IN THE COURT OF APPEALS OF NEW MEXICO

GLORIA MENDOZA,

Worker-Appellant,

vs.

Ct. App. No. 35,520
(WCA No. 15-02355)

ISLETA RESORT AND CASINO
and HUDSON INSURANCE,

Employer/Insurer-Appellees,

vs.

TRIBAL FIRST,

Appellee,

and

STATE OF NEW MEXICO UNINSURED
EMPLOYERS' FUND,

Statutory Third-Party.

WORKER'S/APPELLANT'S BRIEF IN CHIEF

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SUMMARY OF THE PROCEEDINGS

Nature of the Case and Course of Proceedings

This is an appeal from a Workers' Compensation Order Granting Employer/Insurer's Motion to Dismiss based on lack of subject matter jurisdiction. **[RP0212]** The litigation of this case was limited due the Workers' Compensation Judge's (WCJ) decision to dismiss the case with prejudice based on Isleta Pueblo's claim of sovereign immunity. Identifying the correct workers' compensation insurance carrier for Isleta Resort and Casino occupied a great deal of time in the initial stages of litigation as more fully set forth below.

The case arose after Gloria Mendoza (Worker) was injured while working as a custodial porter at Isleta Resort and Casino (Employer). On August 24, 2015, Worker injured her right knee while pushing in chairs during her midnight shift. After all workers' compensation benefits were denied, Worker filed her Workers' Compensation Complaint on November 16, 2015. **[RP0001]** Employer and Food Industry Self Insurance Fund of New Mexico (FISIF) were named as Employer/Insurer at this stage.

FISIF was named because it was the last known workers' compensation carrier for Employer. Further, FISIF was named because the undersigned had recently

settled another workers' compensation case, filed with the Workers' Compensation Administration (WCA), against Employer with FISIF as the workers' compensation carrier. Of note, neither Isleta Pueblo nor FISIF raised the defense of sovereign immunity in that case. It was later learned that FISIF had ceased providing coverage to Employer the previous year, in 2014.

On November 23, 2015, Worker filed the First Amended Workers' Compensation Complaint naming Isleta Resort and Casino/FISIF as Employer/Insurer and added Tribal First and/or the Uninsured Employers' Fund (UEF). **[RP0014]** The addition of Tribal First as a party was based on the fact that Tribal First identified itself as the third party administrator for Employer and was the entity who denied Worker's claim. **[RP0099]** The UEF was named as a party based on the WCA website that indicated that Isleta Resort and Casino was not covered at all with workers' compensation insurance for the date of the accident in question. Worker anticipated dismissing FISIF as soon as procedurally possible/with leave of the Court and once the correct workers' compensation carrier could be identified.

The parties participated in a mediation on January 7, 2016 where it was acknowledged that FISIF ceased being the workers' compensation carrier for Employer as of January 2014. **[RP0034]** Workers' compensation insurance coverage documents exchanged among the parties at the mediation clearly established that

FISIF was not the proper insurer and that Hudson Insurance acting through its third party administrator, Tribal First, was the liable workers' compensation insurer for this claim.

The mediation resulted in a Recommended Resolution filed on January 14, 2016. **[RP0036]** The Recommended Resolution recommended, among other things, that Worker's claim be considered compensable, that notice of the work accident was timely, that Employer had waived any defense to this claim based on sovereign immunity pursuant to the Indian Gaming Compact of 2015 and that Tribal First acted in bad faith in denying the claim. **[RP00041]**. Of note, the Tribal First adjuster was the only representative that appeared on behalf of Employer/Insurer at the mediation. The Tribal First adjuster appeared by telephone but chose to hang up about half-way through the mediation as referenced in the Recommended Resolution. **[RP0038]**

Employer/Tribal First filed a Notice of Rejection of the Recommended Resolution on February 10, 2016 asserting that the WCA lacked subject matter jurisdiction based on the doctrine of sovereign immunity which applied to the Employer. **[RP0048]** Workers' Compensation Judge Terry Kramer was initially assigned to the case. **[RP0050]**. A Notice of Reassignment of Judge assigning WCJ Leonard Padilla was filed on March 4, 2016. **[RP0079]** On March 2, 2016, two days before the WCJ was finally assigned to this case, before the proper insurer, Hudson

Insurance, was named as a party and before any discovery took place, Employer/Tribal First filed the Motion to Dismiss contesting subject matter jurisdiction pursuant to Rule 1-012 (B) (1). **[RP0057]** Worker filed her Response to Motion to Dismiss on April 5, 2016, which will be discussed below in the Summary of Facts. **[RP0121]**

On March 7, 2016, Worker filed the Motion for Leave to File Second Amended Workers' Compensation Complaint so that FISIF could be dismissed and Hudson Insurance could be added as the proper insurer for the claim. **[RP0080]** Importantly, all counsel agreed to the relief requested in this Motion and no party sought to have Tribal First dismissed. However, the parties could not agree on the form of the order. As a result, WCJ Padilla held a hearing on March 15, 2016 and issued his Order Granting Worker's Motion to File Second Amended Workers' Compensation Complaint on March 16, 2016. **[RP0091]** This Order inexplicably dismissed Tribal First as a party while correctly dismissing FISIF and adding Hudson Insurance in its place. This Order also ordered Worker to dismiss the UEF upon confirmation that Hudson Insurance was the proper workers' compensation carrier for the claim. **[RP0092]**

Worker then filed the Motion to Reconsider Order Granting Worker's Motion to File Second Amended Workers' Compensation Complaint on March 21, 2016.

[RP0093] Worker sought to have the WCJ reconsider dismissal of Tribal First since this entity was the sole entity involved in raising various defenses, denying the claim and made all of the claims adjusting decisions to date. **[RP0096-0100]**

Worker's Motion for Reconsideration and Employer/Insurer's Motion to Dismiss were heard by the WCJ on April 12, 2016. It was during this hearing that counsel for Employer and Hudson Insurance admitted that Tribal First was a "trade name" of Hudson Insurance, that Tribal First was not an "actual entity" and was the third party administrator for Hudson Insurance who was the workers' compensation insurer for the Employer on the date of the work accident. **[CD 1, 4-12-16, 9:48:20]** Worker's Motion for Reconsideration was ultimately denied as being moot based on the WCJ's decision to grant Employer/Insurer's Motion to Dismiss. **[RP0203-0208]** This appeal followed the WCJ's Order Granting Employer/Insurer's Motion to Dismiss.

Summary of Facts Relevant to the Issues Presented for Review

Worker began working for Employer in approximately 2008. On August 24, 2015, Worker injured her right knee while pushing in chairs during her midnight shift as a custodial porter. Worker's duties included cleaning bathrooms, emptying ashtrays, removing trash and generally keeping the casino area tidy. Worker filed a Notice of Accident form with Employer on the same date of this work accident.

[RP0121] Pursuant to the Workers' Compensation Act (WC Act), workers are required to give notice of a work accident within fifteen (15) days of its occurrence based on NMSA 1978, section 52-1-29 (A). Initially, Tribal First denied the claim based on lack of notice of the work accident within "24 hours" pursuant to the "Isleta Resort & Casino work injury program." **[RP0096]** Later, the notice defense was dropped and Tribal First claimed that Isleta Resort & Casino had not waived its sovereign immunity. Tribal First then argued that the WCA lacked jurisdiction over the claim. **[RP0099]**

It is noteworthy that the Tribal First correspondence contains a California insurance license number and reference to it being a product of Alliant Insurance Services, Inc. at the bottom of its correspondence. The name "Hudson Insurance" appears nowhere on any of the Tribal First correspondence to Worker. **[RP0096-0100]** Tribal First/Alliant Insurance is organized under the laws of California and Hudson Insurance is a Delaware corporation. **[RP0151-0153]** Nothing on any of the corporate documents indicate that Tribal First/Alliant Insurance or Hudson Insurance are tribal entities or subsidiaries of Isleta Pueblo. Finally, the Certificate of Liability Insurance that lists Hudson Insurance as the insurer for this claim also lists the WCA as the Certificate Holder indicating an awareness that WCA has jurisdiction. **[RP0083]** Isleta Resort and Casino, Tribal First/Alliant Insurance and Hudson

Insurance will be collectively referred to hereafter as Employer/Insurer.

The Motion to Dismiss filed by Employer/Insurer is based on Rule 1-012 (B) (1) NMRA, lack of subject matter jurisdiction based on Employer's claim of sovereign immunity. **[RP0057]** Employer/Insurer also contend that Worker's exclusive remedy is in Isleta Tribal Court pursuant to Isleta Pueblo's "Ordinance." **[RP0057-0058, 0062, 0066-0076]** In response, Worker contends that Employer/Insurer expressly waived any sovereign immunity defense based on subsection 4 (B) (6) of the 2015 Compact in effect for the date of the work accident on August 24, 2015. **[RP0147]** Alternatively, neither Tribal First as a California corporation, nor Hudson Insurance as a Delaware corporation, are tribal entities to which sovereign immunity applies. **[RP0151-0153]** Worker also argues that subsection 4 (B) (6) of the 2015 Compact requires Isleta Pueblo to adopt laws for workers' compensation claims and provide due process of law. The few pages of the "Ordinance" presented by Employer/Insurer in support of the Motion to Dismiss is not an Isleta tribal law or ordinance at all. The full twenty-two page "Ordinance" which Worker produced is simply a publication from a former, now-defunct workers' compensation insurer (First Nations Compensation Plan) of Isleta Pueblo. **[RP0192-0193]** Worker contends that she had a right to demand compliance with the clear language of the applicable 2015 Indian Gaming Compact, which included having

laws in place to enforce the rights afforded therein.

I. ARGUMENT

Standard of Review and Applicable Law

The whole record review standard applies to decisions of the Workers' Compensation Administration. *Tallman v. Arkansas Best Freight*, 1988-NMCA-091, 108 N.M. 124, 767 P.2d 363; *Moya v. City of Albuquerque*, 2008-NMSC-004, 143 N.M. 258, 175 P.3d 926. Under the whole record review, the appellate court views the evidence in the light most favorable to the WCJ's decision but may not view favorable evidence with total disregard to contravening evidence. *National Council on Compensation Ins. v. New Mexico State Corp. Commission*, 1988-NMSC-036, 107 N.M. 278, 756 P.2d 558; *Wolfley v. Real Estate Commission*, 1983-NMSC-064, 100 N.M. 187, 668 P.2d 303; *Sanchez v. Siemens Transmissions Systems*, 1991-NMCA-028, 112 N.M. 236, 814 P.2d 104. Under a whole record review, such review allows the reviewing court greater latitude to determine whether a finding of fact was reasonable based on the evidence. *Herman v. Miners' Hospital*, 1991-NMSC-021, 111 N.M. 550, 807 P.2d 734. At this stage, all favorable and unfavorable evidence is examined in order to determine whether there is substantial evidence and a reasonable basis to support the decision. *Sanchez v. Siemens Transmissions Systems*, 1991-NMCA-028, 112 N.M. 236, 814 P.2d 104.

Resolution of Worker's claims for medical, indemnity and bad faith penalties in connection with the denial of compensability involves the interpretation of several provisions of the WC Act. This Court reviews interpretations of a statute de novo. *Baca v. Complete Drywall Co.*, 2002-NMCA-002, ¶ 12, 131 N.M. 413, 38 P.3d 181. The plain meaning of the statutes' words are examined first. After determining the meaning of a statute, this Court is to review the whole record to determine whether the WCJ's findings and award are supported by substantial evidence. *Grine v. Peabody Natural Resources*, 2006-NMSC-031, ¶ 17, 140 N.M. 30, 139 P.3d 190.

The question of whether an Indian tribe is entitled to sovereign immunity is also reviewed de novo. A de novo standard is also applied to questions of whether a case is properly dismissed for lack of subject matter jurisdiction. *Sanchez v. Santa Ana Golf Club, Inc.*, 2005-NMCA-003, ¶ 4, 136 N.M. 682, 104 P.3d 548.

A. Did the Workers' Compensation Judge err in granting Employer/Insurer's Motion to Dismiss for lack of subject matter jurisdiction?

This workers' compensation case was dismissed pursuant to Employer/Insurer's Motion to Dismiss based on Rule 1-012 (B) (1) NMRA, lack of subject matter jurisdiction based on the doctrine of sovereign immunity. **[RP0057]** Employer/Insurer and Worker submitted documents in support of their briefing for

this Motion. **[RP0066-0076]** When evidence outside the pleadings is considered, a motion to dismiss should be treated as a motion for summary judgment. *See Sabella v. Manor Care, Inc.*, 1996-NMSC-014, ¶ 8, 121 N.M. 596, 915 P.2d 901; *Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir. 1995) (court is required to convert motion to dismiss into one for summary judgment when resolution of jurisdictional question is intertwined with merits of the case). On appeal from the grant of summary judgment, this Court ordinarily reviews the whole record in the light most favorable to the party opposing summary judgment to determine if there is any evidence that places a genuine issue of material fact in dispute. *City of Albuquerque v. BPLW Architects & Engineers, Inc.*, 2009-NMCA-081, ¶ 7, 146 N.M. 717, 213 P.3d 1146.

In this case, Worker contends that genuine issues of material fact are in dispute with respect to: (1) whether Isleta Pueblo expressly waived any defense of sovereign immunity pursuant to the 2015 Indian Gaming Compact; (2) whether Hudson Insurance and Tribal First are tribal entities entitled to claim the defense of sovereign immunity; (3) whether Isleta Pueblo failed to have workers' compensation laws in place as required by the 2015 Indian Gaming Compact making it impossible for Worker to enjoy any fundamental rights of due process afforded thereunder; and (4) whether Tribal First, as Employer's agent, should be included as a named party so

that claims for bad faith/unfair claims processing could be determined by the WCJ. **[DS 11-13]**

At the outset, Worker recognizes that it is well-established in New Mexico that a tribe's sovereign immunity may not be *implicitly* waived. *Gallegos v. Pueblo of Tesuque*, 2002-NMSC-012, ¶ 48, 132 N.M. 207, 46 P.3d 668 (providing that a tribal entity cannot be subjected to suit in state court "absent an unequivocal and express waiver or the authorization of Congress"). Worker contends that Employer/Insurer *expressly* waived the defense of sovereign immunity by accepting the contractual terms of the 2015 Indian Gaming Compact which states that no defense of sovereign immunity will be asserted. To be clear, Worker is not arguing that an "implicit" waiver of sovereign immunity occurred herein.

In support of Worker's argument that Employer/Insurer expressly waived the defense of tribal sovereign immunity, it is helpful to review the history of the Indian Gaming Compacts as they relate to workers' compensation rights. The four Indian Gaming Compacts (Compact hereafter) that pertain to the Pueblo of Isleta and contain subsection 4 (B) (6), workers' compensation insurance benefits include: 1997 Compact, 2001 Compact, 2007 Compact and 2015 Compact. The extent to which WC benefits have *expanded* over time in subsection 4 (B) (6) is summarized as follows:

1997 Compact, Subsection 4 (B) (6) Regulations required the Pueblo of Isleta to adopt laws:

> providing all employees of a gaming establishment employment benefits, including at a minimum, ...workers' compensation insurance through participation in programs offering benefits at least as favorable as those provided by comparable state programs.

2001 Compact, Subsection 4 (B) (6) Regulations required the Pueblo of Isleta to adopt laws:

> providing all employees of a gaming establishment employment benefits, including at a minimum, ...workers' compensation insurance through participation in programs offering benefits at least as favorable as those provided by comparable state programs.

2007 Compact, Subsection 4 (B) (6) Regulations required the Pueblo of Isleta to adopt laws:

> providing all employees of a gaming establishment employment benefits, including at a minimum, ...workers' compensation insurance through participation in programs offering benefits at least as favorable as those provided by comparable state programs, and which programs shall afford the employees due process of law and shall include an effective means for an employee to appeal an adverse determination by the insurer to ***an impartial forum, such as (but not limited to) the Tribe's tribal court***, which appeal shall be decided in a timely manner and in an administrative or judicial proceeding and as to which ***no defense of tribal sovereign immunity would be available***; and provided that to fulfill this requirement the Tribe may elect to participate in the State's program upon execution of an appropriate agreement with the State. (Emphasis added.)

2015 Compact, Subsection 4 (B) (6) Regulations required the Pueblo of Isleta to adopt laws:

> requiring the Tribe, through its Gaming Enterprise or through a third-

> party entity, to provide all employees of the Gaming Enterprise employment benefits, including, at a minimum, ...workers compensation insurance through participation in programs offering benefits at least as favorable as those provided by comparable State programs, and which programs shall afford the employees due process of law and shall include an effective means for an employee to appeal an adverse determination by the insurer to ***an impartial forum, such as (but not limited to) the Tribe's tribal court***, which appeal shall be decided in a timely manner and in an administrative or judicial proceeding and as to which ***no defense of tribal sovereign immunity would be available***; and provided that to fulfill this requirement the Tribe may elect to participate in the State's program upon execution of an appropriate agreement with the State. (Emphasis added.)

Importantly, the 2015 Compact became effective on July 28, 2015 as noted in Volume 80, No. 144 of the Federal Register. **[RP0149]** The 2015 Compact was the latest Compact in effect on the date of the work accident occurring on August 24, 2015 and is controlling herein.

Worker contends that "no defense of sovereign immunity is available" to Employer/Insurer based on the clear language of the 2015 Compact. Employer/Insurer argue that the 2015 Compact does not say that sovereign immunity is waived but only that sovereign immunity will not be raised as a defense. **[CD 1, 4-12-16, 10:01:00]** This is a distinction without a difference. The Compact should not be construed in such a way as to nullify certain of its provisions. *See Katz v. N.M. Dept. of Human Services*, 1981-NMSC-012, ¶ 18, 95 N.M. 530, 624 P.2d 39. No defense of sovereign immunity is available to Employer/Insurer in this case and

dismissal for lack of subject matter jurisdiction based on the doctrine of sovereign immunity is contrary to the clear language of the 2015 Compact.

Employer/Insurer also attempt to rely on the following workers' compensation cases for support of the argument that sovereign immunity bars this claim: *Antonio v. Inn of the Mountain Gods Resort & Casino*, 2010-NMCA-077, 148 N.M. 858, 242 P.3d 425, *Peña v. Inn of the Mountain Gods Resort and Casino*, No. 29,799, (N.M. Ct. App. Jan. 31, 2011) (non-precedential) and *Martinez v. Cities of Gold Casino*, 2009-NMCA-087, 146 N.M. 735, 215 P.3d 44, *cert. denied*, 2009-NMCERT-007, 147 N.M. 361, 223 P.3d 358. Reliance on these cases is misplaced as either the injury occurred before the express waiver of sovereign immunity language appeared in the applicable Compact or "implicit" waiver, as opposed to an express waiver, was argued by the claimant.

The first case, *Antonio v. Inn of the Mountain Gods Resort and Casino*, is not applicable to this case because it involved a work injury occurring in 2006 which was before the 2007 Compact passed that included the express waiver of sovereign immunity language and which was adopted by the Pueblo of Isleta. The worker was injured on January 9, 2006 during the course of his employment with Ski Apache, a division of the Inn of the Mountain Gods Resort and Casino which is owned by the Mescalero Apache Tribe. *Antonio*, ¶ 4-5. Worker first argued that because he was

injured off the reservation and the Mescalero Tribe was engaged in business in the state of New Mexico, the WCA had jurisdiction. *Antonio*, ¶ 6. This Court cited language in the case relied upon by worker that stated "Without an explicit waiver, the Nation is immune from suit in state court–even if the suit results from commercial activity occurring off the Nation's reservation." *DeFeo v. Ski Apache Resort*, 1995-NMCA-118, ¶ 16, 120 N.M. 640, 904 P.2d 1065.

The next argument by worker was that the Tribe waived immunity based on the language of the **2001 Compact** that required the Tribe to provide WC benefits at least as favorable as those provided by comparable state programs. *Antonio*, ¶ 15. Since worker's injury occurred in 2006, the 2001 Compact applied and this version of the Compact did not contain the language that *"no defense of tribal sovereign immunity would be available."* Worker was paid WC benefits for over eight months, so the argument that the Tribe did not have a WC program in effect failed. *Antonio*, ¶ 16. Of note, the Mescalero Tribe passed a Workers' Compensation Ordinance which became effective on January 1, 2007, after the date of worker's injury. This Court reiterated that purchasing WC insurance or participating in the state's workers' compensation program does not constitute an express waiver of sovereign immunity. *Citing Martinez v. Cities of Gold Casino*, 2009-NMCA-087, ¶ 27, 146 N.M. 735, 215 P.3d 44 and *Sanchez v. Santa Ana Golf Club, Inc.*, 2005-NMCA-003, ¶ 18, 136 N.M.

682, 104 P.3d 548.

The applicable 2001 Compact in *Antonio* did not yet contain the prohibition of defending this claim based on sovereign immunity as does the 2007 and 2015 Compacts. Any arguments that the Tribe implicitly waived sovereign immunity based on the 2001 Compact should have failed. The last point of interest in *Antonio* is that this Court noted that the 2001 Compact is "silent as to where jurisdiction might lie with regard to conflicts over the workers' compensation provided by the Tribe." *Antonio*, ¶ 21. In contrast, the 2007 and 2015 Compacts are clear that jurisdiction might lie in any ***impartial forum, such as (but not limited to) the Tribe's tribal court.*** The WCA is such an impartial forum, has subject matter jurisdiction over workers' compensation claims and Worker is not required to pursue this claim through Isleta's Tribal Court based on the clear language of the Compact.

The second case relied on by Employer/Insurer is the unpublished case, *Peña v. Inn of the Mountain Gods Resort and Casino*, also offers no support for the Motion to Dismiss. The date of the work accident in *Peña* was January 17, 2009 which makes the 2007 Compact applicable. Worker initially filed his WC claim with the tribal workers' compensation system. The claim was denied by employer on the basis that worker was engaged in horseplay and was therefore acting outside the scope of his employment when injured. *Peña*, ¶ 1. Apparently, worker did not appeal this

decision.

Instead, the worker then filed a claim for the same injury with the WCA. *Peña*, ¶ 1. The worker in *Peña* unsuccessfully argued that the Mescalero Apache Tribe had "implicitly" waived any sovereign immunity defense by voluntarily participating in proceedings at the WCA. This Court held that the Tribe's participation in the WCA proceedings did not waive tribal sovereign immunity. *Peña*, ¶ 3. Here, Worker asserts an express waiver of sovereign immunity by Employer/Insurer based on the 2015 Compact in effect on the date of the work accident which eliminates the defense of sovereign immunity. Based on the 2015 Compact, there is no longer a choice of whether or not Isleta Pueblo may contest jurisdiction of the WCA based on the defense of sovereign immunity as was the case with prior versions of the Compacts before 2007. Based on the 2015 Compact, jurisdiction lies with any *impartial forum, such as (but not limited to) the Tribe's tribal court* and *no defense of tribal sovereign immunity would be available.*

This Court also rejected worker's argument that the 2007 Compact gives the WCA jurisdiction to hear the claim. *Peña*, ¶ 4. In rejecting the argument, this Court cited to the *Antonio* and *Martinez* cases which involved the 2001 Compact. The 2001 Compact was silent as to the proper forum and it was not until the 2007 Compact that the language of *"an impartial forum, such as (but not limited to) the Tribe's tribal*

court" appeared. Based on the language of the 2015 Compact, jurisdiction of this case lies with an impartial forum that is not limited to tribal court. Alternatively, Worker argues that the language of the 2015 Compact does not state a precise forum making the WCA equally as valid as any other forum. *Sheffer v. Buffalo Run Casino*, 315 P.3d 359 (OK 2013) (dissent view that the fact Compact did not state the precise forum renders the choice of a state court forum equally as valid as tribal court).

The last case relied upon by Employer/Insurer in support of the Motion to Dismiss is *Martinez v. Cities of Gold Casino*, 2009-NMCA-087, 146 N.M. 735, 215 P.3d 44. The worker was injured in 2005 making the 2001 Compact applicable. This Court noted that 2001 Compact is silent as to where jurisdiction might lie for workers' compensation claims. *Martinez*, ¶ 26. The purchase of workers' compensation insurance for employees of the casino did not, by itself, amount to waiver of the Tribe's sovereign immunity defense in proceedings before the WC Administration. *Martinez*, ¶ 27. In the case at bar, the 2015 Compact is no longer silent as to where jurisdiction might lie and an express waiver of sovereign immunity is made when the defense of sovereign immunity is no longer available.

If there were Isleta laws or tribal ordinances on workers' compensation claims, Worker would have attempted to exhaust her remedies through Isleta Tribal Court as Employer/Insurer suggest was required. **[RP0063]** The undersigned repeatedly

requested from Isleta Pueblo and Isleta Tribal Court a copy of any tribal workers' compensation laws and was repeatedly told that none exist. Written requests for these laws to Isleta Tribal counsel also went unanswered. Instead, the 22-page document titled "Tribal Occupational Injury Coverage Form" was produced by Isleta Pueblo. **[RP0171-0192]**

Copies of actual Isleta Tribal laws/ordinances have been obtained including Isleta Tribal Court Rules, Law and Order Code and Labor and Employment Relations Ordinance. None of these laws contain any reference to workers' compensation claims. All of these laws make reference to being passed by the Isleta Tribal Council, contain the date of passage, contain the number of council members voting for/against and bear the certification of the Isleta Governor or president of the Tribal Council as required by the Isleta Constitution. Based on the formalities seen with actual Isleta Tribal laws, Worker contends that the 22-page document titled "Tribal Occupational Injury Coverage Form" is not a tribal law or ordinance.

Referring to the first page of the "Tribal Occupational Injury Coverage Form," it is clear that it was not passed by the tribal council, does not bear the certification of the Isleta Governor or president of the Tribal Council and does not comply with the formalities of passing laws per the Isleta Constitution. **[RP0171]** Referring to the last page of the "Tribal Occupational Injury Coverage Form," it is also clear that the

form is from Isleta's former carrier, First Nations Compensation Plan, which is now defunct. **[RP0192-0193]**

The lack of any ordinances or laws on this area of the law is in violation of the 2015 Compact which requires Isleta Pueblo to adopt laws on the topic. Requiring Worker to exhaust tribal court remedies when no such remedies exist is illogical. *United Nuclear Corp. v. General Atomic Co.*, 1980-NMSC-094, 96 N.M. 155, 629 P.2d 231 ("Clearly, the right to a fair trial in a fair tribunal is a basic requirement of due process").

Even if the "Tribal Occupational Injury Coverage Form" were considered a tribal law, it clearly does not offer benefits at least as favorable as those provided by comparable State programs as required by the 2015 Compact. One example of how unfavorable this program was is found where no benefits are paid for psychological or mental injuries. **[RP0175]** The only impartial forum available to Worker is the WCA and the WCA has exclusive jurisdiction to hear this claim based on laws afforded by the WC Act.

Another case that Employer/Insurer attempt to rely on for support of the Motion to Dismiss is a 2002 New Mexico Supreme Court case involving personal injuries, not work-related injuries. *Gallegos v. Pueblo of Tesuque*, 2002-NMSC-012, 132 N.M. 207, 46 P.3d 668. On October 28, 1996, plaintiff was a visitor at Camel

Rock Gaming Center which is owned and operated by Tesuque Pueblo. Plaintiff was entering the walkway from the parking lot when she fell and suffered injuries. *Gallegos*, ¶ 3. The date of these injuries occurred after the invalidation of the 1995 Compact and before the effective date of the 1997 Compact. *Gallegos*, ¶ 5. Thus, there was no Compact in effect on the date of the injuries.

Plaintiff first filed a claim in New Mexico district court against the Pueblo of Tesuque and others. The district court granted defendants' motion to dismiss stating that it lacked jurisdiction because no Compact covered the date of the accident and Tesuque Pueblo had not waived its sovereign immunity. *Gallegos*, ¶ 4. Plaintiff then filed a separate lawsuit against Zurich, the insurer for Tesuque Pueblo, and other defendants but did not name Tesuque Pueblo. Zurich filed a motion to dismiss based on failure to join an indispensable party pursuant to Rule 1-019. *Gallegos*, ¶ 5.

Zurich's motion to dismiss was not based on Rule 1-012 (B) (1), lack of subject matter jurisdiction as is Employer/Insurer's Motion to Dismiss in this case. The motion to dismiss by Zurich was granted as Tesuque Pueblo had not expressly and unequivocally waived sovereign immunity and was in indispensable party in the suit against its insurance carrier. *Gallegos*, ¶ 1. The New Mexico Supreme Court was clear that the case had unique circumstances and confined the application of its analysis to these facts. *Gallegos*, ¶ 1. Footnote 7 of the *Gallegos* opinion states:

> Throughout our review, we are mindful that this case presents itself on a motion to dismiss for failure to join an indispensable party and not a motion to dismiss for failure to state a claim. Thus, we confine our discussion only to the issue of whether Tesuque as a tribe is an indispensable party in Gallegos' suit against Zurich, arising from an incident that occurred at a tribal casino when no compact was in place. Nothing in this opinion speaks to the legal validity or invalidity of Gallegos' claims based on the New Mexico Trade Practices and Fraud Act.

Nothing in *Gallegos* supports Employer/Insurer's Motion to Dismiss as it was based on an entirely different procedural rule, the 2015 Compact does apply, no defense of sovereign immunity is available to the Employer/Insurer, Isleta has been joined as a party and a direct claim at Hudson and/or Tribal First is also permissible as set out more fully in the next section.

B. Does the defense of sovereign immunity extend to Insurer/Third Party Administrator, Hudson Insurance and Tribal First, neither of which are tribal entities?

If this Court finds that Employer may defend this workers' compensation claim on the basis of sovereign immunity, Worker contends that such a defense does not extend to non-tribal entities Hudson Insurance and Tribal First. In support of this argument, section 52-1-4 (C) of the WC Act states:

> Every contract or policy insuring against liability for workers' compensation benefits or certificate filed under the provisions of this section shall provide that the insurance carrier or the employer shall be directly and primarily liable to the worker and, in event of his death, his dependents, to pay the compensation and other workers' compensation

benefits for which the employer is liable.

The policy insuring against liability for workers' compensation benefits and corresponding certificate was filed under this provision with the WCA by Employer/Insurer. **[RP0083]** Pursuant to the policy in effect for the date of this work accident, either Isleta Resort and Casino **or** Hudson Insurance/Tribal First shall be directly and primarily liable to Worker. Under the facts of this case, Isleta Pueblo is not an indispensable party and Hudson Insurance/Tribal First should be directly and primarily liable to Worker as the third party beneficiary of the workers' compensation policy in existence.

In addition to section 52-1-4 (C), case law that permits joinder of an insurer in the context of personal injury suits involves a similar public policy analysis. Since 1998, New Mexico has permitted an insurer to be joined in a suit against the insured by the injured party where: 1) coverage was mandated by law, 2) it benefits the public, and 3) no language of the law expresses an intent to deny joinder). *Raskob v. Sanchez*, 1998-NMSC-045, ¶ 3, 126 N.M. 394, 970 P.2d 580. Joinder of Hudson Insurance/Tribal First, with or without Isleta Pueblo, should be equally permissible in the context of workers' compensation cases because such coverage is mandated by law, it benefits the workers who are injured on the job while working for Isleta Pueblo and no language of the WC Act expresses an intent to deny joinder.

Workers' compensation regulations define "employer" collectively as an employer subject to the WC Act, a workers' compensation insurance carrier or its representative or any authorized agent of an employer or insurance carrier. NMAC 11.4.7.7 (K). It is clear that Employer was subject to the WC Act by the filing of the Certificate of Liability. **[RP0083]** Hudson Insurance through Tribal First acted as agents or representatives for Employer and should not escape liability unless sovereign immunity somehow extends to these non-tribal entities.

In a very similar 2012 case involving Hudson Insurance and Tribal First, the Oklahoma Supreme Court held that the Osage Tribe enjoys sovereign immunity but Hudson Insurance (and Tribal First) did not. *Waltrip v. Osage Million Dollar Elm Casino*, 290 P.3d 741 (2012). **[RP0155-0169]** While *Waltrip* is not controlling precedent here, it involves similar facts that this Court is urged to consider. In *Waltrip*, Hudson Insurance issued a workers' compensation policy to the Osage Tribe but later argued that the policy provisions provided no coverage for workers' compensation claims. *Waltrip*, ¶ 9. The terms of the policy also contemplated claims of injured workers would be adjudicated in tribal court. However, the Osage Tribe did not have tribal ordinances pertaining to workers' compensation claims and the same is true for the Pueblo of Isleta. Instead, Tribal First imposed its "provisions" which controlled workers' compensation claims. *Waltrip*, ¶ 10. Here, as in *Waltrip*,

the Tribal First Provisions make it practically impossible for any injured worker to receive benefits. The Oklahoma Supreme Court correctly described Tribal First's claims processing tactics:

> "By its apparently unilateral adoption of the Provisions, Tribal First appears to function as legislature, executive, trial court, and appellate court regarding the claims of injured workers while functioning as an agent of the Insurer."

Waltrip, ¶ 11. The Court found that Hudson Insurance was unjustly enriched by collecting premiums from the Osage Tribe for workers' compensation coverage while simultaneously expecting to assert the Tribe's sovereign immunity to deny claims. *Waltrip*, ¶ 12.

The *Waltrip* Court also found that injured workers enjoy third party beneficiary status based on an Oklahoma statute, the Estoppel Act, that is similar to NMSA 1978, section 52-1-4 (C) (every contract or policy insuring against liability for workers' compensation benefits shall provide that the insurance carrier or the employer shall be directly and primarily liable to the worker). *Waltrip*, ¶ 14. Because the Osage Tribe lacked any tribal ordinances or a tribally sanctioned process that dealt with workers' compensation claims, Hudson Insurance's policy was a sham and illusory. Tribal First acts as the final arbiter of such claims on behalf of Hudson Insurance and the fundamental rights of due process are completely absent for injured workers.

Waltrip, ¶ 16. The same exact analysis applies to Worker in this case.

The *Waltrip* Court also found that the Tribe's sovereign immunity did not extend to Hudson Insurance, which is a Delaware corporation. **[RP0151]** The same reasoning applies to Tribal First as it is a California corporation. **[RP0152-0153]** Sovereign immunity as a defense to this case has been expressly waived by Employer and certainly does not extend to Hudson Insurance, nor Tribal First, because neither is a sovereign nation. Worker calls upon Employer/Insurer to cite to any evidence in the record below that proves that Hudson Insurance and/or Tribal First are tribal entities.

At the very minimum, Worker should have been permitted time to conduct discovery as to the corporate make-up and tribal entity status of Hudson Insurance and Tribal First before dismissal was proper. Regulations on the formal hearing process in workers' compensation claims allow for disqualification of a WCJ within ten days of the judge assignment, require an answer to the workers' compensation complaint to be filed and provide for discovery to be completed. NMAC 11.4.4.13 (A), (B) and (C). Worker was afforded none of these basic adjudicatory rights in this matter before dismissal was granted. Because a motion for summary judgment in these cases is governed by Rule 1-056 NMRA and specifically subsection (F), the WCJ should have refused to rule on the Motion to Dismiss or alternatively ordered

a continuance to allow Worker to conduct discovery. NMAC 11.4.4.13 (G) (motions for summary judgment shall comply with Supreme Court Rules Annotated 1986, 1-056).

C. Did the Workers' Compensation Judge err in denying Worker's Motion to Reconsider Order Granting Leave to File Second Amended Workers' Compensation Complaint so that Tribal First and Hudson Insurance could be named as parties?

If this Court determines that dismissal of the case was error and that the defense of sovereign immunity is not available, then Worker respectfully requests this Court to also determine that the proper parties to this action include Hudson Insurance and Tribal First. There is no dispute now that Hudson Insurance is the workers' compensation insurer and that Tribal First has acted as its third party administrator in this case. **[CD 1, 4-12-16, 9:48:20]** There is no dispute that Tribal First has committed bad faith and unfair claims processing in this matter. One example is denying the claim based on grounds that Worker was required to and failed to give notice of the work injury within twenty-four hours. **[RP0096]** The WC Act requires notice of a work accident to be given within fifteen days pursuant to NMSA 1978, section 51-1-29 (A). Even the so-called twenty-two page "Ordinance" allows for notice within thirty days. **[RP0178]**

Workers' compensation regulations define bad faith as conduct in the handling

of a claim by any person that amounts to fraud, malice, oppression or willful, wanton or reckless disregard of the rights of any party. The regulations define unfair claims processing as any practice, whether intentional or not, which unreasonably delays or prolongs the payment of benefits. Unfair claims processing includes knowingly misrepresenting pertinent facts relating to benefits and failing to adopt and implement reasonable standards for the prompt investigation and processing of claims. NMAC 11.4.1.7 (C), (W). The WC Act also permits direct actions for unfair claim-processing and/or bad faith directly at the insurer or claim-processing representative. NMSA 1978, section 52-1-28.1 (A).

Worker has undergone surgery for the work-related injury to right her knee. Some, but not all, of the medical bills have been paid by her private health insurer which is provided through continued employment with Employer. Some of the medical bills have been referred to collections affecting Worker's credit. Tribal First acted in reckless disregard of Worker's rights when representing that the claim would be denied because of a failure to report the injury within twenty-four hours.

Based on the foregoing arguments, Tribal First misrepresented the law applicable to injured workers in New Mexico and has made a practice of doing so across the nation on behalf of numerous tribes and Hudson Insurance. Workers' compensation cases almost identical to this case have been derailed by Tribal First

and Hudson Insurance from Colorado to New York. Hudson Insurance and Tribal First should be required to defend their actions and inactions.

II. CONCLUSION

For the reasons stated herein, Worker/Appellant respectfully requests that this Court reverse the Workers' Compensation Judge's Order Granting Employer/Insurer's Motion to Dismiss based on lack of subject matter jurisdiction, reinstate the case to the Workers' Compensation Administration as the proper forum, remand the case with instructions that Worker be permitted to file her Second Amended Workers' Compensation Complaint naming Tribal First and Hudson Insurance collectively as Insurer along with Isleta Resort and Casino and order that FISIF and the UEF be dismissed with prejudice, and for such other relief as the Court deems just and appropriate.

Respectfully submitted,

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I hereby certify that a true and correct copy of the foregoing Brief In Chief was mailed to opposing counsel of record on September 9, 2016.

LeeAnn Ortiz