WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

DEBORAH HEMSTED, *Applicant*

vs.

UNITED INDIAN HEALTH SERVICES and TRIBAL FIRST INSURANCE, *Defendants*

Adjudication Number: ADJ10124964
Eureka 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.[1]

In the Findings and Order of June 21, 2019, the workers' compensation administrative law judge ("WCJ") found that on September 24, 2014, applicant, while employed as a Medical Assistant III by United Indian Health Services ("UIHS"), sustained industrial injury to unspecified body parts, that the Workers' Compensation Appeals Board ("WCAB") has jurisdiction to address this case, and that "whatever claim of sovereign immunity Tribal First Insurance had was waived by the tribes who created [UIHS]."

UIHS filed a timely petition for reconsideration of the WCJ's decision. UIHS contends that the WCJ erred in "rul[i]ng on the wrong issue," that the evidence does not justify the WCJ's finding that UIHS impliedly or expressly waived sovereign immunity, that the U.S. Congress has not authorized the pursuit of workers' compensation claims before the WCAB, and that the WCAB lacks jurisdiction over applicant's claim based upon *Middletown Rancheria v. Workers' Comp. Appeals Bd.* (1998) 60 Cal.App.4th 1340 [63 Cal.Comp.Cases 15].

The Board did not receive an answer from applicant, who is self-represented.

The WCJ submitted a Report and Recommendation ("Report").

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[1] Commissioner Marguerite Sweeney signed the Opinion and Order Granting Petition for Reconsideration dated September 3, 2019. As Commissioner Sweeney is no longer a member of the Appeals Board, a new panel member has been substituted in her place.

Based on our review of the record and applicable law, we conclude that the WCJ erred in neglecting to finally determine the issue of sovereign immunity in her previous decision of December 2, 2016, and that the WCJ must revisit the issue of sovereign immunity under the five-factor test for an "arm of a tribe" described by the California Supreme Court in *People v. Miami Nation Enterprises* (2016) 2 Cal.5th 222 ("*Miami*"). We will rescind the WCJ's previous decision of December 2, 2016 and the Findings and Order of June 21, 2019, and we will return this matter to the trial level for further proceedings and new final determination of the issue of sovereign immunity by the WCJ.[2]

I. THE FINDINGS AND ORDER OF DECEMBER 2, 2016 WAS NOT A FINAL ORDER.

In the Findings and Order of December 2, 2016, the WCJ found that on September 24, 2014, applicant, while employed as a Medical Assistant III by UIHS, claimed to have sustained industrial injury to her back, hips, shoulders, left wrist and musculoskeletal system, and that "the WCAB does not have jurisdiction to adjudicate her claim due to the doctrine of sovereign immunity." However, the WCJ also found that the issue of "whether sovereign immunity has been waived has not yet been determined," and the WCJ issued the following Order: "It is hereby determined UIHS and Tribal First are entitled to assert sovereign immunity as a jurisdictional bar to adjudicating [applicant's] workers' compensation claim in this forum. Jurisdiction is reserved in this forum to determine whether sovereign immunity has been waived."

No party filed a petition for reconsideration of the WCJ's decision of December 2, 2016.

Ordinarily, the effect of the failure to file a petition reconsideration of a WCJ's decision is that the decision becomes final and beyond the reach of subsequent legal challenge. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1076 [65 Cal.Comp.Cases 650].)

However, we conclude that the Findings and Order of December 2, 2016 was not a "final order" within the meaning of Labor Code sections 5900, 5902 and 5903. The decision was not a final order because it did not definitively resolve the issue of whether applicant's claim against UIHS is barred for lack of WCAB jurisdiction on grounds of UIHS's asserted sovereign immunity.

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[2] The WCJ did not have occasion to consider *Miami* before issuing the Findings and Order of December 2, 2016 because the *Miami* decision did not come down until December 22, 2016. The WCJ did not consider *Miami* before issuing the Findings and Order of June 21, 2019 because she evidently assumed that the issue of sovereign immunity had been finally resolved in the Findings and Order of December 2, 2016. As explained in the body of this opinion, the WCJ's assumption was incorrect.

On one hand, the WCJ ordered that UIHS was "entitled to *assert* sovereign immunity," but on the other hand the WCJ deferred the issue of whether UIHS's supposed sovereign immunity was waived. If the WCJ later determined that there was such a waiver, then UIHS's defense of sovereign immunity would fail and the WCAB's jurisdiction over applicant's claim would be re-established, as happened here. The paradoxical nature of the WCJ's December 2, 2016 decision - its failure to *finally resolve* the issue of sovereign immunity - made it interlocutory in nature. This conclusion is supported by the Court of Appeal's opinion in *Capital Builders Hardware, Inc. v. Workers' Comp. Appeals Bd.* (*Gaona*) (2016) 5 Cal.App.5th 658 [81 Cal.Comp.Cases 1122] ("*Gaona*"). In that case, the Court determined that a WCAB order denying a petition to strike a physician's report and remove her as an Agreed Medical Evaluator ("AME") was not a "final order" because it did not resolve a threshold issue. Although the interlocutory order in *Gaona* involved an evidentiary ruling, whereas here the WCJ's December 2, 2016 decision attempted to resolve the threshold issue of jurisdiction, the Court of Appeal explained in footnote four of *Gaona* that "the substance and effect of the adjudication" is determinative:

> "It is not the form of the decree but the substance and effect of the adjudication which is determinative. As a general test, which must be adapted to the particular circumstances of the individual case, it may be said that where no issue is left for future consideration except the fact of compliance or noncompliance with the terms of the first decree, that decree is final, but where anything further in the nature of judicial action on the part of the court is essential to a final determination of the rights of the parties, the decree is interlocutory."
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> (*Gaona, supra,* 5 Cal.App.5th at 662, fn. 4, quoting *Lyon v. Goss* (1942) 19 Cal.2d 659, 670.)

In this case, "the substance and effect" of the WCJ's Findings and Order of December 2, 2016 was to require something "further in the nature of judicial action on the part of the [WCJ]…to [effect] a final determination of the rights of the parties[.]" (*Ibid.*)[3] Therefore, we conclude that the Findings and Order of December 2, 2016 was an interlocutory ruling and not a "final order." In that case, the failure of the parties to seek reconsideration of the decision did not bar objection to it when the WCJ issued her Findings and Order of June 21, 2019. (Lab. Code, § 5904.)

[3] In her Report, the WCJ states that before she issued the Findings and Order of December 2, 2016, the question whether UIHS waived its sovereign immunity was bifurcated. However, the WCJ does not explain why she bifurcated the matter, which resulted in a multiplicity of litigation.

We further note that in seeking reconsideration of the Findings and Order of June 21, 2019, defendant also objects, by implication, to the Findings and Order of December 2, 2016. This is because the December 2, 2016 decision opened, and left open, the door to defeating defendant's assertion of sovereign immunity and its avoidance of WCAB jurisdiction. We therefore consider the WCJ's two decisions in tandem, which ultimately resulted in a "final order."[4] For the reasons that follow, we rescind both of them.

II. THE WCJ MUST REVISIT THE ISSUE OF SOVEREIGN IMMUNITY UNDER THE CORRECT LEGAL FRAMEWORK PERTAINING TO "ARMS OF THE TRIBE."

Preliminarily, we note 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].)

In this case, however, applicant is not pursuing her workers' compensation claim against a federally recognized Indian tribe, but against an "arm of the tribe." This is clear from the fact that defendant describes itself as a "tribal nonprofit organization who…[serves the health care needs] of Native Americans from various federally recognized Indian tribes in the region," and as "an arm or entity of the member tribes." (Petition for Reconsideration, p. 2:6-7 & p. 7:15-17.)

The distinction is important because it affects the burden of proof. Where the applicant is claiming workers' compensation against a "tribally affiliated entity," *the burden is on the tribal entity* to establish that it enjoys the same sovereign immunity as a Native American tribe, pursuant to a five-factor test created by the California Supreme Court in *People v. Miami Nation Enterprises*

[4] We also note that a petition to reopen filed within five years from the date of injury preserves the Appeals Board's continuing jurisdiction over all its orders, decisions and award; upon good cause shown, the Board may rescind, alter or amend any such order, decision or award. (Lab. Code, § 5803.) Here the record reflects that the first WCAB proceeding following the WCJ's December 2, 2016 decision was a status conference held on March 27, 2018 (within five years of applicant's claimed injury). The Minutes of Hearing of March 27, 2018 include the WCJ's notation that applicant "does want to pursue her case [and] she may contact [the Information and Assistance Officer]." Consistent with Labor Code section 5803, we believe applicant's on-the-record claim to pursue her case (notwithstanding defendant's assertion of sovereign immunity) was sufficient to preserve the Appeals Board's continuing jurisdiction over the WCJ's December 2, 2016 decision. (See, e.g., *Blanchard v. Workers' Comp. Appeals Bd.* (1975) 53 Cal.App.3d 590 (40 Cal.Comp.Cases 784) [technically deficient petition to reopen filed within five years of date of injury sufficient to preserve Board's jurisdiction to reopen case after five-year period lapsed].)

(2016) 2 Cal.5th 222 ("*Miami*"). 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.
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> (*Miami, supra,* 2 Cal.5th at 236.)

In *Miami*, the 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 this case, the WCJ (finally) determined in the Findings and Order of June 21, 2019 that "whatever claim of sovereign immunity Tribal First Insurance had was waived by the tribes who created [UIHS],"[5] and therefore the WCAB has jurisdiction to address applicant's workers' compensation claim herein.

In ultimately determining the issue of sovereign immunity, however, the WCJ never applied the correct legal test, which is the five-factor test created by our Supreme Court in *Miami*. The WCJ's conclusion in the Findings and Order of June 21, 2019 that the tribes who created UIHS waived sovereign immunity on its behalf, is relevant to the second *Miami* factor as to whether the tribes intended UIHS to share in their immunity. In order for the WCJ to decide this case under the correct legal analysis, however, we conclude that the WCJ must revisit the second *Miami* factor and the other four factors in determining whether UIHS can meet its burden of proving it is an "arm of the tribe" entitled to tribal immunity. If UIHS makes that showing, the

[5] We observe that applicant's workers' compensation claim is against her employer, UIHS, not Tribal First Insurance. Though Tribal First Insurance presumably is responsible for adjusting claims against UIHS, the issue is whether UIHS, not Tribal First Insurance, is entitled to sovereign immunity.

burden then shifts to applicant to show that tribal immunity has been abrogated or waived, and the WCJ should decide that issue in light of *Miami* as well. The WCJ may further develop the record as she deems necessary or appropriate to determining the foregoing issues in a single decision.

In conclusion, we rescind both the Findings and Order of December 2, 2016 and the Findings and Order of June 21, 2019, and we return the matter to the trial level for further proceedings and new decision on sovereign immunity and waiver of sovereign immunity by the WCJ. We express no final opinion on the issues of sovereign immunity or waiver of sovereign immunity. When the WCJ issues a new decision, any aggrieved party may seek reconsideration as provided in Labor Code sections 5900 *et seq*.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Order of December 2, 2016 and the Findings and Order of June 21, 2019 are **RESCINDED,** and this matter is **RETURNED** to the trial level for further proceedings and new decision by the WCJ, consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA
AUGUST 17, 2023

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

DEBORAH HEMSTED
LIEBERT CASSIDY WHITMORE

JTL/*ara*

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