly asserted and not waived in the first place . . . [T]he experiences of many judges is that when the documents themselves are reviewed, it often turns out that a much smaller percentage of documents actually meet the requirements of the asserted privilege/protection than was claimed by the asserting

party." *Baez-Eliza*, 275 F.R.D. at 70 *citing Victor Stanley, Inc., v. Creative Type, Inc.*, 250 F.R.D. 251, 265 (D. Md. 2008).

Merely copying a lawyer on an e–mail does not, by itself, make the e-mail privileged under the attorney-client and/or work product privilege. In re: *Human Tissue Products Liability Litigation*, 255 F.R.D. 151 (D.N.J.2008), appeal denied, judgment affirmed 2009 WL1097671, reconsideration denied 2009 WL1560161.

CALLING IT "CONFIDENTIAL" DOESN'T MAKE IT PRIVILEGED

"Labeling a document as confidential 'may serve to put recipients on notice that the document is confidential, but it does not at all prove the existence of privilege.' *Tyne v. Time Warner Entertainment, Co., L.P.*, 212 F.R.D. 596, 600, n.4 (M.D.Fla.2002) (decided under Florida state law); *See also Medical Waste Tech v. Alexian Bros. Med. Ctr., Inc.*, 1998 WL 387706 (N.D.Ill.July 3,1998) (documents marked "confidential" found not privileged). *Baez-Eliza*, 275 F.R.D. at 71.

HOW TO NAIL 'EM DOWN

Before asking the court to resolve claims of privilege or objection and before filing a motion for protective or motion to compel, the parties must in good faith confer or attempt to confer in an effort to resolve the dispute. FRCP 26(c)(1); (37)(a)(1) *See* 2006 notes to FRCP 26 "confer" means to make a genuine effort to resolve the dispute by determining (1) what the requesting party is actually seeking, (2) what the responding party is reasonably capable of producing that is responsive to the request, and (3) what specific genuine issues cannot be resolved without judicial intervention. *Cotracom Commodity Trading Co. v. Seaboard Corp.*, 189 F.R.D. 456, 459 (D Kan.1999)

Either party may ask for a hearing on objections, on claims of privilege, or on motions for protective orders or to compel automatic disclosures under FRCP 26(a). *See* FRCP 26(c)(1) (protective orders); FRCP 37(a)(3)(A) (motion to compel disclosures). However, only the requesting party can bring a motion to compel answers to specific discovery requests or subpoenas. *See* FRCP 37(a)(3)(B) (motion to compel discovery), FRCP 45(d)(2)(B)(i)(motion to compel production after subpoena); *Payne v. Exxon Corp.*, 121 F.3d 503, 509-10 (9th Cir.1997) (motion to compel answers to discovery requests).

Failure to request a hearing or file a motion to compel waives the requested discovery. If neither party asks for a hearing, the party who sent the discovery request waives the request to discovery. *See, e.g. Bruce v. Weekly World News, Inc.*, 310 F.3d 25, 30-31 (1st Cir.2002) (plaintiff was not awarded damages because of insufficient evidence; plaintiff should have moved to compel production of evidence necessary to prove damages).

33 U.S.C. Section §927(a) provides the administrative law judge with broad power to direct and authorize discovery in support of the adjudication process. See 5 U.S.C. §556(c); 29 C.F.R.§18.14. Under §27(a) the ALJ may compel a party who neglects to produce, after having been ordered to do so, any pertinent book, paper, or document, or refuses to appear after having been subpoenaed [for a deposition] shall certify the facts to the district court having jurisdiction in the place in which he is sitting which shall thereupon in a summary manner hear the evidence as to the acts complained of, and, if the evidence so warrants, punish such person in the same manner and to the same extent as for a contempt committed before the court, or commit such person upon the same

conditions as if doing of the forbidden act had occurred with reference the process of or in the presence of the court.

The ALJ's discovery ruling has been held by the Board to constitute reversible error only if it is so prejudicial as to result in a denial of due process. A certification to the District Court for contempt based on an employer's refusal to comply with the administrative law judge's discovery order was held premature where the employer had appealed the order to the Board, and, therefore, had not yet as to the lawful order. *Butler v. Ingalls Shipbuilding, Inc.*, 28 BRBS 114 (1984).

Discovery orders are not subject to interlocutory review, barring extraordinary circumstances. See *Atlantic Richfield Co. v. United States Department of Energy*, 769 F.2d 771, 780–781 (D.C.Cir.1984). When the right to due process of law has been violated, a third party who has been subpoenaed, without an opportunity to object to the records (within the time limits afforded by Rule 45) has been denied due process of law and an interlocutory appeal by the third party is permitted. *Niazy v. The Capitol Hilton Hotel,* BRB No. 87-162; 1987 WL 107372 (May 22, 1987).

SPECIFIC AREAS OF ONGOING DISCOVERY DISPUTES

DISCOVERY OF AN EXPERT WITNESS' BIAS THROUGH FINANCIAL AFFILIATION WITH THE EMPLOYER/CARRIER AND/OR ITS ATTORNEYS

"The impact of expert witnesses on modern-day litigation cannot be overstated; yet, to some, they are nothing more than willing musical instruments upon which manipulative counsel can play whatever tune desired . . . .Thus, full, effective cross-examination is critical to the integrity of the truth-finding process." *Elm Grove Coal Company v. Dir.*, OWCP 480 F.3d 278, 301 (4thCir.2007).

To fully explore the trustworthiness and reliability of the employer/carrier's experts, the claimant should be entitled to determine the financial bias of an expert witness who is a repeat [customer] supplier of well-tuned expert opinions that are repeatedly "played" by employer/carrier's counsel.

In terms of whether the information sought by claimant in the case at bar meets the standard of relevancy set forth in 29 C.F.R. §18.14(a) and Rule 26 of the Federal Rules of Civil Procedure, the credibility of a witness is always at issue. Whether the witness is biased in favor of a party due to a long-standing and profitable relationship is, therefore, discoverable. Whether the evidence sought would in fact prove bias cannot be predicted without actually determining what the relationship is. As the court stated in *Behler v. Hanlon,* 199 F.R.D.553,556-57(D.Md.2001): ["S]uch examinations, euphemistically referred to by counsel as 'independent medical examinations ("IME"), can be anything but independent if they are performed by a doctor who has significant financial ties with insurance companies and attorneys assigned to defend personal injury cases."

> [T]he fact that an expert witness may have a 20 year history of earning significant income testifying primarily as a witness for defendants, and then an ongoing economic relationship with certain insurance companies, certainly fits within recognized examples of bias/prejudice impeachment, making such facts relevant both to the subject matter of the litigation, and the claims and defenses raised, and placing it squarely within the scope of discovery authorized by Rule 26(b)(3). *Id.*

Thus, [discovery of] the frequency of the use by the employer of the same expert witness physicians over and over again and the referrals to them, along with the fees paid to the employer's physicians is relevant in determining the credibility and bias of a witness. Judge J. Hall, dissenting in *Goble v. Aztec Mining Company, Inc.*, 2010 WL 3073561, at

* 9-12. Unfortunately, Chief Judge Dolder and Judge Smith affirmed the ALJ's denial of a motion to compel discovery of interrogatories which sought information about the fees paid, and referrals made, to employer's experts.

DISCLOSURE OF EXPERT TESTIMONY

Fed.R.Civ.P. 26(a)(2)(B) requires the "disclosure of expert testimony." Treating physicians, however, are generally not subject to the mandatory expert witness disclosure requirements. *St. Vincent v. Werner Enterprises, Inc.*, 267 F.R.D. 344 (D. Montana); see also *Arnesen v. Mich. Tissue Bank*, 2007 WL 4698986, at *10 (D.Mont. Mar.26,2007).

> A treating physician's opinion on matters such as causation, future treatment, extent of disability, and the like are part of the ordinary care of a patient. Id. If properly based on personal knowledge, history, treatment of the patient, and the facts of his or her examination and diagnosis, then the treating physician may give an opinion as to the cause of the injury or degree of the injury in the future. Id. This is what doctors do: what is the problem, what caused the problem; how is the problem fixed; what does it mean to the patient. A treating physician is not considered an expert witness unless the testimony offered by the treating physician goes beyond care, treatment, and prognosis, but if it does, there must be full compliance with the requirements of Rule 26(a)(2)(B). Items which are not part of a physician's medical records may be excluded. Id. at 346-347.

A Rule 35 doctor is not a treating physician. As such, the court refused to allow the defense medical examiner to testify as an expert or as a rebuttal expert because the defendant failed to meet the requirements of Rule 26(a)(2)(B). Id. The treating physician's opinions, however, are not limited to what is listed in his medical records. *Id.*

OBJECTIONS TO REQUEST FOR PRODUCTION

A party may move for an order compelling production after the responding party has objected. See FRCP 37(a)(3)(B)(iv) *Peat, Marwick, Mitchell & Co. v. West*, 748 F.2d 540, 541–42 (10thCir.1984). Where the employer/carrier contends that no documents

exist which are responsive to the request for production, the Claimant must demonstrate that the requested documents exist and are being withheld. *Alexander v. FBI*, 194 F.R.D. 305, 311 (D.D.C. 2000); see *Hubbard v. Potter*, 247 F.R.D. 27, 29 (D.D.C. 2008) (if requesting party contends that producing party is withholding additional production, already produced discovery must suggest that there is additional discovery to produce or that the discovery has been destroyed).

EVASIVE OR INCOMPLETE RESPONSES

If a party does not provide adequate responses to discovery requests, the requesting party may move for an order compelling adequate responses. See *GMAC Bank v. HTFC Corp.*, 248 F.R.D. 182, 193 (E.D. Pa. 2008). For purposes of a motion to compel, an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer or respond. FRCP 37(a)(4); see *Beard v. Braunstein*, 914 F.2d 434, 446 (3rd Cir. 1990) see *Continental Ins.Co. v. McGraw*, 110 F.R.D. 679, 681–82 n.2 (D.C. 1986) (improperly signed answers to interrogatories were treated as failure to answer, but sanctions were not appropriate without FRCP 37(a) motion to compel).

DISCOVERY OF A PARTY'S STATEMENT

A party may discover any statement it has made about the lawsuit without having to show substantial need or undue hardship. See FRCP 26(b)(3)(C). For the disingenuous employer/carrier [attorney] a statement is:

1) a written statement that the person has signed or otherwise adopted or approved; or

2) a contemporaneous recording of an oral statement that substantially verbatim. FRCP 26 (b)(3)(C).

FACT WITNESSES

A party may discover information about all fact witnesses. See FRCP 26 (b)(1). Fact witnesses include all persons with relevant information, whether or not their testimony supports the position of the disclosing party. *Scheetz v. Bridgestone/Firestone, Inc.*, 152 F.R.D. 628, 631 n. 3 (D. Mont. 1993).

While a witness's statement may be work product, a non-party may obtain a copy of any statement it has made about the claim or its subject matter by making a request from the party who has the statement. *See* FRCP 26(b)(3)(C)

DISCOVERY OF FACT WITNESSES

(a) Potential Fact Witnesses

A party must disclose the name and, if known, the address and telephone number of each individual who might have discoverable information that the party may use in the litigation process. FRCP 26 (a)(1)(A)(i); *Gluck v. Anselt Australia Ltd.*, 204 F.R.D. 217, 221-22 (D.D.C. 2001).

(b) Other fact Witnesses

A party may be able to discover the names, addresses, and telephone numbers of potential fact witnesses other than those used to support a party's claim or defense. *See* FRCP 26(b)(1); In re: Theragenics Corp. Securities Litigation, 205 F.R.D. 687

THE ALJ MUST EXPLAIN THE RATIONALE FOR HER ORDER ON A MOTION TO COMPEL DISCOVERY/MOTION FOR PROTECTIVE ORDER

"The Administrative Law Judge's discovery determinations will be upheld unless the challenging party establishes they are arbitrary, capricious, an abuse of discretion, or not in accordance with law. *Armani v. Global Linguist Solutions*, 2012 WL 6764253 (BRB) Dec.19, 2012) (The ALJ erred in issuing a subpoena for Claimant's pre-referral deposition

for alleged purposes of determining information concerning a potential War Hazards Compensation Act claim).

In entering an order on a motion to compel discovery and/or motion for protective order an ALJ is required to include in her decision on any motion a statement of findings and conclusions, and the reasons or basis therefore, on all the material issues of fact, law or discretion presented..." 5 U.S.C. §557(c)(3)(A).

REQUEST FOR ADMISSIONS

29 C.F.R. §18.29 (a) provides:

> "A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the genuineness and authenticity of any relevant document described in or attached to the request, or for the admission of the truth of any specified relevant matter of fact."

Generally, under §18.29(b) the failure to respond timely to a request for admissions results in the fact as being admitted, and consequently, as conclusively established. *Fields v. Fluor Corp.*, 2012 WL 5267616, at *2 (BRB). However, the administrative law judge may, in his discretion allow the withdrawal of admissions where the party has neither alleged nor established that it was prejudiced. Fields, at *2.

Requests for admissions are particularly effective as it: boxes the employer/carrier into admitting, denying, or providing a written statement setting forth in detail the reasons why it can neither truthfully admit, nor deny or provide a written objection that some or all of the matters involved are privileged or irrelevant; or that the request is otherwise improper in whole or in part. See §18.29(b)(1–3). The administrative law judge has the authority to issue orders to compel discovery, which includes the production of documents

and the answering of requests for admissions. *Klein v. ABB SUSA*, 2006 WL 6869886, at *4 (BRB).

If a party...fails to comply with the subpoena or with an order, including, but not limited to an order for...the production of documents,...or request for admissions,...the Administrative Law Judge, for the purpose of permitting resolution of the relevant issues and disposition of the proceeding without unnecessary delay despite such failure, may take such action in regard thereto as is just, including but not limited to the following:

i) Infer that the admission, testimony, documents or other evidence would have been adverse to the non-compliant party;

ii) Rule that for the purposes of the proceeding the matter or matters concerning which the order or subpoena was issued be taken as established adversely to the non-complying party. *Id at *5*

The Board has held that an Administrative Law Judge may draw an adverse inference against the party when that party does not submit evidence within his control. *Hansen v. Oilfield Safety, Inc.,* 8 BRBS 835, *aff'd on recon*, 9 BRBS 490 (1978), *aff'd sub nom. Oilfield Safety and Machine Specialties, Inc. v. Harman Unlimited, Inc.,* 625 F.2d 1248, 14 BRBS 356 (5th Cir.1980); *see also Cioffi v. Bethlehem Steel Corp.*, 15 BRBS 201 (1982).

The prejudice necessary to be shown by a party who seeks to prevent the opposing party from withdrawing a request for admission [that has been deemed admitted by the passage of 30 days without a timely response] is to show prejudice which relates to the difficulty a party may face in proving its case because of the sudden need to obtain evidence required to prove the matter that had been admitted. *American Auto Assoc. v.*

AAA Legal Clinic of Jefferson Crooke P.C., 930 F.2d 1117 (5th Cir.1991); see *also U.S. v. Kasuboski*, 834 F.2d 1345 (7th Cir.1987); *Clark v. City of Munster*, 115 F R.D. 609 (N D. Ind.1987).

CONCLUSION

Assuming you have properly selected your case, an employed effective use of all the discovery tools that are available to claimant's counsel you can ensure a successful result, so long as the employer/carrier properly and fully responds to each request. Otherwise, it is up to each of us to attempt to resolve discovery disputes first, informally, without the aid and expenditure of the administrative law judge's time and limited resources. However, when the employer/carrier and its counsel refuse to play by the rules, "hide the ball" and obfuscate discovery, then pin their ears back!

APPENDIX "A"

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Lara D. Merrigan (State Bar No. 250926)
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Attorneys for Respondents
DYNCORP INTERNATIONAL FREE-ZONE, LLC and CONTINENTAL INSURANCE COMPANY

UNITED STATES DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

[redacted]

Claimant,

v.

DYNCORP INTERNATIONAL FREE-ZONE, LLC,

Employer,

CONTINENTAL INSURANCE COMPANY,

Carrier.

OALJ Case No: [redacted]

OWCP No:

INTERROGATORY RESPONSES SET ONE

RESPONDING PARTY:	RESPONDENTS DYNCORP INTERNATIONAL FREE ZONE and CONTINENTAL INSURANCE COMPANY
PROPOUNDING PARTY:	CLAIMANT, MICHAEL F. HILL
SET NO:	ONE

TO CLAIMANT AND HIS ATTORNEYS OF RECORD:

COMES NOW, DYNCORP INTERNATIONAL FZ-LLC and CONTINENTAL INSURANCE COMPANY (hereinafter "Respondents"), pursuant to 29 C.F.R. Section 18.19, submit their responses to Claimant's Interrogatories, Set One.

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GENERAL STATEMENTS AND OBJECTIONS

1. Respondents have not yet completed their investigation of the facts relating to this case, have not completed discovery in this action and have not completed preparation for trial. The following responses are based upon information known at this time, and are given without prejudice to Respondents' right to produce subsequently discovered evidence and facts and to amend these responses based upon such information.

2. Objections are made to each of the Interrogatories propounded by the Claimant to the extent that said Interrogatories seek information that is protected by the attorney-client privilege and/or the attorney work-product doctrine, and to the extent that said Interrogatories seek information that is or may be confidential.

3. Inadvertent identification or production of privileged writings or information by Respondents is not a waiver of any applicable privilege. Production of writings or information does not waive any objection to the admission of such writings or information into evidence.

4. The following responses are made solely for the purpose of, and in relation to, the subject litigation.

5. The term "Respondents", as used below, refers only to DYNCORP INTERNATIONAL FZ-LLC and CONTINENTAL INSURANCE COMPANY.

RESPONSES TO INTERROGATORIES

INTERROGATORY NO. 1:

Please state the full name and address of the individual answering these interrogatories, and, if applicable, the person's official position or relationship with the party to whom the interrogatories are directed.

RESPONSE TO INTERROGATORY NO. 1:

Objection that this is vague as to "the individual answering." Without waiving said objection, Lara Merrigan of Thomas, Quinn & Krieger, LLP 500 Sansome Street, Suite 450, San Francisco, CA 94111 is "the individual" physically answering these interrogatories as counsel for, and in conjunction with, Respondents herein.

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INTERROGATORY NO. 2:

List the names, last known addresses, telephone number, and e-mail address all persons who are believed or known by you, your agents or attorneys to have any knowledge concerning any of the issues in this claim; and specify the subject matter about which the witness has knowledge.

RESPONSE TO INTERROGATORY NO. 2:

Respondents object to this interrogatory in that it is overly-broad, vague as to "issues," vague as to "any knowledge," and not reasonably calculated to lead to admissible evidence. Without waiving said objection, Respondents refer to Claimant and his family members, counsel for Claimant and counsel for Respondents, any attorney who practices under the Longshore Act and is familiar knowledge of legal issues that arise in Longshore Act claims, vocational expert Beverly Brooks, all department of labor employees whose names appear within the pleadings documents disclosed within the requests for production, and all medical providers disclosed throughout the medical records in the requests for production.

INTERROGATORY NO. 3:

Have you ever heard or do you know about any statement or remark made by or on behalf of the Claimant, Michael F. Hill, or any other witness concerning any issue in this claim? If so, state the names, last known address, telephone number, and email address of each person who made the statement or statements, the individual(s) name, employer, last known address, telephone number, and email address of each person who heard any statement, and the date, time, place, and substance of each statement.

a. State the name, address, telephone number and email address of the person(s) who is/are in possession of any statements identified in Interrogatory 3.

RESPONSE TO INTERROGATORY NO. 3:

Objection that this is overly-broad and vague as to "statement." Without waiving said objection, Respondents state that Claimant provided a transcribed statement via deposition on October 18, 2013, and Dr. Carolyn B. Rasche provided a transcribed statement via deposition on November 15, 2011. Their addresses, attending counsel's addresses, and the court

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reporters' addresses are in the transcripts, which included in the Request for Production responses.

INTERROGATORY NO. 4:

For each expert witness you intend to call either by deposition or trial, identify each expert witness and provide their name, business address, telephone number, and email address.

a. The witnesses' complete statement of all opinions he/she will express and the basis and reasons for them;

b. The facts or data considered by the witness in forming the opinions;

c. Any exhibits that will be used to summarize or support the opinions;

d. The witnesses' qualifications, schooling, training, professional degrees, certifications, including a list of all publications authored in the previous 10 years;

e. A list of all other cases in which during the previous 4 years, the witness testified as an expert at trial or by deposition; and

f. A statement of the compensation to be paid for the work performed and testimony in the case.

RESPONSE TO INTERROGATORY NO. 4:

Respondents object to the form of this interrogatory in that it calls for information protected by the attorney work product doctrine and is overly broad and overly burdensome. Respondents will produce their exhibits and disclose their witnesses and witness reports as dictated by pretrial order. Without waiving said objection, and reserving the right to disclose further witnesses in accordance with the prehearing order, Respondents disclose expert witness Beverly Brooks along with her opinions and experience as set forth in the Request for Production discovery responses.

INTERROGATORY NO. 5:

For each lay witness that you intend on testifying state whether it will be by deposition, or at trial; the name of the witness, the witness(es) employer, the witnesses' last known address, telephone number and email address; and the subject matter and substance of what the witness is expected to testify to.

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RESPONSE TO INTERROGATORY NO. 5:

Respondents object to the form of this interrogatory in that it calls for information protected by the attorney work product doctrine. Respondents will designate witnesses and will produce their exhibits as dictated by pretrial order. Notwithstanding said objection, no non-expert witness testimony is anticipated at this time.

INTERROGATORY NO. 6:

State in detail, the specific job, job duties and responsibilities that Claimant, Michael F. Hill, was to perform pursuant to the agreement entered into with DynCorp International, FZ, LLC;

a. What was the claimant's date of hire?

b. What was the ending date of his contract?

RESPONSE TO INTERROGATORY NO. 6:

Respondents object to this interrogatory in that it is compound and the sub-parts do not reasonably relate to the main question. Notwithstanding said objection, and based on current information and belief, Respondents answer:

a. August 5, 2005, and

b. October 4, 2008.

INTERROGATORY NO. 7:

What are the physical requirements of employment for the Claimant's position for which he was employed by the Employer herein during the course of his employment for each job held.

RESPONSE TO INTERROGATORY NO. 7:

Objection that Claimant worked in several positions, and it is unclear which position this question is asking about.

INTERROGATORY NO. 8:

What does the Employer/Carrier contend the Claimant's average weekly wage was and provide the method and manner of the Employer/Carrier's calculation of the Claimant's average weekly wage and the resulting compensation rate?

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RESPONSE TO INTERROGATORY NO. 8:

Respondents object that "resulting compensation rate" is vague as it does not specify the nature of the compensation rate (PPD, PTD, TPD, TTD). Discovery is ongoing and may alter the average weekly wage contentions. In paying benefits on this claim, Respondents have calculated and applied an average weekly wage of $2,688.35. The corresponding temporary total compensation rate is $1,200.62. This is based upon current knowledge and belief and Respondents reserve the right to recalculate this average weekly wage or disability rate, including altering their legal theory or factual analysis underlying the calculation.

INTERROGATORY NO. 9:

If you contend that the Claimant's actual earnings with DynCorp International, FZ, LLC are not the basis for the calculation of his average weekly wage, please provide the names, addresses, telephone numbers and email addresses of three (3) similar employees, and state the amount of wages paid to these similar employees for substantially the whole of 52 weeks preceding the Claimant's injury, including the inclusive dates of employment and the number of days each similar employee worked during the 52 week period preceding the Claimant's date of injury.

RESPONSE TO INTERROGATORY NO. 9:

Respondents object that this is not reasonably calculated to lead to admissible evidence in this case that does not fall under 33 U.S.C. 910(c), that "similar employee" is vague, that this is overly-burdensome, and that it seeks private employment and financial information of employees not involved in this litigation. Without waiving said objection, Respondents at this time make no contention that average weekly wage is based on evidence other than Claimant's own earnings and personal job history.

INTERROGATORY NO. 10:

State what the Claimant's normal work days and hours were each week and whether the Claimant was "on-call" 24 hours per day, 7 days per week.

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RESPONSE TO INTERROGATORY NO. 10:

Respondents object to this interrogatory in that it is compound and in that Claimant worked in several positions while working for DynCorp International Free-Zone, LLC, and it is unclear which position is referenced in this question. It is also unclear whether this refers only to the periods of deployment. It is vague as to "on-call."

INTERROGATORY NO. 11:

State all facts upon which the Employer/Carrier relies upon in denying medical care for the Claimant's:

a. Lumbar condition;

b. Neck;

c. Right shoulder;

d. Tinnitus;

e. Headaches;

f. Hypertension;

g. Urological condition; and

h. Post-traumatic stress disorder, anxiety, and depression.

RESPONSE TO INTERROGATORY NO. 11:

Respondents object to this interrogatory in that it is vague as to which specific medical care is referenced, vague as to the time frame of the denied care, overbroad, overly burdensome, is not reasonably calculated to lead to admissible evidence, and is compound. Further, it incorrectly assumes that medical care has been denied for all conditions. Requests for treatment of most of these conditions have never even been received, and a claim has not even been filed for all of these conditions. Without waiving said objections: Reasonable and necessary medical treatment for the work-related psychological condition has been accepted, and reasonable and necessary medical treatment for the right shoulder condition has been accepted.

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INTERROGATORY NO. 12:

State whether any job has been offered to the Claimant by the Employer, including the date the job was offered, the job title, the job duties, and the description of each of the job's details, including physical work requirements.

RESPONSE TO INTERROGATORY NO. 12:

Respondents object to this interrogatory in that it is vague as to time and as to "offered." Without waiving said objection, Respondents assume herein that the time frame referenced herein is only after Claimant left his employment with DynCorp International Free-Zone, L.L.C. Based on current knowledge and belief, no subsequent jobs were offered to Claimant to return to work with DynCorp International Free-Zone, L.L.C.

INTERROGATORY NO. 13:

State if the Claimant was required to pass a physical examination prior to being hired as an employee of DynCorp International Free-Zone, L.L.C. If your answer is in the affirmative, state:

a. The date of the examination, the location of the examination, the name, last known address, telephone number and email address of the examiner; and

b. The results of the examination and whether Claimant passed the physical examination.

RESPONSE TO INTERROGATORY NO. 13:

Respondents object to the form of this interrogatory in that it is compound. Notwithstanding said objection, Respondents answer that medical clearance was required prior to deployment. This is further detailed within the medical records among Claimant's personnel documents in the request for production responses, which demonstrate a controlled substance test of 7/15/05 conducted by ChoicePoint Medical Review; a mumps screening on July 15, 2005, conducted by Quest Diagnostics; a CBC along with an HIV test, Rubella screen, and basic metabolic panel conducted by Piedmont Medical Laboratory on July 13, 2005; and an evaluation conducted by Kenneth Robert Anderson of CentraCare in Kissimee, FL, on June 17, 2005. Discovery is ongoing and Respondents reserve the right to supplement or amend this response.

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INTERROGATORY NO. 14:

State whether any documents have been removed from the Claimant's employment file and as to each document removed, state the following:

a. The person who removed it;

b. The date the documents were removed;

c. The title and description of the document(s);

d. The reason why the document(s) were removed;

e. Whether the documents have been retained in another location (i.e. network server); provided to other employees, or the carrier, or the attorneys for the carrier.

RESPONSE TO INTERROGATORY NO. 14:

Respondents object to this interrogatory in that it is vague as to "employment file" and "removed." It also seeks information potentially protected by the attorney work product doctrine and attorney client privilege. Without waiving said objection, and based upon current knowledge and belief, the employment file maintained in regard to this Claimant and produced within the attached request for production responses has not been knowingly or deliberately redacted or reduced.

INTERROGATORY NO. 15:

State the name and address of any physician who has opined that the conditions or obligations of employment did not cause, contribute to or hasten in any fashion the Claimant's right shoulder/rotator cuff injury; depression/anxiety; PTSD; headaches; left ear hearing loss; tinnitus in both ears; low back pain with radiating leg pains; neck pain with radiating pain into left arm, elbow, and 4th and 5th digits of his left hand.

RESPONSE TO INTERROGATORY NO. 15:

Respondents object to the form of this interrogatory in that it is compound, and it is not reasonably calculated to lead to admissible information as it encompasses conditions for which claims have not been made, conditions that are accepted, one condition from which Claimant himself testified during his deposition that he does not suffer, and one condition that was the subject of a separate claim, already resolved via stipulation. Without waiving said objections,

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all medical opinions and reports that Respondents possess are included in the requests for production responses.

INTERROGATORY NO. 16:

What is the factual and/or medical basis the Employer/Carrier contends is the cause of the Claimant's current right shoulder/rotator cuff injury; depression/anxiety; PTSD; headaches; hearing loss left ear; tinnitus in both ears; low back pain with radiating leg pains; neck pain with radiating pain into left arm, elbow, and 4th and 5th digits of his left hand.

RESPONSE TO INTERROGATORY NO. 16:

Respondents object to the form of this interrogatory in that it is compound, and it is not reasonably calculated to lead to admissible information as it encompasses conditions for which claims have not been made, conditions that are accepted, one condition from which Claimant himself testified during his deposition that he does not suffer, and one condition that was the subject of a separate claim, already resolved via stipulation. Without waiving said objections, Respondents reference the medical reports and deposition transcripts included with these discovery responses.

INTERROGATORY NO. 17:

Is there surveillance of the Claimant?

a. If so, state the dates of the surveillance and the hours each day the Claimant was surveilled;

b. The address and telephone number of each individual who surveilled the Claimant;

c. Identify the name, address and telephone number of the custodian of the original surveillance and any person who has custody of any copies of the surveillance; and

d. Indicate whether the Employer/Carrier intends on introducing the surveillance at trial or during examination of any witness.

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RESPONSE TO INTERROGATORY NO. 17:

Respondents object to the form of this interrogatory in that it calls for information protected by the attorney work product doctrine, is vague as to "surveillance," and is compound. Without waiving said objection, and based upon current knowledge and belief, there is no surveillance of Claimant.

DATED: December 24, 2013

Respectfully submitted,

THOMAS, QUINN & KRIEGER, LLP

By: ______________________

Michael T. Quinn
Lara D. Merrigan
Attorneys for Respondents
DYNCORP INTERNATIONAL FREE-ZONE, LLC and CONTINENTAL INSURANCE COMPANY

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PROOF OF SERVICE

MICHAEL F. HILL V. DYNCORP INTERNATIONAL FREE-ZONE, LLC AND CONTINENTAL INSURANCE COMPANY

OWCP No: [redacted]227

OALJ No: [redacted]330

I am a citizen of the United States, over 18 years of age and not a party to the within-entitled action. I am employed at and my business address is THOMAS, QUINN & KRIEGER, LLP, 500 Sansome Street, Suite 450, San Francisco, CA 94111. On Tuesday, December 24, 2013, I served the following:

RESPONSES TO INTERROGATORIES
Set One

RESPONSES TO REQUESTS FOR PRODUCTION
Set One

☒ **BY EXPRESS COURIER SERVICE:** by placing the document(s) listed above in a sealed envelope with freight thereon fully prepaid, in the Federal Express drop-box or handing it to a Federal Express employee at San Francisco, California addressed as set forth below. I am readily familiar with the regular practice of collection and processing of correspondence for express mailing. Under that practice correspondence is dispatched with Federal Express in the ordinary course of business, and delivered within 1 business day thereafter.

Mr. Howard S. Grossman
Grossman Law Firm
1098 N.W. Boca Raton Blvd.
Boca Raton, FL 33432

I declare under penalty of perjury that the foregoing is true and correct. Executed at San Francisco, California on Tuesday, December 24, 2013.

Lara D. Merrigan

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UNITED STATES DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

MICHAEL F. HILL, Claimant, v. DYNCORP INTERNATIONAL FREE-ZONE, LLC, Employer, CONTINENTAL INSURANCE COMPANY, Carrier.	OALJ Case No: [redacted] OWCP No: [redacted] **REQUEST FOR PRODUCTION RESPONSES SET ONE**
RESPONDING PARTY:	RESPONDENTS DYNCORP INTERNATIONAL FREE ZONE and CONTINENTAL INSURANCE COMPANY
PROPOUNDING PARTY:	CLAIMANT, MICHAEL F. HILL
SET NO:	ONE

TO CLAIMANT AND HIS ATTORNEYS OF RECORD:

COMES NOW, DYNCORP INTERNATIONAL FZ-LLC and CONTINENTAL INSURANCE COMPANY (hereinafter "Respondents"), pursuant to 29 C.F.R. Section 18.19, submit their responses to Claimant's Request for Production, Set One.

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GENERAL STATEMENTS AND OBJECTIONS

1. Respondents have not yet completed their investigation of the facts relating to this case, have not completed discovery in this action, and have not yet completed preparation for trial. The following responses are based upon information known at this time, and are given without prejudice to Respondents' right to produce subsequently discovered evidence and facts and to amend these responses based on such information.

2. Objections are made to each of the requests for production of documents propounded by the claimant to the extent that said requests for production of documents seek information that is protected by the attorney-client privilege and/or the attorney work product doctrine, and to the extent that said requests for production of documents seek information that is or may be confidential.

3. Inadvertent identification or production of privileged writings or information by Respondents is not a waiver of any applicable privilege. Production of writings or information does not waive any objection to the admission of such writings or information into evidence.

4. The following responses are made solely for the purposes of, and in relation to, the subject litigation.

RESPONSES TO REQUESTS FOR PRODUCTION

REQUEST FOR PRODUCTION NO. 1:

Copies of any and all reports of expert witnesses the Employer/Carrier intends on relying upon for use at trial, or by deposition.

a. A list of all cases in which during the previous four years, the expert has testified at trial or by deposition;

b. Any invoice, bill, fee schedule or statement received from the expert for services rendered or to be rendered.

RESPONSE TO REQUEST FOR PRODUCTION NO. 1:

Respondents object on the basis that this seeks information protected by attorney work product doctrine and requests information regarding expert witnesses before they have been designated (or even possibly located). Without waiving said objection, Respondents produce Ms. Beverly

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Brook's reports included within Exhibit 1. Discovery is ongoing and Respondents reserve the right to supplement the documents provided.

REQUEST FOR PRODUCTION NO. 2:

The Curriculum Vitae of any expert witness the Employer/Carrier intends on presenting testimony at deposition or trial.

RESPONSE TO REQUEST FOR PRODUCTION NO. 2:

Respondents object on the basis that this seeks information protected by attorney work product doctrine and requests information regarding expert witnesses before they have been designated (or even possibly located). Without waiving said objection, Respondents disclose Ms. Brooks' curriculum vitae within Exhibit 1.

REQUEST FOR PRODUCTION NO. 3:

All documents supplied to any expert witness by the Employer/Carrier, its agents or attorneys that identify facts or data and that the expert considered in forming the opinions to be expressed, or identify assumptions that the party's attorney provided and the expert relied on in forming the opinions to be expressed.

RESPONSE TO REQUEST FOR PRODUCTION NO. 3:

Respondents object on the basis that this seeks information protected by attorney work product doctrine and requests information regarding expert witnesses before they have been designated (or even possibly located). Further it is an inappropriate request for production as it seeks to ask what such an expert witness actually relied upon in forming his or her opinions. Without representing the extent to which any such document or fact therein was relied upon, or representing that Ms. Brooks will be the only expert in this matter, all documents sent to Ms. Brooks are included within those disclosed at Exhibit 1.

REQUEST FOR PRODUCTION NO. 4:

All documents, pay stubs, payroll records, ledgers, reflecting all payments by the Employer to the Claimant including wages, per diem, reimbursements, monies of any kind.

RESPONSE TO REQUEST FOR PRODUCTION NO. 4:

Respondents object that this is overly broad, compound, and not reasonably calculated to lead

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to admissible evidence. Without waiving said objection, Respondents produce responsive documents at Exhibit 2.

REQUEST FOR PRODUCTION NO. 5:

All documents setting forth the job description, job duties, physical requirements of each of the Claimant's job with the Employer/Carrier.

RESPONSE TO REQUEST FOR PRODUCTION NO. 5:

Respondents object that this is compound and overly-broad, but without waiving said objection, produce the documents at Exhibits 1 - 3.

REQUEST FOR PRODUCTION NO. 6:

Documents reflecting the calculation of the Claimant's average weekly wage.

RESPONSE TO REQUEST FOR PRODUCTION NO. 6:

Respondents object to the extent that this calls for attorney work product doctrine or documents protected by the attorney-client privilege, and that it is vague as to "the calculation of." Without waiving said objection, Respondents produce the Longshore forms evidencing calculation included at Exhibit 4.

REQUEST FOR PRODUCTION NO. 7:

If the Employer/Carrier contends that the Claimant's contract of hire or the actual earnings are not the basis for the calculation of the average weekly wage, supply the wage records of three (3) similar employees who worked substantially the whole of 52 weeks preceding the Claimant's date of injury.

RESPONSE TO REQUEST FOR PRODUCTION NO. 7:

Respondents object that this is not reasonably calculated to lead to admissible evidence in this case that does not fall under 33 U.S.C. 910(c), that "similar employee" is vague, that this is overly-burdensome, and that it seeks private employment and financial information of employees not involved in this litigation. Without waiving said objection, Respondents at this time make no contention that average weekly wage is based on evidence other than Claimant's own earnings and job history.

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REQUEST FOR PRODUCTION NO. 8:

Any calendar, list, ledger, daily reports, daily log book, time cards, schedule or document reflecting the days worked for each week during the Claimant's employment.

RESPONSE TO REQUEST FOR PRODUCTION NO. 8:

Respondents object that this is overly broad and overly-burdensome as well as compound, but without waiving said objection, produce responsive documents at Exhibit 2.

REQUEST FOR PRODUCTION NO. 9:

A copy of the Employee/Claimant's contract or agreement for employment with DynCorp International Free-Zone, LLC.

RESPONSE TO REQUEST FOR PRODUCTION NO. 9:

Respondents produce responsive documents at Exhibit 2.

REQUEST FOR PRODUCTION NO. 10:

The Employee/Claimant's complete personnel file including, but not limited to, the pre-employment application, correspondence, emails, attendance records, background check, disciplinary matters, letters of commendation, letters of reprimand, the entire file from cover to cover.

RESPONSE TO REQUEST FOR PRODUCTION NO. 10:

Respondents produce responsive documents at Exhibit 2.

REQUEST FOR PRODUCTION NO. 11:

All incident reports completed by the Claimant, or DynCorp administrative staff involving the Claimant, known as Serious Incident Reports ("SIRs") during the course of the Claimant's employment.

RESPONSE TO REQUEST FOR PRODUCTION NO. 11:

Respondents object that his is overly-broad, overly-burdensome, and includes documents which Respondents are not entitled to disclose due to national security concerns. Additionally, Claimant testified during his deposition that he is in possession of all such documents. Without waiving said objection, responsive documents are within Exhibit 2, 3, and 5.

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REQUEST FOR PRODUCTION NO. 12:

All reports of incoming mortars, rockets, rocket propelled grenades, suicide bombers, IEDs, indirect fire and any other explosive device and/or gun fire documented while the Claimant was employed at "FOB Danger," COB Speicher, Tikrit, Baquhah and any other Forward Operating Base, Camp, COB, COP, or physical location of any kind in Iraq where the Claimant performed work.

RESPONSE TO REQUEST FOR PRODUCTION NO. 12:

Objection that this is overly burdensome, overly-broad, and vague as to "reports." Without waiving said objection, responsive documents are within Exhibit 2, 3, and 5.

REQUEST FOR PRODUCTION NO. 13:

Any applications submitted to the Division of Federal Employees' Compensation for reimbursement under the War Hazard's Compensation Act.

RESPONSE TO REQUEST FOR PRODUCTION NO. 13:

Objection that this is overly broad and not reasonably calculated to lead to admissible evidence. Without waiving said objection, no such applications have been submitted for reimbursement of payment of the above-captioned claims.

REQUEST FOR PRODUCTION NO. 14:

All medical records of the Employee/Claimant while employed by the Employer.

RESPONSE TO REQUEST FOR PRODUCTION NO. 14:

Respondents produce responsive documents at Exhibits 2 and 5.

REQUEST FOR PRODUCTION NO. 15:

The Claimant's pre-employment physical examination records and any pre-employment questionnaire completed.

RESPONSE TO REQUEST FOR PRODUCTION NO. 15:

Respondents produce responsive documents at Exhibit 2.

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REQUEST FOR PRODUCTION NO. 16:

All medical records received by the Employer/Carrier from any of the Claimant's health care providers both pre-employment and post incident whether through records custodian subpoenas, medical authorization forms, or any other source.

RESPONSE TO REQUEST FOR PRODUCTION NO. 16:

Respondents produce responsive documents at Exhibit 1, 2, 4, and 5.

REQUEST FOR PRODUCTION NO. 17:

Any correspondence between the Employer/Carrier and the Claimant regarding the reporting of the Claimant's injuries, medical leave status, and benefits available under the Longshore and Harbor Workers' Compensation Act as extended by the Defense Base Act.

RESPONSE TO REQUEST FOR PRODUCTION NO. 17:

Respondents produce responsive documents at Exhibit 2, 4, and 6.

REQUEST FOR PRODUCTION NO. 18:

Any reports of vocational rehabilitation counselors outlining employment opportunities and/or Labor Market Survey the Employer/Carrier contends identifies employment that the Claimant is capable of performing.

RESPONSE TO REQUEST FOR PRODUCTION NO. 18:

Respondents produce responsive documents at Exhibit 1.

REQUEST FOR PRODUCTION NO. 19:

Any employment records received by the Employer/Carrier/ its attorneys from employers prior to the Claimant's employment with DynCorp International, FZ, LLC.

RESPONSE TO REQUEST FOR PRODUCTION NO. 19:

Respondents produce responsive documents at Exhibit 2 and 5.

REQUEST FOR PRODUCTION NO. 20:

All documents supporting the answer to each interrogatory answer.

RESPONSE TO REQUEST FOR PRODUCTION NO. 20:

Respondents object that this is compound, ambiguous, and that no interrogatories request identification of records. Without waiving said objection, all records referenced therein are

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disclosed in the exhibits.

REQUEST FOR PRODUCTION NO. 21:

Any statement, whether written, recorded, or otherwise, taken of Claimant.

RESPONSE TO REQUEST FOR PRODUCTION NO. 21:

Respondents object to the term "statement" as ambiguous. Without waiving said objection, Respondents produce responsive documents at Exhibit 3.

REQUEST FOR PRODUCTION NO. 22:

All statements, whether written, recorded, or otherwise of any persons having knowledge of the Claimant's injury and/or illness which is the subject of his claim against the Employer/Carrier.

RESPONSE TO REQUEST FOR PRODUCTION NO. 22:

Respondents object to the term "statement" as ambiguous. Without waiving said objection, Respondents produce responsive documents at Exhibit 3.

REQUEST FOR PRODUCTION NO. 23:

Any records received by the Employer/Carrier, its attorneys or agents pursuant to releases or authorizations signed by the Claimant for military records, Medicare records, Social Security Administration, unemployment or any other type of record.

RESPONSE TO REQUEST FOR PRODUCTION NO. 23:

Respondents object to this request in that it is compound and is overly broad and vague as to "any other type of record." Without waiving said objection, Respondents produce responsive documents at Exhibit 2.

REQUEST FOR PRODUCTION NO. 24:

All documents filed with the United States Department of Labor, including but not limited to:

i. LS-201

ii. LS-202

iii. LS-206

iv. LS-207

v. LS-208

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vi. LS-210

RESPONSE TO REQUEST FOR PRODUCTION NO. 24:

Objection that this is overbroad, compound, and vague as to "filed." Without waiving said objection, Respondents produce all documents they have filed with the Department of Labor in this matter at Exhibit 4.

REQUEST FOR PRODUCTION NO. 25:

A complete copy of any log notes or other writings from any nurse case manager who has provided services in the instant claim and any correspondence between the nurse case manager, the adjuster and the attorney for the Employer/Carrier; any bills for services provided.

RESPONSE TO REQUEST FOR PRODUCTION NO. 25:

Respondents object to this request in that it is compound, overly-broad, and seeks documents protected by the attorney work product doctrine.

DATED: December 24, 2013

Respectfully submitted,

THOMAS, QUINN & KRIEGER, LLP

By: _____
Michael T. Quinn
Lara D. Merrigan
Attorneys for Respondents
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U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

IN THE MATTER OF

[redacted]

Claimant,

vs.

[redacted]
Date of Accident: 2/2/2012

DYNCORP INTERNATIONAL, INC.,

Employer,

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA,

Carrier.

EMPLOYER'S RESPONSES TO CLAIMANT'S INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS

The Employer and Carrier, Dyncorp International, Inc. and Insurance Company of the State of Pennsylvania, by their counsel, respectfully submit the following responses to Claimant's interrogatories and request for production of documents. Attached are exhibits EX-1 through EX-30 and the Claimant's Exhibits and Witness List which are incorporated by reference into these answers and responses.

INTERROGATORIES TO EMPLOYER/CARRIER

Definitions and Instructions

A. In answering these Interrogatories, for the convenience of counsel and the Court, please set forth each interrogatory immediately before your response thereto.

B. In answering these interrogatories, you are requested to furnish all information available to you, including information in the possession of your attorneys, investigators, employees, agents, representatives, or any other person acting on your behalf, and not merely such information as is known by you or personal knowledge.

C. If you cannot answer any of the following interrogatories in full after exercising due diligence to secure the information necessary to do so, please so state, and answer to the

extent possible, specifying your inability to answer the remainder and stating whatever information or knowledge you have concerning the unanswered portions. If you assert any objection or privilege in response to any interrogatory, or part thereof, you should state the objection or privilege with particularity and, if objection is made, or privilege claimed, with respect to any document, that document should be identified by date, originator, recipient and custodian, and substance.

D. Each request contained in the following interrogatories to "identify each person" shall mean to provide the following information regarding each such person:

(a) When used with reference to a natural person, means to state in the answer in each instance the full name, present or last known address, past and present positions if an officer and/or employee of any of the parties to the action, and if not such an officer and/or employee, the occupation or business and position, if known, and employer of such person; and

(b) When used with reference to a corporation, partnership, association, or any other kind of business or legal entity, means to state in the answer in each instance the full name and address and a brief description of the primary business in which such entity is engaged.

E. Each request contained in the following interrogatories to "identify any document" or "identify any writing" shall mean to provide the following information regarding each such document or writing:

(1) Date and title;

(2) Identity of the individual who prepared the document or written communication;

(3) Identity of the individual to whom the document or writing was addressed;

(4) Nature and contents of the document or writing;

(5) Locations of the original and all copies of the document or writing, together with the name of the custodian thereof.

F. The term "**document(s)**" has the same meaning herein as in Rule 34(a) Fed. R. Civ. P. and includes, without limitation, whether or not in your immediate possession or control, letters, faxes, telexes, telegrams, e-mails, memoranda, reports, studies, calendar and diary entries, drawings, graphs, charts (including navigational charts), cards, tabulations, analyses, statistical or informational accumulations, audits and associated work paper, film, microfilm, microfiche, magnetic tape, mechanical reproductions (such as, but without limitation, the content of computer memory or information storage facilities, and computer programs, and any instructions or interpretive materials associated with them), and copies of documents which are not identical duplicates of the original document (*e.g.*, because handwritten or hand notes appear thereon or are attached thereto), whether or not the originals are in your possession, custody or control, maps, records, logs, photographs, books of account, books of record, bookkeeping records, ledgers,

stenographic or stenotyped notes, and any other data compilations from which information can be obtained and, if necessary, translated into readable form.

G. The term "**writing**" includes, without limitation, all documents containing writings in any language or by any means, including summaries or records of telephone conversations or personal conversations, records of interviews, memoranda, reports including reports and/or summaries of investigations and surveys, contracts, drafts, diaries, log books, standing orders, night orders, instructions reduced to writing, minutes of meetings, notes, studies, surveys, chemical or metallurgical analysis, and marginal comments appearing on any documents. For purposes of this request, a copy of a document or writing is itself a "document" or "writing."

H. The term "**communication**" includes any form of communication, oral or written, including letters, e-mails, memoranda, pictures, telexes, telegrams, notes, reports, facsimiles, and any confirmation or memorandum of an oral conversation.

I. The terms "**Employer**" means Claimant's employer at the time of his injury, **DYNCORP INTERNATIONAL, INC.**, and any employee, agent or attorney for Employer, and any other person acting for or on behalf of Employer.

J. The term "**you**" refers to **DYNCORP INTERNATIONAL, INC.**, as well as its officers, directors, employees, agents, representatives, insurers, and anyone acting at its request or on its behalf with respect to matters raised in the within action.

K. The term "Carrier" means **INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA**, and any employee, agent or attorney for the carrier.

L. The term A**Claimant**@ means the Employee/Claimant, **ERNESTINA BRUCE.**

M. The applicable time period shall be from 2/2/2011 to the present, unless otherwise stated.

GENERAL OBJECTIONS AND OBJECTIONS TO INSTRUCTIONS AND DEFINITIONS

The Employer objects to the instructions definitions to the extent they go beyond the requirements of the Rules. The Employer objections to the definitions to the extent the detail requested is burdensome or invades the privacy of witnesses. The Employer objects to the discovery requests to the extent they request attorney client privileged information and privileged attorney work product, which would include communications between Employer's counsel and the Employer, Insurer and expert witnesses, e.g. all medical providers in the case. The Employer objects to instruction/definitions C, D, E as unduly burdensome, and overbroad. The

Employer objects to instructions I and J, because the Employer and Insurer can only answer for themselves. The Employer reserves the right to supplement these answers as its discovery continues. The Employer incorporates by reference into its answers EX-1 through EX-30, and the attached Exhibit and Witness List.

INTERROGATORIES

1. State the name, address and title of the person(s) answering these interrogatories on behalf of the employer, carrier, or servicing agent, and how long each person has worked for the employer, carrier, or servicing agent.

ANSWER: Adam Howard of Chartis, assisted by counsel.

2. List every non-expert witness who will or may testify at the formal hearing in this matter, and give the name, address, telephone number and email of the witness, along with a detailed description of the expected testimony of each such witness.

ANSWER: Supervisor Terrance Franklin

3. State the name, address, telephone number of each expert witness you intend on calling at the Formal Hearing in this case, and whether such testimony will be by deposition or live, as well as the following information:

i. A complete statement of all opinions the witness will express and the basis and reasons for them.

ANSWER: Dr. York, Dr. Franke and vocational expert Portia E. Smith. Their addresses and phone numbers are on their reports and curriculum vitae. The Employer has not decided which witnesses to call by deposition and which will testify at the hearing.

ii. The facts or data considered by the witness in forming them.

ANSWER: See their reports which are marked as Exhibits.

iii. Any exhibits that will be used to summarize or support them.

ANSWER: See their reports which are marked as Exhibits.

iv. The witnesses' qualifications, including a list of all publications offered in the previous ten years.

ANSWER: See Exhibits which include curriculum vitae

v. A list of all other cases in which, during the previous four years, the witness testified as an expert in trial or by deposition.

ANSWER: The Employer objects to this request as overly broad and unduly burdensome, and as not being relevant to the issues in the case.

vi. A statement of the compensation to be paid for the study and testimony in the case.

ANSWER: Whatever they bill.

vii. The percentage of income that the witness derives from acting as an expert witness.

ANSWER: The Employer objects to this request as overly broad and unduly burdensome, and as not being relevant to the issues in the case.

viii. The percentage of time that the witness devotes to expert witness work and his/her overall time expended in matters other than as an expert witness.

ANSWER: The Employer objects to this request as overly broad and unduly burdensome, and as not being relevant to the issues in the case.

ix. The percentage of cases in which the expert has testified on behalf of the employer/carrier, defendant, or insurance company versus on behalf of a claimant or a plaintiff.

ANSWER: The Employer objects to this request as overly broad and unduly burdensome, and as not being relevant to the issues in the case.

4. State the dates of employment for the Claimant, Ernestina Bruce, including in detail her job title, job duties, and job description.

ANSWER: See exhibit EX-30. The Insurer has inquired of the Employer to see if there is additional information.

5. What is the name, address, telephone number, and email address of the individual with the most knowledge concerning the claimant's job duties and daily work activities?

ANSWER: The Insurer has inquired of the Employer to see if there is additional information.

6. What are the physical requirements of employment for the Claimant's position for the Employer herein.

ANSWER: The Insurer has inquired of the Employer to see if there is additional information.

7. State what the Employer/Carrier contends to be the Claimant's Average Weekly Wage and explain, in detail the basis for the calculation.

ANSWER: $1,196.43. See AWW documentation EX-30. The Insurer has inquired of the Employer to see if there is additional information.

8. State the name, title, employer, physical address, email address and telephone number of each person who the Employer/Carrier relies upon for denying indemnity and medical benefits as claimed in the LS-203 and LS-18, and for each person, state the facts they have knowledge of.

ANSWER: See all persons identified on Exhibits EX-1 through EX-30. Dr. Francke and Dr. York both opined the Claimant can work. Also, her activities show she can work.

9. a) State whether the Employer/Carrier contends the Claimant was not disabled after February 2, 2011 from performing her job for DynCorp International, Inc.

ANSWER: Yes.

b) State the name, address, telephone number, email address of the individual(s) and their job title, who has knowledge of the basis for the answer to the above question.

ANSWER: See all persons identified on Exhibits EX-1 through EX-30.

c) State with specificity the facts you contend support the Employer/Carrier's response to 9(a).

ANSWER: Dr. Francke and Dr. York both opined the Claimant can work. Her activities demonstrated she can work.

10. Do you contend that the Claimant is able to currently return to work and if so what wages do you contend the Claimant is capable of earning?

A. Identify by employer name, address, job title and job description each job and the date you contend the claimant was advised of by the Employer/Carrier that such job was available, within Claimant's physical limitations and transferrable job skills.

ANSWER: Yes, and same as her pre-injury wages. She could return to her regular job, as well as the jobs in EX-21 through EX-23.

B. State the method you contend the Employer/Carrier advised the Claimant of the jobs identified in Interrogatory 11(A).

ANSWER: The Employer sent Claimant's counsel EX-21 through EX-23.

11. State what accommodations were made by the Employer so as to enable the Claimant to be able to continue her employment with the employer after her injury.

ANSWER: Claimant need none, but per the ADA, accommodations would have been made if required.

12. State the name, address and telephone number of any medical provider that has placed the Claimant at Maximum Medical Improvement ("MMI") for each injury the Claimant sustained as a result of the incident.

ANSWER: Dr. Francke and Dr. York.

A. If you contend that the claimant has been placed at MMI, state the date of MMI and the impairment/disability rating and restrictions assigned by the medical provider(s) for each injury for which the Claimant has been authorized to be treated.

ANSWER: See EX-12 through EX-17.

B. Whether the medical provider has authored any correspondence or document confirming the information contained in 12(A), and if so, the date of any such document.

ANSWER: See EX-12 through EX-17.

C. State the name and address of any person or entity that has received documents responsive to 12(A-B).

ANSWER: Claimant's counsel and OWCP.

13. State the names, business addresses and employer of any and all persons involved in the authorization or denial/suspension of any benefits to, or for, the claimant during the pendency of this claim. Also, identify any documents or other evidence supporting the denial/suspension of said benefits including, but not limited to any filings with the Department of Labor such as an LS-207.

ANSWER: Adam Howard and Lawrence Postol. See Exhibits EX-1 through EX-30.

14. For each person or entity hired, retained or otherwise employed by the employer, carrier, or servicing agent to assist in the medical claims handling or to speak with the claimant's medical providers, list the following: name, address, date retained for nurse case management/medical claims handling; the person that retained them, the billing and payment agreement with the employer, carrier, or servicing agent and the total amount paid to date in this case.

ANSWER: The Employee objects to this request as covering protected work product.

15. For each person or entity hired, retained or otherwise employed by the employer, carrier, or servicing agent to advise of the job opportunities available to the claimant, please list the person(s) name, address, and date retained for this particular case, the person or entity that retained them, the billing and payment agreement with the employer, carrier, or servicing agent and the total amount paid to date in this case.

ANSWER: The Employee objects to this request as covering protected work product. Without waiving this objection, see EX-21 through EX-26

16. List the dates and times for each conference or communication that an employee, agent, attorney or other representative of the employer, carrier, or servicing agent has had with any of the Claimant's physician(s), therapist or other medical providers; the name of the

health care provider any such communication was had with, and the amount the provider was paid for the conference or communication, if any.

ANSWER: The Employee objects to this request as covering protected work product.

17. State if the Claimant was required to undergo a pre-employment physical examination as an employee of DynCorp International, Inc. If your answer is in the affirmative, please state:

a) The date, the name, last known address, telephone number and email address of the facility and examining doctor.

ANSWER: The Insurer has inquired of the Employer to see if there is additional information.

18. State the name, address and telephone number of any person(s) who has conducted surveillance of the Claimant.

ANSWER: The Employer objects to this request as covering privileged work product.

A. For each such person, state the date(s) and total amount of hours of surveillance per day of all surveillance conducted.

ANSWER: The Employer objects to this interrogatory as requesting attorney-client and attorney work product privileged information. The Employer will nevertheless produce copies of any surveillance films it is going to offer at trial after the Claimant is deposed.

B. The total number of hours the claimant was surveilled;

ANSWER: The Employer objects to this interrogatory as requesting attorney-client and attorney work product privileged information. The Employer will nevertheless produce copies of any surveillance films it is going to offer at trial after the Claimant is deposed.

C. The total minutes/hours that videotape surveillance was captured;

ANSWER: The Employer objects to this interrogatory as requesting attorney-client and attorney work product privileged information. The Employer will nevertheless produce copies of any surveillance films it is going to offer at trial after the Claimant is deposed.

D. The total minutes/hours of videotape surveillance that is anticipated to be reproduced;

ANSWER: The Employer objects to this interrogatory as requesting attorney-client and attorney work product privileged information. The Employer will nevertheless produce copies of any surveillance films it is going to offer at trial after the Claimant is deposed.

E. Whether the entire surveillance has been preserved, and if not, why not;

ANSWER: The Employer objects to this interrogatory as requesting attorney-client and attorney work product privileged information. The Employer will nevertheless produce copies of any surveillance films it is going to offer at trial after the Claimant is deposed.

F. The name, address, email address and phone number and title of the person whose decision it was to edit the surveillance film;

ANSWER: The Employer objects to this interrogatory as requesting attorney-client and attorney work product privileged information. The Employer will nevertheless produce copies of any surveillance films it is going to offer at trial after the Claimant is deposed.

G. What the surveillance purports to show the claimant performing;

ANSWER: The Employer objects to this interrogatory as requesting attorney-client and attorney work product privileged information. The Employer will nevertheless produce copies of any surveillance films it is going to offer at trial after the Claimant is deposed.

H. The name, address and telephone number of the custodian of any such surveillance; and

ANSWER: The Employer objects to this interrogatory as requesting attorney-client and attorney work product privileged information. The Employer will nevertheless produce copies of any surveillance films it is going to offer at trial after the Claimant is deposed.

I. Whether the employer/carrier intends on introducing the surveillance as evidence in this case.

ANSWER: The Employer objects to this interrogatory as requesting attorney-client and attorney work product privileged information. The Employer will nevertheless produce copies of any surveillance films it is going to offer at trial after the Claimant is deposed.

_____
Signature of Affiant

STATE OF _____)
) SS
COUNTY OF _____)

BEFORE ME, on this day, an officer duly authorized in the State and County aforesaid to take acknowledgments, personally appeared Adam Howard to me known to be the person described in and who executed the foregoing instrument (answers to interrogatories) and s/he acknowledged to and before me that s/he executed same.

SWORN AND SUBSCRIBED before me this ____ day of _____, 201__.

Notary Public:

_____
Signature

_____
Print Name

My Commission expires:

REQUESTS FOR PRODUCTION OF DOCUMENTS

I. DEFINITIONS

A. "**Document**" means any document in your or you attorneys' custody, possession or control, including, but not limited to, any printed, written, recorded, taped, electronic, graphic, or other tangible matter from whatever source, however produced or reproduced, whether in draft or otherwise, whether sent or received, including the original, all amendments and addenda and any non-identical copy (whether different from the original because of notes made on or attached to such copy or otherwise) of any and all writings, correspondence, letters, telegrams, telex communications, cables, notes, notations, papers, newsletters, memoranda, inter-office communications, e-mails, releases, agreements, contracts, books, pamphlets, studies, minutes of meetings, recordings or other memorials of any type of personal or telephone conversations, meetings or conferences (including, but not limited to, telephone bills and long distance charge slips), reports analyses, evaluations, estimates, projections, forecasts, receipts, statements, accounts, books of account, diaries, calendars, desk pads, appointment books, stenographer's notebooks, transcripts, ledgers, registers, worksheets, journals, statistical records, cost sheets, summaries, lists, tabulations, digests, cancelled or uncancelled checks or drafts, vouchers, charge slips, invoices, purchase orders, accountant's reports, financial statements, newspapers, periodical or magazine materials, and any material underlying, supporting or used in the preparation of any documents.

B. "**Claimant**" or "**Employee/Claimant**" means **ERNESTINA BRUCE**.

C. "**Employer**" means Claimant's employer, **DYNCORP INTERNATIONAL, INC.**, and any employee, agent or attorney for Employer, and any other person acting for or on behalf of the Employer.

D. "**Insurer**" means **INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA** and any employee, agent or attorney for Insurer and any other person acting for, or on behalf of Insurer, or under Insurer's authority or control.

E. "**Incident**" or "**Occurrence**" means the accident that occurred while Claimant, **ERNESTINA BRUCE**, was employed with **DYNCORP INTERNATIONAL, INC.**

II. INSTRUCTIONS

A. Any document as to which a claim of privilege is or will be asserted should be identified by author, and recipient, description (*e.g.*, letter, memorandum, telex, recording, etc.), title (if any), date, addressees (if any), general subject matter, present depository and present custodian and a complete statement of the ground for the claim of privilege should be set forth.

B. If it is maintained that any document which is requested has been destroyed, set forth the contents of the document, the date of such destruction and the name of the person who authorized or directed such destruction and that person's employer.

C. If any of the documents cannot be produced in full, produce to the extent possible, specifying the reasons for the inability to produce the remainder.

D. This request is a continuing one. If after producing documents, you become aware of any further documents responsive to this request, you are required to produce such additional documents.

OBJECTIONS

The Employer objects to the instructions definitions to the extent they go beyond the requirements of the Rules. The Employer objections to the definitions to the extent the detail requested is burdensome or invades the privacy of witnesses. The Employer objects to the discovery requests to the extent they request attorney client privileged information and privileged attorney work product, which would include communications with the Employer, Insurer and expert witnesses. The Employer objects to instruction/definitions C, D, E as unduly burdensome, and overbroad. The Employer objects to instructions I and J, because the Employer

and Insurer can only answer for themselves. The Employer reserves the right to supplement these answers as its discovery continues. The Employer incorporates by reference into its answers EX-1 through EX-30, and the attached Exhibit and Witness List.

ITEMS TO BE PRODUCED

All payroll records, paystubs, wage reports, documents of any kind reflecting earnings for the fifty-two (52) week period preceding the Claimant's date of accident used by the Employer/Carrier/Carrier/Servicing Agent in calculating the Claimant's average weekly wage.

RESPONSE: See Exhibit EX-30. The Insurer has inquired of the Employer to see if there is additional information.

1. Any work papers, documents, records reflecting calculation of the Claimant's average weekly wage.

RESPONSE: See Exhibit EX-30, The Insurer has inquired of the Employer to see if there is additional information..

2. Wage records of any similar employees for the 52 week period preceding the Claimant's date of accident.

RESPONSE: The Employer objects to this request on relevancy grounds, because "similar" is not defined, and as overly burdensome.

3. The Claimant's entire personnel file including, but not limited to: employment application, employment agreement, warnings of job related conditions; pre-employment health questionnaire and pre-employment physical examination records, job description and duties; medical records of treatment incurred while in the Employer's employment including medics, Combat Army Support hospitals, or other medical facilities; reports of injury; notices of disciplinary action, or commendations, correspondence, e-mails to and from the Claimant and his employer.

RESPONSE: The Employer objects to this request on relevancy grounds and as being unduly burdensome.

4. All documents filed by the Employer/Carrier with the United States Department of Labor, Office of Workers' Compensation Programs.

RESPONSE: The Employer objects to this request on relevancy grounds and as being unduly burdensome. Also, all these documents are equally available to the Claimant at once.

5. The LS-202 "Employer's First Report of Injury or Occupational Illness" completed by the Employer for the instant accident(s).

RESPONSE: See EX-2.

6. Any Notice of Injury form filed by the Employee pursuant to 33U.S.C. § 912.

RESPONSE: See EX-3 and EX-4.

7. Any LS-1 "Request for Examination and/or Treatment" completed by the Claimant and/or the Employer/Carrier/Servicing Agent for the instant claim.

RESPONSE: None.

8. Any LS-206 "Payment of Compensation Without Award" form completed by the Employer/Carrier/Servicing Agent for the instant claim.

RESPONSE: See EX-27 and EX-28.

9. Any LS-207 "Notice of Controversion of Right to Compensation" form completed by the Employer/Carrier/Servicing Agent for the instant claim.

RESPONSE: See EX-6, EX-7 and EX-8.

10. Any LS-208 "Notice of Final Payment of Suspension of Compensation Payment" form completed by the Employer/Carrier/Servicing Agent for the instant claim.

RESPONSE: See EX-1.

11. Any statements, recorded, written, or in any other fashion memorialized, of the Claimant taken by the Employer/Carrier/Servicing Agent, its attorneys, investigators, adjusters, or agents.

RESPONSE: See EX-3 and EX-4.

12. Any documents completed by the Employer concerning any accident involving the Claimant.

RESPONSE: The Employer objects to this request on relevancy grounds and as being unduly burdensome.

13. Any document, medical record, or note that you contend shows that the claimant was not entitled after June 5, 2012 to the payment of compensation benefits or medical treatment for the injuries she sustained on February 2, 2011.

RESPONSE: See EX-1 through EX-30.

14. All medical records and bills received by the Employer/Carrier/Servicing Agent concerning medical treatment/evaluations rendered to the Claimant by any healthcare provider including, but not limited to any of the following: emergency medical technicians, paramedics, ambulance transport company, emergency medical services, hospitals, emergency room physicians, consulting hospital physicians, radiologists, radiology facilities, MRI scan centers, pathologists, staff physicians, psychologists, medical doctors, osteopathic physicians, chiropractors, physical therapists, pharmacy, independent medical examiner, and any other member or facility of the healing arts.

RESPONSE: The Employer objects to this request on relevancy grounds and as being unduly burdensome.

15. All correspondence, emails, letters, facsimiles, correspondence, documents, records, reports, and photographs sent by the Employer/Carrier, its attorneys or agents to any healthcare provider.

RESPONSE: The Employer objects to this request on relevancy grounds and as being unduly burdensome. This request also covers privileged work product.

16. All payout logs, records or documents of any kind, reflecting payment of indemnity benefits made by the Employer/Carrier/Servicing Agent to the Claimant.

RESPONSE: The Employer objects to this request on relevancy grounds and as being unduly burdensome. Without waiving this request, see EX-1.

17. All payout logs, records or documents of any kind reflecting medical expenses paid for any medical care/evaluation rendered to the Claimant.

RESPONSE: The Employer objects to this request on relevancy grounds and as being unduly burdensome.

18. Any document that the Employer/Carrier/Servicing Agent intends on introducing as evidence in the hearing at this cause before the Administrative Law Judge.

RESPONSE: See EX-1 through EX-30.

19. Any document that shows that the claimant is capable of earning.

RESPONSE: See EX-1 through EX-30.

20. Copies of any and all Labor Market Survey(s) performed by any vocational expert that shows that the claimant is capable of earning wages.

RESPONSE: EX-21 through EX-23.

21. Any unedited surveillance photographs, films, depictions of any kind of the Claimant taken by the Employer/Carrier/Servicing Agent, its agents or investigators, together with any log notes, reports, bills for services rendered for any such activity.

RESPONSE: The Employer objects to this interrogatory as requesting attorney-client and attorney work product privileged information. The Employer will nevertheless produce copies of any surveillance films it is going to offer at trial after the Claimant is deposed.

22. A copy of the entire claims file, including adjuster notes, excluding attorney/client or work product privileged information.

RESPONSE: The Employer objects to this request as covering privileged work product.

23. Any documents reflecting communication with any of the claimant's physicians or members of the healing arts, including, but not limited to:

i. Request for medical records, reports, work restrictions, date of maximum medical improvement, and impairment rating.

ii. Authorization for treatment/or limitation on the scope of treatment to be authorized.

iii. Payments made to any of the claimant's health care providers for record review, reports, conference fees, impairment ratings/maximum medical improvement reports.

iv. Bills, statements, invoices received from any of the claimant's treating health care providers for conferences, record review, reports or for any independent medical examiner, second medical opinion retained by the employer/carrier, its agents or attorneys; any documents provided to and/or received by the employer/carrier/servicing agent, its employees, agents or attorneys from any "independent medical examiner," second medical opinion, or non-treating physician, psychologist or member of the healing arts who was retained to examine the claimant.

RESPONSE: The Employer objects to this request on relevancy grounds and as being unduly burdensome. Also, the request encompassed privileged work product.

24. (i) Any documents, emails, log notes sent by the nurse case manager(s) to the carrier, its agents or attorneys.

(ii) Any documents from the employer/carrier, its agents or attorneys to the nurse case manager.

(iii) Any bills, statements, invoices submitted by any nurse case manager/entity providing medical case management services.

RESPONSE: The request encompassed privileged work product.

25. Any written protocol notes or directives between the Insurance Company of the State of Pennsylvania and Pinnacle Orthopedic & Sports Medicine Specialists, Peachtree Orthopedic Clinic regarding defense medical examinations.

RESPONSE: The request encompassed privileged work product.

Respectfully submitted,

DYNCORP INTERNATIONAL, INC.
and INSURANCE COMPANY OF THE STATE
OF PENNSYLVANIA/CHARTIS

By _____
Lawrence P. Postol
Their Attorney

SEYFARTH SHAW LLP
975 F Street, N.W.
Washington, DC 20004-1454
(202) 828-5385

Dated: December 19, 2012

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing EMPLOYER'S RESPONSES TO CLAIMANT'S INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS was served, via Mail, postage prepaid, this 19th day of December, 2012, upon:

Howard Grossman, Esquire
1098 NW Boca Raton Blvd.
Boca Raton, FL 33432

Lawrence P. Postol

APPENDIX "B"

GROSSMAN
ATTORNEYS AT LAW

March 12, 2013

Via Email: lpostol@seyfarth.com
Total # of Pages (7)

Lawrence Postol, Esquire
Seyfarth Shaw, L.L.P.
975 F. Street, N.W.
Washington, DC 20004-1454

RE: [redacted]
Claimant :
OWCP Number :
Date of Accident :
Our File Number :

Dear Mr. Postol:

I received your responses to my February 26, 2013 letter regarding the Employer/Carrier's discovery responses dated December 19, 2012. While you claim that I "waited over 2 months to write me, and then demand a response to your 5 page letter in two days," the real facts are quite to the contrary.

Shortly after the beginning of the year, after having received your Answers to Interrogatories (on December 19, 2012) that you prepared pursuant to information provided to you by Adam Howard of Chartis, I attempted to discuss the responses with you and how woefully inadequate the responses and objections were. You thought that the objections were appropriate, and that the responses were complete. At that time, I had mentioned to you that you seemed to be taking a position, in particular, with respect to Rule 26, which is not supported by the Rule, nor the case law.

Prior to attending [redacted]'s deposition, I attempted to work out with you by telephone, again, the issues regarding the interrogatories. Granted, you and I did not have much time the day before leaving to go to Atlanta, and I again did address them with you, albeit, briefly on the day of Ms. Bruce's deposition.

On February 28, 2013, I again spoke with you regarding not only the outstanding discovery and the objections/lack of responses, but also settlement matters which I will discuss later in another letter.

Interrogatory Number 2: You believe, that notwithstanding a request for the name, address, telephone number and email of every non-expert witness who you intend on having testify at the Formal Hearing in this matter, that a response of merel y "Supervisor Terrace Franklin" is sufficient. Your position is that since he is management (a supervisor) we cannot contact him. Your response, however, leads one to believe that you have not been able to contact him. Either, he is currently an employee, or he is not. If he is not a current employee, then "the clear consensus is that former managers and other former employers are not within the scope of the rule against ex-parte contacts." See *Wright v. Group Health Hospital*, 103 Wash 2d.192, 691P.2d. 564 (Wash. 1984). In addition, the American Bar Association Committee on Ethics and Professional Responsibility has also cited *Wright* for the same proposition in concluding that neither the text nor the comment to Model Rule 4.2 provides a basis for extending [the prohibition on contacting current employees] its coverage to former employees. ABA Comm. on Ethics and Professional Responsibility Formal Op.91-359 (1991).

Thus, the ABA's opinion, as well as that of the Supreme Court of Washington, and the Florida Supreme Court of Florida, *H.B.A. Management, Inc. v. Estate of Mae Schwartz, deceased by and through the personal representative, Alex Schwartz*, 693 So.2d 541 (Fla. 1997) represent the majority view that contact with former managers is not prohibited by any ethics rules since they can longer bind the corporation, or speak on its behalf. Please verify immediately whether Mr. Franklin is a current, or former manager. If he is not a current manager, please be sure to provide me his last known address, telephone number and email address.

With respect to interrogatory number 3, the Judge, contrary to what you have stated in your letter did not indicate that all of the disclosure requirements of Rule 26 did not apply. In fact, on page 3: see Reference to Rule 26, Federal Rules of Civil Procedure. "Reference may be made to Fed.R.Civ.P. 26, where applicable, to address issues not specifically covered by this Pre-hearing Order."

Rule 26 (a)(2)(B) provides in subparts (i-vi) that a retained expert (and a defense medical examiner is not exempt from complying with Rule 26 disclosures) must provide in his/her report (among other matters) the information listed in Rule 26(a)(2)(B)(v) "a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition," and subpart (vi) "a statement of the compensation to be paid for the study and testimony in the case." Irrespective of whether you have sent an email to me regarding the bill paid to the defense medical examiners, the Claimant is entitled to have the response in a sworn answer to interrogatory.

Additionally, the Claimant is entitled to know what physician's charges to date, besides the defense medical examination, have been. For example, conferences with you, or any of the employer/carrier's agents, fees for responding to letters, requests for additional records reviews, etc. I am not required to depose your defense witnesses to find out the information-this is what expert interrogatories are for. That is also the whole purpose of Rule 26. The Plaintiff is

allowed to stand on the responses and opinions set forth within the expert's report, knowing full well that the defense expert cannot "stray" from the opinions expressed therein, lest the Administrative Law Judge strike any opinion testimony beyond the report. Further, the Employer/Carrier has a duty to supplement the disclosure of its own experts under Rule 26(e). The percentage of income or time that an expert witness devotes to expert witness work, as opposed to non-litigation matters, is relevant and discoverable. It goes to the witness's bias or prejudice. In particular, if the witness has testified on behalf of the Employer/Carrier, defendant, or insurance company regularly, then this is clearly discoverable and the very essence of impeachment evidence. Please provide to me within the next 3 days (now that you have had months to do so) full and complete responses to interrogatory number 3, including subparts (v-ix).

Your client's response to Interrogatory number 4 merely cites see "Exhibit 30." It then goes on to state "the insurer has inquired of the employer to see if there is additional information." To date, nearly 3 months have gone by, and no further response has been forthcoming. Your response on February 28, 2013, that "I believe Mr. Terrance Franklin will be the most knowledge [sic] person and I have made inquiries to track him down as well as Ms. Bruce personnel file," does not suffice. We are entitled to know the Claimant's exact job duties, and not to have you then claim that you will "argue the water bucket for mopping could be on wheels and filed[sic] and empty in steps or with a hose, so that no lifting over 10 pounds would be required." Please provide a complete description of the Claimant's job duties, or we will seek a Motion in Limine to present the Employer/Carrier from contesting Ms. Bruce's description of her job duties.

With respect to interrogatory number 7, you did not ask her what her uplifts were. You knew what they were, and for you to claim that your client's calculation of the Claimant's average weekly wage is based on her deposition testimony is disingenuous. We had already indicated elsewhere the Claimant's average weekly wage wage. You can argue all you want that it was the Claimant's ex-husband's unavailability to continue care for their daughter, however, that does not change the calculation of the average weekly wage.

Interrogatory number 8 was insufficiently answered - telling me to look at Rule 33(d) when you have listed 30 exhibits. It assumes that we will somehow ferret out from the dozens of persons listed in those exhibits the individuals with knowledge. If the witnesses are solely the Claimant, the defense medical examiner's Dr. Franke, Dr. York, the vocational rehabilitation counselor, Ms. Smith (and a new vocational expert-who we will be moving to strike) and supervisor Terrance Franklin, we would be satisfied with that response. However, then adding in your February 28, 2013 letter "some of her former employers and medical providers may be called as witnesses, once I get their records," is insufficient. Please supplement your answers required under Rule 26(e) with the names of any former employers and medical providers you intend on calling as witnesses. Otherwise, should you attempt to use other undisclosed witness(es) testimony without having given us updated Answers to Interrogatories we will move to strike the testimony due to unfair prejudice and surprise.

We strongly disagree that you have any right to talk to treating physicians, and conduct ex-parte conferences. They are not your retained experts. The portion of the advisory comments to the 1970 amendments to Rule 26(b)(4) applies to discovery from an expert retained by that party. You have not retained my client's treating experts. If you have, please so advise immediately. We would contend that you have violated our client's privacy rights, and outside the context of a 7(d)(4) DME or a 7(e)/(i) IME, that the HIPAA regulation specific to worker's compensation 45CFR§164.512(l) provides that only the attending physician's first report under 7(d)(2)(LS-1a) and such "periodic reports as to the medical care being rendered" as the District Director "may require" under 7(a) are obtainable by the Employer/Carrier. Nothing else. The carrier has the right to formal discovery in administrative proceedings in which disclosure is controlled by 45C.F.R §164.512(e) and the "core elements" "required statements" proscribed by §164.508(c)(1)-(2) for disclosure under a Qualified Protective Order. The scope of the information to be disclosed under a Qualified Protective Order must be described in the Order with particularity.

Since you have never filed an appropriate request for a disclosure under a Qualified Protective Order, communications with the Claimant's treating physicians is an ex-parte communication, and it is our position that it violates HIPAA, 42 U.S.C. §1320(d), et. seq. (HIPAA) "Courts have interpreted HIPAA as prohibiting ex-parte interviews of a Plaintiff's treating physician in the absence of strict compliance with HIPAA. *In Re: Vioxx* 230 F.R.D. 470, 472 (Ed. La. 2005) (citing *Law v. Zuckerman*, 307 F.Supp.2d. 705, 707 (D.Md. 2004). The Order that you attached is obviously-HIPAA. Having ex-parte contact with the Claimant's physician is also a violation of the patient's physician-patient privilege and may also subject you to being a witness in this case.

Treating physicians who testify in a deposition under the expert witness evidence rule as to their diagnosis, treatment and prognoses are "experts" within the meaning of the discovery rule and are entitled to a reasonable fee, rather than statutory witness fees payable to fact witnesses. Federal Rules Evid. Rule 702; Fed.R.Civ.P. Rule 26(b)(4)(C), *Grant v. Otis Elevator Co.*, 199 F.R.D. 673 (N.D. Okla. 2001).

The citation of authority that you attached to your February 28, 2013 letter, relies upon *Marine Petroleum Co. v. Champlin Petroleum Co.*, 641 F.2d 1984,1992 (D.C. Cir. 1980) where the Circuit Court was dealing with an expert in Federal Energy Administration Regulatory matters. It was not a physician. It was also a decade before HIPAA was even dreamt about.

If you will not respond to interrogatory number 14 on the basis that not only do you claim to have a right to talk with the Claimant's treating physicians, but that such information gained (responses to correspondence) is protected work product, I will call it up for hearing, and move for sanctions. It is irreconcilable to claim on the one hand that your correspondence to your defense medical examiner is discoverable, but that the information submitted to the treating physicians is not. You claim that the waiver did not occur, however, you did not list any

information that describe[s] the nature of the documents, communications, or tangible things not produced or disclosed – and do so in a manner that without revealing information itself privileged or protected, will enable other parties to assess the claim. See F.R.C.P. 26(b)(5)(A)(i-ii). Thus, you have waived any claimed privilege.

The time has long since sailed for your client to be able to produce a copy of my client's pre-employment physical examination (if one was conducted). Please provide the information requested in 17, and 17(a).

Interrogatory number 18: you indicated back on February 28, 2013, that you would provide a CD disc of the surveillance film. That has not happened. You have already deposed the Claimant and shown her two photographs, and attached them to the deposition. Therefore, there has been a waiver of any supposed privilege regarding the surveillance. Furthermore, the employer/carrier must produce for Claimant's inspection not only those portions of film or tape which it intends to introduce at trial, but all films or tapes of the Claimant in its possession. See *Delaveaux v. Ford Motor Co.*, 518 F.Supp.1249,1252 (E.D. Wis. 1981) see also *Daniels v. National R.R. Passenger Corporation*, 110 F.R.D. 160(S.D.N.Y. 1986).

RESPONSES TO REQUEST FOR PRODUCTION

Request number 8: sought a copy of the Claimant's personnel file. Please advise immediately as to the status of whether such documents exist or do not. Also advise as to the other "Onsite Medical Clinic" records.

Request number 12: provide to me other accident records, if there are any.

Request number 13: provide a response attaching to the request for production all payments made to the defense medical examiners. A payout log will not suffice, as it will contain many other entries, unless you redact the other entries so that we would know which dates and which entries total up to which amount.

Request number 14: seeks not merely a printout of the records received, but all medical records and bills received by the Employer/Carrier/Servicing Agent concerning medical treatment/evaluations rendered to the Claimant by any healthcare provider. Any reports or records received from any facilities are requested, as well as any medical records, supplemental reports/responses and bills received from the defense independent medical examiners. F.R.C.P. 26(b)(4)(c) does not exempt from production the medical records and bills of a defense medical examiner.

Request number 15: at the time of your objections served on December 19, 2012, no specific objection other than "work product" was made. Thus, under Rule 26(b)(5)(A)(i-ii) you did not properly describe the nature of the documents, communications or tangible things not produced

or disclosed-and do so in a manner that, without revealing the information itself privileged or protected, will enable other parties to assess the claim. Obviously, we are not seeking your opinion work-product privileged material; such as mental impressions, opinions, and legal theories. Thus, your citation to F.R.C.P. 26(b)(3) trial-preparation" is inapplicable. The work-product privilege generally protects "the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case, *United States v. Nobles*, 422 U.S. 225, 238 (1975); see also *Carolina Power & Light Co. v. 3M Co.*, 278 F.R.D. 156 (E.D.N.C. 2011). Also, it is not a prerequisite to discovery of an expert's opinion to depose the witness. Thus, any claim of protection from disclosure under 26(b)(4) is also unavailing. If photographs, correspondence (of any kind) or for that matter any documents responsive to request to produce number 15 were sent by you to any physician (exclusive of work product opinion material) then we are entitled to receive copies of it.

Request number 16: you indicated that you would provide it, but I have not received a compensation payout log yet.

Request number 21: see case citations to interrogatory number 18's objection.

Request number 23(1)-(iii): seeks communications with any of the claimant's treating physicians. These are materials that request information such as medical records, reports, work restrictions, date of maximum medical improvement, impairment rating; authorization for treatment/for limitation on the scope of treatment to be authorized; and payments made to any of the Claimant's healthcare providers for record review, reports, conference fees, impairment ratings/maximum medical improvement reports. These are not your work-product protected opinions. Rather, these are communications requesting from my client's treating physician the information as requested in 23(i-iii).

Request number 23(iv) seeks statements, invoices received from any of the Claimant's treating healthcare providers, as well as defense medical examiners or second medical opinion providers, along with any documents provided to those physicians and/or received by the employer/carrier/servicing agent, its employees, agents or attorneys. This is exactly the type of material that you are obligated to produce so that this is not a game of blind-man's bluff. Your communications with the healthcare providers, so long as they do not disclose your mental impressions are not privileged. The insurer's routine correspondence is relevant, since it may contain payment information, requests that the doctor "hurry things up" and/or request for dates of maximum medical improvement, impairment ratings, and such other information that is relevant.

By the way, your citation to Judge Etchingham's Order Granting the Employer's Joint Motion for Clarification of the July 10, 2008 Order is not supportive of your objections. There, you as counsel for Ceres, sought to retroactively allow you to contact the Claimant's treating physician because apparently, you claimed to have been unaware of any order specifically prohibiting you

from contacting Dr. Jameson. Apparently, this is a standard tactic by which you have taken in several other cases. You will not be allowed to do so here, nor are you to speak with any of the Claimant's treating physicians, as those physicians are experts for which the Claimant will be seeking to introduce their expert opinions. Furthermore, no contact is to be made with any of the Claimant's prior (pre-accident) physicians under any circumstances, other than by requesting their records via subpoena and upon prior notice of the request for issuance of the subpoena. See F.R.C.P. Rule 45.

If we cannot work these issues out within the next 3 days, I will submit to the judge my initial letter to you, your response, this response, and a request that the judge rule on the matters contained within the letters as if they were formal pleadings. This has taken way too long to resolve, and it seems that you have no desire to do so.

Sincerely,

Howard S. Grossman
howard@grossmanattorneys.com
HSG/sh

[redacted]

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March 15, 2013

By Certified Mail
Howard S. Grossman, Esquire
1098 NW Boca Raton Blvd.
Boca Raton, FL 33432

Re: [redacted] DynCorp Int'l and AIG; [redacted]

Dear Mr. Grossman:

I am responding to your March 12 letter concerning my discovery responses. I would initially note that I will not respond to points I have already responded to in my previously letters and e-mails. There is not point going back and forward where I say I am right and you merely repeat your claim that I am wrong.

I would note that I have already produced the employer's personnel files for [redacted], the medical file they had for her, printouts of all compensation payments and medical payments, including payments to expert witnesses. The surveillance film has been ordered. While I believe you are only entitled to see what I will offer at trial, I will review the film, and I likely will just give it all to you.

As for treating physicians, the Advisory Committee note could not be clearer: "It should be noted that the subdivision [Rule 26(b)(4)] does not address itself to the expert whose information was not acquired in preparation for trial but rather because he was an actor or viewer with respect to transactions or occurrences that are part of the subject matter of the lawsuit. Such an expert should be treated as an ordinary witness." Clearly this covers the treatment by treating physicians, they are ordinary witnesses as far as their treatment, and can be questioned about it, just like any witness can be communicated with. Of course, by bringing her claim, [redacted] waived the physician-patient privilege. Now if you retain a treating doctor as an expert witness, then I cannot talk to them about their discussions with you and what work they have done for you, but anything before they were retained is still in the open, and thus I can talk to them about that - their treatment and questions related to that. Please immediately send me copies of your retainer agreement with whoever you have retainer as an expert witness. If I do not receive them by March 20, I will assume the treating physicians have not been retained by you.

As for HIPAA, I direct your attention to 45 C.F.R. §164.512(b)(v)(B), which allows disclosures where : " The protected health information that is disclosed consist of findings concerning a work-related illness or injury or a workplace -related medical surveillance." Moreover, in virtually all cases, I already have all the patient/claimant's medical records and thus their medical information, so I am not asking for additional patient medical information, but rather I am asking about the information I already have.

You asked about the subpoena to Mr. Wood. He responded he has no records since his company is J & J Transportation Services. While [redacted] in her interrogatory answers stated that is the company she worked for, that was not true. In fact, she worked for JNJ Transportation Services, and we have located them and sent them a subpoena.

As for Mr. Franklin, as you noted, there is a split in authority as to whether an adversary can talk to an ex-manager. We will side with the cases which say you cannot. Moreover, it turns out the Employer has no record for a Terrace Franklin, apparently another inaccurate statement by your client. I am attempting to track down who was in fact her supervisor.

You contend that because the Judge said in his pretrial order "Reference may be made to" FRCP 26, he adopted everything in that rule. With all due respect, that makes no sense, and is obviously wrong. If that were the case, we would have had to have a discovery plan and a discovery order, after a meet and confer, and that did not happen. Moreover, you claim to have retained all the treating doctors as retained experts. If that is the case, and your argument was correct, you would have to produce all the information FRCP 26 (a)(2)(B) requires, and you have not even attempted to provide any of it.

I am still searching for a job description, and in any case, I would certainly agree if evidence of job duties are not produced in discovery, I cannot have someone from the employer testify about them, or produce a job description at trial that was not produced in discovery. However, as noted above, I am still trying to track down [redacted]'s supervisor, since the name she gave us was wrong.

Finally, I would note I have already given you all my exhibits I have so far. I can say currently my only witnesses are the admissions by the Claimant, Dr. Franke, Dr. York, Ms. Smith, vocational expert Sandy Handy who is follow-up on Ms. Smith's report, and [redacted]'s supervisor who I hope to locate. However, my recent subpoenas based on information [redacted] wrongly withheld, will likely reveal other witnesses.

Sincerely,

SEYFARTH SHAW LLP

Lawrence P. Postol

LPP:edr
cc: Adam Howard

MAR 2 : 2013

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