

IN THE SUPREME COURT OF THE MUSCOGEE (CREEK) NATION

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DONNA SLAY, )  
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 Appellant-Claimant, )  
 )  
 v. )  
 )  
 MUSCOGEE (CREEK) NATION TRAVEL )  
 PLAZA and HUDSON INSURANCE )  
 COMPANY, )  
 )  
 Respondents. )

Case No. **SC 14-01**  
(District Court Case No. CV 2011-213)

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Appeal from District Court, Okmulgee District, Muscogee Nation.

Bryce A. Hill, Law Office of Bryce A. Hill; Tulsa, Oklahoma; for Appellant.

Leah P. Keele; Latham, Wagner, Steele & Lehman; Tulsa, Oklahoma; for Respondents.

**OPINION AND ORDER**

**MVSKOKVLKE FVTCECKV CUKO HVLWAT VKERRICKV HVYAKAT OKETV  
YVNKE VHAKV HAKATEN ACAKKAYEN MOMEN ENTENFVT CETV, HVTVM  
MVSKOKE ETVLWVKE ETEHVLVTKE VHAKV EMPVTAKV.<sup>1</sup>**

Before: ADAMS, *C.J.*; THOMPSON, *V.C.J.*; HARJO-WARE, SUPERNAW, DEER,  
and LERBLANCE, *JJ.*

PER CURIAM.

Order of the District Court vacated. Matter remanded to the District Court with instructions to vacate arbitration orders and remand for arbitration by a three-member panel required under M(C)NCA Title 48, § 2-103 and § 9-101, as enacted by NCA 05-049, when Appellant first contested denial of her worker’s compensation claim in July 2010.

<sup>1</sup> “The Muscogee (Creek) Nation Supreme Court, after due deliberation, makes known the following decision based on traditional and modern Mvskoke law.”

## **PER CURIAM.**

Appellant-Claimant Donna Slay (Appellant or Appellant-Claimant) appeals the District Court's final order entered on December 30, 2013, that reversed arbitration orders directing Respondents Muscogee (Creek) Nation Travel Plaza and/or Hudson Insurance Company (Respondents, Travel Plaza, Hudson, Tribal Worker's Benefits Claim Administrator, or Administrator) to pay for reasonable and necessary medical expenses related to Appellant's workers compensation claim and temporary disability benefits. For lack of subject-matter jurisdiction as set forth below, we vacate the order of the District Court and remand with instructions.

## **BACKGROUND**

Appellant alleges that while employed by Travel Plaza, a single-event, work-related injury occurred on June 3, 2010, that resulted in an injury to Appellant's back. On June 30, 2010, Hudson denied Appellant's worker's compensation claim due to Appellant's purported failure to disclose prior back injuries and permanent partial disability benefits previously awarded by the Oklahoma Worker's Compensation Court. Hudson asserted Appellant violated M(C)NCA Title 48, § 4-102 and § 4-108, and forfeited Muscogee (Creek) Nation worker's compensation benefits by failing to disclose prior injuries and previously awarded permanent disability benefits. Appellant subsequently contested Hudson's denial of her claim and sought binding arbitration as required under Title 48, § 9-101.A.<sup>2</sup>

The parties appeared for binding arbitration on November 2, 2011. In an order entered on November 27, 2011, the arbitrator found *inter alia* (1) Appellant-Claimant provided constructive notice to Travel Plaza of her previous worker's compensation claim; (2)

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<sup>2</sup> See n. 7 *infra*.

Respondents failed to notify Appellant-Claimant of any requirement to disclose pre-existing disabilities or prior worker's compensation claims at the time of application, hiring or injury; and (3) Appellant-Claimant was operating without a lifting restriction while employed by Travel Plaza. Respondents were ordered to pay for reasonable and necessary medical expenses related to Appellant-Claimant's injury, an MRI of Appellant-Claimant's lower back, and temporary total disability benefits. On December 2, 2011, the arbitrator entered an order nunc pro tunc that amended Appellant-Claimant's wage rate and dates for calculation of temporary total disability benefits.

Respondents filed an appeal in the Muscogee Nation District Court on December 22, 2011, and oral argument was heard on July 1, 2013. In an order entered on December 30, 2013, the District Court reversed the arbitration orders and rendered judgment for Respondents. The District Court concluded that, based on the record, (1) the arbitrator was clearly erroneous in finding Appellant-Claimant was operating without a lifting restriction while employed by Travel Plaza; and (2) Appellant-Claimant omitted a material fact under M(C)NCA Title 48, § 4-108, by failing to disclose, on the Travel Plaza employment application, a pre-existing back injury and lifting restriction as the reason she left her previous job. Additionally, as a matter of law and comity, the District Court held the arbitrator's findings were necessarily erroneous because the Oklahoma Worker's Compensation Court had previously decided the issue of Appellant-Claimant's back injury and lifting restriction by awarding her permanent partial disability benefits.

Appellant filed notice of appeal with this Court on January 20, 2014, and oral argument was heard on July 31, 2014. Appellant asserts (1) as legislated and applied, M(C)NCA Title 48, § 4-102 and § 4-108, are unconstitutionally volitional of employees' right to due process; and (2)

the District Court committed reversible error by utilizing the incorrect standard of review for arbitral decisions and re-weighting limited portions of the evidence. Respondent argues (1) Appellant's constitutional argument is precluded, and (2) the District Court properly reversed the arbitration orders.

### **JURISDICTION, SCOPE AND STANDARD OF REVIEW**

Jurisdiction is proper under M(C)NCA Title 27, § 1-101.C.<sup>3</sup> On appeal, we *sua sponte* review subject-matter jurisdiction as a threshold issue and dismiss the action if subject-matter jurisdiction is absent.<sup>4</sup>

### **ISSUE PRESENTED**

Under M(C)NCA Title 48, § 2-103 and § 9-101, do Muscogee Nation courts have subject-matter jurisdiction to adjudicate post-arbitration worker's compensation appeals where the worker, prior to May 2, 2013, timely filed a claim contesting denial of benefits and arbitration was not conducted by a three-member panel?

### **DISCUSSION AND ANALYSIS**

Post-arbitration appeals filed in Muscogee Nation courts seeking adjudication of worker's compensation claims contested from April 1, 2005, through May 1, 2013, are subject to M(C)NCA Title 48 as enacted by NCA 05-049.<sup>5</sup> Title 48 was amended by NCA 13-093 on May 2, 2013; however, as a prospective amendment to Title 48, NCA 13-093 is inapplicable to the

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<sup>3</sup> M(C)NCA Title 27, § 1-101.C., vests this Court with exclusive jurisdiction to review final orders of the Muscogee (Creek) Nation District Court.

<sup>4</sup> M(C)NCA Title 27, § 1-101.C.; SC 11-06, *Muscogee (Creek) Nation National Council v. Tiger* 9, 13 (February 14, 2014); SC 11-09, *Muscogee (Creek) Nation National Council v. Tiger* 4, (June 12, 2014).

<sup>5</sup> NCA 05-049 (A Law of the Muscogee (Creek) Nation Enacting a New Law Governing the Enactment and Codification of the Worker's Benefits Legislation) (effective April 1, 2005).

instant dispute.<sup>6</sup> Appellant first sought binding arbitration to contest denial of her claim in July 2010; therefore, Title 48, as enacted by NCA 05-049, controls.<sup>7</sup>

As a matter of tribal law, Muscogee Nation courts have broad civil jurisdiction,<sup>8</sup> however, tribal law may serve as a limitation on the exercise of subject-matter jurisdiction in certain types of civil proceedings.<sup>9</sup> Under M(C)NCA Title 48, § 9-101, contested worker's compensation claims must first go through binding arbitration before the parties may appeal to Muscogee Nation courts.<sup>10</sup> When Appellant first sought binding arbitration to contest denial of

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<sup>6</sup> NCA 13-093 (A Law of the Muscogee (Creek) Nation Amending MCNCA Title 48, Entitled "Worker's Compensation") (pursuant to § 2, effective "immediately" on May 2, 2013).

<sup>7</sup> The record on appeal fails to indicate a specific date when Appellant first contested Hudson's denial of her claim and sought arbitration in writing as required by M(C)NCA Title 48, § 9-101; however, since § 9-101 required appeals to be timely filed within thirty days of claim denial and Appellant's claim was denied on June 30, 2010, we presume the claim was first contested in July 2010 because the contested claim was allowed to proceed to arbitration.

<sup>8</sup> M(C)NCA Title 27, § 1-102.B ("The Muscogee (Creek) Nation courts shall have general civil jurisdiction over all civil actions arising under the Constitution, laws, or treaties of the Muscogee (Creek) Nation including the Muscogee or Yuchi Common Law, which arise within the Muscogee (Creek) Nation Indian country, regardless of the Indian or non-Indian status of the parties.").

<sup>9</sup> Compare M(C)NCA Title 27, § 1-101.B ("Exclusive original jurisdiction over all matters described in Title 27, § 1-102 and not otherwise limited by Tribal law is vested in the District Court of the Muscogee (Creek) Nation, Okmulgee District."); M(C)NCA Title 27, § 1-101.C. ("Exclusive appellate jurisdiction over all matters described in Title 27, § 1-102 is vested in the Supreme Court of the Muscogee (Creek) Nation."); and M(C)NCA Title 27, § 1-102.B ("The Muscogee Courts shall exercise such other civil jurisdiction as described by any other law of the Muscogee (Creek) Nation."); with M(C)NCA Const. Art. VII, §1 ("The judicial power of the Muscogee (Creek) Nation shall be vested in one Supreme Court limited to matters of the Muscogee (Creek) Nation's jurisdiction and in such inferior courts as the National Council may from time to time ordain."); *Alexander v. Gouge*, 4 Mvs. L. R. 225, 226 (January 16, 2003) ("When there is a question as to whether the Muscogee (Creek) Nation Constitution has been followed in legislative or executive actions, this Court has jurisdiction to interpret those actions in light of the Nation's Constitution."); SC 12-01, *Muscogee (Creek) Nation v. Tyner* 3 (May 22, 2012) (summarizing development of Muscogee common law exigency exception to the final order rule); *Roberts v. Skaggs*, 4 Mvs. L. R. 161, 163 (July 1, 1998) ("We do not deny the possibility that in certain extreme and drastic circumstances this Court may retain the power to hear certain types of interlocutory appeals which are not expressly stated by the MCN code."); SC 11-06, *Muscogee (Creek) Nation National Council v. Tiger* 9 (February 14, 2014) ("[W]e have previously recognized certain justiciability concepts . . . as threshold requirements necessary to warrant the exercise of judicial authority."); and *Oliver v. National Council*, 4 Mvs. L. R. 281, 286 (holding that a seemingly moot case remains justiciable when the underlying harm is capable of repetition while evading judicial review via voluntary, temporary cessation of the harm).

<sup>10</sup> Since it was first enacted in April 2005, Title 48 has consistently required contested worker's compensation claims to go through binding arbitration before an appeal may be sought before Muscogee Nation courts. NCA 05-049, § 2-103 and § 9-101, required the Tribal Worker's Benefits Advisory Council (TWBAC) to select a three-member arbitration panel to adjudicate contested worker's compensation claims as the "first level" of appeal from claims denied by the Administrator. NCA 13-093 amended § 2-103 and § 9-101 to, *inter alia*, (1) require the TWBAC to serve as the "first level" of appeal; (2) seemingly remove the requirement for a three-member arbitration panel and permit use of a single arbitrator as the "second level" of appeal; and (3) permit post-arbitration appeal to

her claim, NCA 05-049 required use of a three-member arbitration panel selected by the Tribal Worker's Benefit Advisory Council (TWBAC).<sup>11</sup> A three-member arbitration panel, as the "first level" of appeal from denial of a worker's compensation claim, was required to conduct necessary hearings and render a final, written decision.<sup>12</sup> Decisions entered by the three-member panel were to be "binding on all parties except for an appeal to the Muscogee (Creek) Nation Tribal Court . . . [.]"<sup>13</sup> Under NCA 05-049, Muscogee Nation courts served as a post-arbitration, "second level" of appeal and were to review arbitral decisions of the three-member panel with extreme deference.<sup>14</sup>

When a statutory provision is unambiguous, we presume the National Council intended the resulting impact of the unambiguous provision and apply the statute according to the plain meaning of its terms.<sup>15</sup> Use of the "plain-meaning rule" is both an appropriate judicial deference to the National Council's constitutional law-making authority and an analytical hurdle which limits unnecessary judicial encroachment into the law-making function. When Appellant first sought binding arbitration in July 2010, NCA 05-049 neither contemplated use of a single arbitrator, nor authorized the TWBAC to promulgate rules that altered the express statutory requirement for a three-member panel.<sup>16</sup> Likewise, NCA 05-049 lacked any provision that

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the District Court as the "third level" of appeal. *See also* SC 09-09, *Speir v. Creek Nation Muscogee Casino, Muskogee, and Hudson Insurance Company I* (November 28, 2011).

<sup>11</sup> NCA 05-049, § 2-103.H.; and § 9-101.A.

<sup>12</sup> NCA 05-049, § 9-101.A.

<sup>13</sup> *Id.* (emphasis added).

<sup>14</sup> NCA 05-049, § 9-101.B. ("Any and all appeals from a decision of the arbitration panel shall be heard by the Muscogee (Creek) Nation Tribal Court. The arbitration panel's decision shall be upheld unless the Tribal Court finds that the decision was: (1) [u]nsupported by evidence; (2) [a]rbitrary and capricious; (3) [a]n abuse of discretion by the Administrator; or (4) [c]ontrary to this Code or other applicable law.").

<sup>15</sup> *See Cox v. Kamp*, 4 Mvs. L. R. 75, 79 (June 27, 1991); and SC 10-01, *Ellis v. Checotah, et al.* 4 (May 22, 2013).

<sup>16</sup> NCA 05-049, § 2-103.; and § 9-101. Although inapplicable to the instant dispute, NCA 13-093 subsequently amended Title 48, § 2-103 and § 9-101 to, *inter alia*, (1) require the TWBAC to serve as the "first level" of appeal; (2) seemingly remove the requirement for a three-member arbitration panel and permit use of a single arbitrator as the "second level" of appeal; and (3) permit post-arbitration appeal to the District Court as the "third level" of appeal.

allowed waiver, stipulation, mutual agreement or “custom” of the parties to alter the three-member panel requirement.<sup>17</sup>

The instant dispute has yet to go through arbitration before a three-member panel selected by the TWBAC as required by NCA 05-049. Until the statutory requirement for a final decision from a three-member arbitration panel is satisfied, appeal to Muscogee courts remains unavailable. Our Nation’s courts are obligated to *sua sponte* review subject-matter jurisdiction and, if absent, dismiss the action.<sup>18</sup> Here, the order of the District Court was entered without subject-matter jurisdiction and must be vacated because only one arbitrator was used during the “first level” of appeal. If it is discovered on appeal that a final judgment of the District Court was delivered without subject-matter jurisdiction, this Court necessarily lacks jurisdiction to reach the merits and must reverse the underlying decision on jurisdictional grounds alone.<sup>19</sup>

**IT IS HEREBY ORDERED** that the *Decision* entered by the District Court on December 30, 2013, reversing the *Arbitration Order* entered November 27, 2011, and *Nunc Pro Tunc Order* entered December 2, 2011, is **VACATED**. The instant appeal is **REMANDED** to the District Court with instructions to vacate the *Arbitration Order* entered November 27, 2011, and *Nunc Pro Tunc Order* entered December 2, 2011, and remand for arbitration by a three-

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<sup>17</sup> During oral argument, in response to the Court’s question regarding whether use of a three-member arbitration panel was mandatory or permissive, Appellant’s counsel indicated that, “out of custom and probably more than anything, convenience, we’ve always selected, at the agreement of both sides, selected one arbitrator.” Transcript of Oral Argument 29:17-19 (July 31, 2014). When asked by the Court whether the term “panel”, as used in Title 48, necessarily required more than one arbitrator, Appellant’s council responded,

It doesn’t tell us the number of the panel, it just says “panel.” And just, historically, myself and [counsel for Respondent]’s firm tried the first arbitration under the Corporate Benefit Act of the Nation. We’ve tried several since then. And just out of custom, or convenience, we’ve always had one arbitrator.

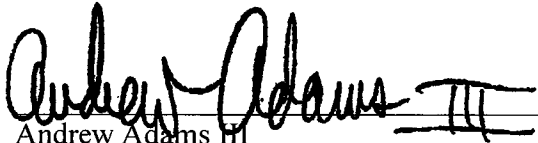
Transcript of Oral Argument 30:4-9 (July 31, 2014).

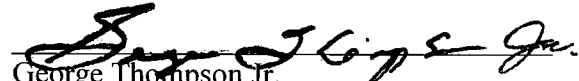
<sup>18</sup> SC 11-06, *Muscogee (Creek) Nation National Council v. Tiger* 9, 13 (February 14, 2014); SC 11-13, *Muscogee (Creek) Nation v. Johnson* 5 (August 15, 2013).

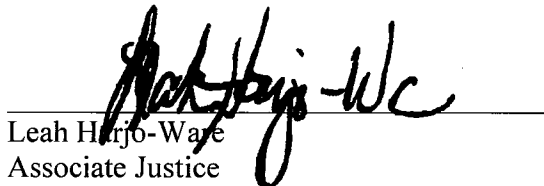
<sup>19</sup> M(C)NCA Title 27, § 1-101.C. (“Exclusive appellate jurisdiction over all matters described in Title 27, § 1–102 is vested in the Supreme Court of the Muscogee (Creek) Nation.”). SC 11-12, *Muscogee (Creek) Nation v. Lee* 5 (August 15, 2013).

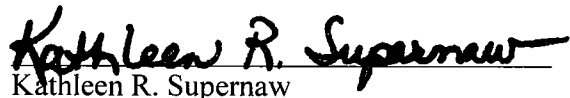
member panel as required under M(C)NCA Title 48 (as enacted by NCA 05-049), § 2-103 and § 9-101, when Appellant first contested denial of the instant claim.


**FILED AND ENTERED:** October 23, 2014

  
Andrew Adams III  
Chief Justice

  
George Thompson Jr.  
Vice-Chief Justice

  
Leah Harjo-Way  
Associate Justice

  
Kathleen R. Supernaw  
Associate Justice

  
Montie R. Deer  
Associate Justice

  
Richard C. Lefblance  
Associate Justice

**CERTIFICATE OF MAILING**

I hereby certify that on October 23, 2014, I mailed a true and correct copy of the foregoing Opinion and Order with proper postage prepaid to each of the following: Bryce A. Hill, Law Office of Bryce A. Hill, 1511 South Delaware Avenue, Tulsa, Oklahoma 74104; and Leah P. Keele, Latham, Wagner, Steele & Lehman, 10441 South Regal Boulevard, Suite 200, Tulsa, Oklahoma 74133. A true and correct copy of same was hand-delivered to: Donna Beaver, Clerk of the Muscogee (Creek) Nation District Court.

  
Laura Marks, Deputy Court Clerk