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Letter Decision and Order on Motion to Compel Signed Medical Release

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RE: HF No. 27, 2016/17 – Nohemi Sanchez v. Interbake Foods, LLC and American Zurich Insurance Co.

Dear Ms. Nasser and Ms. Wosje:

The Department of Labor and Regulation (Department) has received Employer and Insurer's Motion to Compel Signed Medical Release and Claimant's Response. All submissions have been taken under consideration.

Claimant filed this Petition for Workers' Compensation Benefits on August 16, 2016, alleging three separate injuries took place in July 2013, July 2014, and August 2016. Claimant is alleging she is permanently and totally disabled as a result of these injuries. Claimant served discovery requests on September 20, 2016. Claimant produced a limited medical release to counsel for Employer and Insurer on November 3, 2017, pursuant to verbal discussions between Claimant and Employer and Insurer. Without Employer and Insurer's request, Claimant produced medical records on two occasions, first on February 22, 2019 and then on September 10, 2019. On July 30, 2019, Employer and Insurer sent a medical release to Claimant for signature. Claimant did not sign the release. Employer and Insurer requested an executed medical release on October 1, 2019.

On October 10, 2019, Claimant sent a letter to Employer and Insurer detailing her objection to providing an unlimited release, arguing that it makes it impossible to preserve her rights to assert privilege as to non-relevant information. Claimant offered to procure all relevant records and provide them to Employer and Insurer with a detailed privilege log for

any materials redacted or not produced under assertion of privilege. Employer and Insurer filed this Motion to Compel Signed Medical Release on December 13, 2019.

Pursuant to SDCL 62-4-1.3, Employer and Insurer have moved the Department for an Order requiring Claimant to produce a signed release of the medical records or reports relevant to the pending claim. SDCL 62-4-1.3 provides, in pertinent part,

> Upon the request of an employer, an employee subject to this title shall supply a signed medical release to allow copying of any medical record and report relevant to the employee's claim for workers' compensation. If the employee objects to the relevance of any medical record or report, an administrative law judge within the department shall, upon a showing of good cause for the release of such record or report, approve the release of the medical record or report relevant to the employee's claim, to the employer. The employer shall, upon request, provide a copy of all medical records and reports received, to the employee, without cost to the employee.

Claimant argues that she is entitled, under SDCL 62-4-1.3, to object to the relevance of medical records, and in order to assert any objections, she must first be allowed to obtain her own records to determine if any such non-relevant information is contained therein. Claimant further argues that to interpret SDCL 62-4-1.3 otherwise would render her right to object meaningless and strip her of deriving equal benefit of discovery procedures designed to protect parties from “annoyance, embarrassment, oppression, or undue burden or expense.” SDCL 62-2-3. She also argues that under SDCL 19-2-3, the waiver of privilege “shall be narrow in scope, closely tailored to the time period or subject matter of the claim.” Claimant argues that Employer and Insurer have set forth no evidence suggesting that they cannot obtain all information relevant to this claim by the method proposed by Claimant’s October 10, 2019 letter, together with depositions and interrogatories. There have been no records withheld or redacted in the sets of relevant treating physicians to date.

Employer and Insurer assert that SDCL 62-4-1.3 does not give Claimant the right to heavily modify or restrict a medical release, and that the proper process would be to present objections to the Department. Claimant has not moved the Department to consider her objections prior to discussion in this Motion by Employer and Insurer. They further argue that good cause exists for Claimant to execute a full medical release. Claimant is seeking permanent total disability benefits and has alleged three separate injuries spanning over three years. Claimant has received extensive medical treatment, and Employer and Insurer assert that important records are missing from the documents received from Claimant’s counsel. Employer and Insurer argue that a full medical history of Claimant is necessary and relevant to these claims and resolution of this matter.

Under 62-4-1.3, Claimant may object to the relevance of medical records and reports. Claimant asserts that she must be able to filter these records by passing them through her counsel before sending which documents she believes are relevant to Employer and Insurer. However, 62-4-1.3 has provided the proper procedure for objection. If the employee objects to the relevance of a medical record, he or she may make a

showing of good cause to an administrative law judge. 62-4-1.3 does not allow Claimant to release only the records she has personally deemed relevant without showing good cause to the Department. If Claimant has concerns about the relevancy of specific records, she may move the Department to consider the documents in camera.

In addition to her arguments under 62-4-1.3, Claimant also argues that Employer and Insurer have failed to make good faith efforts to confer as required by SDCL 15-6-37(a)(2) which states, in pertinent part, “The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action.” Claimant has further argued that the required communication to meet SDCL 15-6-37(a)(2) was addressed by the South Dakota Supreme Court in *Krueger v. Grinnell Mutual Reinsurance Co.*, 921 N.W.2d 689 (2018). In *Krueger*, the Court concluded that merely sending a letter is not enough to meet the demands of SDCL 15-6-37(a)(2). The Court stated, “[a] single letter between counsel which address the discovery dispute … does not satisfy the duty to confer.” *Id* at ¶17 (citations omitted). The Court further found, “[e]ven if more than one letter is sent, courts still examine the quality of the efforts to confer put forth by the moving party.” *Id* at ¶18 (citations omitted). Claimant argues that Employer and Insurer’s letter requests for medical release were not enough to count as having conferred in good faith. Claimant made an effort to explain her objection to giving an unlimited release, and Employer and Insurer did not confer about the objection. Instead, Employer and Insurer filed this Motion to Compel.

Employer and Insurer argue that in *Krueger,* the Court addressed the potential futility of an attempt to confer, “[w]hen a moving party argues that an attempt to meet and confer would have been futile, the party should still demonstrate facts indicating good faith efforts at communication were met with uncooperative and intractable resistance.” The Court further concluded, “[u]ltimately, it is not the quantity, but the quality, of the communication a court should consider when addressing a motion to compel.” *Id* at ¶25. Employer and Insurer argue that Claimant has established her privacy concerns regarding her medical information. The original medical release sent to Claimant by Employer and Insurer requested, “[a]ll past and future medical, psychiatric, psychological, treatment records, chiropractic records, health insurance and billing records.” Claimant’s version of the release did not include psychiatric and psychological records and restricted Employer and Insurer from “the procurement of opinions or other information” concerning Claimant. Employer and Insurer further argue that these communications from Claimant made it clear that they would not be able to receive records directly, but instead, the records would flow through Claimant’s counsel’s office, Claimant would make a determination of relevance, and then Employer and Insurer would be allowed to receive only those records Claimant and her counsel deemed relevant. From these communications with Claimant, Employer and Insurer decided that further attempts to acquire a signed medical release were futile.

In this matter, the Department is not persuaded that communication between the parties would have been futile. While Claimant’s desire to filter medical records through her counsel is, as explained above, inappropriate, there is no indication that she would

have been wholly unwilling to discuss the matter to avoid judicial involvement. As the Court stated in *Krueger*, “there is no evidence suggesting Grinnell was intractable to the point of rendering the meet and confer requirement futile.” *Id* at ¶23. The same can be said here about Claimant. To meet the requirements of conferring in good faith, Employer and Insurer should have responded to Claimant’s letter of October 10, 2019.

However, the Department finds that there is good cause to grant Employer and Insurer’s motion. While conferring in good faith has not properly occurred in this matter, the Department is persuaded that it is appropriate to compel the release of medical records under 62-4-1.3 for the reasons stated above.

Employer and Insurer’s Motion to Compel Signed Medical Release is granted. The Parties will consider this letter to be the Order of the Department.

SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION

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Michelle M. Faw
Administrative Law Judge