

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.

**REPLY BRIEF AND APPENDIX OF NORTHLAND QUALITY BUILDER
 AND SFM MUTUAL INSURANCE COMPANY – RELATORS**

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LEGAL ARGUMENT

I. THERE ARE FACTUAL AS WELL AS LEGAL ISSUES

With regard to the contract for hire between Relator Nickaboine and Respondent Swenson, Respondent's reasoning completely misses the point. Respondent is claiming workers' compensation benefits arising out of an employment contract that was entirely governed by the laws of the MLBO. Respondent is not asserting a breach of contract claim. However, the workers' compensation claim that Respondent is making arises solely from a contract that is governed in all aspects by Tribal law through the MLBO Court of Central Jurisdiction.

On factual issue is not in dispute: the employment contract between Relator Nickaboine and Respondent was an MLBO contract for hire not a Minnesota contract for hire. Respondent's ability to work on the Grand Casino Hinckley Expansion Project only occurred as a result of MLBO law under the general contract.¹ This contract provided at Section 13.1.1:

The contractor hereby irrevocably submits itself to the jurisdiction of the court of central jurisdiction of 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.

Respondent's personal injury workers' compensation claim is a controversy that arose out of and was related to the execution or performance of the contract.

The Compensation Judge made the appropriate factual findings, based on substantial evidence, and the Workers' Compensation Court of Appeals reversed those findings. This Court should reverse the Decision of the Workers' Compensation Court of Appeals and reinstate the Findings and Order of the Compensation Judge.

¹ Finding 13, Exhibit 9.

II. RESPONDENT'S HYPERBOLE SHOULD BE REJECTED

In his Brief, Respondent incorrectly states that Relators' claims turn entirely upon whether the land in Hinckley, Minnesota, is "outside of this state" and not "within this state." While this is certainly a main issue raised by Relators, it is not the only issue. Respondent attempts to twist a dictionary definition of "outside" which has no application to this case. The Tribal land of the MLBO is no more "inside" the state of Minnesota than the northwest angle of Minnesota is "inside" Canada.

There is no relevant case law on point at either the state or federal level. The legal issues raised in this matter are of first impression in Minnesota.

Respondent cites Cherokee Nation v. Georgia, 30 U.S. 1 (1831) in support of his arguments. Whatever the precedent of Cherokee Nation v. Georgia, it was effectively overruled by the Howard-Wheeler Act. Cherokee Nation v. Georgia has no application to this case.

On page 12 of his Brief, Respondent cites Nevada v. Hicks, 533 U.S. 353 (2001). Nevada v. Hicks did not deal with or discuss a consensual employer-employee relationship in which the parties irrevocably submitted themselves to the jurisdiction of the Tribal authority. Nevada v. Hicks was a criminal case, and has no application to this case.

On page 13 of his Brief, Respondent unmeritoriously argues that Relators' jurisdictional argument "will create a class of Minnesota citizens who will have no remedy for work-related injuries." This argument has no validity, and should be rejected by this Court. As set forth in detail in Relators' Brief, Respondent meets the plain language for jurisdiction to be vested with the Court of Central Jurisdiction of the MLBO. Indeed, Relators' argument is contrary to the decision of the Workers' Compensation Court of Appeals which found that concurrent jurisdiction did indeed vest in the Court of Central Jurisdiction of the MLBO.

Similarly, Respondent makes the exaggerated claim that he will be deprived of any recourse or remedy for his injuries and disability. This argument is speculative at best since the Court of Central Jurisdiction of the MLBO has jurisdiction with regard to Respondent's claim. Respondent further exaggerates on page 13 of his Brief that all employees would be deprived of any recourse or remedy if they work for, "businesses owned by the individual members of the MLBO who happen to be injured on 'Tribal land.'" In this case, under the factual findings by the Compensation Judge in this case, a Tribal contract for hire occurred and Respondent's remedy lies with the Court of Central Jurisdiction. This case is fact specific and would not have widespread application.

Respondent then speculates that if jurisdiction for this case is with the Court of Central Jurisdiction, "it will call into question whether the State of Minnesota has jurisdiction over any activities occurring on 'Tribal land.'" This case will establish no such precedent. Respondent then provides a hypothetical list on pages 13 and 14 of his Brief. These examples have no application to this specific case.

For example, the Office of Administrative Hearings would have jurisdiction over an employee who primarily performs his duties in Minnesota and then happens to be injured on tribal land.

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.

Based on the plain language of this subdivision and its straightforward application, the Office of Administrative Hearings will have jurisdiction over many employees who happen to be injured on Tribal land.

Finally, Respondent argues that Relators' argument would "turn decades of well-established precedent on its head." However, there is no such precedent. No case, state or federal, has ever rejected the argument being made by Relators. It is a case of first impression based on the specific facts of this case.

III. THE MLBO COURT OF CENTRAL JURISDICTION HAS EXCLUSIVE JURISDICTION FOR RESPONDENT'S PERSONAL INJURY CLAIM

Respondent argues that Relators failed to produce a single witness to establish that the MLBO would accept jurisdiction over Respondent's claims for workers' compensation benefits. This invalid argument should be rejected by this Court. Respondent argues, "the MLBO has chosen not to assert jurisdiction over such claims." This assertion is entirely without merit.

Employee has not brought his claim before the MLBO Court of Central Jurisdiction. The MLBO Court of Central Jurisdiction has not accepted or rejected Respondent's claim. The MLBO Court of Central Jurisdiction has not chosen anything with regard to this case. The statutes and laws for personal injuries occurring on Tribal land could not be more explicit. The MLBO has not made a choice regarding jurisdiction, one way or the other. Even the Workers' Compensation Court of Appeals found that jurisdiction does exist with the MLBO Court of Central Jurisdiction.

Finally, Respondent mischaracterizes the deposition testimony of Mr. Robert Thompson and Ms. Robin Roatch.

With regard to Robert Thompson, the following testimony took place.

Q [by Mr. Wulff] Okay. To your knowledge, would there be any option for Mr. Swenson to make a claim for workers' compensation benefits under any Tribal law within the Tribal system of the Mille Lacs Band of Ojibwe?

MR. BRUNKOW: I'm gonna ask him not to answer that. He's not a lawyer, he deals with the work comp plan in place for Band government employees only.

MR. WULFF: Understood. We asked you to provide us with a witness that understood these items.

MR. BRUNKOW: And that's what he's talking about, the plan that pertains to Band government employees.

BY MR. WULFF (continuing): Q: Is there someone else who could answer my question who would know?

A: Can't respond, don't know.

MR. WULFF: Okay. And Mr. Brunkow, you're the solicitor general for the Band?

MR. BRUNKOW: Yes.

MR. WULFF: Is there someone else who can answer our questions?

MR. BRUNKOW: You're asking my client to give you a legal analysis and he is—he is here to talk about the work comp policy in place for Band government employees. I am the attorney for the Band, and I am not the person being deposed.

MR. WULFF: Understood. And my question of you, is there someone else that we should be taking the deposition of who can answer these questions?

MR. BRUNKOW: Not that I can think of.

BY MR. WULFF (continuing): Q: Okay. But in any event, given the facts of Mr. Swenson's situation, is it your testimony that he would not qualify for benefits under the Mille Lacs Band of Ojibwe, workers' compensation plan, is that correct?

A: He would not qualify.²

Mr. Thompson's deposition transcript then reads as follows:

MR. HALL: For the record, Mr. Thompson, and this is not a reflection on your credentials, I object to Thompson Exhibit 1 and your deposition on the grounds primarily of relevance. There's also foundation issues which the Judge can certainly weigh. The issue before the Court is whether or not the Office of Administrative Hearings has jurisdiction over Mr. Swenson and so I just want to put that objection on the record.

Notwithstanding that objection, in the alternative, I do want to ask you a couple of questions of you, Mr. Thompson.

EXAMINATION

BY MR. HALL: Q: Are you a constitutional scholar of the Mille Lacs Band of Ojibwe Constitution?

A: I can't answer that.

Q: Okay. You're not familiar with the intricacies of the constitution of the Mille Lacs Band of the Ojibwe, are you?

A: I am not.

Q: Okay. And with regard to—are you aware that the Mille Lacs Band of Ojibwe has a court system called the Court the Central Jurisdiction?

A: Yes.

Q: You're aware that that entity exists?

A: Correct.

Q: Okay. How about whether or not they would—taking Mr. Wulff's hypothetical into account verbatim, do you have any idea whether they would or would not accept jurisdiction to decide that issue?

² Transcript, page 14, line 2 through page 15, line 17.

A: I have no idea.³

Similarly, with regard to Robin Roatch, her testimony included as follows:

MR. HALL: And for the record again, and this has nothing to do with your credentials, Ms. Roatch, objecting on foundation and also on relevance for the issue that is before the Court of Jurisdiction; this doesn't have anything to do with the question that is before the Court.

However, in the alternative, I am going to ask you just a few questions, Ms. Roatch.

EXAMINATION

BY MR. HALL:

Q: Are you aware of an entity called the Court of Central Jurisdiction?

A: Yes.

Q: And that's the Court of the Mille Lacs Band of the Ojibwe, isn't it?

A: Yes.

Q: Would you have any knowledge one way or the other how the Court of Central Jurisdiction would apply Title V, Chapter 2, Section 111, Subject Matter Jurisdiction?

A: I have no idea.

Q: And same thing would be true, wouldn't it, you have no idea how the Court of Central Jurisdiction would apply Title V, Chapter 2, Section 113, Personal Jurisdiction?

A: No.

Q: And just because Mr. Swenson—assuming, you know, Mr. Wulff's hypothetical to be true, just because Mr. Swenson doesn't have a remedy under the Corporate Commission, Exhibit 1, that doesn't necessarily mean that the Court of Central Jurisdiction might do something, right; you wouldn't know one way or the other, would you?

A: No.

³ Thompson Deposition Transcript page 16, line 4 through page 17, line 11.

Respondent's argument proves his own failure to establish that the State of Minnesota Office of Administrative Hearings has exclusive jurisdiction in this case. Neither of the two workers' compensation plans is pursuant to Minnesota law. The State of Minnesota Office of Administrative Hearings does not have jurisdiction over these plans, does not interpret or award benefits pursuant to these plans, and does not exercise jurisdiction over the entities covered by these plans. The reason that the State of Minnesota Office of Administrative Hearings does not have jurisdiction is that injuries covered by these plans occur outside of the State of Minnesota.

There is no question that both the Mille Lacs Band of the Ojibwe itself and the Corporate Commission of the Mille Lacs Band of the Ojibwe would fit the definition of "employer" under Chapter 176. Likewise, the persons they employ would also fit the definition of "employee" under Chapter 176. The very existence of these plans clearly demonstrates that the MLBO and the Corporate Commission of the MLBO have sovereign status, and are not subject to Chapter 176 precisely because the Tribal Land, including Grand Casino Hinckley on trust land--the territorial jurisdiction of the Band--is outside of the State of Minnesota.

CONCLUSION

This Court should reverse the decision of the Workers' Compensation Court of Appeals and reinstate the Findings and Order of the Compensation Judge. Based on the specific unique facts of this case, the State of Minnesota, Office of Administrative Hearings does not have jurisdiction.

Respectfully Submitted,

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DATED: _____

04/30/2010

STATE OF MINNESOTA
IN SUPREME COURT

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Respondent-Employee,

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CERTIFICATION OF REPLY BRIEF LENGTH

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And

SFM Mutual Insurance Company,

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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 Reply 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 352 lines and 2,497 words. This brief was prepared using Microsoft Office Word 2007.

LYNN, SCHARFENBERG & ASSOCIATES

DATED: 04/30/2010


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APPENDIX INDEX

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1 Band Tribal Government.

2 Q Okay. To your knowledge, would there be
3 any option for Mr. Swenson to make a claim for
4 worker's compensation benefits under any tribal law
5 within the tribal system of the Mille Lacs Band of
6 Ojibwe?

7 MR. BRUNKOW: I'm gonna ask him not to
8 answer that. He's not a lawyer, he' deals with the
9 work comp plan in place for Band government
10 employees only.

11 MR. WULFF: Understood. We asked you to
12 provide us with a witness that understood these
13 items.

14 MR. BRUNKOW: And that's what he's talking
15 about, the plan that pertains to Band government
16 employees.

17 BY MR. WULFF (continuing):

18 Q Is there someone else who could answer my
19 question who would know?

20 A Can't respond, don't know.

21 MR. WULFF: Okay. And Mr. Brunkow, you're
22 the solicitor general for the Band?

23 MR. BRUNKOW: Yes.

24 MR. WULFF: Is there someone else who can
25 answer our questions?

1 MR. BRUNKOW: You're asking my client to
2 give you a legal analysis and he is -- he is here
3 to talk about the work comp policy in place for
4 Band government employees. I am the attorney for
5 the Band, I am not the person being deposed.

6 MR. WULFF: Understood. And my question
7 of you, is there someone else that we should be
8 taking the deposition of who can answer these
9 questions?

10 MR. BRUNKOW: Not that I can think of.
11 BY MR. WULFF (continuing):

12 Q Okay. But in any event, given the facts
13 of Mr. Swenson's situation, it is your testimony
14 that he would not qualify for benefits under the
15 Mille Lacs Band of Ojibwe worker's compensation
16 plan, is that correct?

17 A He would not qualify.

18 Q Okay. And the reason for that is that
19 he's not an employee of the Mille Lacs Band of
20 Ojibwe?

21 A Correct.

22 Q And that's the only claims to which this
23 plan applies?

24 A Correct.

25 MR. WULFF: Okay. I would offer Exhibit

1 1, I will be offering the deposition of Mr.
2 Thompson, and I have nothing further.

3 THE WITNESS: Thank you.

4 MR. HALL: For the record, Mr. Thompson,
5 and this is not a reflection on your credentials, I
6 object to Thompson Exhibit 1 and your deposition on
7 the grounds primarily of relevance. There's also
8 foundation issues which the Judge can certainly
9 weigh. The issue before the Court is whether or
10 not the Office of Administrative Hearings has
11 jurisdiction over Mr. Swenson and so I just want to
12 put that objection on the record.

13 Notwithstanding that objection, in the
14 alternative, I do want to ask you a couple
15 questions of you, Mr. Thompson.

16 EXAMINATION

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18 Q Are you a constitutional scholar of the
19 Mille Lacs Band of Ojibwe constitution?

20 A I can't answer that.

21 Q Okay. You're not familiar with the
22 intricacies of the constitution of the Mille Lacs
23 Band of the Ojibwe, are you?

24 A I am not.

25 Q Okay. And with regard to -- are you aware

1 that the Mille Lacs Band of Ojibwe has a court
2 system called the Court of Central Jurisdiction?

3 A Yes.

4 Q You're aware that that entity exists?

5 A Correct.

6 Q Okay. How about whether or not they would
7 -- taking Mr. Wulff's hypothetical into account,
8 verbatim, do you have any idea whether they would
9 or would not accept jurisdiction to decide that
10 issue?

11 A I have no idea.

12 Q Okay. And are you familiar with Title 5,
13 Chapter 2, Section 101 regarding subject matter
14 jurisdiction?

15 A No.

16 Q Okay. Are you familiar with Title 5,
17 Chapter 2, Section 113, personal jurisdiction?

18 A No.

19 MR. HALL: I don't have any further
20 questions for you, sir.

21 MR. WULFF: Mr. Thompson, you have a right
22 to read and sign the deposition transcript. What
23 that means is the court reporter is going to
24 prepare a transcript of your testimony and you have
25 the right to review it to make sure that she took

1 MR. HALL: And for the record again, and
2 this has nothing to do with your credentials, Ms.
3 Roatch, objecting on foundation and also relevance
4 for the issue that's before the Court of
5 jurisdiction; this doesn't have anything to do with
6 the question that's before the Court.

7 However, in the alternative, I am gonna
8 ask you just a few questions, Ms. Roatch.

9 EXAMINATION

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12 Court of Central Jurisdiction?

13 A Yes.

14 Q And that's the court of the Mille Lacs
15 Band of the Ojibwe, isn't it?

16 A Yes.

17 Q And would you have any knowledge one way
18 or the other how the Court of Central Jurisdiction
19 would apply Title 5, Chapter 2, Section 111,
20 subject matter jurisdiction?

21 A I have no idea.

22 Q And same thing would be true, wouldn't it,
23 you have no idea how the Court of Central
24 Jurisdiction would apply Title 5, Chapter 2,
25 Section 113, personal jurisdiction?

1 A No.

2 Q And just because Mr. Swenson -- assuming,
3 you know, Mr. Wulff's hypothetical to be true, just
4 because Mr. Swenson doesn't have a remedy under the
5 Corporate Commission, Exhibit 1, that doesn't
6 necessarily mean that the Court of Central
7 Jurisdiction might do something, right; you
8 wouldn't know one way or the other, would you?

9 A No.

10 MR. HALL: Okay. I don't have anything
11 further for you then.

12 MR. WULFF: Ms. Roatch, you have the right
13 to read and sign the deposition transcript which
14 means that you have a right to have the court
15 reporter prepare the transcript and then read it to
16 make sure that your answers were recorded
17 accurately before the transcript becomes final.
18 You can either exercise that right or you can waive
19 it and your attorney, Mr. Brunkow, will advise you
20 on that issue.

21 THE WITNESS: I will waive that right.

22 (Deposition concluded at 3:03 p.m.)

23

24

25