

IN THE HO-CHUNK NATION SUPREME COURT

FILED
IN THE HO-CHUNK NATION
TRIAL/SUPREME COURT

OCT 29 2008

ME
Clerk of Court/Assistant

SHARON WILLIAMS,

DECISION

Appellant,

v.

HO-CHUNK NATION INSURANCE REVIEW COMMISSION,

Appellee.

Case No.: SU 08-01

Trial Ct.: CV 07-54

This case comes before the Ho-Chunk Nation Supreme Court on appeal of the Trial Court's *Order (Reversing & Remanding)* in CV 07-43, dated November 14, 2007. Oral arguments were heard on August 29, 2008, by Chief Justice Mary Jo Hunter, Associate Justice Dennis Funmaker, and Associate Justice Joan Greendeer-Lee. Attorney Ronald Fitzpatrick represented appellant Sharon Williams; attorney Michael Murphy represented the Ho-Chunk Nation Insurance Review Commission (HIRC).

FACTS

Appellant Sharon Williams, a non-member, worked at the Ho-Chunk Casino in Baraboo as a dealer. On July 19, 2000, while at work¹, Ms. Williams bumped her left hand. She later developed the chronic pain condition reflex sympathetic dystrophy (RSD).

¹ A question of whether Ms. Williams did in fact sustain her injury at work was raised for the first time by an HIRC Commissioner at the HIRC Hearing of March 28, 2007. See *Tr. of HIRC Hr'g* (Mar. 28, 2007) at 24-30. The issue was not mentioned again in the *HIRC Decision and Order* of April 25, 2007, nor has it been brought before this Court by the appellee. This Court does not consider this matter to be in dispute; it is mentioned here only because of its inclusion in the Trial Court's *Order*. See *Order (Reversing & Remanding)*, CV 07-43 (HCN Tr. Ct., Nov. 14, 2007) at 11, fn. 6.

As a result of her injury, Ms. Williams sought the advice of several doctors. Dr. John Lutz diagnosed Ms. Williams with RSD, stating that it was “secondary to crush injury of the left hand.” *Admin. R.: Outpatient Consultation* (Dec. 29, 2000). Dr. Nathan Rudin indicated that “[s]moking cessation is vital for a patient with this pain condition.” *Admin. R.: Doc.: Pain Clinic* (Jan. 12, 2001) at 4. Physical therapist Kristi Hallisy noted that Ms. Williams had injured her hand while at work, had experienced a progressive increase in symptoms, and “has gone on to develop complex regional pain syndrome,” but did not explicitly state that the RSD was caused directly by the injury. *Admin. R.: Clinic Note* (Mar. 8, 2001). Ms. Hallisy did note that Ms. Williams’ smoking “could have a significant impact on her recovery.” *Id.*

Dr. Jayaprakash, who conducted the *Independent Medical Examination (IME)* in 2002, concluded that Ms. Williams had suffered no significant injury to her hand other than a minor blunt trauma. *Admin. R.: IME*. Dr. Jayaprakash questioned whether Ms. Williams’ injury had caused her RSD and concluded that, because the hand injury was not significant, Ms. Williams’ RSD “clearly originates from the fact that she probably has a psychological overlay syndrome that led to an abnormal response.” In his opinion, Ms. Williams’ RSD was of “an idiopathic origin and not work related,” and a “natural manifestation of an underlying medical condition unrelated to her activity.”

Dr. Rudin, in response to Dr. Jayaprakash’s *IME* findings, stressed that “there is no literature supporting a causative role of psychological factors in the genesis of complex regional pain syndrome.” *Admin. R.: Dep. of Nathan J. Rudin, M.D.* (Feb. 25, 2005) at 11-12. Dr. Rudin also stated that cigarette smoking does not cause RSD, but it can make RSD pain symptoms worse. *Admin. R.: Correspondence to Petitioner* (May 2,

2002). In his opinion, “Ms. Williams [*sic*] left upper limb would be totally disabled whether or not she smoked cigarettes.” *Admin. R.: Correspondence to Counsel of Pet’r* (Sept. 17, 2002). Dr. Rudin was also of the opinion, “to a reasonable degree of medical probability,” that Ms. Williams’ disability was linked to her minor hand injury. *Admin. R.: Dep. of Nathan J. Rudin, M.D.* at 12. He also concluded that Ms. Williams reached a healing plateau in or around February of 2004. *Id.* at 9.

The Clinical Practice Guidelines (CPG) state that RSD develops when “an injury to a nerve or soft tissue... does not follow the normal healing path.” *See Admin. R.: Clinical Practice Guidelines, 2nd Ed.* The CPG also state that RSD does not depend on the magnitude of the injury. Instead, the injury that causes RSD “may be so slight that the patient may not recall ever having received an injury.” In addition to minor trauma, the CPG recognize that a number of other factors have been associated with RSD, including heart disease, spinal disorders, cerebral lesions, infections, surgery, and repetitive motion disorder.

PROCEDURAL HISTORY

Ms. Williams sought worker’s compensation benefits from the Nation under the HCN employee benefit plan, but the Nation’s Third Party Administrator denied her claim. Ms. Williams appealed this decision to the HIRC. The HIRC held its first hearing on the matter in March of 2002, and awarded Ms. Williams permanent partial disability payments for the period of November 28, 2000 to January 19, 2002. However, the HIRC reduced this award of benefits by 75%, finding that “[Ms. Williams’] cigarette smoking contributed 75% of the loss.” Additional benefits were denied based on Dr.

Jayaprakash's *IME* report. Ms. Williams appealed that decision to the Trial Court, but the parties agreed to remand the case back to the HIRC for a new hearing.

A second hearing was held in July of 2005 in which the HIRC denied any additional benefits. That decision was also appealed to the Trial Court, but again the parties agreed to remand back to the HIRC for a new hearing. A third hearing was held on March 28, 2007; the HIRC issued its *Decision* on April 25, 2007. *Decision and Order*, (HIRC, Apr. 25, 2007). The HIRC denied Ms. Williams' claim for additional worker's compensation because: "[t]he two *IME* reports" are inconclusive as to what causes RSD; RSD is poorly understood; Ms. Williams continued to smoke despite testimony that smoking can worsen sensitivity of the condition; and Ms. Williams reached her end of healing on February 1, 2004.

Ms. Williams filed a timely *Petition for Administrative Review* with the Trial Court on May 24, 2007, alleging that the HIRC *Decision* was "arbitrary and capricious and unsupported by substantial evidence and contrary to law." The Trial Court reversed the HIRC *Decision*, finding it arbitrary and capricious and lacking substantial evidence, and remanded to the HIRC to modify the relief afforded to Ms. Williams. *See Order (Reversing & Remanding)*, CV 07-43 (HCN Tr. Ct., Nov. 14, 2007).

The Trial Court found that the HIRC based its initial 75% reduction of benefits in part on an article that supposedly indicated that cigarette smoking exacerbates RSD. Because the Trial Court could find no reference to smoking in the CPG, and because there was no evidence in the record to support the claim that smoking causes RSD, the Court determined that this assertion was a "fabrication." The other basis for the HIRC's initial reduction of benefits was Dr. Rudin's statement that "smoking cessation is vital for

a patient with [RSD].” The Trial Court determined that this statement was not a proper basis for the HIRC *Decision*, because it conflicted with Dr. Rudin’s later statement that “there is no evidence supporting a causative role of smoking in [RSD].” The Trial Court also noted that the amount of the initial reduction of benefits—75%—was not based on any evidence in the factual record, and that it instead “arises seemingly from nowhere.” In addition, the Trial Court found that the 75% reduction violated the WORKER’S COMPENSATION PLAN (WCP), as the Plan only allows the HIRC to reduce disability benefits for a pre-existing condition if “partially due to [a] congenital condition or a prior disease or injury,” which does not include smoking. *See* ERA, 6 HCC § 5.60(g).

The Trial Court also found that there was not substantial evidence to support the suggestion that RSD could be caused by a psychological impairment.² Dr. Jayaprakash, in his *IME* report, stated that RSD “can originate in a variety of stress responses including trauma, psychological impairments, as well as with illnesses.” *Admin. R.: IME* at 11. However, the Trial Court found that “the administrative record is otherwise devoid of even a suggestion that [RSD] can develop from a psychological³ impairment.” The Trial Court further found that the HIRC should not have based its *Decision* on the *IME*, because Dr. Jayaprakash’s conclusion was based on a “tortured line of reasoning.” Dr. Jayaprakash stated that Ms. Williams’ RSD “clearly originates from the fact that she probably has a psychological overlay syndrome,” despite the fact that Ms. Williams has never been diagnosed with a “psychological overlay syndrome.”

² The Trial Court seems to interpret the HIRC’s finding that “[t]he two *IME* reports do not clearly define how [RSD] is caused” as a confusion over Dr. Jayaprakash’s statement that RSD can be caused by a psychological impairment, which conflicts with the rest of the *Administrative Record*.

³ The Trial Court appears to use the word “idiopathic” as a synonym for “psychological,” although this is not the correct definition of the word. The Trial Court’s *Order* questions the HIRC’s decision to “attribute an *idiopathic* origin to the petitioner’s condition” because there is no evidence that RSD can develop from a *psychological* impairment. “Idiopathic” can refer either to a medical condition, the root cause of which is obscure or unknown, or to a condition that arises on its own, not being caused by a trauma or disease.

The Trial Court therefore reversed the HIRC *Decision* and remanded the matter for HIRC to modify the relief afforded to Ms. Williams. The Trial Court's *Order* did not specify what relief the HIRC should afford Ms. Williams. However, the Trial Court has stated that it intended the HIRC to provide a remedy that complied with WCP guidelines. *See Order (Denying Motion to Clarify)*, CV 07-43 (HCN Tr. Ct., Jan. 23 2008). The Trial Court also stated that, "[s]ince this decision represents a non-final judgment, '[a]n appeal from [this] interlocutory order maybe [*sic*] sought by filing a petition for permission to appeal with the Supreme Court Clerk within ten (10) calendar days after the entry of such order with proof of service on all other parties to an action.'" *See* HCN R. App. P. 8. The Trial Court further instructed the HIRC to file a notice with the Court within 15 days, informing the Trial Court of the timeframe in which the HIRC could accomplish adherence with the judgment.

The HIRC filed its *Notice of Appeal* on January 14, 2008. This Court stayed the Trial Court's *Order* pending the outcome of this appeal. Oral arguments were held before this Court on August 29, 2008.

ISSUES PRESENTED

The appellant has presented the following issues for review:

1. Was the appeal filed from a final order, and thus timely filed, or from a non-final, interlocutory order, and thus untimely?
2. Did the Trial Court err in applying U.S. federal standards of administrative review?
3. Did the Trial Court err in considering the initial 2002 HIRC benefits determination?
4. Did the Trial Court improperly engage in fact finding?

5. Did the Trial Court improperly attempt to find a waiver of the Nation's sovereign immunity?

STANDARD OF REVIEW

In reviewing the Trial Court's decisions, this Court applies an "abuse of discretion" standard. See *Anna Rae Funmaker v. Kathryn Doornbos*, SU 96-12 (HCN S. Ct., March 25, 1997); *Rae Ann Garcia v. Joan Greendeer-Lee, et al.*, SU 03-01 (HCN S. Ct., May 2, 2003); *Hope B. Smith v. Ho-Chunk Nation*, SU 03-10 (HCN S. Ct., Dec. 8, 2003). Under this highly deferential standard, this Court will uphold the Trial Court's findings "absent a showing that the Trial Court somehow failed to make a necessary finding, ignored the great weight of the evidence, or otherwise abused it's [sic] discretion in making findings of fact." *Smith* at 2. In reviewing questions of law and Constitutional interpretation, this Court applies a *de novo* standard of review. *Id.* at 5.

DECISION

1. We find that the Trial Court's *Order* was a final order, appealable as of right to this Court, and was thus timely filed with this Court.

Ms. Williams argued that the HIRC's appeal is untimely. Both the Trial Court and Ms. Williams classified the Trial Court's *Order* remanding to the HIRC as a non-final, interlocutory order. Under Rule 8 of the *HCN Rules of Appellate Procedure*, a petition for permissive appeal must be filed with the Supreme Court within ten days of a non-final order. Ms. Williams argued that, because the HIRC never filed a petition for permissive appeal, this Court lacked jurisdiction over the appeal.

The HIRC, however, argued that the Trial Court's *Order* "resembles a final judgment more than an interim, interlocutory order" because the Trial Court "clearly rendered a decision on the merits." As such, the HIRC filed this appeal as if from a final judgment, pursuant to Rule 7(b) of the *HCN Rules of Appellate Procedure*, which requires that an appeal from a final judgment be filed within 60 days of the Trial Court's final judgment.

There is no precedent on this issue from this Court, or do the Nation's laws or Court rules define what constitutes an interlocutory or non-final order. In addition, the issue of whether an order remanding to an agency is final or interlocutory has received conflicting treatment at the Trial Court level. For example, in *Willard Lonetree v. Larry Garvin*, CV 06-74 (HCN Tr. Ct., Mar. 9, 2007, Hon. Judge Matha presiding), the Trial Court, after reviewing the administrative record, reversed a Grievance Review Board (GRB) decision, and remanded to the GRB for further factual determinations. In that case, the Trial Court labeled its order as interlocutory, and advised the parties that any appeal must be brought to the Supreme Court within ten days.⁴ In contrast, in *Susan F. Bosgraff v. Ho-Chunk Nation and HCN Dep't of Insurance*; and *Paula Goulet v. HIRC*, CV 06-99, -105 (HCN Tr. Ct., Aug. 2, 2007, Hon. Judge Rockman presiding), the Trial Court found it impossible to hear the case because the HIRC had failed to make any findings of fact or develop an administrative record. The Trial Court remanded to the HIRC to make findings of fact and to discuss the reasoning behind its determination. The Trial Court labeled this order as a final order appealable as of right to the Supreme Court.

⁴ Because the employer appealed the Trial Court's decision to the Supreme Court within 10 days, the issue of whether the order was final or interlocutory was never brought before this Court.

In the instant case, we agree with the appellee that the Trial Court's *Order* represents a final order appealable as of right to this Court. Such a holding, however, must be as narrowly construed as possible, so as to uphold our previously stated policy of avoiding piecemeal litigation and promoting judicial economy. See *Margaret G. Garvin v. Donald Greengrass and Ho-Chunk Nation*, SU 01-04 (HCN S. Ct., April 05, 2001).

We therefore hold that there are two main considerations in determining whether an order is final. First, there must be something for the reviewing Court to consider; that is, the lower Court must have reviewed and discussed the merits of the case to such an extent that the reviewing Court may evaluate the lower Court's factual determinations and the reasoning behind its decision. Second, the lower Court must have considered and decided *all* of the merits of the case within its authority to decide. If both of these considerations have been met, then the lower Court's decision may be considered "final" and appealed as of right to this Court.

In the instant case, the Trial Court's *Order* discusses the merits of the case and offers clear and thorough reasoning for the Court's decisions. In addition, the Trial Court rendered a decision on all of the merits of the case within its authority to decide. The appellant argues that the *Order* was interlocutory because it did not decide what compensation should be given to Ms. Williams, but instead left this decision to the discretion of the HIRC. However, making a determination of benefits is not within the Trial Court's authority. Because the Trial Court decided all other merits of the case within its authority to decide, the Trial Court's failure to make a benefits determination does not preclude the *Order* from being classified as a final order.

We recognize that our holding today runs counter to U.S. federal precedent, which holds that, in general, an order remanding to an agency is not a final order. See, e.g., *Chugach Alaska Corp. v. Lujan*, 915 F.2d 454, 457 (9th Cir. 1990); *Sun Shipbuilding & Dry Dock Co. v. Benefits Review Board, U.S. Dep't of Labor*, 535 F.2d 758, 760 (3d Cir. 1976); *Giordano v. Roudebush*, 565 F.2d 1015 (8th Cir. 1977); *Pauls v. Secretary of Air Force*, 457 F.2d 294, 297-98 (1st Cir. 1972); *United Transportation Union v. Illinois Central R.R.*, 433 F.2d 566, 568 (7th Cir. 1970). However, our Courts are not bound to adopt U.S. case law as our own precedent. We have previously indicated that the Nation's common law and tribal laws and customs should take precedence over the laws of the United States.⁵

Just as we are not bound to adopt U.S. precedent as our own, we are also free to base our decisions on the policies of the Ho-Chunk Courts, and not on the policies of U.S. courts. Our decision to label the Trial Court's *Order* as final will promote two important policies of the Ho-Chunk Courts. First, it will promote judicial economy by giving this Court the option of stopping the potentially never-ending cycle of decision and remand between agency and Trial Court. In the U.S. courts, the policy of "judicial economy" would usually prevent an appellate level court from reviewing a case until all of the merits had been decided below, thus avoiding "piecemeal" litigation. While this Court does not generally favor piecemeal litigation⁶, in a case such as this the Ho-Chunk Courts would be better served by preventing the Trial Court from hearing the same case

⁵ "...[T]he Ho-Chunk Nation Court system must rely on the Nation's laws and perhaps, the Nation's common law or tribal law. The distinction of a tribal court is to look at legal issues in a fair and objective manner in light of tribal law and custom, rather than simply wholesale adopting the laws and precedents of the United States." *Daniel Brown v. James Webster*, SU 06-03 (HCN S. Ct., Feb. 9, 2007) at 3.

⁶ See *Margaret G. Garvin v. Donald Greengrass and Ho-Chunk Nation*, SU 01-04 (HCN S. Ct., April 05, 2001).

multiple times. Second, accepting review of this case as from a final order could ensure a more swift and definite resolution for parties who make use of the Ho-Chunk Courts. Every party within the Ho-Chunk Court system, member and non-member alike, is entitled to a swift decision. This fosters trust in the system, and will guarantee the continued use of our Courts.

Because the current appeal was filed with this Court within the sixty-day period for appeals from a final order, the appeal is timely. The present appeal is thus within the jurisdiction of this Court to review.

2. While not reversible error, it was improper for the Trial Court to rely solely on federal standards of review.

In making its determination, the Trial Court adopted the U.S. federal system's two-tiered standard for reviewing agency decisions, in which a court determines (1) whether the agency decision is supported by substantial evidence, and, if so, (2) whether the agency decision was arbitrary and capricious—in other words, whether the decision was based on a consideration of the relevant factors and whether there was a clear error of judgment.⁷ The Trial Court relied exclusively on U.S. federal precedent in determining how to apply this standard of review. *See Order* at 17-19, applying *Dickinson v. Zurko*, 527 U.S. 150 (1999); *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359 (1998); *Bowman Transp. v. Ark.-Best Freight Sys.*, 419 U.S. 281 (1974); *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 413 (1971); *Edison Co. v. Labor Bd.*, 305 U.S. 197, 229 (1938); *Universal Camera Corp. v. Labor Bd.*, 340

⁷ The Trial Court first explicitly adopted this standard in *Regina K. Baldwin v. Ho-Chunk Nation, et al.*, CV 01-16, -19, -21 (HCN Tr. Ct., Jan. 9, 2002), and has been using it in administrative review cases ever since.

U.S. 474, 488 (1951). The HIRC alleges that the Trial Court erred in applying U.S. federal standards of judicial review.

This Court has never explicitly adopted or relied on the U.S. federal system's standards of administrative review, contrary to Ms. Williams' suggestion. Ms. Williams cites to *Willard Lone Tree v. Larry Garvin*, SU 07-04 (HCN Sup. Ct., Oct. 6, 2007) in support of this argument. In that case, the Trial Court did rely on U.S. federal standards of administrative review. See *Willard Lone Tree v. Larry Garvin*, CV 06-74 (HCN Tr. Ct., Mar. 9, 2007). However, on appeal this Court never actually reviewed the Trial Court's reliance on U.S. federal standards, nor did it explicitly adopt or acknowledge such a reliance; this Court simply quoted the general standard for administrative review as whether an agency decision is based "upon substantial evidence and escapes a characterization of arbitrary and capricious." See *Willard Lone Tree*, SU 07-04 at 4. Other Supreme Court cases have also acknowledged the Trial Court's use of an arbitrary and capricious standard, but have never explicitly acknowledged or adopted the U.S. federal precedent relied upon by the Trial Court. See, e.g., *Thomas Quimby v. Ho-Chunk Nation and HIRC*, SU 07-08 (HCN S. Ct., May 14, 2008); *Hope B. Smith v. Ho-Chunk Nation*, SU 03-10 (HCN S. Ct., Dec. 8, 2003); *Debra Knudson v. Ho-Chunk Nation Treasury Dep't*, SU 98-01 (HCN S. Ct., Dec. 1, 1998). Because the Trial Court's continued reliance on U.S. federal standards of administrative review has never been directly challenged on appeal prior to this case, this Court has not yet had an opportunity to address the issue.

Nothing in the HCN Constitution, laws, or Court rules prohibits the Courts from using U.S. federal precedent as persuasive authority. This Court has used U.S. federal

precedent as persuasive authority several times in the past when the laws of this Nation have provided incomplete guidance in resolving an issue. See, e.g., *Janet Funmaker v. Libby Fairchild, et al.*, SU 07-05 (HCN S. Ct., Aug. 31, 2007) at 6 (using U.S. federal precedent to help define what constitutes an “error” at the Trial Court level); *Ho-Chunk Nation v. Bank of America, N.A.*, SU 03-06 (HCN S. Ct., July 10, 2003) at 3, n.1 (using U.S. precedent to emphasize the importance of a fully-developed factual record). It is therefore not automatically reversible error for a Court to look to U.S. case law as persuasive authority in deciding issues not covered under Ho-Chunk case law.

We do, however, find it improper and extremely troubling that the Trial Court would rely exclusively on U.S. case law in deciding any issue, without first looking to the laws and precedents of *this* Nation. This Court has indicated time and again that the Ho-Chunk Nation’s common law, tribal laws, and customs should always take precedence over the laws of the United States. See footnote 5, *supra*. In administrative review cases such as this one there is ample case law from our own Courts to provide guidance in applying the proper standard of review. See, e.g., *Karen Bowman v. HCN Insurance Review Commission*, CV 06-02 (HCN Tr. Ct., Jan. 10, 2007); *Gale S. White v. Dep’t of Pers., Ho-Chunk Nation*, CV 95-17 (HCN Tr. Ct., Oct. 11, 1996) at 20 (the Court must find whether the agency decision was supported by substantial evidence and was not unreasonable); *Sandra Sliwicki v. Rainbow Casino, Ho-Chunk Nation*, CV 96-10 (HCN Tr. Ct., Dec. 6, 1996), *rev’d on other grounds* SU 96-15 (HCN S. Ct., June 20, 1997) (applying the “substantial evidence” test); *Debra Knudson v. Ho-Chunk Nation Treasury Dep’t*, CV 97-70 (HCN Tr. Ct., Feb. 5, 1998) at 13-15 (introducing the “arbitrary and capricious” standard, the key inquiry in which is *not* whether the agency decision was

correct, but whether an agency decision was supported by substantial evidence and “reasonable in light of all available evidence”); *Knudson*, SU 98-01 (HCN S. Ct., Dec. 1, 1998) at 8 (affirming the “supported by substantial evidence” and “reasonable, in light of the evidence” standard of review); *Dolores Greendeer v. Randall Mann*, CV 00-50 (HCN Tr. Ct., July 2, 2001) (acknowledging that the introduction of the “arbitrary and capricious” language has not affected the original, underlying analysis); *Willard Lone Tree v. Larry Garvin*, SU 07-04 (HCN Sup. Ct., Oct. 6, 2007) at 4-6 (where an agency misinterprets the HCN CONSTITUTION, the Trial Court may abandon the arbitrary and capricious review standard in favor of *de novo* review).

3. The Trial Court erred in considering the initial 2002 HIRC benefits determination.

The Trial Court found that the HIRC’s initial 2002 benefits determination, which presumably reduced Ms. Williams’ compensation by 75% based on her continued smoking, was arbitrary and capricious. *See Order* at 21. However, Ms. Williams is appealing from the HIRC’s 2007 benefits determination, not its 2002 decision. Issues not brought before a Court cannot be addressed. *See Daniel Brown v. James Webster*, SU 06-03 (HCN S. Ct., Feb. 9, 2007). In addition, the 2002 decision appears nowhere in the administrative record or in the briefs. It is error for a Court to base its decision on evidence not in the record. While we realize that the 2007 benefits determination may implicitly affirm the original 75% reduction of benefits, it is impossible for any Court to review that determination without being provided with the decision itself, or the administrative record upon which it was based. Therefore, insofar as the Trial Court

based its final decision on its finding that the 2002 determination was arbitrary and capricious, such a finding was an abuse of discretion.

4. The Trial Court erred by engaging in impermissible fact-finding.

The Trial Court reversed HIRC's 2007 benefits determination, citing a lack of substantial evidence to support the determination. The Trial Court based its conclusion in large part on its dismissal of the *IME* report, refusing to consider it a substantial piece of evidence. *See Order* at 24. The Trial Court dismissed Dr. Jayaprakash's conclusion that Ms. Williams' hand injury was not sufficient enough to have caused her RSD, because that conclusion conflicted with the statements of other doctors and the CPG. The Trial Court also dismissed Dr. Jayaprakash's conclusion that, since the RSD was not caused by the work-related hand injury, it must have resulted from a pre-existing condition, most likely Ms. Williams' anxiety and depressive disorders as diagnosed by Dr. Krause. In addition, the Trial Court dismissed the fact that RSD is poorly understood, saying it was an improper basis for the HIRC decision because there are many medical conditions that are also poorly understood. *See Order* at 22. Finally, the Trial Court chose to ignore Dr. Jayaprakash's conclusion that that maximum medical improvement for Ms. Williams' hand injury occurred within a week of the injury.

We find that it was an abuse of discretion for the Trial Court to dismiss these pertinent facts. The key inquiry here is *not* whether or not the agency has made the correct decision. As a reviewing Court in administrative review cases, the Trial Court's only concern should be whether there is substantial evidence in the record to support the agency's decision, and whether the agency's decision was reasonable in light of *all* the

evidence available to the agency. The Trial Court may not dismiss some evidence simply because it conflicts with other evidence in the record. Moreover, it is not within the Court's abilities to question the medical conclusions of a medical practitioner. This is precisely the unique role of the HIRC. Agencies by their very nature are "more experienced and educated to perform their specific tasks." *Knudson* at 13-14. It is thus error for a reviewing Court to weigh conflicting evidence found in the record, a task that is best suited for the more expert agency.

We therefore find that the Trial Court erred in dismissing relevant and substantial evidence from the administrative record. Because this evidence should have remained in the record, we conclude that there exists substantial evidence within the record on which the HIRC could have based its decision.

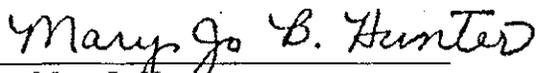
5. The Trial Court did not improperly attempt to find a waiver of the Nation's sovereign immunity.

Where a party fails to assert a defense of sovereign immunity in a case, such a defense is waived. See, e.g., *Louella A. Kelty v. Jonette Pettibone et al.*, CV 98-49 (HCN Tr. Ct., Feb. 22, 2006) (upholding grant of monetary relief because defendants failed to assert a sovereign immunity defense); and *Brown*, SU 06-03 (issues not brought before a Court may not be addressed). The HIRC argues that the Trial Court improperly attempted to "arrive at a new interpretation of sovereign immunity within the Nation's Worker's Compensation Plan." However, a Court does not abuse its discretion by engaging, in dicta, in a theoretical discussion of an issue that has already been waived. We therefore find that the Trial Court did not improperly attempt to find a waiver of the Nation's sovereign immunity.

CONCLUSION

The Trial Court's *Order (Reversing & Remanding)* is reversed. The HIRC *Decision and Order* of 2007 is final and binding on all parties.

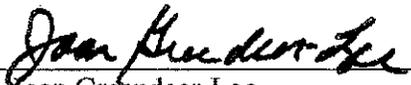
EGI HESKEKJENET. Dated this 29th of October, 2008.



Hon. Mary Jo Hunter
HCN Supreme Court Chief Justice



Hon. Dennis M. Funnaker
HCN Supreme Court Associate Justice



Hon. Joan Greendeer-Lee
HCN Supreme Court Associate Justice