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

David A. Kochendorfer,

Employee,

vs.

Shakopee Mdewakanton Sioux Community — Worker's Compensation Appeal

Employer,

and

Berkley Risk Administrators Company,

Administrator.

On April 25, 2008, the Court in this matter ruled that the phrase "neutral physician", as it is used in Section C.4. of the Workers' Compensation Ordinance of the Shakopee Mdewakanton Sioux Community ("the Ordinance"), meant not only that the appointed physician must be "an impartial, licensed, practitioner of medicine, with no active engagement on either side of the dispute in question", but also that the physician "will not be influenced in any way by a relationship with the Community or the Administrator [and therefore] that the physician should not have been employed by the Community in other similar claims". On May 16, 2008, the Administrator filed a Motion for Further Clarification of the Court's order. Specifically, the Administrator asked the following three question:

1. Is the Administrator correct to read a reasonable time limit into the Court's instruction?

2. Is the Administrator correct to interpret the phrase "employed by ... the Administrator" as being limited in scope to the undersigned Claims Examiner, or other person in that position?

3. Is the Administrator correct to interpret the phrase "similar claims" to mean workers' compensation claims involving the Employer?

The Administrator's stated reason for its requests, and for its interpretation, reduced to its essence, involves the scope of the Administrator's business. In the materials that accompanied its motion, the Administrator explained that it "is a very large, nationwide,

risk management company, administering nearly 150,000 property/casualty and workers' compensation claims for more than 50,000 clients annually." (Administrator's May 15, 2008 Motion and Memorandum, at 5.) Under these circumstances, the Administrator asserted, it would be virtually impossible for the claims examiner who administers the Shakopee Mdewkanton Sioux (Dakota) Community's file to ensure that a given physician has not, at some time in the past, performed some service for some other claims examiner, working for a different client, within the Administrator's firm:

> ...If the Court intended its instruction to be broader than the Administrator's reading of the instruction, then the Administrator could conceivably be barred from appointing a physician who has ever been used by the Administrator in any past workers' compensation claim. In that event, the Administrator is concerned that it would be exceedingly difficult, if not impossible, to find such a physician.
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> Moreover, the Administrator is concerned that it would be excessively burdensome to even determine whether a given physician had ever been used by the Administrator in a past workers' compensation claim. The Administrator has no way of running a computerized name check to determine if it has ever previously used a given physician. Performing such a check would require pulling up and looking into each newer computerized workers' compensation file, and physically pulling and looking into each older paper workers' compensation file, to determine which physician performed the independent medical examination in each case.

Ibid, at 5-6.

The Administrator suggested that a reasonable "look-back" period would be two to three years, and that the look-back should include only employment by the Shakopee Community, and/or by the Community's past and present claims examiners, and not employment by other of the Administrator's claims examiners.

In response, the Employee in this matter submitted two letters to the Court, one dated May 23, 2008 and one dated June 5, 2008. In each, the Employee noted that he recently had been hospitalized, and in each he argued that a neutral physician, under Section C.4. of the Ordinance, should not be an "Independent Medical Examiner". The Court understands the Employee's contention, in this regard, to mean that the neutral physician should not also have been used by the Administrator as an Independent Medical Examiner in workers' compensation files – and that is the thrust of the Court's April 15, 2008 Order. But the questions posed by the Administrator, remain: does the phrase "neutral physician", as it is used in the Ordinance, debar any physician who at any time has worked for any client or any claims examiner of the Administrator?

The Court does not believe that the Ordinance should be read that broadly. The Court accepts the Administrator's argument that a rule of reason must apply here, and that sufficient neutrality is guaranteed if a physician has not had a connection either with the Community's workers' compensation files or with the Community's present claims

examiner for some finite previous period. But the Court is not convinced that the "two or three years" suggested by the Administrator suffices to ensure neutrality. In the Court's view, the Neutral Physician should have been, at least for the previous five years, a stranger both to the Community's workers' compensation claims and to the person or persons presently responsible for handling the Community's claims.

Accordingly, it is herewith ORDERED that the Neutral Physician appointed in this matter under Section C.4. of the Workers' Compensation Ordinance of the Shakopee Mdewakanton Sioux Community shall not have been employed, in connection with any workers' compensation claims, by the Community or by the claims examiner who presently is responsible for handling the Community's workers' compensation claims, for at least the previous five years.

June 9, 2008

Judge John E. Jacobson