

SOUTH DAKOTA DEPARTMENT OF LABOR

OFFICE OF THE SECRETARY

DECLARATORY RULING

Re: SDCL §§ 62-4-1, 62-4-44, 62-4-45

Citibank and Planet Insurance Co., Petitioners; Pamela McDowell, Respondent.

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 that this is not a matter of widespread impact, so a public hearing is unnecessary. On July 28, 2005, a hearing was conducted telephonically by James Marsh, Director, Division of Labor and Management, on behalf of the Secretary, with Kristi Geisler Holm of Davenport, Evans, Hurwitz & Smith, Sioux Falls, appearing on behalf of Citibank (Employer) and Planet Insurance Company, Insurer, (collectively, "Petitioners,") and Chet Groseclose, Sioux Falls, appearing on behalf of Respondent.

The Department has ascertained the following facts:

- 1) In December of 1991, while Respondent was working for Employer, Respondent reported having sustained repetitive trauma injuries to her upper extremities.
- 2) Respondent had two surgeries performed on her arm which did not relieve her pain.
- 3) In 1996, Petitioners entered into a Compromise Agreement as to Compensation which the South Dakota Department of Labor approved.
- 4) The approved agreement states: "Claimant's right to future reasonable and necessary medical expenses directly and causally related to her injuries remain open ...". The parties also stipulated that Petitioners would be responsible only for prescription medication prescribed by Mayo Clinic physicians.
- 5) Since 1996, Respondent has continued to seek extensive medical treatment for pain-related symptoms and management.

6) A number of Mayo Clinic physicians have seen and treated Respondent; Dr.

Bengston is her primary physician.

7) Respondent is quoted in Dr. Bengston's September and October, 2003 records as saying that she "has also seen a anesthesiologist to consider spinal cord stimulator."

As a result, Dr. Bengston referred Respondent to Dr. William T. Asfora in Sioux Falls to determine whether Respondent was an appropriate candidate for spinal cord stimulator implantation.

8) In December, 2004, Dr. Asfora recommended trying a motor cortex stimulator, an experimental procedure.

9) Respondent did not receive the motor cortex stimulator implant, and returned to the Mayo Clinic seeking implantation of a spinal cord stimulator.

10) In September, 2004, other physicians at the Mayo Clinic recommended participation in an in-patient pain program.

11) On November 4, 2004, Respondent underwent a cervical spinal cord stimulator implantation.

12) After undergoing the procedure, Respondent sought payment from Petitioners for the costs associated with the spinal cord stimulator.

13) These costs were approximately \$47,000.

14) On January 26, 2005, Petitioner's attorney prepared correspondence to the medical providers at the Mayo Clinic seeking information and opinions related to the request to pay the charges incurred for the spinal cord stimulator implantation.

15) The correspondence included the following questions:

1. What if any impact has Ms. McDowell's smoking approximately one pack per day had upon her upper extremity pain complaints and need for medical treatment?

2. Are you able to state to a reasonable degree of medical probability whether Ms. McDowell's 1991 injury remains a contributing factor of her

upper extremity pain complaints and need for medical treatment, specifically the spinal cord stimulator?

3. Given your statement that Ms. McDowell "may benefit from a spinal cord stimulator," are you able to state to a reasonable degree of medical probability that given the costs and risks involved in the procedure, the proposed spinal cord stimulator is reasonable for the treatment of Ms. McDowell's 1991 upper extremity injury?

4. Given your statement that Ms. McDowell "may benefit from a spinal cord stimulator," are you able to state to a reasonable degree of medical probability that the proposed spinal cord stimulator constitutes medically necessary treatment of Ms. McDowell's 1991 injury, or is there a less invasive alternative treatment?

5. Having undergone the spinal cord stimulator, what, if any, ongoing medical treatment will be necessary? Specifically, Ms. McDowell previously underwent lidocaine infusion therapy for several days three to four times per year. Will she still require that medical treatment in light of the spinal cord stimulator, and if so, at what level of frequency?

6. What, if any, prescription medications are medically necessary for the ongoing treatment of Ms. McDowell's 1991 injury?

16) A copy of the correspondence was provided to Respondent's counsel.

17) Respondent's counsel wrote the Mayo Clinic on February 3, 2005; the letter included a document entitled "Revocation of Medical Authorization."

18) The "Revocation of Medical Authorization" said that Respondent revoked "any and all authorizations to the Mayo Clinic for disclosure of medical information and bills which were executed by me in favor of the law firm of Davenport, Evans, Hurwitz & Smith, LLP of Sioux Falls, South Dakota. I specifically direct that Mayo Clinic and physicians and employees of the Mayo Clinic are not authorized to respond to a letter dated January 26, 2005 to W. D. Mauck M.D. and a letter dated January 26, 2005 to Keith A. Bengston M.D. in which the doctors are requested to answer in writing six identical questions posed in those two letters."

19) Petitioners have been provided the treating doctors' records and statements that the spinal cord stimulator implantation was reasonable and necessary medical treatment.

20) Respondent's attorney then asked that the physicians address only one question as posed by Respondent's counsel.

21) In addition to implantation of the spinal cord stimulator, Respondent is planning on attending the Mayo Clinic in-patient pain management clinic in June, and is asking Petitioners to cover this expense.

Petitioners have asked the Department to provide its positions on the following questions:

1. Were Petitioners' January 26, 2005 letters permissible communications with Respondent's doctors?
2. Are Petitioners entitled to communicate with Respondent's physicians in writing, with a copy provided to Respondent's attorney, to address issues that arise regarding Respondent's ongoing medical care in accord with the dictates of Sowards v. Hills Materials, 521 N.W.2d 649, 653-654 (SD 1994), including, but not limited to the questions posed in their January 26, 2005 correspondence to Respondent's treating physicians, and are they entitled to a response prior to making a determination of whether treatment and costs are in accord with SDCL § 62-4-1 and the parties' agreement?
3. May the payment for services rendered for the spinal cord stimulator procedure be forfeited due to the physicians' failure to comply with SDCL §§ 62-4-44 and 62-4-45?

The ruling requires the interpretation of the following statutes, quoted in pertinent part:

§62-4-1. The employer shall provide necessary first aid, medical, surgical, and hospital services, or other suitable and proper care including medical and

surgical supplies, apparatus, artificial members, and body aids during the disability or treatment of an employee within the provisions of this title ...

62-4-44. A medical practitioner or surgeon first treating an employee shall furnish a report of the injury and treatment to the employer and the Department of Labor within fourteen days following the first treatment. The Department of Labor may excuse the failure to furnish the report within fourteen days if it finds it to be in the interest of justice to do so. 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 and the Department of Labor at no less than thirty-day intervals, provided that no report shall be required if the medical practitioner or surgeon has not seen the employee since his last report.

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, insurer and the Department of Labor... 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 ...

Respondent argues initially that the Department should not rule on these issues in a declaratory ruling, because the issues could be better handled in the primary litigation in this matter, HF #226, 2004/05 involving these same parties. The Department has already ruled on that issue in denying Respondent's Motion to Dismiss, finding that Petitioner is trying to reduce the conflicts it has with Respondent by asking the Department to confirm whether or not it has the authority to communicate in writing with Respondent's doctors, that this seems consistent with the goals of declaratory rulings listed above, and that such a ruling could have been obtained from the administrative judge handling the primary case, but that is not determinative.

In Sowards, supra, Sowards was stepping onto a stool which broke, causing him to fall and injure his right foot, ankle, knee, and hip. Months later, Sowards became impotent, and claimed workers' compensation benefits connected with that which the

workers' compensation insurer denied. Sowards filed a petition for hearing on the impotency claim, refusing to concede that his sexual dysfunction was not work-related.

The employer's attorney wrote a letter to Sowards' attorney requesting permission to ask Sowards' physicians to address whether the impotency claim was work-related. Sowards then filed a motion for protective order to prevent Employer from sending the proposed letter. The Department denied Sowards' motion; in its order, it ruled that the letter was a permissible communication with Claimant's doctors, not subject to any physician-patient privilege, and not an ex parte communication, as Claimant's attorney was provided a copy in advance. If any new letters were to be sent, Sowards' attorney would be provided copies and given a chance to object to questions considered irrelevant to the pending action. Sowards' attorney would be given a chance to participate in other contacts with the physicians, such as phone calls, and to object to any irrelevant inquiries. The Supreme Court affirmed the Department's rulings and procedure. Id.

It has been argued that the Sowards approach is a minimum standard for such communication, but the Court did not say that. It did say that "there should be a free flow of information regarding an employee's physical condition when a worker's compensation claim is made." It agreed with statements from treatises that observed: "Enforcement of patient-physician privilege in an industrial accident tribunal is nonsense, obvious and complete, " and, "the validity of the privilege should be reexamined against the policies of compensation legislation. In particular, the physician-patient privilege is of doubtful utility." Sowards, supra.

Our medical case management rules reflect a desire to keep communication lines open. Typical is ARSD § 47:03:04:08, which requires a case management plan to

- (1) Develop a treatment plan to provide medical services to an injured or disabled

employee; (2) Systematically monitor the treatment rendered and the medical progress of the injured or disabled employee; (3) Ensure that the injured or disabled employee is following the prescribed treatment plan; and (4) Formulate a plan for return to work when medically and vocationally appropriate for the employee. These tasks would be impossible without regular, informal contacts with a physician, unburdened by the necessity of filtering communications through an injured employee or her attorney. ARSD § 47:03:04:06(2) empowers case management plans to enforce reporting and disclosure laws in the same way insurers can.

The waiver of the physician-patient privilege is only as to medical information relevant to an issue of the physical condition of the patient in any proceeding in which she relies upon the condition as an element of her claim or defense. Id.; SDCL § 62-4-45. The Department also has the affirmative duty to “give effect to the rules of privilege recognized by law.” SDCL 1-26-19. The Department’s procedures should therefore work to prevent irrelevant medical information from being disclosed, while keeping the process as “summary and informal as is compatible with an orderly investigation of the merits.” Sowards, supra.

The primary question here, then, is whether it is required for Respondent to have the opportunity to object to Petitioner’s communications with Respondent’s doctors before the communications take place. It is concluded that it is not. In the vast majority of workers’ compensation claims, communications go on every day between doctors and insurance adjusters, medical case management representatives, employers; and vocational representatives hired by insurers and employers. These contacts go on without an employee or his or her attorney even knowing they are happening. This does not appear to be a source of concern. Even the federal medical privacy regulations specifically exclude from protection those records and reports; 45 CFR §

164.512(l) says: "A covered entity may disclose protected health information as authorized by and to the extent necessary to comply with laws relating to workers' compensation ... " This rule applies because the workers' compensation system would rapidly become unworkable were the insurers and employers who pay for medical treatment required to jump various procedural hoops to get the medical information they need to evaluate claims.

Petitioners have also asked whether they are entitled to wait to get a response from Respondent's treating doctors before making payment decisions. The quoted statutes do not provide any guidance in this area; each case must be evaluated on its own facts, using the base standard of conduct that is reasonable, not vexatious, and consistent with judicially-established notion of "good faith and fair dealing." SDCL §58-12-3; Walz v. Fireman's Fund, 1996 SD 135, ¶ 7, 556 N.W.2d 68, 70.

Finally, Petitioners have asked the Department to rule that Respondent's treating physicians forfeit their right to reimbursement for the spinal cord stimulator procedure under SDCL § 62-4-44 or 62-4-45. "Forfeitures have always been considered as odious in the law." BankWest v. Groseclose, 535 N.W.2d 860 (SD 1995). The constitutional guarantee of due process of law must be applied to and observed in administrative proceedings involving adversary parties, and this would include claims for forfeiture. In re Stabio Ditch Water Right, 417 N.W.2d 391 (SD 1987). The physicians involved, and/or the Respondent, would have a right to a hearing on the merits before a forfeiture could be ordered here.

Therefore, the rulings of the Department of Labor are:

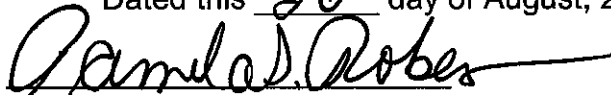
1. Petitioners' January 26, 2005 letters are permissible communications with Respondent's doctors.

2. Petitioners are entitled to communicate with Respondent's physicians in writing, with a copy provided to Respondent's attorney, to address issues that arise regarding Respondent's ongoing medical care, including, but not limited to the questions posed in their January 26, 2005 correspondence to Respondent's treating physicians.

3. Petitioners are entitled to only pay for medical treatment and costs that are in accord with SDCL § 62-4-1 and the parties' agreement. The statutes do not specifically grant or deny them the right to wait for a response from Respondent's doctors before authorizing treatment.

4. The Department lacks the authority to order forfeiture of payment for services rendered for the spinal cord stimulator procedure in this case, as a due process hearing would be required.

Dated this 26th day of August, 2005.



Pamela S. Roberts

Secretary

South Dakota Department of Labor