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/APPELLANT'S REPLY BRIEF

LeeAnn Ortiz
Attorney for Worker/Appellant
1216 Lomas Blvd. NW
Albuquerque, NM 87102
(505) 243-7671
(505) 247-0701 fax

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References to the recorded transcript are by elapsed time from the start of the recording (CD 1, 4-12-16, 9:46:02 indicates a point occurring forty-six minutes and two seconds after the start of the recording which was 9:40:25 on CD 1 on April 12, 2016).

TABLE OF AUTHORITIES

New Mexico Appellate Court and Supreme Court Cases:

Cases From Other Jurisdictions

Statutes

SUMMARY/COURSE OF PROCEEDINGS CLARIFIED

Because this matter was dismissed before any discovery was undertaken and before trial, the summary of proceedings and facts cited by Worker in her brief in chief were largely limited to those proceedings connected with the mediation phase of the case. The procedural history and facts developed during the mediation phase were supported in Worker's brief by more than thirty (30) citations to the record proper.

The record developed in this case establishes that Tribal First initially denied this claim based solely on the "twenty-four hour" notice defense and later relied on the sovereign immunity defense. **[RP0096-0099]** Worker cited to Tribal First documents that establish the various defenses raised by this third party administrator who adjusted the claim on behalf of Isleta Resort and Casino and Hudson Insurance.

The other worker compensation case referenced in Worker's brief in chief at page 2 was settled and paid pursuant to the previous workers' compensation policy in effect and cited by former counsel for Isleta Resort and Casino in FISIF's Response at paragraph 9d. **[RP0034]** This previous case was covered and settled pursuant to Isleta Resort and Casino's workers' compensation coverage through FISIF which was cancelled as of January 1, 2014. No defense of sovereign immunity was raised and other Isleta Pueblo cases have been adjudicated in the WC

Administration prior to this case as the WCJ indicated at the hearing on April 12, 2016:

> "Yeah, that's interesting because I know I've had cases involving Isleta Casino that have gone through the regular Workers' Compensation process since I've been here and I've only been here since 2013."

[CD 1, 4-12-16, 10:10:55] Under coverage provided by its former workers' compensation carrier FISIF, Isleta Resort and Casino routinely accepted WC claims without claiming sovereign immunity.

ARGUMENT

I. THE WHOLE RECORD REVIEW IS THE STANDARD WHICH APPLIES IN WORKERS' COMPENSATION CASES.

The record in this case contains enough information for this Court to decide whether the 2015 Compact permits the sovereign immunity defense for Isleta Resort and Casino and the non-tribal entities, Hudson Insurance and Tribal First (collectively referred to as "Employer/Insurer"). The facts have also been developed enough for this Court to determine who the proper parties are and whether Worker may proceed against Hudson Insurance and Tribal First directly in the event that Isleta Resort and Casino is permitted to claim sovereign immunity as a defense.

An evidentiary hearing is not required for the standard of review to be determined. Employer/Insurer argue that *Selmeczki* requires a final evidentiary

hearing in order for a whole record review by this Court. **[AB 8]** Paragraph 13 of *Selmeczki* cited by Employer/Insurer does not mention the phrase "evidentiary hearing" and does not stand for the proposition that an evidentiary hearing is a prerequisite for the whole record review standard to apply in this case. *Selmeczki v. N.M. Dept. of Corrections*, 2006-NMSA-024, ¶ 13, 139 N.M. 122, 129 P.2nd 158.

This Court reviews *workers' compensation orders* using the whole record standard of review. *Leonard v. Payday Prof'l*, 2007-NMCA-128, ¶ 10, 142 N.M. 605, 168 P.3d 177. This standard applies for all final workers' compensation orders, whether the order is one for dismissal or a compensation order filed after trial.

II. A. THE 2015 INDIAN GAMING COMPACT LANGUAGE IS CLEAR THAT NO DEFENSE OF SOVEREIGN IMMUNITY IS AVAILABLE TO ISLETA CASINO AND RESORT IN WC CASES.

Employer/Insurer appear to argue that based on *R & R Deli, Inc.*, Isleta Resort and Casino may unilaterally proscribe the terms and conditions on which it may be sued, despite the clear language found in the 2015 Compact. **[AB 12]** When the Indian Gaming Compact included language in 2007 in subsection 4 (B) (6) stating that *no defense of sovereign immunity would be available*, tribes were no longer entitled to unilaterally proscribe the terms and conditions on which they may be sued. The 2015 Compact includes the same subsection 4 (B) (6) language found in the 2007 Compact. The 2015 Compact also eliminated the tribes' ability to unilaterally control

the forum in which workers' compensation claims may be filed. Any impartial forum, such as but not limited to a tribal court, is now the appropriate forum for this and other workers' compensation claims to be heard. NMSA 1978, section 11-13-1, (1997, as amended through 2015) Indian Gaming Compact of 2015.

Worker already addressed Employer/Insurer's anticipated reliance on *Antonio, Peña and Martinez* but it bears repeating that those cases are easily distinguishable from this case because either the work injury dates preceded the Compact language changes eliminating the defense of sovereign immunity or an implied waiver argument was asserted. *Antonio* involved a work injury date of 2006, one year **before** the 2007 version of the Compact was enacted which contained language stating that no defense of sovereign immunity would be available to tribes. *Antonio v. Inn of the Mountain Gods Resort and Casino*, 2010-NMCA-077, 148 N.M. 858, 242 P.3d 425, *cert. denied*, 2010-NMCERT-007, 148 N.M. 610, 241 P.3d 611. *Peña* involved the unsuccessful argument that participation in proceedings in the WC Administration created an "implicit" waiver of sovereign immunity by the tribe. *Peña v. Inn of the Mountain Gods Resort and Casino*, No. 29,799, (N.M. Ct. App. Jan. 31, 2011) (non-precedential). *Martinez* involved a work injury date of 2005 making the 2001Compact applicable which did not contain the language indicating that no defense of sovereign immunity would be available. *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.

Expansion of the clear language in the Compacts from the 2001 version that is silent on whether the defense of sovereign immunity is available to the current 2015 version which clearly states that no defense would be available, makes it clear that no defense of sovereign immunity defense is available now. Expansion of the language from 2001 which is silent on the proper forum to the current 2015 version which suggests that this claim may be brought in any impartial forum, such as but not limited to the tribe's tribal court, also indicates that the WC Administration is a proper forum.

If the language "no defense of sovereign immunity would be available" does not mean exactly what it says, what does it mean? Employer/Insurer contend that this language does not amount to an express waiver but fail to explain how the defense of sovereign immunity may be raised in light of the clear language in the 2015 Compact. The 2015 Compact is unambiguous and clear on its face that the defense of sovereign immunity is no longer available. "Statutes must be construed so that no part of the statute is rendered surplusage or superfluous." *W. Investors Life Ins. Co. v. N.M. Life Ins. Guarantee Assn. (In re Rehab of W. Investors Life Ins. Co.)*, 1983-NMSC-082, ¶ 3, 100 N.M. 370, 671 P.2d 31. No interpretation is necessary of the

clear language eliminating the defense of tribal sovereign immunity in this case.

Employer/Insurer also misinterpret the choice of forum language in the 2015 Compact by arguing that a tribe is to select the proper forum, not employees. **[AB 18]** The 2015 Compact affords *employees* workers' compensation benefits, due process of law and "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." Employees choose the forum, not the tribes. In this case, because the Isleta Tribal Court system lacked any tribal laws covering workers' compensation claims, the WC Administration was chosen as the impartial forum where due process of law would be afforded to Worker.

Employer/Insurer's reliance on the Louisiana case, *Bonnette v. Tunica -Biloxi Indians*, is misplaced because it involved tort claims and compact language that explicitly reserved the tribe's sovereign immunity defenses. **[AB 19]** In *Bonnette*, the Louisiana Court of Appeals found that the Tunica-Biloxi Tribe did not waive its sovereign immunity for tort claims based on the following language in the Tribal-State Compact which governed class III gaming:

> *The Tunica-Biloxi Tribe of Louisiana shall not be deemed to have waived its sovereign immunity from suit with respect to such claims by virtue of any provision of this Tribal-State Compact*, but may adopt a remedial system analogous to that available for similar claims arising against the State of Louisiana.

Bonnette v. Tunica-Biloxi Indians d/b/a Paragon Casino Resort, 873 So.2d 1, at p. 6 (La. Ct. App. 2003). The 2015 Compact applicable in the case at bar does not contain any language preserving the defense of sovereign immunity as the compact in *Bonnette* did so clearly.

B. THE 2015 INDIAN GAMING COMPACT CONTAINS AN EXPLICIT WAIVER OF SOVEREIGN IMMUNITY AND AFFORDS WORKER DUE PROCESS OF LAW GIVING HER STANDING TO BRING THIS CLAIM.

Employer/Insurer misconstrue Worker's briefing on the issue of Isleta's lack of tribal laws dealing with workers' compensation claims. **[AB 20-21]** Worker does not raise these facts in support of an argument that sovereign immunity was waived because Isleta Pueblo failed to provide workers' compensation insurance with terms as favorable as state programs as suggested by Employer/Insurer. **[AB 20]** Worker raises these facts in response to Employer/Insurer's argument that: 1) Worker was required to exhaust her tribal remedies in Isleta Tribal Court; and 2) Isleta had tribal laws dealing with workers' compensation that Worker should have enforced. **[RP0063, RP0062]** Worker's point, which is critical to this Court's review of the record established to date, is that there were no tribal laws or tribal remedies available through Isleta Pueblo for Worker to exhaust and the "Ordinance" claimed by Employer/Insurer is neither a tribal law, nor an ordinance, that could be enforced.

To prove this negative, that Isleta Pueblo lacked any workers' compensation laws or ordinances, Worker refers this Court to review the first and last pages of the twenty-two page "Ordinance" that Employer/Insurer claimed was Isleta Pueblo's law on workers' compensation claims. **[RP0171, RP0192]** The "Ordinance" is not an ordinance or law but simply a now-defunct workers' compensation insurance company's, First Nations Compensation Plan's, guide for claims. First Nations Compensation Plan went bankrupt in 2009. **[RP0193]** Worker did not "fail to avail herself" of any Isleta Pueblo law or ordinance because no such laws or ordinances existed. The lack of any Isleta Pueblo workers' compensation laws or ordinances which were required to be adopted pursuant to the 2015 Compact is another basis for Worker's claims to go forward in the WC Administration.

Employer/Insurer's reliance on *R & R Deli, Inc.* and *Coll* also do not advance their argument that Worker lacks standing to pursue any rights that may arise under the 2015 Gaming Compact. **[AB 22]** The plaintiff in *R & R Deli, Inc.* entered into a lease with Tamaya Enterprises, Inc. which was owned by the Pueblo of Santa Ana. *R & R Deli, Inc. v. Santa Ana Star Casino*, 2006-NMCA-020, ¶ 2, 139 N.M. 85, 128 P.3d 513. The Pueblo passed a tribal resolution pursuant to the terms of the lease that contained a limited waiver of sovereign immunity and consent to be sued in the Pueblo of Santa Ana Tribal Court. The waiver was limited to actions seeking

injunctive relief, declaratory judgment or specific performance. After a year when the Pueblo declined to renew the lease and to renew plaintiff's liquor license, plaintiff filed suit. The suit alleged various causes of action, none of which were limited to the three types of actions spelled out in the limited waiver of sovereign immunity resolution. This Court held that the Pueblo of Santa Ana did not waive its sovereign immunity to plaintiff's suit for damages (rather than injunctive or declaratory relief) and that Plaintiff was not a "visitor" under the 2001 Gaming Compact such that a waiver of sovereign immunity encompassed the claims brought by plaintiff. *R & R Deli, Inc.*, ¶ 19.

In contrast to *R & R Deli, Inc.*, Worker contends that an explicit waiver of sovereign immunity is found in Subsection 4 (B) (6) of the 2015 Compact for her workers' compensation claims. Alternatively, Worker contends that non-tribal entities, Hudson Insurance and Tribal First, are not entitled to claim sovereign immunity as a defense at all.

Employer/Insurer next rely on the *Coll* case to suggest that Worker lacks standing to pursue this claim and that the 2015 Compact has no allowance for private party enforcement. **[AB 22-23]** *Coll v.* Johnson, 1999-NMSC-036, 128 N.M. 154, 990 P.2d 1277. *Coll* involved four plaintiffs who were members of the New Mexico House of Representatives and five private citizen plaintiffs. The plaintiffs filed an

action attacking the legality of legislation authorizing Indian gaming. Plaintiffs did not name any Tribes or Pueblos as defendants. Plaintiffs never disputed that the Tribes and Pueblos were entitled to sovereign immunity and may not be sued without consent. *Coll*, ¶ 1. Justice Franchini held that the Tribes and Pueblos that had gaming contracts were indispensable parties and plaintiffs lacked standing to challenge the legality of Indian gaming as beneficially interested parties and would not be granted standing under the doctrine of great public importance. The plaintiffs could not serve as private attorneys general to challenge the legality of the gaming statute at issue. *Coll*, ¶ 9.

In the case at bar, Worker's claims involve a particularized nexus between her right to seek workers' compensation benefits and the duties owed to her by Employer/Insurer pursuant to the 2015 Compact. Isleta Resort and Casino owes duties to its employees when an on-the-job injury is suffered as provided in the 2015 Compact. Worker has standing to enforce rights provided for in the 2015 Compact in an impartial forum and without having to face the defense of sovereign immunity.

III. SECTION 52-1-4 (C) PERMITS A DIRECT ACTION AT ISLETA RESORT AND CASINO, HUDSON INSURANCE AND TRIBAL FIRST.

Employer/Insurer next argue that if Isleta Resort and Casino is entitled to avail itself of sovereign immunity as a defense, then such immunity extends to its insurer.

[AB 23] Curiously absent from this contention is any argument or suggestion that either Hudson Insurance, or Tribal First, are "tribal enterprises" or under the "tribal control" of Isleta Pueblo. They are not tribal enterprises of Isleta Pueblo as the corporate documents prove. **[RP 0151-0153]**

The *Gallegos* case is fully discussed in Worker's brief in chief, but again it bears repeating that it was decided based on a Rule 1-019 motion, failure to join an indispensable party. Employer/Insurer herein filed a Rule 1-012 (B) (1) motion to dismiss for lack of subject matter jurisdiction making *Gallegos* distinguishable. *Gallegos v. Pueblo of Tesuque*, 2002-NMSC-012, 132 N.M. 207, 46 P.3d 668. The New Mexico Supreme Court was mindful that *Gallegos* was a case presented on a motion to dismiss for failure to join an indispensable party and as such, confined its discussion to the issue of whether a tribe was an indispensable party in a suit directed at its insurer when no compact was in place. In this case, Worker named Isleta Resort and Casino and there is no issue that she failed to join an indispensable party. Worker's alternative argument is that non-tribal entities, Hudson Insurance and Tribal First, should remain liable for workers' compensation benefits awarded pursuant to section 52-1- 4 (C).

Employer/Insurer challenge Worker's interpretation of Section 52-1-4 (C) of the Workers' Compensation Act which states that every workers' compensation

policy providing workers' compensation benefits or certificate filed *shall* provide that the insurance carrier *or* the employer *shall* be directly and primarily liable to the injured worker. The disjunctive use of the word "or" between carrier and employer evinces a clear right for this Worker to pursue her claims against Hudson Insurance and Tribal First, with or without Isleta Casino and Resort as a named party.

The certificate of liability referenced in section 52-1-4 (C) was filed with the WC Administration and the WC Administration is identified in the Certificate of Liability as the Certificate Holder. **[RP0083]** The Certificate of Liability was also referenced by Isleta Casino and Resort's former counsel who happens to be current counsel for FISIF. **[RP0034]** Section 52-1-4 (C) is no fallacy and it clearly places potential liability for this claim on either Isleta Resort and Casino, Hudson Insurance and/or Tribal First.

Contrary to Employer/Insurer's contentions, the purpose of the filing of the certificate of liability is not only to ensure coverage and solvency of employers but also to notify workers: a) that the employer has complied with insurance requirements of the WC Act; b) that the employer is subject to the Act; and c) that workers are conclusively presumed to have accepted its provisions. *Shope v. Don Coe Construction Co.*, 1979-NMCA-013, ¶ 1, 92 N.M. 508, 590 P.2d 656. The filing requirements of section 52-1-4 (C) confer third party beneficiary status to workers by

virtue of the fact that the required coverage is for the benefit of injured workers, not employers.

Interestingly, Employer/Insurer devote one paragraph in their Response to the *Waltrip* case that Worker urges this Court to follow. **[AB 27]** *Waltrip v. Osage Million Dollar Elm Casino*, 290 P.3d 741 (OK 2012). While Worker fully recognizes that *Waltrip* is not controlling, the facts and parties are nearly identical to the case at bar. Section 52-1-4 (C) of the Workers' Compensation Act may not be identical to the "Estoppel Act" referred to in *Waltrip*, but the intent of this section and Oklahoma's Estoppel Act is similar: "the rationale of the 'estoppel act' is that an insurer who accepts premiums should not evade liability for benefits due under compensation law. *Waltrip*, ¶ 7. The rationale of section 52-1-4 (C) is to ensure compliance with the coverage requirements of the WC Act. In this case, Hudson Insurance/Tribal First have accepted premiums from Isleta Resort and Casino and should not evade liability for benefits due Worker by claiming that sovereign immunity somehow extends to them as non-tribal entities.

What was the point of paying premiums to Hudson Insurance/Tribal First if every workers' compensation claim was going to be denied by this Insurer/third party administrator based on Isleta Resort and Casino's claim of sovereign immunity? As the Oklahoma Supreme Court stated in *Waltrip*, Hudson Insurance willfully accepts

premiums under the guise of a nonexistent tribal ordinance believing it will step into the shoes of the Tribe and receive the benefit of the Tribe's sovereign immunity. Thus, Hudson Insurance/Tribal First obtain unjust enrichment from the adhesion contract with the Tribe. *Waltrip*, ¶12. As in *Waltrip*, if Hudson Insurance/Tribal First's analysis of evading liability is permitted, their obligation to provide workers' compensation benefits would render the policy of insurance illusory and inane. *Waltrip*, ¶ 15. As in *Waltrip*, the question this Court is asked to answer is whether Hudson Insurance/Tribal First's promise to pay workers' compensation benefits is effectual in the absence of any Isleta tribal ordinance and any tribally sanctioned process for resolving disputes concerning workers' compensation benefits in tribal court. In practice, Hudson Insurance/Tribal First are the final arbiters of Worker's claims and no detached neutral adjudicator is available to Worker. To allow this process to continue would be "trampling on the fundamental rights of employees to due process" and this Court is asked to put a halt to such illusory and inane practices.

If Worker's reading of section 52-1-4 (C) is correct, then by way of analogy *Raskob* is helpful to determine whether joinder of Hudson Insurance/Tribal First is appropriate. Because all of the *Raskob* factors are met, joinder of the workers' compensation insurance carrier/third party administrator in the context of a workers' compensation case is a public policy that finds support in section 52-1-4 (C).

IV. IF THE WCJ ERRED IN DISMISSING WORKER'S CASE, THEN THE ISSUE OF WHO THE PROPER PARTIES IS NO LONGER MOOT.

In the event that this Court reverses the dismissal of the claims, then for purposes of judicial economy, request is respectfully made to also instruct the WCJ on which parties may be named going forward. Worker contends the proper parties are: Isleta Resort and Casino as Employer, Hudson Insurance as the workers' compensation insurance carrier and Tribal First as the third party administrator who adjusted the claim.

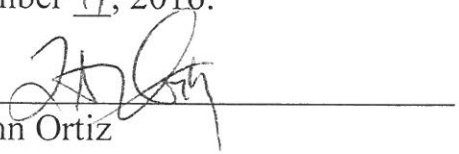
CONCLUSION

For the reasons stated herein, Worker/Appellant respectfully requests that this Court reverse the WCJ'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 WC Complaint adding Hudson Insurance with Employer and Tribal First and order dismissal of FISIF and the UEF.

Respectfully submitted,

LeeAnn Ortiz
Attorney for Worker/Appellee
1216 Lomas Blvd. NW
Albuquerque, NM 87102
(505) 243-7671

I hereby certify that a true and correct copy of the foregoing Reply Brief was mailed to opposing counsel of record on November 17, 2016.



LeeAnn Ortiz