IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. WCM-119576

Robert Tasso,

Petitioner,

vs.

Lucky Star Casino

and

The Workers' Compensation Commission,

Respondents.

APPEAL FROM AN ORDER OF THE OKLAHOMA WORKERS' COMPENSATION COMMISSION DENYING JURISDICTION

A CLAIM FOR BENEFITS BEFORE THE OKLAHOMA WORKERS' COMPENSATION COMMISSION, WCC File No. 2019-04272 H
HONORABLE JOHN L. BLODGETT PRESIDING

ANSWER BRIEF OF RESPONDENT LUCKY STAR CASINO

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Respondent Lucky Star Casino ("Lucky Star"), for itself and on behalf of its insurer AMERIND Risk Management Corporation ("AMERIND") and AMERIND's third-party administrator Berkley Risk Administrators Company LLC ("Berkley Risk"), requests affirmance of the Oklahoma Workers' Compensation Commission's Order Affirming Decision of Administrative Law Judge filed April 22, 2021 (ROA Doc. 33). As the Commission and the Administrative Law Judge (the Honorable John L. Blodgett) correctly held, Lucky Star and AMERIND are both tribal enterprises with tribal sovereign immunity under federal law, and are not subject to the Commission's jurisdiction. The Commission and Judge Blodgett also correctly held that the Administrative Workers' Compensation Act, 85A O.S. § 1 *et seq.* ("AWCA" or "Act"), does not give the Commission authority to require payment by a third-party administrator such as Berkley Risk when it lacks jurisdiction over the insurer. Accordingly, the Court should affirm the Commission's order dismissing the claim of Claimant Robert Tasso ("Claimant" or "Tasso").

SUMMARY OF THE RECORD

As Judge Blodgett noted below, the facts here are undisputed. *See* Order Denying Jurisdiction and Dismissing Claim filed September 17, 2020 (ROA Doc. 19) ("Order") at 2. Claimant is a member of the Cheyenne and Arapaho Tribes (the "Tribes"), a federally recognized Indian tribe[1], and was injured while employed by Lucky Star, a tribal enterprise of the Tribes. *Id.*; Aug. 27, 2020 Transcript of Hearing Before Administrative Law Judge (ROA Doc. 34) at 34. Lucky Star was insured by AMERIND for workers' compensation. Order at 2. AMERIND is a federally chartered corporation wholly owned by three

[1] Although nominally plural, the Cheyenne and Arapaho Tribes are a single federally recognized entity.

federally recognized Indian tribal nations: the Red Lake Band of Chippewa Indians, the Confederated Salish and Kootenai Tribes of the Flathead Reservation, and the Pueblo of Santa Ana. *Id.* at 3. AMERIND's third-party administrator, Berkley Risk, contracted with AMERIND to provide claims administration services. *Id.*

Claimant filed his Notice of Claim for Compensation on July 10, 2019. *See* CC Form 3 filed July 10, 2019 (ROA Doc. 2). Lucky Star appeared specially and moved to dismiss on September 19, 2019, on the ground that it is a tribal enterprise of the Tribes and is entitled to the tribe's sovereign immunity. *See* Motion to Dismiss filed September 19, 2019 (ROA Doc. 7). Claimant then admitted that the Tribes have tribal sovereign immunity, and tacitly conceded that Lucky Star is a tribal enterprise with the same immunity, but moved to add AMERIND and Berkley Risk. *See* Response in Opposition to Respondent's Motion to Dismiss filed October 9, 2019 (ROA Doc. 8) at 1 (stating that "Claimant does not take issue that the Tribe is entitled to sovereign immunity," and failing to raise any argument against Lucky Star's tribal sovereign immunity); CC Form 13 filed November 21, 2019 (ROA Doc. 10) (moving to add AMERIND and Berkley Risk). AMERIND opposed and moved to dismiss on the ground that it is a tribal enterprise entitled, by operation of federal law and under its charter of incorporation, to the tribal sovereign immunity of its three charter tribes, and the Commission therefore lacked jurisdiction over it. *See* AMERIND Motion to Dismiss filed December 9, 2019.[2] Berkley Risk also opposed and moved to dismiss, on the grounds that there is no legally cognizable claim against it, and that the Commission lacks personal jurisdiction over it. *See* Berkley

[2] Although AMERIND and Berkley Risk each filed motions to dismiss on December 9, 2019, the index to the record on appeal appears to list only one of the motions (ROA Doc. 11).

Risk Motion to Dismiss filed December 9, 2019.

On August 27, 2020, Judge Blodgett heard argument on the motions to dismiss. *See* Aug. 27, 2020 Transcript of Hearing Before Administrative Law Judge (ROA Doc. 34). In an Order filed on September 17, 2020, he dismissed the entire action with prejudice. Judge Blodgett held that Lucky Star and AMERIND have tribal sovereign immunity and are not within the Commission's jurisdiction. He further held that the Commission had personal jurisdiction over Berkley Risk, but that the AWCA does not give the Commission authority over a third-party administrator in the absence of jurisdiction over the employer or insurer. "[T]here is no language in the AWCA which indicates the third party administrator is interchangeable with the employer or insurance carrier." Order at 6.

While Claimant was unsuccessfully seeking to establish jurisdiction over AMERIND and Berkley Risk before the Commission, they were paying him benefits. For example, at the time of the hearing, AMERIND had already paid full benefits to Claimant for temporary disability in an amount that Claimant conceded was correct. Aug. 27, 2020 Transcript of Hearing Before Administrative Law Judge (ROA Doc. 34) at 28:21-24; *see also* Claimant's Combined Response to Lucky Star Casino and Berkley Risk Administrators Company, LLC Motions to Dismiss filed February 4, 2020 (ROA Doc. 12), Exhibit 1 (checks to Claimant through January 27, 2020 totaling $11,069.76).

Claimant requested en banc review of Judge Blodgett's Order. On April 16, 2021, the Commission sitting en banc heard oral argument on Claimant's appeal, and in an order filed April 22, 2021, it unanimously affirmed the decision of the Administrative Law Judge in its entirety for the reasons stated therein. *See* Order Affirming Decision of Administrative Law Judge filed April 22, 2021 (ROA Doc. 33).

STANDARD OF REVIEW

Review "of the jurisdiction of the Workers' Compensation Court" over an employee's claim "is reviewed de novo and may be reviewed without a denial or award of benefits." *Waltrip v. Osage Million Dollar Elm Casino,* 2012 OK 65 ¶ 5, 290 P.3d 741, 747 (citing *Triad Transport, Inc. v. Wynne*, 2012 OK 30, ¶ 7, 276 P.3d 1013, 1016); *see also Dilliner v. Seneca-Cayuga Tribe*, 2011 OK 61, ¶ 12, 258 P.3d 516, 519 ("The standard of review for questions concerning the jurisdictional power of the trial court to act is de novo.").

ARGUMENT

Claimant is a tribal member employed at his tribe's (the Cheyenne and Arapaho Tribes') tribal casino (Lucky Star) that is insured by a tribal insurer (AMERIND). Claimant has received workers' compensation benefits from the tribal enterprise's tribal insurer, yet seeks further relief in an Oklahoma forum. As Claimant conceded below, the Commission lacks jurisdiction over the Tribes and its tribal enterprise, Lucky Star, because both have tribal sovereign immunity. Likewise, Lucky Star's insurer, AMERIND, is a tribal enterprise and has the tribal sovereign immunity of its three Charter Tribes. Claimant's attempt to seek redress against the insurer's third-party administrator (Berkley Risk), to effectively turn the third-party administrator into a duplicate or substitute insurer, is not authorized by the AWCA, and thus the Commission correctly upheld dismissal of Claimant's case.

PROPOSITION I

IT IS UNDISPUTED THAT THE COMMISSION LACKS JURISDICTION OVER THE TRIBES AND THEIR TRIBAL ENTERPRISE, LUCKY STAR CASINO, DUE TO TRIBAL SOVEREIGN IMMUNITY

It is undisputed that the Commission lacks jurisdiction over the Cheyenne and

Arapaho Tribes, a sovereign, federally recognized tribal nation, and their tribal enterprise, Lucky Star. *See* Order at 1 (citing Claimant's Oct. 9, 2019 brief, ROA Doc. 8). Indian tribes are "separate sovereigns pre-existing the Constitution" and possess the "common-law immunity from suit traditionally enjoyed by sovereign powers." *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 788 (2014). Tribal sovereign immunity is a jurisdictional issue. *See Bonnet v. Harvest (U.S.) Holdings, Inc.*, 741 F.3d 1155, 1158 (10th Cir. 2014); *accord Seneca-Cayuga Tribe of Okla. v. State of Okla. ex rel. Thompson*, 874 F.2d 709, 714 (10th Cir. 1989) ("Sovereign immunity is a jurisdictional question ...."); *Ramey Constr. Co. v. Apache Tribe of Mescalero Reservation*, 673 F.2d 315, 318 (10th Cir. 1982) ("The issue of sovereign immunity is jurisdictional."). "As a matter of black-letter law, Indian tribes are immune from lawsuit or court process in both state and federal court unless Congress has authorized the suit or the tribe has waived its immunity." *Waltrip*, 2012 OK 65 n.7, 290 P.3d at 747 (citations omitted).

Tribal immunity may be abrogated only by a clear and unequivocal congressional statement to that effect. *Bay Mills,* 572 U.S. at 790. "Absent an effective waiver or consent, a state court may not exercise jurisdiction over a recognized Indian tribe." *Dilliner*, 2011 OK 61, ¶ 12, 258 P.3d at 519 (quoting *Pullayup Tribe, Inc. v. Department of Game*, 433 U.S. 165, 172 (1977)).

Further, as this Court has long recognized, "[a] tribe's sovereign immunity extends to its commercial as well as governmental activities. Tribal sovereign immunity protects a tribal corporation owned by a tribe and created under its own laws, absent express waiver of immunity by the tribe or Congressional abrogation." *Waltrip*, 2012 OK 65 at n.7, 290 P.3d at 747 (citations omitted). Here, "[i]t is undisputed that Lucky Star Casino is a tribal

enterprise." Order at 3. Claimant does not and cannot dispute that Lucky Star possesses the tribal sovereign immunity of the Tribes.

No federal law provides the Commission or this Court with jurisdiction over the Cheyenne and Arapaho Tribes in this case, and there is no express waiver of sovereign immunity by the Tribes. Therefore, as Claimant himself has conceded, the Commission and this Court lack jurisdiction over the Tribes and Lucky Star in this case.

PROPOSITION II

THE COMMISSION LACKS JURISDICTION OVER AMERIND BECAUSE IT IS A TRIBAL ENTERPRISE ORGANIZED UNDER 25 U.S.C. § 5124 AND HAS TRIBAL SOVEREIGN IMMUNITY

A. AMERIND is a federally chartered tribal enterprise with tribal sovereign immunity.

As Judge Blodgett and the Commission correctly held, AMERIND, like Lucky Star, is also a tribal enterprise with tribal sovereign immunity and is not subject to the Commission's jurisdiction. AMERIND is a federally chartered corporation formed by three sovereign, federally recognized Indian tribes under Section 17 of the Indian Reorganization Act of 1934 ("IRA"), 25 U.S.C. § 5124 (formerly 25 U.S.C. § 477).[3] A copy of AMERIND's federally approved charter is in the record. *See* Reply in Support of

[3] 25 U.S.C. § 5124 provides as follows:

The Secretary of the Interior may, upon petition by any tribe, issue a charter of incorporation to such tribe: Provided, That such charter shall not become operative until ratified by the governing body of such tribe. Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law; but no authority shall be granted to sell, mortgage, or lease for a period exceeding twenty-five years any trust or restricted lands included in the limits of the reservation. Any charter so issued shall not be revoked or surrendered except by Act of Congress.

Motion to Dismiss filed May 27, 2020 (ROA Doc. 18) Exhibit 1. The charter tribes are the Red Lake Band of Chippewa Indians, the Confederated Salish and Kootenai Tribes of the Flathead Reservation, and the Pueblo of Santa Ana ("Charter Tribes").

Claimant admits that "AMERIND is a tribal enterprise." Tasso Brief in Chief ("Br.") at 4. He also admits that AMERIND "is a federally chartered corporation formed by the Red Lake Band of Chippewa Indians, the Confederated Salish and the Kootenai tribes of the Flathead Reservation and the Pueblo of Santa Ana tribes pursuant to Section 17 of the Indian Reorganization Act of 1934." *Id.* And although Issue 2 in his amended petition for review challenges the Commission's decision recognizing AMERIND's tribal sovereign immunity, he does not argue the point in his brief and has therefore waived it. *See* Rule 1.11(k)(1) ("Issues raised in the Petition in Error but omitted from the brief may be deemed waived."). Nowhere in his brief does he dispute that AMERIND is entitled to tribal sovereign immunity. Nor could he, having admitted that AMERIND is a federally chartered tribal enterprise.

Section 17 provides a method for tribes to form corporate entities under federal law without relinquishing their tribal sovereign immunity for such entities except as expressly provided in their corporate charters. "[Section 17] corporations are entitled to tribal sovereign immunity." *Amerind Risk Mgmt. Corp. v. Malaterre,* 633 F.3d 680, 685 n.5 (8th Cir. 2011). Every court that has addressed the question has held that Section 17 corporations inherently possess tribal sovereign immunity that is not waived except to the extent that the charter of incorporation expressly provides such a waiver. *See Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1184 n.8 (10th Cir. 2010) ("[S]ection 17 corporations retain their tribal status—and, accordingly,

sovereign immunity in the absence of a 'sue and be sued' waiver ...."); *Memphis Biofuels, LLC v. Chickasaw Nation Indus., Inc.*, 585 F.3d 917, 921 (6th Cir. 2009) (Section 17 corporations "do not automatically forfeit tribal sovereign immunity."); *accord Bales v. Chickasaw Nation Indus.*, 606 F. Supp. 2d 1299, 1301-02 (D.N.M. 2009) (same); *Am. Vantage Cos. v. Table Mt. Rancheria*, 292 F.3d 1091, 1099 (9th Cir. 2002) ("A tribe that elects to incorporate [under Section 17] does not automatically waive its tribal sovereign immunity by doing so.") (citations omitted).

This Court has repeatedly recognized the tribal sovereign immunity of Section 17 corporations. For example, in *Dilliner*, 2011 OK 61, ¶¶ 15-16, 258 P.3d at 519-20, this Court cited with approval the Sixth Circuit's decision in *Memphis Biofuels*, which recognized the tribal sovereign immunity of a Section 17 corporation. This Court relied on the Sixth Circuit's holding that where the Section 17 corporation's charter required approval by the board for any waiver of tribal sovereign immunity, a purported contractual waiver of immunity was ineffective. *Id.* ¶ 16, 258 P.3d at 520. The Court also cited *Memphis Biofuels* for the proposition that equitable estoppel is not a basis for waiver of tribal sovereign immunity. *Id.* ¶ 17, 258 P.3d at 520. Thus, *Dilliner* recognizes that a Section 17 corporation must expressly waive tribal sovereign immunity to be subject to suit.

Similarly, this Court has recognized that under a parallel federal statute that applies to tribes in Oklahoma, 25 U.S.C. § 5203 (previously codified as 25 U.S.C. § 503), "an Oklahoma tribe may incorporate and waive immunity for assets held by the corporation," if such a waiver is in its corporate charter. *Okla. ex rel. Okla. Tax Comm'n v. Thlopthlocco Tribal Okla.*, 1992 OK 127, ¶ 9, 839 P.2d 180, 183. In *Thlopthlocco*, the tribe had included

a "waiver of immunity in its corporate charter." *Id.* ¶ 12, 839 P.2d at 183.

AMERIND's federally approved Charter expressly provides that AMERIND retains its Charter Tribes' sovereign immunity unless the Board of Directors approves a waiver. Section 16.1 of AMERIND's Charter states that it "is an instrumentality of the Charter Tribes and is entitled to all of the privileges and immunities of the Charter Tribes, individually and jointly." Reply in Support of Motion to Dismiss filed May 27, 2020 (ROA Doc. 18) Exhibit 1. AMERIND's tribal sovereign immunity can be waived only by a resolution of AMERIND's Board of Directors. *Id.* (Section 16.4). The Charter has a "sue and be sued" clause (Section 8.18) which expressly provides that the power to sue and be sued is limited by Article 16, which includes the provisions just quoted that expressly preserve tribal sovereign immunity unless it is waived by board resolution.

AMERIND's undisputed status as a tribal enterprise chartered under Section 17 of the IRA distinguishes this case from *Waltrip*. In that case, the insurer, Hudson Insurance Company, was a Delaware corporation, not a tribal enterprise. *Waltrip*, 2012 OK 65 ¶ 19, 290 P.3d at 747. This Court held that the insurer was not entitled to the Osage Nation's tribal sovereign immunity merely by virtue of being its insurer. *Id.* By contrast, here AMERIND is not attempting as an insurer to invoke the sovereign immunity of its insured, the Cheyenne and Arapaho Tribes. Rather, AMERIND has its own inherent tribal sovereign immunity, as a Section 17 corporation and a tribal enterprise of the Red Lake Band of Chippewa Indians, the Confederated Salish and Kootenai Tribes of the Flathead Reservation, and the Pueblo of Santa Ana. Thus, *Waltrip* supports dismissal here. "[T]ribal sovereign immunity for the actions of tribal enterprises has been acknowledged

widely." *Id.* ¶ 19, 290 P.3d at 747; *see id.* n.7.

Having admitted that AMERIND is a federally chartered tribal enterprise, Claimant raises two other arguments relating to AMERIND, neither of which coherently challenges AMERIND's tribal sovereign immunity, and neither of which has any merit. These are addressed in the next two sections.

B. 25 U.S.C. § 5118 does not prohibit the Tribes from buying insurance from AMERIND and does not affect AMERIND's tribal sovereign immunity.

Claimant argues incorrectly in his Proposition I that the Cheyenne and Arapaho Tribes "were prohibited from engaging AMERIND to provide workers' compensation coverage." Br. at 3. He argues that the Tribes may not "engage" AMERIND's Charter Tribes "directly, or indirectly by of [*sic*] extension AMERIND, to provide workers compensation insurance coverage." *Id.* at 4. As an initial matter, Claimant waived this argument by failing to raise it before the trial judge. "Trial courts are not traditionally reversed for error unless the error was called to their attention at a time when they themselves could reasonably be expected to correct it." *Gaines v. Sun Ref. & Mktg.*, 1990 OK 33, ¶ 20, 790 P.2d 1073, 1080 (*overruled on other grounds by Davis v. B.F. Goodrich*, 1992 OK 14, 826 P.2d 587). "[G]enerally, issues raised for the first time on appeal are not subject to review." *Nichols v. State ex rel. Dep't of Pub. Safety,* 2017 OK 20, ¶ 17, 392 P.3d 692, 696. "This Court does not generally, in the exercise of our appellate jurisdiction, make first instance determinations on disputed questions of fact or law." *Robinson v. Fairview Fellowship Home for Senior Citizens, Inc.*, 2016 OK 42 ¶ 10, 371 P.3d 477, 482.

Claimant's argument is not only untimely but completely wrong. For this argument, he relies on 25 U.S.C. § 5118, which he badly misconstrues. Section 5118 is a provision of the IRA that originally "excluded tribes in Oklahoma from the provisions

relating to self-government and tribal organization." *Hoover v. Kiowa Tribe*, 1998 OK 23, n.64, 957 P.2d 81, 92. Legislative history indicates that tribes in Oklahoma were excluded from these provisions "to avoid any potential encouragement of returning to reservations" in light of perceived progress toward assimiliation. *Id.* (citing *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439 (D.C. Cir. 1988)). But similar provisions that apply to tribes in Oklahoma were enacted just two years later: "Both Oklahoma and Alaska were initially exempted from much of the IRA. In 1936 the main provisions of the IRA were extended to the Alaska Territory. The Oklahoma Indian Welfare Act of 1936 applied similar principles to tribes in that state, including the Five Tribes, the Osage, the plains tribes, and other Indians." 1 *Cohen's Handbook of Federal Indian Law* § 1.05 (2019).

Thus, while tribes in Oklahoma were excluded from Section 17 and could not incorporate under federal law when the IRA was enacted, the OIWA changed that just two years later. "Like the Indian Reorganization Act (IRA) of 1934, the OIWA authorized tribes to organize 'for [their] common welfare,' adopt constitutions, and receive charters of incorporation." *Id.* § 4.07 (2019). This Court has recognized that 25 U.S.C. § 5203 and 25 U.S.C. § 5124 are parallel statutes for tribes within and outside of Oklahoma, and has interpreted and applied the statutes in tandem. In *Thlopthlocco,* this Court explained that

> 25 U.S.C. § 503 permits any recognized tribe in Oklahoma to obtain a corporate charter issued by the Secretary of the Interior. Under Section 503 the corporate charter may grant to the corporation any powers properly vested in a corporate body according to laws of the state. Congress' purpose in enacting this statute and its similar counterpart, 25 U.S.C. § 477, which permits tribes from other states to organize as corporations, was to promote organization by tribes for economic purposes.

Thlopthlocco, 1992 OK 127, ¶ 8, 839 P.2d at 182-83 (citations omitted); *see also Hoover*,

1998 OK 23, n.65, 957 P.2d at 92.

Thus, contrary to Claimant's fanciful contention in his Proposition I, 25 U.S.C. § 5118 does not prohibit tribes in Oklahoma from doing business with (or buying insurance from) tribes outside Oklahoma. Instead, it was part of an incremental legislative process that included enactment of the OIWA two years later. In any event, Claimant does not explain why it would matter if he could somehow show that the Tribes are prohibited from buying insurance from AMERIND. He does not argue that this would make the Tribes or AMERIND any less immune to his suit before the Commission or this Court, as indeed it would not.

C. 25 U.S.C. § 5124 authorizes AMERIND's federal corporate charter.

Claimant's Proposition V is likewise untimely because he failed to raise it before Judge Blodgett in the trial court. *See Gaines*, 1990 OK 33, ¶ 20, 790 P.2d at 1080. It is also a complete misreading of Section 17, now codified as 25 U.S.C. § 5124. Claimant argues, contrary to the plain language of the statute, that Section 17 does not "confer any authority" to AMERIND "to provide workers' compensation insurance." Br. at 9. He points to nothing in the language of Section 17 to support this argument. As this Court recognized in *Thlopthlocco,* "Congress' purpose in enacting ...[Section 17], which permits tribes from other states to organize as corporations, was to promote organization by tribes for economic purposes." *Thlopthlocco*, 1992 OK 127, ¶ 8, 839 P.2d at 182-83 (citations omitted). Section 17 expressly allows the Secretary of the Interior to grant charters to Indian tribes that "convey to the incorporated tribe the power to ... own, hold, manage, operate, and dispose of property of every description" as well as all "powers as may be incidental to the conduct of corporate business, not inconsistent with law ...." 25 U.S.C. § 5124. Owning and managing property of every description for the conduct of corporate

business plainly includes the business of insurance. Claimant's argument to the contrary is entirely unsupported and frivolous. It is also irrelevant, as he never explains how, even if AMERIND were not an authorized insurer, that could possibly lead to a conclusion that the Commission has jurisdiction over Lucky Star, AMERIND, or Berkley Risk.

PROPOSITION III

THE AWCA AND *WALTRIP* DO NOT PROVIDE JURISDICTION OVER AN INSURER WITH TRIBAL SOVEREIGN IMMUNITY

Nothing in the AWCA gives or could give the Commission jurisdiction over a tribe or a tribal enterprise, and *Waltrip* does not support such jurisdiction. Claimant's Proposition IV argues that the dispute resolution process in the AMERIND policy is inadequate, but Claimant does not argue or explain how any perceived inadequacy in a tribal insurer's process could possibly give the Commission jurisdiction here. Rather, he merely suggests the Commission must "consider 85A [O.S.] § 38."[4] Claimant's Proposition IV repeats an argument rejected by Judge Blodgett. *See* Claimant's Combined Response to Lucky Star Casino and Berkley Risk Administrators Company, LLC Motions to Dismiss filed February 4, 2020 (ROA Doc. 12) at 5. Claimant makes no effort before this Court to address Judge Blodgett's sound reasoning rejecting this argument.

As Judge Blodgett explained, *Waltrip* held that the Commission had jurisdiction over a non-tribal insurer. Order at 4. Judge Blodgett correctly recognized that *Waltrip* does not provide any rationale or authority for jurisdiction over an insurer that is itself a tribal enterprise with tribal sovereign immunity. *Id.* In *Waltrip* the non-tribal insurer's third-

[4] Claimant bases his argument on a premise that is not only irrelevant but incorrect. Berkley Risk does not appoint a Hearing Examiner. AMERIND must appoint one that is "impartial, objective and qualified." *See* Reply in Support of Motion to Dismiss filed Nov. 18, 2019 (ROA Doc. 9), Exh. B §§ 1.B., 6.E; *accord* Order at 3 (noting that "AMERIND selects and appoints Hearing Examiners").

party administrator had imposed its own dispute resolution procedures without approval by the tribe or the tribal employer, and yet the insurer sought to invoke the tribe's sovereign immunity to avoid payment of benefits. *Waltrip,* 2012 OK 65 ¶¶ 10-11, 290 P.3d at 744-45. *Waltrip* "is distinguishable" because "the insurance carrier in *Waltrip* was an insurance company created by the laws of the State of Delaware with its principal place of business in New York," while "AMERIND is a federally chartered corporation formed by three federally recognized Indian tribes under Section 17 of the Indian Reorganization Act of 1934 (25 U.S.C. § 477). Because it is a tribal enterprise, AMERIND is also entitled to sovereign immunity, and must be dismissed." Order at 4.

As Judge Blodgett recognized, the policies motivating the AWCA and relied on in *Waltrip* do not and cannot change this conclusion. No waiver of immunity be implied from the use of any particular set of procedures or from any policy in state law. A waiver of tribal sovereign immunity "cannot be implied but must be unequivocally expressed." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *accord Ramey*, 673 F.2d at 320. A tribe's waiver of immunity must be expressed "clearly and unequivocally." *Nanomantube v. Kickapoo Tribe,* 631 F.3d 1150, 1152 (10th Cir. 2011). "[T]he requirement that a waiver of tribal immunity be 'clear' and 'unequivocally expressed' is not a requirement that may be flexibly applied or even disregarded based on the parties or the specific facts involved. In the absence of a clearly expressed waiver by either the tribe or Congress, the Supreme Court has refused to find a waiver of tribal immunity based on policy concerns, perceived inequities arising from the assertion of immunity, or the unique context of a case." *Ute Distribution Corp. v. Ute Indian Tribe*, 149 F.3d 1260, 1267 (10th Cir. 1998) (citations omitted); *accord Amerind,* 633 F.3d at 687-88 (citing *Memphis Biofuels,* 585 F.3d at 921-

22, as holding "where federal charter required board resolution to waive tribal immunity, immunity was not waived without such a resolution even though the corporation's contract with the plaintiff expressly waived all immunities"). "Indian sovereignty, like that of other sovereigns, is not a discretionary principle subject to the vagaries of the commercial bargaining process or the equities of a given situation." *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1295 (10th Cir. 2008) (citation omitted).

PROPOSITION IV

THE COMMISSION LACKS STATUTORY AUTHORITY TO SUBSTITUTE A THIRD-PARTY ADMINISTRATOR IN PLACE OF AN INSURER THAT IS NOT SUBJECT TO ITS JURISDICTION

As the Commission correctly found, Claimant's attempt to impose liability on Berkley Risk as a third-party administrator under the estoppel act, 85A O.S. § 117, has no basis in the AWCA or this Court's holding in *Waltrip*. After ruling that Berkley would be subject to personal jurisdiction in Oklahoma, Order at 5[5], Judge Blodgett correctly held that the AWCA does not give the Commission authority to substitute Berkley Risk, as a third-party administrator, in place of an employer or insurer.

Berkley Risk is not subject to the estoppel act, which by its express terms applies only to "[e]very employer and insurance carrier," and not to a third-party administrator. 85A O.S. § 117. Berkley Risk is not an "employer" under the Act. *See* 85A O.S. § 2(19). Nor is it a "carrier." The Act defines a "carrier" as "any stock company, mutual company, or reciprocal or interinsurance exchange authorized to write or carry on the business of workers' compensation insurance in this state. Whenever required by the context, the term

[5] Although Lucky Star, AMERIND, and Berkley Risk disagree with Judge Blodgett's analysis of personal jurisdiction over Berkley Risk, the issue was not appealed, and the Court can therefore disregard Claimant's Proposition III addressing this issue.

'carrier' shall be deemed to include duly qualified self-insureds or self-insured groups." 85A O.S. § 2(2). This definition does not encompass third-party administrators such as Berkley Risk. Rather, "third-party administrators" are expressly distinguished from "carriers" in other sections of the Act. For example, 85A O.S. § 29(A) provides that "[e]ach ***carrier*** writing compensation insurance in this state shall pay to the Workers' Compensation Commission an annual fee of One Thousand Dollars ($1,000.00)" while 85A O.S. § 29(C) provides that "[e]ach ***third-party administrator*** and marketing firm shall pay to the Commission an annual application fee of One Thousand Dollars ($1,000.00)." (Emphasis added.) Likewise, in 85A O.S. § 6(I), which specifies procedures for providing notices regarding the punishment applicable to any person who commits workers' compensation fraud, the legislature provided that notice must be provided "on all forms for notices and instructions to employees, employers, ***carriers*** and ***third-party administrators***..." (Emphasis added.) The legislature was aware of the role of third-party administrators in the insurance process and knew how to include them within the scope of statutory provisions when appropriate.

Contrary to Claimant's Proposition II, *Waltrip* does not support the idea that a third-party administrator may be haled before the Commission and ordered to fund benefits to an injured employee as a substitute for the insurer, as if it were an actual insurer. *Waltrip* presented "only the question of the jurisdiction of the Workers' Compensation Court over ***Insurer*** concerning Employee's claim." *Id.* ¶ 5, 742. In *Waltrip*, an injured employee of a tribal enterprise brought a claim against his employer, The Osage Million Dollar Elm Casino, and the employer's workers' compensation insurer, Hudson Insurance Company ("Hudson"), under the AWCA, and more specifically, the estoppel act. *See Waltrip*, 2012

OK 65, ¶¶ 0-4, 290 P.3d at 742. The Court noted that "[a] third party, Tribal First, administers claims asserted under the policy"; however, Tribal First was not a party to the action. *Id.*

The Court focused on whether the estoppel act provided the Oklahoma Workers' Compensation Court with jurisdiction over Hudson because it was an insurer. As the *Waltrip* Court held that the estoppel act "prevent[s] those who ***insure*** employers against liability under the Workers' Compensation Act from denying coverage based on the status of the parties. The estoppel act makes ***insurers*** liable, regardless of the insured's status as a covered employer, when it is established that—at the time of the injury—premiums computed on a claimant's wages were accepted under a policy insuring the employer against liability under the Workers' Compensation Act." *Id.* ¶ 7, 290 P.3d at 743 (emphasis added). The *Waltrip* Court further explained that the focus of the estoppel act is "on the rights of an injured claimant against the ***insurance carrier*** of the entity for whom claimant was acting when injured. ***These rights are purely statutory.***" *Id.* ¶ 13, 290 P.3d at 745 (emphasis added). The *Waltrip* opinion is replete with references to the obligations of the insurer under the estoppel act; however, there is absolutely no analysis to support the application of the estoppel act to a third-party administrator. In context, it is clear that the language in *Waltrip* cited by Claimant, stating that the "Oklahoma Workers' Compensation Court may exercise jurisdiction over Insurer, which is a Delaware corporation, and its third party administrator," was based on the Court's conclusion that the Commission *had jurisdiction over the non-immune insurer*. *Id.* ¶ 19, 290 P.3d at 747. Its holding was reflected in its disposition of the case, where it stated: "This claim, brought in the Workers' Compensation Court pursuant to the estoppel act, ***should have been asserted against***

Insurer and not the tribal enterprise. On remand, that court is instructed to ***reinstate the claim against Insurer only***." *Id.* ¶ 20, 290 P.3d at 747 (emphasis added).

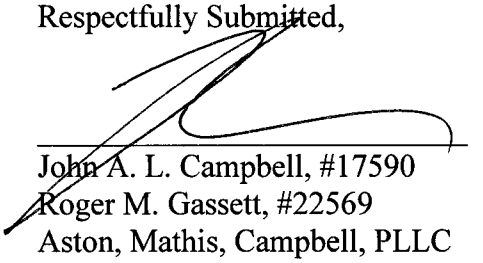
Nothing in *Waltrip* supports freestanding jurisdiction over a third-party administrator *in the place of* an insurer who is *not* subject to the Commission's jurisdiction. *Waltrip*'s passing mention of jurisdiction over a third-party administrator was made only in the context of the Court holding that it had jurisdiction over the insurer. Obviously when the Commission has jurisdiction over an insurer and can therefore order payment by the insurer, the presence or absence of the third-party administrator is ancillary. But as Judge Blodgett correctly held, the AWCA does not provide authority to effectively turn the third-party administrator itself into an insurer. It is undisputed that Berkley Risk did not itself receive any premiums or undertake any contractual obligation to fund workers' compensation benefits. Checks issued by Berkley Risk are written on AMERIND's account. *See* Claimant's Combined Response to Lucky Star Casino and Berkley Risk Administrators Company, LLC Motions to Dismiss filed February 4, 2020 (ROA Doc. 12), Exhibit 1. Berkley's contractual relationship with AMERIND to provide administrative services does not make it an insurer, and there is no cause of action against Berkley Risk available under the AWCA here.

CONCLUSION

Lucky Star, on behalf of itself, AMERIND, and Berkley Risk, respectfully requests that the Court affirm the Commission's decision adopting Judge Blodgett's Order for the reasons stated in the Order.

RESPECTFULLY SUBMITTED this 30th day of August 2021.

Respectfully Submitted,



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CERTIFICATE OF MAILING

I hereby certify that on August 30th, 2021 a true and correct copy of the above and foregoing instrument was mailed with proper postage fully prepaid thereon, to:

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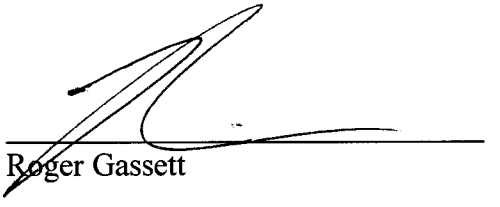

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