

December 14, 2022

Jolene Nasser
Nasser Law Firm, PC
204 South Main Avenue
Sioux Falls, SD 57104

Kerri Cook Huber
Gunderson | Palmer | Nelson | Ashmore, LLP
PO Box 8045
Rapid City, SD 57709

RE: HF No. 56, 2019/20 – Tonya Schoenfelder v. Power Wellness Management, LLC and Zurich American Insurance Company

Greetings:

This letter addresses Power Wellness Management, LLC and Zurich American Insurance Company (Employer and Insurer) Motion to Compel Tonya Schoenfelder (Schoenfelder) to attend an Independent Medical Examination (IME) in the above-referenced matter.

The current matter arises from a work-related injury sustained by Schoenfelder on June 15, 2015, which was accepted as compensable by Employer and Insurer. In January 2016, Schoenfelder underwent surgery on her hip. Following the surgery, she was diagnosed with Complex Regional Pain Syndrome (CRPS). On July 16, 2016, Employer and Insurer sent Schoenfelder for an IME with Dr. Elkins who confirmed CRPS, opined it was related to the work injury, and that she was not yet at maximum medical improvement (MMI). On March 6, 2017, Employer and Insurer required Schoenfelder to complete a

Functional Capacity Evaluation (FCE). Schoenfelder underwent a second hip surgery on April 28, 2017.

Following the surgery, Employer and Insurer required a third IME with Dr. Bissell who opines that all of Schoenfelder's treatment and need for restrictions were causally related to the work injury and that her medical care, diagnoses, and work restrictions were necessary and appropriate. On July 5, 2019, Employer and Insurer sent Schoenfelder for a fourth IME with Dr. Martin. Dr. Martin opined that the CRPS diagnosis was not appropriate as he does not believe the condition exists. To support his conclusion, he cited a book he had written. He provided an impairment rating that did not include CRPS, and he concluded she was at MMI. He further stated that she had no work restrictions because the condition that supposedly limited her did not exist. His opinion contradicted the conclusions of Schoenfelder's treating physicians and the three previous IMEs. As a result of Dr. Martin's IME opinion, Employer and Insurer denied Schoenfelder all workers' compensation benefits since July 2019. On November 15, 2019, Schoenfelder submitted a Petition for Workers' Compensation Benefits to the Department of Labor & Regulation (Department).

Employer and Insurer scheduled an IME with Dr. Bissell in Dakota Dunes. Schoenfelder requested the IME be canceled. She requested that the IME take place in Sioux Falls. Employer and Insurer found Dr. Flescher in Sioux Falls to conduct the IME. The appointment has not been scheduled. Schoenfelder informed Employer and Insurer that she intended to have a registered nurse attend with her.

Employer and Insurer have moved to compel Schoenfelder to attend an IME pursuant to SDCL 62-7-1 without the presence of Registered Nurse Denise Reck (Reck). SDCL 62-7-1 provides:

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.

Schoenfelder objects to attending an additional IME. She asserts that Employer and Insurer are not requiring the IME to determine the nature, extent and probable duration of the injury as required by SDCL 62-7-1, but instead, are merely attempting to secure a new opinion to sustain a denial that was not medically supported. She argues that an IME for such a purpose is not permissible under SDCL 62-7-1. She further argues that Employer and Insurer are required to make a showing of necessity pursuant to SDCL 15-6-35 which provides:

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 (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). While the Department may look to the rules of Civil

Procedure under Title 15 for guidance, Title 62 provides the legislative intent and guiding authority regarding workers' compensation provisions. Title 62 does not contain a specific statute that provides the Department with the authority to compel attendance at an IME. The effect of failing to submit to an exam is provided by SDCL 62-7-3 which states:

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.

Therefore, the Department cannot compel Schoenfelder to attend the IME, but if Schoenfelder does not submit herself for the IME, the result would be the temporary suspension of her benefits.

The next question is whether Schoenfelder may have Reck attend the IME. Employer and Insurer assert that SDCL 62-7-2 allows the presence of a duly qualified medical practitioner practicing within the scope of her profession, but they assert Reck does not meet those criteria. Reck has been employed as a legal nurse consultant since 2006 and has not treated patients for at least 16 years. SDCL 62-7-2 provides:

The 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. If the examination is made by a surgeon engaged by the employer and the injured employee has no surgeon present at the examination, the surgeon making the examination at the instance of the employer shall deliver to the injured employee, upon the employee's request or that of the employee's representative, a statement in writing of the condition and extent of the injury to the same extent that the surgeon reports to the employer.

The Court has stated

When conducting statutory interpretation, we determine the intent of a statute "from what the Legislature said, rather than what [we] think it should have said, and ... must confine [ourselves] to the language used." *Puetz Corp.*, 2015 S.D. 82, ¶ 16, 871 N.W.2d at 637 (quoting *State v. Clark*, 2011

S.D. 20, ¶ 5, 798 N.W.2d 160, 162). “Words and phrases in a statute must be given their plain meaning and effect. When the language in a statute is clear, certain, and unambiguous, there is no reason for construction, and this Court’s only function is to declare the meaning of the statute as clearly expressed.”

Long v. State, 2017 S.D. 78, ¶ 13, 904 N.W.2d 358, 364

To attend the IME, SDCL 62-7-2 requires that Reck be a “duly qualified medical practitioner or surgeon employed and paid for by the employee.” SDCL 62-1-1.1. defines medical practitioner as “a health care provider licensed and practicing within the scope of his [or her] profession under Title 36.” Title 36 offers a broad array of definitions for a variety of medical practitioners and healthcare professionals. SDCL 36-9-1 defines registered nurse as “any person authorized under this chapter to practice nursing as defined in § 36-9-3.” SDCL 36-9-3 provides

The practice of a registered nurse includes:

- (1) Providing comprehensive nursing assessment of health status of patients;
- (2) Collaborating with the health care team to develop and coordinate an integrated patient-centered health care plan;
- (3) Developing the comprehensive patient-centered health care plan, including:
 - (a) Establishing nursing diagnosis;
 - (b) Setting goals to meet identified health care needs; and
 - (c) Prescribing nursing interventions;
- (4) Implementing nursing care through the execution of independent nursing strategies and the provision of regimens requested, ordered, or prescribed by authorized health care providers;
- (5) Evaluating responses to interventions and the effectiveness of the plan of care;
- (6) Designing and implementing teaching plans based on patient needs;
- (7) Delegating and assigning nursing interventions to implement the plan of care;
- (8) Providing for the maintenance of safe and effective nursing care rendered directly or indirectly;
- (9) Advocating for the best interest of the patient;
- (10) Communicating and collaborating with other health care providers in the management of health care and the implementation of the total health care regimen within and across settings;

- (11) Managing, supervising, and evaluating the practice of nursing;
- (12) Teaching the theory and practice of nursing;
- (13) Participating in development of health care policies, procedures, and systems; and
- (14) Other acts that require education and training consistent with professional standards as prescribed by the board, by rules promulgated pursuant to chapter 1-26, and commensurate with the registered nurse's education, demonstrated competence, and experience.

In a letter to Schoenfelder's counsel on July 16, 2020, The Board of Nursing wrote that a registered nurse who practices legal consulting is practicing within the scope of her profession. The Board specifically noted that such consultation falls under SDCL 36-9-3(8) and (14). (14) specifically defers to professional standards as prescribed by the Board. For these reasons, the Department concludes that Reck would be practicing in the scope of her profession if she were to attend Schoenfelder's IME, and she is thus "a health care provider licensed and practicing within the scope of his [or her] profession under Title 36" pursuant to SDCL 62-1-1.1.

Employer and Insurer's Motion to Compel Tonya Schoenfelder to attend an Independent Medical Examination is DENIED. If Schoenfelder chooses to attend the IME, Reck may attend pursuant to SDCL 62-7-2.

Sincerely,



Michelle M. Faw
Administrative Law Judge

MMF/das