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**IN THE
HO-CHUNK NATION TRIAL COURT**

MICHELE M. FERGUSON, **JUDGMENT**

Plaintiff,

v.
**HCN INSURANCE REVIEW COMMISSION/
DIVISION OF RISK MANAGEMENT,**

Case No.: CV 99-20

Defendants.

Appearances: Gerald R. Fox for Michele Ferguson, William Boulware and Dan Adams for the HCN Insurance Review Commission/Division of Risk Management. A *Complaint* was filed on March 22, 1999. An *Answer* was filed on April 7, 1999, followed by *Defendant’s Notice and Motion to Dismiss* and *Defendant’s Brief in Support of Motion to Dismiss* filed on June 7, 1999. The plaintiff filed a *Notice of Motion, Motion to Enlarge Time*, and a *Brief in Opposition to Motion to Dismiss* on June 22, 1999.¹ A *Motions Hearing* in this case was held on June 23, 1999 at the Ho-Chunk Nation Court House at Black River Falls, WI. The plaintiff filed a *Supplemental Brief in Opposition to Motion to Dismiss* on July 6, 1999. This case is now ready for a decision.

INTRODUCTION

This is an employee insurance case with Constitutional overtones. The plaintiff is an employee of the Nation. She works at the Ho-Chunk Casino, a tribally owned and operated enterprise located on trust lands in Baraboo, WI. The plaintiff was injured during her shift on August 3, 1998. The plaintiff

¹This *Brief in Opposition to Motion to Dismiss* was technically filed one day late, hence the *Motion to Enlarge Time*. The Court granted the *Motion to Enlarge Time* from the bench at the *Motions Hearing* on June 23, 1999.

1 sought treatment for her injuries from her chiropractor, Dr. Anderson, to whom she was referred by her
2 regular physician. Her insurance claim was denied because Dr. Anderson is not on the list of Workers
3 Compensation providers. She appeared before the Ho-Chunk Insurance Review Commission
4 (hereinafter HIRC), and her claim was again denied.

5 The *Ho-Chunk Insurance Review Commission Ordinance* (hereinafter *Ordinance*) states in part
6 that “the HIRC shall have the sole power to hear Insurance appeals” and that “no appeal regarding such
7 decisions shall be made to any other tribal entity.” The defendant argues that this language precludes
8 the Ho-Chunk Nation Trial Court, as a tribal entity, from hearing this case. In the alternative, the
9 defendant argues that the HIRC is immune from suit, as the Ho-Chunk Legislature has not waived
10 sovereign immunity with regard to insurance claims.

11 The plaintiff argues that this language in the *Ordinance* is unconstitutional because Article III,
12 Section 3, of the HO-CHUNK NATION CONSTITUTION states: “No branch of the government shall exercise
13 the powers or functions delegated to another branch” and Article VII, Section 5 of the HO-CHUNK
14 NATION CONSTITUTION states in part that: “The Trial court shall have original jurisdiction over all cases
15 and controversies, both criminal and civil, in law or in equity, arising under the Constitution, laws,
16 customs, and traditions of the Ho-Chunk of the Ho-Chunk Nation, including cases in which the Ho-
17 Chunk Nation, or its officials and employees, shall be a party.” In addition, the plaintiff argues that the
18 defendant seeks to apply the doctrine of sovereign immunity too broadly.

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APPLICABLE LAW

21 HCN CONSTITUTION, ARTICLE III - Organization of the Government
22 Section 3. Separation of Functions. No branch of the government shall exercise the powers or functions
delegated to another branch.

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23 HCN CONSTITUTION, ARTICLE VII - Judiciary
24 Section 4. Powers of the Judiciary. The judicial power of the Ho-Chunk Nation shall be vested in the
Judiciary. The Judiciary shall have the power to interpret and apply the Constitution and laws of the
Ho-Chunk Nation.

25 Section 5. Jurisdiction of the Judiciary. The Trial Court shall have original jurisdiction over all cases

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1 and controversies, both criminal and civil, in law or in equity, arising under the Constitution, laws,
2 customs and traditions of the Ho-Chunk Nation, including cases in which the Ho-Chunk Nation, or its
3 officials and employees, shall be a party. Any such case or controversy arising within the jurisdiction of
the Ho-Chunk Nation shall be filed in Trial Court before it is filed in any other court. This grant of
jurisdiction by the General Council shall not be construed to be a waiver of the Nation's sovereign
immunity.

4 *Ho-Chunk Insurance Review Commission Ordinance:*

5 Section 1. General Provisions and Purpose

6 Sec. 101. This Ordinance shall be known as the Ho-Chunk Nation Insurance Review Commission
Establishment Ordinance.

7 Sec. 102. This Ordinance is enacted to:

8 (a) Provide a statutory basis for a commission to hear appeals on Ho-Chunk Insurance Plan
decisions relating to employment; and

9 (b) Provide consistent equitable procedures for the commission to follow in hearing Insurance
Plan appeals.

10 Section 2. Establishment

11 The Ho-Chunk Nation establishes a Ho-Chunk Nation Insurance Review Commission (HIRC), as set
12 forth in this Ordinance, to hear appeals of Ho-Chunk Nation Insurance Plan decisions regarding Ho-
Chunk Nation employees. The tenure of the HIRC shall be at the pleasure of the Ho-Chunk Nation
Legislature.

13 Section 3. Purpose and Powers

14 The HIRC shall have the power to adjudicate all Insurance claims. Such decisions shall be available for
15 the benefit of employees who have been denied benefits under Ho-Chunk Nation Insurance plans. No
appeal regarding such decisions shall be made to any other tribal entity. The HIRC shall have the sole
power to hear Insurance appeals.

16 Section 4. Insurance Review Commission

17 (a) The HIRC shall be composed of four (4) commissioners who are appointed by the Ho-Chunk
Legislature.

18 (b) The HIRC shall elect one of the four (4) commissioners to preside over such hearings and to
render the decision and the opinion of the HIRC. Such commissioner shall be considered the Presiding
Commissioner. The Presiding Commissioner shall make all evidentiary rulings.

19 (c) The HIRC shall determine the powers and responsibilities of the personnel needed to carry out
the purpose of the HIRC.

20 (d) The HIRC shall provide notice to tribal employees. Such notification shall include information
21 regarding the establishment of the HIRC and a general statement of its purpose.

22 Section 5. Compensation of Judges and Personnel

23 HIRC Commissioners and personnel shall receive for their services a reasonable compensation which
shall not be diminished during the existence of the HIRC.

24 Section 6. Funding

25 The Compensation of the HIRC Commissioners, personnel and administrative costs of the HIRC shall
26 come from the Legislature through the Ho-Chunk Division of Risk Management.

1 Section 7. Procedures of Insurance Review Commission

2 (a) The HIRC shall accept written Appeals from Tribal employees who follow the procedures of the HIRC herein listed.

3 (b) An Appeal shall be considered only when the following occur:

4 (i) exhaustion of all administrative reconsideration.

5 (ii) all HIRC forms are filed and shall include the following:

6 a. complete name and current address of the employee

7 b. identification of the insurance plan

8 c. date of injury or illness

9 d. nature of injury or illness

10 e. place of employment

11 f. list of witnesses

12 g. summation of appealable issue

13 (iii) The claimant must sign the petition

14 (iv) The request must be filed with the Division of Risk Management

15 (v) All of the above must be completed within Ninety (90) days of receipt of the appeal.

16 (vi) After receipt of a timely petition, the Division of Risk Management shall issue and mail a copy of the petition to the HIRC Presiding Commissioner.

17 (vii) Within ninety (90) days of filing such petition, the Division of Risk Management shall mail, be certified mail, notification to the claimant the time, date, and location of the Insurance Appeals hearing. Failure to appear shall result in denial of the claim.

18 Section 8. Insurance Review Commission Decision

19 Section 8.01 In its review of Insurance Plan decisions, the HIRC shall review the entire record and take into consideration the findings and conclusions of the Insurance Plan determinations.

20 Section 8.02 The HIRC may issue an oral decision at the hearing, but shall confirm the oral decision with a written decision. The written decision shall be issued within ten (10) days and shall contain the reason(s) behind the HIRC decision. All interested parties shall be notified of the commission decision within ten (10) days of the written decision.

21 Section 9. Severability

22 If any of the provisions, or application of any of the provisions of this Ordinance shall in the future be declared invalid by a court of competent jurisdiction, the invalid provision or provisions shall be severed and the remaining provisions shall continue in full force and effect.

23 Section 10. Savings Clause

24 All enactments of the Ho-Chunk Nation adopted before the effective date of this Ordinance shall remain in full force and effect to the extent that they are consistent with this Ordinance.

25 **FINDING OF FACTS**

26 1. Michele Ferguson suffered various injuries, particularly to her wrist, while working on August 3, 1998 at the Ho-Chunk Casino, a tribally owned entity.

27 2. Ms. Ferguson immediately reported her injuries to her supervisor, and received treatment from Megan Johnson, the EMT officer. Prior to leaving, she asked Ms. Johnson if she could call her doctor,

1 and Ms. Johnson said she could and dialed the phone for her.

2 3. Ms. Ferguson's doctor was not in that day, and she was referred to the chiropractor, Dr.
3 Anderson.

4 4. Ms. Ferguson continued to receive treatment from her chiropractor, Dr. Anderson, for her
5 injuries.

6 5. The week after Ms. Ferguson sustained her injuries, she spoke with Karen Raines from the
7 Insurance Department at the Ho-Chunk Casino. Ms. Raines asked her if she was seeing a doctor from
8 the list of Workers Compensation providers, and gave her a copy of the July 22, 1998 memo setting
9 forth this policy. When Ms. Ferguson explained that she was not, Ms. Raines told her that "we would
10 let it go this time but if something would happen to you again at work, this is where you'd go."

11 6. That same week, Karen Raines requested a progress report from Dr. Anderson, explaining that if
12 Ms. Ferguson was going to be seeing Dr. Anderson many more times, or it would exceed a certain dollar
13 amount, she would have to switch physicians and see a doctor from this list of Workers Compensation
14 providers. Ms. Ferguson provided Ms. Raines with a progress report from Dr. Anderson, which stated
15 that she would be seeing the chiropractor four (4) or five (5) more times, and Ms. Raines told her to
16 continue seeing Dr. Anderson.

17 7. Ms. Ferguson's Workers Compensation claim was denied on August 25, 1998. The reason given
18 for this denial is that the chiropractor's charges would not be covered as the chiropractor seen by Ms.
19 Ferguson was not on the list of Workers Compensation providers.

20 8. The original memo providing the information about Workers Compensation providers, and the
21 requirement to see a doctor from that list, was dated July 2, 1998. This memo was posted in Ms.
22 Ferguson's department on January 13, 1999. Ms. Ferguson, and her entire department at the Ho-Chunk
23 Casino, read and signed this memo in February of 1999.

24 9. The Ho-Chunk Nation Legislature adopted the *Ho-Chunk Insurance Review Commission*
25 *Ordinance* on April 25, 1995. In that *Ordinance*, it established the Ho-Chunk Insurance Review

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1 Commission (hereinafter HIRC), and stated that “No appeal regarding such decisions shall be made to
2 any other tribal entity.”

3 10. Ms. Ferguson went before the HIRC on January 18, 1999. The HIRC denied her claim on
4 January 26, 1999.

5 11. Ms. Ferguson filed her *Complaint* in the Trial Court on March 22, 1999.

6 12. Neither party has been able to point to any other tribal, state, or federal administrative appeal
7 process that cannot be appealed to a judicial system.

8 13. At the *Motions Hearing* before this Court on June 22, 1999, the defendant, through its attorney
9 Dan Adams, admitted: “Well, we assert that, perhaps, the nature of this adjudicative power is different in
10 respect to the Ho-Chunk [Insurance] Review Commission, and that *it may be more accurately described*
11 *as quasi-judicial*, as well as administrative, in that the Ho-Chunk Insurance Review Commission is not
12 vested with the power to make the finding of fact or conclusions of law, but is only considering whether
13 the insurance coverage is applicable and appropriate in the cases presented forth.” (Emphasis added)
14 (Tr. at 14, line 23 to 15, line 8)

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DECISION

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ORDER

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22 **IT IS SO ORDERED** this _____ day of _____, 199____ from within the sovereign lands
23 of the Ho-Chunk Nation.

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1 Hon. Mark Butterfield
2 HCN Chief Trial Judge

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