

July 2, 2020

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LETTER DECISION AND ORDER

Tracye L. Sherrill
Lynn, Jackson, Shultz, & Lebrun, PC
110 N. Minnesota Ave. Ste. 400
Sioux Falls, SD 57104

RE: HF No. 36, 2017/18 – Beth Rust v. Midlands Clinic, P.C. and SFM Mutual Insurance Co.

Dear Ms. Nasser and Ms. Sherrill-

This letter addresses the following submissions by the parties:

April 16, 2020	Employer/Insurer's Motion to Compel Claimant to Attend Independent Medical Examination Pursuant to SDCL 62-7-1
	Employer/Insurer's Brief in Support of Motion
May 26, 2020	Claimant's Response to Motion to Compel
	Affidavit of Denise Reck, RN
June 9, 2020	Employer/Insurer's Reply Brief

ISSUE PRESENTED: IS DENISE RECK A "QUALIFIED MEDICAL PRACTITIONER" PURSUANT TO SDCL 62-7-2 WHO MAY ATTEND AN IME AT CLAIMANT'S REQUEST?

FACTS AND PROCEDURAL HISTORY

Employer/Insurer scheduled an independent medical examination (IME) for Claimant to attend on May 19, 2020. Due to the current Corona Virus outbreak, the IME was rescheduled until July 2020. Claimant indicated that she wished to attend the IME

with Denise Reck, an RN employed by her attorney. Employer/Insurer objected to Ms. Reck's presence at the IME, arguing that Ms. Reck does not meet the definition of a "qualified medical practitioner" under SDCL 62-7-2.

ANALYSIS

The provision allowing Claimant to have a medical practitioner present during an IME is found at SDCL 62-7-2:

The examination provided by § 62-7-1 shall be made in the presence of a duly qualified medical practitioner or surgeon employed and paid for by the employee, if the employee so desires. If the examination is made by a surgeon engaged by the employer and the injured employee has no surgeon present at the examination, the surgeon making the examination at the instance of the employer shall deliver to the injured employee, upon the employee's request or that of the employee's representative, a statement in writing of the condition and extent of the injury to the same extent that the surgeon reports to the employer.

The term "medical practitioner" is defined under SDCL 62-1-1.1. "For purposes of this title only, a health care provider licensed and practicing within the scope of his profession under Title 36 is a medical practitioner." Further, SDCL 36-2-1 defines the "practice of healing" as "any system, treatment, operation, diagnosis, prescription, or practice for the ascertainment, cure, relief, palliation, adjustment, or practice for the ascertainment, cure, relief, palliation, adjustment, or correction of any human disease, ailment, deformity, injury, unhealthy or abnormal physical or mental condition."

The requirements to practice nursing in South Dakota are found under SDCL 36-9-3, which provides:

The practice of a registered nurse includes:

- (1) Providing comprehensive nursing assessment of health status of patients;
- (2) Collaborating with the health care team to develop and coordinate an integrated patient-centered health care plan;
- (3) Developing the comprehensive patient-centered health care plan, including:

- (a) Establishing nursing diagnosis;
 - (b) Setting goals to meet identified health care needs; and
 - (c) Prescribing nursing interventions;
- (4) Implementing nursing care through the execution of independent nursing strategies and the provision of regimens requested, ordered, or prescribed by authorized health care providers;
 - (5) Evaluating responses to interventions and the effectiveness of the plan of care;
 - (6) Designing and implementing teaching plans based on patient needs;
 - (7) Delegating and assigning nursing interventions to implement the plan of care;
 - (8) Providing for the maintenance of safe and effective nursing care rendered directly or indirectly;
 - (9) Advocating for the best interest of the patient;
 - (10) Communicating and collaborating with other health care providers in the management of health care and the implementation of the total health care regimen within and across settings;
 - (11) Managing, supervising, and evaluating the practice of nursing;
 - (12) Teaching the theory and practice of nursing;
 - (13) Participating in development of health care policies, procedures, and systems; and
 - (14) Other acts that require education and training consistent with professional standards as prescribed by the board, by rules promulgated pursuant to chapter 1-26, and commensurate with the registered nurse's education, demonstrated competence, and experience.

The use of the phrase “any system” in SDCL 36-2-1 allows for a wide array of possible criteria to qualify as treatment of illness or injury. Any of the enumerated duties found in SDCL 36-9-3 qualify as activities meant to treat patients. Broadly speaking, a registered nurse may qualify as a medical practitioner under SDCL 62-7-2.

Employer/Insurer attempts to differentiate a registered nurse from other medical personnel found under Title 36 to support its argument that a registered nurse does not

qualify as a medical practitioner. For example, Employer/Insurer discusses at length the differences between the duties of a registered nurse and a nurse practitioner. However, Employer/Insurer is reading a distinction into SDCL 62-7-2 where none exists. Nothing in that statute requires the duties found in the definition of a nurse practitioner as a prerequisite to be a qualified practitioner. So long as a registered nurse performs a function which could be classified as practicing the healing arts, that individual may be considered a medical practitioner.

While a registered nurse may qualify as a medical practitioner under SDCL 62-7-2, this does not automatically mean that Ms. Reck eligible to attend an IME with Claimant. SDCL 62-7-2 requires that one also be “practicing within the scope of [her] profession.” Employer/Insurer argues that even if a registered nurse does qualify as a medical practitioner under SDCL 62-7-2, Reck does not. Employer/Insurer contend that the “practicing of the healing arts requires an individual be engaged in “actively treating the types of maladies identified.”

Employer/insurer cites two cases, *Richards v. Lenz*, 539 N.W.2d 80, (S.D. 1995) and *Rehm v. Lenz*, 1996 S.D., 547 N.W.2d 560 in support of this argument. Both cases involved the same defendant and similar facts. In *Richards*, the plaintiffs sought out marriage counseling from psychologist Eldon Lenz. They sued Lenz and his employer for various torts after he began a romantic relationship with the wife, Tammy. Lenz moved for summary judgment arguing that the suit was outside the statute of limitations for medical malpractice under SDCL 15-2-14.1. The circuit court granted Lenz’s motion explaining that the gravamen of the plaintiff’s case was one for medical malpractice. Since Lenz was a practitioner of the healing arts while providing marriage counseling to

the Plaintiffs, their complaint against him was barred by the two-year statute of limitations.

Upon appeal, the Supreme Court reversed the circuit court's decision that Lenz was protected by the statute of limitations for medical personnel. It noted: "Lenz has been unable to provide any authority to support his argument that a psychologist, under the facts of this case, is a practitioner of the healing arts... When the Richards contacted WRMH in 1987 they were seeking marriage counseling. They were not specifically seeking treatment for a 'human disease, ailment, deformity, injury, unhealthy or abnormal physical or mental condition.'" *Richards v. Lenz*, 539 N.W.2d 80, 84 (S.D. 1995).

The Court elaborated on its ruling in the second case involving Lenz. Like *Richards*, the plaintiffs in *Rehm* sought out counseling from Lenz, though on an individual basis. The wife's relationship with Lenz also developed into a romantic one. The plaintiffs later sued Lenz for various torts, including negligence, fraud, breach of contract. The circuit court in *Rehm* also dismissed the case against Lenz based on the statute of limitations. Relying on its earlier reasoning in *Richards*, the Court again concluded that the statute of limitations for medical malpractice did not apply to plaintiffs' claims:

Further, the Rehms did not couch their allegations in terms of medical malpractice (although they do refer to professional malpractice). Even if they had used that term, however, the analysis of *Richards* dictates that a psychologist providing counseling services is not the equivalent of a medical practitioner engaged in the healing arts. Thus, the 2-year statute of limitations for medical malpractice does not apply to the Rehms' complaint. Even if the medical malpractice statute of limitations did apply to psychologists providing counseling for depressed persons, as suggested by the concurrence in part, Lenz' conduct

by its very nature was not undertaken to “treat” depression and is not entitled to the protection of the limitations period for practitioners of the healing arts.

Rehm v. Lenz, 1996 S.D. 51, ¶ 14, 547 N.W.2d 560, 565

It is undisputed that Reck has not actively treated patients for many years.

Reck’s curriculum vitae indicates that she has worked as a “Legal Nurse Consultant.”

Among the duties Reck listed under legal nurse consultant include:

- Assist attorneys and insurance adjusters with initial case screenings.
- Identify and determine damages and related costs of services.
- Assist with medical expert communication.
- Collaborate in preparation or analysis complaints, demand letters, settlement brochures and briefs.
- Assist with depositions and trials, including developing and preparing exhibits.

These duties deal primarily with assisting in the preparation of legal matters.

Even under the most liberally construed interpretation of “practicing the healing arts”, none of the duties Reck engages in as a legal nurse consultant would qualify as such.

During the telephonic hearing, Claimant argued that Ms. Reck’s purpose in attending the IME was to ensure that the doctor received an interpreted the patient’s information correctly.

The Department concludes that this fact alone is insufficient to qualify Reck as a qualified medical professional where she otherwise is not one under SDCL 62-7-2.

Nothing prohibits Reck from interpreting the IME doctor’s notes and offering an opinion after the conclusion of the IME.

CONCLUSION

The Department concludes that a registered nurse may be considered a qualified medical practitioner pursuant to SDCL 62-7-2. However, Reck does not qualify as one. Reck is not currently engaged in the treatment of patients as defined under *Richards* and *Rhem*. Employer/Insurer's motion to compel Claimant's attendance at an IME without Reck is GRANTED. This letter shall constitute the order of the Department on this matter.

Sincerely,

/s/ Joe Thronson
Joe Thronson
Administrative Law Judge