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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota, by and through Workforce Safety and Insurance, **Appellee,** **vs.** **Cherokee Services Group, LLC, Cherokee Nation Government Solutions, LLC, Cherokee Medical Services, LLC, Cherokee Nation Technologies, LLC, Steve Bilby and Hudson Insurance Company,** **Appellants.**	**Supreme Court No.: 20200166** **Burleigh County Civil** **No. 2018-cv-01075** **ORAL ARGUMENT REQUESTED**

BRIEF OF APPELLEE NORTH DAKOTA WORKFORCE SAFETY AND INSURANCE

APPEAL FROM DISTRICT COURT ORDER REVERSING ADMINISTRATIVE LAW JUDGE'S DECISION DATED MAY 13, 2020, AND DISTRICT COURT ORDER FOR JUDGMENT AND JUDGMENT DATED MAY 14, 2020
BURLEIGH COUNTY DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT
THE HONORABLE DAVID E. REICH

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STATEMENT OF THE ISSUES

[1] Whether the District Court correctly concluded that the Appellants are not entitled to tribal sovereign immunity from liability for unpaid workers compensation premiums.

[2] Whether the District Court correctly concluded that Steven Bilby could be held personally liable under N.D.C.C. § 65-05-26.1 for unpaid premiums.

[3] Whether the District Court correctly concluded that WSI had authority to issue a cease and desist order to Hudson Insurance Company.

REQUEST FOR ORAL ARGUMENT

[4] Pursuant to Rule 28(h) of the North Dakota Rules of Appellate Procedure, Appellee Workforce Safety and Insurance ("WSI") requests oral argument. This appeal raises issues of law concerning whether tribal entities, operating on non-tribal/sovereign land are subject to application of workers compensation laws under Title 65 of the North Dakota Century Code. In addition, there is an important question on the authority of WSI to issue a cease and desist order relating to insurance companies writing policies for workers compensation coverage in North Dakota. It is believed oral argument will assist the Court in understanding the important factual and legal distinctions in the case law addressing tribal immunity that are implicated by the facts of this case.

STATEMENT OF THE CASE

[5] On February 4, 2015, WSI issued an Administrative Order relating to the Employer Account of Cherokee Services Group, LLC, Cherokee Nation Government Solutions, LLC, Cherokee Medical Services, LLC and Cherokee Nation Technologies, LLC ("Cherokee Entities"). (Appx. 21-37) Cherokee Entities submitted a Special Appearance,

Request for Reconsideration and Demand for Formal Hearing. (C.R.[1]18-25) An administrative hearing was held July 12, 2016. (C.R. 373-431) Following post-hearing briefing (C.R. 432-463; 465-478; 479-487) and responses to questions raised by the ALJ (C.R. 490-491; 492-504) the ALJ issued Findings of Fact, Conclusions of Law and Order dated March 22, 2018. (Appx. 38-47) In that decision the ALJ *reversed* WSI's February 4, 2015, Order. (Appx. 44)

[6] On April 19, 2018, WSI filed an appeal of the ALJ's March 22, 2018 Findings of Fact, Conclusions of Law and Order to the District Court, Burleigh County. See Docket # 1, Appx. 3; Appx. 61-63. The Cherokee Entities filed a Notice of Removal of the appeal to the United States District Court for the District of North Dakota on May 17, 2018. See Docket #6, Appx. 3. On November 1, 2019, the United States District Court for the District of North Dakota issued an Order Granting The Plaintiff's (WSI's) Motion to Remand. See Docket # 14, Appx.

[7] On May 13, 2020, the District Court, the Honorable David E. Reich, issued an Order Reversing Administrative Law Judge's Decision. (Appx. 48-55) The District Court reversed the ALJ's decision that the Cherokee Entities were entitled to tribal sovereign immunity from compliance with North Dakota workers compensation laws. (Appx. 54) Judgment was entered in District Court on May 14, 2020. (Appx. 57) The Cherokee Entities then filed the appeal to this Court. (Appx. 60)

STATEMENT OF FACTS

[8] WSI had in place a project known as the Job Service Referral Project. (C.R. 392-393) Through that project, WSI identified employers that were reporting

[1] C.R. refers to the Certificate of Record on Appeal to District Court dated November 7, 2019, filed pursuant to N.D.C.C. § 28-32-44.

payroll and wages to Job Service, but did not have coverage through WSI. (C.R. 393) WSI would send out a letter advising of the requirements to have coverage through WSI. (Id.) If a response was not received from the initial letter, a second, "more stern" letter is sent out. (Id.)

[9] Through this Job Service Referral Project a letter was generated to Cherokee Services Group, LLC on March 10, 2011 (C.R. 38, 393) and to Cherokee Nation Government Solutions on December 13, 2012 (C.R. 51, 393). A follow-up letter was sent to Cherokee Nation Government Solutions on February 25, 2013. (C.R. 56, 393) A response to the March 10, 2011, correspondence was received by WSI from Hudson Insurance Group stating it had issued a sovereign nation policy for Cherokee Nation Enterprises and Cherokee Services Group. (C.R. 43-45) WSI's legal department responded to that correspondence that North Dakota operates in a monopolistic environment and neither Hudson Insurance Group (nor any other private workers compensation carrier) is licensed to write workers compensation in the State. (C.R. 46) WSI made some follow-up contacts (C.R. 47-48) and the response received was that Cherokee Services Group, LLC was asserting sovereign immunity, claimed it was not subject to North Dakota's workers compensation laws and that the State of North Dakota therefore cannot assert jurisdiction over a wholly owned tribal entity and require it to obtain North Dakota workers compensation insurance. (C.R. 49) The correspondence from an attorney for the Cherokee Nation confirmed that Cherokee Services Group, LLC had "nine IT employees working in North Dakota." (C.R. 49)

[10] On December 13, 2012 and February 25, 2013, WSI sent correspondence to Cherokee Nation Government Solutions regarding the requirements of workers

compensation coverage when operating with employees in North Dakota. (C.R. 51-57) WSI asked for completion of an Application for Coverage or submission of a Verification of Non-Employment if there were no employees in North Dakota. (Id.)

[11] WSI's legal department again wrote to Cherokee Services Group, LLC on March 5, 2013, regarding information WSI had obtained that it had employees working at an office located in Minot, North Dakota. (C.R. 58-59) That correspondence noted that because Cherokee employed workers in North Dakota off the reservation, Cherokee was required to carry workers compensation insurance through WSI. (C.R. 58) On March 11, 2013, WSI received correspondence from IMA, Inc., an insurance broker for Cherokee Nation regarding a policy issued to Cherokee Nation Businesses, LLC by Hudson Insurance Company. (C.R. 63) That correspondence confirmed that Cherokee Nation Government Solutions, LLC had one employee working approximately 7 hours per month in North Dakota. (Id.) IMA responded that Cherokee Nation Government Solutions, LLC was wholly owned by Cherokee Nation of Oklahoma, and the tribe asserted sovereign immunity and elected to buy coverage through a Sovereign Nation Workers Compensation policy rather than through the State of North Dakota. (C.R. 63)

[12] On August 28, 2013, WSI's legal department again wrote to Cherokee Services Group, LLC. (C.R. 79) WSI noted that because it continued to employ workers in North Dakota and off the reservation, it was required to carry workers compensation coverage through WSI. (Id.) WSI asked Cherokee Services Group, LLC to establish coverage with WSI by completing an application and providing identity of individuals working in North Dakota. (C.R. 80)

[13] On October 31, 2014, Cherokee Nation Businesses, LLC "and its subsidiary, Cherokee Medical Services, LLC" wrote to WSI asserting sovereign immunity from WSI's requirement to obtain coverage for workers compensation for its employees. (C.R. 83) This letter was in response to an assessment charged to Cherokee Nation Businesses as a result of a claim filed with WSI by an Amy Thomas for an injury on March 10, 2014. (C.R. 82) The correspondence from Cherokee Nation Businesses confirmed Amy Thomas was "a CMS [Cherokee Medical Services, LLC] employee." (C.R. 83) Cherokee Nation asserted that tribal sovereign immunity extended to its entities, as tribal employers, operating off the reservation. (C.R. 84) On January 20, 2015, Cherokee Nation Businesses submitted certificates of liability insurance for Cherokee Services Group, LLC, Cherokee Nation Government Solutions, LLC, Cherokee Nation Technologies, LLC and Cherokee Medical Services, LLC. (C.R. 89-92) Cherokee again asserted that these commercial entities were immune from state workers compensation laws even for off-reservation activities. (C.R. 88)

[14] Sarah Feist, WSI's employer compliance specialist conducted some general research on each of the Cherokee entities. (C.R. 393) She also utilized Job Service and the Secretary of State to identify information on the operations and number of employees of each entity. (C.R. 393-394) For Cherokee Services Group, information obtained reflected that it acquired a previous business, Information Technology Experts (ITX). (C.R. 114, 394) A facsimile to Job Service North Dakota confirmed Cherokee Services Group "acquired 100% of the North Dakota workforce of Information Technology Experts, Inc." (C.R. 114, 117) As of September 11, 2009, Cherokee Services Group was the employer of these workers in North Dakota. (C.R. 115) The

business performed computer consulting services at two locations, one in Bismarck and one in Fargo. (C.R. 116) Feist's research also confirmed that the work being performed was not on sovereign land. (C.R. 394) Wages were reported quarterly to Job Service for these employees by Cherokee Services Group. (C.R. 394-395) WSI utilized this reported wage information to establish its billing to Cherokee Services. (C.R. 395) Feist also ran a report on a program called Clear from which it identified whether Cherokee had a physical location in North Dakota as well as determining the location of employees, i.e., that the employees work in North Dakota, live in North Dakota, and earn a paycheck in North Dakota, which she believed supported WSI insuring their risks. (C.R. 395) Feist also utilized filings with the North Dakota Secretary of State to identify any manager of a limited liability company for determination of personal liability. (C.R. 165a-165i, 395-396)

[15] Documentation obtained from Job Service North Dakota regarding Cherokee Nation Government Solutions, LLC, reflected it began reporting employees in February of 2011. (C.R. 167,171, 173) The Cherokee filing with Job Service North Dakota document noted it was "not doing business as an Indian tribe, they are doing business as a llc – corporation." (C.R. 171, emphasis supplied) Work being performed was "professional services" from individual employee residential addresses. (C.R. 172) The documentation reflects that Cherokee Nation Government Solutions "did not continue the business that was acquired." (C.R. 173)

[16] Investigation revealed Cherokee Medical Services, LLC, first employed workers in North Dakota as of July 17, 2012. (C.R. 183) The location of the business was the Minot Air Force Base. (C.R. 184) The type of work being performed was

"medical staffing." (Id.) In addition, Cherokee Nation Technologies, LLC, first employed workers in North Dakota in October of 2013. (C.R. 194) The services provided were "full service information tech services." (C.R. 195) The location where those services were performed was at an address in Bismarck, North Dakota. (C.R. 195)

[17] Cherokee Nation has no trust land outside of the State of Oklahoma. (C.R. 402) Thus, none of the Cherokee Entities that WSI asked to obtain coverage were being operated on sovereign trust land. (C.R. 407) At the hearing, Cherokee Nation submitted a copy of a Jobs Growth Act. (C.R. 212) The "primary purpose" of that Act was to create jobs for Cherokee citizens. (C.R. 402-404) It was confirmed, however, that Cherokee Nation also employs non-tribal citizens. (C.R. 402) Cherokee Nation does recognize that a state would have a valid concern about an entity coming into its state and employing its citizens. (C.R. 407) Carey Calvert, Director of Risk management and attorney for the Cherokee Nation, testified that only about 50 percent of the profits from the Cherokee Entities gets placed back into the Cherokee Nation. (C.R. 404) There was no evidence presented at the administrative hearing that the employees of these Cherokee entities operating in North Dakota were enrolled members of the Cherokee Nation.

[18] In its Order, WSI also sought to hold Steven Bilby personally liable for unpaid workers compensation premiums due by the Cherokee Entities under N.D.C.C. § 65-04-26.1. (C.R. 8-9) In addition, WSI ordered Hudson Insurance Company to cease and desist from writing workers compensation coverage in North Dakota. (C.R. 9)

[19] On February 4, 2015, ALJ Janet Demarais Seaworth issued Findings of Fact, Conclusions of Law and Order reversing WSI's Order. The ALJ concluded that while Cherokee employed workers in North Dakota "it was not subject to Title 65 as it is

a tribal entity cloaked with the tribe's sovereign immunity." (Conclusion of Law #1, Appx. 41) The ALJ concluded that Cherokee Nation had not waived its sovereign immunity in the area of workers compensation (Conclusion of Law #2, Appx. 41), and rejected WSI's arguments that asserting jurisdiction over the Cherokee Nation and its entities was necessary to ensure its substantial regulatory interests. (Conclusion of Law #2, Appx. 42) The ALJ also concluded that Steven Bilby could assert immunity from personal liability for any unpaid premiums of the Cherokee entities. (Conclusion of Law #3, Appx. 42-43) Lastly, the ALJ held that WSI did not have authority to issue a cease and desist order to preclude Hudson Insurance Company from issuing workers compensation coverage in North Dakota. (Conclusion of Law #4, Appx. 44) WSI appealed that decision. (Appx. 61)

[20] On May 13, 2020, the District Court, the Honorable David E. Reich, entered an Order Reversing Administrative Law Judge's Decision. (Appx. 48-55) The District Court rationale for reversing the ALJ's decision is summarized as follows:

> [¶14] In this case, the work of the employees of the Cherokee Entities was performed entirely off the Cherokee reservation and within the state of North Dakota. Cherokee Nation has no sovereign land in North Dakota. There does not appear to be any evidence in the record that the employees of the Cherokee entities were Cherokee tribal members. Documents filed by Cherokee Nation with Job Service North Dakota states that the Cherokee Entities are "not doing business as an Indian tribe."
>
> [¶15] Under the circumstances of this case, the exercise of tribal power to provide workers compensation coverage to nonmember workers in North Dakota is not necessary to protect tribal self-government or to control internal relations. The North Dakota workers compensation system is provided by nondiscriminatory state law and serves the important regulatory state interest of keeping workers within the boundaries of North Dakota safe, as well as providing care to injured workers with the State. Because the Cherokee Entities are employing individuals off-reservation and within the boundaries of North Dakota, the Cherokee

> Nation entities are subject to the jurisdiction of Workforce Safety and Insurance. Accordingly the ALJ's decision finding that the Cherokee Entities are entitled to tribal sovereign immunity from compliance with North Dakota workers compensation laws is Reversed.

(Appx. 54) It is from this Order that the Cherokee Entities have taken an appeal to this Court.

LAW AND ARGUMENT

I. SCOPE OF REVIEW ON APPEAL.

[21] On appeal, this Court reviews the decision of the ALJ, giving "due respect to the district court's analysis and review." Bergum v. Workforce Safety and Insurance, 2009 ND 52 ¶ 8, 764 N.W.2d 178. This appeal raises only questions of law. In reviewing the decision of an independent ALJ on legal issues, no deference is given to the ALJ's legal conclusions because questions of law are fully reviewable on appeal. Sloan v. North Dakota Workforce Safety and Ins., 2011 ND 194 ¶ 6, 804 N.W.2d 184.

II. THE ISSUE OF WHETHER TRIBAL SOVEREIGN IMMUNITY EXTENDS TO TRIBAL BUSINESSES AND ENTITIES IS NOT A MATTER OF ESTABLISHED LAW.

[22] Cherokee asserts that it is "well established" that tribal sovereign immunity "extends to tribal business entities when they act as an "arm of the tribe." This argument mischaracterizes the case law and does not account for the legal analysis required to determine whether a commercial entity of a tribe is operating off of tribal lands and therefore not an "arm of the tribe." District Court recognized that the ALJ erred in so concluding and reversed that decision.

[23] In Kiowa Tribe of Okla. V. Mfg. Techs., Inc., 523 U.S. 751 (1988) the United State Supreme Court specifically reaffirmed that their cases have in fact allowed states "to apply their substantive laws to tribal activities . . . ." Id. at 755. The holding in

Kiowa Tribe is limited to affirming that "tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation." Id. at 760, emphasis supplied. In Kiowa Tribe the tribe itself was a party to the contract. The situation here does not involve a contract, involves separately created entities of the tribe engaged in business activities on non-tribal land, that are employing individuals that are not members of the Cherokee Nation. The question raised in this action is whether the Cherokee Entities in this situation can assert sovereign immunity to WSI's application of the State of North Dakota's workers compensation laws. That is an entirely different question than what was answered in Kiowa.

[24] The United States Supreme Court in fact reiterated in Kiowa Tribe that it has "recognized that a State may have authority to tax or regulate tribal activities occurring within the State but outside Indian country." Id. at 755. The question in this case is whether the State of North Dakota's workers compensation laws apply to these Cherokee Entities. Although these entities were organized by Cherokee Nation, that Supreme Court has stated it was "unrealistic" to conclude that an entity is *automatically* an arm of the tribe and entitled to sovereign immunity. See Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973). In fact, the Supreme Court in Mescalero confirmed that tribal entities engaged in "off reservation activities are within the reach of state law." Id. at 153.

[25] In Sue/Perior Concrete & Paving, Inc. v. Lewiston Golf Course Corporation, 24 N.Y.S.3d 538, 542 (2014), the defendant (Lewiston) was a wholly owned subsidiary of the Seneca Nation of Indians. Id. It was organized under the laws of the

Seneca Nation. Id. It subsequently acquired land which was not part of a reservation or any sovereign land. Id. The plaintiff (Sue/Perior) contracted with Lewiston to build a golf course on the property owned by Lewiston. Id. at 544. Mechanic's liens were filed by plaintiff and subsequently a foreclosure action was initiated. Id. Lewiston asserted sovereign immunity. Id. That court agreed that Kiowa Tribe did not apply "because [Kiowa] concerned lawsuits against Indian tribes themselves, not against corporate affiliates of tribes." Id. at 548. That Court noted that by a tribe using a corporate form protects its assets "from being called upon to answer the corporation's debt. But this protection means that they are not the real party in interest." Id. at 550-551. Significantly, that Court noted **"the question whether a corporate affiliate of an Indian tribe is protected by the tribe's sovereign immunity has not been settled by the United States Supreme Court."** Id. at 551, emphasis supplied.

[26] The assertions in Cherokee's Brief that tribal sovereign immunity extends to tribal owned businesses and the cases cited in support of that proposition that the businesses "function as arms of the tribe," rely upon a determination or stipulation that the tribal business involved was an "arm of the tribe." As referenced above, this requires a specific analysis with evidence to support that analysis. As noted in Sue/Perior, absent evidence that the entity implicates the tribes assets, it is not in fact "settled law" that the entity is an arm of the tribe and entitled to sovereign immunity. This was in fact recognized in Hagen v. Sisseton-Wahpeton Cmty. Coll. 205 F.3d 1040, 1043 (8th Cir. 2000) when it noted that an entity is not entitled to sovereign immunity as an arm of the tribe when it acts as a "mere business." See also Pink v. Modoc Indian Health Project, Inc., 157 F.3d 1185, 1188 (9th Cir. 1998).

[27] The District Court properly reviewed the law in connection with tribal sovereign immunity to determine whether WSI could apply the state workers compensation laws to the Cherokee Entities, operating off tribal land, not employing tribal citizens and not operating as a tribal nation. That law, outlined below and accepted by the District Court, permits WSI to do so. Therefore, this Court should affirm the District Court's decision.

III. THE DISTRICT COURT CORRECTLY CONCLUDED THAT WSI WAS AUTHORIZED TO EXERCISE JURSDICTION OVER THE CHEROKEE NATION OWNED ENTITIES BECAUSE THEY ARE OPERATING OFF TRIBAL LAND AND ARE NOT OPERATING AS A TRIBAL NATION.

[28] N.D.C.C. § 65-01-01 outlines the purpose of workers compensation in North Dakota as follows:

> The state of North Dakota, exercising its police and sovereign powers, declares that the prosperity of the state depends in a large measure upon the well-being of its wageworkers, and, hence, for workers injured in hazardous employments, and for their families and dependents, sure and certain relief is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding, or compensation, except as otherwise provided in this title, and to that end, all civil actions and civil claims for relief for those personal injuries and all jurisdiction of the courts of the state over those causes are abolished except as is otherwise provided in this title. . . .

North Dakota enacted its Workers Compensation Act in 1919. Workmen's Compensation Fund v. E. W. Wylie Co., 79 N.D. 471, 58 N.W.2d 76 (1953). The Act is compulsory to any employer engaged in hazardous employment. Under North Dakota law, "[n]o option is given an employer to obtain insurance elsewhere or to carry it himself." State v. Hughes Electric Co., 51 N.D. 45, 199 N.W. 128 (1924).

[29] Regarding jurisdictional issues involving tribal entities, this Court in State of North Dakota by Workforce Safety & Insurance v. JFK Raingutters and Frank

Whitecalfe, individually, 2007 ND 80, 733 N.W.2d 248, addressed a jurisdictional question concerning WSI's attempt to impose workers compensation premiums, penalties and other sanctions against JFK for work performed on reservation or trust lands. In considering the issue, this Court cited 40 U.S.C. § 3172, which provides as follows:

> Extension of state workers' compensation laws to buildings, works, and property of the Federal Government.
>
> (a) Authorization of extension. – The state authority charged with enforcing and requiring compliance with the state workers' compensation laws 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, and to all projects, buildings, constructions, improvements, and property in the State and belonging to the Government, in the same way and to the same extent as if the premises were under the exclusive jurisdiction of the State in which the land, premises, projects, buildings, construction, improvements, or property are located.
>
> (b) Limitation on relinquishing jurisdiction. – The Government under this section does not relinquish its jurisdiction for any other purpose.
>
> (c) Nonapplication. – This section does not modify or amend subchapter 1 of chapter 81 of title 5.

Case law discussed by this Court in JFK Raingutters reflects that the "right which Indians hold in reservation land is that of occupancy, the fee and right of disposition remains in the United States government. . . . Therefore, the reservation is land 'owned or held by the United States' and, under 40 U.S.C. § 290, [state] workers compensation laws apply on the reservation." State ex rel. Indus. Comm'n v. Indian Country Entersl., Inc., 944 P.2d 117 (Idaho 1997)(citations omitted). This Court went on to cite Begay v. Kerr-McGee Corp., 682 F.2d 1311 (9th Cir. 1982) which held state workers compensation law applied in an action by individual Indian miners against their employers for injuries

received while employed at uranium mines on the Navajo reservation. Id. ¶ 14 (emphasis supplied). The Court quoted from Begay that 40 U.S.C. § 3172 "unambiguously permits application of state workers' compensation laws to all United States territory within the state." Id., citing Begay, 682 F.2d at 1319.

[30] In Arrow Midstream Holdings, LLC v. 3 Bears Construction, LLC, 2015 ND 302, 873 N.W.2d 16, this Court again addressed an issue of state jurisdiction over claims involving tribal entities in a breach of contract action between Arrow, a Delaware company, and 3 Bears, a North Dakota limited liability company. Id. ¶ 2. In addressing the issue, this Court stated as follows:

> While tribal court jurisdiction is determined under the test set forth in Montana v. United States, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981), state court jurisdiction is determined under the test set forth in Williams v. Lee, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959) See Winer [v. Penny Enters., Inc.] 2004 ND 21, ¶ 16, 674 N.W.2d 9. In Dohen's Handbook of Federal Indian Law, § 603[2][c], at pp. 528-29 (Nell Jessup Newton ed., 2012) (footnotes omitted), the authors explain:
>
> > State jurisdiction and tribal jurisdiction in Indian country raise two separate legal questions. For example, if application of the Montana test results in a finding that a tribe lacks jurisdiction over a non-Indian on non-Indian land in Indian country, it does not necessarily follow that the state can enter Indian country and impose its laws by prosecuting or controlling the non-Indian behavior. Whether state law can apply in Indian country remains subject to the Williams test, even as the Montana analysis considers whether tribal authority is necessary to protect vital tribal interests. How that preemption/infringement test is applied, however, may take into account, as one factor, the absence of tribal jurisdiction. Thus, for example, in Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C., [467 U.S. 138, 104 S.Ct. 2267, 81 L.Ed.2d 113 (1984),] the Court considered the tribes' decision not to assert jurisdiction over suits against non-Indians, together with the fact that the tribes themselves sought to invoke the state court's jurisdiction as weighing in favor of state authority over those actions.

> See also Winer, 2004 ND 21, ¶¶ 13-18, 674 N.W.2d 9 (declining to apply Supreme Court precedent interpreting Montana in case involving state court jurisdiction).

Arrow, 2015 ND 302 ¶ 10, 873 N.W.2d 16. This Court went on to analyze the jurisdictional question "with these principles in mind." Id. ¶ 11. In so doing, this Court quoted from Montana v. United States, 450 U.S. 544, 565-66, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981) as follows:

> [T]he inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe. To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. . . . A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Also in Arrow, this Court discussed Williams v. Lee, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959), and its interpretation of that decision, explaining that "state courts do not have jurisdiction over a claim by a non-Indian against an Indian which arises on an Indian reservation." Bryzewski v. Bryzewski, 429 N.W.2d 394, 396 (N.D. 1988). "Only 'where essential tribal relations were not involved and where the rights of Indians would not be jeopardized' could state jurisdiction be asserted." Bryzewski, 429 N.W.2d at 396, quoting Williams v. Lee, 358 U.S. at 219.

[31] The facts of this case do not neatly fall within either the analysis under Montana or Williams. The Cherokee Entities were organized under the laws of the Cherokee Nation and wholly owned by the Cherokee Nation, however, none of the

entities are operating on sovereign land, nor are they employing tribal citizens. Despite testimony presented regarding the intent and rationale for the Cherokee Nation creating these entities to employ tribal members, Cherokee provided no evidence that the individuals employed in North Dakota were in fact part of the Cherokee Nation. The evidence in the record demonstrated the employees in existence at the time the Cherokee entity purchased the assets of the prior North Dakota business, became employees of that Cherokee entity.

[32] To the ALJ and the District Court, Cherokee Services argued that the first prong of Montana applies due to a consensual relationship involving "commercial dealings, contracts, leases, or other arrangements," between non-Indians and the tribe. However, the 9th Circuit Court of Appeals recognized that tribal civil and regulatory jurisdiction as stated in Montana should not apply where an activity occurs off that tribe's reservation such as is the fact in this case. Montana, 450 U.S. at 566. In Water Wheel Camp Recreational Area, Inc. v. LaRance, 642 F.3d 802, 815 (9th Cir. 2011) that court examined an Indian tribe's civil authority over non-Indians acting on tribal land within the reservation. However, in discussing that authority and recognizing a tribe's "inherent sovereign powers" the Court noted that those powers are less with regulating non-Indians on tribal land. Id. at 808-09. That court then reviewed decisions since Montana that have limited the extent of a tribe's jurisdiction. Specifically, the Court recognized that "a tribe's adjudicative jurisdiction may not exceed its regulatory jurisdiction." Id. at 814. That court went on to discuss the issue of civil and adjudicatory jurisdiction, stating:

> In Philip Morris [USA, Inc. v. King Mountain Tobacco Co., Inc., 569 F.3d 932 (9th Cir. 2009)], we determined that the Yakama Tribe lacked regulatory, and therefore adjudicative, jurisdiction over non-Indian

> corporation Philip Morris regarding federal trademark registration. 569 F.3d at 945 (Fletcher, W., J., concurring); see also id. at 942.
>
> . . .
>
> Furthermore, Philip Morris did not involve a question related to the tribe's authority to exclude or its interest in managing its own land. To the contrary, the activity in question occurred off reservation. The tribal court clearly lacked jurisdiction and, arguably, Montana did not even apply because there the Court considered a tribe's regulatory jurisdiction over activities on non-Indian fee land within the reservation, not beyond the reservation's borders where the tribe lacked authority to regulate a non-Indian. Atkinson Trading Co., 532 U.S. at 657 n. 12, 121 S.Ct. 1825 (observing that except in limited circumstances, "there can be no assertion of civil authority beyond tribal lands"); see Philip Morris, 569 F.3d at 945–46 (Fletcher, W., J., concurring) (noting that the panel majority's opinion answers a simple and straightforward question with "an extended opinion containing a great deal of dicta").
>
> . . .
>
> The Supreme Court recently reaffirmed those long-standing principles when it recognized the general rule that a tribe has plenary jurisdiction over tribal land until or unless that land is converted to non-Indian land. See Plains Commerce Bank, 554 U.S. at 328, 128 S.Ct. 2709 ("Our cases have made clear that once tribal land is converted into fee simple, the tribe loses plenary jurisdiction over it."); see also Bourland, 508 U.S. at 689, 113 S.Ct. 2309 (recognizing that the change in land status from Indian to non-Indian abrogates the tribe's power to exclude and "implies the loss of regulatory jurisdiction over the use of the land by others.)

These cases by the Ninth Circuit show that, in general, a tribe cannot claim it has sovereign immunity or its own jurisdiction when it operates off tribal lands.

[33] The Seventh Circuit has also addressed tribal jurisdiction/authority under Montana. In Stifel, Nicolaus & Co., Inc. v. Lac du Flambeau Band of Lake Superior Chippewa Indians, 907 F.3d 184 (7th Cir. 2015), as amended Dec. 14, 2015, the tribe argued that Montana only applied to situations in which tribes attempt to regulate nonmember conduct on non-Indian fee land as opposed to tribal trust land. Id. at 206. The 7th Circuit disagreed, stated as follows:

The Tribal Entities' view cannot be squared with the Supreme Court's more recent cases, Nevada v. Hicks, 533 U.S. 353, 121 S.Ct. 2304, 150 L.Ed.2d 398 (2001) and Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 128 S.Ct. 2709, 171 L.Ed.2d 457 (2008). In Hicks, the Supreme Court considered whether a tribal court had jurisdiction over a warden's allegedly tortious conduct while executing a search warrant on tribe-owned land within the reservation. The Supreme Court began its analysis with the general proposition that "Indian tribes' regulatory authority over nonmembers is governed by the principles set forth in Montana." Hicks, 533 U.S. at 358, 121 S.Ct. 2304. It noted first that although "the non-Indian status of the land was central to the analysis in . . . Montana," that was not because "Indian ownership suspends the 'general proposition' . . . that 'the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." Id. at 359, 121 S.Ct. 2304. "The ownership status of land," the Court explained, "is only one factor to consider in determining whether regulation of the activities of nonmembers is 'necessary to protect tribal self-government or to control internal relations.'" Id. at 360, 121 S.Ct. 2304 (emphasis added). "[T]he existence of tribal ownership," however, "is not alone enough to support regulatory jurisdiction over nonmembers." Moreover, more recently in Plains Commerce Bank, the Supreme Court reiterated that Montana's "general rule restricts tribal authority over nonmember activities taking place on the reservation, and is particularly strong when the nonmember's activity occurs on land owned in fee simple by non-Indians – what we have called 'non-Indian fee land.'" 554 U.S. at 328, 128 S.Ct. 2709 (quoting Strate v. A-1 Contractors, 520 U.S. 438, 446, 117 S.Ct. 1404, 137 L.Ed.2d 661 (1997)). Plains Commerce Bank, therefore, leaves no doubt that Montana applies regardless of whether the actions take place on fee or non-fee land. We therefore turn to the Montana exceptions.

Looking at the first Montana exception, the Tribal Entities assert that the Financial Entities entered into a consensual relationship with the Tribe and engaged in on-reservation conduct that brings it within the jurisdiction of the tribal court. We made clear in Jackson, however, that Plains Commerce Bank "circumscribed" the already narrow Montana exceptions. Jackson, 764 F.3d at 782. We explained that a tribe's authority to regulate nonmember conduct "centers on the land"; "'Montana and its progeny permit tribal regulation of nonmember conduct inside the reservation that implicates the tribe's sovereign interests.'" Id. (quoting Plains Commerce Bank, 554 U.S. at 327, 128 S.Ct.2709).

The Tribal Entities submit that, in evaluating whether the tribal court has jurisdiction over the Financial Entities under the first Montana exception, the court need not limit its consideration to the on-reservation actions of the Financial Entities. This view, however, is at odds with Plains

> Commerce Bank, in which the Court observed "that the sovereignty that the Indian tribes retain is of a unique and limited character. It centers on the land held by the tribe and on the tribal members within the reservation." 554 U.S. at 327, 128 S.Ct. 2709 (emphasis added)(citations omitted)(internal quotation marks omitted). The actions of nonmembers outside of the reservation do not implicate the Tribe's sovereignty.

Stifel, 807 F.3d at 206-208. Clearly, therefore, it is significant in the analysis of whether WSI can assert jurisdiction over the Cherokee Nation that the work of the employees being performed by these entities is wholly off-reservation.

[34] In Atkinson Trading Company, Inc. v. Shirley, 532 U.S. 645 (2001), the Supreme Court concluded that "the inherent sovereignty of Indian tribes was limited to 'their members and their territory.' '[E]xercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes." Atkinson, 532 U.S. 650-51, citing Montana, 450 U.S. at 564. Furthermore, the Supreme Court held that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." Id. at 651. "Indian tribes are 'unique aggregations possessing attributes of sovereignty over both their members and their territory,' but their dependent status generally precludes extension of tribal civil authority beyond these limits." Id. at 659, citing United States v. Mazurie, 419 U.S. 544, 577 (1975) (emphasis supplied). Thus, Cherokee Nation while it certainly would enjoy sovereign immunity if it was operating in its territory and utilizing its members as employees, the same cannot be said as to the extension of that immunity where it is operating outside of its territory, within the State of North Dakota, and employing non-tribal citizens of North Dakota.

[35] The interests of the State of North Dakota cannot be ignored when determining jurisdiction. It is precisely the interests of the State, articulated in N.D.C.C. §

65-01-01, that are at issue regarding the well-being of its wageworkers. Tribal power extends "only as far as 'necessary to protect tribal self-government or to control internal relations.'" National Labor Relations Board v. Little River Band of Ottawa Indians Tribal Government, 788 F.3d 537, 545 (6th Cir. 2015), quoting Montana, 450 U.S. at 564, 101 S.Ct. 1245. In addition, the United States Supreme Court, in Nevada v. Hicks, 533 U.S. 353 (2001), concluded that "the principle that Indians have the right to make their own laws and be governed by them requires 'an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other.'" Id. at 362 (citations omitted). The Court went on to hold:

> When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest. When, however, state interests outside the reservation are implicated, States may regulate the activities even of tribe members on tribal land.

Id.

[36] In Rice v. Rehner, 463 U.S. 713, 718 (1983) the Supreme Court held that "even on reservations, state laws may be applied unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law" (quoting Mescalero, 411 U.S. at 148). Thus, it is clear that states, provided they have a regulatory interest, may exercise jurisdiction over tribal activities, even activities by tribe members on tribal land.

[37] The wage earners/employees of the Cherokee Nation entities are in fact citizens of the State of North Dakota and not tribal members. In filings with Job Service North Dakota, the tribe admits it is "not doing business as an indian tribe." (C.R. 171) The "balance" between sovereign immunity/jurisdiction and State interests given these

facts weigh in favor of the State of North Dakota having the ability to regulate the activity of Cherokee Nation via its organized entities.

> "[A]s the activity in question moves off the reservation the state's governmental and regulatory interest increases dramatically, and federal protectiveness of Indian sovereignty lessens." Smith Plumbing Co. v. Aetna Casualty & Sur. Co., 149 Ariz. at 530, 720 P.2d at 505 (citing Organized Village of Kake v. Egan, 369 U.S. 60, 75, 82 S.Ct. 562, 571, 7 L.Ed.2d 573, 583 (1962)); see also Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976). Thus, in Smith Plumbing, the court held that where the tribe had purchased supplies from a company off the reservation which had not conducted business on the reservation, "the Tribe's reaching out outside the confines of the reservation to engage in commercial activity-without the concomitant reaching in by non-Indians-makes this a proper instance of nondiscriminatory adjudication of a contract claim by the courts of this state." 149 Ariz. at 531, 720 P.2d at 506.

Begay v. Roberts, 167 Ariz. 375, 379, 807 P.2d 1111, 1115 (Ct. App. 1990). The same can be said here. Cherokee Nation has chosen to conduct business in the form of commercial activity off its sovereign land, in North Dakota where, in fact, it has no sovereign land. As such, it is wholly appropriate and consistent with the law for North Dakota to assert jurisdiction over those entities by requiring them to purchase coverage for workers compensation for those employees like any other business, organized in another state, that comes in to North Dakota, hires employees and conducts business operations. "A State's regulatory interest will be particularly substantial if the State can point to off-reservation effects that necessitate State intervention." New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 336 (1983). Furthermore, in Gavle v. Little Six, Inc., 555 N.W.2d 284, 290 (Minn. 1996), that court noted:

> Absent express federal law to the contrary, [Indian business entities] going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148–49, 93 S.Ct.

> 1267, 1270, 36 L.Ed.2d 114 (1973). In those circumstances, the Court has held that state courts may have jurisdiction to hear the cause of action.

The Tenth Circuit echoed this holding in stating, "when Indians ('who') act outside of their own Indian country ('where'), including within the Indian country of another tribe, they are subject to non-discriminatory state laws otherwise applicable to all citizens of the state. Muscogee (Creek) Nation v. Pruitt, 669 F.3d 1159, 1172 (10th Cir. 2012) (citing Mescalero, 411 U.S. at 148–49.). See also Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024, 2034 (2014).

[38] The workers' compensation system of North Dakota is nondiscriminatory state law and serves an important regulatory state interest in keeping workers within the boundaries of North Dakota safe as well as providing care to injured workers within North Dakota. WSI is the sole provider and administrator of workers' compensation in North Dakota. It is clear that the State of North Dakota, acting through WSI, has a substantial interest in providing workers' compensation services and benefits to all of those that work within the borders of North Dakota. WSI's interest in ensuring coverage for employees working off-reservation and within North Dakota is a substantial State interest. See Haney v. North Dakota Workers Compensation Bureau, 518 N.W.2d 195, 199 (N.D. 1994)(noting that workers compensation law falls within the field of social welfare and economics). Because the Cherokee Entities are employing individuals within the boundaries of North Dakota, the Cherokee Nation entities are subject to the jurisdiction of Workforce Safety and Insurance, an arm of the State of North Dakota.

[39] Several courts have held that, pursuant to 40 U.S.C. § 3172[2] a state may apply its workers' compensation laws to all federal territory within state boundaries. Smith Plumbing Company, Inc. v. Aetna Casualty and Surety Company, 149 Ariz. 524, 530, 720 P.2d 499, 506 (1986), citing Begay v. Kerr-McGee Corporation, 682 F.2d 1311, 1319 (9th Cir.1982). In addition, in State of Idaho, ex rel., Industrial Commission v. Indian Country Enterprises, Inc., 130 Idaho 520, 521, 944 P.2d 117, 118 (1997) specifically ruled that Idaho's workers' compensation laws apply on the reservations within Idaho. This case is especially noteworthy because it applied Idaho's workers' compensation law to activities *within* the reservation, whereas this matter involves activities *outside* the reservation, where the tribe's jurisdictional power is greatly lessened. It is also important to note that the exercise of state jurisdiction over claims involving workers' compensation did not infringe upon or frustrate tribal self-government.

[40] In concluding WSI could not exercise jurisdiction over the Cherokee Entities owned by the Cherokee Nation the ALJ relied upon Kiowa Tribe, 523 U.S. 751. Kiowa involved a breach of contract action between a tribal entity and a private entity and the purchase of certain stock. Id. at 753. It was disputed whether the contract was signed on or off of tribal land. The contract in question also included a paragraph stating: "Nothing in this Note subjects or limits the sovereign rights of the Kiowa Tribe of Oklahoma." Id. at 754. After the tribal entity defaulted, an action was commenced in state court in Oklahoma. Id. The holding in Kiowa is limited to upholding "immunity from suits on contracts, whether those contracts involve governmental or commercial

[2] Formerly 40 U.S.C. § 290.

activities and whether they were made on or off a reservation." Id. at 760. Cherokee Nation may argue that the Kiowa decision does not solely relate to contract issues, however "[n]otably, in the only subsequent Supreme Court decision to mention Kiowa, the Court characterized its Kiowa holding again in terms of contract: 'Tribal immunity, we ruled in Kiowa, extends to suits on off-reservation commercial contracts.'" C & L Enterprises, Inc. v. Citizen Band of Potawatomi Indian Tribe of Oklahoma, 532 U.S. 411 (2001)(emphasis supplied).

[41] Other regulatory laws have been held to apply to tribal activities. In doing so, as is the case here, the courts look at the location of the activity of the entity and identity of the employee involved. For example, OSHA has been held to apply to a tribally-owned and operated farm located on a reservation, which did business both on and off the reservation. Karen L. Lenertz & Sandra Glass-Sirany, State Regulatory Authority in Indian Country: State OSHA Jurisdiction, 17 Hamline L. Rev. 447, 451-52 (1994) (citing Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113 (9th Cir. 1985)). Because of the off-reservation ties, the court determined that the tribal farm, even though it was a business owned and operated by the tribe, was not "purely intramural or essential to self-government." OSHA regulations therefore did not affect tribal sovereignty.

[42] The NLRB has determined the tribe should have jurisdiction over labor matters related to a tribally-owned enterprise employing people on the reservation. However, outside reservation land the NLRB has held that tribally-owned enterprises are subject to the NLRA. In Sac & Fox, 307 NLRB 241 (1992), the Board held that a tribal corporation involved in a commercial venture (manufacture of chemical resistant suits) off the reservation was subject to the NLRA. The Board's reasoning in Sac & Fox was

expressly based on the location of the tribe's operation off the reservation." LABOR AND EMPLOYMENT ISSUES IN INDIAN COUNTRY: A NON-INDIAN BUSINESS PERSPECTIVE, 2005 No. 5 RMMLF-INST Paper No. 15.

[43] The United States District Court for the Southern District of New York in Otoe-Missouria Tribe of Indians v. New York State Dep't of Fin. Servs., 974 F. Supp. 2nd 353 (S.D.N.Y. 2013), concluded that state regulations applied to online loans provided by tribal owned limited liability companies. The underlying premise of state regulation applying to off-reservation activities of the tribe remains applicable to the current case. This online lending was a significant source of the Tribes' operating budget as the court noted the following:

> Revenue from online lending generates almost half of the Plaintiff Otoe–Missouria Indian Tribe's (the "Otoe–Missouria's") non-federal revenue, and it has created dozens of new jobs for their members. *356 (Decl. of John Shotton, dated Aug. 22, 2013, Doc. No. 10 ("Shotton Decl."), ¶¶ 23, 28.) Likewise, online lending revenue makes up forty-six percent of the operating budget of the Plaintiff Lac Vieux Desert Band of Lake Superior Chippewa Indians (the "Lac Vieux") and constitutes an essential resource for their government payroll and services.

Otoe-Missouria Tribe of Indians v. New York State Dep't of Fin. Servs., 974 F. Supp. 2d at 355–56 aff'd, 769 F.3d 105 (2d Cir. 2014). The court held that "[t]he undisputed facts demonstrate that the activity the State seeks to regulate is taking place in New York, off of the Tribes' lands. Having identified no 'express federal law' prohibiting the State's regulation of payday loans made to New York residents in New York, the Tribes are subject to the State's non-discriminatory anti-usury laws." Id. at 361. The tribe in Otoe-Missouria pointed out that "(1) the Tribes own and control the lending websites, (2) the websites warn that loans are subject to tribal law and jurisdiction, (3) the 'Tribal loan underwriting system' reviews loans, (4) loans are funded by Tribally-owned bank

accounts, and (5) the Tribe's internal regulators regulate the loan process," however the court did not find these arguments persuasive. Id. at 360.

[44] The State of North Dakota is seeking only to regulate activity occurring in North Dakota and not on sovereign land. In no case has the Supreme Court specifically considered whether sovereign immunity applies to a tribe's conduct that has no nexus to the tribe's lands or its sovereign functions. Kiowa, 523 U.S. 751, 764, J. Stevens dissenting. This is precisely that case. The state of North Dakota and WSI are entitled to exercise jurisdiction over the Cherokee Nation entities and enforce the laws pertaining to the requirement to purchase workers compensation coverage through WSI when these entities are operating off tribal land, employing North Dakota workers, and there is no evidence to support that this commercial activity is specific to tribal sovereign functions. The District Court properly so recognized and reversed the ALJ's decision to the contrary. This Court must affirm that decision.

IV. THE DISTRICT COURT PROPERLY REVERSED THE ALJ'S DECISION THAT BILBY WAS PERSONALLY LIABLE UNDER N.D.C.C. § 65-05-26.1 FOR ANY UNPAID PREMIUMS.

[45] While not disputing the right of WSI to hold Bilby personally liable, ALJ Seaworth held that Bilby was permitted to assert tribal immunity under Lewis v. Clarke, 137 S. Ct. 1285 (2017). The District Court correctly reversed this holding.

[46] In Lewis v. Clarke, the Court reviewed two issues. First, whether sovereign immunity of an Indian tribe bars individual capacity damages against tribal employees for torts committed within the scope of their employment; and second, what role, if any, a tribe's decision to indemnify its employees plays in this analysis. On the first issue, the Supreme Court noted that courts cannot simply rely on the characterization

of the parties. It further noted that sovereign immunity "'does not erect a barrier against suits to impose individual and personal liability.'" Lewis v. Clarke, 137 S. Ct. at 1291, quoting Hafer v. Melo, 502 U.S. 21, 30-31 (emphasis supplied). The Supreme Court confirmed that when an action is a "personal-capacity suits" which seeks to impose individual liability on a government officer for actions, those officers sued in their personal capacity come into court as individuals and the real party in interest is the individual, not the sovereign. Thus, sovereign immunity does not apply. The Supreme Court held, that simply because Clarke was acting within the scope of his employment, sovereign immunity did not apply because the suit is to recover for the personal actions of Clarke.

[47] In this case liability of Bilby is sought in his personal capacity. See Grand Forks Professional Baseball, Inc. v. N.D. Workers Compensation Bureau, 2002 ND 204 ¶ 13, 654 N.W.2d 426. Applying the rationale of Lewis v. Clarke, to the facts of this action confirms sovereign immunity does not apply to Bilby. Although it is based on his standing in relation to the Cherokee Entities, the liability under N.D.C.C. § 65-04-26.1 is personal to the individual, i.e., it is based on an independent individual responsibility to ensure that premiums are paid. The second part of the analysis in Lewis v. Clarke was that the Gaming Authority is the real party in interest because under tribal law, it must indemnify Clarke. In this regard, the Supreme Court held that it was not who may be legally bound by an adverse judgment, not who will ultimately pick up the tab. The Court held that an indemnification provision did not convert the suit against Clarke, in his individual capacity, into a suit against the sovereign. There was no indemnification provision argued by Cherokee in these proceedings, nonetheless, it would not change the

analysis here because, like Lewis v. Clarke, the liability sought against Bilby is personal to him under 65-04-26.1. Accordingly, sovereign immunity does not apply to Bilby under the rationale of Lewis v. Clarke. The District Court, therefore, properly reversed the ALJ. This Court should affirm that decision.

V. THE DISTRICT COURT PROPERLY REVERSED THE ALJ ON THE ISSUE OF AUTHORITY TO ISSUE A CEASE AND DESIST ORDER TO HUDSON INSURANCE COMPANY.

[48] Cherokee Nation asserted it did not need coverage through WSI because it carries coverage for its employees in North Dakota through a policy purchased from Hudson Insurance Company. Hudson Insurance Company is not a licensed workers compensation carrier in North Dakota. Nor can it be, because WSI is the sole provider of workers compensation coverage in the State of North Dakota.

[49] Jeff Ubben of the North Dakota Insurance Department testified at the administrative hearing that the North Dakota Insurance Department regulates insurance companies that write workers compensation insurance, for example, making sure to examine their financials for adequate reserves, they are appropriately using and appointing agents and following the laws of Title 26.1. (C.R. 386) However, as it pertains to whether an employer having coverage for workers compensation, the North Dakota Insurance Department's position is that when it comes to the employer/employee relationship and providing workers compensation, "the Legislature has carved that power out under Title 65 for Workforce Safety and Insurance" and thus the North Dakota Insurance Commissioner does not enforce any of those provisions. (Id.)

[50] This Court confirmed in Hughes Electric Co., 51 N.D. 45, 199 N.W. 128, that employers are not allowed to obtain insurance elsewhere. See also United States

Fidelity and Guaranty Co. v. North Dakota Workmen's Compensation Bureau, 275 N.W.2d 618 (N.D. 1979) (noting that Title 65 "provides an exclusive, compulsory, and comprehensive program" and is "one of the few such programs in the United States in which the Bureau serves as both the administrator and insurance carrier.") As it pertains, therefore, to the relationship employer-employee and coverage for workers compensation, this Court has held that the intent of the law is clear: "to provide state insurance for industrial accidents, insuring sure and certain relief to the injured workman, taking from the employer and employee who comes under the act all responsibility, and placing **absolute control** in the Workmen's Compensation Bureau." Tandsetter v. Oscarson, 56 N.D. 392, 217 N.W. 660 (1928) (emphasis supplied). As such, it is WSI's responsibility and obligation to ensure compliance with the laws relating to coverage for workers compensation. As the sole provider of such coverage, WSI is cloaked with authority to preclude employers from attempting to or securing coverage elsewhere as well as prohibiting insurance companies from issuing policies purporting to cover employers in North Dakota with workers compensation insurance.

[51] The ALJ incorrectly concluded that it is the duty of the North Dakota Insurance Commissioner N.D.C.C. § 26.1-02-02 to determine whether a company can issue policies or make insurance contracts. (Conclusion of Law #4, Appx. 44) Under N.D.C.C. § 26.1-01-03.1 the insurance commissioner has no authority to issue such orders for a violation of "this title," meaning Title 26.1. As confirmed by Jeff Ubben, the Insurance Commissioner does not exercise any power or regulatory authority over the employer-employee relationship and requirements for workers compensation coverage. Those are matters left to WSI, which is consistent with the case law cited above. The

ALJ's construction would render no entity of the State of North Dakota permitted to enforce the law as it pertains to insurance companies selling workers compensation coverage. Statutes are construed to avoid absurd results. Inwards v. Workforce Safety and Insurance, 2014 ND 163 ¶ 28, 851 N.W.2d 693.

[52] In Valley Med Flight, Inc. v. Dwelle, 171 F. Supp. 3d 930, 945 (D.N.D. 2016) the Federal District Court for the District of North Dakota confirmed that Title 65 regulates North Dakota's workers compensation system. The Court also recognized that North Dakota has adopted a public system of workers compensation which does not compete with private insurance carriers, and that workers compensation is not insurance. Id. Rather, WSI is "a monopolistic state-mandated program." Id. WSI does not issue insurance contracts and North Dakota's insurance regulations, Title 26.1 of the North Dakota Century Code do not apply to WSI. Id. at 946. See also Beyer's Cement, Inc. v. North Dakota Insurance Guaranty Assoc., 417 N.W.2d 370 (N.D. 1987) (holding workers compensation in North Dakota is not an insurance fund). Thus, WSI is the arm of the State of North Dakota in charge of ensuring compliance with workers compensation laws. The North Dakota Insurance Commissioner has so recognized.

[53] Because workers compensation in North Dakota is not insurance, the regulatory authority relating to the laws governing workers compensation coverage fall under Title 65 and the jurisdiction of WSI. Under N.D. Cent. Code § 65-08-01(4) an employer whose employment results in significant contacts with the state is required to secure coverage from WSI. WSI is granted specific authority to require employers secure coverage from WSI. For employers that do not, WSI has the means to issue administrative decisions to enforce those laws. This includes taking action against

Hudson Insurance which purports to provide coverage to the Cherokee Entities for workers compensation. WSI does not need a specific statute to issue a cease and desist order. It has the power and authority to issue administrative decisions precluding the purported action taken by Hudson Insurance Company to write workers compensation coverage in North Dakota. WSI's issuance of its Administrative Order in this case precluding Hudson Insurance Company from doing so was within its powers conferred under Title 65 and N.D.C.C. ch. 28-32. The ALJ erred in concluding otherwise and the District Court properly reversed that decision. This Court should affirm.

CONCLUSION

[50] For the foregoing reasons, WSI requests this Court affirm the decision of the District Court in all respects.

DATED this 24th day of September, 2020.

/s/ Jacqueline S. Anderson

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CERTIFICATE OF COMPLIANCE

The undersigned, as attorney for the Appellee, North Dakota Workforce Safety and Insurance, in this matter, and as the author of the above Brief, hereby certifies, in compliance with Rule 32(a)(7) of the North Dakota Rules of Appellate Procedure, that the Brief of Appellant was prepared with proportional typeface and the total number of pages in the above Brief totals 37.

DATED this 24th day of September, 2020.

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota, by and through Workforce Safety and Insurance, **Appellee,** **vs.** **Cherokee Services Group, LLC, Cherokee Nation Government Solutions, LLC, Cherokee Medical Services, LLC, Cherokee Nation Technologies, LLC, Steve Bilby and Hudson Insurance Company,** **Appellants.**	**Supreme Court No.: 20200166** **Burleigh County Civil** **No. 2018-cv-01075** **AFFIDAVIT OF ELECTRONIC SERVICE**

STATE OF NORTH DAKOTA)
)ss.
COUNTY OF CASS)

Melany J. Strendin, being first duly sworn on oath, deposes and says that she is of legal age, is a resident of Moorhead, Minnesota, not a party to nor interested in the action, and that she served the attached:

- **BRIEF OF APPELLEE NORTH DAKOTA WORKFORCE SAFETY AND INSURANCE**

on the following:

Lawrence King lking@zkslaw.com

VIA E-MAIL to each person above named at the above e-mail address.

That the undersigned knows the person served to be the person named in the papers served and the person intended to be served.

Melany J. Strendin

SUBSCRIBED AND SWORN to before me on September 24, 2020.

RACHEL D. HENRY
Notary Public
State of North Dakota
My Commission Expires Oct. 4, 2021

Notary Public

cc.: Jennifer Fender, ND WSI
Emp. Acct. No.: 1298517
Nilles File No.: 13-400.170