

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

CHRISTIAN LUIZ, *Applicant*

vs.

**MASONITE, NORTHERN CIRCLE INDIAN;
HOUSING AUTHORITY, UNITED NATIVE HOUSING
DEVELOPMENT CORPORATION; AMERIND, *Defendants***

**Adjudication Number: ADJ11269850
Santa Rosa District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

The Appeals Board granted reconsideration to study the factual and legal issues. This is our Decision After Reconsideration.

In the Joint Findings and Order of September 27, 2021, the workers' compensation administrative law judge ("WCJ") found in ADJ11269850 that applicant, while employed by Northern Circle Indian Housing Authority ("Northern Circle"), and while allegedly employed by United Native Housing Development Corporation ("United Native Housing"), claims that he sustained industrial injury to his neck and upper extremity due to cumulative trauma ending March 30, 2018, that applicant was an employee of Northern Circle from February 27, 2000 to September 27, 2018, that Northern Circle is a tribal entity with sovereign immunity and is not subject to the jurisdiction of the California Workers' Compensation Appeals Board ("WCAB"), that United Native Housing was formed for the purpose of accessing funds that were not available to tribal entities, and that United Native Housing does not enjoy sovereign immunity and is subject to the jurisdiction of the WCAB.

United Native Housing ("petitioner") filed a petition for reconsideration and removal in response to the WCJ's decision. Petitioner contends, in substance, that the WCJ's decision will result in irreparable harm and significant prejudice to petitioner, and that the WCJ erred in concluding that petitioner does not enjoy sovereign immunity pursuant to the five factors discussed

by the California Supreme Court in *People v. Miami Nation Enterprises* (2016) 2 Cal.5th 222 (“*Miami*”).

Applicant filed an answer.

The WCJ submitted a Report and Recommendation (“Report”).

Based on our review of the record and applicable law, we have re-weighed the five factors set forth in the *Miami* decision, and we conclude that the preponderance of evidence establishes petitioner’s sovereign immunity. As our Decision After Reconsideration, we will rescind the WCJ’s finding to the contrary and substitute our finding of sovereign immunity.

In reference to the petition for removal filed by petitioner, we note that if a decision includes resolution of a “threshold” issue, then it is a “final” decision, whether or not all issues are resolved or there is an ultimate decision on the right to benefits. (*Aldi v. Carr, McClellan, Ingersoll, Thompson & Horn* (2006) 71 Cal.Comp.Cases 783, 784, fn. 2 (Appeals Board en banc).) Threshold issues include but are not limited to, injury arising out of and in the course of employment, jurisdiction, the existence of an employment relationship and statute of limitations issues. (See *Capital Builders Hardware, Inc. v. Workers’ Comp. Appeals Bd. (Gaona)* (2016) 5 Cal.App.5th 658, 662 [81 Cal.Comp.Cases 1122].) Failure to timely petition for reconsideration of a final decision bars later challenge to the propriety of the decision before the WCAB or Court of Appeal. (See Lab. Code, § 5904.) Alternatively, non-final decisions may later be challenged by petition for reconsideration once a final decision issues.

A decision issued by the Appeals Board may address a hybrid of both threshold and interlocutory issues. If a party challenges a hybrid decision, the petition seeking relief is treated as a petition for reconsideration because the decision resolves a threshold issue. However, if the petition challenging a hybrid decision disputes a determination made on an interlocutory question, then the Appeals Board will evaluate the issues raised by the petition under the removal standard applicable to non-final decisions, i.e., significant prejudice or irreparable harm. (Cal. Code Regs., tit. 8, § 10955.)

In this case, the WCJ’s decision resolved the threshold issue of whether the WCAB has jurisdiction over the claim filed by applicant against petitioner. Therefore, the filing of a petition for reconsideration, which petitioner has done here, is the correct legal vehicle to challenge the WCJ’s decision. The same is not true of the petition for removal filed by petitioner. Although a petition for removal is appropriate for challenging interlocutory orders, the Joint Findings and

Order of September 27, 2021 is not in the nature of an interlocutory order. Therefore, we need only address the petition for reconsideration filed by petitioner.

Turning to the threshold issue of jurisdiction, we begin by noting that where an applicant pursues a workers' compensation claim directly against a "federally recognized Indian tribe," the burden is on the applicant to establish that the WCAB has jurisdiction over the claim. (*Middletown Rancheria v. Workers' Comp. Appeals Bd.* (1998) 60 Cal.App.4th 1340, 1353 (63 Cal.Comp.Cases 15) [party seeking relief afforded by state workers' compensation laws has the burden of proving requisite jurisdictional facts].)

However, where the applicant is claiming workers' compensation against a "tribally affiliated entity," as here, the burden is on the tribal entity to establish that it enjoys the same sovereign immunity as the Native American tribe itself, pursuant to a five-factor test. In *Miami*, the California Supreme Court summarized this burden and the five-factor test as follows:

The main legal question [presented here] is how to determine whether a tribally affiliated entity shares in a tribe's immunity from suit. We conclude that an entity asserting immunity bears the burden of showing by a preponderance of the evidence that it is an "arm of the tribe" entitled to tribal immunity. In making that determination, courts should apply a five-factor test that considers (1) the entity's method of creation, (2) whether the tribe intended the entity to share in its immunity, (3) the entity's purpose, (4) the tribe's control over the entity, and (5) the financial relationship between the tribe and the entity. As explained below, this test takes into account both formal and functional considerations—in other words, not only the legal or organizational relationship between the tribe and the entity, but also the practical operation of the entity in relation to the tribe. Once the entity demonstrates that it is an arm of the tribe, it is immune from suit unless the opposing party can show that tribal immunity has been abrogated or waived.

(*Miami, supra*, 2 Cal.5th at 236.)

The Supreme Court further explained that in applying the five-factor test, no single factor is dispositive, so that each case requires a "fact-specific inquiry into all the factors followed by an overall assessment of whether the entity has carried its burden by a preponderance of the evidence." (*Miami*, 2 Cal.5th at 248.)

In his Report in this case, the WCJ discusses the five-factor test in support of his finding that petitioner (United Native Housing) does not enjoy sovereign immunity, as follows:

A. FORMATION AND PURPOSE OF UNITED NATIVE HOUSING DEVELOPMENT CORPORATION.

United Native Housing Development Corporation is a California corporation. (Applicant's Exhibit 7). It was formed by, and is controlled by, Northern Circle. (Testimony of Dewey Hobson Bandy, retired employee of California Coalition for Rural Housing; July 6, 2021 Minutes of Hearing and Summary of Evidence ([July 6, 2021 Minutes of Hearing] "Minutes II" at page 3, lines 12-28). Mr. Bandy gave technical advice to help United Native Housing achieve Community Housing Development Organization ("CHDO") status.

Mr. Bandy explained that a CHDO distributes funds received from the Federal government. A participating jurisdiction must be one of four units of government---city, county, consortium of cities, or state government. In the case at bar, the State of California is the participating jurisdiction. (Minutes II at p. 3, lines 24-36).

Significantly, Mr. Bandy testified, "United Native could access funds for use by Northern Circle. **At that time, Northern Circle Indian Tribal [sic, Housing] Authority, as a tribal entity, could not access funding.**" (Minutes II, page 5, lines 11-16, emphasis added).

[This WCJ] finds as a fact that United Native Housing was formed for the purpose of accessing funds that were not available to tribal entities. This finding of fact has an impact on application of the *Miami* factors in the following paragraphs.

B. APPLICATION OF THE MIAMI FACTORS.

Applying the first *Miami* factor, United Native Housing was formed by Northern Circle, a tribal entity with sovereign immunity. Mr. Bandy testified, "Northern Circle did not seek to waive sovereign immunity for itself nor for United Native Housing" "At the time, the issue of sovereign immunity was never raised in any way." (Minutes II, page 5, lines 1-9).

None of the exhibits filed by Defendant United Native Housing address sharing of sovereignty, or a grant of sovereignty, from the Tribes or Northern Circle to United Native Housing. (Exhibits A through I). Exhibits B and C are consistent with the testimony of Mr. Bandy, stating that United Native Housing was formed for the explicit purpose of tapping sources of funding from the State of California that were not available to Northern Circle as a Tribally Designated Housing Entity. Exhibit B states:

“Because [Northern Circle] is a [Tribally Designated Housing Authority], it is limited in the sources of funding that it can receive, the services it can provide, and the target population to whom it can provide services. The purpose of creating the [United Native Housing Development Corporation] was to provide housing and housing related services for the general low and moderate-income population within the planned service area, using funding from sources that would not be available to [Northern Circle]. (Exhibit B). Exhibit C identifies a specific, intended funding source as the State of California. (Exhibit C).

It is determined that Northern Circle and the member tribes intentionally did not extend tribal entity status and sovereign immunity status to United Native Housing. Tribal status would make it ineligible to receive grants from the intended funding sources.

Turning to the second factor, neither the Articles of Incorporation (Applicant’s Exhibit 7), nor United Native Exhibits A through I state an intent to share sovereign immunity with United Native Housing.

Regarding the third factor, the purposes of Northern Circle and United Native Housing are very similar, but not identical. Northern Circle’s purpose is to provide housing for tribal members. In contrast, the purpose of United Native Housing is broader. As stated in Article 2 of the Articles of Incorporation:

“The specific purposes for which this corporation is organized are to promote, assist and provide for the enhancement and development of housing and housing assistance for low-income families and others in need of housing assistance, including Native American families.”

(Applicant’s Exhibit 7).

United Native Housing exists to provide housing to low-income families, including Native Americans. In contrast, Northern Circle provides for the housing needs of tribal members only.

[This WCJ] concludes that the two entities exist to secure funding from two different and distinct funding streams. Northern Circle is eligible for funding available only to tribal entities. United Native Housing is eligible for funding that, at one time, tribal entities could

not access. In conclusion, the third *Miami* factor weighs against a finding of tribal entity status and against a finding of sovereign immunity in relation to United Native Housing.

The fourth factor considers the tribes control over the entity. Here, Northern Circle, a tribal entity, exercises control over United Native Housing.

However, leadership of United Native Housing Development Corporation is not limited to Tribal members. Witness Dewey Hobson Bandy is on the Board of Directors of United Native. He is not a tribal member. (Minutes II at page 5, lines 33-34).

The fifth and final factor is the financial relationship between the tribe and the entity. It is determined that, the financial relationship here weighs against extension of sovereign immunity to United Native Housing. Instead, [this WCJ] concludes that Northern Circle formed United Native Housing intentionally as a non-tribal entity, to enable it to secure funding from sources that the Tribes could not access.

For all these reasons, it is determined that the seven tribes and Northern Circle did not intend to share their sovereign immunity when forming United Native Housing. To do so would have defeated the purpose for which United Indian Housing Development Corporation was formed.

We agree with the WCJ's analysis and conclusions in reference to the second and fourth factors set forth by our Supreme Court in *Miami*. In reference to the second factor - whether the Seven Tribes who created Northern Circle intended United Native Housing ("arm-of-the-tribe") to share in the Tribes' immunity – we agree with the WCJ's assessment that a preponderance of the evidence does not demonstrate an intent on the part of the Tribes or Northern Circle to share sovereign immunity with United Native Housing. In reference to the fourth factor – the Tribes' control over United Native Housing through Northern Circle, the WCJ likewise correctly determined that Northern Circle, an undisputed tribal entity, exercises control over United Native Housing. Thus, the parts of the WCJ's analysis with which we agree place one of the five *Miami* factors in applicant's column (lack of intent to share sovereign immunity) and one of the five *Miami* factors (tribal control) in petitioner's column.

However, we are persuaded that the other three factors, i.e., the United Housing’s method of creation, its purpose, and its financial relationship with the Tribes and Northern Circle, support petitioner’s argument that it enjoys sovereign immunity from applicant’s claim before the WCAB.

The first *Miami* factor to be addressed is United Housing’s method of creation. In his Report, the WCJ states that Northern Circle and the member tribes did not intend to extend tribal entity status and sovereign immunity status to United Native Housing. We disagree with this part of the WCJ’s analysis because it is more relevant to the second *Miami* factor, i.e., whether Northern Circle and the tribes intended United Housing to share in their immunity, than to the first *Miami* factor – the “method of creation.”

We further note that in *Miami*, wherein certain “payday” lending businesses were alleged to be “arms of the tribe” who enjoyed sovereign immunity, the Supreme Court addressed the “method of creation” factor by noting that the “capital and intellectual property on which [the]...lending businesses were founded did not come from either tribe. Instead, they came from an outside commercial entity that continued to play a significant role in the lending operations after [the lending businesses] formally took ownership.” (2 Cal.5th at 255-256.)

In this case, the WCJ acknowledges in his Report that the July 6, 2021 trial testimony of Mr. Bandy, formerly of the California Coalition for Rural Housing and a current Board member of United Housing, establishes that United Housing was created by the tribal entity, Northern Circle. Although United Native Housing was created to access public funds that were not available to tribal entities, and to provide housing to low-income families, this intent to provide housing also included Native Americans.

Relevant to the “method of creation” factor, Mr. Bandy also testified that United Housing was closely related to Northern Circle and was created to serve as a regional affordable housing provider when a tribe does not have land or cannot provide housing. (Summary of Evidence, 7/6/21, p. 3:24-26 & 3:42-47.) Mr. Bandy further testified that United Housing was organized and partially funded by Northern Circle, and that United Housing was created to take advantage of Northern Circle’s capacity and experience to achieve housing goals, which United Housing lacked. (Summary of Evidence, 7/6/21, p. 4:26-31.) It was also Mr. Bandy’s testimony that United Housing could provide housing assistance to all income-qualified individuals, but United Housing was focused on reaching Native Americans. (Summary of Evidence, 7/6/21, pp. 5:43-6:3.)

As noted before, the WCJ emphasized that United Native Housing was created to access public funds that were not available to tribal entities, which led the WCJ to conclude that the “method of creation” factor (*Miami* factor one) weighed against sovereign immunity for United Housing. We disagree, based on the totality of Mr. Bandy’s trial testimony. Although United Housing was created to access funds otherwise unavailable to Northern Circle, Mr. Bandy’s testimony establishes that United Housing was, in essence, an arm of Northern Circle. United Housing was organized and partially funded by Northern Circle, and United Housing served as a regional affordable housing provider when a tribe did not have land or could not provide housing. Further, United Housing was created to take advantage of Northern Circle’s capacity and experience to achieve housing goals, which United Housing lacked, and United Housing had a focus on reaching Native Americans. We therefore conclude that the first *Miami* factor, method of creation, favors sovereign immunity on behalf of United Housing.

As for *Miami* factor three, United Housing’s purpose, the WCJ concludes in his Report that United Native Housing was formed for the purpose of accessing funds that were not available to tribal entities. We agree that one of the purposes of United Native Housing was to access funds that were unavailable to tribal entities, but that was not its sole purpose. As noted above, Mr. Bandy testified that another purpose of United Native Housing was to serve as a regional affordable housing provider when a tribe does not have land or cannot provide housing; another purpose was to take advantage of Northern Circle’s capacity and experience to achieve housing goals; and yet another purpose was to provide housing assistance to all income-qualified individuals, but with a focus on reaching Native Americans. In reviewing the various purposes of United Native Housing, we conclude, on balance, that *Miami* factor three – the purpose of the asserted tribal entity – weighs in favor of concluding that United Native Housing is entitled to sovereign immunity.

The fifth *Miami* factor that must be considered is the financial relationship between the tribe and the asserted tribal entity. Although United Native Housing was created to access funds otherwise unavailable to Northern Circle, it was partially funded by Northern Circle, it received material in-kind support from Northern Circle, such as meeting rooms, and in 2006 Northern Circle provided accounting and financial reporting services to United Native Housing for an annual fee of \$3,600.00. (Summary of Evidence, 7/6/21, Bundy testimony at p. 4:7-16; Exhibit D.) Taking an overall view of the financial relationship between United Native Housing and Northern Circle,

it appears that United Native Housing owed its financial existence to Northern Circle and was intended to be a pass-through organization to access government funds otherwise unavailable to Northern Circle. As our Supreme Court acknowledged in *Miami*, however, an analysis of tribal immunity does not require an inquiry into “the respectability or ethics of the business in which a tribe or tribal entity elects to engage.” (2 Cal.5th at 251, internal quotation marks omitted.) In light of United Native Housing’s financial dependence on Northern Circle, we conclude that the fifth Miami factor weighs in favor of sovereign immunity for United Native Housing.

Applying the five factors discussed above, and mindful that each case requires an overall assessment with no single factor being dispositive,¹ we conclude that United Native Housing enjoys sovereign immunity. Although there was a lack of intent for United Native Housing to share sovereign immunity with the tribes and Northern Circle, the other four *Miami* factors weigh in favor of sovereign immunity - United Native Housing’s method of creation, its purpose, Northern Circle’s control over United Native housing, and the financial relationship between the two entities. As our Decision After Reconsideration, we will rescind the WCJ’s finding that United Native Housing does not enjoy sovereign immunity and substitute our finding that it does.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers’ Compensation Appeals Board, that the Joint Findings and Order of September 27, 2021 is **AFFIRMED**, except that Findings 4 and 5 and the second paragraph of the Order in ADJ11269850 are **RESCINDED** and the following new Findings 4 and 5 and second paragraph of the Order in ADJ11269850 are **SUBSTITUTED** in their place:

FINDINGS OF FACT

4. United Native Housing was formed for the purpose of accessing funds that were not available to tribal entities.

5. United Native Housing enjoys sovereign immunity and is not subject to the jurisdiction of the California Workers’ Compensation Appeals Board.

ORDER in ADJ11269850

...

¹ *Miami*, 2 Cal.5th at 248.

IT IS FURTHER ORDERED THAT United Native Housing Development Corporation is dismissed as a party defendant because it is a tribal entity with sovereign immunity.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 4, 2023

SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

**CHRISTIAN LUIZ
LAW OFFICE OF RONALD GLENN MAHURIN
LAW OFFICES OF RICHARD K. GREEN**

JTL/ara

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date. *abs*