

SOUTH DAKOTA DEPARTMENT OF LABOR
OFFICE OF THE SECRETARY

HF No. 1D, 2009/10
DECLARATORY RULING
Re: SDCL § 58-20-24, ARSD ch 47:03:04

This matter comes before Pamela Roberts, the Secretary of the South Dakota Department of Labor, as a petition for declaratory ruling under SDCL 1-26-15 and ARSD 47:01:01:04. The Secretary has determined this is not a matter of widespread impact, so a public hearing is unnecessary. The record consists of comments which were submitted to the Secretary on October 30, 2009.

Facts

The following assumed facts are presented:

Scenario 1. Worker has been injured on the job and has given timely notice. Insurer contacts its certified case management plan (CMP) and a nurse case manager (CM) is assigned. The worker receives medical treatment and CM schedules appointments, attends appointments, and carries out various other tasks under the CMP. CM also sends periodic progress reports to Insurer and has regular direct contact with Worker's physicians. Employer/Insurer denies all benefits except some ongoing medical expenses. Worker files a Petition for Hearing; Worker continues receiving medical treatment and CM continues actively carrying out purposes of the CMP.

Scenario 2. Same facts as Scenario 1, except Worker filed a Petition for Hearing culminating in a settlement agreement with Employer/Insurer approved by DOL.

The agreement left future medical claims open, with Employer/Insurer reserving the right to review and investigate the services.

Questions

Petitioner has requested the Secretary address the following questions, with answers in the context of each factual scenario presented:

1. Does a CM for a CMP need a signed medical release from Worker before the CM may obtain copies of Worker's medical records, attend Worker's medical appointments, or speak with Worker's treating physicians?
2. Are the CM and his/her CMP Insurer's agents or representatives, such that the work-product privilege of SDCL §15-6-26(b) would protect from discovery any correspondence, progress reports, or other documents sent back and forth between the case manager and Insurer?
3. Is a CM for a CMP permitted to have direct contact with Worker's treating physicians, either verbally or in writing, even if Worker is not present or otherwise involved in the communication? Is such communication also protected by the work-product privilege?

Discussion

The petition requests an interpretation of SDCL §58-20-24 and ARSD chapter §47:03:04. SDCL §58-20-24 (quoted in part) says: "[E]very policy issued by any corporation, association, or organization to assure the payment of compensation under the provisions of the title, Workers' Compensation, shall contain provisions to provide medical services and health care to injured workers for compensable injuries and diseases under a case management plan that

meets the requirements established in rules promulgated by the Department of Labor pursuant to chapter 1-26.”

ARSD 47:03:04:06 was promulgated under §58-20-24 authority. It provides in part: “To provide medical services ... the medical provider must comply with the following requirements: (2) Agree to supply the reports required by SDCL 62-4-44 and 62-4-45 to the case management plan ... The employer may assign to the case management plan its rights to receive reports under SDCL ... 62-4-44 and 62-4-45.” In turn, those laws say, in pertinent part:

62-4-44. A medical practitioner or surgeon first treating an employee shall furnish a report of the injury and treatment to the employer ... within fourteen days following the first treatment. ... Thereafter, if the employee needs continued medical care or claims to be disabled from his employment, the medical practitioner or surgeon shall provide status reports to the employer ... at no less than thirty-day intervals.

62-4-45. All medical practitioners or surgeons attending injured employees shall comply with the rules promulgated pursuant to chapter 1-26 by the Department of Labor and shall make the reports as may be required by it. All medical and hospital information relevant to the particular injury shall, upon demand, be made available to the employer, employee, (and) insurer ... No relevant information developed in connection with treatment or examination for which compensation is sought may be considered a privileged communication for purposes of a workers' compensation claim.

Additionally, ARSD 47:03:04:08 provides: “Case management includes the following: (1) Developing a treatment plan to provide medical services to an injured or disabled employee; (2) Systematically monitoring the treatment rendered and the medical progress of the injured or disabled employee; (3) Ensuring that the injured or disabled employee is following the prescribed

treatment plan; and (4) Formulating a plan for return to work when medically and vocationally appropriate for the employee.”

Collectively, these rules are designed to create a process of routine communication and exchange of information between a CMP and a treating provider. Records are to be provided periodically as treatment continues, and “on demand” as necessary. A CMP could not reasonably be expected to help develop treatment plans, return to work plans, and monitor the progress of treatment without communicating with a worker’s physicians. This is consistent with the philosophy expressed by the Supreme Court concerning exchange of medical information in workers’ compensation cases:

One of the primary purposes of the South Dakota Worker’s Compensation Act is to provide an injured employee with a remedy which is both expeditious and independent of proof of fault. In order to accommodate this purpose, worker’s compensation procedure is generally as summary and informal as is compatible with an orderly investigation of the merits. The whole idea is to get away from the cumbersome procedures and to reach a right decision by the shortest and quickest possible route. This informality not only prevents the defeat of claims by technicalities, but simplifies and expedites the achievement of substantially just results.

SDCL 19-13-7 provides the physician/patient privilege in South Dakota. It is clear that South Dakota law implies a waiver of the privilege if, as here, a patient litigant has placed his or her physical condition at issue as the basis of a legal claim. The rules of evidence provide: “There is no privilege ... as to a communication relevant to an issue of the physical ... condition of the patient in any proceeding in which he relies upon the condition as an element of his claim or defense” SDCL 19-13-11.

SDCL 19-2-3 provides: In any action or proceeding or quasi-judicial administrative proceeding, whenever the physical or mental health of any person is in issue, any privilege under 19-13-7 shall conclusively be deemed to be waived at trial or for the purpose of

discovery under chapter 15-6 if such action or proceeding is civil in nature ...

There should be a free flow of information regarding an employee's physical condition when a worker's compensation claim is made.

Sowards v Hills Materials Co., 94 SD 826, 521 NW2d 649.
(additional citations omitted.)

That said, the Department has long held the view that these rights of communication do not confer the ability for a CM or any Employer representative to be present in a treating provider's examination room while an examination takes place.

A document or tangible thing is attorney work-product if in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation. Tebben v. Gil Haugan Construction, Inc., 2007 SD 18, ¶29, 720 NW2d 166. In Tebben, a distinction is arguably drawn between the disclosure of expressed medical opinions and matters discussed with a physician that could reveal an attorney's strategy. See Tebben, Id. The object of the rule is to protect the mental impressions, conclusions, opinions or legal theories of an attorney. Kaarup v. St. Paul Fire & Marine Ins. Co., 436 NW2d 17, 21 (SD 1989). ARSD 47:03:04:06 quoted above declares a CMP to be an agent of an insurer for the purpose of receiving reports should an insurer wish; to the degree the work-product privilege applies to the insurer, it applies to the CMP.

Looking at "Scenario 1" and "Scenario 2," in the former situation litigation is pending, in the latter it is not. There is no indication in "Scenario 2" that an

attorney is involved or potentially involved on Insurer's behalf. The work-product privilege could be fairly said to apply in "Scenario 1," but, without more, it would not apply in "Scenario 2."

A different issue is presented when a CM contacts Worker's treating physicians. There is no prohibition against such communications, even if litigation is involved, as this encourages the flow of information recognized in Sowards, supra. However, it would produce an absurd result to say communications between the CM and a treating physician, one likely selected by Worker and providing services to Worker, could not be disclosed to Worker. Granted, while litigation is pending, the impressions or opinions subsequently drawn by a CM or other insurer agent from those communications are protected, but as to what was exchanged between the CM and Worker's physicians by way of questions and responses, no privilege exists.

It has been assumed for this purpose of this Declaratory Ruling that the litigation to which the petitioner has referred is not based on an insurer's bad faith, or Worker's demand for attorney's fees per SDCL 58-20-3. Were such litigation involved, the opinions expressed here might change.

Therefore, to respond to the inquiries presented, it is DECLARED:

1. As to Question 1, applying "Scenario 1" or "Scenario 2," a CM for a CMP does not need a signed medical release from Worker before the CM may obtain copies of Worker's medical records, attend Worker's medical appointments, or speak with Worker's treating physicians. This would not

- entitle the CM to be present while Worker was being examined by the treating physician.
2. As to Question 2, applying “Scenario 1,” a CM and his/her CMP are Insurer’s agents or representatives, such that the work-product privilege would protect from discovery any correspondence, progress reports, or other documents sent back and forth between the case manager and Insurer.
 3. As to Question 2, applying “Scenario 2,” it cannot be presumed from the facts a work-product privilege applies.
 4. As to Question 3, applying “Scenario 1” or “Scenario 2,” a CM for a CMP is permitted to have direct contact with Worker’s treating physicians, either verbally or in writing, even if Worker is not present or otherwise involved in the communication. There is no work-product or other privilege protection associated with the information gathered in such a communication. In “Scenario 1,” the impressions or opinions subsequently made by a CM or other agent of the insurer based on those communications would be privileged, but they would not be privileged in “Scenario 2,” as there would be no litigation pending.

Dated this 25th day of November, 2009.

Pamela Roberts
Secretary
South Dakota Department of Labor