20200166
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
AUGUST 25, 2020
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota, by and through Workforce Safety and Insurance, Appellee v. Cherokee Services Group, LLC, Cherokee Nation Government Solutions, LLC, Cherokee Medical Services, LLC, Cherokee Nation Technologies, LLC, Steven Bilby and Hudson Insurance Company, Appellants	)	Supreme Court No. 20200166 District Court No. 2018-cv-01075

APPEAL FROM DISTRICT COURT'S ORDER REVERSING ADMINISTRATIVE LAW JUDGE'S DECISION DATED MAY 13, 2020, THE DISTRICT COURT'S ORDER FOR JUDGMENT DATED MAY 14, 2020, AND THE DISTRICT COURT'S JUDGMENT DATED MAY 14, 2020

APPELLANTS' BRIEF – ORAL ARGUMENT REQUESTED

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STATEMENT OF THE ISSUES

[¶ 1] Whether the District Court erred in violating the sovereign rights of the Cherokee Nation by rejecting the ALJ's determination that wholly owned subsidiaries of the Cherokee Nation, are entitled to sovereign immunity?

[¶ 2] Whether the District Court erred in reversing the ALJ's determination that Steven Bilby is entitled to sovereign immunity?

[¶ 3] Whether the District Court erred in reversing the ALJ's determination that WSI had no authority to issue a cease and desist order to Hudson Insurance Company?

STATEMENT OF THE CASE

[¶ 4] WSI commenced an administrative proceeding against Cherokee Services Group, LLC; Cherokee Nation Government Solutions, LLC; Cherokee Medical Services, LLC; Cherokee Nation Technologies, LLC (hereinafter collectively referred to as the "Cherokee Entities"); Steven Bilby, who was the Executive General Manager of the Cherokee Entities during the relevant timeframe; and Hudson Insurance Company, which provides workers' compensation coverage to the Cherokee Entities.

[¶ 5] On February 4, 2015, WSI issued an Administrative Order asserting that the Cherokee Entities (1) are employers within the State of North Dakota, are subject to Title 65 of the North Dakota Century Code, and are liable for workers' compensation premiums; (2) must report their payroll and pay overdue workers' compensation premiums; and (3) are subject to the penalties provided by N.D.C.C. § 65-04-33. See Doc. ID #25. Additionally, the Administrative Order claimed that Bilby is personally liable for the workers' compensation premiums allegedly owed to WSI and ordered Hudson to cease and desist from writing workers' compensation coverage in North Dakota. See Doc. ID #25.

[¶ 6] On March 19, 2015, the Cherokee Entities submitted a Special Appearance, Request for Consideration and Demand for Formal Hearing. *See* Doc. ID #26.

[¶ 7] On July 16, 2016, an administrative hearing was conducted. *See* Doc. ID #28.

[¶ 8] On March 22, 2018, the administrative law judge ("ALJ"), Janet Demarais Seaworth, issued an Order, reversing WSI's February 4, 2015 Administrative Order. *See* Doc. ID #21. In the Order, the ALJ held that (1) tribal sovereign immunity precludes WSI from applying North Dakota workers' compensation laws to the Cherokee Entities, which are not subject to Title 65 of the North Dakota Century Code; (2) the Cherokee Entities are immune from any suit brought by WSI to enforce its workers' compensation laws; (3) because WSI seeks relief against Bilby based on actions taken in the course of his employment, he shares in the tribe's sovereign immunity; and (4) WSI does not have the authority to preclude Hudson from writing workers' compensation coverage in North Dakota. *Id.*

[¶ 9] On April 19, 2018, WSI filed an appeal of the Order in North Dakota state court. *See* Doc. ID #1.

[¶ 10] On May 17, 2018, the Cherokee Entities filed a Notice of Removal of the appeal to the United States District Court for the District of North Dakota, Western Division. *See* Doc. ID #6.

[¶ 11] On June 12, 2018, WSI filed a motion to remand the matter to the state district court. *See* Doc. ID # 14.

[¶ 12] On October 29, 2019, the federal court remanded the matter to the state district court. *See* Doc. ID #14.

[¶ 13] On May 13, 2020, the District Court reversed the ALJ's Order. *See* Doc. ID #68

[¶ 14] On June 17, 2020, the Cherokee Entities filed a notice of appeal to this Court. *See* Doc. ID #71.

STATEMENT OF THE FACTS

[¶ 15] The Cherokee Entities are wholly owned by the Cherokee Nation, a federally recognized Indian tribe. *See* Doc. ID #40, p 28. WSI does not dispute that each of the Cherokee Entities is a "wholly owned tribal entity that acts as an arm of the tribe itself." Doc. ID #40, p 27.

[¶ 16] With more than 330,000 members, the Cherokee Nation is the largest tribal nation in the United States. Doc. ID #40, p 28. The Cherokee Nation is committed to protecting its inherent sovereignty, preserving and promoting the Cherokee culture, and improving the quality of life for future generations of the Cherokee Nation. As part of its commitment to providing core government services to its members, the Cherokee Nation has created numerous business enterprises, including the Cherokee Entities to create income for the Cherokee Nation's tribal operations. *Id.*

[¶ 17] As a sovereign government, the Cherokee Nation has passed its own comprehensive laws, which are codified on a regular basis and available to the general public. Among its laws is the Cherokee Nation Worker's Compensation Act. Doc. ID #40, p 29. The Act is a comprehensive codification of workers' compensation laws and coverage for all Cherokee Nation employees. *See Id.* The Act provides, in part, as follows:

> [A]ll employees shall be conclusively presumed to have acknowledged the exclusive applicability of the terms, conditions, and provisions of this Act, and that the Cherokee Nation is a sovereign Nation for the purposes of worker's compensation, governed by the laws set forth by the Council of the Cherokee Nation and that no other worker's compensation law . . . is applicable to injuries or to death sustained by them.

Doc. ID #37, p 33.

[¶ 18] The Cherokee Nation obtained workers' compensation coverage through Hudson and pays a significant annual premium for that coverage. *See* Doc. ID #30, p 36. The Cherokee Entities are all named insureds on the Cherokee Nation's Hudson policy. Doc. ID #30, p 37. The Hudson policy applies to all of the Cherokee Nation's operations regardless of the location of such operations and includes coverage for the Cherokee Entities' employees in North Dakota. Doc. ID #30, pp 38-39. The policy provides:

> Sovereign Nation Workers' Compensation means the worker or workman's compensation benefits as established by you. It does not include any state, federal worker or workmen's compensation law, any federal occupational disease law or the provisions of any law that provide non-occupational disability benefits.
>
> Recognizing the tribe as a sovereign nation, with its corresponding civil jurisdiction, the actual benefits provided by this policy are subject to the tribal ordinance related to workers compensation benefits, in effect as of the effective date of this policy.

Doc. ID #30, p 40.

[¶ 19] The Cherokee Entities provide services to the federal government under various federal contracts. *See* Doc. ID #40, p 36. In fulfilling one of these government contracts, the Cherokee Entities utilized the work of Amy Moser in North Dakota. Prior to her employment, Ms. Moser signed the Cherokee Nation Workers' Compensation Notice of Acknowledgement, which is provided to all tribal employees. Doc. ID #38, p 2. The acknowledgement states in bold, underlined font as follows:

> I understand that the Cherokee Nation has enacted a worker's compensation act covering Cherokee Nation and its wholly owned entities. I further understand the benefits will not be administered through a court of any state or any other jurisdiction.

Doc. ID #38, p 2. Despite this acknowledgement, Ms. Moser later filed a worker's compensation claim with WSI, triggering the administrative action at issue in this case.

[¶ 20] In the administrative hearing, WSI fully acknowledged it does not cover federal employees because, like the Cherokee Nation, the federal government has its own workers' compensation scheme. WSI's collections supervisor (who was previously WSI's employer compliance specialist) testified:

> Q. I asked Mr. Schumacher earlier about Federal employees. Are you aware of WSI's coverage of Federal employees at all?
>
> A. We don't cover Federal.
>
> Q. And why is that?
>
> A. Because they have their own policies.
>
> Q. Even if they're within the geographic confines of the state of North Dakota?
>
> A. Mm-hmm. Yes. That's correct.
>
> Q. Even if they're working downtown?
>
> A. Yep, that's correct.
>
> Q. And that's because they have their own Federal coverage -
>
> A. Correct
>
> Q. - for workers' compensation?
>
> A. Correct.

Doc. ID #40, p 24.

[¶ 21] The evidence also showed that state agencies in other states have concluded that subsidiaries of the Cherokee Nation are not subject to the workers' compensation schemes in those states. *See* Doc. ID #40, p 34.

[¶ 22] Despite the fact that (1) the Cherokee Nation has sovereign immunity and its own workers' compensation act that provides coverage for tribal employees, (2) Amy Moser acknowledged the Cherokee Nation workers' compensation law applied to her, and (3) the

Cherokee Entities provide services to the federal government under federal contracts, WSI continues to push this matter forward.

STANDARD OF REVIEW

[¶ 23] The standard of review on an appeal from an agency determination is well settled.

[¶ 24] In an appeal from a district court's review of an administrative agency decision, this court reviews the agency's decision, not the district court's decision. *See Spectrum Care v. Stevick,* 2006 ND 155, 718 N.W.2d 593 (citing *Baier v. Job Serv. N.D.*, 2004 ND 27, ¶6, 673 N.W.2d 923). Under N.D.C.C. §§ 28-32-46 and 28-32-49, this Court must affirm the decision of an administrative agency unless:

> 1. The order is not in accordance with the law.
>
> 2. The order is in violation of the constitutional rights of the appellant.
>
> 3. The provisions of this chapter have not been complied with in the proceedings before the agency.
>
> 4. The rules or procedure of the agency have not afforded the appellant a fair hearing.
>
> 5. The findings of fact made by the agency are not supported by a preponderance of the evidence.
>
> 6. The conclusions of law and order of the agency are not supported by its findings of fact.
>
> 7. The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant.
>
> 8. The conclusions of law and order of the agency do not sufficiently explain the agency's rationale for not adopting any contrary recommendations by a hearing officer or an administrative judge.

N.D.C.C. § 28-32-46; *Bergum v. N.D. Workforce Safety & Ins.*, 2009 ND 52, ¶ 8, 764 N.W.2d 178. This Court reviews the administrative agency's decision, but "giv[es] due respect to the district court's analysis and review." *Bergum*, 2009 ND 52, ¶ 8, 764 N.W.2d

178. "[T]his Court does not make independent findings of fact or substitute its judgment for that of the administrative agency." *Rodenbiker v. Workforce Safety & Ins.*, 2007 ND 169, ¶ 14, 740 N.W.2d 831. Finally, this Court does not give deference to the ALJ's legal conclusions, and questions of law are fully reviewable on appeal. *Johnson v. N.D. Workforce Safety & Ins.*, 2012 ND 27, ¶9, 812 N.W.2d 467.

ARGUMENT

[¶ 25] It is well established that tribal sovereign immunity extends to tribal businesses and entities when they act as an "arm of the tribe." Here, the ALJ correctly concluded that tribal sovereign immunity precludes WSI from applying North Dakota workers' compensation laws to the Cherokee Entities, who are wholly owned subsidiaries of the Cherokee Nation and act as arms of the tribe. The ALJ also properly determined that (1) the Cherokee Entities are immune from any suit by WSI to enforce the North Dakota workers' compensation laws; (2) Steven Bilby ("Bilby") is not personally liable for unpaid premiums, interest, penalties and costs under N.D.C.C. § 65-04-26.1 and shares in the sovereign immunity of his tribal employer; and (3) WSI did not have the authority to issue a cease and desist order to preclude Hudson from writing workers' compensation coverage in North Dakota. For the reasons set forth below, the ALJ's Order should be affirmed.

LAW AND ARGUMENT

I. TRIBAL SOVEREIGN IMMUNITY PRECLUDES WSI FROM APPLYING NORTH DAKOTA WORKERS' COMPENSATION LAWS TO THE CHEROKEE ENTITIES.

A. Tribes and tribal businesses enjoy sovereign immunity.

[¶ 26] In 1831, Chief Justice John Marshall labeled Indian tribes "domestic dependent nations" who exercise inherent sovereign authority. *Cherokee Nation v. Georgia*, 5 Pet. 1,

17, 8 L. Ed. 25 (1831). As "dependents" of the federal government, "tribes are subject to plenary control by Congress." *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 788 (2014). At the same time, they "remain 'separate sovereigns pre-existing the Constitution.'" *Id.* (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978)). Tribes retain their "historic sovereign authority" unless Congress acts to limit it. *Id.*

[¶ 27] One of the "core aspects" of this sovereignty is the "'common-law immunity from suit traditionally enjoyed by sovereign powers.'" *Bay Mills*, 572 U.S. at 788 (quoting *Santa Clara Pueblo*, 436 U.S. at 58); *see Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 890 (1986) (noting that sovereign immunity is a "necessary corollary to Indian sovereignty and self-governance"). Thus, "an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its sovereign immunity." *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 755 (1998). The United States Supreme Court has "time and time again" recognized that tribal sovereign immunity is "settled law" and has consistently dismissed suits brought against tribes without congressional authorization or a waiver by the tribe. *Bay Mills*, 572 U.S. at 789.

[¶ 28] Tribal sovereign immunity bars actions brought by the states, in addition to those filed by individuals. *Bay Mills*, 572 U.S. at 789. This applies even to cases filed by a state in its own courts. *Id.* Without the express authorization of Congress or a tribal waiver, a state court may not exercise jurisdiction over a federally recognized Indian tribe. *See Oklahoma Tax. Commission v. Citizen Band Potawatomi Tribe of Oklahoma*, 498 U.S. 505, 509 (1991); *Three Affiliated Tribes*, 476 U.S. at 891 ("[I]n the absence of federal authorization, tribal immunity, like all aspects of tribal immunity, is privileged from diminution by the States."). Courts have recognized that this sovereign immunity bars

workers' compensation claims brought against tribes in state courts and agencies. *See, e.g., Middletown Rancheria of Pomo Indians v. Workers' Compensation Appeals Bd.*, 60 Cal App. 4th 1340 (Cal. Ct. App. 1998) (concluding state Workers' Compensation Appeals Board did not have subject matter jurisdiction over tribe for purpose of enforcing California workers' compensation laws); *Cupo v. Seminole Tribe of Fla.*, 860 So. 2d 1078, 1079 (Fla. Ct. App. 2003) (affirming dismissal of workers' compensation clam brought by tribal employee in state court); *Mendoza v. Isleta Resort & Casino*, 460 P.3d 467, 474 (N.M. 2020) (applying sovereign immunity and holding state Workers' Compensation Administration lacked subject matter jurisdiction over claim filed by employee of tribal casino).

[¶ 29] Tribal sovereign immunity extends to wholly owned tribal businesses that function as arms of the tribe. *See Inyo Cty. v. Paiute-Shoshone Indians of the Bishop Cmty.*, 538, U.S. 701 n.1 (2003) ("The United States maintains, and the County does not dispute, that the Corporation is an "arm" of the Tribe for sovereign immunity purposes."); *Dine Citizens Against Ruining Our Env't v. Bureau of Indian Affairs*, 932 F.3d 843, 856 (9th Cir. 2019) ("[T]he settled law of our circuit is that tribal corporations acting as an arm of the tribe enjoy the same sovereign immunity granted to a tribe itself."); *Hagen v. Sisseton-Wahpeton Cmty. Coll.,* 205 F.3d 1040, 1043 (8th Cir. 2000) (holding tribal college was entitled to sovereign immunity because it "serves as an arm of the tribe and not as a mere business").

B. Tribal sovereign immunity extends to commercial activity occurring outside the tribe's reservation or territory.

[¶ 30] The Supreme Court has expressly held that sovereign immunity applies to a tribe's commercial activities, even if those activities occur outside of the tribe's reservation or territory. In *Kiowa*, a plaintiff sued the tribe in Oklahoma state court, seeking to recover on

a promissory note executed by the tribe. The plaintiff argued the doctrine of sovereign immunity should not apply to commercial activities engaged in by the tribe off its reservation because tribal businesses "had become removed from tribal self-governance and internal affairs." *Kiowa*, 523 U.S. at 758. The Supreme Court "decline[d] to draw this distinction" and "defer[red] to the role Congress may wish to exercise in this important judgment." *Id*. Because Congress had not abrogated the tribe's immunity for commercial activities undertaken off its reservation and the tribe had not waived it, the Court held the tribe was immune from suit in state court.[1] *Id*. at 760; *see C&L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 414 (2001) (recognizing that in *Kiowa*, the Court "held that an Indian tribe is not subject to suit in a state court—even for breach of contract involving off-reservation conduct—unless Congress has authorized the suit or the tribe has waived its immunity.").

[¶ 31] Although Kiowa involved an action to enforce a contract, there is nothing in the decision limiting its application to contract cases. Indeed, the Court cited its prior decision in *Oklahoma Tax. Commission v. Citizen Band Potawatomi Tribe of Oklahoma*, 498 U.S. 505 (1991), which it described as "reaffirm[ing] that while Oklahoma may tax cigarette sales by a Tribe's store to nonmembers, the Tribe enjoys immunity from a suit to collect unpaid taxes." 523 U.S. at 755 (citing *Potawatomi*, 498 U.S. at 510). Far from limiting its sovereign immunity holding to contract actions, the Supreme Court expressly reiterated

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[1] The Court also rejected any notion that suits brought by a state against a tribe or tribal entity were not barred by tribal sovereign immunity. It distinguished "state sovereign immunity from tribal sovereign immunity, as tribes were not at the Constitutional Convention. They were thus not parties to the 'mutuality of . . . concession' that 'makes the states surrender of immunity from suit by sister states plausible.'" *Id.* at 755-56. So, importantly, "tribal immunity is a matter of federal law and is not subject to diminution by the states." *Id.*

that the doctrine also applied to actions—like this one—brought by state agencies purportedly to enforce state laws.

[¶ 32] Thus, Indian tribes and their commercial entities are fully immune from suit in state courts for all of their actions or inactions—regardless of where they occurred—unless Congress or the tribes themselves have acted to waive that immunity.

C. The ALJ properly held that sovereign immunity protects the Cherokee Entities.

[¶ 33] Here, the ALJ correctly found that the Cherokee Nation "has not waived its sovereign immunity in the area of workers compensation." Doc. ID #24, p 4. Instead, as the ALJ notes:

> [The tribe] has enacted its own workers' compensation ordinances; it provides a forum for workers compensation matters in its own tribal court system; and it has obtained its own workers' compensation insurance policy with Hudson Insurance Group for the provision of benefits to its employees, to the exclusion of all other workers' compensation laws.

Id. Nor has Congress acted to restrict the Cherokee Entities' sovereign immunity with respect to commercial activities outside of the Cherokee Nation boundaries. Thus, the ALJ properly concluded that "the state is without a mechanism to enforce its workers compensation laws against these wholly owned subsidiaries of the Cherokee Nation." Doc. ID #21, p 5. A waiver of tribal sovereign immunity may never arise by implication. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59 (1978). If a waiver of immunity exists, by act of Tribe or Congress, the waiver or abrogation of immunity must be clear, express and unmistakable. *United States v. Dion*, 476 U.S. 734, 738-739 (1986). No such waiver has occurred here.

D. The District Court erred by failing even to consider—much less recognize—the sovereign immunity of the Cherokee Entities.

[¶ 34] Although the ALJ decision under review was based on tribal sovereign immunity, the District Court essentially ignored that issue. Instead, it focused on a separate—and wholly irrelevant—subject, *i.e.,* the jurisdiction of state and tribal courts over private individuals and corporations, not tribal entities. Answering the wrong questions led the court to the wrong conclusion, which must be reversed.

[¶ 35] The District Court held that because the work of the Cherokee Entities was performed by non-tribal members in North Dakota (where the Cherokee Nation does not have tribal land), state law should apply. Doc. ID #68, p 6. But it cites no authorities suggesting that the location of the work or the identity of tribal employees impacts the sovereign immunity enjoyed by tribes and tribal businesses. It does not. As shown above, sovereign immunity may be waived or limited ***only*** by Congress or the tribes themselves. Neither Congress nor the Cherokee Nation has limited the tribe's sovereign immunity here. Moreover, the Supreme Court in *Kiowa* expressly rejected the argument—adopted by the District Court below—that sovereign immunity does not protect a tribe from suit based on actions occurring outside of its tribal land. 523 U.S. at 760.

[¶ 36] Instead of following the Supreme Court's clear holding in *Kiowa*, the District Court rejected the Cherokee Entities' claim of sovereign immunity based on caselaw that ***does not even mention tribal sovereign immunity***. It relied on *Montana v. United States,* 450 U.S. 544 (1981), which examined "tribal court jurisdiction over a non-consenting non-tribal member." Order at 6. It also applied *Nevada v. Hicks*, 533 U.S.535 (2001) and *Williams v. Lee*, 358 U.S. 217 (1959), which considered the converse issue, *i.e.,* whether state courts have jurisdiction over tribal members for claims arising on tribal land. But neither question is presented here. This case does not involve a jurisdictional dispute over

which court may resolve claims against private individuals or corporations or which law governs those claims. Instead, WSI seeks to enforce state law against ***the tribe itself***, through its tribal businesses. This squarely implicates tribal sovereign immunity—a doctrine that does not apply to individual tribal members and private corporations. This sovereign immunity bars WSI's attempt to enforce its workers' compensation scheme against the Cherokee Entities ***in any forum***, including this Court. The ALJ correctly concluded tribal sovereign immunity precludes WSI from applying North Dakota workers' compensation laws to the Cherokee Entities and enforcing them in the state courts. The District Court's decision to the contrary should be reversed.

II. THE ALJ CORRECTLY CONCLUDED BILBY IS NOT PERSONALLY LIABLE FOR UNPAID PREMIUMS, INTEREST, PENALTIES, AND COSTS UNDER N.D.C.C § 65-04-26.1 AND BILBY IS ENTITLED TO SOVEREIGN IMMUNITY.

[¶ 37] Bilby shares the Cherokee Nation's sovereign immunity as an officer of Cherokee Services Group, LLC; Cherokee Nation Government Solutions, LLC; and Cherokee Nation Technologies, LLC. Appellee's attempted action against Bilby is without merit. Tribal immunity may not be evaded by suing tribal officers. *Fletcher v. U.S.*, 116 F.3d 1315, 1324 (10th Cir. 1999) (citing *Kenai Oil & Gas Inc. v. Dept. of Interior*, 522 F. Supp. 521, 531 (D. Utah 1981)).

[¶ 38] The United States Supreme Court has recognized a narrow, limited exception to this rule where tribal employees are the real party in interest in a lawsuit. *See Lewis v. Clark*, 581 U.S. ____, 137, S. Ct. 1285 (2017). In *Lewis*, the court declined to extend tribal sovereign immunity to an employee who caused an off-reservation motor vehicle accident while driving a tribe-owned limousine carrying patrons of the tribe's casino. The Court held that tribal sovereign immunity does not protect a tribal employee sued in his individual

capacity when the employee is the real party in interest and the tribe's sovereign immunity is not implicated. *Id*. at 1290-1293. The *Lewis* court drew a distinction between official capacity suits–where the relief sought is only nominally against the official and is, in fact, against the official's office and thus the sovereign itself–and suits that seek to impose individual liability upon a government officer for actions taken under color of state law. *Id*. Defendants in official-capacity actions may assert sovereign immunity, whereas defendants in an individual-capacity action may not assert sovereign immunity. *Id*. at 1291. Applying these general rules in the context of tribal sovereign immunity, the question is whether the sovereign or the employee is the real party in interest. *Id*. at 1290. In making this assessment, courts may not simply rely on the characterization of the parties in the complaint. *Id*. at 1290-1291.

[¶ 39] In the instant case, Bilby has no obligation to pay workers' compensation premiums unless the Cherokee Entities are obligated to pay WSI premiums in the first instance. In other words, under N.D.C.C § 65-04-26.1, the personal liability of corporate officers is truly derivative in nature. WSI is attempting to assess premiums against the Cherokee Nation and its business entities. That assessment of premiums was the basis for the underlying WSI order. Accordingly, the Cherokee Nation is the real party in interest in this matter.

[¶ 40] Again, as *Lewis* indicates, the "distinction between individual and official-capacity suits is paramount." 137 S. Ct. at 1291. In an official capacity claim, the relief sought is only nominally against the official and in fact is against the official's office and thus the sovereign itself. That is exactly what the Appellant is seeking in this case. Personal capacity suits seek to impose individual liability on a government employee for his or her

own actions occurring during the course of his or her employment. For example, the limousine driver in *Lewis* was performing his job for the tribe when the accident occurred, but he was sued because of his personal negligence—not because of something the tribe did or failed to do. Thus, the Supreme Court determined the driver was the real party in interest, not the tribe. By contrast, Bilby's alleged liability flows not from his own independent actions but from the Cherokee Entities' failure to obtain insurance from WSI. Bilby could have no alleged personal obligation to pay the claimed premiums if he were not the Executive General Manager of the Cherokee Entities. In short, the Cherokee Nation is the real party in interest in this case, and Bilby is entitled to tribal sovereign immunity. As such, the ALJ properly concluded Bilby is not liable for unpaid premiums, interest, penalties, and costs under N.D.C.C. § 65-04-26.1 and held that Bilby could assert tribal sovereign immunity.

[¶ 41] The district court failed to consider and analyze the issue of whether Bilby could assert tribal sovereign immunity. Therefore, the district court erred in exercising its limited review for an appeal of an agency's determination under N.D.C.C § 28-32-46.

III. THE ALJ CORRECTLY CONCLUDED WSI HAS NO AUTHORITY TO ISSUE A CEASE AND DESIST ORDER TO HUDSON INSURANCE COMPANY.

[¶ 42] The ALJ succinctly explained that "[w]hile WSI has the authority to require that employers and employees comply with Title 65, N.D.C.C., a review of Title 65 shows that the worker's compensation statutes confer no basis upon which WSI may issue a cease and desist order precluding an out of state insurer from providing a workers compensation policy to an out of state employer for the benefit of its employees wherever they may be." Doc. ID #21, p 7. There exists no statutory authority to grant WSI any "cease and desist"

authority over out-of-state insurance companies. Neither does WSI have "implied authority" to regulate insurance companies. Any implied authority would be in direct abrogation of the specific authority given to the North Dakota insurance commissioner to determine whether an insurance company is legally qualified to transact business in this state. *See* N.D.C.C. § 26.1-02-02.

[¶ 43] In the briefing to the ALJ and district court, WSI relied on several cases supporting the general proposition that WSI is the sole entity that can provide workers' compensation coverage to employers within the State of North Dakota. *See* Docket # 53, ¶ 40. At the very same time, WSI acknowledges that any federal employee working in the state does not need to have any coverage through WSI as it is controlled by another statutory scheme. *See* Doc. ID #40, p 24. Those other systems have insurance policies for that workers' compensation coverage, which covers employees working in North Dakota. *Id.*

[¶ 44] Further, WSI relied on § 65-08-01(4), N.D.C.C., for the proposition that an employer whose employment results in significant contacts with the state is required to secure coverage from WSI. *See* Doc. ID #53, ¶ 43. However, WSI acknowledges that other employees covered by other workers' compensation systems do not need WSI insurance. Regardless of whether WSI has the statutory authority to require an employer to obtain coverage from WSI, WSI has no authority to issue "cease and desist" orders to out-of-state insurance companies.

[¶ 45] Lastly, there is no indication or evidentiary basis whatsoever to determine that Hudson is writing insurance coverage in North Dakota. Hudson insures the Cherokee Nation and all its businesses and entities. To suggest that WSI has regulatory authority over Hudson writing coverage for Cherokee Nation outside of the state of North Dakota

and on tribal land is without basis. Therefore, the ALJ did not err in concluding WSI does not have the authority to preclude Hudson from writing workers' compensation coverage.

[¶ 46] The district court did not address the issue of whether WSI has the authority to issue a cease and desist order to Hudson. The district court erred in its limited review for an appeal of an agency's determination under N.D.C.C. § 28-32-46.

CONCLUSION

[¶ 47] For the reasons stated above, the Appellants respectfully request this Court to reverse the state district court's order reversing the ALJ's decision.

REQUEST FOR ORAL ARGUMENT

[¶ 48] This case involves important legal questions regarding tribal sovereign immunity. In particular, whether or not tribal sovereign immunity precludes Workforce Safety and Insurance from applying and enforcing North Dakota Workers' Compensation Laws to the Cherokee Entities. Oral argument will be helpful to the Court in order to fully discuss and address this important issue.

Dated this 26th day of August, 2020.

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CERTIFICATE OF COMPLIANCE

[¶ 49] The undersigned certifies the above brief is in compliance with N.D.R. App. P. 32(a)(8)(A) and the total number of pages in the brief, excluding this Certificate of Compliance and the service document, and this certification of compliance totals 22 pages.

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I hereby certify that on August 26, 2020, a true and correct copy of the foregoing Appellants' Brief - Oral Argument Requested and Appellants' Appendix was served on the following by email.

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20200166
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
AUGUST 27, 2020
STATE OF NORTH DAKOTA

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I hereby certify that on August 27, 2020, a true and correct copy of the updated Index to Appendix and pages 60-63 to Appellants' Appendix were served on the following by email.

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