

IN THE
HO-CHUNK NATION SUPREME COURT

FILED
IN THE HO-CHUNK NATION
TRIAL/SUPREME COURT

MAY 15 2008

ME

Clerk of Court/Assistant

THOMAS QUIMBY,

Appellant,

v.

HO-CHUNK NATION AND
HO-CHUNK NATION INSURANCE
REVIEW COMMISSION,

Appellees.

DECISION

SU 07-08

CV 05-91

This matter came before the full court March 15, 2008 for oral argument with Associate Justice Joan Greendeer-Lee, Associate Justice Dennis M. Funmaker and the Honorable Chief Justice Mary Jo Hunter presiding. This matter is an appeal of an adjudicative decision of the Ho-Chunk Nation Insurance Review Commission. The Trial Court issued an *Order (Final Judgment)* CV05-31 holding for the defendants on April 10, 2007.

The Appellant is a former employee of the Ho-Chunk Nation Casino, where he made \$28.40 an hour. *Trial Court Order (Final Judgment)*, 7. On August 24, 2004, the Appellant was injured while moving an air-compressor at work. *Id.* His employment was terminated on January 31, 2005 as he was unable to meet the requirements of the job. *Id.* Appellant then filed a claim for Workman's Compensation benefits with Crawford & Company, which was denied on January 28, 2005. *Id.* Appellant appealed this decision to the HIRC on February 25, 2005. The HIRC found that the Appellant had healed as of April 26, 2005. *Id.* Consequently, on September 24, 2005, the Appellee issued its

Decision and Order, granting partial relief to the Appellant. Mr. Quimby received disability at five percent but was denied his other four requests of relief.

The Trial Court below explained the arbitrary and capricious standard to be used in reviewing the agency decisions. *Tr. Ct. Final Judgment* at 8-11. The Trial Court asserted that the Appellant failed to meet this standard because his claim rested upon “representations allegedly made to him by his original employment interview regarding the Workman’s Compensation Plan of the Ho-Chunk Nation”. *Id.* at 11-12. Finally, the Court ruled that the benefits the Appellant requested were outside the scope allowed by the laws of the Nation. Specifically, the Nation’s laws do not provide for compensation for his future impaired earning capacity. *Id.* at 13.

Appellant makes two legal arguments. First, although he does not couch his claim in the language, he is essentially making an implied contract claim, stating that he was told by Ms. Pampling, Mr. Lonetree, and Mr. Henish that the Nation followed Wisconsin law concerning worker’s compensation. *Id.* at 5. The Appellant cited Wisconsin law, Chapter 102, Stats. which allows for the impairment of earning capacity. Appellant did not flesh out the elements of an implied contract however.

The second legal argument is based on the laws of the Ho-Chunk Nation. First, Appellant points to the Nation’s Personnel Policies and Procedures Manual which states “temporary disabilities that arise in the course of employment with the Nation are compensable to the state’s worker’s compensation program”. *Id.* Also, the ERA secretary states that the compensation plan is operated for the benefit of the employees. Paragraph 60(c)(1) provides the basis for coverage with regard to permanency benefits. *Id.* Paragraph 60(c)(5) incorporates by reference the weekly benefit schedule used by

Wisconsin through the Department of Workforce Development. *Id.* Consequently, Appellant argued that the “impairment of earning capacity works off that weekly benefit schedule.” However, it is entirely unclear what “works off that” means. Appellant concluded that his employment included features comparable the Wisconsin worker’s compensation law, which stops the Nation from asserting that impairment of earning capacity is not recognized as a compensable manner. *Id.*

Appellee stated that Ho-Chunk Nation and not Wisconsin law should apply and offered several arguments in support of this contention. First, Appellee argued that statements of Lonetree, Henish and Pemblin were never entered into the record as the HIRC denied the request to have them testify. *Id.* at 7. However, Appellant’s counsel did make an offer of proof as to the individuals who would have testified. *Id.* Next, Appellee stated that even if the statements were made to Appellant, it does not follow that Wisconsin law would apply. *Id.* The assurance that the Nation had ‘comparable’ benefits does not mean “exactly the same” benefits as Wisconsin. *Id.* Appellee notes that while there is a great ambiguity in regards to what was said to Appellant, there is no ambiguity in the fact that the HCN Legislature did not adopt the law of the State of Wisconsin. *Id.*

The Appellee further argued that the ERA does not authorize the benefits Appellant seeks. The broad statements of “purpose” noted by the Appellant cannot be construed to grant the type of benefits he desires. *Id.* at 8.

Appellee also alleged that the HIRC’s *Decision* was not arbitrary or capricious as it was based on the medical statements of Dr. Cederberg. *Id.* Additionally, the Commission relied on evidence that the complaints were not related to the injury which

occurred at the Ho-Chunk Casino. *Id.* The HIRC also cited to the applicable portions of the worker's compensation policy, so their decision was not contrary to law.

Finally, Appellee noted that whether the Nation should award the benefits sought by Appellant is not the issue. *Id.* If the Nation had intended to award those benefits, the language could have been drafted more precisely. *Id.* Citing *Janet Funmaker v. Libby Fairchild*, SU 07-05 (HCN S. Ct. August 31, 2007) at 7. Appellee asserted that is not the Supreme Court's job to fix drafting mistakes in Legislation. *Id.* at 8-9. The Court agrees.

The Trial Court's ruling is upheld because the Appellant does not provide a basis for altering the HIRC's decision. Appellee asserts that the Appellant fails to understand the crucial point behind denying his claims: that the expenses were incurred after the end of healing date, which was determined to be April 26, 2005. *Appellee Brief* at 5-6. Because Appellant does not argue for a different end of healing date, he cannot succeed in overturning the Trial Court's decision, which was based on the validity of the end of healing date. *Id.* at 6.

The HIRC's decision was not arbitrary and capricious, unsupported by substantial evidence or contrary to law. The basis for the HIRC's *Decision* was two-fold: 1. It had no authority to award relief for impaired earning capacity. 2. The end of healing date was April 26, 2005, which was determined by Dr. Paul Cederberg, M.D. *Id.* at 6. The HCN's workers compensation policy does not allow for payment for medical costs or payment for loss of time past their healing date. Sections 4.010 and 5.011.

CONCLUSION

Based on the foregoing, the Court affirms the Trial Court's decision in *Thomas Quimby v. Ho-Chunk Nation and Ho-Chunk Nation Insurance Review Commission*, CV 05-91(HCN Tr. Ct., April 10, 2007).

It is so ordered. Egi Heshkekjet.

Dated this 14th day of May, 2008.

Per Curiam.



Hon. Dennis M. Funmaker, Associate Justice

CERTIFICATE OF SERVICE

I, Mary K. Endthoff, Clerk of the Ho-Chunk Nation Supreme Court, do hereby certify that on the date set forth below, I served a true and correct copy of the Decision in Case No. SU 07-08, upon all persons listed below:

By United States Postal Service:

Attorney J. Drew Ryberg
Ryberg & Happe, S.C.
200 Riverfront Terrace, Suite 100
P.O. Box 1999
Eau Claire, WI 54702-1999

Attorney Michael Murphy
Whyte, Hirschboeck, Dudek, S.C.
33 East Main Street, Suite 300
Madison, WI 53703-4655

Jack Fleming
Crawford Insurance
175 North Patrick Blvd. #100
Brookfield, WI 53045

Ho-Chunk Nation Department of Justice
P.O. Box 667
Black River Falls, WI 54615

Dated: May 14, 2008


Mary K. Endthoff, Clerk
Ho-Chunk Nation Supreme Court

