SOUTH DAKOTA DEPARTMENT OF LABOR AND REGULATION
DIVISION OF LABOR AND MANAGEMENT

LEWIS TRUSTY, **HF No. 197, 2003/04**

Claimant,

v. **DECISION**

PESKA CONSTRUCTION,

Employer,

and

MEDICAL ASSURANCE COMPANY,

Insurer.

This is a workers' compensation case brought before the South Dakota Department of Labor and Regulation Division of Labor and Management pursuant to SDCL 62-7-12 and ARSD 47:03:01. This case was heard by Donald W. Hageman, Administrative Law Judge on January 13, 2011, in Sioux Falls, South Dakota. Claimant was represented by Steven J. Morgans. Michael S. McKnight represented Employer and Insurer.

Issue:

Whether Employer and Insurer are responsible for medical expenses other than those related to the treatment provided by Dr. Dietrich?

Facts:

1. On October 6, 2001, Lewis Trusty (Claimant) sustained a compensable work injury arising out of and in the course of his employment with Peska Construction (Employer).

2. On May 11, 2004, Claimant filed a petition with the Department of Labor seeking permanent total disability benefits under the odd-lot doctrine.

3. Following Claimant's October 6, 2001, work-related injury, he began treating in Sioux Falls with Dr. John Hanson, who began prescribing a regimen of pain medications for Claimant including, but not limited to, morphine, oxycodone, and fetanyl.

4. In July of 2008, Claimant, Employer and Medical Assurance Company (Insurer) entered into mediation to resolve the claims that were the subject of Claimant's petition. One of the issues to be resolved through settlement was who Claimant's treating physician would be going forward. Prior to finalizing the settlement agreement, Claimant, through his attorney, proposed both Drs. Terry Graber and Steve Frost as potential treating physicians. Both Drs. Graber and Frost, however, were rejected by Employer and Insurer as potential treating physicians for Claimant.

5. On July 22, 2008, the parties executed a settlement agreement resolving Claimant's claims. Paragraph 8 of that agreement states the following:

> 8. The parties mutually agree that Dr. Christopher Dietrich of The Rehab Doctors, 1136 Jackson Boulevard, Rapid City, South Dakota, shall become Claimant's designated treating doctor. Claimant further agrees that any further treatment rendered or any new treatment recommended by Dr. John A. Hansen of Sioux Falls, South Dakota, shall be at Claimant's expense and shall not be the responsibility of Employer and Insurer.

6. During their negotiations of the settlement agreement, the parties discussed the managed care nurse, Pat Svarstad. Claimant alleges that the parties agreed that Svarstad would not communicate with the new treating physician without the Claimant being present. The Employer and Insurer allege that the agreement was that Svarstad would not discuss the case with the physician until after Claimant's initial examination. Neither version of the agreement was incorporated into the final written agreement. Claimant now contends that Employer and Insurer violated the terms of that agreement. Employer and Insurer contend that they complied with the agreement.

7. On Tuesday, July 22, 2008, Dr. Dietrich examined Claimant, recorded his history, and discussed a course of treatment with Claimant. Dietrich was of the opinion that Claimant was being prescribed dangerously high levels of opiates while under Dr. Hanson's care.

8. At the conclusion of Claimant's July 22, 2008 appointment, Dr. Dietrich communicated to Claimant that he believed it was necessary to transition Claimant into a pain rehabilitation program to titrate him off his current pain medication levels.

9. At the July 22, 2008 appointment Claimant disagreed with Dr. Dietrich's proposal to attend a rehabilitation program. Claimant indicated that he wanted to continue on the drug regime that had been prescribed by Dr. Hanson. Claimant became confrontational with Dr. Dietrich and his staff.

Claimant was also noncompliant in working with Dr. Dietrich's staff to complete the necessary patient history and release of record forms.

10. On August 8, 2008, Claimant called Dr. Hanson and requested that Dr. Hanson write him additional prescriptions for pain medications. In response to Claimant's request, Dr. Hanson provided Claimant with additional pain medication prescriptions.

11. Following the July 22, 2008 appointment, Dr. Dietrich did not personally see Claimant at his office again; however, he corresponded with him by telephone on the following dates: August 18, 20, 2008, September 2, 3, 2008; and November 3, 2008.

12. Following Dr. Dietrich's receipt and review of Claimant's medical records, he strongly recommended that Claimant enroll in a pain rehabilitation program.

13. Dr. Dietrich initially discussed having Claimant undergo rehabilitation at either the Courage Center in Minneapolis, Minnesota, or the Mayo Clinic Pain Rehabilitation Program in Rochester, Minnesota. On September 2, 2008, Dr. Dietrich called Claimant to communicate this course of treatment. However, Claimant was unavailable. As a result, Dr. Dietrich left a message for Claimant outlining his treatment plan.

14. On September 3, 2008, Claimant called Dr. Dietrich's office to have his notes sent to Dr. Hanson, which were subsequently received on September 15, 2008. During this conversation, Claimant stated that Dr. Dietrich was “way out in left field” and he wasn’t going to go his route. He said that he was going to find another doctor that agrees with his old doctor.” At this time, Claimant was again hostile towards Dr. Dietrich's staff, and resorted to using profane language.

15. After Claimant’s September 3, 2008 call, Dr. Dietrich noted in his record “Do not reschedule without ok from Dr. D.”

16. On September 3, 2008, Claimant again called Dr. Hanson's office seeking prescriptions for pain medications. Dr. Hanson agreed to write and mail pain medication prescriptions for Claimant for the next two months.

17. On September 26, 2008, Dr. Hanson faxed a referral letter to Dr. Graber for Claimant.

18. On November 3, 2008, Clamant called Dr. Dietrich’s office, the entry in Dr. Dietrich’s chart states: “[Patient] called states he is in a bind and needs to know what he needs to do to come back in to see you?”

19. In accordance with Dr. Dietrich's referral, Dr. Dietrich's medical assistant scheduled an appointment for Claimant at Mayo for Wednesday, November 26, 2008. However, Claimant's appointment at Mayo was ultimately cancelled because Claimant refused to begin a program the day before Thanksgiving.

20. Following the cancellation of the appointment at Mayo, Dr. Dietrich referred Claimant to the treatment program at the Keystone Treatment Center in Canton, South Dakota. The Keystone Treatment Center is a 30-day inpatient rehabilitation program.

21. An evaluation of Claimant was required before his treatment at the Keystone facility. Claimant's initial evaluation was scheduled for Friday, November 28, 2008, in Rapid City, South Dakota. However, Claimant refused to appear for his evaluation.

22. Claimant's evaluation was rescheduled for December 24, 2008, at Rhoades Counseling in Rapid City, South Dakota. On December 16, 2008, Ms. Svarstad received a call from Rhoades Counseling stating they had a cancellation for testing on the morning of December 17, 2008. In response, Ms. Svarstad gave them Claimant's telephone numbers and asked them to call him regarding the appointment to see if he could attend on December 16, 2008. Rhoades Counseling Center called Claimant and notified him of the cancellation for December 17. In response, Claimant indicated that he was not willing to go to the evaluation on the morning of December 17, 2008, or on December 24, 2008.

23. Claimant has treated with Dr. Graber after Dr. Hanson's September 26, 2008 referral.

24. Additional facts may be discussed in the analysis below.

Analysis:

The general rule is that a claimant has the burden of proving all facts essential to sustain an award of compensation. Horn v. Dakota Pork, 2006 SD 5, ¶14, 709 NW2d 38, 42 (citations omitted).

In this case, the settlement agreement executed by the parties on July 22, 2008, is clear and unambiguous and was approved by the Department of Labor. As such, its terms are enforceable. SDCL 62-7-5.[1]

[1] SDCL 62-7-5. If the employer and employee reach an agreement in regard to the compensation under this title, a memorandum of the agreement shall be filed with the department by the employer or employee. Unless the department within twenty days notifies the employer and employee of its disapproval of the agreement by letter sent to their addresses as given in the memorandum filed, the agreement shall stand as approved and is enforceable for all purposes under the provisions of this title.

The settlement agreement designated Dr. Dietrich as Claimant's treating physician. Once the agreement was signed, only Dr. Dietrich was authorized to treat or refer Claimant to another physician. SDCL 62-4-43 states in part:

> 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. The employer is not responsible for medical services furnished or ordered by any medical practitioner or surgeon or other person selected by the employee in disregard of this section.

SDCL 62-4-43. (emphasis added).

The medical expenses for which Claimant seeks compensation here are for services provided by Dr. Graber and prescriptions written by Dr. Graber or Dr. Hanson. SDCL 62-4-43 makes clear that only Dr. Dietrich could refer Claimant to Dr. Grabber. Dr. Dietrich did not make that referral. In addition the agreement relieved the Employer and Insurer of any responsibility for service provided or new treatments recommended by Dr. Hanson. Consequently, these medical expenses are not compensable.

The Claimant argues that a doctor-patient relationship never existed between Claimant and Dr. Dietrich. The Department disagrees. A doctor-patient relationship existed. Dietrich examined Claimant and prescribed a course of treatment, namely rehabilitation. If the doctor-patient relationship was severed, it was done so by the Claimant, through his words and deeds. He refused the treatment suggested by Dietrich and verbally abused the Doctor and his staff. In addition, on September 3, 2008, Claimant stated that he was going to find a new medical provider. It was only in reaction to these actions that Dietrich declined to see Claimant again.

Claimant also complains that Nurse Svarstad's involvement in the case violated the terms of their agreement. Claimant's complaint is without merit. No agreement concerning Ms. Svarstad's involvement in the case was incorporated into the written language of the agreement. As such the terms of any such agreement are unenforceable pursuant to the "parol evidence rule".

The South Dakota Supreme Court discussed the parol evidence rule in Butler Machinery Co. v. Morris Construction Co., 2004 SD 81, 682 NW2d 773. In that decision it stated:

> The parol evidence rule prevents a party to an unambiguous contract to challenge its terms by asserting alleged oral variations to what is written in the document. This rule, as codified in SDCL 53-8-5, provides: "The execution of a contract in writing, whether the law requires it to be written

> or not, supersedes all the oral negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument."

Butler Machinery at ¶ 11.

If Claimant wanted to limit Nurse Svarstad's involvement in this case, he needed to incorporate that contingency into the language of the agreement. He failed to do so.

Conclusion:

Employer and Insurer are not responsible for any medical expenses other than those related to the treatment provided by Dr. Dietrich. Employer and Insurer shall submit Proposed Findings of Fact and Conclusions of Law and an Order consistent with this Decision, within 20 days after receiving this Decision. Claimant shall have an additional 20 days from the date of receipt of Employer and Insurer's Proposed Findings of Fact and Conclusions of Law to submit Objections and/or Proposed Findings of Fact and Conclusions of Law. The parties may stipulate to a waiver of formal Findings of Fact and Conclusions of Law. If they do so, counsel for Employer and Insurer shall submit such stipulation together with an Order consistent with this Decision.

Dated this _20th_ day of May, 2011.

___/s/ Donald W. Hageman_____
Donald W. Hageman
Administrative Law Judge