

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMES A. DRAKE : CIVIL ACTION
 :
 v. :
 :
 :
 J.B. HUNT TRANSPORT, INC. and :
 PAUL A. BLUHM : NO. 97-5641

MEMORANDUM ORDER

This is an action to recover for injuries allegedly sustained in an automobile accident. Presently before the court are defendants' motion to compel an independent orthopedic examination of plaintiff by a physician of defendants' choice within this district, and plaintiff's motion for a protective order to preclude the examination. The pertinent facts are as follow.

Plaintiff sued defendants in the Supreme Court of Cortland County, New York to recover for injuries he allegedly suffered in an automobile accident in Schuylkill County, Pennsylvania. Defendants removed the action to the United States District Court for the Northern District of New York and then moved successfully to have the action transferred to this court.

Plaintiff resides in McGraw, Cortland County, New York. McGraw is over 200 miles from Philadelphia but barely 40 miles from Binghamton and Syracuse, New York. Plaintiff does not contest that defendants are entitled to have him examined by a

physician of their choice. Rather, plaintiff represents that his financial situation is precarious and it would be an undue hardship for him to travel to Philadelphia for such an examination.

Some courts have held that plaintiffs in personal injury actions are subject to physical examinations pursuant to Fed. R. Civ. P. 35 in the district in which the trial will be held. See, e.g., Costanza v. Monty, 50 F.R.D. 75, 76 (E.D. Wisc. 1970); Baird v. Quality Foods, Inc., 47 F.R.D. 212, 213 (E.D. La. 1969); Warren v. Weber & Heidenthaler, Inc., 134 F. Supp. 524, 524-25 (D. Mass. 1955); Pierce v. Brovig, 16 F.R.D. 569 (S.D.N.Y. 1954). In most of those cases, however, the plaintiffs had chosen to bring suit in that district. See, e.g., Baird, 47 F.R.D. at 213; Warren, 134 F. Supp. at 525; Pierce, 16 F.R.D. at 570. Those courts understandably concluded that a plaintiff should not be heard to complain about having to submit to an examination in the district in which he had chosen to bring suit.

Plaintiff, however, did not choose to bring this suit in this district. He chose to bring suit in Cortland County, New York where he resides. Under New York law, venue is proper in any county in which any of the parties resides. See N.Y. C.P.L.R. § 503.

Moreover, several courts have recognized that when the travel expenses necessary to attend a physical examination far

from the plaintiff's residence would be unduly burdensome or are otherwise avoidable, it is appropriate to require the defendants to advance to a plaintiff funds sufficient to cover his reasonable travel and lodging expenses. See McCloskey v. United Parcel Service General Svces. Co., 171 F.R.D. 268, 269 (D. Or. 1997); Eckmyre v. Lambert, 1988 WL 573858, *1 (D. Kan. Sept. 6, 1988); Warren, 134 F. Supp. at 525 n.1. The amount of such an advance may be deducted from the amount of plaintiff's recovery, if any. See Eckmyre, 1988 WL 573858, at *1; Warren, 134 F. Supp. at 525 n.1.

Defendants have not contested that it would be a financial hardship for plaintiff to attend a physical examination in this district. The court will require plaintiff to submit to a physical examination in this district on condition that defendants advance to him reasonable travel and lodging expenses. Defendants may elect to conduct the examination in Syracuse or Binghamton, in which event defendants will not be required to assume plaintiff's expenses.

ACCORDINGLY, this day of February, 1999, upon consideration of defendants' Motion to Compel Independent Orthopedic Examination of Plaintiff (Doc. #8) and plaintiff's Motion for Protective Order (Doc. #9), **IT IS HEREBY ORDERED** that defendants' Motion is **GRANTED** in that defendants may require plaintiff to submit to an orthopedic examination in this district

if they advance reasonable travel and lodging expenses to plaintiff, and plaintiff's Motion is **DENIED**.

BY THE COURT:

JAY C. WALDMAN, J.