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STATE OF NEBRASKA
OFFICIAL
MAY 12 1993
DEPT. OF JUSTICE

DATE: May 6, 1993

SUBJECT: Constitutionality of One Provision of LB 757 and Amendment No. 1188 to LB 757 Relating to the Use of Independent Medical Examiners in Workers' Compensation Cases

REQUESTED BY: Senator Chris Abboud, Nebraska State Legislature

WRITTEN BY: Don Stenberg, Attorney General
Lisa D. Martin-Price, Assistant Attorney General

In your letter dated April 20, 1993, you ask our opinion concerning one provision of LB 757 and Amendment No. 1188 to LB 757 concerning the use of independent medical examiners in workers' compensation cases. Specifically, you question whether these two provisions violate Article I, § 13, of the Nebraska Constitution, which provides that, "[a]ll courts shall be open, and every person, for any injury done him in his lands, goods, person or reputation, shall have a remedy by due course of law, and justice administered without denial or delay."

In your first question, you cite to the following language found on page 48, commencing with line 9, of LB 757: "No petition may be filed with the compensation court regarding the issue of reasonableness and necessity of medical treatment unless a medical finding on such issue has been rendered by an independent medical examiner." You ask whether this requirement violates an injured employee's right to access the courts in violation of Article I, § 13, of the Nebraska Constitution. It is our opinion that this provision does not violate Article I, § 13, as long as it simply requires the independent medical examiner to issue an opinion before a petition may be filed in the Workers' Compensation Court, without regard to what the opinion says.

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In this regard, we must note that the provision quoted by you for our analysis is somewhat ambiguous. That is, it can be read to require an opinion by an independent medical examiner that the medical treatment is reasonable and necessary prior to a petition being filed, or it can be read to simply require that an independent medical examiner issue an opinion regarding the reasonableness and necessity of medical treatment, but not necessarily requiring the independent medical examiner's opinion to be that medical treatment is reasonable and necessary as a result of the injury. As long as the intention of the Legislature is that the latter interpretation govern, it is our opinion that this provision does not violate Article I, § 13, of the Nebraska Constitution.

Our opinion is based upon the holding of the Nebraska Supreme Court in *Prendergast v. Nelson*, 199 Neb. 97, 256 N.W.2d 657 (1977). There, a declaratory judgment action was filed seeking a determination of the constitutionality of the Nebraska Hospital-Medical Liability Act. The defendant contended that the provisions of the Act creating a medical review panel were void because they were unconstitutional. The section of the Act in question, Neb. Rev. Stat. § 44-2840(2) (1976), provides, "[n]o action against a health care provider may be commenced in any court of this state before the claimant's proposed petition has been presented to a medical review panel established pursuant to section 44-2841 and an opinion has been rendered by the panel." As codified, the panel has the duty to express its opinion to the parties as to whether or not the evidence supports the conclusion that the defendant(s) acted or failed to act within the appropriate standards of care, as well as to the issue of damages proximately caused by the failure to act in accordance with such standards. The court noted that the report, or any minority report, of the panel would be admissible as evidence in any action subsequently filed in a court of law by the claimant, but that the report would not be conclusive, in that either party would have the right to call any member of the medical review panel as a witness.

In determining that this statutory requirement did not violate Article I, § 13, of the Constitution of Nebraska, the court stated:

> Article I, section 13, of the Constitution is merely a declaration of a general fundamental principle. It is the primary duty of the courts to safeguard this declaration of rights and remedies. However, it does not in any way imply that the Legislature is without power to impose a special procedure before resort to the courts. Claimants are not denied access to the courts. Those who do not elect otherwise are merely required to follow a

> certain procedure before submitting their claims to the courts.

Id. at 103.

The court noted that simply requiring the claimant to submit his claim to a medical review panel which renders a finding did not preclude a claimant's access to the courts for a final determination. The court stated:

> The act provides, at the expense of a slight delay in filing the suit in court, a procedure for review to determine from the evidence submitted if there is a basis for the claim. If the panel determines there is a basis for the claim, the claimant obviously is benefited. If it determines there is no basis for it, the claimant is informed of what others think of the merits of his claim. If he disagrees, he still has access to the courts for a vindication of what he thinks his rights may be.

Id. at 106.

With regard to the provision in LB 757 requiring an opinion of an independent medical examiner concerning the reasonableness and necessity of medical treatment, as long as it is not intended that a claimant cannot file a petition with the Workers' Compensation Court unless he has an opinion from an independent medical examiner that medical treatment for the work related injury is reasonable and necessary, it does not violate Article I, § 13, of the Nebraska Constitution.

Next, you ask whether a provision in Amendment No. 1188 to LB 757 is violative of Article I, § 13, of the Constitution of the State of Nebraska. The particular provision you question contains the following language:

> (6) If the parties agree to use of a medical examiner, the examiner's findings shall be binding. If the compensation court assigns an independent medical examiner, it shall be a rebuttable presumption that the examiner's findings are correct.

You question whether this provision limits the fact finding role of the court through binding determinations by an examiner. This provision is analogous to agreements providing for binding arbitration. It is our opinion that that portion of subsection (6) of Amendment No. 1188 to LB 757 providing that the independent medical examiner's findings shall be binding if the parties agree to the use of a medical examiner, is not violative of Article I,

§ 13, of the Nebraska Constitution as long as a dispute has arisen between the parties prior to the parties agreeing to the use of a medical examiner.

For more than a century, the Nebraska Supreme Court has consistently and repeatedly held that agreements to arbitrate entered into before a dispute has arisen are unconstitutional, contrary to public policy, and unenforceable. *See*, e.g., ***City of Lincoln v. Soukup***, 215 Neb. 732, 736, 340 N.W.2d 420 (1983). This rule was reiterated as recently as December, 1991, in ***State of Nebraska v. Nebraska Association of Public Employees***, 239 Neb. 653, 658, 477 N.W.2d 577 (1991). In ***Overland Constructors v. Millard School District***, 220 Neb. 220, 224-225, 369 N.W.2d 69 (1985), the court analyzed and discussed the rule in some detail.

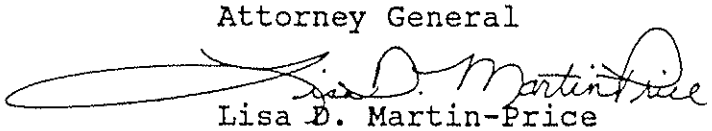
> We turn to the next question, whether the parties are bound by the determination made by the architect pursuant to an arbitration clause contained in the contract documents. We believe that under the circumstances in this case the parties are not bound. While this court is supportive of parties resolving their differences through arbitration, if possible, we have consistently held that an arbitration agreement entered into before a dispute arises, denying to the parties their right to seek the assistance of the courts, is contrary to public policy and is not enforceable. In a long line of cases beginning with German-American Ins. Co. v. Etherton, 25 Neb. 505, 41 N.W. 406 (1889), and continuing through City of Lincoln v. Soukup, 215 Neb. 732, 340 N.W.2d 420 (1983), we have consistently held that a contract to compel parties to arbitrate future disputes and, thus, to oust the courts of jurisdiction to settle such disputes is against public policy and is void. See, also, National Masonic Accident Association v. Burr, 44 Neb. 256, 62 N.W. 466 (1895); Schrandt v. Young, 62 Neb. 254, 86 N.W. 1085 (1901); Phoenix Ins. Co. v. Zlotky, 66 Neb. 584, 92 N.W. 736 (1902); Wilson & Co., Inc. v. Fremont Cake & Meal Co., 153 Neb. 160, 43 N.W.2d 657 (1950); Heisner v. Jones, 184 Neb. 602, 169 N.W.2d 606 (1969). The School District directs our attention to the cases of Simpson v. Simpson, 194 Neb. 453, 232 N.W.2d 132 (1975), and Knigge v. Knigge, 204 Neb. 421, 282 N.W.2d 581 (1979), in support of its contention that arbitration clauses are enforceable. It neglects, however, to note the significant distinction in both Simpson and Knigge. In each of those cases a dispute had already arisen and the parties agreed to submit their known dispute to arbitration. In such cases we do enforce the decision growing out of the arbitration

> proceeding. The distinction is whether the agreement to submit to arbitration is entered into before the dispute arises and before the parties know the nature and extent of their dispute or whether it is entered into after the dispute has arisen and at a time when the parties are aware of the nature of the dispute and have agreed to a method of resolving that dispute. In the instant case the agreement to arbitrate was entered into before the dispute arose and is therefore unenforceable. (Emphasis in original.)

From this, it is apparent that it is not violative of Article I, § 13 of the Nebraska Constitution for the parties to agree to the use of a medical examiner, and for the examiner's findings to be binding, as long as the parties agree to the use of a medical examiner after a dispute has arisen concerning an injured worker's right to workers' compensation benefits. While it is not clear from the language of subsection 6 of Amendment 1188 that this provision only comes into effect after a dispute has arisen, if one turns to subsection 3 of Amendment 1188, it appears that the amendment does envision that the use of an independent medical examiner provided for in subsection 6 will only come into play after a dispute has arisen. In this regard, subsection 3 of Amendment 1188 provides in pertinent part: "If the parties to a dispute cannot agree on an independent medical examiner of their own choosing, the compensation court shall assign an independent medical examiner from the list of qualified examiners to render medical findings in any dispute relating to the medical condition of a claimant . . . ." Assuming that this is the interpretation intended by the Legislature, it is our opinion that subsection 6 of Amendment No. 1188 does not violate Article I, § 13 of the Nebraska Constitution.

Sincerely,

DON STENBERG
Attorney General



Lisa D. Martin-Price
Assistant Attorney General

cc: Patrick J. O'Donnell
Clerk of the Legislature

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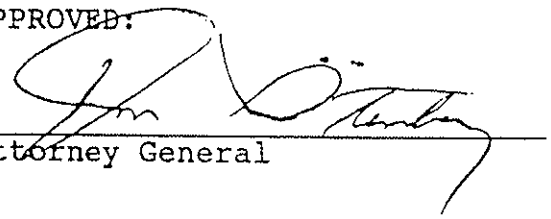

Attorney General

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