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April 10, 2023

Idaho Industrial Commission
PO Box 83720
Boise, ID 83720

RE: Proposed JRP 3 – Medical Release

Dear Commissioners:

I write to express my opposition regarding a proposed change to JRP 3 (please see attached). I understand that this proposed rule change may be introduced and enacted on or after May 10, 2023 when the Advisory Council meets again. I write in opposition to this rule and urge you not to adopt it.

**Systems are games.**

I have been representing injured workers in Idaho's system for just over 10 years. During that time, I can count on one hand the number of times I saw any advance in our system in favor of injured workers. To be fair there have been some advances, such as permitting additional rights for first responders and streamlining the lump sum process. But meaningful increases in benefits, compensation, or rights to the injured workers of our state have been few and far between. Moreover, I have yet to recall any administrative rule that has benefited Claimants in any meaningful way.

In contrast, I regularly see actions by other interested parties to chip away at the rights of Claimants in our system. Over time, I admit I have had to fight to not become jaded as to the principles the system claims to uphold. It is frustrating to read about the "sure and certain relief" mentioned in IC §72-201 and see how so many parties in this system approach it as a game as they work to reduce the protections and benefits provided to Claimants. This slippery slope is not steep but definitely slanted. Perhaps for some it is just lip service to a principle most largely ignore (or perhaps do not believe). The workers' compensation system is just a game for most parties in the system.

1. It is a game for sureties who are trying to make money in the market.
2. It is a game for third party administrators who are trying to make money and keep their out of state sureties as clients.
3. It is a game for medical providers who are trying to make a living by keeping sureties just happy enough to approve the surgery or other care.
4. It is a game for the expert witnesses who provide medical exams and testimony in the system.

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5. It is a game for adjusters who are trying to find ways to limit or deny care or benefits to a Claimant in an effort to save money.
6. It is a game for employers who are trying to save money on premiums and run their business so as not to increase costs and minimize the effect on their bottom line.
7. It is a game for defense counsel who advocate for sureties and employers and aggressively pursue any means to advocate on their client's behalf.
8. It is a game for legislators who pass laws that affect the outcome of the system in service to their own political game.

In this game, everyone is angling for advantage for their own interests. But in almost every instance the advantage they get comes at a cost to Claimants.

I am not being critical of the system by describing it as a game. I cannot think of any adversarial system that does not become a game by virtue of its nature.[1] Strategies are developed in an effort to accomplish a goal or outcome within the system. In any game, opponents and players angle for advantage to win. That is human nature, and it is the genius of our system of government as well as our adversarial system. Distribute power so that law and rules can be changed slowly if at all. The Founders did that because they knew people would approach our government as another game. The Founders took into account that people approach government, law, and rules as part of the game in an adversarial system.

With all the interested players in this system angling for an advantage, is it fair to criticize a claimant or their attorney who plays to their strength too?

**The problem.**

For years, defense counsel pushed claimants and their counsel, demanding broad medical releases. For years, (largely because I think Claimant's counsel were lazy or did not know better) those have been voluntarily provided by claimant's counsel. These were used to great effect by the defense to hoover up vast amounts of documents Claimants did not have. In many instances some defense counsel have withheld those documents in an effort to obtain an advantage in the game over Claimants.

Members of my firm determined enough was enough and we refused to provide general releases executed by our clients. We drew a line in the sand and required that defense counsel justify up front their need for a release so as to avoid defense counsel going on abusive and invasive fishing expeditions. We also limited the releases they received to specific providers where there was a reasonable basis to request information. This had the effect of eliminating opponents' ability to get materials with a release, not disclose them to Claimant's counsel, and then take a

[1] I would note that this is not any different in our Civil Justice system either. Any adversarial system with rules lends itself to game theory and strategy.

deposition of Claimant with knowledge of the undisclosed materials. The clear purpose of this practice was to unfairly trap Claimants.

**Actions in response to enforcing Claimants' rights.**

Several defense counsels scoffed at our firm's actions and filed motions to compel. When Claimants' counsel pushed back and used the rules of procedure to defend Claimants' privacy, the Commission properly denied the motions on discovery rule grounds. *See Boo v. Wood Group USA*, IC No. 2021-022457, *Tovar v. Clapier Construction*, IC No. 2020-020379, and *Rexhepi v. Yellow Corporation* IC No 2019-026654.[2]

Put simply, the Commission's referees acknowledged that words mean something. This included the words in the Idaho Rules of Civil Procedure and the JRP. The Commission acknowledged that these rules do not grant any right to defense counsel to a medical release. This irritated defense counsel who had grown accustomed to getting these unrestricted releases.

This was a rare victory for Claimants. Not because it moved the needle in terms of substantive outcomes for Claimants, but because it acknowledged that a Claimant has rights in what is probably the most sacred thing a person has. Their own body and medical information about their body.

US Supreme Court Justice Gray put it this way:

> "No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."

*Union Pac Ry Co v. Botsford*, 141 U.S. 250 at 251, 11 S.Ct. 1000, 35 L.Ed. 734 (1891).

A Claimant gives up many rights to make a work comp claim in our system. But they do not give up every right. Somehow in this system, getting the private medical records of a Claimant became so routine, Claimants' opponents thought it was their right to get anything and everything in a Claimant's life. This includes employment records, social security records, and even Fish and Game records just as a matter of course. Many Claimants' counsel just went along and allowed Claimants to sign those unrestricted releases.

The point of this fight is not about whether material is relevant, or even discoverable. The point is that some defense counsel have taken the extreme position that it is their <u>right</u> to pry into the

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[2] It should be noted that the defense counsel members of the Advisory Committee, some of whom are the proponents of proposed JRP 3, are the very attorneys who were ruled against in these cases and adopted these aggressive positions.

lives of Claimants without limits. That cannot be consistent with the spirit relief in the workers' compensation system and the practiced belief by some defense counsel must stop.

It should have stopped when the Commission decided *Boo*, *Rexhapi*, and *Tovar*. Unfortunately, proponents of this proposed rule are intent on enshrining in rule their abusive practices. Rather than concede the merits that they have no such right and civilly work with Claimants' counsel on reasonable discovery requests, they propose this rule to fundamentally remove rights from Claimants granting to defendants unfettered access.

It is a bold claim to say Claimants have no right to privacy against defendants and their counsel in workers' compensation cases. It is also arrogant and demeaning for defense counsel to argue this. Somehow, defendants (and perhaps others) forget that Claimants are people and not numbers on a list with dollar signs next to their name. Yet that does not stop defense counsel dragging a Claimant into the intrusive games they play in an effort to find something, anything, that can be used as leverage.

Claimants are people with rights enshrined in law and rules. When this was pointed out to defense counsel and then reaffirmed by the Commission, defense counsel instinctively complained about how it slows things down.[3] The real reason is that in light of the Commission's rulings, defense counsel (and other parties) have to respect a Claimant's privacy. No longer can they cast a large net indiscriminately and without accountability in hopes of snagging more invasive information about a claimant or embarrassing them.

Claimant of course does not have the right to deny relevant and discoverable material from defense counsel. But what I am pointing out is that one side in this game has gone so far in their unsupported expectation of compliance that they think they have rights that do not exist as against the Claimant. Some defense counsel need a reminder that there are limits to what discovery tools they have for a reason. What should be happening is a civil conversation among practitioners regarding the dispute, not simply threats of "my-way-or-the-highway" regarding providing releases.

Claimants do have a reasonable expectation of privacy, even in a comp case. By insisting upon (and voluntarily granting) a general release, defendants have grown accustomed to getting their way. It created an artificial imbalance of the playing field that naturally developed in an adversarial system.

We needed a rebalancing and pushing back on defense counsel's overreach had the effect of reminding them that they too have to play by the rules and respect the reasonable privacy of a Claimant. Rules exist for good policy reasons.

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[3] Imagine a defense counsel whining about slowing down a workers' compensation case.

The rulings by the Commission and push back by attorneys in my office re-established the balanced comity that was lost among some practitioners. It also encourages respectful and meaningful engagement in litigated cases. By and large this is not a problem with most defense practitioners. However, there are a few actors who push the envelope and needed this reminder.

With the rules in place currently, Claimants and their attorneys are able to hold defense counsel accountable for the use of releases and allow Claimants to regulate who and what material is recovered with a release within reason. This also permits defense counsel to acquire material that is relevant and discoverable to satisfy justice. If there is a legitimate dispute, defense counsel can file a motion to compel. That status quo does not seem to be anything that needs additional regulation. This is not broken and it does not need a new rule addressing it.

**Proposed JRP 3 is flawed and should not be adopted.**

The proposed JRP 3 has several flaws. First it provides rights to the defense at the expense of the Claimant. That is not the compromise that was sought in the worker's compensation system. It is only after these rights have been reaffirmed by the Commission that the defense bar is trying to rewrite the rules. This is telling. The current rules provide limits to what a defendant can do. That is good enough in the civil system, and there is no good policy reason as to why that is not good enough for the workers' compensation system.

Second, the proposed rule as written shifts the burden to Claimants in an unfair and arguably unconstitutional manner. Claimants have the right under current law to limit defendants to the discovery tools outlined in the IRCP as adopted by the JRP. If the proposed rule were to go in effect, it conflicts with the IRCP regarding who has the burden in a motion to compel or protective order. Such an administrative rule would likely be found to be in violation of the rules of procedure and procedural due process. It would be far wiser policy for the Commission to enforce the rules of procedure currently in place as it has, rather than to hastily craft a new rule that violates Claimants' reasonable right to privacy.

Third, keeping the status quo provides stability and equilibrium between parties. There is extensive case law to cite for the IRCP and its interpretation. The interpretation of these procedural rules creates certainty and balance between opponents. Parties can look to the interpretation of the IRCP in other matters to see what the outcome would likely be in front of the Commission. They can then take action with a reasonable understanding of what the outcome would be. All parties are served when they know the likely outcome. Adopting this rule effectively eliminates some parts of the IRCP as adopted. That will cause more confusion, not less, and will create more discovery disputes. This seems counterintuitive to what creating rules should do.

Proposed JRP 3 throws these principles and good policy out the window. Not only does it cite as authority a statute that does not deal with discovery (IC §72-432(11)) but it shifts the burden to the claimant to show why he/she should not provide a release. Keep in mind that as the law currently exists, there is no right for the defendants to receive a general medical release. This rule goes to an extreme at the expense of Claimants who have pushed back on the abusive practices of defense counsel who argue that granting this right will make the system more efficient.

**Conclusion**

I am tired of the erosion of Claimants' rights that seemed to be compromised for doctors, sureties, employers, their counsel, and even for the convenience of those in government in our system. Sometimes rules are unfair. Unfair rules should be corrected. However, that is not the problem we have in this instance.

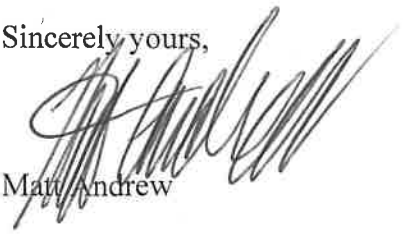
The bullyish behavior by certain defense counsel in abusing these general releases has not stopped. In fact, it has simply manifested itself in the current lobbing efforts for this proposed rule. The goal of the rule is to eliminate a Claimants right to any level of privacy. That is what the proponents of the proposed JRP 3 are doing here. They perceive they lost something when my office stood up to them and their abusive practices. Now they are trying to change the rule so they get the blessing of the Commission to continue their invasive and unreasonable methods. The Commission should not be blind to this scheme and their intent.

I urge the Commission to not adopt proposed JRP 3. Doing so will temper the unreasonably aggressive and overreaching actions of some defense counsel and remind them that their right to information and to pry into the lives of Claimants do have reasonable limitations in law. It will force defendants and their counsel to engage with Claimants' counsel on discovery and work out their disputes in a civil manner rather than simply issue threats and demand unreasonable access to the lives of Claimants. It will ensure that the sacred and personal privacy of a Claimant is not unreasonably violated. Lastly, it will send a message that this Commission is not going to change a rule simply because one side whines about it after losing when its rulings have been correct under law.

The rules of procedure and discovery are fair. I urge the Commission to take a broader policy perspective and resist the reactive urge to implement a rule that favors one side's abusive tactics. Leave well enough alone.

Thank you for your kind consideration of my thoughts on the matter. Should you wish to contact me, please do so.

Sincerely yours,



Matt Andrew

Encs:

1. Proposed JRP 3
2. Decision regarding Motion to compel in *Boo v. Wood Group USA*, IC No. 2021-022457
3. Decision regarding Motion to Compel in *Tovar v. Clapier Construction*, IC No. 2020-020379
4. Order Denying Motion to Compel in *Rexhepi v. Yellow Corporation* IC No 2019-026654

B. **Medical Release**

To facilitate the exchange of medical information anticipated by Idaho Code 72-432(11), if requested to do so by a party defending a complaint, an injured worker shall execute such medical release(s) as may be required by a medical provider in order to release medical records to the party defending the complaint. A release submitted to an injured worker for signature shall identify the medical provider from whom medical information is sought. An injured worker who objects to a request to execute such release(s) may file a motion for protective order pursuant to JRP 3(F) within 30 days following such request. The Commission may, for good cause shown, enter an order to protect an injured worker from undue annoyance, embarrassment, or oppression. Should an injured worker refuse to execute such medical release(s) after having been requested to do so, or after having been denied a protective order by the Commission, no action may be taken by worker in the prosecution of the complaint during the period of refusal. An opposing party who uses a release(s) executed pursuant to this rule to obtain the medical information of an injured worker shall provide one true and correct copy of all medical information so obtained to the injured worker, free of charge.

*Comments*

1. A release may list more than one provider.

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

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| ELIUD TOVAR,<br>Claimant,<br>v.<br>CLAPIER CONSTRUCTION CO.,<br>Employer,<br>and<br>OHIO SECURITY INSURANCE CO.,<br>Surety,<br>Defendants. | **IC 2020-020379**<br><br>**MEMORANDUM DECISION AND ORDER ON DEFENDANTS' MOTION TO COMPEL**<br><br>**Filed 3/24/22** |

On January 28, 2022, Defendants filed a Motion to Compel Executed Medical Releases, seeking an Order requiring Claimant to sign and return certain releases for medical records. Defendants had previously submitted said releases to Claimant through his counsel, with repeated requests for their execution and return. Claimant steadfastly refused to sign and return the releases. Further, Claimant opposed Defendants' Motion to Compel and filed a Memorandum in Opposition to the motion.

Given the fact that it appeared from the opposition briefing that Claimant was not simply opposed to the particular releases in question but was opposed to being required to sign any releases, and further that the practice of requiring execution of releases was a longstanding practice at the Commission, the undersigned felt this issue was important enough to allow for additional briefing by all parties to the motion. After an informal telephone conference wherein it was suggested that perhaps the issue would be better presented to the Commission as

a declaratory judgment action, but if the parties so chose they could proceed ahead with the motion to compel after an opportunity to brief their positions, the parties proceeded ahead with the instant Motion to Compel Executed Medical Releases and objection thereto. Having read the briefing submitted by the parties, the Referee issues the following Memorandum and Order.

**Memorandum Decision**

Defendants argue that they are entitled to the documents subject to the release. If the release is not signed, Defendants argue they will have to utilize more expensive and time-consuming means to acquire the medical information sought by the release. Defendants suggest they will have to subpoena and depose each and every medical provider who has treated Claimant in the past. It is not clear why Defendants feel that simply sending Claimant a set of requests for production of medical records and an interrogatory seeking the names and addresses of each of his past providers is not an option. Claimant's refusal to properly identify his past providers and produce all medical records associated with them would subject him to the very real possibility of "serious consequences" as set out in the note of JRP 3. Claimant cannot escape production of past medical records by simply refusing to sign a release. Document production discovery allows for a very broad range of record discovery, and the old "fishing expedition" defense went out the window decades ago. *See, e.g. Hickman v. Taylor*, 329 U.S. 495 (1947).

Defendants note that providing an executed medical release facilitates judicial efficiency and allows for worker's compensation cases to reach a just, speedy, and economical determination of the issues. On this point the Referee agrees. Most often, it makes sense for a claimant to execute a medical release. That argument, however, begs the question of whether a claimant can be compelled to execute a release simply because doing so may be logical.

There are several pitfalls awaiting a claimant who chooses not to execute a medical release. Failure to obtain all the relevant medical records could certainly impact a claimant's quest for benefits. It could lead to sanctions. It may impair a claimant's argument in favor of attorney fees for delay in decision making by Surety. It undoubtedly increases the costs and "hassles" in obtaining medical records from various providers. It can delay proceedings, and thus recovery or settlement. It can lead to accusations of evidence spoliation and the negative implications thereof. On the other hand, most often there are no benefits from not signing the release. Claimants still must produce the same documents covered by the release or risk harsh sanctions. Discovery of past medical records is quite broad, and liberally construed.

Despite all the advantages offered by a release, and all the pitfalls of not signing one, it is not up to the Referee to compel Claimant to utilize the procedure of convenience over the claimant's objection. There are alternative methods set out in the IRCP and JRP for production of those records and Claimant has a right to limit discovery to the methods permitted therein. While it may seem foolhardy to reject the release when the same documents will need to be produced in response to proper discovery requests, and knowing the "overly broad" objection creates a very high bar to overcome in many cases, it is not up to the undersigned to order Claimant to utilize one method of document production over another if both will produce the same end result.

Claimant herein cannot escape production of past medical records by simply refusing to sign a release. He does not have to sign the release; instead, he can shoulder the burden which belongs to him in the first place and produce all requested medical and employment records, or timely move for a protective order with specific objections to specific documents, supported by legal authority and good cause. Any other alternative may well subject Claimant to JRP 16 sanctions.

Defendants cite to Idaho Code § 72-432(11) to support their motion. That statute allows employers and/or sureties to access all medical information relevant to or bearing on a particular injury or occupational disease for which compensation is sought. However, this statute applies regardless of, and independent from, a claimant signing a release. In other words, under the language of Idaho Code § 72-432(11) a surety does not need a release from a claimant to obtain directly from a medical provider those records relevant to or bearing on a claimed work injury. It is hard to see how that statute provides authority for Defendants in their motion to compel a signed release.

Defendants also cite to *Clark v. Cry Baby Foods, LLC,* 155 Idaho 182, 307 P.3d 1208 (2013) in support of their motion. While it is true that the Referee required the claimant to sign a release and sanctioned him when he did not, the issue of whether a claimant can be compelled to sign a release was not before the Supreme Court. The only reference to releases in the opinion was to illustrate that the claimant had signed several releases, but subsequently claimed the signatures were fraudulent. The *Clark* decision is not dispositive or informative of the issue presented herein.

The Commission did not rule that Clark was obligated to sign a release; the only reference came from the Referee who wrote the Findings of Fact. One Referee's procedural orders are not binding on other Referees. If Defendants want a blanket ruling from the Commission, they will need to seek such ruling from the Commissioners.

Other cases citing the dissent of former Justice Bistline are not inapposite. They deal with access to medical records, not the procedure for how those records are obtained. Defendants do have the right to review Claimant's medical history as a general rule; it does not follow automatically that Defendants have a right to obtain those records via a release. A ruling against

Defendants on their motion to compel does not preclude them from obtaining Claimant's medical records. Claimant is not seeking a protective order herein; Defendants are seeking an order compelling him to sign a release. Should Claimant attempt to seek a protective order he will need to do so with a properly filed and supported motion.

Finally, Defendants argue that an adverse ruling today will wreak havoc on the worker's compensation practice as we know it. For one thing, they argue the JRP forms (complaint and release) would need to be reworked. The irony is that Defendants do not seek the JRP form release from Claimant; they want their own. The current release has been the subject of criticism for years and is probably less than ideal. The form of that release is not the focus of this motion.

Releases are, have been, and will continue to be a tool of convenience for the parties, as is made clear by the note to JRP 3. If Defendants want more teeth in that tool, they should seek to amend the JRP provisions to make signing a release a prerequisite to scheduling a hearing or provide some other weighty consequence for failing to sign one. As the JRP are currently written there is no set sanction for refusing to sign a release. Today's ruling will not change that fact.

Sureties can always ask for a release, and have been doing so for years, both in civil litigation and worker's compensation. A release is a valuable tool, but it is not a hammer.

**Order**

For the reasons set forth above, Defendants' Motion to Compel is HEREBY DENIED.

DATED this 24th day of March, 2022.

INDUSTRIAL COMMISSION

Brian Harper

Brian Harper, Referee


ATTEST:

Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on the 24th day of March, 2022, a true and correct copy of the foregoing **MEMORANDUM AND DECISION ORDER ON DEFENDANTS' MOTION TO COMPEL** was served by email transmission upon each of the following:

RANDALL SCHMITZ
randy@skauglaw.com

MATTHEW PAPPAS
mpappas@ajhlaw.com

*Jennifer S. Komperud*

jsk

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

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|---|---|
| TERRY BOO,<br>Claimant,<br>v.<br>WOOD GROUP USA, INC.,<br>Employer,<br>and<br>ACE AMERICAN INSURANCE CO.,<br>Surety,<br>Defendants. | **IC 2021-022457**<br><br>**MEMORANDUM DECISION AND ORDER DENYING DEFENDANTS' MOTION TO COMPEL**<br><br>**Filed 3/24/22** |

On February 2, 2022, Defendants filed a Motion to Compel, seeking an Order requiring Claimant to sign and return releases for medical and employment records. Defendants had previously submitted said releases to Claimant through his counsel, with repeated requests for their execution and return. Claimant steadfastly refused to sign and return the releases. Further, Claimant opposed Defendants' Motion to Compel and filed a Memorandum in Opposition to the motion.

Given the fact that it appeared from the opposition briefing that Claimant was not simply opposed to the particular releases in question but was opposed to being required to sign any releases, and further that the practice of requiring execution of releases was a longstanding practice at the Commission, the undersigned felt this issue was important enough to allow for additional briefing by all parties to the motion. After an informal telephone conference wherein

it was suggested that perhaps the issue would be better presented to the Commission as a declaratory judgment action, but if the parties so chose they could proceed ahead with the motion to compel after an opportunity to brief their positions, the parties proceeded ahead with the instant Motion to Compel and objection thereto. Having read the briefing submitted by the parties, the Referee issues the following Memorandum and Order.

**Memorandum Decision**

To begin, Claimant argues a Motion to Compel is not a proper vehicle for Defendants to bring the issue before the Commission. He notes the lack of any JRP or ICRP which specifically allows a party to compel the production of a properly executed release. This reading is overly narrow. At least ostensibly JRP 3 can be read to require claimants to execute a medical release, and if there was no mechanism to enforce this obligation, it would become a rule without a remedy. JRP 1A allows construction of the JRP to be liberally construed to secure a just, speedy, economical determination of all issues before the Commission. A motion to compel is proper in this circumstance.

Defendants raise a host of arguments supporting their motion. Some deal with the release itself, others with the "real world" interplay between the release and discovery. Each will be addressed in turn.

**Legal Bases for Compelling a Release**

*JRP 3*

Defendants note that JRP 3A1 states the "complaint shall be in the form prescribed by the Commission, an example of which is attached hereto as Appendix 1". The example form, on page 2 of the 3-page complaint, contains a line which states in bold and capital letters – **CLAIMANT MUST COMPLETE, SIGN, AND DATE THE ATTACHED MEDICAL**

**RELEASE FORM** – the release form is actually page 3 of the complaint. Defendants argue this language is dispositive and requires Claimant's objection to be rejected. Even if that were true, and it is not, Defendants in the present case have demanded Claimant sign a release to obtain his past employment records, which clearly is not covered by the above-cited language, as well as a release not in the form set out in JRP 3. A demand for Claimant to sign a release in a form other than, and broader in scope than the one set out as part of the complaint would not be subject to Defendants' argument.

The "Appendix 1" release contains numerous "check-the-box" limitations and is geared toward each medical provider individually; it is not necessarily an "unrestricted, universal" release. Nothing in JRP 3 mentions anything about the scope of the release. In theory, a claimant could limit the release to those physicians who treated claimant for the work injury and exclude all other providers. Furthermore, by the language of the release, the Claimant may at any time after signing the release simply revoke the document by informing Defendants in writing.

Importantly, the comment to JRP 3 notes;

> [t]he necessity to sign the release by claimant is not jurisdictional to filing the complaint. The use of this form is intended for ease in receiving medical information by Employer/Surety. Should claimant refuse to release such medical information, serious consequences may develop in pursuing the claim for benefits.

This language makes several things clear. First, failure to sign the release is not grounds for dismissal of the complaint on jurisdictional grounds. The release is simply a tool of convenience, which will be discussed further below. Finally, a claimant's refusal to provide *medical information* (not the release) may well severely and negatively impact a claimant's case.

Defendants argue that St. Luke's has issues with the JRP 3 release and has raised concerns since at least 2014 concerning the release language. As such, Defendants are justified

in demanding a release acceptable to St. Luke's, even while citing JRP 3 as authority to compel Claimant to sign the release. This argument is not persuasive because the Commission has known of St. Luke's concern since 2014 and yet as of today the hospital's complaints have not carried the day. The argument that because JRP 3 requires a perceived insufficient release, Defendants are free to substitute a release of their choosing and still rely on the provisions of JRP 3 as authority seems a bit like a "bait and switch."

JRP 3 in no way serves as blanket authority for the proposition that claimants must sign releases. Defendants cannot use that rule to compel Claimant herein to sign the releases proposed by Defendants.

*Idaho Code and I.D.A.P.A.*

Defendants next point out that Idaho Code § 72-432(11) entitles employers and/or sureties to access all medical information relevant to or bearing on a particular injury or occupational disease for which compensation is sought. However, this statute applies regardless of, and independent from, a claimant signing a release. In other words, under the language of Idaho Code § 72-432(11) a surety does not need a release from a claimant to obtain directly from a medical provider those records relevant to or bearing on a claimed work injury. It is hard to see how that statute provides authority for Defendants in their motion to compel a signed release.

Next, Defendants note that I.D.A.P.A. 17.01.01.601.07 provides that submitting a claim for compensation "*shall* be considered an authorization for the release of medical records." (Emphasis added.) Because sureties have an ongoing duty to appropriately investigate claims at all stages and determine compensability of a claim and scope of medical care related to the accident or occupational disease and cannot simply wait for a claimant to put forth evidence, Defendants argue that obtaining a signed release is imperative for them to comply with the law.

Certainly, having a signed medical release facilitates the ease of obtaining medical records, as mentioned in the footnote to JRP 3, cited above. However, without such a release Defendants still have the ability to access Claimant's relevant medical records under the provisions of Idaho Code § 72-432(11). While utilizing that statute will not give Defendants all the Claimant's past records needed for analyzing any potential pre-existing conditions which could have a bearing on Claimant's right to benefits, it does provide Defendants with an opportunity to begin the medical review process. Coupled with timely requests for production and interrogatories, Defendants have the necessary tools for obtaining the records they need, as addressed further below.

*Stare Decisis*

Defendants next argue that the Commission has a long history of routinely granting motions to compel execution of medical releases, which is true. In fact, this Referee has done so several times. However, rarely has there been an objection made to the motion to compel and thus the routine practice has been to grant the non-contested motion. Here, an objection caused this Referee to consider the issue in greater detail. Having done so, the undersigned has come to believe there is no legal ground to compel execution of releases in cases such as this one. The doctrine of *stare decisis* guides but does not compel or preclude.

*Speedy and Cost-Effective Remedy*

Defendants next argue that allowing them to obtain releases allows for a smooth, speedy, and cost-effective progression of the case. Also, they point to IRCP 26(b)(1)(C)(i), which they claim requires a party to utilize sources that are more convenient, less burdensome, or less expensive when several alternative forms of discovering the same information exist. That reading of IRCP 26(b)(1)(C)(i) butchers the true intent of the rule, which actually provides

a mechanism for limiting the frequency or extent of allowable discovery if it is determined that the discovery sought is unreasonably cumulative or duplicative, or it can be obtained from some other source that is more convenient, less burdensome, or less expensive. For example, if a claimant provides a release for medical information to defendants, the defendants may well be precluded from additionally requiring the claimant to produce a duplicate set of those same documents. The rule does not require a party to sit down and calculate the relative cost or burden of complying with proper discovery and choose the method which the party (or better yet, the *other* party) determines to be the most "cost-effective" or "least burdensome."

While it is true that from the claimant's perspective, signing a release may be the most cost effective and least burdensome method of supplying medical records, nothing in the rules *requires* a claimant to utilize this procedure over objection and in lieu of obtaining those same medical records directly from claimant's provider. From the Defendants' perspective, sending out a request for production of the records may actually be the most cost-effective and least burdensome method for obtaining those records from the claimant, at least in theory. After all, it takes money and effort to contact the various providers, deal with their protocols and costs for production, and overcome the various obstacles many providers put in place before delivering the requested records. Those costs and frustrations fall on whichever party undertakes the task of obtaining the records.

Defendants suggest that without releases they would have to file "numerous motions to compel," file subpoenas, and face delays in the proceedings. Furthermore, they would have to rely on claimants to fully comply with their discovery requests. The Commission would be inundated with various motions, leading to delay and additional costs to the parties.

The flaws with this argument are readily apparent. First, the argument speculatively assumes claimants will not comply with proper discovery requests. That is not a valid assumption.

The better assumption is that a party will fully and completely respond to discovery; Rule 11 and other sanctions help reinforce that assumption. Next, most discovery issues are resolved without motion practice. Also, most claimants and their attorneys recognize the overwhelming benefits of providing releases and a contrary ruling should not result in a wholesale reversal of a practice which has served all parties well for decades, as will be discussed below in greater detail. Finally, sanctions are available against any party for violation or abuse of the rules and procedures, including filing frivolous motions for protective orders, etc. JRP 16. These forces should work to minimize the disruptions predicted by Defendants herein.

Defendants further argue that Claimant's responses to interrogatories limit the identification of medical providers past or current to those the claimant can recall to the best of his knowledge at the time he answered the discovery. However, it is always the case that claimants identify those past providers to the best of their recollection. Defendants are free to investigate Claimant's medical history and even without a release could obtain records bearing upon this case, which interpreted broadly could include Claimant's past medical providers. Idaho Code § 72-432(11).

*Practical Implications*

Defendants acknowledge the scope of the releases and whether or not the information sought by them is relevant goes beyond, but it is related to, their motion to compel. After all, Claimant has cited the fact that the releases are overly broad and seek irrelevant information as one of his reasons for not signing them.

Parties typically exchange interrogatories and request for production of documents, including medical records. Production of medical records is often costly and time consuming and frankly many claimants do not want to undertake a task which is so fraught with peril. After all,

if a claimant fails to produce all of the medical records requested, the claimant runs a risk of "serious negative consequences" as suggested by JRP3. For these reasons, most times a claimant will provide the defendants with a signed release. In exchange there is typically a stipulation that defendants will provide the claimant with a copy of all medical records obtained via the release.

This burden-shifting practice has several benefits for the parties. For the claimant, the burden of obtaining the records and costs associated therewith now falls on the defendants. If the defendants fail to obtain medical records through no fault of the claimant that fact does not inure to the detriment of the claimant. From the defendant's perspective, obtaining the release allows for production of the documents without unnecessary delay. It also gives the defendants "peace of mind" in knowing that no medical records have been misplaced or improperly reserved by the claimant.

Not signing a release requires the claimant to obtain, copy, and deliver all requested medical records to the defendants at the claimant's cost. Delays in doing so may slow down the claim investigation, and delay decisions on continued medical care. Under such a scenario it would be difficult to blame defendants for the delay if a claimant seeks attorney fees from them for unreasonable delay.

Any perceived benefits from retaining control of the record production are illusory. Even if there are documents the claimant feels are irrelevant, they still must be produced because relevance is for the Commission, not the parties, to determine. Discovery allows for a very broad range of record discovery, and the old "fishing expedition" defense went out the window decades ago. *See, e.g. Hickman v. Taylor*, 329 U.S. 495 (1947). *After discovery,* irrelevant documents can, and should be, excluded from the record by agreement of the parties or by motion if contested.

Likewise, if there are very sensitive documents in the medical record, which have no bearing on the relevant issues for resolution, without a release the claimant would need to raise a proper objection and prepare a log with identification of the records sought to be excluded, with dates and general subject matter. If, after viewing the log, the defendants still contested the claimant's objection to production, the claimant would need to seek an in camera review of the documents. With a release, the parties would be free to carve out an exception in the release language so that production of those specific documents would not be released. Only if no agreement was reached would the matter need to be resolved by the Referee handling the case. In any event, these types of disputes are rare.

Claimant herein must be aware he cannot escape production of past medical records by simply refusing to sign a release. He does not have to sign the release; instead, he can shoulder the burden which belongs to him in the first place and produce all requested medical and employment records, or timely move for a protective order with specific objections to specific documents, supported by legal authority and good cause. Any other alternative may well subject Claimant to JRP 16 sanctions.

Despite all the advantages offered by a release, and all the pitfalls of not signing one, it is not up to the Referee to compel Claimant to utilize a procedure of convenience over his objection. There are alternative methods set out in the IRCP and JRP for production of those records and Claimant has a right to limit discovery to the methods permitted therein. While it may seem foolhardy to reject the release when the same documents will need to be produced in response to proper discovery requests, and knowing the "overly broad" objection creates a very high bar to overcome in most cases, it is still not up to the undersigned to order Claimant to utilize one method of document production over another if both will produce the same end result.

## Order

For the reasons set forth above, Defendants' Motion to Compel is HEREBY DENIED.

DATED this 24th day of March, 2022.

INDUSTRIAL COMMISSION

Brian Harper

Brian Harper, Referee


## CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of March, 2022, a true and correct copy of the foregoing **MEMORANDUM AND DECISION ORDER DENYING DEFENDANTS' MOTION TO COMPEL** was served by email transmission upon each of the following:

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jsk

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

| | |
|---|---|
| JANUZ REXHEPI,<br><br>Claimant,<br><br>v.<br><br>YELLOW CORPORATION,<br><br>Employer,<br><br>and<br><br>OLD REPUBLIC INSURANCE COMPANY,<br><br>Surety,<br><br>Defendants. | **IC 2019-026654**<br><br>**ORDER DENYING MOTION TO COMPEL**<br><br>Filed April 4, 2022 |

On March 21, 2022, Defendants filed a motion to compel seeking an order compelling Claimant to sign a HIPAA medical release. Defendants wrote that they have "been unable to obtain any information" (emphasis in original) related to the Claimant and that Claimant has failed to answer or produce any preexisting medical records.

Claimant responds that there is no rule or law that requires a claimant to sign an unrestricted and open-ended medical records release. Further, Claimant did provide pre-existing medical records at pages 579 through 658 and pages 841 through 934 of the 1,406 pages of responsive discovery that was provided.

Idaho Code § 72-432(11) provides:

> All medical information relevant to or bearing upon a particular injury or occupational disease shall be provided to the employer, surety, manager of the industrial special indemnity fund, or their attorneys or authorized representatives, the claimant, the claimant's attorneys or authorized representatives, or the commission without liability on the part of the

> physician, hospital or other provider of medical services and information developed in connection with treatment or examination for an injury or disease for which compensation is sought shall not be privileged communication. When a physician or hospital willfully fails to make a report required under this section, after written notice by the commission that such report is due, the commission may order forfeiture of all or part of payments due for services rendered in connection with the particular case. An attorney representing the employer, surety, claimant or industrial special indemnity fund shall have the right to confer with any health care provider without the presence of the opposing attorney, representative or party, except for a health care provider who is retained only as an expert witness.

JRP 3 provides that a complaint "shall be in the form prescribed by the Commission, an example of which is attached hereto as Appendix 1." Appendix 1 is a three-page form of which the third page is an "Authorization for Disclosure of Health Information." Page two of the form indicates "**CLAIMANT MUST COMPLETE, SIGN AND DATE THE ATTACHED MEDICAL RELEASE FORM**" (emphasis in original).

Comments to JRP 3 read as follows: "[t]he necessity to sign the release by claimant is not jurisdictional to filing the complaint. The use of this form is intended for ease in receiving medical information by Employer/Surety. Should claimant refuse to release such medical information, serious consequences may develop in pursuing the claim for benefits."

JRP 7 provides:

> A. Parties may obtain discovery by one or more of the following methods: depositions by oral examination or written questions, written interrogatories, or requests for production of documents or things.
> B. Requests for admissions shall not be allowed. This provision notwithstanding, the parties may agree to admit facts prior to hearing.
> C. Procedural matters relating to discovery, except sanctions, shall be controlled by the appropriate provisions of the Idaho Rules of Civil Procedure.

The comments to JRP 7 provides in relevant part "Discovery is limited to the procedures within this rule."

Defendants argue that the clear purpose of the health disclosure attached to the complaint is to permit a defendant to access a claimant's medical records as outlined in the JRP 3 comments and as authorized by Idaho Code § 72-432(11). Defendants point out that the health disclosure attached to the complaint is insufficient to facilitate the purpose of Idaho Code § 72-432(11), requiring a more sophisticated and complete authorization, which Defendants have already written and provided to Claimant.

Defendants are correct that they are entitled to "all medical information relevant to or bearing upon a particular injury." Idaho Code § 72-432(11). Defendants are correct that they are entitled to past relevant medical records. *Clark v. Cry Baby Foods, LLC*, 155 Idaho 182, 307 P.2d 1208 (2013). Where Defendants are incorrect is that the entitlement authorized by Idaho Code § 72-432(11) is equivalent and the same as entitlement to an unrestricted medical release signed by Claimant.

The health disclosure form attached to the complaint is not jurisdictional, as noted in the comments to the rule. The comments also make clear that the Commission is concerned with provision of medical information, not the provision of an unrestricted medical release. The form is for the "ease" of Defendants, not a right of Defendants.

Defendants argue that the medical release facilitates timely, low cost, efficient provision of medical records because Defendants can go directly to the medical provider and get records. Without the health disclosure form, Defendants rely on Claimant to identify, obtain, and provide copies to Defendants of past medical records. Defendants point out that this will add expense and delay for claimants, defendants, and the Commission. Defendants may be correct, but expediency and convenience notwithstanding,

there is simply no legal authority to compel a claimant to sign an unrestricted medical release.

Claimant admits and acknowledges he has put his medical history and conditions at issue and that his prior medical history is relevant. Discovery at this stage of litigation is broad. The purpose of discovery is to facilitate the fair and expedient exchange of information and avoid trial by surprise. Any records Claimant does not wish to provide due to their confidential nature require a motion for protective order accompanied by a showing of good cause with specific facts as to why the requested information would embarrass, annoy, oppress, or burden the Claimant. *Westby v. Schaefer*, 157 Idaho 616, 338 P.3d 1220 (2014); IRCP 26(c). Any claim of privilege or work product must be expressly claimed and detailed as outlined in IRCP 26(b)(5).

For the foregoing reasons, Defendants' Motion to Compel is DENIED.

DATED this 4th day of April, 2022.

INDUSTRIAL COMMISSION

Sonnet Robinson

Sonnet Robinson, Referee

ATTEST:

Gina Esparza

Assistant Commission Secretary

INDUSTRIAL COMMISSION SEAL STATE OF IDAHO

## CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of April, 2022, a true and correct copy of the foregoing **ORDER DENYING MOTION TO COMPEL** was served by *E-mail transmission* upon each of the following persons:

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g e Gina Espinoza