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Hospitals shield doctor reviews

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Argus Leader

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WATERTOWN - Marilyn Zubke, who farms with her husband northwest of here, must perform the kind of daily chores a feeble back won't allow. So when she injured her spine in a car accident in 2002, and a doctor told her she needed surgery to repair it, she didn't hesitate to take his advice.

Zubke later learned she might have healed without surgery. But that news, she alleges, came after the surgeon, Dr. Britt Borden, had twice sliced her open, removed vertebrae and inserted metal hooks and rods - leaving Zubke with a mangled back and six-figure medical bills.

"He ruined my life," the 42-year-old woman said.

Zubke is now suing Borden and Avera St. Luke's Hospital in Aberdeen, where the surgeries were done, claiming the medical center did nothing to stop the surgeon from recklessly operating and collecting hundreds of thousands of dollars in revenue.

Borden and the hospital deny wrongdoing and are fighting the suits. Records show hospital officials conducted a study of Zubke's operations, a process known as peer review, but they won't discuss findings or say if Borden was disciplined.

Avera St. Luke's chief executive Ron Jacobson said "an allegation is very different than proof," and doctors deserve protection from public scorn.

But hospitals' common protective layer, the peer review system, has come under increasing scrutiny from critics who say it is tainted by profit motives and hidden from public view. It is intended to encourage doctors to discuss among themselves suspected cases of malpractice - behind closed doors and free from the threat of lawsuits.

When complaints are made by patients or a doctor's colleagues, the head of the hospital's medical staff appoints a committee of doctors to investigate. The doctors review records, interview staff members involved and determine if mistakes were made.

It is not common for them to interview alleged victims, and results of the probes are legally kept secret.

Patients such as Zubke are left to wonder what went wrong.

Hospital reviews are not the only disciplinary actions that are hidden in South Dakota. Unlike in any other state, the South Dakota Board of Medical and Osteopathic Examiners, charged with investigating complaints against doctors, has historically refused to release a list of disciplined doctors. The board turned down a national consumer group's request for a summary of actions, and the Argus Leader fought three months before getting the board to turn over the records. They decided to do so last week.

If problems are uncovered during a peer review, and the hospital suspends a doctors' privileges - the right to admit patients - or hands out other punishment such as probation, the medical center

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is supposed to report the action to the National Practitioner Data Bank, a federal repository started by Congress to track failing doctors.

Hospital executives use it as part of background checks they do on all doctors to whom they give privileges.

Yet 54 percent of the nation's hospitals have never once reported a doctor to the data bank, which was established in 1990. Through 2002, 79 percent of South Dakota hospitals had never reported, the highest percentage in the nation.

The government concedes that the system is incomplete, at best, because it has no way to make sure hospitals report.

And the data bank does not publicly name doctors or hospitals that have reported, shedding little light on which doctors have troubled pasts.

The American Medical Association, the national physician lobby, has long argued that the data bank should be private because it also contains malpractice payments, and even good doctors get sued.

In fact, the AMA says many lawsuits are completely unwarranted, but more doctors are getting stung by litigation because a growing number of greedy trial lawyers are ushering as many patients as they can into court.

Patients turn to lawyers

Steve Johnson, a Sioux Falls lawyer who has both defended and sued doctors, said hospitals might need to offer anonymity to get staff to speak out. He doesn't deny that frivolous lawsuits exist, and he agrees that medical staffs need some protection.

But simply shoveling the problem onto the laps of trial lawyers is shortsighted, he said. Johnson and other top health-care lawyers are approached with far more malpractice cases than they can take.

He blames hospital staffs that take peer review protections too far, concealing all information and leaving patients to hire lawyers just to learn what went wrong.

"If you're looking for the truth, and you're not afraid of it, then it's only fair that the person who was injured as a result of a mistake ought to be told what happened and why," Johnson said.

Lee Schoenbeck, a state legislator and Zubke's lawyer, called the system "an absolute embarrassment" and said his client's case illustrates its flaws.

Zubke was in a car accident and injured her back in July 2002. She was referred to Borden. He immediately advised surgery.

"He told me if I didn't, I could end up paralyzed," Marilyn Zubke said. "I was so scared, I agreed to it."

Zubke alleges in her lawsuit that Borden botched the first surgery in August 2002. He said he would place hooks and rods along her vertebrae to stabilize her spine above and below where she was told there was a broken bone. But, among other problems, Borden placed them two levels off from where he said he would, she alleges, and actually increased pressure on the break.

A second surgery was scheduled two weeks later. That time, he removed three discs and two levels of her vertebra and replaced them with a metal cage, which Zubke alleges wasn't necessary. He again placed hooks and rods over several vertebrae, she says, inserting them straight rather than correctly following the bend of her back.

Borden, reached at his home, did not immediately comment but said he would call the Argus Leader later. He never did.

In a deposition and in court documents filed by his lawyer, Ed Evans of Sioux Falls, Borden stands by his decision to operate and said the first outcome can be blamed on a fluke, a post-surgery mishap that unhinged the hooks.

Borden was previously sued for malpractice in Washington, yet because of the privacy surrounding legal settlements and the federal data bank, how the case was resolved could not be confirmed.

About the money

Avera St. Luke's and another doctor accused of failing to properly assess Borden's work in Aberdeen denied wrongdoing but would not comment further.

"People's expectation of physicians and hospitals has become one of perfection. So whenever there's a disappointing outcome, they use hindsight to question," Evans said in defense of the medical industry. "We forget that it's not always 100 percent and that sometimes there is a bad result for whatever reason."

Zubke went to the Twin Cities in the fall of 2002 to have a third operation to correct what doctors there determined were mistakes. She now has metal rods running the length of her back to keep what's left of her spine intact.

What floored her, though, was when the Minnesota doctors told her the initial surgery might not have been needed. They said she had a compression fracture and could have been given a brace to wear while her back healed without surgery.

Between insurance and out-of-pocket payments, Zubke accumulated more than \$300,000 in medical bills - mostly for work she thinks she may never have needed.

The Aberdeen doctor or hospital didn't try to explain what really went wrong, she said. But she did hear from Avera St. Luke's when it took out a lien on the Zubkes' farm - even though they had health insurance - to make sure they paid their hospital bills.

"It was all about money. It's the only reason this woman was operated on," Schoenbeck said, adding that for all the talk about the injustice of frivolous lawsuits, his client had no other option but to find a lawyer. "You ask someone who's been mutilated by this kind of character what he should get away with, and then talk about justice."

Zubke says she can never run or lift or twist again. Her back is so worn from surgery that any jarring causes biting pain. She and her husband, David, once ran the farm as a team. She would handle the animals and help her husband load grain. They've had to sell their livestock and scale back the rest of their operation.

"Now I sit inside and watch him," she said of her husband working, "and he can't do it all alone. We worry about the future." She paused, then her voice curled in frustration. "I'm terribly angry."

Far-reaching concerns

Several doctors across the nation have stepped forward to complain that peer review systems fall short of keeping bad doctors out of operating rooms.

Among the most publicized cases in recent years involved Chae Hyun Moon and Fidel Realyvasquez Jr., who performed and supervised cardiac procedures at Redding (Calif.) Medical Center.

Federal prosecutors said the two charged inflated prices for dozens of procedures that weren't necessary, ripping off Medicare and hurting patients.

Patients and doctors complained to hospital administrators, but they said because the accused doctors were generating millions in revenue, the hospital's peer review system overlooked them. Eventually, though, the complaints mounted enough to be heard by prosecutors. The hospital's parent health system did not admit guilt but settled a civil lawsuit last year, paying more than \$50 million to the government alone for Medicare billing fraud.

Officials from the South Dakota Association of Health Care Organizations and several hospitals say peer review is taken seriously in every case, and doctors are encouraged to come forward to protect patients. The "process is pretty solid," said Dr. Ken Aspaas, chief medical officer for Sioux Valley Hospital.

But there's no way to tell, because unlike in the California case, many doctors do not speak out. They worry they'll be punished for rocking the boat. Hospitals can suspend a doctor's privileges

for what they deem unprofessional behavior or acts that could hurt the hospital's bottom line.

Dr. Larry Teuber, a Rapid City surgeon, exposed a competitor's alleged wrongdoing. That doctor, Steven Schwartz, was later sued by 14 patients and placed on probation by the state last year. But before that happened, Rapid City Regional Hospital pulled Teuber's privileges. The hospital would not say why, but Teuber said he was cut off because he blew the whistle on a doctor who generated big money for the hospital. Schwartz and others have said Teuber was out to ruin a competitor.

"Never mind that we saved who knows how many patients from bad surgeries," Teuber said.

In a 2002 Sioux Falls case, several doctors said a top-earning surgeon who had privileges at both major hospitals in town mishandled a hysterectomy, allowed his 27-year-old patient to bleed to death, then failed to accurately document in the woman's medical records what happened.

The woman's husband agreed to a settlement with either the hospital or the doctor, but details were sealed by a judge.

Doctors with direct knowledge about the issue discussed it privately with the Argus Leader - one provided copies of internal records as proof the surgery was mishandled - but refused to have their names used, for fear of retribution.

Questions remain

Records provided by Schoenbeck, Zubke's lawyer, show that the Avera St. Luke's medical staff conducted a peer review of Borden's work in the fall of 2002 after Zubke's surgeries. No results were released, and the doctor's privileges were not restricted at that time.

Borden continued to operate well into 2003. Schoenbeck said he has heard from five other patients who think Borden failed them as well.

Jacobson, the hospital's chief executive, cautioned against presuming guilt in any case, but added, "The medical staff here has very high standards ... and if those standards are not met, they are not reluctant" to cut a doctor's privileges.

In the same recent interview, Jacobson said Borden still had the right to work at Avera St. Luke's. But on Oct. 13, 2003, three days after Schoenbeck formally interviewed Borden in a deposition, the hospital was notified that the practice Borden was a partner in would be dissolved.

The other partner, Dr. Charles Miller, who was in charge of neurosurgical procedures at the hospital, would not allow Borden to operate at St Luke's, Schoenbeck said. Miller did not deny that but declined to comment on the case.

Court records show that Borden has not operated since last fall.

David Zubke said he and his wife wouldn't know that much if they hadn't hired a lawyer.

"All we want is the truth, and that's the problem, I guess," he said. "You ask a doctor a question, and he can lie to you, and everyone else at the hospital can cover for him."

His wife nods sadly.

"Did they ever do a peer review, or did they just say they did?" she asked. She paused to hold back tears. "How would you ever know? How would you know anything that goes on with their decisions?"

"That doesn't seem right. I'm the one who had my back carved up. I'm the one who can't work or sleep at night, and no one can tell me why this had to happen?"

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