IN THE COURT OF THE SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

David A. Kochendorfer,

Employee,

vs.

Shakopee Mdewakanton Sioux Community

Employer,

and

Berkley Risk Administrators Company,

Administrator.

Worker's Compensation Appeal
Court File No. 603-08

The Appellant, David A. Kochendorfer, was employed by the Shakopee Mdewakanton Sioux (Dakota) Community ("the Community") as a carpenter. During his employment, he sustained two injuries to his back. On December 4, 2006, he was struck on the back by the metal door of a dumpster and was unable to work for a period of approximately two and one-half months. He returned to work on February 20, 2007, and on that day was again injured while he was lifting heavy furniture. Thereafter, he was seen by a number of health care providers, some of whom fell within the definition on an approved "health care provider" under section D.5. of the Workers' Compensation Ordinance of the Shakopee Mdewakanton Sioux (Dakota) Community ("the Ordinance"), and some of whom did not. During the Appellant's course of treatment, disagreements arose between him and some of the medical professionals who were treating him. Eventually, the Administrator discontinued payment of his benefits, asserting that (i) the Appellant had failed to cooperate with reasonable medical or vocational rehabilitation as required by section D.3.d.5 of the Ordinance, and (ii) that the pain the Appellant was experiencing was due to a pre-existing condition and therefore was excluded from compensation under section C.3.n. of the Ordinance. Then, in June, 2007, the Appellant's employment was terminated by the Community on the grounds of misconduct, and thereafter the Administrator asserted that compensation also should be denied because of that misconduct, under section D.3.d.2 of the Ordinance.

The Appellant sought review of the Administrator's decisions before a Hearing Examiner, under section F.7. of the Ordinance. The Hearing Examiner elected to review the matter based on the written record, without conducting a hearing, as is her prerogative

under the Ordinance, and on August 22, 2007 she affirmed the Administrator's denial of benefits. She concluded that the Appellant's ongoing pain was a result of a pre-existing condition, and therefore she did not reach either the issue relating to the Appellant's alleged failure to cooperate with a reasonably rehabilitation program or the issue relating to his termination for misconduct. The Hearing Examiner said:

> The findings on the [Appellant's] 12-6-06 MRI, which predate the 2-20-07 injury, as well as the findings on the 3-13-07 MRI clearly show preexisting degenerative conditions in Employee's lumbar spine. No acute vertebral fractures were seen on either MRI. The pre and post 2-20-07 MRI's are virtually identical though the written descriptions in the reports vary slightly due to the wording choices of the physicians reading the films.
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> Dr. Sherman his [sic] 5-9-07 report opined that Employee has preexisting conditions in the lumbar spine which may have been aggravated on 2-20-07 causing symptoms of pain. This opinion is consistent with the MRI findings noted above.
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> In light of the Employee's preexisting underlying degenerative conditions of the lumbar spine and the clarity of Ordinance C.3.n., Employee's claim is denied and the Claim Petition is dismissed.

From this decision, the Appellant filed a timely appeal with this Court under section F.8. of the Ordinance, but for reasons that are not altogether clear the record in this matter was not forwarded to the Court until January 24, 2007.

The record on appeal is fairly voluminous. It is comprised of medical records from a number of the persons and entities with whom the Appellant consulted, correspondence between the Appellant and the Administrator, and the Appellant's affidavits and argument concerning those other documents.

Having reviewed the record, the Court must observe that the Appellant's affidavits and arguments are in many places very difficult to follow. But it is at least clear that he contends that the pain he experienced after February 20, 2007 was not a result of a pre-existing condition, and that he did not fail to comply with reasonable rehabilitative requirements.

The Court's role in an appeal of this sort is limited. Under the Ordinance, the Court cannot reverse the Hearing Examiner's factual findings. Section F.8. of the Ordinance provides:

> ***F.I. Appeal.*** There shall be no further review of factual decisions made by a hearing examiner. A decision by a hearing examiner concerning legal issues, whether the result of an evidentiary hearing or more, may be appealed by either party to the Shakopee Mdewakanton Sioux (Dakota) Judicial Court. The appeal must be filed with the Judicial Court in writing within 30 days of the date of the

appeal and shall be served on all parties. The Judicial Court may remand the matter to the hearing examiner for additional factual determinations if the Judicial Court determines that the factual record is inadequate. The decision of the Judicial Court shall be final.

However, the Court does have the authority and the responsibility to review the Hearing Examiner's conclusions of law, and as is noted above, has the authority to "remand the matter to the hearing examiner for additional factual determinations if the Judicial Court determines that the factual record is inadequate".

Upon due consideration, the Court has concluded that a remand in this matter is appropriate, because although the Hearing Examiner found that the Appellant's condition, as shown in the two MRI's, did not appreciably change from December, 2006 to March, 2007, the Hearing Examiner did not, in the Court's view, make sufficiently specific findings that tie the Appellant's pre-existing condition to the pain that the Appellant assertedly experienced after February 20, 2007. In addition, in the Court's view, the Hearing Examiner and the Administrator appear to have ignored a pertinent provision of the Ordinance. Section C.4. of the Ordinance provides:

> *C.r. Coverage in Cases of Prior or Subsequent Injuries.* In cases of multiple personal injuries, if an injury sustained during the course of employment with an Employer is the material or principal cause of the Employee's disability or need for medical treatment, the Employer shall be liable for all benefits to which the Employee may be entitled under this Ordinance. If an injury sustained during the course of employment with an Employer is not the material or principal cause of the Employee's disability or need for medical treatment, the Employer shall not be liable for any benefits under this Ordinance. In the event of a dispute concerning apportionment, a neutral physician shall be appointed by the Administrator, and the opinion of the neutral physician shall be binding on the Employee and the Employer.
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> (Emphasis supplied).

Here, the Court is of the view that the pre-existing condition that the Hearing Examiner found, based upon her review of the Appellant's MRI's, should be interpreted as a prior "injury". Therefore the Administrator should have appointed a "neutral physician" to examine the Appellant and his medical records to determine whether, given the Appellant's pre-existing condition as it is revealed by the MRI's and other evidence, the pre-existing condition "is the material or principal cause of the Employee's disability".

The Court therefore remands this matter to the Administrator with instructions that a neutral physician be appointed to make that determination. If that physician's concludes that, in fact, the Appellant's February 20, 2007 injury likely was not "the material or principal cause" of his disability, then under the Ordinance this matter is at an end because the neutral physician's findings are "binding on the Employee and the Employer", under section C.4. of the Ordinance. If, on the other hand, the neutral

physician's finding is that the Appellant's pre-existing condition likely is not "the material or principal cause" of his disability, then further proceedings will be necessary before the Hearing Examiner concerning the contentions of the Administrator that were not dealt with in the Hearing Examiner's August 22, 2007 decision.

March 11, 2008

Judge John E. Jacobson