



**ORIGINAL**

**IN THE SUPREME COURT OF THE STATE OF OKLAHOMA**

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No. 119576

**FILED**  
**SUPREME COURT**  
**STATE OF OKLAHOMA**

**AUG 13 2021**

**ROBERT TASSO,**

**JOHN D. HADDEN**  
**CLERK**

**Petitioner,**

**Vs.**

**LUCKY STAR CASINO,**  
**Respondent**

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**APPEAL FROM AN ORDER OF THE COMMISSIONERS**  
**OF THE WORKERS COMPENSATION COMMISSION**

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**BRIEF IN CHIEF OF PETITIONER ROBERT TASSO**

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Respectfully submitted,

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## **I. ABBREVIATIONS AND OTHER DESIGNATIONS**

Claimant= Robert Tasso

Appellant= Claimant in the trial court

The Tribe= Cheyenne and Arapahoe Tribe

The Panel= Three-judge panel

ROA= Record of Appeal

## **INTRODUCTION**

Mr. Tasso was injured on June 10, 2019, while employed by Lucky Star Casino. (ROA Doc. 2) After his injury, Mr. Tasso began receiving benefits from the Cheyenne and Arapahoe workers compensation plan including medical and wage benefits. (ROA at Doc 12 at 1). The Cheyenne and Arapahoe Tribes workers compensation plan is underwritten by AMERIND (Motion to Dismiss at 1). (ROA Doc 7 at 1); and Lucky Star admits that the plan is also administered by AMERIND (Motion to Dismiss at 1). (ROA at Doc. 7 at 1). However, on its Website, AMERIND states that its Tribal Workers' Compensation program is administered by the third-party administrator, Berkley Risk, which is publicly traded and a member company of W.R. Berkley Corporation, and an A+ Fortune 500 holding company. (See Exhibit 1-Response in Opposition to Respondent's to Motion to Dismiss). (ROA Doc 8). The Court allowed the joinder of AMERIND and dismissed Lucky Star. Claimant filed a Form 13 to join AMERIND and Berkley Risk on November 21, 2019. (ROA Doc. 10). Claimant continues to contend and the same is supported by *Waltrip v. Osage Million Dollar Elm Casino*, 2012 OK 65, 290 P.3d 741 that to the extent that the Tribe has a workers' compensation insurance, and that insurance is administered by a third-party administrator, Claimant may proceed against that administrator. *Id* at ¶19, 290 P.3d. 741, 747.

On April 16, 2021, the Three-Judge Panel of Commissioners of the Worker's Compensation Commission heard oral arguments on the issue of jurisdiction and affirmed the decision of the trial judge on April 19, 2021. (ROA Doc 33). Claimant timely filed an appeal of the decision of the Panel by filing a Petition for Review on May 12, 2021.

### **SUMMARY OF THE RECORD**

Tasso filed his First Notice of Claim for Compensation (CC Form 3) on July 10, 2019, and alleged injury to the left leg (knee) as the result of a single incident accidental injury occurring June 10, 2019. (ROA Doc 3). Tasso filed pleadings requesting medical treatment and temporary total disability benefits. (ROA Doc 6). Lucky Star Casino filed a special entry of appearance and Motion to Dismiss on September 19, 2019, alleging that the Worker's Compensation Commission did not have jurisdiction because it is a wholly owned business entity of Cheyenne and Arapaho Tribes and entitled to sovereign immunity. (ROA Doc 7). Tasso filed a Response in Opposition to Respondents Motion to Dismiss on October 9, 2019, admitting that the Tribes were entitled to sovereign immunity but that the Tribes' insurance carrier, AMERIND Risk Management Corporation and third-party administrator, Berkley Risk Administrator Company were subject to the Commission's jurisdiction. (ROA Doc. 8). Tasso moved to Join AMERIND and via a CC Form 13 filed November 21, 2019. (ROA Doc. 10). AMERIND filed a special appearance and moved to dismiss arguing sovereign immunity. (ROA Doc 11). Berkley Risk filed a special entry of appearance and Motion to Dismiss on December 9, 2019 (alleging there were not sufficient minimum contacts for the Commission to exercise jurisdiction. (ROA Doc. 11). Tasso filed a combined response to Berkley's and AMERIND'S motions to dismiss. (ROA 12). Berkley Risk and AMERIND filed reply briefs. (ROC Docs. 15,16, 17, 18). The Commission dismissed Tasso's claims on September 17, 2020 (ROA Doc 19).

#### **IV. ARGUMENT AND AUTHORITY**

##### **A. STANDARD OF REVIEW**

A motion to dismiss is generally viewed with disfavor, and the standard of review before this Court is *de novo*. Simonson v. Schaefer, 2013 OK 25, ¶ 3, 301 P.3d 413, 414. When evaluating a motion to dismiss, this Court examines only the controlling law, taking as true all of the factual allegations together with all reasonable inferences that can be drawn from them. Wilson v. State ex rel. State Election Bd., 2012 OK 2, ¶ 4, 270 P.3d 155, 157. The party moving for dismissal bears the burden of proof to show the legal insufficiency of the petition. Tuffy's, Inc. v. City of Oklahoma City, 2009 OK 4, ¶ 6, 212 P.3d 1158, 1163, Ladra v. New Dominion, LLC, 2015 OK 53, ¶ 8, 353 P.3d 529, 531.

##### **PROPOSITION I:**

##### **25 U.S.C. § 5118 SPECIFICALLY PROHIBITS THE CHEYENNE AND ARAPAHOE TRIBES TO AFFILIATE WITH ANY OTHER TRIBE OR ANY OTHER TRIBAL PURPOSES ESTABLISHED UNDER 25 U.S.C. § 5124**

The question of jurisdiction may be raised at any point in the proceeding, “The prime question is one of subject matter jurisdiction, which can be raised *sua sponte*, and this Court is duty-bound to inquire into the jurisdiction of the court from whence the decision came. Lincoln Bank and Trust Co. v. Okla. Tax Com’n, 1992 OK 22, 827 P.2d 1314, 1318. “Even if the constitutional issue were before us, our duty to address it would not depend on the public interest or welfare, because the underlying question is jurisdictional.” Muskogee Fair Haven Manor Phase I, Inc. v. Scott, 1998 OK 26, ¶ 13, 957 P.2d 107, 111–12.

The Commissioners were not persuaded that 25 U.S.C. § 5118 was dispositive on the issue of whether Cheyenne and Arapaho Tribes were prohibited from engaging AMERIND to provide workers’ compensation coverage. The resolution of this question is jurisdictional and may be

properly invoked by this Court. To this end, Appellant would direct the Court's attention to the legislation which the Cheyenne and Arapahoe Tribe contends allows association with AMERIND, 25 U.S.C. § 5124. It is key to the analysis that the Cheyenne and Arapahoe Tribes are excluded by name and by State from participating in the enterprises under which AMERIND is incorporated (25 U.S.C. Section 5124), by 25 U.S.C. Section 5118. What the Cheyenne and Arapahoe Tribes failed to disclose before the trial court of the Commission was that and the Cheyenne and Arapahoe Tribes cannot escape the prohibition of 25 U.S.C. Section 5118 by association with another tribe:

The provisions of this Act shall not apply to any of the Territories, colonies, or insular possessions of the United States, except that sections 9, 10, 11, 12, and 16 shall apply to the Territory of Alaska: *Provided*, That sections 4, 7, 16, 17, and 18 of this Act shall not apply to the following-named Indian tribes, the members of such Indian tribes, together with members of other tribes affiliated with such named tribes located in the State of Oklahoma, as follows: Cheyenne, Arapaho, Apache, Comanche, Kiowa, Caddo, Delaware, Wichita, Osage, Kaw, Otoe, Tonkawa, Pawnee, Ponca, Shawnee, Ottawa, Quapaw, Seneca, Wyandotte, Iowa, Sac and Fox, Kickapoo, Pottawatomi, Cherokee, Chickasaw, Choctaw, Creek, and Seminole. Section 4 of this Act shall not apply to the Indians of the Klamath Reservation in Oregon.

25 U.S.C. § 5118.

In this case AMERIND is a tribal enterprise. It 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. 25 U.S.C. Section 5124 (formerly 25 U.S.C. Section 477) (Exhibit 1 of AMERIND's Reply in Support of Motion to Dismiss, filed May 18, 2020. (ROA Doc 16). The directive of 25U.S.C. Section 5124 cannot supersede, supplant or serve subservient to 25 U.S.C. Section 5118. Thus, the answer to the inquiry whether the Cheyenne and Arapahoe Tribes may engage the incorporating tribes directly, or indirectly by of extension AMERIND, to provide workers compensation insurance coverage is in the negative.



**PROPOSITION II:**

**APPELLANT MAY PROPERLY PROCEED AGAINST THE  
THIRD PARTY ADMINSTRATOR OF LUCKY STAR CASINO**

At trial the Tribe filed successive motions to dismiss. The issues were identical with the exception of the addition of the Tribal Resolution which adopts the AMERIND RISK Tribal Workers Compensation Policy. What is clear from the addition is that: (1) The Cheyanne and Arapaho Tribes do not have a Tribal Worker's Compensation Ordinance (See Exhibit B- Benefit Endorsement, "The benefits in this Endorsement will prevail in the absence of a Tribal Workers' Compensation Ordinance") (ROA Doc. 18, Exhibit B ); (2) That the Cheyenne and Arapaho Tribe has an insurance policy. (See Respondent's Exhibit A -"A Resolution to Renew the 2019 Commercial Property, Commercial General Liability and Workers' Compensation Policy) (ROA Doc. 18, Exhibit B); (3) That the Amerind Risk Tribal Worker's Compensation Benefit Endorsement is administered by it Claims Administrator (See Respondent's Exhibit B, provision E- Claims Administrator- The third party entity appointed by the Administrator, and charged with administering claim benefits in accordance with this Benefit Endorsement) (ROA Doc. 18, Exhibit B); and (4) Berkley Risk is the Third-Party Administrator who issues checks to Appellant (Exhibit 1) (ROA at Doc 8 Exhibit 1) and administers prescriptions to the Appellant (Exhibit 2) (ROA at Doc. 12 at Exhibit 2). Thus, despite its attempts to the contrary, the Tribe exhibits serve only to exemplify the position of the Oklahoma Supreme Court in Waltrip v. Osage Million Dollar Elm Casino, 2012 OK 65, 290 P.3d 741, that "Regardless of the tribes sovereign immunity, the Oklahoma Worker's Compensation Court may exercise jurisdiction over Insurer, which is a Delaware Corporation, and it third-party administrator." *Id.* at ¶19. So too, may this Court exercise jurisdiction over the third-party administrator of the tribe, Berkley Risk.

Berkley Risk improperly argues Waltrip does not apply because Hudson Insurance Co. (Insurer in Waltrip) and Tribal First (Third Party Administrator in Waltrip) are “the same entity.” They are not. In Waltrip, Hudson Insurance Co. is a Delaware Corporation with New York headquarters and Tribal First is licensed and headquartered in California. In this case, both the Tribes and Berkley Risk acknowledge its position as third party-administrator and that Berkley Risk is neither sovereign nor a tribal entity, and therein lies the distinction for purposes of establishing jurisdiction.

### **PROPOSITION III:**

#### **THE COMMISSION HAS JURIDICTION OVER BERKLEY RISK ADMINISTRATORS COMPANY, LLC**

In the trial court, The Tribe filed a third motion to dismiss, on the basis that it lacks minimum contacts which the State of Oklahoma sufficient to satisfy Worldwide Volkswagen. Here too, the legal position is without legal or factual merit. (ROA at Doc 11).

In Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 104 S. Ct. 1473, 79 L. Ed. 2d 790 (1984), Hustler Magazine, business which distributed its publication nationwide, attempted to advance the notion that it did not have minimum contacts with an individual which harmed by its publication. The Court sitting in Keeton reasoned as follows:

In Perkins v. Benguet Mining Co., 342 U.S. 437, 72 S.Ct. 413, 96 L.Ed. 485 (1952), none of the parties was a resident of the forum State; indeed, neither the plaintiff nor the subject-matter of his action had any relation to that State. Jurisdiction was based solely on the fact that the defendant corporation had been carrying on in the forum “a continuous and systematic, but limited, part of its general business.” *Id.*, at 438, 72 S.Ct., at 414. In the instant case, respondent's activities in the forum may not be so substantial as to support jurisdiction over a cause of action unrelated to those activities.<sup>11</sup> But \*780 respondent is carrying on a “part of its general business” in New Hampshire, and that is sufficient to support jurisdiction when the cause of action arises out of the very activity being conducted, in part, in New Hampshire.

Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 779–80, 104 S. Ct. 1473, 1481, 79 L. Ed. 2d 790 (1984). World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 286, 100 S. Ct. 559, 561–62, 62 L. Ed. 2d 490 (1980) is likewise determinative in Tasso’s favor and provides in relevant part:

A state court may exercise personal jurisdiction over a nonresident defendant only so long as there exist “minimum contacts” between the defendant and the forum State. *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95. The defendant's contacts with the forum State must be such that maintenance of the suit does not offend traditional \*\*562 notions of fair play and substantial justice, *id.*, at 316, 66 S.Ct., at 158, and the relationship between the defendant and the forum must be such that it is “reasonable . . . to require the corporation to defend the particular suit which is brought there,” *id.*, at 317, 66 S.Ct., at 158. The Due Process Clause “does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations.” *Id.*, at 319, 66 S.Ct., at 159. Pp. 564–566.

World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 286, 100 S. Ct. 559, 561–62, 62 L. Ed. 2d 490 (1980). This applicability of Keeton and World-Wide Volkswagen belie any claim that Oklahoma lacks jurisdiction since Berkley Risk Administrators Company, LLC has inserted itself in the administration of a Worker’s Compensation policy which covers a resident of the state of Oklahoma.

In this case, the Claims Administrator is Berkley Risk Administrators Company, LLC. In fact, Berkley Risk Administrators Company, LLC, had at the time of the submission of briefs before the trial judge, had issued eleven (11) checks to Claimant with a Berkley Risk claim number (BLCM WC 88915) and with the address of Berkley Risk Administrators, LLC., 222 South Ninth Street, Minneapolis, Minnesota, 55402, which is the same address which is listed on the website of Berkley Risk Administrators, as its corporate address. (ROA Doc 12 at Exhibit 1) The checks notate that the payment is for TTD and indicates the weekly periods for which the sums are paid. The checks are mailed directly from Berkley Risk Administrators Company, LLC and the sole

reference to Amerind Risk Management is in c/o Berkley Risk Administrators Company, LLC. (ROA Doc 12 at Exhibit 1) Berkley Risk “partnered” with Optum to provide prescriptions (See Exhibit 2). (ROA Doc 12 at Exhibit 2) Thus, there are no facts which bar exercising jurisdiction over Berkley Risk Administrators under the authority of Waltrip nor is there any viable claim that Berkley Risk Administrator Company LLC does not have sufficient contacts with Oklahoma which would prevent exercise of *in-personam* jurisdiction or would offend the notion of fair play required by International Shoe.

#### **PROPOSITION NO. IV:**

##### **THE AMERIND POLICY OF INSURANCE ALLOWS ARBITRARY DENIAL OF CLAIMS**

The Cheyenne-Arapaho Tribe has no workers’ compensation ordinance. (ROA Doc7 at Exhibit B). The trial judge correctly concluded the same and the same is acknowledged by the AMERIND policy itself which provides, “BENEFIT ENDORSEMENT.” (ROA Doc 7 at Exhibit B). “This Endorsement modifies your AMERIND RISK Tribal Workers’ Compensation Policy. The benefits in this Endorsement will prevail in the absence of a Tribal Worker’s Compensation Ordinance.” (Exhibit B). (ROA Doc 7 at Exhibit B). The AMERIND Insurance Policy, includes a Section 6-Claims Administration. Section 6 allows for the arbitrary administration of claims condemned in Waltrip by, for instance, allowing the Administrator (Berkley Risk) to appoint a Hearing Examiner (ROA Doc 7 at Exhibit B). This practice is expressly condemned in Waltrip ¶15, 16 because there is no “detached and neutral adjudicator.”

The absence of a detached and neutral adjudication requires the Commission to consider 85A § 38. Securing compensation is required by 85A § 38, and provides, “A. An employer shall secure compensation to employees under this act...” and “D. The failure of any employer to secure

the payment of compensation provided in this act shall have the effect of enabling the Commission to assert the rights of an injured employee against the employer.”

**PROPOSITION V:**

**SECTION 5124 DOES NOT AUTHORIZE AMERIND  
TO PROVIDE WORKERS’ COMPENSATION INSURANCE**

Berkley Risk argues in its Motion to Dismiss that AMERIND is an Indian owned entity pursuant to 25 U.S.C. § 477 [sic] (now § 5124). (ROA Doc 7 at 1) However, §5124 shall not become operative until ratified by the Tribe. The statute fails to confer any authority of the Tribe through the corporation to provide insurance and specifically workers’ compensation insurance.

Section 5124 is in Chapter 45, which provides for protection of Indians and preservation of resources. The statutes in Chapter 45 pertain to land not insurance, 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.

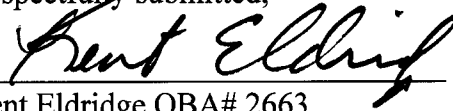
25 U.S.C. § 5124.

Clearly from the language of the statute itself, AMERIND’s scope of incorporation is for the purpose of conveyance of land. Thus, there can be no supportable argument that AMERIND has the authority to provide workers’ compensation insurance to the Cheyenne and Arapahoe Tribe of Oklahoma, especially in light of 25 U.S.C. Section 5118. However, Waltrip fully allows the inclusion of the Third-Party Administrator Berkley Risk.

**CONCLUSION**

WHEREFORE, premises considered, Appellant prays that this Honorable Court reverse the decision of the Commission, reinstate Appellant's claim and remand the case to the Worker's Compensation Commission for further proceedings.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I certify that on the 13<sup>th</sup> day of August 2021, a true and correct copy of the foregoing was mailed, first class, postage prepaid to:

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KENT ELDRIDGE, OBA# 2663