CIRCUIT COURT OF SOUTH DAKOTA
SIXTH JUDICIAL CIRCUIT

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April 2, 2020

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MEMORANDUM OPINION

RE: 32CIV19-114
Dittman v. Rapid City School District and Dakota Truck Underwriters

FACTUAL BACKGROUND

On February 17, 2017, Claimant Melissa Dittman ("Dittman") injured her back working as a special education teacher for the Rapid City School District. Her injury occurred when a student whose legs she restrained kicked and caused trauma to her spine. Dakota Truck Underwriters insured the School District at the time of injury (hereinafter "Respondents" collectively).

Dittman sought treatment with Black Hills Orthopedic & Spine Center ("Black Hills Ortho") on April 27, 2017. She saw Mitch Grieve, P.A., who worked under the supervision of Dr. Robert Woodruff. On June 8, 2017, Mitch Grieve referred Dittman to Dr. Peter Vonderau at The

Rehab Doctors for additional pain treatment. Dittman attended appointments with Dr. Vonderau throughout 2017 and 2018.

At an August 2, 2017 appointment, Dr. Vonderau and Dittman discussed the possibility of surgery. Dr. Vonderau referred Dittman back to Black Hills Ortho for a surgical evaluation. On August 10, 2017, Mitch Grieve determined that Dittman was not a surgical candidate. Despite this opinion, Dittman continued to discuss surgery with Dr. Vonderau. At an August 21, 2017 appointment, Dittman indicated to Dr. Vonderau that she would continue to research potential surgeons in both South Dakota and Colorado.

Sometime after the August 21, 2017 appointment, Dittman identified Dr. Donald Corenman in Vail, Colorado as a potential surgeon. Dr. Vonderau had made referrals to Dr. Corenman in the past with success. On November 3, 2017, Dr. Vonderau submitted a request to Dittman's case management plan for a surgical consult with Dr. Corenman. Dr. Vonderau was informed that this request was denied on November 21, 2017 and called Dittman to inform her of the denial that day. Following this denial, Dittman filed a Petition for hearing to the Department of Labor ("the Department") on November 28, 2017, and Respondents submitted an Answer on January 4, 2018.

Despite the denial of surgical consult, Dittman still wanted to explore surgery with Dr. Corenman as a treatment option. At a February 9, 2018 appointment, she requested that Dr. Vonderau set up a teleconference to discuss a possible second opinion. Dr. Vonderau ultimately referred Dittman to Dr. Corenman. Dittman had a telephonic long-distance consultation with Dr. Corenman on July 17, 2018. On October 2, 2018, Dittman traveled to Colorado for an evaluation. On December 3, 2018, Dittman underwent spinal fusion surgery with Dr. Corenman.

The parties submitted the issue of whether Dr. Corenman's expenses constituted a second opinion to be borne at Dittman's expense pursuant to SDCL 62-4-43 to the Department on briefs. During the process of determining the issues for submission, the parties also clearly briefed the issues of compensability and the applicability of the Department's Administrative Regulations and knew that these issues would be decided. Administrative Judge Michelle Faw ("the ALJ") determined the expenses to be a covered referral in a Letter Decision dated March 5, 2019 and an Order dated March 8, 2019. However, the ALJ entered an Order to Vacate on March 12, 2019. An Amended Letter Decision was issued on April 5, 2019 declaring that the issues in front of the Department were whether the evaluation was a second opinion under SDCL 62-4-43 and whether Dittman was responsible for the expenses under the Department's Administrative Regulations.

The ALJ acknowledged that Dittman noticed the issue of compensability in her Petition for Hearing but stated that it was not a genuine issue and did not address it. The ALJ never provided any reasoning or cited law explaining why it refused to hear the issue of compensability. Instead,

she merely stated that the issue of whether Dittman sustained an injury arising out of and in the course of employment was not necessary to decide, and that Respondents never made "true denial" in their Answer, and that the denial they had made "was in good faith."

In the April 5, 2019 Amended Letter Decision, the ALJ maintained that Dr. Vonderau made a referral. However, the ALJ also found that the expenses were not covered because Dr. Corenman was not a participating medical provider in the case management plan under 47:03:04:01(10). Moreover, the exceptions of ARSD 47:03:03:05 were not met. On June 18, 2019, the ALJ entered and Order and Findings of Fact and Conclusions of Law consistent with the Amended Letter Decision and dismissed Dittman's claims without prejudice. However, an Amended Order was entered on June 26, 2019 with the same findings and conclusions but dismissed Dittman's claims on the merits with prejudice. Dittman appealed the Department's decision that the surgery and evaluation are not covered. Respondents filed a Notice of Review appealing the Department's decision that the evaluation and treatment with Dr. Corenman was made by referral rather than as a second opinion.

QUESTIONS PRESENTED

I. WHETHER THE DEPARTMENT OF LABOR ERRED WHEN IT REFUSED TO ADJUDICATE WHETHER DITTMAN SUFFERED A COMPENSABLE INJURY ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT.

II. WHETHER THE DEPARTMENT OF LABOR ERRED WHEN IT DETERMINED RESPONDENTS DID NOT DENY COMPENSABILITY.

III. WHETHER THE DEPARTMENT OF LABOR ERRED WHEN IT DETERMINED DR. VONDERAU MADE A REFERRAL TO DR. CORENMAN.

IV. WHETHER THE DEPARTMENT OF LABOR ERRED WHEN IT DETERMINED DITTMAN WAS RESPONSIBLE FOR EXPENSES RELATED TO DR. CORENMAN'S EVALUATION AND TREATMENT.

STANDARD OF REVIEW

This court's review of a decision from an administrative agency is governed by SDCL 1-26-36:

> The court shall give great weight to the findings made and inferences drawn by an agency on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of

> the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
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> > (1) In violation of constitutional or statutory provisions;
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> > (2) In excess of the statutory authority of the agency;
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> > (3) Made upon unlawful procedure;
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> > (4) Affected by other error of law;
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> > (5) Clearly erroneous in light of the entire evidence in the record; or
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> > (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.
>
> A court shall enter its own findings of fact and conclusions of law or may affirm the findings and conclusions entered by the agency as part of its judgment.

"Agency decisions concerning questions of law . . . are fully reviewable." *Hayes v. Rosenbaum Signs & Outdoor Adver., Inc.*, 2014 S.D. 64, ¶ 7, 853 N.W.2d 878, 881. When the issue is a question of fact, the clearly erroneous standard is applied to the agency's findings, and this Court will reverse only when, after careful review, the Court is firmly convinced a mistake has been made. *Haynes v. Ford*, 2004 S.D. 99, ¶ 14, 686 N.W.2d 657, 660-61. However, when an agency makes factual determinations on the basis of documentary evidence, such as a deposition, the matter is reviewed de novo. *Id*.

ANALYSIS

I. THE DEPARTMENT OF LABOR ERRED WHEN IT REFUSED TO ADJUDICATE WHETHER DITTMAN SUFFERRED A COMPENSABLE INJURY ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT.

The pleading requirements of workers' compensation are not the same as those of civil procedure. *Sowards v. Hills Materials Co.*, 521 N.W.2d 649, 652 (S.D. 1994). ARSD 47:03:01:02 states ". . . [A] general equitable request for an award shall constitute a sufficient prayer for awarding compensation, interest on overdue compensation, and costs to the Claimant. A letter which embodies the information required in this section is sufficient to constitute a petition for hearing." Dittman raised the issue of compensability in her Petition and alleged facts in other

correspondence which supported her position. These actions were sufficient under ARSD 47:03:01:02.

It bears noting that workers' compensation is meant to facilitate "expedient, fair, and efficient" compensation. *Baier v. Dean Kurtz Const., Inc.*, 2009 SD 7, ¶ 14, 761 N.W.2d 601, 605. The Department's decision to not address compensability despite Dittman having raised the issue in her Petition ran counter to these purposes. *Id*.

Finally, compensability was ripe and relevant when Dittman filed her Petition. Whether benefits, including medical expenses, are owed was dependent on the determination that Dittman suffered a compensable injury arising out of and in the course of employment. SDCL 62-1-1(7). Without compensability, benefits are not owed. *Id*. Compensability must be addressed before considering whether specific benefits are to be paid, including treatment. Further, whether Dr. Corenman's expenses are benefits owed depends on whether Respondents denied compensation under ARSD 47:03:04:05(4), which provides, in part:

> A medical provider who is not a participating provider in the case management plan may provide medical services to an employee in any of the following circumstances:
>
> . . . .
>
> (4) When compensability for an injury or disability is denied by the insurer. The Employer is liable for reasonable and necessary medical services if the injury or disability is later determined compensable . . .

Again, compensability is the first step in determining whether benefits are owed. Accordingly, under the pleading requirements of ARSD 47:03:01:02, the goals of workers' compensation as noted in *Baier*, and the relevance of compensability under ARSD 47:03:04:05(4), the Department erred when it refused to determine whether Dittman suffered an injury arising out of and in the course of employment, and the matter is remanded to the Department for determination. *See* 2009 SD at ¶ 14, 761 N.W.2d at 605.

In the interest of providing swift answers in accordance with the workers' compensation scheme, the remainder of the issues are addressed assuming the first step of compensability has been found. *See Baier*, 2009 SD at ¶ 14, 761 N.W.2d at 605. If compensability is not found, the remaining issues are moot.

II. THE DEPARTMENT OF LABOR ERRED WHEN IT DETERMINED RESPONDENTS DID NOT DENY COMPENSABILITY.

Dittman raised the issue of compensability in her Petition for Hearing. *See supra*. In the Answer, Respondents denied "each and every allegation of the Petition for Hearing except as

specifically admitted or qualified herein." Respondents' Answer did not go on to specifically admit or qualify the compensability of Claimant's injury. Therefore, Respondent's denied compensability of injury. *See Sowards*, 521 N.W.2d at 652; *See Baier*, 2009 SD at ¶ 14, 761 N.W.2d at 605; *See* ARSD 47:03:01:02.

That the Department did not hear arguments on compensability does not change the fact that Dittman raised the issue and Respondents denied it. Moreover, nothing in ARSD 47:03:01:02 indicates that a denial of an issue raised in a Petition isn't effective when done "in good faith," as the ALJ characterized Respondent's denial. The ALJ was not at liberty to create such a standard. Similarly, the ALJ found as a conclusion of law that Respondents' denial was not a "true denial." Nothing in ARSD 47:03:01:02 indicates that a denial must be a "true denial" to have effect. The Petition for Hearing and Answer followed the plainly delineated process by which a Claimant raises the issue of compensability and Respondents deny it. ARSD 47:03:01:02. The ALJ could not circumvent this process by labeling the denial "in good faith" or "not a true denial." Simply put, statutes say what they mean and mean what they say, and nothing in ARSD 47:03:01:02 says anything about good faith or a true denial. The Department's determination that Respondents did not deny compensability is therefore reversed.

III. THE DEPARTMENT OF LABOR DID NOT ERR WHEN IT DETERMINED DR. VONDERAU MADE A REFERRAL TO DR. CORENMAN.

SDCL 62-4-43 provides:

> The employee may make the initial selection of the employee's medical practitioner or surgeon from among all licensed medical practitioners or surgeons in the state . . . The medical practitioner or surgeon selected may arrange for any consultation, referral, or extraordinary or other specialized medical services as the nature of the injury shall require. . . An employee may seek a second opinion without the Respondents' approval at the employee's expense.

Dr. Vonderau testified in his deposition that he referred Dittman to Dr. Corenman because "if someone isn't getting relief from conservative care, it's very reasonable to talk to a surgeon." Dr. Vonderau then opined that when Mitch Grieve told Dittman she was not a surgical candidate it was "very reasonable [for her] to seek a second opinion." Dr. Vonderau further described his actions as "medically necessary."

The fact that Dr. Vonderau described Dr. Corenman's expenses as both a "second opinion" and a "referral" in his deposition was not helpful in clarifying the issue. However, *Rakowski v. Frigo Cheese Corporation* resulted in a medical appointment being deemed a second opinion even though the doctor in that case called it a referral. 1998 WL 918528. Thus, Dr. Vonderau's

underlying reasoning controlled whether it was a referral or a second opinion. *See id*. Dr. Vonderau's reasoning was that an appointment with Dr. Corenman was "medically necessary" because "conservative care was not working." This reasoning illustrated that Dr. Corenman's expenses were the result of a referral because the medical attention Dittman was receiving was not providing relief.

The Department found as a conclusion of law that Dr. Corenman's expenses were a referral and not a second opinion. It held that, while Dittman did research on her own in selecting Dr. Corenman and requested a referral, it was ultimately Dr. Vonderau who determined that the visits were necessary given the lack of results seen form conservative care. The Department based its reasoning on the legal standard that workers' compensation statutes are to be liberally construed in favor of the Claimant. *Caldwell v. John Morrell & Co.*, 489 N.W.2d 353, 364.

Under the principles set forth in *Rakowski* and *Caldwell*, it is clear that Dr. Vonderau made a referral because Dittman was not finding relief in the care being provided. *See* 1998 WL 918528; 489 N.W.2d at 364. The Department conclusion that Dr. Corenman's expenses were the result of a referral is affirmed.

IV. WHETHER THE DEPARTMENT OF LABOR ERRED WHEN IT DETERMINED DITTMAN WAS RESPONSIBLE FOR EXPENSES RELATED TO DR. CORENMAN'S OPINION AND TREATMENT IS DEPENDENT ON THE RULING OF COMPENSABILITY IN ISSUE I.

While SDCL 62-4-43 states that Respondents are responsible for any referrals made by a medical provider, statutes are to be construed to give effect to each statute and so as to have them exist in harmony. *Rotenberger v. Burghduff*, 2007 SD 7, ¶ 8, 727 N.W.2d 291, 294. Thus, SDCL 62-4-23 must exist in harmony with SDCL 58-20-24, which provides that all payments of compensation under the South Dakota workers' compensation statutes must be made in accordance with a case management plan. Although Dr. Vonderau made a referral, his referral was to a medical provider outside of South Dakota and therefore outside of Respondents' case management plan. Thus, for coverage to apply to these expenses, the referral must have been made under an exception of ARSD 47:03:04:05.

Dittman's coverage relied on ARSD 47:03:04:05(4), which required a denial of compensability. As has been discussed *supra*, Dittman raised the issue of compensability in the November 28, 2017 Petition for Hearing, and Respondents' January 4, 2018 Answer denied it. Therefore, under ARSD 47:03:04:05(4), the Dr. Corenman June 29, 2018 consultation, October 2, 2018 evaluation, and December 3, 2018 surgery would be covered if compensability is found. Thus, the expenses are covered should the Department find the injury compensable on remand.

The parties argued over the issue of timing because Dr. Corenman's expenses were incurred after the Petition for Hearing was filed. Administrative Regulations are subject to the same rules of construction as are statutes. *Citibank, N.A. v. South Dakota Dept. of Revenue*, 2015 S.D. 67, ¶ 12, 868 N.W.2d 381, 387. In ascertaining the language of a regulation or statute, "[w]e give words their plain meaning and effect, and read statutes as a whole, as well as enactments relating to the same subject." *Chapman v. Chapman*, 2006 SD 36, ¶ 11, 713 N.W.2d 572, 576 (other citations omitted). Moreover, workers' compensation statutes are to be liberally construed in favor of the Claimant. *Caldwell*, 489 N.W.2d at 364.

ARSD 47:03:04:05(4) clearly states ". . . [w]hen compensability for an injury or disability is denied by the insurer. The employer is liable for reasonable and necessary medical services if the injury or disability is later determined compensable." The issue of compensability was raised in the Petition for Hearing and denied in Respondents' Answer. ARSD 47:03:04:05(4) plainly contemplates that a Claimant can seek medical attention after such a denial and then have the issue of compensability determined later. Under principles of statutory construction and workers' compensation, it is inconsistent with this language that a Claimant would have medical expenses excluded from coverage because they were incurred before the issue of compensability is resolved. *Id.; Chapman*, 2006 SD at ¶ 11, 713 N.W.2d at 576; *Caldwell*, 489 N.W.2d at 364. Thus, should the Department determine that Dittman's injury is compensable, the timing of the expenses would not bar coverage under ARSD 47:03:04:05(4).

CONCLUSION

For the foregoing reasons, the Department's decision is AFFIRMED in part and REVERSED and REMANDED in part.

BY THE COURT:

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The Honorable Christina L. Klinger
Circuit Court Judge
Sixth Judicial Circuit