

R.D. #0008-00
New Jersey

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22**

**OCCUPATIONAL HEALTH CENTERS
OF NEW JERSEY, P.A. d/b/a
CONCENTRA MEDICAL CENTERS**

Employer

And

CASE 22-RC-11944

**PHYSICIANS FOR RESPONSIBLE
NEGOTIATION**

Petitioner

SUPPLEMENTAL DECISION AND ORDER

On August 31, 2000, I issued a Decision and Direction of Election (DD&E) in the above-captioned case. On September 27, 2000, the National Labor Relations Board (the Board) granted the request of Occupational Health Centers of New Jersey, P.A., d/b/a Concentra Medical Centers (the Employer) for Review of my findings therein that the Employer's Center Medical Directors and physicians are not statutory supervisors and that the Employer and Concentra Health Services, Inc. (Concentra HSI) are not joint employers.¹ On May 29, 2001, the United States Supreme Court

¹ On October 28, 2000, an election was held in this matter and the ballots were impounded.

issued *National Labor Relations Board v. Kentucky River Community Care*, 121 S. Ct. 1861 (*Kentucky River*), addressing the test for determining whether a professional employee is a supervisor within the meaning of the National Labor Relations Act, as amended (the Act). On June 20, 2001, the Board issued an Order remanding this proceeding to the undersigned to reopen the record, in light of *Kentucky River*, on two issues: (1) whether the Center Medical Directors and the physicians "assign" and "responsibly direct" other employees and the scope and degree of "independent judgment" used in the exercise of such authority, referring to Section 2(11) of the Act; and (2) the related issue of whether the Employer and Concentra HSI are joint employers. Pursuant to the remand order, a hearing was held before a hearing officer of the Board.

On remand, the Employer contends that it, on the one hand, and Concentra HSI, a wholly owned subsidiary of Concentra, Inc., and Concentra Inc., (collectively Concentra), on the other hand, are joint employers of the Center Medical Directors and physicians. In addition, the Employer attempted to withdraw from its stipulation at the first hearing that Physicians for Responsible Negotiations (the Petitioner) is a labor organization. The Employer also contends that the Center Medical Directors and physicians "responsibly direct" medical assistants, radiology technicians and physical therapists, all of whom are employed by Concentra, and physician's assistants, who are employed by the Employer.²

² As discussed in the DD&E, only if a supervisor and the employees he or she supervises are employed by the same employer can the supervisor supervise employees, as defined in Section 2(11) of the Act, which requires that a statutory supervisor do so "in the interest of the employer." *Crenulated Company, Ltd.*, 308 NLRB 1216 (1992).

The Petitioner disputes that the Employer and Concentra are joint employers. The Petitioner also disputes that the Center Medical Directors and physicians "responsibly direct" the medical assistants, radiology technicians, physical therapists or physician's assistants.

I. Employer's Motion to Withdraw from Stipulation as to the Petitioner's Labor Organization Status

During the initial hearing in this matter in August 2000, the Employer stipulated that the Petitioner was a labor organization within the meaning of the Act. The record reflects that the Employer entered into this stipulation after reviewing documents it had subpoenaed from the Petitioner concerning its status. During the hearing after remand, the Employer moved to withdraw from the stipulation because the Supreme Court in *Kentucky River* eliminated one basis upon which the Board had previously relied to find that employees were not statutory supervisors. The Employer argued that, after *Kentucky River*, it was more likely that the leadership of the Petitioner included statutory supervisors. The Employer also sought to introduce evidence in the post-remand hearing concerning Petitioner's status. In addition, the Employer sought to subpoena additional evidence concerning Petitioner's status.

The hearing officer denied the Employer's motion to withdraw from the stipulation, basing her ruling on the scope of the Board's remand order, which was specific as to the issues remanded and did not include reconsideration of the status of the Petitioner. On similar grounds, the hearing officer refused to admit evidence concerning the status of the Petitioner, placing the evidence in a rejected evidence file. She also granted Petitioner's motion to revoke the Employer's subpoena concerning the status of

the Petitioner, noting that the Employer had an opportunity to subpoena documents on this issue at the pre-remand hearing.

I affirm each of these rulings. I note in addition, upon review of the record, including the rejected evidence, that at no time has the Employer alleged that any facts have changed since the pre-remand hearing sufficient to establish that Petitioner is disqualified from representing employees because its leadership included supervisors. The Board does not take as given that there is an inherent conflict between supervisors and employees such that the participation of any supervisor in a labor organization disqualifies that organization from representing employees. Rather, such disqualification depends:

- (1) Upon whether a supervisor or supervisors employed by the Employer are in a position of authority within the labor organization and, if so, upon the role of that individual or individuals in the affairs of the labor organization; or
- (2) In the instance of supervisors employed by third-party employers and holding positions of authority, upon some demonstrated connection between the Employer and the employer or employers of those supervisors which might affect the bargaining agent's ability to single-mindedly represent the unit employees.

Sidney Farber Cancer Institute, 247 NLRB 1 (1980). The burden of establishing this conflict is on the party opposing the union's qualification and is a "heavy one." *Id.*

The Employer makes no claim that any of its supervisors are in a position of authority within the Petitioner. Nor does the record, even with the inclusion of the proffered evidence, reflect any connection between the Employer and the employer of any supervisor alleged to participate in the Petitioner. Indeed, the Employer does not claim that such a connection exists. The only change since the pre-remand hearing alleged by the Employer is *Kentucky River*. Even if I assumed *arguendo*, however dubious, that as a consequence of *Kentucky River*, officers of the Petitioner had become

statutory supervisors, I would not have adequate grounds under relevant case law to disqualify the Petitioner from representing employees. There is thus no basis to revise Petitioner's status.

II. Employer's Motion to Reopen the Record

After the close of the hearing, the Employer, by letter dated November 30, 2001, moved to reopen the record to submit additional evidence in support of its position that the Petitioner is not a labor organization within the meaning of the Act. By letter dated December 6, 2001, I denied the Motion for reasons that I said would be set forth in the instant Supplemental Decision.

In the Employer's November 30 letter, it sought to introduce an article from a publication entitled "Modern Healthcare" which reported that: (1) in late 2000, the Petitioner received a \$1.8 million dollar loan from the American Medical Association (AMA); and (2) the President of the Petitioner, Susan Adelman, serves on the Board of Trustees of the AMA. The Employer argues that this evidence shows that the Petitioner is dominated by the AMA, an organization that includes statutory supervisors in its membership.

A motion to reopen the record properly concerns only evidence that is newly discovered, evidence which has become available only since the close of the hearing or evidence which the Board believes should have been taken at the hearing. Board's Rules and Regulations, Rule 102.48(d)(1). The record reflects that at the post-remand hearing, the Employer had been provided the Petitioner's Form LM-2, Labor Organization Annual Report, submitted to the U.S. Department of Labor for the year 2000. This Report discloses that during 2000, almost all of the Petitioner's income

was obtained from a loan from the AMA. Therefore, the fact that the AMA is a significant source of the Petitioner's income is not new.

Furthermore, a party moving to reopen the record must demonstrate that the introduction of additional evidence into the record would require a different result. *Id.*; *Fitel/Lucent Technologies, Inc.*, 326 NLRB 46 n. 1 (1998). Neither the existence of a loan from the AMA nor the proffered evidence concerning the role of Susan Adelman, when considered separately or together, establishes that the alleged participation of supervisors in the activities of the Petitioner disqualifies it from being certified as an exclusive bargaining representative of employees pursuant to Section 9 of the Act. *Sidney Farber Cancer Institute*, above.

As discussed above, the Employer makes no claim that any of its supervisors are in a position of authority within the Petitioner or that there is any connection between the Employer and the employer of any supervisor alleged to participate in the Petitioner. Accordingly, I deny the Employer's motion to reopen the record.

III. Joint Employer

The Employer is a New Jersey professional association that employs physicians, physician's assistants, physical therapists and nurse practitioners to provide, at the Employer's centers located in New Jersey, occupational health care to employees of employers with which it has arranged to provide such services. At each center, there is a physician titled Center Medical Director. There may be one additional staff physician, a floater physician or specialist physicians also working at a center. The Employer's two floater physicians rotate among different clinics. The specialists also divide their time among the clinics and include an orthopedist, a

specialist in pain management and a physician certified in occupational medicine who performs independent medical examinations used to determine disability benefits.³

Concentra HSI is a Nevada corporation that provides administrative and related services at occupational health centers throughout the country, including the centers staffed by employees of the Employer. Concentra HSI is a division of Concentra, Inc, a Delaware corporation.⁴ At each of the Employer's centers, Concentra employs a Center Administrator, a Health Services Manager, a receptionist and at least one medical assistant, radiology technician and physical therapist. The Center Administrator is responsible for the day-to-day operations of the center, including budget, staffing and scheduling, maintaining statistics and issuing reports. The Health Services Manager markets the Employer's centers.

Concentra HSI and the Employer have entered into a management and consulting agreement dated July 1, 1999 and effective at all times material herein.⁵ This agreement provides in pertinent part that while the Employer shall exercise control over the medical services rendered at the New Jersey centers, Concentra HSI "shall have the authority and responsibility to conduct, supervise and manage the day-to-day non-medical operations of the centers and provide all developmental, management and administrative services attendant to [the Employer]'s practice." The Employer and Concentra HSI maintain separate functions to comply with New Jersey

³ In the DD&E, I found that the Center Medical Directors were not the statutory supervisors of the other physicians working in the centers.

⁴ Concentra, Inc. consists of four divisions: Concentra Preferred Systems, Inc., a Delaware corporation which audits hospital bills; Concentra Managed Care Services, Inc., a Massachusetts corporation which provides medical and management services; Concentra Management Services, a non-operating Nevada corporation created for tax purposes; and Concentra HSI.

law, which prohibits the practice of medicine by a corporation. Thus, at its New Jersey centers, employees of the Employer are responsible for the practice of medicine while Concentra HSI employees administer and maintain the occupational health care centers.

The Employer employs employees at ten medical centers in New Jersey. Eight of these are considered to be within Concentra's Northern New Jersey and Connecticut Region. These eight centers are located in Edison, Elizabeth, Jersey City, Newark, Passaic,⁶ Secaucus, South Plainfield, and Teterboro. (Two other New Jersey centers, in Mount Laurel and Voorhees, are included within Concentra's Greater Philadelphia Region. Prior to July 1, 2001, and thus at the time of the August 2000 pre-remand hearing, all ten centers comprised Concentra's New Jersey Region.)

In each of Concentra's geographical regions, a Regional Medical Director is responsible for managing the medical aspects of the centers within the region. The Center Medical Directors, the staff and floating and specialist physicians report to the Regional Medical Director. Since April 2001, Concentra's Regional Medical Director for its Northern New Jersey and Connecticut Region has been Dr. William A. Pagano. Before then and at the pre-remand hearing, Dr. Pagano was the Regional Medical Director responsible for Concentra's New Jersey centers. Dr. Pagano has an employment contract with the Employer. Although Dr. Pagano testified at the pre-remand hearing that the Employer employs him, in the post-remand hearing he testified that Concentra employs him. He reports to Dr. John Anderson, who is the

⁵ Concentra has similar agreements with other professional associations throughout the country.

Vice-President of Medical Affairs for Concentra and who also has an employment contract with Occupational Health Centers for the Southwest, P.A. Dr. Anderson reports to Dr. W. Tom Fogarty, an officer of both Concentra and the Employer.

There is considerable overlap between the Employer's officers and the officers of Concentra. The officers of the Employer are: Arthur T. Canario, M.D., President; Daniel J. Thomas, Vice-President; W. Tom Fogarty, Vice-President; James M. Greenwood, Vice-President; Richard A. Parr II, Vice President and Treasurer; and Susan L. Witliff, Assistant Secretary. Five of the six officers of the Employer are also officers or employees of Concentra. Mr. Thomas is also President and Chief Executive Officer of Concentra. Dr. Fogarty is also Senior Vice President and Chief Medical Officer of Concentra. Mr. Greenwood is also Executive Vice-President of Corporate Development of Concentra. Mr. Parr is also Executive Vice-President, General Counsel and Secretary of Concentra, Inc. and Vice-President of the Employer. Ms. Witliff is also an attorney employed by Concentra and is Assistant Secretary of the Employer. The only officer of the Employer who is not an officer of Concentra is Dr. Arthur T. Canario, the Employer's Director as well as President. Dr. Canario is an orthopedic surgeon who is employed as a floating physician at the Employer's Elizabeth and Newark centers. Dr. Canario reports to Dr. Pagano.

During the pre-remand hearing, Richard Parr, Executive Vice-President, General Counsel and Secretary of Concentra, Inc. and Vice-President of the Employer, testified that the terms and conditions of employment of the employees of

⁶ The Employer's Regional Medical Director for the Region including the Passaic Center testified that it intended to move the Passaic Center to Paterson in August 2001.

the Employer are the sole responsibility of the Employer. However, Arlene King, Concentra's Director of Human Resources Compliance, testified that the Employer does not have a human resources department. Concentra's human resources department, located at its corporate headquarters, performs human resources functions for the Employer's employees as well as its own. Concentra assigns a field representative from its human resources department to serve as the first point of contact for the Employer's and its employees on human resources issues.

The approval of Concentra personnel is required to hire a physician to work for the Employer. The process of hiring a physician begins when the Regional Medical Director requests that Concentra's human resources department provide him with curricula vitae of physicians from its recruiting office. The Regional Medical Director reviews these resumes and interviews applicants. Dr. Anderson, employed by Concentra and Occupational Health Centers for the Southwest, P.A., then interviews candidates for a position as a physician with the Employer. After Dr. Anderson's approval, Ted Bucknam, the Concentra Vice-President for Operations for the Midwest and East, approves the prospective hire. The recommendation then goes from Mr. Bucknam to Dr. Fogarty. The ultimate approval to hire rests with Keith Newton, President of Concentra HSI. A corporation named Focus, which is owned by Concentra, determines whether a prospective physician has the required credentials to work for the Employer. Dr. Anderson and Dr. Fogarty determine the salary at which a physician is hired. A physician employed by the Employer signs an employment agreement drafted by Concentra's Legal Department.

The initial recommendation to discipline or terminate a physician is made by the Regional Medical Director. The approval of Dr. Anderson is required to discipline or terminate a physician. The Regional Medical Director has contacted the Concentra legal department for advice regarding a disciplinary or termination decision. Dr. Fogarty's approval is required to promote or to terminate an employee of the Employer, with the exception of the physical therapists. The Regional Medical Director consults with Concentra's human resources department to adjust grievances of the Employer's employees. The Regional Medical Director appraises employees of the Employer.

Concentra determines the benefits paid to the Employer's employees, which are the same as those provided to Concentra's employees. Concentra provides the same paid holidays and paid time off to the Employer's employees and its own employees. Concentra and the Employer's employees may donate paid time off to each other in the event of medical hardship. Concentra provides health insurance and determines the level of benefits provided to the Employer's employees, who are included within the same group policy as Concentra's employees. Concentra provides life insurance, accidental death and dismemberment benefits, disability insurance, a 401(k) plan and an employee assistance program to the Employer's employees. Concentra provides medical malpractice insurance to the physicians who contract with the Employer.

Concentra drafts and distributes an employee handbook that applies to the employees under contract with the Employer as well as Concentra employees. The handbook includes a substance abuse policy, standards of conduct and a sexual

harassment policy. Under the substance abuse policy, employees are subject to random testing. Employees of Concentra and the Employer are grouped together for selection for random testing. Pursuant to the sexual harassment policy, employees are directed to complain about harassment to the Concentra human resources department, which investigates complaints. Concentra responds to employment discrimination complaints against the Employer's employees. Concentra has issued a Family Medical Leave Act policy that covers the Employer's employees. Concentra indemnifies employees of the Employer in the event of misconduct charges.

Concentra provides health and safety training to employees employed by the Employer. It has a safety policy applicable to the Employer's employees. Concentra prepares workers' and unemployment compensation filings on behalf of the Employer.

Concentra maintains the personnel files of the Employer's employees at its headquarters. The Employer does not handle the payroll by which its employees are paid. Concentra administers the Employer's payroll.

Analysis

In order to establish that two or more employers are joint employers, the entities must share or codetermine matters governing essential terms and conditions of employment. *M. B. Sturgis, Inc.*, 331 NLRB No. 173, slip op. at 4 (2000) (citing *NLRB v. Browning Ferris Industries*, 691 F.2d 1117, 1123 (3d Cir. 1982) adopted by the Board in *TLI/Crown Zellerbach Corp.*, 271 NLRB 798 (1984)). The essential terms and conditions referred to in the joint employer criteria were defined by the

Board in *Laerco Transportation*, 269 NLRB 324, 325 (1984) as hiring, firing, disciplining, supervising and fixing the rates of remuneration.

The Petitioner argues that there is language both in the management and consulting agreement and in Concentra's Form 10K filing with the Securities and Exchange Commission that denotes the Employer as the sole employer of the physicians. However, such documents do not control the determination under Board law as to whether parties are joint employers. *Martiki Coal Corporation*, 315 NLRB 476, 484 (1994). The Petitioner argues further that in order for the Employer to comply with New Jersey law prohibiting the practice of medicine by a corporation, the Employer must be the sole employer of the physicians. Just as the Board is not bound by state professional regulations requiring an employee to supervise another in determining whether an employee is a supervisor within the meaning of Section 2(11), state law prohibiting an entity from employing employees is not determinative of whether that employer is a joint employer with another as that term is applied in Board law. See *Third Coast Emergency Physicians*, 330 NLRB No. 117, slip op. at p. 1, n.1 (2000); *Crittenton Hospital*, 328 NLRB 879 (1999).

The record on remand establishes that Concentra personnel are integrally involved in the process of hiring, firing, disciplining and fixing the rates of remuneration for the physicians. Each of these subjects is an essential term and condition within the context of the joint employer relationship as defined in *Laerco Transportation*, above. Additionally, Concentra provides the benefits available to the Employer's employees and has drafted and enforced the personnel policies applicable

to them. Therefore, based on the evidence supplied at the hearing after remand, I find that Concentra is the Joint Employer of the Employer's employees.⁷

IV. Use of Independent Judgment by Center Medical Directors and Physicians to Assign and Responsibly Direct Employees

Background - The Employer's Operations

The Employer's medical practice is restricted to occupational medicine. The Employer provides its services to employees who are sent to the centers by their employers. According to the testimony of Dr. Francis Mann, a Center Medical Director called to testify by the Employer, the range of medical issues encountered at the Employer's centers is substantially less than a physician would encounter in a family practice. Dr. Mann estimated that 80% of the Employer's medical practice involves treating work-related injuries and providing follow-up care, with the remaining 20% of the practice devoted to "routine" physical examinations. The physical examinations include both pre-employment and annual examinations.

The Employer's injury care work consists of providing treatment to employees who first come to the center just after suffering an injury. Typically, patients who have suffered injuries come to the clinic without an appointment. An injured employee may return for one or more follow-up visits called "rechecks." The Employer's clinics do not handle injuries that involve a threat of loss of sight, limb or life and do not treat patients with serious fractures. Rather, the clinics handle simple fractures and some wounds, sprains and eye injuries.

⁷ In the initial DD&E, I determined that the Center Medical Directors and physicians employed by the Employer could not be supervisors of employees employed by Concentra, using the analysis of *Crenulated Company, Ltd.*, 308 NLRB 1216. See footnote 2 above. The Joint Employer finding herein precludes that line of analysis.

Unlike injury care, physical examinations and rechecks are generally scheduled in advance and listed on a daily list prepared towards the end of the preceding day. Ordinarily, the receptionist schedules an employee for a physical examination, although a medical assistant may do this.

The Employer also performs drug and alcohol screening tests. The Employer does not consider such tests to be medical tests, but rather to involve the collection of evidence. Drug and alcohol tests are performed by non-physician employees, usually without the involvement of a physician.

Dr. Mann testified that the Employer expects a physician to see a minimum of 25 patients a day, whether for physical examinations or injury care. The Employer expects its centers to handle ten additional patients for each Center Administrator, medical assistant, x-ray technician and receptionist employed at the center. Dr. Mann testified that the center staff works together as a team.

A. Medical Assistants

At each center, there is at least one medical assistant. The medical assistant performs clerical and administrative functions and some of the tasks in a medical practice that can be delegated to a non-physician, so that the physician can devote his or her time to doing the things that can only be done by a physician.

The Employer ensures that medical assistants are thoroughly trained. The Employer prefers to hire medical assistants who have been trained to work as a medical assistant in occupational medicine. Concentra requires medical assistants to pass a ten-day in-house training program before working at a center. The Employer maintains a file that includes a document listing the tasks in which a medical assistant

has been trained. A Center Medical Director may also provide on-the-job training to make sure that a medical assistant can perform a task he or she is expected to perform. The Employer's witnesses agreed that the medical assistants have been trained to perform the tasks requested of them. These witnesses also agree that the assistants are not expected to perform any task for which they have not been trained.

Dr. Pagano, the Regional Medical Director called to testify by the Employer, described the directions given by physicians to medical assistants as "routine in the sense that we do them frequently" or "daily," but not "that we do them without forethought or consideration." Both Dr. Mann and Center Administrator Johanna Kelly, also called by the Employer, testified that medical assistants know their responsibilities and how to accomplish their tasks.

Patient Processing

Medical assistants receive patients from the center waiting room and take them to the appropriate area for examination or treatment. The Employer's job description for medical assistants and its criteria for appraising them reflect that this responsibility is, to a considerable extent, the major single function of a medical assistant.⁸ When a patient comes to the center, whether for examination or injury care, he or she registers and completes a questionnaire about his or her medical

⁸ The Employer's form for evaluating a medical assistant shows that it bases the largest single portion, 40%, of the medical assistant's overall rating on how the assistant receives patients from the waiting room and processes them for treatment. Twenty five percent of the assistant's rating depends on how the assistant conducts tests such as drug screen collections and audiograms. Ten percent depends on how the assistant performs while assisting with dressings, splints and other treatments and while measuring patients' vital signs. Five percent depends on assisting physicians in the provision of health services and registering and checking out patients using computer applications. The remaining 20% depends on performance of various administrative duties.

history. The medical assistant makes sure that the patient has completed the questionnaire and any other necessary paperwork and that he or she is authorized to receive care at the center.

Physical Examinations

Medical assistants participate in physical examinations. They take the patient's vital signs and perform certain tests prior to the examination of the patient by a physician. Dr. Mann described the work of a medical assistant in connection with the physical examinations as “routine.”

Physical examinations at the centers are performed according to written protocols that are printed on the patient's chart. The clinic's Health Service Manager works in advance with referring employers whose employees are to be examined to develop and draft these protocols. The Center Medical Director reviews and approves the protocols before they are implemented.

Medical assistants ensure that the patient's file contains the protocol that is consistent with the authorization from the patient's employer to come to the clinic. After bringing a patient to the examining room, the medical assistant takes the patient's vital signs and performs certain tests, as specified by the protocol for the examination. The vital signs consist of a patient's blood pressure, pulse and respiration. Depending on the protocol, the medical assistant may measure height, weight and vision, collect urine or perform such tests as an EKG, an audiogram or a pulmonary function test.⁹

⁹ A pulmonary function test uses equipment to measure how much air a person can blow out over several seconds. A Center Medical Director

Medical assistants independently perform the work preliminary to the physical examinations, guided by the protocols in effect. In a few situations, where the protocol identifies a procedure as optional, the physician will tell the medical assistant whether the procedure should be done.

After the medical assistant performs his or her tasks in connection with a physical examination, he or she places the patient's chart in a specified area for the physician. The physician picks up the chart, enters the examination room, takes the patient's history and performs the actual physical examination. The medical assistant will stay with the patient only if asked to be present as a "chaperone," which involves merely being present during the examination.

Injury Care

The Employer's contention that the physicians are statutory supervisors of the medical assistants focuses mainly on the medical assistant's responsibilities in providing injury care, a situation in which the physician and the medical assistant work together. When a medical assistant is not available, the physician performs the tasks that are typically performed by an assistant.

During injury care, the medical assistant escorts an injured patient to the examination room. Medical assistants have standing instructions to take the vital signs of each patient with a new injury. Thereafter, the tasks performed by medical assistants vary with the nature of the injury suffered by the patient. For example, Dr. Mann testified that he has a standing request that a medical assistant perform an eye

exam on a patient with an eye injury and that the medical assistants know his "routine" in that situation.

Medical assistants may help patients get on or off examining tables and may help patients disrobe. The assistant may help a patient expose a body part that needs treatment. If a patient is bleeding and cannot be seen immediately by a physician, the medical assistant can try to stabilize the bleeding. The assistant may clean and bandage a wound until the physician arrives.

When a physician treats a wound, he or she may ask a medical assistant to soak the wound in a specified antiseptic liquid, such as peroxide and water. The physician decides if he or she wants to suture and if so whether he or she wants the help of a medical assistant. The medical assistant may assist the physician in suturing by handing supplies to the doctor. The physician may ask a medical assistant to set up a suture tray. Usually, the physician, when he or she began working with the medical assistant, instructed the assistant as to how the physician wanted the tray set up. In that event, the medical assistant sets up the tray without specific directions. The physician may ask the assistant to include a certain clamp in a suture kit. Some of the physicians ask medical assistants to assist them during suturing by handing them a particular size suture or by holding a vial of anesthetic. The size of a suture is denoted by a number which appears on the label of its package.

If a physician decides to dress a wound, he or she may direct the assistant to apply a particular dressing material, such as petroleum gauze, and may request a kind of bandage to be used or a sterile glove. In the event of an eye injury, a physician may have given a standing instruction to the assistant to irrigate the eye. If a

physician decides to give an injured patient a cast, he or she may ask the medical assistant to hand him or her the necessary materials, such as plaster or fiberglass.

A physician may ask a medical assistant to perform tests on an injured patient. For example, if a patient has an inhalation injury, the physician may want a cardiogram or a pulmonary function test done. If the physician suspects an infection, he or she may ask the medical assistant to take the patient's temperature or to perform a blood test. A physician may ask a medical assistant to take the patient's vital signs again if the physician believes the patient's pain and anxiety at the outset of the visit to the center may have caused elevated readings.

The medical assistant processes an injured patient out of the center according to the relevant protocol.

Rechecks and Miscellaneous Duties

Medical assistants typically perform only a few tasks when a patient is in the clinic for a recheck. Medical assistants take the blood pressure of each patient in a recheck visit, along with whatever other procedures are requested by the physician. For example, a medical assistant may be requested to perform an eye exam on a patient who has previously been treated for an eye injury.

Medical assistants also perform drug and alcohol screening tests. In the performance of these responsibilities, the Center Administrator or another trained employee supervises them.

There was testimony that, on an infrequent basis, a physician may request that a medical assistant redo a test. If a physician believes that a procedure specified on the protocols or requested by the physician has not been done correctly, he or she may

perform the task him or herself to double-check the medical assistant's results, ask the medical assistant to repeat the task or provide informal, on-the-job training to the medical assistant in the particular procedure. However, Center Administrator Kelly testified that when a physician decides that a medical assistant has not performed a task correctly, it is her responsibility to ensure that the medical assistant can perform the task or if the assistant requires additional training.

Medical assistants are also responsible for ordering supplies, restocking examination rooms, keeping examination rooms orderly and maintaining and sterilizing equipment.

Overtime

A physician has the authority to ask a medical assistant to stay after the clinic's closing time and thus to work overtime in order to assist in seeing a patient who has arrived at the clinic before it closes. It is the Employer's policy that a medical assistant is required to stay until released by the physician in order to finish the treatment of all patients who arrive at the clinic before closing.

Role of Center Administrator

There is no dispute that the Center Administrator supervises the medical assistants, the receptionist and the X-ray technician. The Employer argues that the Center Administrator and the physicians jointly supervise the medical assistants.

According to the testimony of Center Administrator Kelly, medical assistants report directly to the Center Administrator. The Center Administrator has the authority to hire medical assistants. The Center Administrator schedules the medical assistants. The Center Administrator assigns a medical assistant to work on either

injury care or non-injury care. During the course of the workday, the Center Administrator determines, based on the workload of the clinic, whether the medical assistant should be reassigned to a different kind of work. Typically, a medical assistant switches frequently during the day between injury care and non-injury care. On occasion, a physician who is treating an injured patient may ask the medical assistant assigned to non-injury care to assist in suturing a wounded patient. Similarly, a physician may ask a medical assistant who is not busy to serve as a chaperone.

Analysis

Section 2(11) of the Act defines the term “supervisor” as:

...any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees or responsibly to direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgement.

It is well established that an individual need possess only one of the enumerated indicia of authority in order to be encompassed by the definition, as long as the exercise of such authority is carried out in the interest of the employer, and requires the exercise of independent judgment. *Big Rivers Electric Corp.*, 266 NLRB 380, 382 (1993). The legislative history of Section 2(11) indicates that Congress intended to distinguish between employees who may give minor orders and oversee the work of others, but who are not necessarily perceived as part of management, from those supervisors truly vested with genuine management prerogatives. *George C. Foss Co.*, 270 NLRB 232, 234 (1984). The Board takes care not to construe supervisory status too broadly because the employee who is deemed a supervisor

loses the protection of the Act. *St. Francis Medical Center-West*, 323 NLRB 1046 (1997).

The exercise of some supervisory authority in a merely routine, clerical, perfunctory or sporadic manner does not require a finding that an employee is a supervisor within the meaning of the Act. *Somerset Welding & Steel*, 291 NLRB 913 (1988). Designation of an individual as a supervisor by title in a job description or other documents is insufficient to confer supervisory status. *Western Union Telegraph Company*, 242 NLRB 825, 826 (1979). The mere issuance of a directive or a job description setting forth supervisory authority is also not determinative of supervisory status. *Bakersfield Californian*, 316 NLRB 1211 (1995); *Connecticut Light & Power Co.*, 121 NLRB 768, 770 (1958). State legislation requiring a healthcare employee to supervise another is not the equivalent of the Act's requirements for supervisory status. *Third Coast Emergency Physicians*, 330 NLRB No. 117, slip op. at p.1, n.1 (2000); *Crittenton Hospital*, 328 NLRB at 879. Rather, the question is whether there is evidence that the individual actually possesses any of the powers enumerated in Section 2(11). *Western Union Telegraph Company*, above, at 826; *North Miami Convalescent Home*, 224 NLRB 1271, 1272 (1976).

In *Kentucky River*, 121 S. Ct. at 1866, the Supreme Court agreed with the Board that the burden of proving supervisory status rests on the party asserting that status. Absent detailed, specific evidence of independent judgment, mere inferences or conclusionary statements without supporting evidence are insufficient to establish supervisory status. *Quadrex Environmental Co.*, 308 NLRB 101 (1992); *Sears Roebuck & Co.*, 304 NLRB 193 (1991). Whenever evidence is in conflict or

otherwise inconclusive on particular indicia of supervisory authority, the Board will find that supervisory status has not been established. *Phelps Medical Center*, 295 NLRB 486, 490-91 (1989).

The Board has recognized the tension between the "professional judgment" that is required of a professional employee covered by the Act pursuant to Section 2(12) and the "independent judgment" that excludes an employee from coverage by virtue of Section 2(11). Prior to *Kentucky River*, the Board endeavored to resolve this tension in cases involving the supervisory status of professional employees by ruling that the use of professional judgment to direct employees was not "independent judgment." However, in *Kentucky River*, the Supreme Court ruled that the Board may not exclude from the "independent judgment" required in Section 2(11) professional or technical judgment when used in directing less-skilled employees to deliver services. The Court reasoned that such a per se approach was inconsistent with the language of Section 2(11) and its previous decision in *NLRB v. Health Care and Retirement Corp.*, 511 U.S. 571 (1994), in which it had ruled that the statute applies no differently to professionals than to other employees.

Although the *Kentucky River* Court found the Board's interpretation of "independent judgment" to be inconsistent with the Act, the Court recognized that it is within the Board's discretion to determine what scope or degree of discretion meets the statutory requirement that a supervisor use independent judgment. *Id.* at 1867. The Court stated: "Many nominally supervisory functions may be performed without the 'exercis[e of] such a degree of ... judgment or discretion ... as would warrant a finding' of supervisory status under the Act." *Id.* (citing *Weyerhaeuser Timber Co.*,

85 NLRB 1170, 1173 (1949)). The Court also agreed with the Board that if the Employer limits the degree of independent judgment by, for example, detailed orders, the individual may not be appropriately held a supervisor. *Kentucky River*, above at 1867 (citing *Chevron Shipping Co.*, 317 NLRB 379, 381 (1995)). Additionally, while the Court explicitly refrained from interpreting the phrase “responsibly to direct,” the Court suggested that the Board could interpret this phrase by “distinguishing between employees who direct the manner of others' performance of discrete tasks from employees who direct other employees as [Section] 2(11) requires.” *Kentucky River*, above at 1871 (citing *Providence Hospital*, 320 NLRB 717, 729 (1996)).

In the instant case, medical assistants perform much of their work, including some of their most significant functions, on their own. Medical assistants work independently to receive patients from the waiting room and process them for treatment; to perform tests on patients at the outset of their physical examinations; and to accomplish other administrative duties.

The Employer's argument that the physicians use independent judgment to responsibly direct the medical assistants depends in large part upon the application of the statutory criteria to a minor portion of the medical assistant's job duties, i.e., those duties performed in proximity to a physician. This argument focuses primarily on the directions given by physicians to medical assistants during injury care. In such situations, a physician instructs a medical assistant to provide him or her with supplies and instruments and/or to assist in providing injury care by, for example, dressing the patient's wound or irrigating an eye.

The Board has recognized the type of instruction generally at issue in this case is both an assignment and a direction:

The term "assignment" ... clearly differs from responsible direction in that it refers to the assignment of an employee's hours or shift, the assignment of an employee to a department or other division, or other overall job responsibilities. It would also include calling in an employee or reassigning the employee to a different unit. Whether assignment also includes ordering an employee to perform a specific task is, however, less clear. ... Certainly there are times when the assignment of tasks overlaps with direction. For example, ordering a nurse to take a patient's blood pressure could be viewed as either assigning the nurse to that procedure or directing the nurse in the performance of patient care. Because the distinction between assignment and direction in these circumstances is unclear, the Board has often analyzed the two statutory indicia together.

Providence Hospital, above at 727. Regardless of whether the instruction is an assignment or a direction, the Board decides if the instruction is given with supervisory authority by determining if the instruction requires independent judgment. *Id.* at 729; *Ten Broeck Commons*, 320 NLRB 806, 810 (1996).

The Employer argues that because physicians issue instructions to medical assistants and because physicians are responsible for patients' medical care, the physicians responsibly direct the medical assistants. However, not all assignments and directions given by an employee involve the exercise of supervisory authority. In *Providence Hospital*, above at 733, 734 and 736, the Board found that charge nurses and other health care employees with the responsibility to direct employees were not statutory supervisors because their assignments and directions were not made with Section 2(11) authority. There, the Board quoted the court in *NLRB v. Security Guard Service*, 384 F.2d 143, 151 (5th Cir. 1967):

If any authority over someone else, no matter how insignificant or infrequent, made an employee a supervisor, our industrial composite would be

predominantly supervisory. Every order-giver is not a supervisor. Even the traffic director tells the president of a company where to park his car.

Providence Hospital, above at 725. The Board has instructed that each case involving the indicia of assignment and responsibility to direct turns on its own particular facts and that there are no hard and fast rules. *Id.* Since Section 2(11) explicitly requires a statutory supervisor to use independent judgment in assigning and responsibly directing employees, determining whether an employee's directions render the employee a statutory supervisor requires deciding whether the directions given require independent judgment or whether such directions are merely routine. *Id.* at 729.

There can be no doubt that the tasks to which medical assistants are assigned are of critical importance to the health of the patients who visit the Employer's centers. This does not mean that the directing of such tasks cannot be routine. As the Board observed concerning a treatment plan devised by a charge nurse for a patient in *Ten Broeck Commons*, above at 811:

There is an important distinction between designing complex work tasks and directing employees in carrying out those tasks. If this distinction is blurred, it becomes easy to be misled into concluding that an individual exercises independent judgment based simply on the fact that the work tasks being designed by that individual are relatively 'complex' or 'important.' ... [T]he fact that severe adverse consequences might flow from an employee's routine direction or monitoring of the work of others does not, without more, make the employee a supervisor.

The work of the medical assistants at issue here consists of following protocols for routine physical examinations of working adults and assisting in the care of injuries limited by type and severity. The discrete tasks performed by the medical assistants are similar to those previously found to be routine by the Board. In

Loyalhanna Health Care Associates, 332 NLRB No. 86, slip op. at p. 3 (2000), the Board found that nurses did not use supervisory authority to give directions to aides in the absence of evidence that such direction involved other than routine aspects of patient care, such as taking patients' vital signs and ensuring that care plans are followed. See also *Northern Montana Health Care Center*, 324 NLRB 752, 753 (1997); *Ten Broeck Commons*, above at 810-812. Regional Medical Director Dr. Pagano testified with regard to the duties performed by medical assistants that the directions given to them by the physicians are routine instructions given on a frequent and daily basis. Routine directions do not require the use of Section 2(11) independent judgment. *Kentucky River*, 121 S. Ct. at 1867; *Loyalhanna Health Care Associates*, above, at p. 3; *Ten Broeck Commons*, above at 810-812; *Northern Montana Health Care Center*, above at 753; *Weyerhaeuser Timber Co.*, 85 NLRB at 1173. Thus, I find that the directions of the sort given by the physicians to the medical assistants do not require the degree of judgment or discretion as would warrant a finding of supervisory status under the Act. *Kentucky River*, above at 1867.

Moreover, proof of independent judgment in the assignment or direction of employees entails the submission of concrete evidence showing how such decisions are made. *Harborside Healthcare, Inc.*, 330 NLRB 1334, 1336 (2000); *Crittenton Hospital*, 328 NLRB 879; *Quadrex Environmental Co.*, 308 NLRB 101; *Sears Roebuck & Co.*, 304 NLRB 193. In *Crittenton Hospital*, above, the employer argued that charge nurses were supervisors because they had the power to make mandatory overtime assignments or call in substitutes based on their assessments of whether staffing was adequate. However, there was

no evidence showing how mandatory overtime or additional staffing needs are determined, or the process by which employees are selected for overtime or call-in. Thus, the employer ... failed to demonstrate that RNs utilize independent judgment.

Id. at 879. See also *Harborside Healthcare, Inc.*, above at 1336 (charge nurses' call-in authority was not supervisory in the absence of evidence disclosing how they decided which employees to call). The record leaves no doubt that physicians instruct medical assistants. However, in the absence of sufficient testimony as to the basis for a physician's decision to ask a medical assistant to assist him or her with a task, I cannot conclude that the physicians use independent judgment to responsibly direct the medical assistants. Id.; *Crittenton Hospital*, above at 879.

The assignment of tasks in accordance with an Employer's set practice, pattern, parameters or protocol does not require the exercise of independent judgment to satisfy the statutory definition. *Kentucky River*, 121 S. Ct. at 1867; *Chevron Shipping Co.*, 317 NLRB at 381; *Express Messenger Systems*, 301 NLRB 651, 654 (1991); *Bay Area-Los Angeles Express*, 275 NLRB 1063, 1075 (1985). Where an employee has been preassigned a set of tasks, it is not supervisory authority for an employee to ask another employee to do those tasks that were already assigned to him or her. *Western Union Telegraph Company*, 242 NLRB 825. The record shows that the Employer, in conjunction with Concentra, has decided that medical assistants can perform certain tasks and has made certain that the medical assistants are trained to do such tasks. There was repeated testimony that the medical assistants know what they are supposed to do. In most cases, the Center Administrator assigns medical assistants to a duty, such as injury care. In these circumstances, I conclude that when the physicians direct a medical assistant to perform a task, the physicians are merely

functioning within the parameters established by the Employer. *Kentucky River*, above at 1867; *Chevron Shipping Co.*, 317 NLRB at 381; *Express Messenger Systems*, 301 NLRB at 654; *Bay Area-Los Angeles Express*, above at 1075. Accordingly, I find that they do not use independent judgment to responsibly direct medical assistants.

An assignment based on an assessment of employees' skills, where the matching of skills to requirements is a routine function, does not reflect supervisory authority under the Act. *Ten Broeck Commons*, 320 NLRB at 810 (charge nurses' assignment of work to certified nursing assistants did not require the use of independent judgment because the assistants had the same skills and were routinely rotated). There was scant evidence that the physicians take into account any factor, such as the medical assistant's skill or experience, in determining the tasks to be performed by the medical assistant. The absence of consideration by the physician of any such factors further indicates that a physician's decision to delegate a task to a medical assistant during injury care is made without independent judgment. *Kentucky River*, above at 1867; *Ten Broeck Commons*, above at 810; *Weyerhaeuser Timber Co.*, 85 NLRB at 1173.

I recognize that Regional Medical Director Dr. Pagano testified that when functioning as a part-time floating physician in the Employer's centers he did not ask a medical assistant to lavage an eye unless he was certain that he or she can perform the task. However, this was the only testimony that a physician exercised any discretion in determining whether a medical assistant was capable of performing a task. This testimony contrasts with extensive testimony that medical assistants are

competent to perform the tasks assigned to them. This testimony also contrasts with other testimony of Dr. Pagano that if a Center Medical Director wants a medical assistant to be able to lavage an eye, he or she will make certain that the medical assistant is trained to do this task. I note that lavaging an eye is the only task Dr. Pagano reported that he has hesitated to assign to a medical assistant. Thus, the assessment described by Dr. Pagano in connection with directing a medical assistant to irrigate an eye was an isolated occurrence.

Moreover, Dr. Pagano is an undisputed Section 2(11) supervisor who supervises the physicians. Thus, the only instance in the record of a physician making a judgment as to whether a medical assistant is competent to perform a particular task involved an acknowledged supervisor. In the absence of evidence that Center Medical Directors or physicians made this kind of judgment, I find that these physicians do not use independent judgment to responsibly direct employees.

In circumstances other than injury care, I find that there is no evidence that the physicians use independent judgment to responsibly direct medical assistants. A physician may ask a medical assistant to give a test to a patient, such as an EKG or an audiogram, or to redo a particular test for various reasons that have to do with something other than the skill with which the medical assistant has performed the test. Directions of a physician to a medical assistant to stay after a center closes to finish work on patients who came to the center before closing and the release of a medical assistant when work on patients has been completed are routine and merely consistent with the Employer's policy of completing the treatment of patients who came to a clinic prior to its closing time. *Kentucky River*, 121 S. Ct. at 1867; *Chevron Shipping*

Co., above at 381; *Express Messenger Systems*, above at 654; *Bay Area-Los Angeles Express*, above at 1075. Directions of a physician to a medical assistant who is not working on injury care to assist in injury care are based on no more judgment than observing the plain fact that the medical assistant was, prior to reassignment, working on non-injury care. *Kentucky River*, above at 1867; *Weyerhaeuser Timber Co.*, above at 1173.

Additionally, I find that the distinction approved by Justice Scalia in *Kentucky River* between directing discrete tasks and directing employees applies to the facts here. When a physician gives instructions to a medical assistant while the medical assistant is assisting the physician in injury care, he or she is directing the medical assistant to perform discrete tasks, such as to hand him or her a particular suture. In directing the medical assistant in that context, the physician is delegating to the medical assistant those tasks that do not have to be performed by the physician.

In both injury care and other contexts, physicians and medical assistants function as members of a team, each of whom reports to a separate supervisor. While the physician determines a course of healthcare, the medical assistant executes certain discrete tasks necessary to implement the physician's decision. In these circumstances, I find that the physicians are directing discrete tasks and thus are not acting as statutory supervisors of the medical assistants. *Kentucky River*, above at 1871; *Providence Hospital*, 320 NLRB at 729.

In *NLRB v. Quinnipiac College*, 256 F.3d 68 (2d Cir. 2001), a finding of responsible direction resulted from the fact that supervisors were accountable for the performance of other employees. The record reflects that while the physicians may

be accountable for the care they provide, the Center Administrator, not the physicians, is responsible for the performance of the medical assistants. This fact distinguishes the instant case from *Custom Bronze & Aluminum Corp.*, 197 NLRB 397 (1972) and *Schnurmacher Nursing Home v. NLRB*, 214 F. 3d 260 (2nd Cir. 2000), both relied upon by the Employer. In *Custom Bronze & Aluminum Corp.*, above at 398, the Board relied “in particular” on the fact that the alleged supervisor alone was responsible for the work of other employees. In *Schnurmacher Nursing Home*, above at 266-67, the court relied heavily on the fact that a putative supervisor was held accountable for the employees she supervised to the extent that the supervisor was disciplined for the shortcomings of the supervisees.

Here, the Center Administrator testified that when a medical assistant failed to perform a task correctly, it was the Administrator's responsibility to make certain that the medical assistant learned to perform the task. In contrast, a physician's response, when a medical assistant did not perform a task correctly, was, on an ad hoc basis, to tell the assistant to redo the task, to do it him or herself or to give on-the spot training to the medical assistant. However, there was no evidence that physicians were held responsible for the performance of medical assistants. The absence of this accountability is consistent with my finding that the physicians do not responsibly direct the medical assistants. *NLRB v. Quinnipiac College*, above; *Schnurmacher Nursing Home*, above; *Custom Bronze & Aluminum Corp.*, above. Moreover, the fact that one employee may point out deficiencies in the performance of another employee does not necessarily make that employee a statutory supervisor. *Crittenton Hospital*, 328 NLRB at 879.

In sum, I find that physicians' instructions to medical assistants involve routine tasks performed during a limited portion of medical assistants' duties. Furthermore, while physicians undoubtedly use independent judgment to determine a course of patient care, the Employer has not provided concrete evidence of how physicians use independent judgment to assign tasks to medical assistants. I find that physicians are constrained to assign medical assistants the discrete tasks in which they have been trained by the Employer and that physicians do not generally differentiate between the skills and experience of medical assistants when they assign a task to a medical assistant. I further find that the record shows that the Center Administrator supervises the medical assistants and is accountable for their performance. For all of these reasons, I find that the Employer has not sustained its burden of proving that the physicians use independent judgment to assign and responsibly direct the medical assistants. Therefore, I find that the physicians are not statutory supervisors of the medical assistants as a result of exercising these functions.

B. Physical Therapists

There is typically, no more than one physical therapist at a center. The physical therapists report to a Lead Physical Therapist who, in turn, reports to a Regional Director of Physical Therapy. If the Physical Therapist is absent, it is the Lead Therapist who finds a replacement.

The physical therapist receives from the Center Medical Director or physician a prescription for a patient's physical therapy. In most cases, the physical therapist knows what therapy to administer based on the diagnosis made by the physician, such as "low back injury." Center Medical Director Dr. Mann described the choice of

therapy based on the communicated diagnosis as “routine.” No physical therapist has refused to follow the order of a physician. Dr. Mann described his relationship with the physical therapist as “collaborative.” A physician may incorporate the suggestions of a physical therapist into the physician’s direction to the therapist of the prescribed course of therapy. A physician may change or extend the therapy initially prescribed.

The Employer argues that the physicians responsibly direct the physical therapists because no physical therapy can be provided without the specific direction of the physician. However, the decision that a patient requires physical therapy, which undoubtedly requires independent judgment, does not mean that the decision to assign this work to the physical therapist also involves the use of independent judgment. *Ten Broeck Commons*, 320 NLRB at 811. In *Providence Hospital*, 320 NLRB at 735, the Board found that a nurse's assignments to physical, occupational and speech therapists, based on the availability of the therapists and whether the therapists can perform the functions, were routine. In *Weyerhaeuser Timber Co.*, 85 NLRB at 1173, the Board found that assignments by an employee to one of two machinists were routine, noting that an employee does not exercise any significant degree of discretion when making an assignment if there is a limited number of persons available and qualified to perform the work.

Here, a physician's assignment of work to a physical therapist is more routine than the assignment to therapists at issue in *Providence Hospital*, above. In each of the Employer's centers there is no more than one physical therapist. In most cases, the physician does not assign or direct a particular course of therapy. Rather, the

physician only transmits to the physical therapist a diagnosis. The record does not reflect that the physician has any involvement with the physical therapist's technique. He or she does not direct the physical therapist in how to perform his or her job. For such direction, the physical therapist consults the Lead Physical Therapist. The relationship between the physician and the physical therapist described by Dr. Mann is one of team members. In view of these facts, I find the physicians do not use independent judgment to assign or responsibly direct the physical therapists. *Kentucky River*, 121 S. Ct. at 1871; *Providence Hospital*, above at 729; *Weyerhaeuser Timber Co.*, above at 1173. Therefore, I find that the physicians are not statutory supervisors of the physical therapists as a result of exercising these functions.

C. X-ray Technicians

X-ray technicians report to their Center Administrators. For assistance that an X-ray technician needs with regard to taking X-rays, he or she reports to a Lead X-ray Technician. There is no evidence that a physician is involved in how an X-ray technician takes X-rays. Most X-ray technicians are cross-trained as medical assistants and work simultaneously in both classifications. The Center Administrator testified that, like medical assistants, X-ray technicians know what functions they are responsible for and how to accomplish their tasks. X-ray technicians are involved in non-injury and injury care at the centers. The protocols for the physical examination include the required X-rays. When a patient needs an X-ray as part of a physical examination, the medical assistant takes the patient directly to the X-ray technician.

A physician may tell an X-ray technician what spot or part of the body to X-ray, in which case the technician will take the X-rays prescribed in protocols. Dr. Mann called the X-ray technician's choice of particular X-ray views, when told where to X-ray, as "automatic." Occasionally, a physician may tell an X-ray technician a particular view to X-ray. After viewing the X-ray, a physician may tell an X-ray technician that the X-ray taken by the technician is too light or too dark. However, there is no evidence that a physician directs an X-ray technician in how to take an X-ray. Dr. Mann reported that the X-ray technician is more familiar with the operation of the X-ray equipment than he. If a physician approves an X-ray, it is sent to a radiologist outside the center.

The Employer asserts that physicians responsibly direct X-ray technicians because an X-ray technician can only take an X-ray at the direction of a physician. Such an assignment, insofar as the X-ray technician is selected to take an X-ray, like the assignment of physical therapy to the physical therapist, is automatic, routine and perfunctory. *Providence Hospital*, 320 NLRB 717; *Weyerhaeuser Timber Co.*, above. Similarly, there is no evidence that a physician directs an X-ray technician in how to take an X-ray. Rather, the Lead X-ray Technician performs this function. I find, therefore, that the Employer has not presented sufficient evidence to find that physicians assign or responsibly direct X-ray technicians in the performance of their work. Therefore, I find that the physicians are not statutory supervisors of the X-ray technicians as a result of exercising these functions.

D. Physician's Assistants

The Employer employs two physician's assistants, one at each of two centers. A professional regulation requires physician's assistants to work under the supervision of a physician. The Employer's practice is to have a physician available when a physician's assistant is working. The physicians review ten percent of the notes made by physician's assistants.

The Employer argues that the legal requirement that physician's assistants work under the supervision of physicians establishes the supervisory authority of the physicians under the Act. I find, contrary to the claim of the Employer, that Board law does not equate such a requirement with statutory supervision as defined in the Act. *Crittenton Hospital*, 328 NLRB 879; *Third Coast Emergency Physicians*, 330 NLRB No. 117. I find that the Employer has not made a sufficient record as to the type of directions given to physician's assistants to find that the physicians responsibly direct them. *Quadrex Environmental Co.*, above; *Sears Roebuck & Co.*, above. Therefore, I find that the physicians are not statutory supervisors of the physician's assistants as a result of exercising these functions.

ORDER

I have found that the Center Medical Directors and physicians are employees and not statutory supervisors within the meaning of Section 2(11) of the Act. Noting that after the election in this matter was held on October 28 2000, the ballots were impounded, I order that the impounded ballots be opened and counted and that an appropriate Tally of Ballots issue. The time and place will be subsequently designated under separate cover.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Supplemental Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington by February 14, 2002.

Signed at Newark, New Jersey this 31st day of January 2002.

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