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SUPREME COURT  
STATE OF OKLAHOMA

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IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

JOHN A. WALTRIP,

Petitioner,

-v-

OSAGE MILLIOIN DOLLAR ELM CASINO

and

HUDSON INSURANCE COMPANY,

Respondents.

BRIEF IN CHIEF of PETITIONER, JOHN A. WALTRIP

THE WORKERS' COMPENSATION COURT

STATE OF OKLAHOMA

HONORABLE OWEN T. EVANS, TRIAL JUDGE

APPEAL FROM AN ORDER DENYING JURISDICTION

LAW OFFICE OF BRYCE A. HILL

Bryce A. Hill, O.B.A. # 11346

1511 South Delaware Avenue

Tulsa, Oklahoma 74104

918-584-2889

February 23, 2011

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**BRIEF IN CHIEF of PETITIONER, JOHN A. WALTRIP**

---

**INTRODUCTION**

On December 9, 2008, Claimant below, Petitioner herein, John A. Waltrip ("Waltrip") slipped and fell on a patch of ice at work that resulted in various injuries, the most significant of which was an injury to his Right Shoulder. Waltrip initially obtained medical treatment from his personal physician. Tribal First, the third party administrator for Hudson Insurance, chose to send Waltrip for an evaluation with an orthopedic specialist, Thomas Marberry, M.D., on June 9, 2009, at which time Dr. Marberry

recommended a bone scan. After performance of a bone scan, Dr. Marberry evaluated Waltrip again on August 25, 2009 and recommended surgery to Waltrip's right shoulder. The recommended surgery was never authorized, even though Dr. Marberry was selected to treat Waltrip by Tribal First. A year later Dr. Marberry was requested by counsel for Hudson / Tribal First to render an opinion as to whether the need for surgery was due to the December 9, 2008 work injury or from a right shoulder injury ten years previous. Dr. Marberry responded in his report of July 20, 2010 that Waltrip recovered from his previous injury and the need for the recommended surgery was due to the recent injury of December 9, 2008.

As the above scenario was transpiring Waltrip filed a Form 3 with the Oklahoma Workers' Compensation Court in an effort to gain court assistance in obtaining the surgery recommended by Dr. Marberry. The Osage Million Dollar Elm Casino and Hudson Insurance ("Respondents") moved to dismiss the claim filed in the Oklahoma Workers' Compensation Court due to lack of jurisdiction founded upon the sovereign immunity of the Osage Nation and its business, the Osage Million Dollar Elm Casino. Hearing was held on the issue of jurisdiction before the Honorable Owen T. Evans on November 23, 2010. Judge Evans issued an Order that was filed on December 9, 2010 which in paragraphs number 6 and 7 determined the Oklahoma Workers' Compensation Court did not have jurisdiction over

Hudson Insurance Company and therefore dismissed Waltrip's claim for benefits under the Oklahoma Workers' Compensation Act. It is the Order of December 9, 2010 from which Waltrip now appeals and seeks this Court's review.

### **SUMMARY OF TRIAL PROCEEDINGS**

Hearing on the sole issue of jurisdiction was held before the Honorable Owen T. Evans on November 23, 2010. No witnesses were called at the hearing of this matter. Both parties submitted trial briefs, exhibits and presented arguments as contained in the hearing transcript.

### **STANDARD OF REVIEW**

When the issue on review questions a factual finding of the workers' compensation trial court, the standard of review before the appellate court is the any competent evidence standard, *Sneed -v- McDonnell Douglas*, 1999 OK 84, 991 P.2d 1001. However, if the appellate court is presented with a question of law, the reviewing court uses a de novo standard without deference to the reasoning of the trial court, *Arrow Tool & Gauge -v- Mead*, 2000 OK 86, 16 P.3d 1120. Under *de novo* review the appellate court shows no deference to the trial court's decisions on questions of law with the appellate court independently determining the presented questions of law. In cases involving jurisdiction and constitutional violations, this independent review can involve weighing the evidence and redetermination

of the facts. Bomford v. Socony Mobil Oil Co., 1968 OK 43, 440 P.2d 713;  
Bose Corp. v. Consumers Union, 466 U.S. 485, 104 S. Ct. 1949 (1984).

### **ARGUMENT AND AUTHORITY**

The propositions set forth below will correspond in number to the  
Issues and Errors enumerated in Waltrip's Petition for Review.

### **PROPOSITION I**

#### **THE TRIAL COURT COMMITTED ERROR IN FAILING TO APPLY THE "ESTOPPEL ACT" OF TITLE 85 O.S. §65.2 and §65.3**

Waltrip agrees with many of the assertions of the Osage Nation contained in the *Trial Brief of Respondent and Insurance Carrier*, particularly that the Osage Nation and its owned business entities enjoy the benefit of sovereign immunity from the jurisdiction of the Oklahoma Workers' Compensation Court, as reflected in Waltrip's stipulations set forth in his Trial Brief. However, Hudson is a Delaware corporation and does not enjoy the protection of sovereign immunity and IS subject to the jurisdiction of the Oklahoma Workers' Compensation Court. As shown below, the stipulations of Waltrip combined with the admissions of the Osage Nation and Hudson, the language of the Hudson policy, the **lack of an Osage Nation Congress legislated** workers' compensation act, statutes or ordinances, the **lack of an Osage Nation Congress legislated forum** for resolving disputes and issues regarding benefits to be provided by Hudson

all lead to the conclusion that the “Estoppel Act”, which is found at *Title 85 O.S. §§ 65.2 and 65.3*, is applicable to the present claim and operates to grant the Oklahoma Workers’ Compensation Court jurisdiction over **ONLY Hudson Insurance Group** and NOT the Osage Nation.

The Estoppel Act has been applied to maintain jurisdiction over an insurance company that writes workers’ compensation insurance for an Indian Tribe, when the following three criteria are met: **1)** an accidental injury occurs during the time when there is in effect a policy of insurance that covers work related injuries (met in this claim via Admission #4, Record Index No. 30, Trial Brief, Exhibit “A”); **2)** the Tribe has paid premiums for the insurance based on the claimant’s salary or upon the number of employees and their job classifications that were considered in the premium calculation (met in this claim via Admission #5, Record Index No. 30, Trial Brief, Exhibit “A”); and **3)** the claimant’s injury arose out of and in the course of employment with the Tribe, (met in this claim via Admission #6, Record Index No. 30, Trial Brief, Exhibit “A”). Dominic –v- Creek Nation, 1997 OK 41, 936 P.2d 935. (Record Index No. 30, Trial Brief, Exhibit “E”).

Additionally, in Dominic the Oklahoma Supreme Court held:

The employer's compensation policy is treated as a guarantee that the insured entity's employee is protected by the Workers' Compensation Act. Once the existence of insurance is established, *jurisdictional requirements for proceeding before the trial tribunal are deemed met.*

The Court went on to state that "The rationale of the "estoppel act" is that an insurer who accepts premiums, as Hudson has done in this matter, should not evade liability for benefits due under compensation law. By long-settled case law, the "estoppel act" bars the insurer from interposing any challenge to the employer's status as an entity covered by the compensation law." "What triggers estoppel's application is the employer's payment of insurance premiums computed on claimant's wages. Once that proof is met, a compensation insurance policy is conclusively presumed to be for the benefit of the insured's employee regardless of the type of business in which the employer is engaged or the nature of the employee's work, whether hazardous or otherwise." Dominic, supra. Hudson clearly falls within the parameters contemplated by the Estoppel Act and the interpreting case law.

Hudson has argued and taken the position in its trial brief that its insurance policy (Record Index No. 30, Trial Brief, Exhibit "C") is "expressly intended to provide sovereign nation workers' compensation benefits to employees of the Assured / Tribal Nation .... The benefits provided under this policy are established by the Assured / Tribal Nation."

(Emphasis added). As admitted by the Tribe and Hudson, there is no Tribal legislative enactment to establish the benefits to be provided by Hudson. As will be discussed more fully below in Proposition III, Waltrip had no other forum available to enforce the Hudson policy and the language of the policy clearly contemplated the use of a state workers' compensation act for the determination of benefits.

## **PROPOSITION II**

### **THE TRIAL COURT COMMITTED ERROR IN RELYING ON THE CASE OF *HALL –v- CHEROKEE NATION* AS THE OSAGE NATION HAS NOT ENACTED WORKERS' COMPENSATION LAW**

Claimant agrees that Hudson provides the Osage Nation with “Sovereign Nation Workers’ Compensation Insurance”. The problem for Hudson is the fact that the Osage Nation Congress has never enacted or legislated a workers’ compensation act, statutes or ordinances to delineate the workers’ compensation benefits to be provided by the Hudson policy and the Osage Nation does not provide for a court or other issue resolution mechanism to resolve issues and disputes regarding compensability, medical treatment and benefits. Hudson relies on the cases of *Hall –v- Cherokee Nation*, 2007 OK CIV APP 49, 162 P.3d 979 and *Pales –v- Cherokee Nation Enterprises*, 2009 OK CIV APP 65, 216 P.3d 309. Those cases and the two subsequent cases of *Quinton –v- Cherokee Nation Enterprises*, 2010 OK CIV APP 16, 229 P.3d 581 and *Hamby –v- Cherokee Nation Casinos*, 2010

OK CIV APP 21, 231 P.3d 700 (attached to Waltrip's Trial Brief, Record Index No. 30, Exhibit "B") are tabbed and highlighted to point out that in each case, **the Cherokee Nation had a duly legislated workers' compensation ordinance in effect and provided a forum for resolving issues under those ordinances** regarding compensability, medical treatment and monetary benefits Hudson was obligated to provide. In each of the four cited cases, the appellate court found the Estoppel Act inapplicable and the Oklahoma Workers' Compensation Court lacked jurisdiction because the Cherokee Nation had workers' compensation ordinances and a mechanism for dispute resolution regarding benefits to be provided by the insurance carrier. The failure of the Osage Nation to have a worker's compensation ordinance and court for resolution of disputes and enforcement of the Hudson policy is a fatal flaw and creates a huge void in Hudson's position regarding jurisdiction.

Since the Osage Nation has no workers' compensation statutes or court to enforce payment of benefits provided by the Hudson policy, the **ONLY** tribunal available for Waltrip is the Oklahoma Workers' Compensation Court as the Estoppel Act and its interpreting case law forbid that an insurance company collect a premium to provide benefits for work related injuries, and then hide behind the employer's sovereign immunity to avoid payment, which is exactly what Hudson is doing in this claim.



Unfortunately the Trial Court relied upon Hall, supra, in paragraph six (6) of its Order to deny jurisdiction of the Oklahoma Workers' Compensation Court without fully realizing the significance of the Osage Nation having no workers' compensation law or forum. While it is true the Hudson policy does not refer to Oklahoma by name, it is clear from the language of the Hudson policy that in situations such as this, where there is no workers' compensation law or ordinances legislated by the insured Indian Nation, that the law of the state where the Nation is located may be used to determine benefits up to the state maximum. The Hudson policy language and its implications of creating jurisdiction with the Oklahoma Workers' Compensation Court will be more fully explored in Proposition III below.

### **PROPOSITION III**

#### **THE HUDSON INSURANCE POLICY CONTEMPLATED USE OF OKLAHOMA LAW WHEN AN INDIAN NATION HAS NOT ENACTED IT'S OWN WORKERS' COMPENSATION LAW**

As admitted by the Osage Nation and Hudson, there is no legislative enactment by the Osage Nation Congress to establish the benefits to be provided by Hudson. This void thereby allows Hudson to impose its will on claimants, such as Waltrip in the present claim, and leaves all such claimants with no avenue of recourse other than the state workers' compensation system. The insurance policy provided through discovery by Hudson,

Record Index No. 30, Trial Brief, Exhibit “C”, has been highlighted for the Court to illustrate that it refers to benefits “established by the Tribe”, that do not exist. See Page 1 of the Hudson policy in Paragraph C to see the following language (emphasis added):

“Sovereign Nation Workers’ Compensation means the workers or workmen’s compensation benefits as established by you.”

“... the actual benefits provided by this policy are subject to the tribal ordinance related to workers compensation benefits, in effect as of the effective date of this policy.”

In cases such as the present matter, where an Indian Nation has not enacted or legislated any workers’ compensation statutes or ordinances, the policy sets out the following:

In the absence of a tribal ordinance you may or may not elect to utilize a state’s workers’ compensation benefit levels as a guideline for the benefits payable under this policy. However, in no event shall the benefits payable exceed such state level benefits. The mere use of a state’s benefit levels as a guide for payments, however, does not constitute an adoption of such state’s benefit levels and shall not be construed as a waiver of your sovereign immunity. (Emphasis added)

With the Osage Nation having no workers’ compensation act, statutes or ordinances, and with the policy language referencing the state’s benefit guidelines and that the benefits Hudson would pay cannot be greater than the state’s benefits levels, Hudson clearly contemplated and considered

situations such as the present matter where the Osage Nation they are insuring has not legislated workers' compensation ordinances, statutes or laws.

Next, the Court's attention is directed to a very telling provision of the Hudson policy found at Page 2, Paragraph H, section 3, wherein it is stated:

"We are directly and primarily liable to any person entitled to the benefits payable by this insurance. Those persons may enforce our duties; so may an agency authorized by law. Enforcement may be against us or against you and us."  
(Emphasis added).

Per the language of the Hudson policy, Waltrip, as a person who is entitled to the benefits payable by Hudson, is within his right to seek enforcement of the policy for the authorization of medical treatment and the payment of monetary TTD benefits. The Oklahoma Workers' Compensation Court is clearly, "an agency authorized by law" that is charged with resolving disputes concerning work related injuries and by the very language of the Hudson Insurance policy, the Oklahoma Workers' Compensation Court is empowered to enforce the provisions of the Hudson policy per "state benefit guidelines" via the Estoppel Act as set out above.

#### **PROPOSITION IV**

#### **THE TRIAL COURT WAS INCORRECT IN DECLINING TO ACCEPT JURISDICTION OVER HUDSON AS WALTRIP MET ALL REQUIRED ELEMENTS TO TRIGGER APPLICATION OF THE ESTOPPEL ACT AND THEREBY CONVEY JURISDICTION UPON THE OKLAHOMA WORKERS' COMPENSATION COURT**

The stipulations, admissions, facts, arguments and legal support contained in Propositions I, II and III above also apply to and fully support the present proposition that the Trial Court committed reversible error in failing to find that Waltrip met all requirements for application of the Estoppel Act to convey jurisdiction upon the Oklahoma Workers' Compensation Court. In Paragraph seven (7) of the Order of December 9, 2010 the Trial Court determined the Oklahoma Workers' Compensation Court did not have jurisdiction over the present matter and dismissed the claim of Waltrip with prejudice. Waltrip feels it is necessary to specifically contest the Trial Court's finding in paragraph seven (7) of its Order and hereby incorporates the entire content of Propositions I, II and II in support of this Proposition.

#### **PROPOSITION V**

#### **IN FAILING TO FIND JURISDICTION, THE TRIAL COURT VIOLATED ARTICLE I, §6 and §7 OF THE CONSTITUTION OF THE STATE OF OKLAHOMA**

Waltrip is a citizen of the State of Oklahoma and as such has an unalienable and absolute right to seek a remedy against Hudson Insurance

Group, a Delaware corporation conducting insurance business within the State of Oklahoma, for wrongfully refusing to pay workers' compensation benefits, pursuant to The Constitution of the State of Oklahoma, Article I, §6 which states:

*"The course of justice of the State shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation; and right and justice shall be administered without sale, denial, delay or prejudice."*

The absence of any workers' compensation law or forum legislated by the Osage Nation Congress and the Order of the Trial Court divesting itself of jurisdiction deprives Waltrip of due process of law and violates The Constitution of the State of Oklahoma, Article I, §7 which states:

*"No person shall be deprived of life, liberty, or property, without due process of law."*

The trial court committed reversible error in declining to accept jurisdiction in this matter as Waltrip is a citizen of the State of Oklahoma who sustained a work related injury within the State of Oklahoma and has been in need of a surgical operation to correct the injury to his right shoulder for over sixteen (16) months. The December 9, 2010 Order of the Trial Court deprived Waltrip of his Constitutional right to a remedy to correct the withholding of workers' compensation benefits by Hudson and in addition Waltrip has been wrongfully deprived of the physical ability to pursue the goals of his life and the liberty that medical treatment to cure the injury

would provide. Waltrip continues to lose property in the form of wages and the loss of personal property subsequent to his injury of December 9, 2008.

### **PROPOSITION VI**

#### **THE OSAGE NATION DOES NOT ENJOY SOVEREIGN IMMUNITY WHEN ITS CASINO IS PHYSICALLY SITUATED IN THE STATE OF OKLAHOMA AND NOT ON LAND HELD IN TRUST FOR THE OSAGE NATION**

Reluctantly, and only as a last resort to show the Oklahoma Workers' Compensation Court has jurisdiction over the present matter, Waltrip believes the Osage Million Dollar Casino has been determined to be located on fee land in the state of Oklahoma and is not situated on land held in trust for the Osage Nation as the Osage Reservation was disestablished by Congress over one hundred years ago. *Osage Nation -v- Irby, et al.*, 597 F.3d 1117, 1121. Although the *Irby* case involved the Tenth Circuit Court of Appeals affirming the right of the State of Oklahoma's to collect income tax from a member of the Osage Nation living in Osage County, the body of the opinion makes clear that due to the Osage Allotment Act of 1906 the vast majority of the land that is now Osage County is no longer under Tribal control or held in trust for the Tribe, but rather is private fee land under the governance of the state of Oklahoma. *Irby*, supra at 1125. Unfortunately for the Osage Nation, "the 2005 compact between the Osage Nation and the state of Oklahoma authorizing the Nation to conduct gaming on its "Indian

lands” has resulted in the operation of casinos on fee lands in Osage County.” *Irby*, supra at 1126.

Due to the fact that the Osage Nation has been and is currently operating the Osage Million Dollar Elm Casino on land that is situated on fee property within and governed by the state of Oklahoma, the Osage Nation does not have the sovereign immunity it would have had if the casino were situated on “Indian land” held in trust for the Osage Nation. The Osage Nation has no more rights than any business that comes to Oklahoma from outside the United States. Canadian businesses in Oklahoma do not get to claim that work injuries are governed by Canadian law and neither do European or South American companies get the benefit of the law of their homeland. If a foreign company is doing business in Oklahoma, it is Oklahoma law, including the Oklahoma Workers’ Compensation Act, that applies to work related injuries. The Osage Nation is no different than any other foreign country or corporation that operates a business in Oklahoma with respect to being subject to the Oklahoma Workers’ Compensation Act for work related injuries.

## PROPOSITION VII

### THE TRIBAL FIRST WORKERS' COMPENSATION PROVISIONS WERE NOT A PART OF THE HUDSON INSURANCE CONTRACT WITH THE OSAGE NATION and THE OSAGE NATION CONGRESS HAS NEVER ADOPTED, LEGISLATED OR ENACTED THE TRIBAL FIRST PROVISIONS FOR USE IN OSAGE NATION WORK RELATED INJURIES

Respondents argued at the Trial Court hearing that the "Workers' Compensation Provisions" of Tribal First, the Third Party Administrator<sup>1</sup> for Hudson Insurance, are applicable to the present claim. Claimant would point out that the Information Page and the Hudson insurance policy contain all agreements between the Osage Nation and Hudson. In fact, in the General Section, Paragraph "A", the policy states:

This policy includes at its effective date the information Page and all endorsements and schedules listed there. It is a contract of insurance between you (the tribe named in Assured in Item 1 of the Information Page) and us (the insurer named on the Information Page). **The only agreements relating to this insurance are stated in this policy. The terms of this policy may not be changed or waived except by endorsement issued by us to be part of this policy.** (Emphasis added)

A review of the Hudson Insurance policy and all of its attachments reveals that there is absolutely no mention of the Tribal First workers' compensation provisions. Respondents' Trial Brief was couched in language that could erroneously lead this Court to believe that the Hudson

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<sup>1</sup> A "third party administrator" is nothing more than a private adjusting company hired to adjust the claims of an insurance company. In the present case, Tribal First is adjusting the claims for Hudson Insurance Group.



policy itself references the Tribal First workers' compensation provisions, however, such language is nowhere to be found in the Information Page, the Endorsements or the Policy itself (See Record Index No. 30, Trial Brief, Exhibit "C"). Clearly, workers' compensation provisions referenced by Hudson were developed and created by a complete stranger to the contract between Hudson and the Osage Nation. The third party administrator, Tribal First, is not a party to the insurance contract between the Osage Nation and Hudson and therefore the "workers compensation provisions" have absolutely no applicability in the present matter and accordingly should be ignored and should have been excluded from evidence per Waltrip's objection at the Trial Court hearing.

The Constitution of the Osage Nation (Record Index No. 34), Article VI – Legislature, provides in Section 1 for one legislative body known as the Osage Nation Congress and in Section 12 sets out the process for enacting a law:

No laws shall be made except by statute and no statute shall be enacted except by bill. No bill shall be passed without the concurrence of a majority of the members of the Osage nation Congress.

Neither Hudson or the Osage Nation provided evidence of any enactment by the Osage Nation Congress that adopted the Tribal First workers compensation provisions as law.

Any attempt by Hudson to argue that the Tribal First “workers compensation provisions” have any applicability to the present matter is misplaced as Tribal First was not a party to the insurance contract between Hudson and the Osage Nation, the Tribal First “workers compensation provisions” were not made a part of the insurance contract by agreement, reference or endorsement and the Osage Nation Congress has not adopted the Tribal First “workers compensation provisions”. Therefore, the Tribal First “workers compensation provisions” can have no applicability to the present matter.

### **SUMMARY AND CONCLUSION**

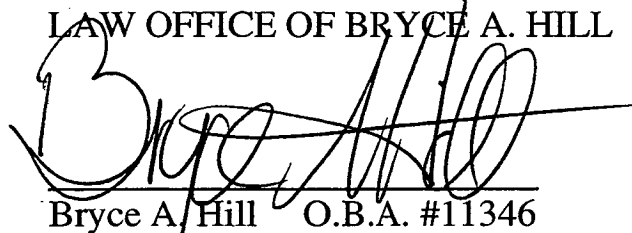
John Waltrip was injured over two (2) years ago and has been waiting for over sixteen (16) months for a surgery as recommended by the orthopedic specialist selected by Tribal First. The Osage Nation Congress has enacted no workers’ compensation laws and provides no forum to hear issues regarding work injuries that occur at its casino. The Osage Nation has however contracted with the Hudson Insurance Group to provide workers’ compensation insurance. The policy language clearly contemplates a situation such as the one encountered in the present case where the insured Indian Nation does not have workers’ compensation laws or ordinances. The present matter clearly meets all three (3) requirements of the Estoppel Act to hold Hudson Insurance within the jurisdiction of the

Oklahoma Workers' Compensation Court. The four (4) most recent appellate opinions involve the Cherokee Nation and those cases are distinguishable as the Cherokee Nation has workers' compensation statutes and a forum for dispute resolution whereas the Osage Nation has neither. Additionally, John Waltrip is an Oklahoma citizen and the Constitution of the State of Oklahoma guarantees him the right to a certain and speedy remedy for his injuries and that he will not be deprived of life, liberty or property without due process. Lastly, the Osage Million Dollar Elm Casino is not sitting on land held in trust for the Osage Nation, but rather is sitting on Oklahoma land that does not provide the sovereign immunity the Osage Nation would enjoy if the casino were on land held in trust for the Osage Nation.

For the above and foregoing reasons, John Waltrip respectfully asks this Appellate Court to reverse and vacate the December 9, 2010 Order of the Trial Court, hold that the Oklahoma Workers' Compensation Court has jurisdiction over this work related injury and remand this to the Trial Court for further proceedings to award benefits under the Oklahoma Workers' Compensation Act.

Respectfully Submitted,

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**CERTIFICATE OF MAILING**

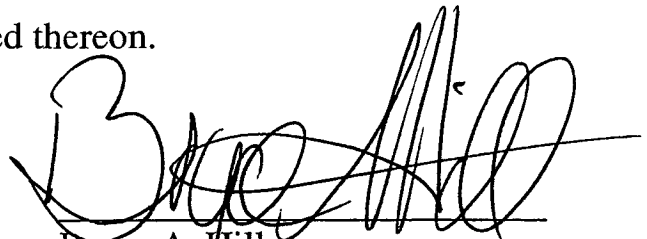
I hereby certify that on the 23<sup>rd</sup> day of February 2011, I mailed a true and correct copy of the above and foregoing Brief in Chief of Petitioner to:

Leah P. Keel, Esq.  
1800 South Baltimore Avenue  
Suite 500  
Tulsa, Oklahoma 74119

and

Robert Tharp, Clerk  
Workers' Compensation Court  
1915 North Stiles Avenue  
Oklahoma City, Oklahoma 73105

with proper postage fully prepaid attached thereon.

  
Bryce A. Hill