

March 18, 2021

[REDACTED]

**LETTER DECISION ON  
MOTION TO COMPEL**

[REDACTED]

RE: HF No. 52, 2018/19 – Scott Niles v. IUOE Local 49 and SFM Mutual Insurance Company

Dear Mr. Niles and Ms. Sherrill:

This letter addresses Employer and Insurer’s Motion to Compel Claimant’s Submission to an Independent Medical Examination and all responsive submissions. International Union of Operating Engineers a/k/a IUOE Local 49 and SFM Mutual Insurance Company (Employer and Insurer) have moved the Department of Labor & Regulation (Department) to compel Claimant, Scott Niles (Niles) to attend an Independent Medical Examination (IME) in Rapid City, South Dakota on May 24, 2021.

**Background**

Niles alleges that on or about November 17, 2016, he sustained an injury while in the course and scope of his employment with Employer. He specifically alleges that he suffered injury to his ear, head, neck, and back when an airbag deployed for no reason in the vehicle he was driving. Employer and Insurer answered that neither had sufficient information or knowledge to admit or deny Niles’s work-related incident or the nature and extent of his alleged injuries.

Niles submitted a Petition for Hearing on November 13, 2017. On October 8, 2019, a telephonic hearing was held between the parties and the Department regarding the status of an IME. At the telephonic hearing, Employer and Insurer stated they were

waiting on the remaining medical records. Another telephonic hearing was held on February 3, 2020, at which Employer and Insurer explained they were having difficulty securing an appointment with a licensed ear, nose, and throat (ENT) examiner in South Dakota. An independent medical examiner was secured, and a letter was sent to Niles on February 6, 2020 notifying him of the appointment. Niles was unhappy with the selected examiner, and Employer and Insurer agreed to consider a different examiner. Niles provided recommended examiners, but Employer and Insurer did not agree to his suggestions. On February 14, 2020, Employer and Insurer informed the Department that they wished to locate a different neurologist/ENT specialist that had been suggested by Niles.

On February 20, 2020, Employer and Insurer informed Niles that an IME had been secured in Colorado. Employer and Insurer requested Niles availability. On February 24, 2020, Niles responded by email that he would not be available until the middle to end of April. On April 9, 2020, Employer and Insurer emailed Niles requesting his availability in May. Niles responded that he would not be available until fall. Employer and Insurer responded requesting at least a three-week notice of when Niles might be available.

On October 2, 2020, an email was sent to Niles requesting his availability for an IME. He responded that he was working in Murdo, South Dakota until March and would only have one week off at Christmas. A telephonic hearing was held between the Department and the Parties on October 26, 2020. Following the telephonic hearing, the parties emailed back and forth. In an email, Niles indicated he would make himself available May 24, 2021. Employer and Insurer have secured an IME for May 24, 2021 in Rapid City, South Dakota. Niles home address is located in Rapid City, South Dakota. Employer and Insurer have moved the department for this motion to compel Niles' attendance at the May 24, 2021 IME due to the multiple times Niles has stated he would be available but then is unavailable for an IME.

### **Authority to Compel**

The Department must first determine whether it has the authority to compel Niles' attendance at the IME. Employer/Insurer have provided SDCL 15-6-35(a) which allows the Circuit Court to order a party to submit to a physical examination.

In an action in which the mental or physical condition of a party or the consanguinity of a party with another person or party is in controversy, the court in which the action is pending may order such person or party to submit to a physical or mental examination or blood test by a physician. The order may be made only on motion for good cause shown and upon notice to the person or party to be examined and to all other persons or parties involved and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

The South Dakota Supreme Court has held that “proceeding’s under Work[er’s] Compensation Law . . . are purely statutory, and the rights of the parties and the manner of procedure under the law must be determined by its provisions.” *Martin v Am. Colloid Co.*, 2011 S.D. 57, ¶ 12, 804 N.W.2d 65, 68. Citing *Caldwell v. John Morrell & Co.*, 489 N.W.2d 353, 364 (S.D.1992). There is no specific statute that provides the Department with the authority to compel attendance at an IME. The Court has further held that “[t]he Department of Labor frequently observes the rules of civil procedure, particularly when . . . the parties are represented by excellent legal counsel. The rules of civil procedure provide litigants with the benefit of centuries of evolving jurisprudence. These rules are time tested and have weighed the conflicting policies confronted while litigating cases.” *Homan v. Wal-mart & Am. Home Assurance Co*, 2009 WL 3199118, at \*3 (S.D. Dept. Lab. Sept 30, 2009). The Department is reluctant to assert an authority to compel a party to submit to physical examination based on the rules of civil procedure in a matter where a party is not represented, as Niles is in this matter. The Department is not persuaded that it would be appropriate to apply the rules of civil procedure in this matter to compel Niles to attend the IME. Employer and Insurer’s Motion to Compel is denied.

### **Failure to Attend and Requests Related to IME**

Next the Department will address other issues and requests raised in the submissions. Employer and Insurer’s right to an IME, by the medical practitioner of their choice, is provided by SDCL 62-7-1 which addresses compulsory medical examination of an employee at the request of an employer:

An employee entitled to receive disability payments shall, if requested by the employer, submit himself or herself at the expense of the employer for examination to a duly qualified medical practitioner or surgeon selected by the employer, at a time and place reasonably convenient for the employee, as soon as practicable after the injury, and also one week after the first

examination, and thereafter at intervals not oftener than once every four weeks. The examination shall be for the purpose of determining the nature, extent, and probable duration of the injury received by the employee, and for the purpose of ascertaining the amount of compensation which may be due the employee from time to time for disability according to the provisions of this title.

Failing to attend the compulsory IME could result in loss of benefits for Niles. SDCL 62-7-3 provides:

If the employee refuses to submit himself or herself to examination pursuant to § 62-7-1 or unnecessarily obstructs the examination, the employee's right to compensation payments shall be temporarily suspended until the examination takes place. No compensation is payable under this title for such period.

While, as stated above, the Department will not compel Niles to attend the IME, Niles' must understand that his potential entitlement to compensation is at risk if he does not attend.

Niles has requested that he be provided with a list of questions that the doctor will ask at the IME. There is no authority that requires a list of questions be provided to an employee before an IME. However, Niles may have his own medical professional present during the IME at his own expense under SDCL 62-7-2 which states, in pertinent part, "[t]he examination provided by § 62-7-1 shall be made in the presence of a duly qualified medical practitioner or surgeon employed and paid for by the employee, if the employee so desires." Therefore, Niles request for questions ahead of the IME is denied.

Niles has also requested that he be compensated for any lost wages due to attendance at the IME. However, the Department does not have authority to grant him lost wages. Therefore, Niles request for lost wages is denied.

**Order:**

In accordance with the decisions above, Employer and Insurer's Motion to Compel Claimant's Submission to an Independent Medical Examination is DENIED;

Niles request for pre-IME questions is DENIED; and

Niles request for lost wages for IME is DENIED.

The Parties will consider this letter to be the Order of the Department.

Sincerely,

A handwritten signature in blue ink that reads "Michelle Faw". The signature is written in a cursive, flowing style.

Michelle M. Faw  
Administrative Law Judge