

1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 Opinion Number: _____

3 Filing Date: **April 9, 2018**

4 **NO. A-1-CA-35520**

5 **GLORIA MENDOZA,**

6 Worker-Appellant,

7 v.

8 **ISLETA RESORT AND CASINO**

9 **and HUDSON INSURANCE,**

10 Employer/Insurer-Appellees,

11 and

12 **TRIBAL FIRST,**

13 Appellee,

14 and

15 **STATE OF NEW MEXICO UNINSURED**

16 **EMPLOYERS' FUND,**

17 Statutory Third Party.

18 **APPEAL FROM THE WORKERS' COMPENSATION ADMINISTRATION**

19 **Leonard J. Padilla, Workers' Compensation Judge**

1 LeeAnn Ortiz
2 Albuquerque, NM

3 for Appellant

4 Barnhouse Keegan Solimon & West LLP

5 Christina S. West

6 Los Ranchos de Albuquerque, NM

7 for Appellees

1 **OPINION**

2 **VIGIL, Judge.**

3 {1} Gloria Mendoza (Worker), an employee at Isleta Pueblo Resort and Casino
4 (Isleta Casino), appeals orders of the Workers’ Compensation Judge (WCJ)
5 dismissing her workers’ compensation complaint and denying her motion to
6 reconsider a prior order to name the proper parties to the case. Worker contends that
7 the WCJ erred in dismissing her complaint on grounds of tribal sovereign immunity
8 based on an express and unequivocal waiver contained in the 2015 Indian Gaming
9 Compact; that even assuming Isleta Casino enjoys sovereign immunity in this case,
10 the defense does not extend to Isleta Casino’s non-tribal entity insurer and third-party
11 administrator; and that the WCJ erred in denying Worker’s motion to reconsider its
12 order granting leave to file a second amended workers’ compensation complaint
13 naming Isleta Casino’s insurer and third-party administrator as parties to the case. For
14 the reasons that follow, we reverse and remand for further proceedings.

15 **BACKGROUND**

16 **A. The New Mexico Indian Gaming Compacts and Workers’ Compensation**

17 {2} In 1988, the United States Congress enacted the Indian Gaming Regulatory Act
18 (IGRA), Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified at 25 U.S.C. §§ 2701-
19 2721 (2012)), which provides a statutory basis for Indian tribes to establish gaming

1 enterprises in Indian Country conducted pursuant to state-tribal compacts. *See* 25
2 U.S.C. § 2702; 25 U.S.C. § 2710(d)(1), *invalidated in part by Seminole Tribe of Fla.*
3 *v. Florida*, 517 U.S. 44, 47 (1996).

4 {3} In 1995 and pursuant to IGRA, the Governor of the State of New Mexico, Gary
5 Johnson, unilaterally entered into state-tribal gaming compacts with certain tribes. *See*
6 *State ex rel. Clark v. Johnson*, 1995-NMSC-048, ¶ 8, 120 N.M. 562, 904 P.2d 11.
7 Concluding that it violated separation of powers under the New Mexico Constitution
8 for Governor Johnson to enter into the state-tribal gaming compacts without
9 legislative approval, our Supreme Court held in *Johnson* that the 1995 Indian Gaming
10 Compacts were without legal effect. *Id.* ¶¶ 46-50.

11 {4} Based on the decision in *Johnson*, Chapter 190, Section 1 of New Mexico laws
12 of 1997 established the first legally effective state-tribal gaming compact in New
13 Mexico. Section 4(B)(6) of the 1997 Indian Gaming Compact addressed workers'
14 compensation for tribal gaming enterprise employees by stating that:

15 [T]he Tribe shall adopt laws . . . providing to all employees of a gaming
16 establishment employment benefits, including, at a minimum, sick leave,
17 life insurance, paid annual leave and medical and dental insurance as
18 well as providing unemployment insurance and workers' compensation
19 insurance through participation in programs offering benefits at least as
20 favorable as those provided by comparable state programs[.]

1 {5} In 2001 a new and revised Indian Gaming Compact was adopted. S.J. Res. 37,
2 45th Leg., 1st Sess. (N.M. 2001). The 2001 Indian Gaming Compact included a
3 version of Section 4(B)(6), which was identical to the 1997 Compact.

4 {6} The Indian Gaming Compact was revised again in 2007. S.J. Res. 21 , 48th
5 Leg., 1st Sess. (N.M. 2007). Under the 2007 Indian Gaming Compact, Section
6 4(B)(6) was modified to add additional basic rights that tribal gaming enterprise
7 employees must be afforded in the context of workers' compensation and how
8 signatory tribes may elect to participate in the State of New Mexico's workers'
9 compensation program. Section 4(B)(6) of the 2007 Indian Gaming Compact
10 provided that:

11 [T]he Tribe shall adopt laws . . . providing to all employees of a gaming
12 establishment employment benefits, including, at a minimum, sick leave,
13 life insurance, paid annual leave and medical and dental insurance as
14 well as providing unemployment insurance and workers' compensation
15 insurance through participation in programs offering benefits at least as
16 favorable as those provided by comparable state programs, *and which*
17 *programs shall afford the employees due process of law and shall*
18 *include an effective means for an employee to appeal an adverse*
19 *determination by the insurer to an impartial forum, such as (but not*
20 *limited to) the Tribe's tribal court, which appeal shall be decided in a*
21 *timely manner and in an administrative or judicial proceeding and as*
22 *to which no defense of tribal sovereign immunity would be available;*
23 *and provided that to fulfill this requirement the Tribe may elect to*
24 *participate in the State's program upon execution of an appropriate*
25 *agreement with the State[.]*

26 (Emphasis added.)

1 {7} In 2015 the current version of the Indian Gaming Compact was adopted. S.J.
2 Res. 19, 52nd Leg., 1st Sess. (N.M. 2015). With revisions emphasized below, the
3 2015 Indian Gaming Compact re-adopted in its entirety the 2007 amendment to
4 Section 4(B)(6). Section 4(B)(6) of the 2015 Indian Gaming Compact provides:

5 [T]he Tribe shall adopt laws . . . *requiring the Tribe, through its Gaming*
6 *Enterprise or through a third-party entity, to provide to all employees*
7 *of the Gaming Enterprise employment benefits, including, at a*
8 *minimum, sick leave, life insurance, paid annual leave or paid time off*
9 *and medical and dental insurance as well as providing unemployment*
10 *insurance and workers' compensation insurance through participation*
11 *in programs offering benefits at least as favorable as those provided by*
12 *comparable State programs, and which programs shall afford the*
13 *employees due process of law and shall include an effective means for*
14 *an employee to appeal an adverse determination by the insurer to an*
15 *impartial forum, such as (but not limited to) the Tribe's Tribal Court,*
16 *which appeal shall be decided in a timely manner and in an*
17 *administrative or judicial proceeding and as to which no defense of*
18 *tribal sovereign immunity would be available; and provided that to*
19 *fulfill this requirement the Tribe may elect to participate in the State's*
20 *program upon execution of an appropriate agreement with the State[.]*

21 (Emphases added.) The Pueblo of Isleta has been a signatory to the 2015 Indian
22 Gaming Compact since July 28, 2015. *See* Indian Gaming, 80 Fed. Reg. 44,992-01
23 (July 28, 2015).

24 **B. Parties in Interest**

25 {8} Worker, the injured worker and complainant seeking work injury benefits from
26 her employer in this case, is employed by and works as a custodial porter for Isleta
27 Casino. Isleta Casino is a Class III tribal gaming enterprise located in the State of

1 New Mexico that is wholly owned and operated by the Pueblo of Isleta. At the time
2 of Worker's work injury, Isleta Casino maintained workers' compensation insurance
3 issued by Hudson Insurance Company (Hudson), a Delaware corporation. Tribal
4 First, which functioned as the third-party administrator of Isleta Casino's workers'
5 compensation insurance policy at the time of Worker's injury, is a program
6 administered by the California corporation, Alliant Specialty Insurance Services, Inc.
7 Finally, First Nations Compensation Plan, was a company that provided Indian tribes
8 with workers' compensation coverage until 2009. In 2009, First Nations
9 Compensation Plan ceased paying claims after being pulled into bankruptcy
10 proceedings involving a related company whose principals were investigated for
11 operating a "Ponzi scheme" and were convicted on charges of mail fraud.

12 **C. Worker's Work Injury and Claim for Work Injury Benefits**

13 {9} On August 24, 2015, Worker was injured at work while pushing chairs during
14 her midnight shift at Isleta Casino. Worker suffered a torn meniscus in her right knee.
15 Worker filed a notice of accident form with Isleta Casino, was sent to an urgent care
16 clinic by Isleta Casino, and saw a doctor all within twenty-four hours of her accident.

17 {10} On September 11, 2015, Worker received a letter signed by Erica Brown, an
18 insurance adjuster for Tribal First (the Tribal First adjuster), which stated that Tribal

1 First would be handling her claim for work injury benefits on behalf of Isleta
2 Casino. The letter continued that “[p]er Isleta Resort & Casino work injury program,
3 claims are to be reported within 24 hours.” The letter incorrectly asserted, “Since you
4 did not report your claim timely per Isleta Resort & Casino[’s] work injury program,
5 your claim is denied.” The letter concluded that if Worker disagreed with Tribal
6 First’s decision, she was required to submit a written request for appeal with Tribal
7 First no later than thirty days after the date of the letter denying her work injury
8 benefits.

9 {11} Worker responded by filing a workers’ compensation complaint with the
10 Workers’ Compensation Administration (WCA), naming Isleta Casino and the Food
11 Industry Self Insurance Fund of New Mexico (FISIF) as parties to the case. Worker
12 then amended her complaint to add as parties Tribal First and the Uninsured
13 Employers Fund of New Mexico (UEF). While the case was pending, a certificate of
14 workers’ compensation insurance was filed with the WCA, identifying Hudson as the
15 workers’ compensation liability insurance carrier for Isleta Casino at the time of
16 Worker’s accident.

17 {12} A mediation conference was then held, but the parties were not able to resolve
18 the matter. Included in the mediator’s observations and recommendations were that
19 the WCA had jurisdiction to adjudicate Worker’s case because Isleta Pueblo waived

1 tribal sovereign immunity, pursuant to Section 4(B)(6) of the 2015 Indian Gaming
2 Compact, and that “[t]he behavior of the Tribal First adjuster raises a question of
3 whether there is an enterprise to take tribes’ money but pay no claims. . . . Such a
4 course of behavior, even if true, is beyond the scope of the WCA. It would not be
5 beyond the scope of appellate courts, were the case to go that far.”

6 {13} Counsel then entered an appearance on behalf of Isleta Casino and Tribal First
7 in the case for the limited purpose of contesting the subject matter jurisdiction of the
8 WCA to adjudicate Worker’s claim and filed a Rule 1-012(B)(1) NMRA motion to
9 dismiss on March 2, 2016, asserting tribal sovereign immunity. Attached to the
10 motion were selected pages from an insurance policy produced by First Nations
11 Compensation Plan purported by counsel for Isleta Casino, Hudson, and Tribal First
12 to be the Pueblo’s workers’ compensation ordinance, and which counsel argued
13 conferred on Isleta Pueblo exclusive jurisdiction over claims made under its workers’
14 compensation insurance policy with Hudson. Subsequent proceedings brought to light
15 that the purported workers’ compensation ordinance was not in fact tribal law in force
16 or effect for the Pueblo at the time of Worker’s work injury.

17 {14} The WCJ then entered an order granting an unopposed motion filed by Worker
18 requesting leave to file a second amended complaint adding Hudson as a party and
19 dismissing FISIF. However, without explanation, the order also dismissed Tribal

1 First. Worker moved for reconsideration of the WCJ's order, requesting that Tribal
2 First remain a party in the case.

3 {15} The WCJ later issued orders, granting the motion to dismiss on grounds of
4 sovereign immunity, relying on *Antonio v. Inn of the Mountain Gods Resort &*
5 *Casino*, 2010-NMCA-077, 148 N.M. 858, 242 P.3d 425, and summarily denying the
6 motion for reconsideration as moot. As a result, Worker's workers' compensation
7 case was dismissed with prejudice. This appeal followed.

8 **DISCUSSION**

9 {16} Worker raises three issues on appeal: (1) that the WCJ erred in granting Isleta
10 Casino's motion to dismiss for lack of subject matter jurisdiction on grounds of tribal
11 sovereign immunity; (2) that the defense of tribal sovereign immunity does not extend
12 to Isleta Casino's non-tribal workers' compensation insurer, Hudson, or third-party
13 administrator, Tribal First; and (3) that the WCJ erred in denying her motion to
14 reconsider its order granting her leave to file a second amended workers'
15 compensation complaint naming Hudson and Tribal First as parties to the case.

16 **I. The WCJ Erred in Granting Isleta Casino's Motion to Dismiss for Lack** 17 **of Subject Matter Jurisdiction**

18 {17} Worker first contends that Section 4(B)(6) of the 2015 Indian Gaming Compact
19 contains an express and unequivocal waiver of sovereign immunity. Worker urges us
20 to focus our attention to the language of Section 4(B)(6) added in 2007 and re-

1 adopted in the 2015 Indian Gaming Compact providing that employees of Isleta
2 Pueblo’s gaming enterprises “shall [be] afford[ed] . . . an impartial forum, such as
3 (but not limited to) the Tribe’s tribal court,” and a judicial or administrative
4 proceeding for appeals from adverse workers’ compensation determinations in
5 “which no defense of tribal sovereign immunity would be available[.]” (Emphasis
6 omitted.) This language, Worker argues, demonstrates Isleta Pueblo’s intent and
7 agreement that either it or its gaming enterprise(s) waive tribal sovereign immunity
8 in cases like hers—which challenge an adverse workers’ compensation determination
9 by Isleta Casino’s workers’ compensation insurer/third-party administrator.

10 {18} Isleta Casino in turn relies on this Court’s opinions in *Antonio*, 2010-NMCA-
11 077; *Martinez v. Cities of Gold Casino*, 2009-NMCA-087, 146 N.M. 735, 215 P.3d
12 44; and our non-precedential opinion in *Pena v. Inn of the Mountain Gods Resort &*
13 *Casino*, No. A-1-CA-29799, mem. op. (N.M. Ct. App. Jan. 31, 2011) (non-
14 precedential), to argue that “New Mexico courts have consistently applied the
15 doctrine of tribal sovereign immunity to dismiss workers’ compensation claims from
16 the jurisdiction of state courts.” Isleta Casino also contends that the language of
17 Section 4(B)(6) of the 2015 Indian Gaming Compact does not constitute an express
18 and unequivocal waiver of sovereign immunity. Rather, Isleta Casino argues that
19 Section 4(B)(6) describes a contractual obligation, enforceable only by the parties to

1 the compact, requiring that Isleta Pueblo shall adopt laws that establish a process for
2 resolving its gaming enterprise employees' workers' compensation claims.

3 **A. Standard of Review**

4 {19} In reviewing an appeal from an order granting or denying a motion to dismiss
5 for lack of jurisdiction based on tribal sovereign immunity, review is de novo.
6 *Gallegos v. Pueblo of Tesuque*, 2002-NMSC-012, ¶ 6, 132 N.M. 207, 46 P.3d 668;
7 *see Sanchez v. Santa Ana Golf Club, Inc.*, 2005-NMCA-003, ¶ 4, 136 N.M. 682, 104
8 P.3d 548.

9 **B. Section 4(B)(6) of the 2015 Indian Gaming Compact Contains an Express
10 and Unequivocal Waiver of Sovereign Immunity**

11 {20} “Indian tribes are ‘domestic dependent nations’ that exercise inherent sovereign
12 authority over their members and territories.” *Gallegos*, 2002-NMSC-012, ¶ 7
13 (internal quotation marks and citation omitted). These domestic dependent nations
14 “have long been recognized as possessing the common-law immunity from suit
15 traditionally enjoyed by sovereign powers.” *Santa Clara Pueblo v. Martinez*, 436
16 U.S. 49, 58 (1978); *see Michigan v. Bay Mills Indian Cmty.*, ___ U.S. ___, ___, 134
17 S. Ct. 2024, 2030 (2014) (“Among the core aspects of sovereignty that [Indian] tribes
18 possess . . . is the common-law immunity from suit[.]” (internal quotation marks and
19 citation omitted)); *Hoffman v. Sandia Resort & Casino*, 2010-NMCA-034, ¶ 6, 148

1 N.M. 222, 232 P.3d 901 (stating that our Supreme Court has long “recognize[d] tribal
2 sovereign immunity as a legitimate legal doctrine of significant historical pedigree”).

3 {21} But tribal sovereign immunity is not absolute. *See Gallegos*, 2002-NMSC-012,
4 ¶ 7. Article I, Section 8 of the United States Constitution confers on Congress “the
5 ultimate authority over Indian affairs,” which includes the ability to “expressly
6 authorize suits against Indian tribes through legislation.” *Gallegos*, 2002-NMSC-012,
7 ¶ 7; *see Antonio*, 2010-NMCA-077, ¶ 10 (quoting *Kiowa Tribe of Okla. v. Mfg.*
8 *Techs, Inc.*, 523 U.S. 751, 756 (1998) for the proposition that “[t]ribal immunity is
9 a matter of federal law and is not subject to diminution by the states” (alteration
10 omitted)). Moreover, a tribe is also free to waive its sovereign immunity; however,
11 such a waiver must be “express and unequivocal.” *R & R Deli, Inc. v. Santa Ana Star*
12 *Casino*, 2006-NMCA-020, ¶ 10, 139 N.M. 85, 128 P.3d 513. “Because a tribe need
13 not waive immunity at all, it is free to prescribe the terms and conditions on which it
14 consents to be sued, and the manner in which the suit shall be conducted.” *Id.*
15 (internal quotation marks and citation omitted). Entities under tribal control are also
16 extended sovereign immunity to the same extent as the tribe itself. *Sanchez*, 2005-
17 NMCA-003, ¶ 6.

18 {22} State-tribal compacts are contracts, subject to the rules of contract
19 interpretation. *See Gallegos*, 2002-NMSC-012, ¶ 30. As a result, a court’s duty in

1 interpreting and construing a state-tribal gaming compact is to ascertain the
2 compacting parties’ intent, and absent ambiguity, apply the plain meaning of the
3 language employed in the compact. *See id.* We have therefore consistently declined
4 to hold that a tribe waives sovereign immunity by implication. *See Antonio*, 2010-
5 NMCA-077; *Martinez*, 2009-NMCA-087; *Sanchez*, 2005-NMCA-003; *see also Pena*,
6 No. A-1-CA-29799, mem. op. at *1.

7 {23} In *Sanchez*, an employee of Santa Ana Golf Club, Inc., an entity wholly owned
8 and operated by Santa Ana Pueblo, sued the golf club for wrongful discharge and
9 defamation after being fired upon informing her employer that she had been tested for
10 Hepatitis C—for which she tested negative. 2005-NMCA-003, ¶¶ 1-2. The golf club
11 raised tribal sovereign immunity in a motion to dismiss for lack of subject matter
12 jurisdiction under Rule 1-012(B)(1), which the district court granted. *Sanchez*, 2005-
13 NMCA-003, ¶ 2. On appeal, the employee argued that Santa Ana Pueblo’s “voluntary
14 participation in New Mexico’s workers’ compensation program” served as a waiver
15 of sovereign immunity. *Id.* ¶ 17. Reasoning that the employee’s claim relied on a
16 theory of waiver by implication, this Court held that mere “activities such as
17 participation in the state’s workers’ compensation program” do not establish a clear
18 and unequivocal waiver of tribal sovereign immunity. *See id.* ¶¶ 7, 18.

1 {24} This Court’s holding in *Sanchez* was extended in our decision in *Martinez*, in
2 which an injured employee of the Cities of Gold Casino, an entity wholly owned and
3 operated by Pojoaque Pueblo, was allegedly terminated in retaliation for filing a
4 workers’ compensation claim. *Martinez*, 2009-NMCA-087, ¶ 1, 3. In response to the
5 employee’s filing of a workers’ compensation claim, the casino filed a motion to
6 dismiss, which included the defense of tribal sovereign immunity. *Id.* ¶¶ 10-11. The
7 WCJ denied the casino’s motion. *Id.* ¶¶ 15-16. On appeal, the employee argued that
8 the defense of sovereign immunity was unavailable to the tribe because it had
9 purchased a workers’ compensation insurance policy. *Id.* ¶ 27. Following our logic
10 in *Sanchez*, we reversed the WCJ, holding that by merely purchasing workers’
11 compensation insurance, the casino did not “implicitly” waive sovereign immunity
12 requiring it “to surrender to state court jurisdiction.” *Martinez*, 2009-NMCA-087,
13 ¶ 27.

14 {25} *Martinez* also addressed the issue of whether the 2001 Indian Gaming Compact
15 contained a waiver of sovereign immunity. *Id.* ¶ 26. In support of his claim that
16 Section 4(B)(6) of the 2001 Indian Gaming Compact effected a waiver of sovereign
17 immunity in workers’ compensation claims, the employee referred to the language
18 requiring tribal gaming enterprise employees be afforded workers’ compensation
19 benefits “at least as favorable as those provided by comparable state programs.” *Id.*

1 (internal quotation marks omitted). We reasoned that to find a waiver of sovereign
2 immunity from this language would also require this Court to implicitly find that the
3 casino agreed to submit to the jurisdiction of the WCA. *See id.* In support of our
4 conclusion, we pointed out that the compact language cited by the employee did not
5 indicate “where jurisdiction might lie when and if a workers’ compensation claim is
6 filed by an employee” of the casino. *Id.* Accordingly, we held that Section 4(B)(6) of
7 the 2001 Indian Gaming Compact did not contain a waiver of tribal sovereign
8 immunity. *See id.*

9 {26} Similarly, in *Antonio*, an employee of Ski Apache, an entity wholly owned and
10 operated by the Mescalero Apache Tribe, was injured in the course of his employment
11 as a snowmaker. 2010-NMCA-077, ¶ 2. After availing himself of the tribe’s workers’
12 compensation program, administered by Tribal First, the employee still believed “that
13 he was entitled to additional compensation” and filed a complaint with the WCA. *Id.*
14 ¶ 3. The WCJ dismissed the employee’s complaint for lack of subject matter
15 jurisdiction. *Id.* ¶ 4. On appeal, the employee raised the same argument as the
16 employee in *Martinez*—that Section 4(B)(6) of the 2001 Indian Gaming Compact
17 waived the tribe’s sovereign immunity with respect to workers’ compensation
18 disputes through its language requiring that the tribe provide its employees with
19 workers’ compensation benefits “at least as favorable as those provided by

1 comparable state programs[.]” *Antonio*, 2010-NMCA-077, ¶ 15. Relying on our
2 reasoning in *Sanchez* and *Martinez*, we reaffirmed that Section 4(B)(6) of the 2001
3 Indian Gaming Compact does not effect a waiver of tribal sovereign immunity. *See*
4 *Antonio*, 2010-NMCA-077, ¶¶ 15, 17, 20; *see also Pena*, No. A-1-CA-29799, mem.
5 op. ¶ 4 (same).

6 {27} *Sanchez*, *Martinez*, and *Antonio* do not control. In those cases, the employees
7 all relied upon theories of waiver of tribal sovereign immunity by
8 implication—whether by voluntary participation in WCA proceedings, purchasing
9 workers’ compensation insurance, or under Section 4(B)(6) of the 2001 Indian
10 Gaming Compact.

11 {28} In contrast, here Worker’s argument relies on Section 4(B)(6) of the 2015
12 Indian Gaming Compact, which expressly provides that employees of Isleta Pueblo’s
13 gaming enterprises “shall [be] afford[ed] . . . an impartial forum such as (but not
14 limited to) the Tribe’s tribal court” and a judicial or administrative proceeding for
15 appeals from adverse workers’ compensation determinations in “which no defense of
16 tribal sovereign immunity would be available[.]” Worker asserts this is an express and
17 unequivocal waiver of tribal sovereign immunity. This language materially changed
18 the substance and operation of the compact and it was not in effect in *Martinez* or
19 *Antonio*, which construed Section 4(B)(6) of the 2001 Indian Gaming Compact.

1 Therefore, the question of whether Section 4(B)(6) of the 2015 Indian Gaming
2 Compact contains an express and unequivocal waiver of tribal sovereign immunity
3 is one of first impression. Thus, *Sanchez, Martinez, and Antonio* do not govern in this
4 case, and we proceed to analyze the 2015 Compact language to determine whether it
5 constitutes an express and unequivocal waiver of tribal sovereign immunity.

6 {29} There is no issue about whether Section 4(B)(6) of the 2015 Indian Gaming
7 Compact is ambiguous on its face. We therefore proceed to construe the ordinary and
8 usual meaning of the language employed in the 2015 Compact. *See ConocoPhillips*
9 *Co. v. Lyons*, 2013-NMSC-009, ¶ 23, 299 P.3d 844 (holding that where a contract is
10 unambiguous, “the words of the contract are to be given their ordinary and usual
11 meaning” (alteration, internal quotation marks, and citation omitted)). Section 4(B)(6)
12 of the 2015 Indian Gaming Compact sets forth an express and unequivocal waiver of
13 sovereign immunity. Section 4(B)(6) of the 2015 Compact expressly states that
14 “appeal[s]” from “adverse [workers’ compensation] determination[s]” by Isleta
15 Casino’s insurer “shall be decided . . . in an administrative or judicial proceeding . .
16 . as to which no defense of tribal sovereign immunity would be available[.]”

17 {30} Isleta Casino denies that its workers’ compensation program does not comply
18 with Section 4(B)(6), and further, assuming Isleta Pueblo has failed to adopt laws as
19 required by the compact, Isleta Casino argues that such a failure can only be remedied

1 by the State of New Mexico, as a party to the contract. The WCJ failed to hear
2 evidence or make any findings of fact on whether Isleta Pueblo has adopted laws
3 requiring it to participate in a workers' compensation program as mandated by
4 Section 4(B)(6). Therefore, notwithstanding that Section 4(B)(6) contains an express
5 waiver of sovereign immunity, we are not able to determine, on the record before us,
6 whether the waiver is operative. Under these circumstances, we would ordinarily
7 remand the case directing the WCJ to hear and consider relevant evidence and make
8 findings of fact on the question of immunity. *See South v. Lujan*, 2014-NMCA-109,
9 ¶ 11, 336 P.3d 1000 (stating that where determination of jurisdiction depends on
10 factual questions that are inadequately developed for appeal, we may remand the case
11 to the district court to make findings of fact and conclusions of law). It is not
12 necessary for us to do so in this case, because even if Isleta Casino has sovereign
13 immunity, Worker has a right to pursue her workers' compensation claim directly
14 against Hudson and its third-party administrator, Tribal First. However, if Worker
15 still wishes to proceed against Isleta Casino in addition to the insurers, then the WCJ
16 should hear evidence and make findings (and allow discovery, if he deems it
17 advisable) on the immunity question.

1 **II. Worker May Pursue Her Workers’ Compensation Claim Against**
2 **Hudson and Tribal First, Notwithstanding Isleta Casino’s Entitlement**
3 **To Tribal Sovereign Immunity**

4 {31} Worker next argues that even if this Court “finds that Employer [Isleta Casino]
5 may defend this workers’ compensation claim on the basis of sovereign immunity,
6 . . . [then] such a defense does not extend to non-tribal entities Hudson Insurance and
7 Tribal First.” In support of her argument, Worker relies on the 2012 Oklahoma State
8 Supreme Court case *Waltrip v. Osage Million Dollar Elm Casino*, 2012 OK 65, 290
9 P.3d 741.

10 {32} Although counsel for Isleta Casino, Hudson, and Tribal First concede that
11 neither Hudson nor Tribal First are tribal entities entitled to claim sovereign
12 immunity, counsel contends that Isleta Pueblo’s sovereign immunity effectively
13 extends to the insurers of its tribal gaming enterprises. This argument, relies on a
14 statement in *Gallegos*, 2002-NMSC-012, ¶¶ 42-48, that “New Mexico courts have
15 specifically found[, under Rule 1-019 NMRA,] that tribal enterprises are
16 indispensable parties in suits brought against tribal insurers and that independent
17 claims cannot be sustained against a tribal insurer.” As a result, Isleta Casino and
18 Hudson assert that adoption of Worker’s argument under *Waltrip* “directly conflicts
19 with New Mexico law.”

1 **A. Gallegos Does Not Apply to This Case**

2 {33} In *Gallegos*, a visitor to the Camel Rock Gaming Center, an entity wholly
3 owned and operated by the Pueblo of Tesuque (Tesuque), was injured when she was
4 knocked down by a garbage container that blew into her because of a sudden gust of
5 wind. 2002-NMSC-012, ¶ 3. At the time of the visitor’s injury, the gaming center had
6 an insurance policy in effect with Zurich American Insurance Company. *Id.* The
7 visitor thereafter filed a common law tort action against Tesuque and other defendants
8 seeking damages. *Id.* ¶ 4. The district court dismissed the case on the basis of tribal
9 sovereign immunity. *Id.* The visitor proceeded to file a separate lawsuit against the
10 gaming center’s insurer, Zurich and other defendants, alleging, in pertinent part,
11 breach of contract for failing to pay her medical expenses and insurance bad faith. *Id.*
12 ¶ 5. Zurich responded by filing a Rule 1-019 motion to dismiss for failure to join an
13 indispensable party—Tesuque, which enjoyed sovereign immunity. *Gallegos*, 2002-
14 NMSC-012, ¶ 5. On appeal, our Supreme Court affirmed the district court, *id.* ¶ 37,
15 citing federal precedent for the proposition that in actions involving contract disputes,
16 the parties to the contract are indispensable parties. *Id.* ¶ 43.

17 {34} The Court in *Gallegos* reasoned that the visitor’s contract claims “would
18 require that the court interpret the provisions of the insurance contract, as well as
19 determine the duties and responsibilities under the insurance policy” of Tesuque,

1 Zurich, and the visitor “in relation to each other” and “as understood by the
2 contracting parties.” *Id.* ¶ 43. “The propriety or impropriety of Zurich’s performance
3 under the insurance policy[,]” the Court stated, was of “substantial interest” to
4 Tesuque, which “paid for the insurance protection in question and on whose behalf
5 Zurich acts.” *Id.* Accordingly, the Court held that Tesuque was an indispensable party
6 to the visitor’s case against Zurich. *Id.* ¶ 47.

7 {35} *Gallegos* does not apply under the facts and circumstances of this case. In
8 *Gallegos*, the visitor’s claim against Zurich was a common law civil action, alleging
9 breach of contract for failing to pay her medical expenses and insurance bad faith. *Id.*
10 ¶ 38.

11 {36} Here, Worker’s case was filed as a statutory workers’ compensation claim.
12 From these facts it follows that the procedural issues that warranted dismissal of the
13 visitor’s claim against Zurich in *Gallegos* on grounds of failure to join an
14 indispensable party—Tesuque—are not presented in Worker’s case. Specifically, in
15 *Gallegos*, the visitor’s breach of contract and insurance bad faith claims against
16 Zurich would have required the Court to interpret and determine the duties created
17 under the insurance policy executed between Zurich and the gaming center in relation
18 to the visitor. Therefore, the Court held that based on the principle that in actions
19 involving contract disputes, the parties to the contract at issue are indispensable

1 parties, the gaming center, which the district court determined enjoyed tribal
2 sovereign immunity in relation to the visitor's claim, was an indispensable party
3 without which the visitor's case against Zurich could not go forward.

4 {37} Here, in contrast, interpretation of the duties created under the workers'
5 compensation insurance policy executed between Isleta Casino and Hudson is not at
6 issue. Rather, to succeed on the merits in her claim for workers' compensation
7 benefits before the WCA, Worker need only establish that at the time of her accident:
8 (1) Isleta Casino had complied with workers' compensation laws regarding obtaining
9 insurance; (2) Worker was performing "service arising out of and in the course of
10 employment"; and (3) her injury was "proximately caused by accident arising out of
11 and in the course of" her employment and was "not intentionally self-inflicted."
12 NMSA 1978, § 52-1-9 (1973). Additionally, workers' compensation law, unlike the
13 common law of contract, generally requires that both a worker's employer and his or
14 her employer's insurer shall be directly and primarily liable to the worker to pay to
15 him or her work injury benefits where the aforementioned elements of a workers'
16 compensation claim are satisfied. *See* NMSA 1978, § 52-1-4(A), (C) (1990). As a
17 result, even assuming Isleta Casino was determined to enjoy tribal sovereign
18 immunity in the context of Worker's workers' compensation claim, Isleta Casino is
19 not an indispensable party without which Worker's claim cannot go forward under

1 *Gallegos*—as both Isleta Casino and Hudson may be directly and primarily liable to
2 her for work injury under workers’ compensation law.

3 {38} Concluding that *Gallegos* does not apply in this case, we proceed to consider
4 Worker’s claim that we should adopt the reasoning in the Oklahoma Supreme Court’s
5 decision in *Waltrip* and hold that she may pursue her workers’ compensation claim
6 against Hudson and Tribal First in the WCA notwithstanding that Isleta Casino may
7 be immune.

8 **B. *Waltrip’s Rationale Is Persuasive and Worker May Pursue Her Claim for***
9 ***Workers’ Compensation Benefits Against Hudson and Tribal First***

10 {39} In *Waltrip*, an employee of the Osage Million Dollar Elm Casino, wholly
11 owned and operated by the Osage Nation, fell on a patch of ice while on the job
12 working as a surveillance supervisor at the casino. 2012 OK 65, ¶¶ 2-3. At the time
13 of the accident, the casino carried an insurance policy issued by Hudson Insurance
14 Company—administered by Tribal First. *Id.* ¶ 2. Although the casino’s insurance
15 policy with Hudson contemplated adjudication of workers’ compensation claims in
16 Tribal Court, the Osage Nation had not enacted an ordinance governing workers’
17 compensation. *Id.* ¶ 9. The employee proceeded to file a claim in the Oklahoma
18 Workers’ Compensation Court, seeking workers’ compensation benefits. *Id.* ¶ 4. The
19 Workers’ Compensation Court, however, dismissed the employee’s claim based on
20 the casino and Hudson’s assertion of tribal sovereign immunity as a defense. *Id.*

1 Relying on a section of the Oklahoma Workers’ Compensation Act titled “Estoppel
2 from denying employment”¹ and the common law rights in contract of third-party
3 beneficiaries, the court determined that although the casino enjoyed tribal sovereign
4 immunity based on its status as a tribal enterprise, Hudson Insurance—a non-tribal
5 Delaware corporation—was not beyond the jurisdiction of the state’s Workers’
6 Compensation Court. *Id.* ¶ 19.

7 {40} The *Waltrip* court’s reasoning was as follows. Per the estoppel statute, the
8 employee had been conferred third-party beneficiary status under the insurance policy
9 entered into by the casino and Hudson. *Id.* The purpose of the estoppel statute was to
10 ensure “that an insurer who accepts premiums should not evade liability for benefits
11 due under compensation law” notwithstanding an insured’s status as a sovereign
12 entitled to immunity from suit. *Id.* ¶ 7 (internal quotation marks and citation omitted).
13 Hudson “knew or should have known” that the Osage Nation had put no workers’
14 compensation ordinance in place, but still “[willfully] and intentionally collect[ed]
15 premiums from the tribal enterprise[, the casino,] for providing workers’

16 ¹Okla. Stat. Ann. tit. 85A, § 117 (West 2014) (providing that “[e]very employer
17 and insurance carrier who schedules any employee as a person employed by the
18 employer for the purpose of paying or collecting insurance premiums on a workers’
19 compensation insurance policy or who pays, receives or collects any premiums upon
20 any insurance policy covering the liability of such employer under the workers’
21 compensation law by reason of or upon the basis of the employment of any such
22 employee shall be estopped to deny that such employee was employed by the
23 employer”).

1 compensation . . . believing that it w[ould] step into the shoes of the Tribe and receive
2 the benefit of the Tribe’s sovereign immunity.” *Id.* ¶ 12. To permit an insurer to evade
3 any liability because of the status of an employer that it insures would “render the
4 [insurance] policy provisions illusory and inane. Insurer would possess the ability to
5 arbitrarily deny claims and yet evade any judicial review in any tribal, federal, or state
6 court. It would leave no avenue for an injured worker of the tribal enterprise to
7 compel [i]nsurer’s performance under the policy in a judicial forum.” *Id.* ¶ 15
8 (emphasis omitted). As a result, without a tribal ordinance governing workers’
9 compensation and establishing the law and a forum for adjudication of employees’
10 workers’ compensation claims, the state Workers’ Compensation Court could
11 exercise jurisdiction over Hudson and Tribal First. *Id.* ¶ 19.

12 {41} The circumstances central to the court’s decision in *Waltrip* are strikingly
13 similar to those presented in this case. First, like the casino in *Waltrip*, Isleta Casino
14 carried a workers’ compensation insurance policy issued by Hudson and administered
15 by Tribal First at the time of Worker’s work injury. Like the arrangement between the
16 Osage Nation and Hudson in *Waltrip*, the insurance policy in force between Isleta
17 Casino and Hudson appeared to contemplate adjudication of Isleta Casino employees’
18 workers’ compensation claims in some forum. However, at the time that the *Waltrip*
19 employee and Worker were injured, the Osage Nation and apparently Isleta Pueblo

1 had not adopted tribal ordinances governing workers' compensation. Upon the filing
2 of workers' compensation complaints with the New Mexico WCA and Oklahoma
3 Workers' Compensation Court, respectively, both Worker and the *Waltrip* employee's
4 claims were dismissed on grounds of tribal sovereign immunity. And as was the case
5 in *Waltrip*, Hudson and Tribal First knew or should have known that no Isleta Pueblo
6 ordinance governing workers' compensation was in place. Yet Hudson and Tribal
7 First still collected premiums from Isleta Pueblo contending, once again, that it would
8 benefit from the Pueblo's sovereign immunity.

9 {42} Second, Oklahoma's estoppel from denying employment statute, which is
10 aimed at ensuring "that an insurer who accepts premiums should not evade liability
11 for benefits due under compensation law" notwithstanding an insured's status as a
12 sovereign entitled to immunity from suit, *Waltrip*, 2012 OK 65, ¶ 7 (internal
13 quotation marks and citation omitted), is similar to Section 52-1-4(C). As referenced
14 above, Section 52-1-4(C) requires that both an employer and the employer's workers'
15 compensation insurer assume direct and primary liability to pay employees'
16 "compensation and other workers' compensation benefits" where an employee's
17 injuries are deemed compensable. Section 52-1-4 has also been construed by our
18 Supreme Court as intended to notify a worker that their employer has complied with
19 the insurance requirements of the Workers' Compensation Act, that the employer is

1 subject to the provisions thereof, and that the worker has conclusively accepted the
2 provisions of the Workers' Compensation Act. *See Shope v. Don Coe Constr. Co.*,
3 1979-NMCA-013, ¶ 9, 92 N.M. 508, 590 P.2d 656.

4 {43} Finally, New Mexico common law expressly recognizes that workers are third-
5 party beneficiaries of workers' compensation insurance policies. *See Hovet v. Allstate*
6 *Ins. Co.*, 2004-NMSC-010, ¶¶ 16, 20, 135 N.M. 397, 89 P.3d 69 (reaffirming that
7 workers are "intended beneficiaries" of workers' compensation insurance policies);
8 *Russell v. Protective Ins. Co.*, 1988-NMSC-025, ¶¶ 15-16, 107 N.M. 9, 751 P.2d 693
9 (recognizing that workers are third-party beneficiaries under workers' compensation
10 insurance policies), *abrogated on other grounds by Cruz v. Liberty Mut. Ins. Co.*,
11 1995-NMSC-006, ¶¶ 7-10, 119 N.M. 301, 889 P.2d 1223; *Points v. Willis*, 1939-
12 NMSC-041, ¶¶ 47, 50, 44 N.M. 31, 97 P.2d 374 (recognizing that workers and
13 dependents of the worker are third-party beneficiaries of workers' compensation
14 policies).

15 {44} Based on the foregoing factual and legal similarities, we find *Waltrip*
16 persuasive and adopt its rationale. Applying the *Waltrip* reasoning, we conclude that
17 Worker is a third-party beneficiary to the workers' compensation insurance policy
18 between Isleta Casino and Hudson (evidenced by the December 1, 2015, certificate
19 of workers' compensation insurance filed with the WCA). Specifically, Isleta Casino

1 and Hudson intended for the employees of Isleta Casino, including Worker, to benefit
2 from the rights and protections created under the policy in the event that they are
3 injured on the job. Additionally, the filing of the certificate of workers' compensation
4 insurance with the WCA rendered Hudson to being held directly and primarily liable
5 to pay workers' compensation benefits as Isleta Casino's workers' compensation
6 insurer, pursuant to Section 52-1-4(C). As a result, we likewise conclude, as the
7 Oklahoma Supreme Court concluded in *Waltrip*, that allowing Hudson and Tribal
8 First to deny Worker's claim in this case by hiding behind Isleta Pueblo's sovereign
9 immunity renders the Pueblo's insurance policy illusory and inane and permits
10 Hudson and Tribal First to arbitrarily evade judicial review of its determination in any
11 forum.

12 {45} Accordingly, we hold that: (1) Hudson and Tribal First, as Isleta Casino's
13 workers' compensation insurer and third-party administrator, are proper parties to
14 Worker's workers' compensation case; and (2) assuming Isleta Casino enjoys tribal
15 sovereign immunity in this case, Worker may pursue her claim for work injury
16 benefits in the WCA against Hudson and Tribal First.

17 **CONCLUSION**

18 {46} For the foregoing reasons, we reverse and remand for further proceedings in
19 Worker's workers' compensation case in the WCA in accordance with this opinion.

1 Additionally, on remand, Worker shall be permitted to amend her complaint to name
2 Tribal First, as Hudson’s third-party administrator, as a party to the case.

3 {47} **IT IS SO ORDERED.**

4
5

MICHAEL E. VIGIL, Judge

6 **WE CONCUR**

7
8

LINDA M. VANZI, Chief Judge

9
10

EMIL J. KIEHNE, Judge