CASE NO. A10-380

State of Minnesota
In Supreme Court

RODNEY W. SWENSON,

Respondent,

vs.

NORTHLAND QUALITY BUILDER,

Relator,

and

SFM MUTUAL INSURANCE COMPANY,

Relator,

and

1. Medica Health Plans,
2. Detroit Lakes Chiropractic,
3. MN Department of Labor & Industry/VRU, and
4. MeritCare Health System,

Intervenors.

RESPONDENT'S BRIEF

LAW OFFICE OF
DAVID C. WULFF
David C. Wulff (#162401)
2575 Hamline Avenue North
Suite D
Roseville, Minnesota 55113
(651) 636-1900

Attorney for Respondent

LYNN, SCHARFENBERG
& ASSOCIATES
M. Chapin Hall (#167946)
P.O. Box 9470
Minneapolis, Minnesota 55440-9470
(952) 838-4476

Attorney for Relators

(*Additional Parties Listed on Following Page*)

MEDICA HEALTH PLANS
Attn: Jacquie Hakes
12125 Technology Drive
Eden Prairie, Minnesota 55344

MINNESOTA DEPARTMENT
OF LABOR & INDUSTRY/VRU
Attn: Cheryl D. Eliason
443 Lafayette Road North
St. Paul, Minnesota 55155

DETROIT LAKES CHIROPRACTIC
Attn: Thomas Wilson
213 State Street West
Detroit Lakes, Minnesota 56501

MERITCARE HEALTH SYSTEM
Attn: Thomas J. Rohleder
P.O. Box MC
Fargo, ND 58122

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

LEGAL ISSUES

I. DOES THE STATE OF MINNESOTA HAVE SUBJECT MATTER JURISDICTION OVER CLAIMS FOR WORKERS' COMPENSATION BENEFITS UNDER MINN. STAT. CHAPTER 176 WHEN THE EMPLOYER IS AN INDIVIDUAL WHO IS BOTH A MINNESOTA CITIZEN AND A MEMBER OF THE MILLE LACS BAND OF OJIBWE (MLBO) OPERATING A BUSINESS AS A SOLE PROPRIETOR SOLELY FOR PERSONAL PROFIT, THE EMPLOYEE IS A MINNESOTA CITIZEN AND NOT A MEMBER OF THE MLBO, THE EMPLOYEE'S EMPLOYMENT CONTRACT IS CONSUMMATED WHILE EMPLOYEE IS PHYSICALLY ON LAND HELD IN TRUST BY THE U.S. GOVERNMENT FOR THE MLBO, THE EMPLOYEE PERFORMS THE PRIMARY DUTIES OF HIS EMPLOYMENT ON LAND HELD IN TRUST BY THE U.S. GOVERNMENT FOR THE MLBO, AND THE INJURY OCCURS ON LAND HELD IN TRUST BY THE U.S. GOVERNMENT FOR THE MLBO?

The Workers' Compensation Court of Appeals held: Yes.

II. DOES THE MLBO TRIBAL COURT HAVE CONCURRENT JURISDICTION OVER SUCH A CLAIM?

The Workers' Compensation Court of Appeals held: Yes.

III. DO PRINCIPLES OF TRIBAL SOVEREIGN IMMUNITY, INFRINGEMENT AND PREEMPTION REQUIRE THE STATE OF MINNESOTA TO DEFER TO THE MLBO TRIBAL COURT'S JURISDICTION UNDER THE FACTS INVOLVED IN THIS CASE?

The Workers' Compensation Court of Appeals held: No, the State of Minnesota may assert jurisdiction over Respondent's claim for workers' compensation benefits under the facts involved in this case.

STATEMENT OF THE CASE

Relators failed to include a Statement of the Case in their brief as required by Minn. R. Civ. App. P. 128.02, subd. 1 (c). Therefore, Respondent offers the following.

This appeal involves the legal issue of whether the State of Minnesota, Office of Administrative Hearings, has subject matter jurisdiction over Respondent's claim for workers' compensation benefits against Relators, or whether Respondent is required to bring his claim in the Mille Lacs Band of Ojibwe Court of Central Jurisdiction under tribal law.

Respondent's work-related injury occurred on May 30, 2007. Primary liability for said injury was denied by Relators. On December 20, 2007, Respondent filed a claim petition with the Office of Administrative Hearings seeking benefits under the Minnesota Workers' Compensation Act.

On January 28, 2009, Relators filed a "Motion on Jurisdictional Issue" requesting that Respondent's claims "be dismissed from the State of Minnesota Office of Administrative Hearings and transferred to the Tribal Court of the Mille Lacs Band of the Ojibwe pursuant to Minn. Stat. Sec. 176.041." Compensation Judge Jennifer Patterson cancelled the hearing on Respondent's claim petition scheduled for the next day and on March 4, 2009, held a separate trial solely on the issue of subject matter jurisdiction.

Judge Patterson issued her Findings and Order on July 17, 2009, ruling that the State of Minnesota, Office of Administrative Hearings, does not have subject matter

jurisdiction over Respondent's claim for workers' compensation benefits, and dismissing Respondent's claim petition.

Respondent filed his Notice of Appeal to the Workers' Compensation Court of Appeals on July 22, 2009. The Workers' Compensation Court of Appeals issued its decision on January 26, 2010, reversing the decision of Judge Patterson and remanding the case back to the Office of Administrative Hearings for a hearing on the merits of Respondent's claim for benefits.

Relators seek review by certiorari of the decision of the Workers' Compensation Court of Appeals.

STATEMENT OF FACTS

Respondent objects to and disagrees with the Statement of Facts set forth in Relators' brief. Relators make assertions of alleged facts that are simply not true; reference "concessions" allegedly made by Respondent that were never made or that Relators misrepresent; assert as facts legal issues to be decided by this Court; and inappropriately include arguments on disputed factual and legal issues in what is supposed to be a statement of facts. Respondent also objects to and rejects the assertions made by Relators in their brief under the heading "Legal Background." The assertions included under this heading include an inappropriate mixture of alleged facts and legal arguments, and misstate many of the "laws" Relators purport to be summarizing.

Respondent sets forth the following as his statement of the facts relevant to the issues presented by this appeal.

At all times material hereto, Respondent Rodney W. Swenson was an individual resident of the State of Minnesota residing in Detroit Lakes, Minnesota. Respondent is not a member of the Mille Lacs Band of Ojibwe (hereinafter referred to as "MLBO"). [Transcript, p. 33.]

At all times material hereto, Relator Michael Nickaboine was an individual resident of the State of Minnesota residing in Detroit Lakes, Minnesota. In addition to being a citizen and resident of the State of Minnesota, Relator Nickaboine is a member of the MLBO. [Transcript, p. 87.]

At all times material hereto, Relator Nickaboine operated a contracting business as a sole proprietor under the assumed business name "Northland Quality Builders" registered with the Minnesota Secretary of State. [Transcript, p. 89.] Relator Nickaboine was licensed as a contractor both with the State of Minnesota and with the MLBO. [Transcript, p. 89.] Relator Nickaboine's business was located and operated out of his home in Detroit Lakes, Minnesota. [Transcript, pp. 93-94.] All of his work was performed for the MLBO or for fellow members of the MLBO as his customers. [Transcript, p. 120.]

Although Relator Nickaboine is a member of the MLBO, the MLBO had absolutely nothing to do with his co ntracting business, other than being one of his customers. The MLBO had no equity ownership interest in Relator Nickaboine's business. [Transcript, pp. 89-90.] The MLBO did not fund or capitalize Relator Nickaboine's business in any way. [Transcript, pp. 90-91.] The MLBO did not pay any of Relator Nickaboine's business expenses. [Transcript, p. 91.] The MLBO did not receive, share in, or benefit in any way from the revenues generated by Relator Nickaboine's business. [Transcript, p. 91.] The MLBO had absolutely no input or control over the operation of Relator Nickaboine's business. [Transcript, pp. 91-92.]

Relator Nickaboine's business was not organized for any purpose that was governmental in nature. [Transcript, pp. 92-93.] Relator Nickaboine's business was purely a commercial venture organized solely for the purpose of making money for Relator Nickaboine. [Transcript, p. 92.] The MLBO and Relator Nickaboine's business were not linked in governing structure or other characteristics in any way. [Transcript,

pp. 91-92.] Relator Nickaboine's business was not owned or operated by any political subdivision of the MLBO, including the Corporate Commission of the MLBO. [Transcript, pp. 90-91.] When Relator Nickaboine was conducting his business as a contractor he was not acting in any official capacity as an officer, appointee or employee of the MLBO or of the Corporate Commission of the MLBO. [Transcript, pp. 92-93.]

Relator Nickaboine hired Respondent to work for his contracting business as a carpenter. [Transcript, pp. 98-100.] Respondent was hired primarily to work on a subcontract Relator Nickaboine entered into with M.A. Mortenson Company to hang the doors in a hotel being built by the MLBO next to their casino in Hinckley, Minnesota.

The land on which the hotel in Hinckley, Minnesota, is situated was not part of any of the original treaties entered into with the MLBO. The land was purchased from the State of Minnesota, Pine County, by the United States of America in trust for the MLBO on February 14, 1969. [Employer's Exhibits 6 and 7.] The MLBO does not own the land. The United States government owns it and holds it in trust for the MLBO, allowing the MLBO to operate a casino and hotel.

Respondent now concedes that his employment contract was consummated on October 23, 2006, while he was physically present at the hotel being built by the MLBO in Hinckley, Minnesota, on the land held in trust by the United States government for the MLBO. Respondent also concedes that all of the services he performed for Relator Nickaboine as his employee took place on "tribal land" or land held in trust by the United States government for the MLBO. (This is not the same as conceding that Respondent was not hired within the state, or that he did not regularly perform the primary duties of

his employment within the state, as erroneously asserted by Relators in their statement of facts. Those are critical questions of law to be decided by this Court.)

Respondent claims he sustained a work-related injury while working within the course and scope of his employment by Relator Nickaboine on May 30, 2007. [Transcript, pp. 55-57.] This injury occurred at the hotel being built by the MLBO in Hinckley, Minnesota, on the land held in trust by the United States Government for the MLBO. [Transcript, pp. 57-58.] (Again, this is not the same as conceding that Respondent was injured outside of the state, as erroneously asserted by Relators in their statement of facts. This is a critical question of law to be decided by this Court.)

Respondent claims he is entitled to workers' compensation benefits pursuant to the Minnesota Workers' Compensation Act, Minn. Stat. Chapt. 176, and that he is entitled to have his claims heard by a compensation judge of the Office of Administrative Hearings. Relators contend the State of Minnesota lacks jurisdiction over Respondent's claim because his injury occurred outside of the State of Minnesota within the meaning of Minn. Stat. § 176.041, subd. 5a (2007).

LEGAL ARGUMENTS

I. THE STATE OF MINNESOTA, OFFICE OF ADMINISTRATIVE HEARINGS, HAS SUBJECT MATTER JURISDICTION TO HEAR RESPONDENT'S CLAIMS FOR BENEFITS UNDER MINN. STAT. CHAPTER 176.

Relators' assertion that the State of Minnesota lacks jurisdiction over Respondent's claims for workers' compensation benefits turns entirely upon whether the land in Hinckley, Minnesota, that is held in trust by the United States Government for the MLBO, on which is situated the hotel Respondent was working on when he was injured, is "outside of this state" and not "within this state" as those phrases are used in Minn. Stat. § 176.041, subds. 2, 3 and 5a (2007). This issue presents a question of statutory construction which this Court reviews de novo. See *In re Kleven*, 736 N.W.2d 707, 709 (Minn. App. 2007) (citing *Brookfield Trade Ctr., Inc. v. County of Ramsey*, 584 N.W.2d 390, 393 (Minn. 1998).

Minn. Stat. § 176.041, subd. 5a (2007) provides: "Except as specifically provided by subdivisions 2 and 3, injuries occurring outside of this state are not subject to this chapter." Relators contend the hotel in Hinckley, Minnesota, is on land "outside of this state" and so Respondent's injury is not subject to the Minnesota Workers' Compensation Act, unless one of the two cited exceptions apply.

Subdivision 2 provides in relevant part: "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." Relators contend that since Respondent regularly performed the primary

duties of his employment at the hotel in Hinckley, Minnesota, and that land is not within this state, this exception does not apply.

Subdivision 3 provides: "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." Relators contend that since Respondent's employment with Relator Nickaboine was consummated while Respondent and Relator Nickaboine were physically at the hotel expansion project in Hinckley, Minnesota, he was not hired in this state. Relators also contend that Relator Nickaboine is not a Minnesota employer, apparently on the basis all of his work as a contractor occurred on "tribal land" which they contend is not "within" the state of Minnesota.

Relators' brief fails to discuss, much less cite any authority for, their argument that what they call "tribal land" is "outside of this state." Relators simply assert that "tribal land" is outside of the state and then jump to the conclusion that "therefore" Respondent is not entitled to claim workers' compensation benefits under the Minnesota Workers' Compensation Act.

The Workers Compensation Court of Appeals rejected this conclusory and illogical argument, stating:

> "...The insurer argues that the MLBO reservation, being tribal land, is located 'outside of' the state of Minnesota. We disagree.
>
> The insurer cites to no authority for its position. Extensive litigation has taken place on the question of whether and in what circumstances a state may apply its laws on a reservation. Nowhere in any of the case law on this issue is there any suggestion that a reservation is in some manner outside of the state in which it is located. Indeed, in Nevada v. Hicks, the Supreme Court noted that '[s]tate sovereignty does not end at a reservation's border. Though tribes are often referred to as "sovereign"

> entities ... it is now clear, "an Indian reservation is considered part of the territory of the State."' 533 U.S. 353, 361-362 (2001) (citations omitted).
>
> We conclude that the MLBO reservation lies within Minnesota for the purposes of Minn. Stat. § 176.041, subd. 5a, and that a work injury on the reservation is not an out-of-state injury under the workers' compensation statute."

Relator's Appendix at page A-22.

What constitutes an injury "occurring outside of the state" is not specifically defined by the statute. In construing the statutes of this state, words and phrases are to be construed according to rules of grammar and according to their common and approved usage. Minn. Stat. § 645.08 (1). The common dictionary definition of "outside" is: "a place or region beyond an enclosure or boundary; the area farthest from a specified point of reference; of, relating to, or being on or toward the outer side or surface; situated outside of a particular place." *Webster's New Universal Unabridged Dictionary* 936 (2nd Ed. 1979). *Black's Law Dictionary* defines "outside" as: "to the exterior of; without; outward from." *Black's Law Dictionary* 994 (5th Ed. 1979). Application of dictionary definitions of "outside" supports the conclusion that land within the borders of Minnesota is not "outside" of the state, but is "within" the state, at least in a physical, geographic sense.

It cannot be disputed that the casino and hotel property in Hinckley, Minnesota is physically located within the state of Minnesota. However, it must be considered whether "tribal land" is somehow legally "outside" of the state as that term is used in Minn. Stat. § 176.041, subd. 5a (2007).

There is no indication in the statute or in the legislative history of the statute that it was ever intended to apply to "tribal lands." Relators have not cited, and Respondent cannot find, any decision of the Workers' Compensation Court of Appeals, the Minnesota Court of Appeals, this Court or any other court that has ever ruled that "tribal lands" are "outside of the state" of Minnesota for the purposes of Minn. Stat. § 176.041, subd. 5a (2007). This language has consistently been limited to situations where employees suffer injuries in states other than the state of Minnesota or in foreign countries.

At the federal level, the issue of whether or not "tribal lands" constitute "foreign" lands somehow "outside" of the states within which they exist has been considered and rejected by the United States Supreme Court.

In *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831), the state of Georgia attempted to strip the Cherokee Nation of all legal rights and seize the lands which had been assured to them by the United States in various treaties. One of the issues raised was whether or not the Cherokee tribe in Georgia constituted a "foreign nation" and whether or not the land set aside in the treaty for their reservation constituted "foreign land" effectively outside of the state of Georgia. The Court rejected this argument stating in relevant part:

> "The Indian Territory is admitted to compose a part of the United States. In all our maps, geographical treatises, histories, and laws, it is so considered. In all our intercourse with foreign nations, in our commercial regulations, in any attempted intercourse between Indians and foreign nations, they are considered as within the jurisdictional limits of the United States, subject to many of those restraints which are imposed upon our own citizens. ... Though the Indians are acknowledged to have an unquestionable, and heretofore unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government, yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict

> accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases."

30 U.S. at 8-9.

More recently, in *Nevada v. Hicks*, 533 U.S. 353 (2001), the Supreme Court considered whether a tribal court may assert jurisdiction over civil claims against state game wardens who entered tribal land to execute a search warrant against a tribe member suspected of having violated state law outside the reservation by killing a California bighorn sheep, a gross misdemeanor under Nevada law. In discussing this issue, the Court stated:

> "Our cases make clear that the Indians' right to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation. State sovereignty does not end at a reservation's border. Though tribes are often referred to as 'sovereign' entities, it was 'long ago' that 'the Court departed from Chief Justice Marshall's view that "the laws of [a State] can have no force" within reservation boundaries. *Worcester v. Georgia*, 6 Pet. 515, 561 (1832),' *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 141 (1980). [Footnote omitted.] **'Ordinarily,' it is now clear, 'an Indian reservation is considered part of the territory of the State.'** U. S. Dept. of Interior, Federal Indian Law 510, and n. 1 (1958), citing *Utah v. Northern R. Co. v. Fisher*, 116 U.S. 28 (1885); see also *Organized Village of Kake v. Egan*, 369 U.S. 60, 72 (1962)."

533 U.S. at 361-62. [Emphasis added.]

No case, state or federal, has ever accepted the argument being made by Relators. Declaring the MLBO casino and hotel in Hinckley, Minnesota, to be outside of the state of Minnesota would turn decades of well-established precedent on its head.

Significant public policy considerations also support Respondent's position that "tribal lands" should not be ruled to be "outside" of the state of Minnesota.

If this Court accepts Relators' argument, it will create a class of Minnesota citizens who will have no remedy for work-related injuries. As discussed more fully below, the workers' compensation plans of the MLBO and the Corporate Commission of the MLBO apply only to employees of those two entities. The laws of the MLBO do not provide workers' compensation benefits to employees of businesses owned by individuals who happen to be members of the tribe. If this Court rules that Respondent's claims under Minnesota law are barred because his injury occurred outside of the state of Minnesota, he will be deprived of any recourse or remedy for his injuries and disability, as will all employees of businesses owned by individual members of the MLBO who happen to be injured on "tribal land."

If this Court accepts Relators' argument, it will call into question whether the state of Minnesota has jurisdiction over any activities occurring on "tribal land." Arguably, all work-related injuries occurring on "tribal land" potentially would be outside the jurisdiction of the Minnesota Workers' Compensation Act because the injury occurred "outside of the state"; persons injured in motor vehicle accidents on "tribal land" might not be entitled to no-fault benefits pursuant to Minn. Stat. § 65B.46 (no-fault benefits are not available to persons injured "outside this state" unless the injury occurs "in the United States, United States possessions, or Canada."); the state of Minnesota might no longer be able to prosecute crimes committed on "tribal land;" the state of Minnesota might no longer be able to collect real estate taxes from nontribal members residing on "tribal land;" the state of Minnesota might no longer be able to collect excise tax from gasoline sold at gas stations located on "tribal land;" the state of Minnesota might no longer be

able to collect sales tax for sales made by nontribal business entities that happen to be located on "tribal land;" the state of Minnesota might no longer be able to collect income tax from nontribal residents who reside on "tribal lands." The list of potential absurd and perverse legal consequences flowing from a declaration that "tribal land" is "outside" of the state goes on and on.

The MLBO is not a foreign nation. The land which they occupy pursuant to a trust held by the federal government is not "foreign" land. The land is "within" the state of Minnesota. It is not "outside" the state of Minnesota. The limited right of self government granted by the federal government simply does not render the trust land they occupy to be "outside" of the state of Minnesota.

Respondent was hired in Minnesota, by a Minnesota employer, regularly performed the primary duties of his employment within Minnesota, and suffered an injury within the state of Minnesota. He is entitled to claim benefits under the Minnesota Workers' Compensation Act and to have his claim heard by a compensation judge of the Office of Administrative Hearings.

II. CONCURRENT JURISDICTION OVER RESPONDENT'S CLAIMS DOES NOT EXIST BECAUSE THE MLBO STATUTES AND LAWS DO NOT PROVIDE FOR WORKERS' COMPENSATION CLAIMS AGAINST INDIVIDUAL MEMBERS OF THE TRIBE ENGAGED IN BUSINESS VENTURES FOR PERSONAL PROFIT AND THE MLBO COURT OF CENTRAL JURISDICTION DOES NOT ASSERT JURISDICTION OVER SUCH WORKERS' COMPENSATION CLAIMS.

Relators' assertion that the State of Minnesota should defer to the MLBO's jurisdiction to hear Respondent's claims against Relators, requires Relators' to prove that

the MLBO Court of Central Jurisdiction accepts jurisdiction over claims for workers' compensation benefits against individual members of the tribe engaged in business ventures solely for personal profit. Otherwise, only the State of Minnesota has jurisdiction over Respondent's claims and there is no MLBO jurisdiction to which to defer. This issue requires an interpretation of the "laws" of the MLBO which this Court reviews de novo. See *In re Kleven*, 736 N.W.2d 707, 709 (Minn. App. 2007) (citing *Brookfield Trade Ctr., Inc. v. County of Ramsey*, 584 N.W.2d 390, 393 (Minn. 1998).

Relators failed to produce a single witness to establish that the MLBO would accept jurisdiction over Respondent's claims for workers' compensation benefits. Relators failed to identify a single provision within the MLBO statutes or laws that apply to Respondent's claims for workers' compensation benefits. That is because no such statute or law exists and because the MLBO has chosen not to assert jurisdiction over such claims.

As confirmed by the deposition testimony of Mr. Robert Thompson and Ms. Robin Roatch [Employee's Exhibits K and L], and by the plain language of the two workers' compensation plans discussed below [Employee's Exhibits I and J], the "laws" of the MLBO do not apply to claims brought by employees of business entities owned by individual members of the MLBO like Relator Nickaboine. The only types of claims over which the MLBO has chosen to assert jurisdiction are claims brought by employees of the MLBO or by employees of the Corporate Commission of the MLBO against one of those two entities.

The relevant sections of the Mille Lacs Band of Ojibwe Workers' Compensation Plan provide as follows:

"Section 1 Definitions.

1.002 Employer: The Mille Lacs Band of Ojibwe where it has obtained the labor services of a person for hire.

...

1.003 Employee: Any person who performs labor services alone for the Mille Lacs Band of Ojibwe for hire at an established wage or salary. Contract labor services are specifically excluded from the provisions of this Plan.

Section 2 Purpose and Scope.

2.001 The purpose of the Mille Lacs Band of Ojibwe Workers' Compensation Plan (the "Plan") is to provide a system of compensation and medical benefits for Employees of the Mille Lacs Band of Ojibwe who suffer Compensable injuries in the Employment of the Mille Lacs Band of Ojibwe.

2.002 All Employees of the Mille Lacs Band of Ojibwe are covered for Compensable Bodily Injuries whether the Accident and Bodily Injury occur on or off the Reservation.

2.003 This Plan is a self-funded, self-insurance program of the Mille Lacs Band of Ojibwe, a sovereign Indian Tribal government and is operated solely for the benefit of its employees."

[Employee's Exhibit I at pages 1 and 3.]

Similarly, the relevant provisions of the Corporate Commission of the Mille Lacs Band of Ojibwe Indians Workers' Compensation Plan provide:

"Section 1 Definitions.

1.002 Employer: The Commission, where it has obtained the labor services of a person for hire.

...

1.003 Employee: Any person who performs labor services alone for the Commission for hire at an established wage or salary.

Section 2 Purpose and Scope.

2.001 The purpose of this Plan is to provide a system of compensation and medical benefits for Employees of the Commission who suffer Compensable injuries in the Employment of the Commission.

2.002 All Employees of the Commission are covered for Compensable Bodily Injuries whether the Accident and Bodily Injury occur on or off the Reservation.

2.003 This Plan is a self-funded, self-insurance program of the Commission, a unit of a sovereign Indian Tribal government and is operated solely for the benefit of its employees."

[Employee's Exhibit J at pages 1 and 3.]

These plans, the only "laws" under which the MLBO asserts jurisdiction for claims relating to work-related injuries, are expressly limited to claims of employees of the MLBO or employees of the Corporate Commission of the MLBO. Respondent was employed by Relator Nickaboine, not the MLBO or the Corporate Commission of the MLBO. There simply is no MLBO law under which Respondent has the option of pursuing his claims against Relator Nickaboine within the MLBO tribal court system.

Since the MLBO has chosen not to assert jurisdiction over claims for workers' compensation benefits against individual members of the band, there is no MLBO jurisdiction to which to defer.

III. IF THIS COURT RULES OR ASSUMES THAT THE MLBO HAS CONCURRENT JURISDICTION OVER RESPONDENT'S CLAIM FOR WORKERS' COMPENSATION BENEFITS THEN IT MUST DETERMINE WHETHER THE STATE OF MINNESOTA SHOULD DEFER TO THE MLBO TRIBAL COURT UNDER ESTABLISHED PRINCIPLES OF TRIBAL SOVEREIGN IMMUNITY, INFRINGEMENT AND PREEMPTION.

If this Court rules or assumes that the State of Minnesota and the MLBO Central Court of Jurisdiction have concurrent jurisdiction over claims for worker's compensation

benefits asserted against individual members of the tribe engaged in business ventures for personal profit, then the issue of whether the State of Minnesota should defer to the jurisdiction of the MLBO must be resolved based upon established principles of tribal sovereign immunity, infringement and preemption. This issue presents a question of law, and this Court is not bound by, and need not give deference to, the Workers' Compensation Court of Appeals' decision on questions of law. See *Bondy v. Allen*, 635 N.W.2d 244, 249 (Minn. App. 2001) (citing *Frost-Benco Elec. Ass'n. v. Minn. Pub. Utils. Comm'n*, 358 N.W.2d 639 (Minn. 1984).

This Court established the test for determining whether principles of tribal sovereign immunity, infringement and preemption extend to commercial business entities such as Relator Nickaboine's in *Gavle v. Little Six, Inc.*, 555 N.W.2d 284 (Minn. 1996). Specifically, this Court established the following test:

> "Taking into account the reasoning of these cases, we conclude that the principle factors to be considered in determining whether tribal sovereign immunity extends to a tribal business entity are three:
>
> 1) Whether the business entity is organized for a purpose that is governmental in nature, rather than commercial;
>
> 2) Whether the tribe and the business entity are closely linked in governing structure and other characteristics; and
>
> 3) Whether federal policies intended to promote Indian tribal autonomy are furthered by the extension of immunity to the business entity."

555 N.W.2d at 294.

Applying the test adopted in *Gavle* to the facts involved in this case establishes that Relator Nickaboine is not entitled to the assertion of tribal sovereign immunity, and

that even assuming concurrent jurisdiction exists in the MLBO tribal court, Respondent's claims for workers' compensation benefits should be brought in the Office of Administrative Hearings pursuant to Minnesota workers' compensation law.

Relator Nickaboine's business was never organized for a purpose that was governmental in nature; it has always been a purely commercial business entity organized solely for the purpose of making money for Relator Nickaboine and his family. Relator Nickaboine's business and the MLBO were in no way linked in governing structure or other characteristics; Relator Nickaboine was a sole proprietor and the MLBO had absolutely no involvement in the operation of his business other than being one of his customers. Federal policies intended to promote Indian tribal autonomy would not be furthered by extension of immunity to individual members of the tribe engaged in business activities solely for their own personal profit.

Ruling that Respondent may pursue his claim for workers' compensation benefits under the Minnesota Workers' Compensation Act at the Office of Administrative Hearings would not "undermine the authority of the tribal courts" or "infringe on the right of Indians to govern themselves." See *Lemke v. Brooks*, 614 N.W.2d 242, 246 (Minn. App. 2000) ("Lemke does not seek damages against a tribe, tribal official, or tribal business, or implicate the sovereign immunity of the tribe. Therefore, the principles expressed in *Gavle* do not require the state district court to defer to the tribal court."), and cases cited therein.

Even assuming the State of Minnesota and the MLBO have concurrent jurisdiction over claims for worker's compensation benefits asserted against individual members of

the tribe engaged in business ventures for personal profit, established principles of tribal sovereign immunity, infringement and preemption do not require that the State of Minnesota should defer to the jurisdiction of the MLBO. The state of Minnesota should assert jurisdiction over such cases to protect its strong interest in making sure citizens of this state who suffer work-related injuries have adequate remedies available to them.

IV. MLBO TRIBAL LAW IS CONSISTENT WITH RESPONDENT'S POSITION.

The "laws" adopted by the MLBO are consistent with the principles adopted by this Court in the *Gavle* decision.

The tribe's two workers' compensation plans limit claims to employees of the MLBO or the Corporate Commission of the MLBO, exactly as contemplated by the three-factor test established by *Gavle*.

The MLBO statutes distinguish exclusive original jurisdiction from concurrent jurisdiction.

Title 24, Subchapter 1, Section 2 of the Mille Lacs Band Statutes Annotated sets forth the band's position concerning matters over which it shall have *exclusive original jurisdiction*. Specifically, Title 24, Subchapter 1, Section 2(b) provides in relevant part, "The Court of Central Jurisdiction shall have exclusive original jurisdiction over all civil matters in which the Non-Removable Mille Lacs Band of Chippewa Indians, any of its political subdivision or entities, or its officers, appointees or employees are parties in their official capacity...." [Employee's Exhibit F.]

This language closely tracks and is consistent with the three-factor test established by *Gavle*. The only types of cases over which the band itself exercises *exclusive original jurisdiction* are those in which the band itself or any of its political subdivisions, entities or officers acting in their official capacity are involved. That simply is not the case here.

The other provisions of the Mille Lacs Band Statutes Annotated discuss matters over which the MLBO is willing to assert *concurrent jurisdiction.* None of these provisions deal with workers' compensation claims other than those asserted by employees of the MLBO or of the Corporate Commission of the MLBO. The MLBO has chosen not to assert jurisdiction over such claims. [Employee's Exhibits F, M, N and O.]

Respondent never did and never will have the option of pursuing his claims for workers' compensation benefits against Relator Nickaboine in MLBO tribal court or under MLBO tribal law. There is no original jurisdiction. There is no concurrent jurisdiction. Respondent's only option is to sue Relator Nickaboine for benefits under Minnesota law in the Office of Administrative Hearings.

V. THE WCCA PROPERLY RULED THAT WORKERS' COMPENSATION CLAIMS ARE CIVIL CAUSES OF ACTION OF THE TYPE CONTEMPLATED BY 28 U.S.C. § 1360

Relators argue that a Minnesota workers' compensation administrative hearing "obviously" is not a civil regulatory law as contemplated by 28 U.S.C. § 1360 (Public Law 280), and that "[n]o 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." This issue presents a question of law, and this Court is

not bound by, and need not give deference to, the Workers' Compensation Court of Appeals' decision on questions of law. See *Bondy v. Allen*, 635 N.W.2d 244, 249 (Minn. App. 2001) (citing *Frost-Benco Elec. Ass'n. v. Minn. Pub. Utils. Comm'n*, 358 N.W.2d 639 (Minn. 1984).

In *Tibbetts v. Leech Lake Reservation Business Comm.*, 397 N.W.2d 883, 887, 39 W.C.D. 238, 243 (Minn. 1986), a case cited by Relators at pages 17, 20, 21 and 23 of their brief, this Court ruled: "It cannot reasonably be argued that [the] Minnesota Workmen's Compensation Act ... is not a civil regulatory law. Obligations and liabilities are imposed upon employers and employees regulating not only the forum and its procedures, but issues of substantive law as well. Minn. Stat. ch. 176 provides for a 'mutual renunciation of common law rights and defenses.' Minn. Stat. § 176.001 (1984). In return for scheduled benefits for compensating employees who sustain injuries in the course of the employment relationship, the employer's liability is made substantially absolute. Chapter 176, indeed, is a civil regulatory law."

VI. THE WORKERS' COMPENSATION COURT OF APPEALS PROPERLY INTERPRETED AND APPLIED 40 U.S.C. § 3172.

Although arguably unnecessary to the resolution of the issues raised by Relators, the Workers' Compensation Court of Appeals properly interpreted and applied 40 U.S.C. § 3172 as providing further support of its ruling that the State of Minnesota has jurisdiction over Respondent's claim for workers' compensation benefits against Relators. This issue presents a question of law, and this Court is not bound by, and need not give deference to, the Workers' Compensation Court of Appeals' decision on

questions of law. See *Bondy v. Allen*, 635 N.W.2d 244, 249 (Minn. App. 2001) (citing *Frost-Benco Elec. Ass'n. v. Minn. Pub. Utils. Comm'n*, 358 N.W.2d 639 (Minn. 1984).

40 U.S.C. § 3172 provides in relevant part, 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."

In *Tibbetts, supra*, this Court noted: "The sole objective of [40 U.S.C. § 3172] was to close a gap that prevented states from exercising workers' compensation jurisdiction over work-related injury causing accidents occurring on federal lands. 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." 397 N.W.2d at 888, 39 W.C.D. at 243.

In this case, the land on which Respondent's injury occurred is owned by the federal government and is held in trust for the MLBO. Relators never contended that the State of Minnesota lacks jurisdiction over Respondent's claims because the land on which his injury occurred is owned by the federal government; but, the Workers' Compensation Court of Appeals' reference to and application of 40 U.S.C. § 3172 properly disposes of that issue. It also addresses apparent confusion on the part of the compensation judge concerning the application of these federal statutes.

Relators argue the Workers' Compensation Court of Appeals ignored the "fact" that Relator Nickaboine is a "tribal employer" not a "Minnesota employer." Relators cite no authority for their position. Moreover, they invoke a term, "tribal employer," that (as pointed out by the Workers' Compensation Court of Appeals in footnote 2 of its decision), is found nowhere in statutory or case law, but is unique to the compensation judge's decision in this matter.

Relators confuse the legal distinction between Indian tribes and businesses owned by Indian tribes, and individual members of Indian tribes and businesses owned by individual members of Indian tribes. Sovereign immunity applies to tribes and businesses owned by tribes; sovereign immunity does not apply to individual members of tribes or businesses owned by individual members of tribes.

Relator Nickaboine is an individual member of the MLBO who operates his business as a sole proprietor for his own personal profit. He is not a "tribal employer" because he is not the tribe and his business is not owned by the tribe.

VII. RESPONDENT'S CLAIMS AGAINST RELATOR NICKABOINE ARE FOR WORKERS' COMPENSATION BENEFITS NOT BREACH OF A CONSENSUAL COMMERCIAL TRANSACTION.

Compensation Judge Patterson inexplicably considered whether or not the employment contract between Respondent and Relator Nickaboine constituted a "consensual commercial transaction" between a tribal member and a non-tribal member. She decided that it did. She then went on to state that "Tribal Court has primary jurisdiction over claims arising from consensual commercial transactions between Tribal

members and non-Tribal members." She also reasoned, "Where, as here, an employee entered into a contract for hire with a Tribal member who operated a Tribal business only on Tribal land, as a subcontractor under a general contract providing for disputes between the general contractor and MLBO to be resolved in the MLBO Court of Central Jurisdiction, the MLBO Court of Central Jurisdiction has subject matter jurisdiction to hear and decide the employee's claim for workers' compensation benefits."

Relators have perpetuated this issue in their brief by discussing the terms of the contract between the MLBO and M.A. Mortenson Company, and the contract between M.A. Mortenson Company and Relator Nickaboine.

This reasoning completely misses the point. Respondent is claiming entitlement to workers' compensation benefits arising out of an injury that occurred while he was working for Relator Nickaboine. He is not asserting a breach of contract claim. His claims do not involve a dispute between M.A. Mortenson and the MLBO, or between M.A. Mortenson and Relator Nickaboine. The fact that the MLBO Court of Central Jurisdiction may assert subject matter jurisdiction over breach of contract claims is simply irrelevant.

CONCLUSION

Respondent respectfully requests that this Court affirm the decision of the Workers' Compensation Court of Appeals in all respects, and remand this matter back to the Office of Administrative Hearings for a trial on the merits of Respondent's claim for workers' compensation benefits.

Respondent also requests an award of attorney fees pursuant to Minn. Stat. § 176.511, subd. 5 and reimbursement of the costs incurred in responding to this appeal.

Respectfully submitted,

Law Office of David C. Wulff

Dated: 4/15/10

David C. Wulff (#0162401)
Attorney for Respondent
2575 Hamline Ave., N., Suite D
Roseville, MN 55113
651-636-1900

STATE OF MINNESOTA

IN SUPREME COURT

CASE TITLE:

Rodney W. Swenson,

Respondent,

v.

Northland Quality Builder,

Relator,

and

SFM Mutual Insurance Company,

Relator,

and

1. Medica Health Plans,
2. Detroit Lakes Chiropractic,
3. MN Department of Labor & Industry/VRU, and
4. MeritCare Health System,

Intervenors.

CERTIFICATION OF BRIEF LENGTH

SUPREME COURT NO.: A10-380

WORKERS' COMPENSATION COURT OF APPEALS NO.: WC09-4977

DATE OF SERVICE OF WRITTEN NOTICE OF DECISION: 01/26/2010

I hereby certify that this brief conforms to the requirements of Minnesota Rules of Appellate Procedure 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 681 lines and 6,966 words. This brief was prepared using Microsoft Office Word 2007.

Dated: April 15, 2010.

LAW OFFICE OF DAVID C. WULFF

Brenda K. Bialke

Brenda K. Bialke, Paralegal
2575 Hamline Avenue North, Suite D
Roseville, MN 55113
651/636-1900