

NO. A10-380

State of Minnesota
In Supreme Court

Rodney W. Swenson,

Respondent-Employee,

vs.

Northland Quality Builder,

Relator-Employer,

and

SFM Mutual Insurance Company,

Relator-Insurer,

and

1. MN Department of Employment and Economic Development,
2. MN Department of Labor & Industry Vocational Rehabilitation,
3. Medica, and
4. MeritCare Medical Group,

Intervenors.

**BRIEF OF NORTHLAND QUALITY BUILDER
AND SFM MUTUAL INSURANCE COMPANY - RELATORS**

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This is a case of first impression in the State of Minnesota.

LEGAL ISSUES

I. IS A WORKERS' COMPENSATION CLAIM A CIVIL CAUSE OF ACTION?

The Workers' Compensation Court of Appeals held in the affirmative.

II. ARE A COMPENSATION JUDGE'S FINDINGS OF FACT SUBJECT TO A HENGEMUHLE STANDARD OF REVIEW?

The Workers' Compensation Court of Appeals held in the negative.

III. DID THE COMPENSATION JUDGE CORRECTLY INTERPRET FEDERAL STATUTES AND CASES?

The Workers' Compensation Court of Appeals held in the negative.

STANDARD OF REVIEW

This matter comes before the Minnesota Supreme Court pursuant to Minn. Stat. § 176.471:

176.471 REVIEW BY SUPREME COURT ON CERTIORARI.

Subdivision 1. Time for seeking review; grounds.

Where the Workers' Compensation Court of Appeals has made an award or disallowance of compensation or other order, a party in interest who acts within 30 days from the date the party was served with notice of the order may have the order reviewed by the Supreme Court on certiorari upon one of the following grounds:

- (1) the order does not conform with this chapter;
- (2) the Workers' Compensation Court of Appeals committed any other error of law; or
- (3) the findings of fact and order were unsupported by substantial evidence in view of the entire record as submitted.

On January 26, 2010, The Minnesota Workers' Compensation Court of Appeals served and filed its Opinion on this case, pursuant to Minn. Stat. § 176.421:

176.421 APPEALS TO WORKERS' COMPENSATION COURT OF APPEALS.

Subdivision 1. Time for taking; grounds.

When a petition has been heard before a compensation judge, within 30 days after a party in interest has been served with notice of an award or disallowance of compensation, or other order affecting the merits of the case, the party may appeal to the Workers' Compensation Court of Appeals on any of the following grounds:

- (1) the order does not conform with this chapter; or
- (2) the compensation judge committed an error of law; or
- (3) the findings of fact and order were clearly erroneous and unsupported by substantial evidence in view of the entire record as submitted; or
- (4) the findings of fact and order were procured by fraud, or coercion, or other improper conduct of a party in interest.

In Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 59, 37, W.C.D. 235, 239 (Minn. 1984), this Court analyzed the 1983 legislative changes to § 176.421 and determined the limited scope of review on appeal: "Under the 1983 amendments, the court of appeals no longer may

disregard the compensation judge's findings and substitute its own but it instead performs an appellate review function." Hengemuhle, at 59. This Court construed the 1983 amendments as follows:

The court of appeals can no longer disregard the compensation judge's findings and order. The court of appeals, instead, determines if the findings and order are supported by substantial evidence in view of the entire record as submitted. If the findings and order are so supported, the court of appeals affirms. If not, then, in that event only, the court of appeals may substitute its own findings, or it may remand to the compensation judge for a rehearing.

Hengemuhle, *Id.*

This Court further stated:

The standard of review-whether the findings and order are supported by substantial evidence means the findings are to be affirmed if, in the context of the record as a whole, they are supported by evidence that a reasonable mind might accept as adequate. [citations omitted]... The Workers' Compensation Court of Appeals must also give due weight to the opportunity of the compensation judge to evaluate the credibility of witnesses appearing before the judge. Further, in applying the substantial evidence standard, where the evidence is conflicting or more than one inference may reasonably be drawn from the evidence, the findings of the compensation judge are to be upheld. In other words, the court of appeals is not to substitute its view of the evidence for that adopted by the compensation judge if the compensation judge's findings are supported by evidence that a reasonable mind might accept as adequate.

Hengemuhle, at 59-60. The findings of fact of the compensation judge, "will not be disturbed unless they are clearly erroneous in the sense that they are manifestly contrary to the evidence." *Id.*

A decision which rests upon the application of a statute or rule to essentially undisputed facts generally involves a question of law which the Workers' Compensation Court of Appeals may consider *de novo*. Krovchuk v. Koch Oil Refinery, 48 W.C.D. 607 (W.C.C.A. 1992), *summarily affirmed* (Minn. June 3, 1993).

Although there are some questions of law at issue, the compensation judge made factual findings that are determinative of this case. The Workers' Compensation Court of Appeals erroneously applied only a *de novo* review of the Findings and Order.

STATEMENT OF FACTS

On May 30, 2007, Rodney W. Swenson, (hereinafter “employee”) was employed by Michael Nickaboine d/b/a Northland Quality Builder (hereinafter “employer”).¹ Employer and SFM Mutual Insurance Company (hereinafter “insurer”) dispute that a work injury even occurred. At the hearing of this matter on March 4, 2009, the parties stipulated that employee’s claimed work injury occurred on Tribal land of the Mille Lacs Band of the Ojibwe (hereinafter “MLBO”).² The employer is licensed by MLBO to operate a construction business on Tribal land.³

Michael Nickaboine is the son of a full-blooded Ojibwe father and is an enrolled member of MLBO.⁴ From June 9, 2004 through March 4, 2009, employer worked as a sole proprietor, only on MLBO reservation land as originally defined by treaty in 1854 and on land held in trust by the Federal Government for the benefit of MLBO since 1969. He was licensed by MLBO to run a construction business on Tribal land.⁵

At all times relevant herein, and specifically in 2006 and 2007, employer ran a Tribal business under Tribal license on Tribal land.⁶ As such, employer was subject to Tribal Statutes.⁷

At some point before August 2005, MLBO decided to expand Grand Casino Hinckley. In August, 2005, MLBO entered into a construction contract with M.A. Mortenson Company as a general contractor.⁸ This contract provided, at §13.1.1:

The Contractor hereby irrevocably submits itself to the jurisdiction of the Court of Central Jurisdiction for the Mille Lacs Band of Ojibwe with regard to any controversy in any way arising out of or relating to the execution or performance of this agreement. The Contractor further agrees that the contract shall be governed,

¹ Pursuant to Finding 2.C. the parties stipulated, “[t]he date of claimed work injury remains in dispute: For the limited purpose of deciding the subject matter jurisdiction issue, the date of injury can be considered to be May 30, 2007.

² Finding 2.A.

³ Finding 2.B.

⁴ Finding 5.

⁵ Finding 9.

⁶ Finding 11.

⁷ Finding 12.

⁸ Finding 13; exhibit 9.

construed, and enforced solely and exclusive as follows: first, by the written Tribal Statutory and Judicial laws of the Mille Lacs Band of the Ojibwe Indians (MLBO), excluding any unwritten Tribal cultural traditional laws, or unwritten customs or traditions of the MLBO (the "Tribal Laws"); second, in the absence of applicable Tribal laws, the United States federal laws, and third, in the absence of any applicable Tribal laws or federal law, the laws of the state of Minnesota.

Mortenson agreed to abide by the TERO compliance plan for the Grand Casino Hinckley expansion project and agree to maximize the participation of MLBO Native American Contractors and the employment of MLBO Native Americans and other Native Americans on the Grand Casino Hinckley expansion project as more fully detailed in the 2005 contract.⁹ Section 4 of the contract included provisions setting out that any mediation or arbitration proceedings would be conducted in the territorial jurisdiction of MLBO.¹⁰

In August, 2006, Mortenson entered into a subcontract agreement with employer¹¹ in part to comply with the TERO compliance plan for the Grand Casino Hinckley expansion project. This subcontract agreement included terms and conditions that were part of the main construction contract between MLBO and Mortenson. Section 16.2 of the subcontract agreement between employer and Mortenson required that employer had to purchase workers' compensation insurance.¹² Employer hired employee on October 23, 2006.¹³ Employee was hired on Tribal land by a Tribal employer to work only on Tribal land on a Tribal project.¹⁴

The compensation judge found that jurisdiction vested in the MLBO Court of Central Jurisdiction, and that employee's petition from benefits should have been filed there.

On appeal to the Workers' Compensation Court of Appeals, employee conceded that his employment contract with employer was not a "Minnesota contract for hire," but instead occurred at

⁹ Exhibit 9, attachment exhibit B.

¹⁰ Finding 13.

¹¹ Exhibit 4.

¹² Finding 14.

¹³ Finding 22.

the MLBO Grand Casino Hinckley, on land held in trust for the MLBO. Employee further conceded that all of the services he performed for employer took place exclusively on Tribal land held in trust for MLBO.¹⁵

The employee's claimed injury occurred on Tribal land, outside of the State of Minnesota.¹⁶ As such, the MLBO Court of Central Jurisdiction has subject matter jurisdiction to hear and decide employee's claim for workers' compensation benefits.¹⁷ Such jurisdiction is consistent with the contracts at issue. These contracts required Mortenson, and all subcontractors--including employer and all of his employees--to irrevocably submit themselves to the jurisdiction of the Court of Central Jurisdiction for the Mille Lacs Band of Ojibwe with regard to any controversy in any way arising out of or relating to the execution or performance of this agreement. These contracts created a hierarchy that governed, construed, and enforced solely and exclusively as follows: first, by the written Tribal Statutory and Judicial laws of the Mille Lacs Band of the Ojibwe Indians (MLBO), excluding any unwritten Tribal cultural traditional laws, or unwritten customs or traditions of the MLBO (the "Tribal Laws"); second, in the absence of applicable Tribal laws, the United States federal laws.

Since there are, in fact, written Tribal Statutory and Judicial laws of the MLBO that explicitly cover the factual scenario of this case, the United States federal laws never even come into direct application.

On July 1, 1967, Minn. Stat. §175.006 became law and, under subd. 1, created the division of workers' compensation, generally administering the workers' compensation law. Under subd. 4, the powers and duties of the former industrial commission were, "transferred to, vested in, and imposed

¹⁴ Finding 23.

¹⁵ Appellant's Brief to Workers' Compensation Court of Appeals, page 5.

¹⁶ Finding 39.

¹⁷ Finding 39.

upon the commissioner of the department of labor and industry, the head of the Workers' Compensation Division.”

In 1973, Minn. Stat. §175.101 became effective:

Subd. 1. Purpose; duties. It is the legislative purpose in creating a division of workers' compensation, and in assigning to the commissioner of the department of labor and industry specific duties and responsibilities, to: (a) provide for a unified department of labor and industry for the limited purposes of organization and administration of common administrative functions; and

(b) assure the autonomy and maximum independence of the necessary adjudicative functions and quasi-legislative administrative duties of the division.

The commissioner as head of the workers' compensation division is the administrator of the workers' compensation division. The commissioner shall possess only the powers and shall perform only the duties prescribed by law.

Therefore, the commissioner and the Minnesota Office of Administrative Hearings are not part of the judicial branch of the Minnesota government. They perform “adjudicative functions” and “quasi-legislative” administrative duties. They preside over administrative—not civil—actions.

In 1981, the Minnesota legislature created the Workers' Compensation Court of Appeals in its present form:

175.A.01. Creation

Subdivision 1. Establishment; membership. The workers' compensation court of appeals as previously constituted is reconstituted as an independent agency in the executive branch.

The court shall consist of five judges, each serving in the unclassified service.

As part of the executive branch of the Minnesota government, the Workers' Compensation Court of Appeals reviews administrative—not civil—actions. Neither the Office of Administrative Hearings nor the Workers' Compensation Court of Appeals is a constitutionally created judicial court. The Workers' Compensation Court of Appeals is charged with interpreting the Minnesota Workers' Compensation Law, and has no authority to decide civil causes of action.

On appeal, the Workers' Compensation Court of Appeals reversed the compensation judge's findings and order on the belief that, "a workers' compensation claim brought by an injured worker is a civil cause of action of the type contemplated by 28 U.S.C. § 1360, and that, as a result, Minnesota jurisdiction may be asserted over a petitioner's claim arising out of a workers' compensation injury even though the injury occurred on tribal lands."

The Workers' Compensation Court of Appeals disregarded the clear mandate of Hengemuhle and ignored the compensation judge's factual findings regarding the hierarchy of the contracts at issue, the actual relationship between the parties, and the plain language of the written Tribal Statutory and Judicial laws of the MLBO.

This appeal follows.

LEGAL BACKGROUND

Tribal Law of Mille Lacs Band of the Ojibwe

The plain language of the written MLBO Statutory and Judicial laws confers subject matter jurisdiction to the MLBO Court of Central Jurisdiction regarding employee and employer.

In 1934, the United States Congress passed the Indian Reorganization Act.¹⁸ This legislation, also known as the Wheeler-Howard Act—48 Stat. 984—25 U.S.C. §461 *et seq*, has as part of its preamble, "*to grant certain rights of home rule to Indians.*" Part of section 5 provides:

Title to any lands or rights acquired pursuant to this Act shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

Section 5, therefore, exempts an Indian tribe from State and local taxation. Therefore, any State of Minnesota taxation authority would not have jurisdiction over an Indian tribe, such as the Mille Lacs Band of the Ojibwe. Part of section 16 provides:

¹⁸ Exhibit 10.

Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and bylaws when ratified as aforesaid and approved by the Secretary of the Interior shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws.

In conformity with the Indian Reorganization Act of 1934, the Mille Lacs Band of the Ojibwe (“MLBO”) adopted its own Constitution, adopted a Revised Constitution and Bylaws¹⁹ enacted Mille Lacs Band Statutes—Title 2²⁰ and Mille Lacs Band Statutes—Title 18.²¹

Specifically, with regard to the Mille Lacs Band of the Ojibwe, the United States has previously ceded to the Band 216.9 acres in Pine County, Minnesota. This land is located adjacent to what is now Grand Casino Hinckley, which includes a hotel that was part of the Grand Casino Hinckley expansion project on which employee claims he was injured. The casino and hotel are not on this 216.9 acre parcel.

The Indian Reorganization Act of 1934 recognizes and affirms the sovereign nation status of the MLBO. Furthermore, this Act allows the MLBO to obtain tribal land to be held in trust by the United States for the Mille Lacs Band of the Ojibwe.

When a parcel of land is acquired in this manner, it is known as “Trust Land.” Pursuant to 25 CFR §151.2(d), such “trust land” is within the sovereignty and jurisdiction of the Indian tribe.

Mille Lacs Band statutes annotated, Title 5, Chapter 2 sets forth the judicial authority and jurisdiction of the Court of Central Jurisdiction.

Chapter 2, Section 101, “judicial authority” provides as follows:

¹⁹ Exhibit 1.

²⁰ Exhibit 2.

²¹ Exhibit 3.

Except as otherwise provided for by law, the Court of Central Jurisdiction shall have all judicial authority extending to cases in law and equity. The Court of Central Jurisdiction shall have all powers necessary for carrying into execution its judgments and determinations in order to promote the general welfare, preserve and maintain justice, and to protect the rights of all persons under the jurisdiction of the Non-Removable Mille Lacs Band of Chippewa Indians.

Chapter 2, Section 104, "Powers of Construction and Interpretation" reads as follows: The Court of Central Jurisdiction shall have the power to construe and interpret statutes, legal instruments, records, decisions, or legal process applicable or pertaining to or emanating from the Non-Removal Mille Lacs Band of Chippewa Indians, when brought before the Court.

Chapter 2, Section 108, "Special Magistrate" reads as follows:

The Court of Central Jurisdiction shall have the power to appoint a law-trained individual to serve as a special magistrate as needed to hear cases at such times as the interests of justice require independent or supplementary judicial review. A special magistrate shall have all authority conferred upon any other justice or judge of the Court of Central Jurisdiction.

Therefore, the MLBO Court of Central Jurisdiction has the power to appoint a special magistrate to preside over and administer a workers' compensation claim, such as the one in this case.

Chapter 2, Section 111, "Subject Matter Jurisdiction" reads as follows:

- (a) the Court of Central Jurisdiction shall have civil jurisdiction over non-Indians, in all cases as provided in Section 113 of this Chapter. The court shall have jurisdiction pursuant to the laws of the United States of America.
- (b) the Court of Central Jurisdiction is hereby granted exclusive original jurisdiction over all criminal or civil causes of action, involving any person, where such grievance or dispute arises concerning any property, personal or otherwise, located on lands or contiguous waters subject to the jurisdiction of the Non-Removal Mille Lacs Band of Chippewa Indians.

Finally, Chapter 2, Section 113, "Personal Jurisdiction," reads as follows:

The Court of Central Jurisdiction shall have civil jurisdiction over any person, corporation, business organization or other private entity that:

- (a) Transacts business with any member of the Band within the territorial jurisdiction of the Band;

- (b) Engages in any activity which results in injury or property damage within the territorial jurisdiction of the Mille Lacs Band;
- (d) Contracts to ensure any person, property, corporation, business organization or risk located within the territorial jurisdiction of the Band;
- (e) Enters into a written or verbal sales or service agreement within the territorial jurisdiction of the Mille Lacs Band or where performance of the agreement is to be within the territorial jurisdiction of the Mille Lacs Band.

Therefore, the MLBO Court of Central Jurisdiction has personal jurisdiction and subject matter jurisdiction over **any person** (including employee) who:

- (a) Transacts business (enters an employee-employer relationship) with any member of the Band (including Michael Nickaboine) within the territorial jurisdiction of the Band (including the Grand Casino Hinckley expansion project);
- (b) Engages in any activity (enters an employee-employer relationship) which results in injury (employee's exact claim—that he sustained a personal injury) within the territorial jurisdiction of the Band (including the Grand Casino Hinckley expansion project);
- (e) Enters into a written or verbal service agreement (enters an employee-employer relationship) within the territorial jurisdiction of the Band (including the Grand Casino Hinckley expansion project) or where performance of the agreement (the employee-employer relationship) is to be within the territorial jurisdiction of the Band (including the Grand Casino Hinckley expansion project).

Based on the plain language of MLBO law, there is no question that the MLBO Court of Central Jurisdiction has subject matter jurisdiction over this matter.

Indeed, the Workers' Compensation Court of Appeals concluded that, “the MLBO tribal court would also be able to assert jurisdiction over a workers’ compensation claim filed there by a petitioner injured during employment on tribal land...” The Workers' Compensation Court of Appeals, however, erroneously found this jurisdiction to be concurrent, not exclusive.

Minnesota Law.

Article III, § 1 of the Constitution of the State of Minnesota²² defines the distribution of the powers of government:

Division of powers

Section 1. The powers of government shall be divided into three distinct departments: legislative, executive and judicial. No person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others except in instances expressly provided in this constitution.

Article VI, § 3 defines the jurisdiction of the district court as follows:

The district court has original jurisdiction in all civil and criminal cases and shall have appellate jurisdiction as prescribed by law.

The Minnesota Workers' Compensation Act, Minn. Stat. Ch. 176, is a comprehensive scheme to address work-related injuries in the State of Minnesota. Minn. Stat. § 176.021, subd. 1 reads, in part, “[e]xcept as excluded by this chapter, all employers and employees are subject to the provisions of this chapter.” Subd. 1 of 176.021 then indicates, “[e]very employer is liable for compensation according to the provisions of this chapter... The burden of proof of these facts is upon the employee.” Therefore, it is the employee’s burden of proof to show that the employee is entitled to benefits under the Minnesota Workers' Compensation Act.

On page 4 of its Opinion, the Workers' Compensation Court of Appeals ignored the employee’s burden of proof when it noted, “[t]he insurer cites to no authority for its position.” The Workers' Compensation Court of Appeals apparently overlooked the authority of the MLBO Court of Central Jurisdiction, noted above. The Workers' Compensation Court of Appeals also ignored that the employee cited no authority for his position.

Minn. Stat. § 176.041 provides for exclusions from Minnesota Statute Chapter 176. Subd. 5a of Minn. Stat. § 176.041 reads, “**Out-of-state injuries.** [e]xcept as specifically provided by

²² Adopted October 13, 1857; Amended and Restructured November 5, 1974.

subdivisions 2 and 3, injuries occurring outside of this state are not subject to this chapter.”

(Emphasis added.)

Subd. 2 of Sec. 176.041 reads:

Extraterritorial application. If an employee who regularly performs the primary duties of employment within this state receives an injury while outside of this state in the employ of the same employer, the provisions of this chapter shall apply to such injury. If a resident of this state is transferred outside the territorial limits of the United States as an employee of a Minnesota employer, the resident shall be presumed to be temporarily employed outside of this state while so employed.

Subd. 3 of Sec. 176.041 reads:

Temporary out-of-state employment. If an employee hired in this state by a Minnesota employer, receives an injury while temporarily employed outside of this state, such injury shall be subject to the provisions of this chapter.

Therefore, Minnesota jurisdiction exists only where 1) the employee is hired in Minnesota; 2) by a Minnesota employer; and 3) is injured while temporarily outside of the state. It is well-settled that the employee must prove all three of these requirements for Minnesota jurisdiction to attach. Wood v. Fred Madsen, 49 W.C.D. 569 (1990); Bilotta v. Peerless Pump, slip op. (W.C.C.A. December 10, 1991).

ARGUMENT

I. A MINNESOTA WORKERS' COMPENSATION ADMINISTRATIVE HEARING IS NOT A CIVIL CAUSE OF ACTION.

The Workers' Compensation Court of Appeals made a clear error of law when it concluded:

We believe that a workers' compensation claim brought by an injured worker is a civil cause of action of the type contemplated by 28 U.S.C. § 1360, and that, as a result, Minnesota jurisdiction may be asserted over a petitioner's claim arising out of a workers' compensation injury even though the injury occurred on tribal lands.

This conclusion has no merit and should be vacated. Employee never raised this argument at hearing, nor did he preserve it on appeal. It should be vacated on this basis alone.

More importantly, this conclusion violates Article III, § 1 of the Constitution of the State of Minnesota. It contradicts the division of governmental powers (sometimes called separation of powers) clearly mandated in the Constitution of the State of Minnesota. A workers' compensation claim is obviously not a civil cause of action. No previously reported case has ever made such a strained jump of logic, and this Court should correct the Workers' Compensation Court of Appeals' flawed analysis and conclusion.

A civil cause of action is governed by the judicial branch of the Minnesota government, arising from Article VI, § 3 of the Constitution of the State of Minnesota. A workers' compensation hearing at the Office of Administrative Hearings is a quasi-legislative adjudicative proceeding. The Workers' Compensation Court of Appeals is part of the executive branch of the government.

A civil cause of action allows for a jury trial; a workers' compensation hearing--an administrative hearing--does not. A civil law jury determines issues of negligence; a compensation judge does not. A civil cause of action is governed by the Rules of Evidence;²³ a workers' compensation hearing is not:

176.411 RULES OF EVIDENCE, PLEADING, AND PROCEDURE.

Subdivision 1. Conduct of hearings and investigations.

Except as otherwise provided by this chapter, when a compensation judge makes an investigation or conducts a hearing, the compensation judge is bound neither by the common law or statutory rules of evidence nor by technical or formal rules of pleading or procedure. Hearsay evidence which is reliable is admissible. The investigation or hearing shall be conducted in a manner to ascertain the substantial rights of the parties.

Findings of fact shall be based upon relevant and material evidence only, as presented by competent witnesses, and shall comport with section 176.021.

Subd. 2. Depositions.

Except where a compensation judge orders otherwise, depositions may be taken in the manner which the law provides for depositions in civil actions in district court.

²³ Minnesota Rule of Evidence 101.

Subd. 3. Hospital records as evidence.

A hospital record relating to medical or surgical treatment given an employee is admissible as evidence of the medical and surgical matters stated in the record, but it is not conclusive proof of such matters.

A civil cause of action is governed by the trial court's calendar, usually by date of filing. A

workers' compensation hearing may be expedited pursuant to § 176.341:

Subd. 6. Significant financial hardship; expedited hearings.

An employee may file a request for an expedited hearing which must be granted upon a showing of significant financial hardship. In determining whether a significant financial hardship exists, consideration shall be given to whether the employee is presently employed, the employee's income from all sources, the nature and extent of the employee's expenses and debts, whether the employee is the sole support of any dependents, whether either foreclosure of homestead property or repossession of necessary personal property is imminent, and any other matters which have a direct bearing on the employee's ability to provide food, clothing, and shelter for the employee and any dependents.

A medical provider almost never attempts to intervene and is almost never allowed to intervene in a civil cause of action. In this case, there are medical intervenors. Furthermore, intervention is routinely made and allowed in a workers' compensation claim pursuant to § 176.361:

Subdivision 1. Right to intervene.

A person who has an interest in any matter before the Workers' Compensation Court of Appeals, or commissioner, or compensation judge such that the person may either gain or lose by an order or decision may intervene in the proceeding by filing an application or motion in writing stating the facts which show the interest. The commissioner is considered to have an interest and shall be permitted to intervene at the appellate level when a party relies in its claim or defense upon any statute or rule administered by the commissioner, or upon any rule, order, requirement, or agreement issued or made under the statute or rule.

Pursuant to Canon 2.9 (C) of the Code of Judicial Conduct, a district court judge may never independently investigate a pending civil cause of action. On the other hand, a compensation judge may make an investigation pursuant to § 176.391:

Subdivision 1. Power to make.

Before, during, or after any hearing, the commissioner or a compensation judge may make an independent investigation of the facts alleged in the petition or answer.

Subd. 2. Appointment of physicians, surgeons, and other experts.

The compensation judge assigned to a matter, or the commissioner, may appoint one or more neutral physicians or surgeons to examine the injury of the employee and report thereon except as provided otherwise pursuant to section 176.1361. Where necessary to determine the facts, the services of other experts may also be employed.

Subd. 3. Reports.

The report of a physician, surgeon, or other expert shall be filed with the commissioner and the compensation judge assigned to the matter if any. The report shall be made a part of the record of the case and be open to inspection as such.

The differences between a civil cause of action and a workers' compensation claim are many and clear. Based on the plain language of the constitutional division of powers and Chapter 176, this Court should easily reject the conclusion of the Workers' Compensation Court of Appeals. Its erroneous conclusion should be vacated and the compensation judge's Findings and Order should be reinstated.

II. THE MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS DOES NOT HAVE SUBJECT MATTER JURISDICTION FOR THIS CASE.

A. The *Minnesota Workers' Compensation Deskbook* supports the position of the employer and insurer.

The *Minnesota Workers' Compensation Deskbook* is a comprehensive authoritative guide to Minnesota workers' compensation law. In its preface, the *Minnesota Workers' Compensation Deskbook* states:

This Deskbook is a current, comprehensive and thorough analysis of workers' compensation law and practice in Minnesota. It is our hope that this Deskbook will further enhance the efficiency and effectiveness of the workers' compensation bar in this state.

We have attempted at every turn to avoid either a petitioner or defense bias. In most cases, a petitioner and a defense attorney have been paired on a single chapter. In every case, the editors have reviewed the materials to ensure as objective and accurate reflection of Minnesota Workers' Compensation Law as possible.

In § 1.4 Excluded Employments, the *Deskbook* states:

5. Employees Of Indian Tribes

Generally, there is no Minnesota jurisdiction over injuries occurring during employment on one of the state's Indian reservations. Since early time, Indian tribes have been recognized as being independent political communities, possessing natural rights of self-governance. Both state and federal courts have thus recognized that these political units are generally immune from suit unless this immunity has been waived.

The doctrine of sovereign immunity has thus precluded recovery of workers' compensation benefits under the Minnesota Workers' Compensation Act to injured employees of Indian tribes located within the state. Tibbetts v. Leech Lake Reservation Business Community, 39 W.C.D. 238, 397 N.W.2d 883 (Minn. 1986). Furthermore, since the tribe was not recognized as a defaulting employer, the Special Compensation Fund had no liability to provide benefits to these injured employees. *Id.*

Initially, many tribal business operations did procure workers' compensation coverage and enacted ordinances which provided for a waiver of sovereign immunity to the extent it had workers' compensation coverage. However, many of the tribes now have their own workers' compensation plans, setting forth their own scheme of benefits and procedures.

Recovery under these plans, through proceedings in tribal court, would be the remedy of **any individual injured while working for businesses located on Indian land.** (emphasis added).

The *Deskbook*, therefore, fully supports the Findings and Order of the compensation judge. The Workers' Compensation Court of Appeals' flawed analysis and Opinion should be vacated.

B. There was no "Minnesota" contract for hire.

The employee must prove all three requirements for jurisdiction to attach: a Minnesota employer; a Minnesota contract for hire; the employment was temporarily out of state.

In the present action, in Finding 22, the compensation judge determined that the final assent of employee's contract for hire occurred on Tribal land. There was, therefore, no "Minnesota" contract for hire. This factual finding should be given the Hengemuhle standard of review. The Workers' Compensation Court of Appeals applied the wrong standard and erroneously reversed this finding. This Court should vacate the Opinion of the Workers' Compensation Court of Appeals and reinstate the Findings and Order of the compensation judge.

There is substantial evidence on the record as a whole for this finding, and employee conceded this issue at the Workers' Compensation Court of Appeals. In Pauley v. Donco, 46 W.C.D. 14 (1991), an employee filled out an application in Minnesota which had to be sent to Oklahoma for final approval. It was found that the "hiring" did not occur in Minnesota, even though paperwork was completed in this state. Therefore, no jurisdiction attached under § 176.041, subd. 3.

Finding 22, therefore, alone determines the outcome of this case. The Workers' Compensation Court of Appeals' rationale to the contrary is an improper exercise of its standard of review. It is not in conformity with the Minnesota Workers' Compensation Law. Therefore, the Workers' Compensation Court of Appeals' Opinion should be vacated, and the Findings and Order of the compensation judge should be reinstated.

C. Michael Nickaboine is not a "Minnesota" employer.

In Finding 12, the compensation judge made a factual finding that Michael Nickaboine is not a Minnesota employer. This factual finding should be given the Hengemuhle standard of review. The Workers' Compensation Court of Appeals applied the wrong standard and erroneously reversed this finding. This Court should vacate the Opinion of the Workers' Compensation Court of Appeals and reinstate the Findings and Order of the compensation judge.

Employee failed to prove that Michael Nickaboine is a "Minnesota" employer. Whether or not Michael Nickaboine is a Minnesota employer is a question of fact. This is not necessarily synonymous with being a Minnesota corporation or filing a Certificate of Assumed Name with the Minnesota Secretary of State. The situs of incorporation does not control the issue of whether a given employer is a "Minnesota" employer. Rundberg v. Hirschbach Motor Lines, 51 W.C.D. 193 (1994).

Rather, the pertinent factors are the nature and degree of the employer's actual activities within the state. With regard to the subcontract between Mortenson and employer,²⁴ Michael Nickaboine testified that it was subject to Tribal Law, including TERO, specifically Title 18, Chapter 5. (T.115, L17-25).²⁵ From 2004 through May 30, 2007, all of employer's work was on Tribal land subject to Tribal law. (T.120, L.4-19).

Since none of employer's actual activities occurred within the state, Finding 12 is supported by substantial evidence on the record as a whole. The Workers' Compensation Court of Appeals made an error of law when it reversed this finding.

In response to a question whether or not the MLBO funds his business, Michael Nickaboine testified, "The Band supports my business through contracts, sir. I guess I don't understand the question. There wouldn't be a Northland Quality Builders if it wasn't for the Band." (T.90, L.15-18). Mr. Nickaboine further testified that the MLBO regulates his business, "[t]hrough the TERO Compliance and what licenses they require me to carry." (T.91, L.22-23). For example, the MLBO required employer to have a Non-Gaming Vendor License.²⁶ This license is, "issued by the Mille Lacs Band Corporate Commission basically saying that I'm a legal business entity that can operate for the reservation on the reservation." (T.108, L.5-8). Employee stipulated that employer is, "licensed to run a business on Tribal land." (T.109, L9-12).

Regarding how he conducts his business, employer explained, "I have a computer operation set up at my residence in Detroit Lakes. My office is mobile in my vehicle or in one of the casino motels." (T.94, L.18-20). The presence or lack of an office in Minnesota is a factor to be considered by the compensation judge. Additional factors include the nature and degree of the employee's actual duties in the state and whether the employee performed a portion of his

²⁴ Exhibit 4.

²⁵ Exhibit 3, Mille Lacs Band Statutes – Title 18.

employment duties within the state. Letourneau v. Benson Electric, slip op. (W.C.C.A. June 16, 1998). In this case employee performed none of his employment duties within the state.

Therefore, Finding 12 alone determines the outcome of this case. The Workers' Compensation Court of Appeals' rationale to the contrary is an improper exercise of its standard of review. It is not in conformity with the Minnesota Workers' Compensation Law. Therefore, the Workers' Compensation Court of Appeals' Opinion should be vacated, and the Findings and Order of the compensation judge should be reinstated.

As the compensation judge succinctly—and correctly—concluded in Finding 23:

The employee was not hired to work for the employer until October 23, 2006. He was hired on Tribal land by a Tribal employer to work only on Tribal land on a Tribal project. He entered into a consensual employment relationship, a type of consensual commercial transaction.

Findings 12, 22 and 23 determine the outcome of this case in favor of the employer and insurer.

III. THE WORKERS' COMPENSATION COURT OF APPEALS MISINTERPRETED FEDERAL STATUTES.

In addition to its incorrect analysis of 28 U.S.C. § 1360, the Workers' Compensation Court of Appeals also misread and misapplied 40 U.S.C. § 3172. The Workers' Compensation Court of Appeals noted that, “the state authority charged with enforcing and requiring compliance with the state workers’ compensation law and with the orders, decisions and awards of the authority **may** apply the laws to all land and premises in the state which the Federal Government owns or holds by deed or act of cession.” (Emphasis added.)

The Workers' Compensation Court of Appeals then went on to cite two irrelevant civil actions, neither one from the Federal 8th Circuit, which includes Minnesota. The only relevant case arguably on point is Tibbetts v. Leech Lake Reservation Business Comm., 397 N.W.2d 883, 39 W.C.D. 238

²⁶ Exhibit 5.

(Minn. 1986). The Workers' Compensation Court of Appeals misconstrues Tibbetts with the following example:

For example, following enactment of the statute, an Indian injured on an Indian reservation in the course of his employment by a **non-Indian employer** could maintain a workers' compensation action against that employer under the state's workers' compensation law, and the employer could not raise the fact the accident occurred on federal land as a defense.

Tibbetts, at 888; at 243 (emphasis added).

In the Tibbetts example above, the **non-Indian employer** would be a "Minnesota" employer who hired the employee pursuant to a "Minnesota" contract for hire. As such, this example meets the requirements of either subds. 2 or 3 of § 176.041, which would then confer subject matter jurisdiction to the Minnesota Office of Administrative Hearings.

In the present case, however, the Workers' Compensation Court of Appeals ignored the factual finding that Mr. Nickaboine is not a non-Indian employer. He is an Indian employer. He is a Tribal employer. The Workers' Compensation Court of Appeals seemed confused by this factual finding of the compensation judge. In reality, there is nothing confusing about the compensation judge's factual finding.

Mr. Nickaboine is a Tribal employer, not only by his status as an enrolled member of MLBO, but also by how he actually conducts his business. In Findings of Fact 9, 11, 12 and 23, the compensation judge noted substantial evidence in support of her decision. To summarize, all of employer's work is for the MLBO, paid by the MLBO, regulated by the MLBO, and actually occurring on MLBO land. There is overwhelming evidence on the record that Michael Nickaboine is a Tribal employer.

The Workers' Compensation Court of Appeals inappropriately misread Tibbetts as a basis for *de novo* review, when in fact, Tibbetts supports a Hengemuhe affirmance of the compensation

judge's findings. This Court should vacate the Workers' Compensation Court of Appeals' Opinion and reinstate the compensation judge's Findings and Order.

CONCLUSION

The Opinion of the Workers' Compensation Court of Appeals violates the division of powers among the legislative, executive and judicial branches of the Minnesota government. It misreads and misapplies federal cases that have no precedential value to this case. It further misreads the Tibbetts case. Finally, the Workers' Compensation Court of Appeals applied the wrong standard of review. For all of these reasons, the Opinion of the Workers' Compensation Court of Appeals should be vacated and the compensation judge's Findings and Order should be reinstated.

Respectfully Submitted,

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STATE OF MINNESOTA
IN SUPREME COURT

Rodney W. Swenson,

Respondent-Employee,

vs.

CERTIFICATION OF BRIEF LENGTH

Northland Quality Builder,

Relator-Employer,

And

SFM Mutual Insurance Company,

Relator-Insurer,

And

1. MN Dept. of Employment and Economic Development,
2. MN Department of Labor & Industry,
Vocational Rehabilitation,
3. Medica,
4. MeritCare Medical Group,

Intervenors.

I hereby certify that this Brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a monospaced font. The length of this brief is 840 lines and 7,193 words. This brief was prepared using Microsoft Office Word 2007.

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