

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

Huey Brock,

*Plaintiff and* Appellant,

vs.

Richard Price and KS Industries, LLC,

*Defendants and* Appellees.

SUPREME COURT NO. 20190092

Civil No. 31-2015-CV-00106

ON APPEAL FROM SUMMARY JUDGMENT ORDER AND  
JUDGMENT OF DISTRICT COURT, NORTH CENTRAL  
JUDICIAL DISTRICT

ORAL ARGUMENT REQUESTED

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### **STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

1. Whether the District Court abused its discretion when it considered KSI, LLC's and Price's Second Motion for Summary Judgment which was filed beyond the dispositive motion deadline.
2. Whether KSI, LLC, Brock's contributing employer, and Price, Brock's co-employee, are entitled to statutory immunity from suit under the exclusive remedy rule.
3. Whether Brock's proceedings before the California Workers' Compensation Appeals Board, to which neither KSI, LLC nor Price were a party, collaterally estop KSI, LLC and Price from claiming statutory immunity under the exclusive remedy rule.
4. Whether Brock is collaterally estopped from claiming KSI, LLC was not his contributing employer because he failed to request reconsideration of or otherwise challenge WSI's Notice of Decision Accepting Liability and Awarding Benefits.

## **STATEMENT OF THE CASE**

[¶1] Huey Brock (“Brock”) and Richard Price (“Price”) were co-employees, hired, employed, and compensated in the exact same way by KS Industries, LLC (“KSI, LLC”). Brock, Price, and a third KSI, LLC employee were involved in a motor-vehicle accident in a KSI, LLC vehicle in March 2011 while traveling to a KSI, LLC jobsite. Brock suffered severe injuries resulting in quadriplegia. Brock applied for, accepted, and received workers’ compensation benefits under KSI, LLC’s North Dakota Workforce Safety & Insurance (“WSI”) account for a total of 32 months.

[¶2] After accepting and receiving WSI benefits, Brock also applied for California workers’ compensation benefits. In the California proceeding to determine whether the Workers’ Compensation Appeals Board (“WCAB”) had jurisdiction over Brock’s claim, Brock alleged he was employed by KSI, LP<sup>1</sup> rather than KSI, LLC. Significantly, neither KSI, LLC nor Price were a party to the WCAB proceeding. Price was not notified of the WCAB proceeding and had no opportunity to participate. The WCAB accepted jurisdiction over Brock’s claim and KSI, LP’s private workers’ compensation carrier was required to pay Brock’s benefits. Brock’s WSI benefits were terminated.

[¶3] Brock then commenced the present action against KSI, LLC, his contributing employer, and Price, his co-employee. The parties filed cross-motions for summary judgment. Brock argued KSI, LLC, who was undisputedly not a party to the WCAB proceeding and undisputedly paid WSI premiums on Brock’s behalf, should be precluded from arguing it, rather than KSI, LP, was Brock’s employer, invoking collateral estoppel

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<sup>1</sup> A California limited partnership and KSI, LLC’s affiliate which does not conduct business in North Dakota.

with respect to the WCAB's acceptance of jurisdiction over Brock's claim for California benefits. Brock claimed KSI, LLC was an actual party to the WCAB proceeding and that Price was in privity with KSI, LLC and, therefore, bound by the WCAB's decision. In contrast, KSI, LLC and Price argued they were entitled to dismissal as a matter of law pursuant to the exclusive remedy rule which provides contributing employers and co-employees with statutory immunity from suit.

[¶4] The District Court initially granted Brock's Motion for Summary Adjudication and held KSI, LLC is collaterally estopped from arguing it was Brock's contributing employer. The District Court initially denied KSI, LLC's and Price's Motion for Summary Judgment, holding KSI, LLC and Price were not immune from suit. The District Court's conclusion was a misapplication of the law premised on what the District Court described as Brock's "confusing and/or misleading" statement of "uncontroverted material facts."

[¶5] The District Court's decision created a scenario in which two identically situated workers were deemed agents of different employers absent any factual or legal justification. The District Court's decision also created an unworkable tension between two antithetical workers' compensation systems. The injustice which resulted from KSI, LLC being required to provide WSI coverage to Price and Brock, under a statutory threat of criminal sanction, while simultaneously denying KSI, LLC statutory immunity afforded to contributing employers with respect to its employee, Brock, who was hired, employed, and compensated in the same way as Price, is plain. The panoply of legal issues and prejudice to both KSI, LLC and Price created by the District Court's decision prompted KSI, LLC and Price to file a Second Motion for Summary Judgment. KSI, LLC and Price argued (1) collateral estoppel is applicable in KSI, LLC's and Price's favor with respect to

WSI's Notice of Decision awarding benefits to Brock, (2) the District Court was not bound by the WCAB proceeding as the elements of collateral estoppel are not satisfied, and (3) they were entitled to statutory immunity from suit under the exclusive remedy rule.

[¶6] Following briefing and oral argument, the District Court granted the Second Motion for Summary Judgment, vacated its prior decision, and dismissed Brock's Complaint. The District Court explained Brock's "uncontroverted material facts," filed in support of his Motion, were "confusing and/or misleading," in large part because neither KSI, LLC nor Price were actual parties to the California proceedings, rendering Brock's claim for application of collateral estoppel meritless. The District Court held KSI, LLC and Price were entitled to statutory immunity under the exclusive remedy rule. Brock appealed. KSI, LLC and Price request Oral Argument given the procedural complexities in this case.

### **STATEMENT OF THE FACTS**

[¶7] KSI, LLC applied for WSI coverage before hiring employees for its North Dakota operations. (*Affidavit of Sylvia Matlock*, App. 309, ¶ 4; *WSI Application for Insurance, March 16, 2010*, App. 315). Coverage was effective on March 16, 2010, and has been in effect continuously since that time. *Id.* (*Affidavit of Barry Schumacher dated March 10, 2016*, App. 307, ¶ 2).

[¶8] Price, then a California resident, submitted an online application to work in North Dakota for KSI, LLC on October 28, 2010. KSI, LLC hired Price following pre-employment screening. (*Excerpts from Price's Depo. Trans.*, App. 551, 10:3-11). Price began working for KSI, LLC in North Dakota on November 15, 2010. As part of his job duties, Price transported co-workers in a KSI, LLC vehicle to and from KSI, LLC's home-base in Tioga. *Id.* at App. 552, 29:25-30:1-6.

[¶9] Brock is a California resident. (*WCAB Minutes of Hearing and Summary of Evidence*, App. 095, 8:24-25). Like Price, Brock submitted an online application for employment through the same website. *Id.* at App. 095, 8:19-21. A KSI, LLC representative contacted Brock by phone about a job opening with KSI, LLC in North Dakota. KSI, LLC hired Brock and he began work in North Dakota on December 6, 2010. *Id.* at App. 098, 11:1-13. Like Price, Brock was required to submit to pre-employment screening. *Id.* at App. 098, 11:13-15. In 2010 and 2011, Brock and Price worked exclusively for, and were paid exclusively by, KSI, LLC for work performed in North Dakota. (*Matlock Aff.*, App. 310, ¶ 9; *Brock W-2 Forms*, App. 559-60; *Price W-2 Forms*, App. 561-62).

[¶10] On March 31, 2011, Brock, Price and a third KSI, LLC employee were traveling to KSI, LLC's homebase in Tioga in a KSI, LLC vehicle driven by Price. (*Complaint*, at App. 564, ¶ VII). The KSI, LLC vehicle was involved in a four-vehicle collision, caused by a semi-tractor trailer backing upon on Highway 2. (*Traffic Collision Report*, App. 061-087). Brock sustained significant injuries and is now a quadriplegic.

[¶11] Following the accident, KSI, LLC completed a First Report of Injury, which Brock signed on April 4, 2011. (*Brock Report of Injury*, App. 324). WSI accepted Brock's claim and Brock's was transferred from Trinity Hospital in Minot to Craig Hospital in Denver, Colorado. (*WSI Notepad Entries*, App. 568-70, pg. 2-4 of 73). On April 6, 2011, WSI issued its Notice of Decision Accepting Claim and Awarding Benefits to Brock under KSI, LLC's employer account, finding

[a]n application for workers' compensation benefits was filed in connection with an injury on [March 31, 2011,] the injured worker was employed by the employer listed above [KSI, LLC], [and] [t]he evidence shows the

injured worker sustained an injury by accident arising out of and in the course of employment.

(*WSI Notice of Decision*, App. 201).

[¶12] The same day WSI issued its Notice of Decision, WSI contacted Brock's wife. She signed a second First Report of Injury on Brock's behalf on April 7, 2011. (*WSI Notepad Entries*, App. 573, pg. 7 of 73; *First Report of Injury Signed by Stephanie Brock*, App. 700). The Brocks' then-counsel affirmed in writing their acceptance of WSI benefits and the application of North Dakota law. (*May 5, 2011 Letter to WSI*, App. 640-41). Brock did not request reconsideration of the April 6, 2011 Notice of Decision and did not challenge WSI's finding that his work-related injury was covered under KSI, LLC's employer account. Brock received WSI benefits from April 2011 until January 2014.

[¶13] In April 2012, Brock's current counsel asked WSI whether under N.D.C.C. § 65-05-05 Brock's benefits would be suspended if he applied for California workers' compensation benefits. (*April 19, 2012 Letter to WSI*, App. 642-43). North Dakota law expressly recognizes that an injured worker may be entitled to benefits in more than one state, but an injured worker who elects to receive benefits in another state waives the right to seek benefits from WSI, avoiding double recovery. *See* N.D. Admin Code § 92-01-02-50(3) and N.D.C.C. § 65-05-05. A draft Stipulation permitting Brock to continue receiving WSI benefits until adjudication of his claim for California workers' compensation benefits was negotiated amongst Brock, KSI, LLC, and WSI. (*Draft Stipulation*, App. 644-46). KSI, LLC specifically disputed the allegation that Brock was hired in California. (*Letter from KSI, LLC to WSI*, App. 416-17). Recognizing the disputed issues, a Revised Stipulation was fully executed by all parties in June of 2012. (*Correspondence from WSI re Revised Stipulation*, App. 460; *Revised Stipulation*, App. 325-29).

[¶14] Brock then submitted an application for California workers' compensation benefits, claiming he was employed by KSI, LP. (*Application for Adjudication of Claim*, App. 202-08). KSI, LP opposed the application, arguing Brock was employed by KSI, LLC and covered by WSI. (*Answer to Application for Adjudication of Claim*, App. 217-223). A trial was held in February of 2013. Contrary to Brock's contention before the District Court, the parties to the California action were Brock, KSI, LP, and KSI, LP's private workers' compensation carrier. Neither KSI, LLC nor Price were a party to the California proceedings, which addressed whether: (1) KSI, LLC or KSI, LP employed Brock and (2) the WCAB had jurisdiction over Brock's claim for benefits.

[¶15] Following trial, Judge Justice concluded, under California law, Brock was employed by KSI, LP and the WCAB had jurisdiction over his claim. (*WCAB Findings and Award*, App. 231, at ¶¶ 2-3). Judge Justice offered no opinion as to whether KSI, LLC was a contributing employer under North Dakota law or whether KSI, LLC would be entitled to immunity from suit under the exclusive remedy rule because those issues were not relevant to the California proceedings. KSI, LP filed a Petition for Reconsideration and a Petition for Writ of Review. Both were denied. (*Petition for Reconsideration*, App. 235-51; *WCAB Report and Recommendation on Petition for Reconsideration*, App. 388-94; *WCAB Order Denying Defendants' Petition for Reconsideration*, App. 252-53; *Petition for Writ of Review*, App. 254-82; *California 2<sup>nd</sup> Appellate Court of Appeal Order Denying Defendant's Petition for Writ of Review*, App. 283-85). As a result, KSI LP's workers' compensation carrier was required to commence paying benefits to Brock in California and Brock's WSI benefits under KSI, LLC's employer account terminated.

[¶16] Brock commenced the present tort action on February 13, 2015 against his former employer, KSI, LLC, and former co-worker Price. Brock contends Price was an employee of KSI, LLC and drove the KSI, LLC vehicle in which Brock was injured. (*First Amended Complaint*, App. 647, ¶ 2). Brock also contends, in reliance on the WCAB proceedings, that unlike Price, Brock was an employee of KSI, LP. *Id.* at ¶¶ 4-5.

[¶17] On March 30, 2016 Brock filed a Motion for Summary Adjudication to preclude KSI, LLC from arguing that it, rather than KSI, LP, was Brock's employer. (*Brock's Brief in Support of Motion for Summary Adjudication*, App. 26-48). Brock contended the California proceeding, to which neither KSI, LLC nor Price were a party, precluded KSI, LLC and Price from immunity under North Dakota's exclusive remedy rule. *Id.* KSI, LLC and Price filed a cross Motion for Summary Judgment, arguing Brock's claim was barred as a matter of law under the exclusive remedy rule. (*Memorandum in Support of Defendants' Motion for Summary Judgment*, App. 330-353).

[¶18] On August 18, 2016, the District Court granted Brock's Motion and denied KSI, LLC's and Price's Motion. (*Order Granting Plaintiff's Motion for Summary Adjudication and Denying Defendants' Motion for Summary Adjudication*, App. 395-405). The District Court concluded collateral estoppel was applicable with respect to the WCAB's finding that KSI, LP was Brock's employer, precluding KSI, LLC from arguing differently as part of this action. *Id.* at App. 400-03, ¶¶ 24-34. The District Court rejected KSI LLC's argument that the exclusive remedy rule precluded Brock's claim because it was contrary to the California adjudication. *Id.* at App. 404, ¶ 41. The District Court also held WSI's previous adjudication of coverage under KSI, LLC's employer account was not entitled to

collateral estoppel because it did not include a finding that Brock was employed by KSI, LLC and someone else submitted the WSI claim on Brock's behalf. *Id.* at ¶ 42.

[¶19] As the case progressed, the inconsistencies between the two workers' compensation systems became more apparent. The injustice of treating differently two employees who were hired, employed, and compensated in identical ways became undeniable. Because it was unclear how the case could proceed knowing a jury would be forced to reach an unsupported and illogical factual conclusion—that Price was an employee of KSI, LLC and Brock was an employee of KSI, LP—KSI, LLC and Price filed their Second Motion for Summary Judgment on November 20, 2018, nearly four months in advance of the March 11-29, 2019 trial. (*Defendants' Second Motion for Summary Judgment*, App. 416-17). The Second Motion for Summary Judgment was premised upon the exclusive remedy rule. Brock objected to the timing of the Second Motion for Summary Judgment. (*Letter to Judge Mattson regarding Second Motion for Summary Judgment*, App. 461). The District Court required Brock to respond. (*Letter from Judge Mattson regarding November 29, 2018 Letter*, App. 462).

[¶20] Following briefing and argument, the District Court issued its Order Granting Defendants' Second Motion for Summary Judgment. (*Order Granting Defendants' Second Motion for Summary Judgment*, App. 531-43). The District Court held its prior decision was wrongly decided and vacated its previous Order. *Id.* at App. 532, ¶ 4. The District Court found Brock's contention that KSI, LLC and Price were parties to the California proceeding lacked support and that Brock's "uncontroverted material facts" were "misleading and/or confusing," resulting in the District Court's erroneous decision. *Id.* at App. 538-39, ¶¶ 26 & 29. Because neither KSI, LLC nor Price were parties to the

California proceeding, the District Court held Brock's reliance on the doctrine of collateral estoppel was erroneous. The District Court further held that even if KSI, LP and KSI, LLC are alter egos of each other, KSI, LLC and Price would still be entitled to immunity. *Id.* at App. 541, ¶ 34. The District Court concluded KSI, LLC and Price are statutorily immune from suit under the exclusive remedy rule because Brock was working for KSI, LLC, KSI, LLC paid WSI premiums on Brock's behalf, and Brock applied for, accepted, and received WSI benefits. *Id.* at App. 541-42, ¶ 37. Brock appealed. (*Notice of Appeal*, App. 546).

## **LAW AND ARGUMENT**

### **I. Standard of Review**

[¶21] Summary judgment is a procedural device for the prompt resolution of a controversy on the merits without a trial so long as there are no genuine issues of material fact or if the only issues to be resolved are questions of law. *Valentina Williston, LLC v. Gadeco, LLC*, 2016 ND 84, ¶ 11, 878 N.W.2d 397. "On appeal, this Court decides whether the information available to the district court precluded the existence of a genuine issue of material fact and entitled the moving party to judgment as a matter of law." *Loper v. Adams*, 2011 ND 68, ¶ 19, 795 N.W.2d 899. "Whether the District Court properly granted summary judgment is a question of law which [this Court] reviews de novo on the entire record." *Id.*

[¶22] A district court has broad discretion regarding case progression, scheduling orders, and trial. *See Rickert v. Dakota Sanitation Plus, Inc.*, 2012 ND 37, 812 N.W.2d 413; *Wilson v. Wilson*, 2014 ND 199, 855 N.W.2d 105. "An abuse of discretion by the district court is never assumed, and the burden is on the party seeking relief affirmatively to establish it." *Martin v. Trinity Hosp.*, 2008 ND 176, ¶ 17, 775 N.W.2d 900. An abuse of discretion occurs only when a district court "acts in an arbitrary, unreasonable, or

unconscionable manner, or when its decision is not the product of a rational mental process leading to a reasoned determination.” *Id.* “The party seeking relief must show more than the district court made a ‘poor’ decision, but that it positively abused the discretion it has.” *Id.* This Court does not overturn a decision made by the district court “merely because it is not the decision [it] may have made if [it] were deciding the motion.” *Id.*

**II. The District Court did not abuse its discretion in considering the Second Motion for Summary Judgment given the legal anomalies created by the District Court’s decision granting Brock’s Motion for Summary Adjudication premised upon Brock’s misleading and/or confusing “uncontroverted material facts.”**

[¶23] KSI, LLC’s and Price’s Second Motion for Summary Judgment was filed after the dispositive motion deadline. Brock objected to the timeliness of the Second Motion and requested relief from responding until a status conference was scheduled. (*Letter to Judge Mattson regarding Second Motion for Summary Judgment*, App. 461). The District Court declined to schedule a status conference and required Brock to respond to the Second Motion. (*Letter from Judge Mattson regarding November 29, 2018 Letter*, App. 462).

[¶24] The Second Motion for Summary Judgment was consistent with the purpose of summary judgment: “prompt resolution of a controversy on the merits without a trial if there are no genuine issues of material fact...or if the only issues to be resolved are questions of law.” *Saltsman v. Sharp*, 2011 ND 172, ¶ 4, 803 N.W.2d 553. Significantly, the District Court’s erroneous decision to grant Brock’s Motion for Summary Adjudication was based, at least in part, on Brock’s “confusing and/or misleading” “uncontroverted material facts.” (*Order Granting Defendants’ Second Motion for Summary Judgment*, App. 539, ¶ 29). Brock cannot now complain of the District Court’s decision to vacate its initial decision having invited the Court’s error himself. *See Dillon v. Nissan Motor Co.*,

986 F.2d 263, 269 (8th Cir. 1993); *Brandt v. Milbrath*, 2002 ND 117, ¶ 27, 647 N.W.2d 674; *Wagner v. Miskin*, 2003 ND 69, ¶¶ 15-16, 660 N.W.2d 593.

[¶25] KSI, LLC and Price emphatically disagreed with the District Court’s 2016 Order. The error, however, became more glaring as the matter progressed, as did the inconsistencies between North Dakota and California workers’ compensation systems. These reasons prompted KSI, LLC and Price to file their Second Motion.

[¶26] Cognizant of the Scheduling Order, the District Court, in its discretion, determined KSI, LLC’s and Price’s Second Motion for Summary Judgment would be heard and decided in advance of trial. *See* N.D.R. Civ. P. 54(b) (“[A]ny order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action...and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties’ rights and liabilities.” (emphasis added)).<sup>2</sup> The District Court’s decision was not arbitrary, capricious, unconscionable, or irrational. Brock sought in excess of sixty million dollars—in non-economic damages alone. *See Brock’s Second Amended Responses to KSI, LLC’s Interrogatories*, App. 657, at Response to Interrogatory No. 12. The impending three-week trial would have required Brock, a quadriplegic to travel from California to Stanley. The Second Motion for Summary Judgment presented possible basis to resolve the matter short of a trial on a question of law which would preclude the suit entirely.

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<sup>2</sup> *See also Murr Plumbing, Inc. v. Scherer Bros. Fin. Servs. Co.*, 48 F.3d 1066, 1070 (8th Cir. 1995) (“The district court has the inherent power to reconsider and modify an interlocutory order any time prior to the entry of judgment.”); *Oliver v. Cty. of Gregory*, 2016 WL 958171, at \*1, n.1 (D.S.D. Mar. 8, 2016) (“the Court may review the Opinion and Order *sua sponte*.”).

**III. The District Court correctly concluded KSI, LLC, Brock's contributing employer, and Price, Brock's co-employee, are entitled to statutory immunity from suit under the exclusive remedy rule.**

[¶27] North Dakota's workers' compensation system is a legislatively-created compromise for claims between injured workers and their employers. *Fleck v. ANG Coal Gasification Co.*, 522 N.W.2d 445, 453 (N.D. 1994). The Workers' Compensation Act provides sure and certain relief to employees without regard to questions of fault, and to the exclusion of every other remedy. N.D.C.C. Ch. 65; *see Dunn v. N. Dakota Workmen's Comp. Bureau*, 191 N.W.2d 181 (N.D. 1971). The Legislature and this Court have zealously safeguarded the exclusive remedy rule. *See e.g., Cormier v. Nat'l Farmers Union Prop & Cas. Co.*, 445 N.W.2d 644, 648 (N.D. 1989).<sup>3</sup>

[¶28] Every local or out-of-state employer conducting business in North Dakota must first obtain workers' compensation coverage before hiring employees. N.D.C.C. § 65-04-33. In exchange for securing coverage, the employee's exclusive remedy against the employer or co-employees is limited to the recovery of benefits under the workers' compensation statutes. *Richard v. Washburn Pub. Sch.*, 2011 ND 240, ¶ 13, 809 N.W.2d 288. North Dakota law mandates the procurement of WSI coverage under the threat of criminal sanction in exchange for statutory immunity. N.D.C.C. § 65-04-33(1). As this Court aptly held in *Barry v. Baker Elec. Co-op, Inc.*:

We do not believe that the State of North Dakota, under the threat of criminal sanction, intended to exact a premium for coverage, may, and at the same time, deny the immunity to the complying employer. **To exact such a premium but not provide the concomitant immunity to the employer would constitute fraud.**

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<sup>3</sup> Four separate statutes establish contributing employers' statutory immunity from suit. *See* N.D.C.C. §§ 65-01-01, 65-01-08, 65-04-28, 65-05-06.

354 N.W.2d 666, 673 (N.D. 1984) (emphasis added).

[¶29] KSI, LLC obtained workers' compensation coverage through WSI in March of 2010, prior to commencing operations in this State. (*Matlock Aff.*, App. 309, ¶ 4; *Application for Insurance*, App. 311-14). KSI, LLC obtained coverage for its employees including Price and Brock, who were identified on KSI, LLC's annual Employer Payroll Reports. (*Matlock Aff.*, App. 310, ¶¶ 6-9; *WSI Employer Payroll Report 2010-2011*, App. 316-23; *WSI Employer Payroll Report 2011-2012*, App. 679-99). Brock does not dispute, nor can he, the fact that KSI, LLC secured and maintained WSI coverage on his behalf, rendering KSI, LLC a contributing employer under North Dakota law.

[¶30] "A 'contributing employer' is the entity who pays the WSI premium to secure workers' compensation coverage for the employee and, in turn, receives immunity from legal liability for injuries." *Trinity Hosp. v. Mattson*, 2006 ND 231, ¶ 11, 723 N.W.2d 684. Pursuant to Section 65-01-08, an injured employee does not have a claim for relief against the "contributing employer or against any agent, servant or other employee of the employer for damages for personal injuries." *Id.* All parties, including WSI, agree KSI, LLC paid WSI premiums to secure coverage on Brock's behalf.

California apparently has determined Huey Brock was employed by KS Industries, LP at the time of his March 31, 2011 workplace injuries. Irrespective, because Huey Brock provided services to KS Industries, LLC and his wages were claimed, coverage existed in North Dakota, and as a result his claim for benefits was properly deemed compensable by WSI.

(*Schumacher Aff.*, App. 308, ¶ 6). WSI is the agency responsible for enforcing North Dakota's WSI's statutes and is entitled to deference. Brock ignores WSI's finding that whether KSI, LP was deemed to be Brock's employer in the California proceedings is irrelevant for purposes of statutory immunity in North Dakota. *Trinity Hosp.*, at ¶¶ 19-21.

As a contributing employer, KSI, LLC is immune from suit, as is Price because he is an “agent, servant or other employee of the employer.” N.D.C.C. § 65-01-08(1).

[¶31] Pursuant to Section 65-05-06, “[t]he payment of compensation or other benefits by the organization to the injured employee...[is] in lieu of any and all claims for relief whatsoever against the employer of the injured or deceased employee.” *Trinity Hosp.*, 2006 ND 231, ¶ 11. Once a claimant accepts WSI benefits, he or she gives up the right to sue the contributing employer or co-employees for a work-related injury. N.D.C.C. §§ 65-01-01 & 65-01-08; *Westman v. Dessellier*, 459 N.W.2d 545, 548 (N.D. 1990). Phrased another way, acceptance of WSI benefits forecloses the ability to sue the contributing employer or co-employees for a work-related injury.

[¶32] Brock was injured on March 31, 2011 while working for KSI, LLC in North Dakota. Brock signed a First Report of Injury on April 4, 2011, triggering the WSI claim process. (*Brock Report of Injury*, App. 324). Brock’s wife also signed a First Report of Injury on his behalf. (*First Report of Injury Signed by Stephanie Brock*, App. 700). WSI issued its Notice of Decision accepting liability and awarding Brock benefits on April 6, 2011, assessed against KSI, LLC’s employer account for Brock’s workplace injuries. (*WSI Notice of Decision*, App. 201).

[¶33] On May 5, 2011, Brock’s then-counsel affirmed Brock’s receipt of WSI’s determination of coverage and acceptance of the award of benefits under KSI, LLC’s account. (*May 5, 2011 Letter to WSI*, App. 640-41). Brock received WSI benefits for 32 months under KSI, LLC’s employer account, including during the pendency of his California proceedings.

[¶34] Brock does not dispute he applied for, was awarded, and received WSI benefits under KSI, LLC's employer account. In an effort to avoid KSI, LLC's immunity from suit, due to Brock's acceptance and receipt of WSI benefits, Brock strains to distinguish the facts of this case from *Lovelette v. Braun* in which the North Dakota federal district court held that a plaintiff who previously applied for and received WSI benefits is precluded from challenging their employment status in a later action. *Lovelette v. Braun*, 293 F. Supp. 41, 44 (D.N.D. 1968). Like Brock, Lovelette's injuries were deemed compensable by WSI and benefits were paid to Lovelette under Morrison-Knudson's employer account. *Id.* at 42. Like Brock, Lovelette then sued his employer, Morrison-Knudson, and his co-employee, Herman Braun, for his workplace injuries. *Id.*

[¶35] Like KSI, LLC, Morrison-Knudson asserted Lovelette's claims were barred by the exclusive remedy rule and the application of res judicata or collateral estoppel with respect to WSI's determination. *Id.* The sole issue in *Lovelette* was "whether the plaintiff, after seeking and obtaining benefits under the North Dakota Workers Compensation Act as an employee of Morrison-Knudson injured in the course of his employment, can now be heard to assert the contrary." *Id.* at 43.

[¶36] Consistent with a majority of jurisdictions with similar workers' compensation systems, the *Lovelette* Court held Lovelette's status as an employee of Morrison-Knudson was "conclusively settled" by the award of workers' compensation benefits and under Sections 65-01-08 and 65-05-06 Lovelette had no right of action against his co-worker or his employer for injuries resulting from the workplace injury. *Id.*

[¶37] Brock asserts this case is factually different because he adjudicated a claim for benefits in California following the award of benefits in North Dakota, KSI, LP was

deemed to be responsible for his workers' compensation benefits in California, he is currently receiving benefits in another state, and WSI was reimbursed for monies paid on his behalf. These facts do not alter the outcome in this case. Unsurprisingly, Brock ignores clear North Dakota law holding "once a claimant is allowed to participate in the fund, he or she may no longer elect to bring a lawsuit against the employer...or a coworker." *Westman v. Dessellier*, 459 N.W.2d 545 (N.D. 1990).

[¶38] In fact, Brock stipulated KSI, LLC was his contributing employer in order to maintain benefits in North Dakota while simultaneously seeking benefits in California. More than a year after Brock was awarded WSI benefits in North Dakota, Brock sought to pursue a claim for workers' compensation benefits in California. (*April 19, 2012 Letter to WSI*, App. 642-43). Again acknowledging he was entitled to WSI coverage as a KSI, LLC employee, Brock's current counsel sought an informal opinion from WSI that Brock's benefits would not cease in the event he pursued a claim for benefits in California. *Id.* (indicating "KS Industries, L.L.C. is based in California, and that claimant was hired in California to perform services for the employer in North Dakota." (emphasis added).

[¶39] Brock KSI, LLC, and WSI negotiated a Stipulation permitting Brock to continue to receive WSI benefits as an employee of KSI, LLC during the pendency of his California claim, temporarily suspending the application of Section 65-05-05. *Draft Stipulation*, App. 644-46.; see N.D.C.C. § 65-05-05(2) ("If an employee...applies for benefits from another state for the same injury, the organization will suspend all future benefits pending resolution of the application."). KSI, LLC requested the Stipulation be revised to reflect that Brock was not hired in California. (*KSI, LLC Letter to WSI*, App. 456-57). A Revised

Stipulation was executed by Brock, KSI, LLC, and WSI in June of 2012.<sup>4</sup> (*Revised Stipulation*, App. 325-39). The executed Revised Stipulation included Brock’s admission he was employed by KSI, LLC at the time of his injuries: “claimant sustained a compensable injury by accident arising out of an in the course of his employment with KSI, LLC.” *Id.* The Revised Stipulation also sets forth WSI’s adjudication of coverage: “WSI issued a decision on April 6, 2011 accepting liability and awarding payment of benefits.” *Id.*

[¶40] Brock has never disputed that KSI, LLC paid WSI premiums on his behalf or that he applied for, accepted, and received benefits under KSI, LLC’s employer account. These facts are conclusive and preclude his present suit. As the District Court held:

Even though, under California law, Brock was found to be an employee of KS Industries, LP, at the time he was injured, Brock was nevertheless doing work for KSI, LLC, in North Dakota, KSI, LLC, was paying premiums to WSI, and Brock applied for and received benefits through WSI...KSI, LLC, as a contributing employer, and Price, as an employee of KSI, LLC, were/are entitled to immunity under North Dakota law.

(*Order Granting Defendants’ Second Motion for Summary Judgment*, App. 541-42, ¶ 37).

**IV. The District Court correctly concluded Brock’s proceedings before the WCAB do not collaterally estop KSI, LLC and Price from claiming statutory immunity under the exclusive remedy rule.**

**A. Administrative agency decisions are entitled to collateral estoppel effect when the elements of collateral estoppel are satisfied.**

[¶41] “Collateral estoppel, or issue preclusion, forecloses relitigation of issues of either fact or law in a second action based on a different claim which were necessarily litigated, or by logical and necessary implication must have been litigated, and decided in the prior

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<sup>4</sup> Pursuant to the Revised Stipulation, Brock’s counsel acted in trust for WSI before the WCAB. (*Revised Stipulation*, App. 326).

action.” *Riverwood Commercial Park, L.L.C. v. Standard Oil Co., Inc.*, 2007 ND 36, ¶ 13, 729 N.W.2d 101. The doctrine “applies only if the determination of the issue in the prior action was necessary and essential to support the judgment.” *Id.* at ¶ 20. In that regard, “[t]he doctrine does not apply to matters which are incidental or collateral to the determination of the main controversy.” *Id.* (quotation omitted).

[¶42] An issue is only “necessarily decided” “if ‘the determination of the former action could not have been made without determining’ the issue in question.” *Id.* at ¶ 21 (quoting *Knutson v. Ekren*, 5 N.W.2d 74, 78 (N.D. 1942)). “Relitigation of an issue presented and decided in a prior case is therefore not foreclosed if the decision of the issue was not necessary to the judgment reached in the prior litigation.” *Id.* (quoting 18 Moore Prac. & Proc. § 132.04(4)(f)). The purpose of this limitation on the application of collateral estoppel “is to prevent the incidental or collateral determination of a nonessential issue from precluding reconsideration of that issue in later litigation.” *Id.*

[¶43] Collateral estoppel is also “limited by the principle of mutuality, which means a judgment can operate as collateral estoppel only where all the parties to the proceeding in which the judgment is relied upon were bound by the judgment.” *Hofsommer v. Hofsommer Excavating, Inc.*, 488 N.W.2d 380, 384 (N.D. 1992) (internal quotations omitted). Accordingly,

[f]our tests must be met before collateral estoppel will bar relitigation of a fact or issue involved in an earlier lawsuit: (1) Was the issue decided in the prior adjudication identical to the one presented in the action in question?; (2) Was there a final judgment on the merits?; (3) Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?; and (4) Was the party against whom the plea is asserted given a fair opportunity to be heard on the issue?

*Id.* The doctrine of collateral estoppel is tempered by fairness and justice and its application “should not be applied so rigidly as to defeat the ends of justice or to work an injustice.” *Riverwood*, at ¶ 14.

**B. Collateral estoppel does not apply to the WCAB’s decision because whether KSI, LLC and Price are entitled to statutory immunity was not necessarily decided as part of the California proceedings.**

[¶44] To be eligible for California benefits, Brock had to show he entered into a “contract of hire” in California. “An employee injured out of state during the course of his employment is entitled to compensation under California’s workers’ compensation laws if he ‘has been hired...in the state.’” *Bowen v. Workers’ Comp. Appeals Bd.*, 86 Cal. Rptr. 2d 95, 104 (Ct. App. 1999) (Zebrowski, J., concurring); Cal. Lab. Code § 3600.5. The WCAB has exclusive jurisdiction over claims arising out of out-of-state employee injuries “where...the contract of hire was made in [California].” *Bowen*, at 104; Cal. Lab. Code § 5305. “If the ‘contract of hire’ was not ‘made in [California],’ subject matter jurisdiction would not reside in the workers’ compensation system, but would instead remain in the California Superior Court.” *Bowen*, at 104; *see* CAL. CONST., art. VI, § 10. Accordingly, whether an employee’s contract of hire was made in California within the scope of section 5305 determines which forum has subject matter jurisdiction. *Bowen*, at 105-06.

[¶45] At trial, Judge Justice identified the issues as (1) employment (whether Brock was employed by KSI, LP or KSI, LLC) and (2) whether the WCAB has jurisdiction over Brock’s claim (whether the contract was formed in California). (*WCAB Minutes of Hearing and Summary of Evidence*, App. 089, 2:13-19). Brock testified he received a call from KSI, LLC in North Dakota while he was in California during which he was offered a position and accepted employment. *Id.* at App. 097, 10:10-13. Brock testified he had to

pass a drug test in North Dakota, but that he worked 10 hours before he submitted to the required drug test. *Id.* at App. 098, 11:1-15.

[¶46] KSI, LP argued KSI, LLC, was Brock's employer and that Brock's place of hire was North Dakota because he was required to submit to a pre-employment drug test there. (*Defendants' WCAB Post-Trial Brief*, App. 703-05, at 2:6-16; 3:14-24). Significantly, Brock asserted in rebuttal that even if KSI, LLC was Brock's employer it would not matter because he entered into a contract for hire in California, satisfying the jurisdictional requirements. (*Applicant's WCAB Rebuttal Brief*, App. 717-18).

[¶47] Judge Justice found Brock was employed by KSI, LP at the time of injury and that WCAB had jurisdiction because (1) Brock was offered and accepted employment from KSI, LP in California and (2) all KS Industries, wherever located, are merely alter egos of LP. (*WCAB Opinion on Decision*, App. 233-34). This same analysis is reflected in the Report and Recommendation on KSI's Petition for Reconsideration. (*WCAB Report and Recommendation on Petition for Reconsideration*, App. 388-94). The Report and Recommendation also concluded that even if Brock's employer was KSI, LLC, the contract for hire was made in California. *Id.* at App. 392.

[¶48] Brock now maintains the only issue for trial in California was the identity of his employer and suggests the question of jurisdiction, if addressed at all, was only ancillary. Brock's contention that jurisdiction was ancillary to the issue of employment is backwards. Subject matter jurisdiction is a threshold question the existence of which is a condition precedent to a tribunal's authority over a case. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006). Its existence is so pivotal that it cannot be waived and courts have an independent obligation to determine whether it exists. *Id.* In the absence of subject matter jurisdiction,

a tribunal has no power over the matter before it. *Id.* If the WCAB lacked jurisdiction over Brock’s claim for benefits, the WCAB lacked authority to determine whether Brock was employed by KSI, LP.

[¶49] The California proceedings established Brock was entitled to California benefits because, regardless of whether Brock was employed by KSI, LP or KSI, LLC, the contract for hire was formed in California. Judge Justice made no findings regarding whether KSI, LLC was a contributing employer under North Dakota law, whether Price and Brock were co-employees, or whether KSI, LLC and Price are entitled to statutory immunity from suit in the present action. The legal issue for resolution before the WCAB was not determinative of the issue before the District Court at summary judgment and is not determinative of the issue before this Court on appeal: whether Brock was covered by North Dakota WSI benefits under KSI, LLC’s employer account (and, therefore, whether KSI, LLC and Price are immune from suit).

C. **Collateral estoppel does not apply to the WCAB’s decision because neither KSI, LLC nor Price were party to or in privity with a party to the California proceedings.**

[¶50] Before the District Court, Brock fervently maintained KSI, LLC was an actual party to the California proceedings. As the District Court explained, “many of Brock’s ‘uncontroverted material facts’ [were] confusing and/or misleading” in that “there is no support for Brock’s assertion that KSI, LLC and Price were parties to the California proceeding.” (*Order Granting Defendants’ Second Motion for Summary Judgment*, App. 538-39, ¶¶ 29 & 26).

[¶51] Brock alleges for the first time on appeal that KSI, LLC and Price were in privity with KSI, LP; Brock never presented this argument to the District Court. “[I]f a party fails to properly raise an issue or argument before the district court, the party is precluded from

raising that issue or argument on appeal.” *Rutherford v. BNSF Ry. Co.*, 2009 ND 88, ¶ 28, 765 N.W.2d 705.

[¶52] Notwithstanding Brock’s failure to properly raise this argument, Brock’s argument fails on its merits. Brock first suggests the District Court failed to consider whether KSI, LLC and/or Price were in privity with the parties to the California proceedings. However, the District Court’s alleged “myopic view” of the party/privity element of collateral estoppel, was due to the fact that Brock’s sole argument was that KSI, LLC was an actual party to the proceedings before the WCAB. Courts are not tasked with searching “the record for evidence.” *Barry v. St. Joseph’s Hosp.*, 1999 ND 204, ¶ 9, 601 N.W.2d 587; *see Minto Grain, LLC v. Tibert*, 2009 ND 213, ¶ 27, 776 N.W.2d 549 (“judges are not ferrets who engage in unassisted searches of the record for evidence to support a litigant’s position”). Brock was required to “explain the connection between the factual assertions and the legal theories in the case.” *Id.* (citation omitted); *see also Loper v. Adams*, 2011 ND 68, ¶ 19, 795 N.W.2d 899 (“On appeal, this Court decides whether the information available to the district court precluded the existence of a genuine issue of material fact and entitled the moving party to judgment as a matter of law.” (emphasis added)).

[¶53] Although the District Court did not directly analyze whether KSI, LLC was in privity with the parties involved in the California proceedings for purposes of collateral estoppel, the District Court did analyze and consider KSI, LLC’s responses to Brock’s Requests for Admissions which form the basis of Brock’s privity argument. In response to Request No. 18, KSI, LLC admitted it was represented by counsel at the trial held before the WCAB. (*KSI, LLC’s Responses to Brock’s Requests for Admissions*, App. 195, at

Response to Request No. 18). Lorenzo Alvarez, the Director of Legal Services of KSI, LP and its affiliated entities, including KSI, LLC, signed the responses. *Id.* at App. 197.

[¶54] The District Court found this fact to be significant when combined with Judge Justice’s finding that all KS Industries entities, wherever located, are alter egos of KSI, LP and this Court’s analysis in *Trinity Hospitals v. Mattson*. (*Order Granting Defendants’ Second Motion for Summary Judgment*, App. 540-41, ¶ 33). The District Court ultimately concluded that even if KSI, LLC and Price could be held to have participated in the California proceedings as an alter ego of KSI, LP, KSI, LLC and Price were still entitled to immunity from suit. *Id.* at App. 541, ¶ 34. Brock seeks reversal of the District Court’s Order Granting Defendants’ Second Motion for Summary Judgment for three reasons: (1) *Trinity Hospitals v. Mattson* is inapposite, (2) there was no finding of alter-ego status made by Judge Justice, and (3) an issue of fact existed regarding KSI, LP’s and KSI, LLC’s corporate structure, precluding summary judgment. Brock is wrong on all accounts.

[¶55] Brock wants to use the WCAB’s finding that KSI, LP was his employer under California law to preclude KSI, LLC from arguing it was Brock’s contributing employer under North Dakota law. Brock seeks to impose collateral estoppel only on the finding of the California decision that suits his needs. This patent inconsistency underscores one of many reasons why the District Court vacated its initial decision.

[¶56] Judge Justice found KSI, LLC as well as the other KS entities were “merely alter egos of KS Industries, LP.” (*WCAB Opinion on Decision*, App. 233). This finding precludes Brock from suing KSI, LLC or Price in tort. Under California law, a parent corporation cannot be held vicariously liable under the equitable doctrine of alter ego doctrine when the subsidiary satisfied its obligation to its employees by securing

payment of workers' compensation benefits. *Doney v. TRW, Inc.*, 33 Cal. App. 4th 245, 39 Cal. Rptr. 2d 292 (1995). This same result holds true under North Dakota law.

[¶57] “A ‘contributing employer’ is the entity who pays the WSI premium to secure workers' compensation coverage for the employee and, in turn, receives immunity from legal liability for injuries to the employee.” *Trinity Hosps.*, 2006 ND 231, ¶ 12, 723 N.W.2d 684, 689. That KSI, LLC paid the WSI premiums on behalf of Brock, Price, and all KSI, LLC employees is undisputed. As noted by Barry Schumacher, the Chief of Employer Services at WSI: KSI, LLC identified Brock as an employee; paid WSI premiums on his behalf; and WSI awarded benefits to Brock under KSI, LLC's WSI account. (*Schumacher Aff.*, App. 307, ¶¶ 2-5).

[¶58] Even if whether KSI, LP and KSI, LLC are alter egos is a disputed fact, it does not preclude summary judgment in favor of KSI, LLC and Price. “Factual disputes that are irrelevant or unnecessary will not be counted.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Alter ego analysis is irrelevant to whether KSI, LLC and Price are entitled to statutory immunity under the exclusive remedy rule. In fact, the District Court highlighted that collateral estoppel was secondary to its analysis. “The [District] Court's grant of summary judgment in favor of [KSI, LLC and Price] in this case is based primarily on the exclusive remedy provision of North Dakota's workers' compensation law.” (*Order Granting Defendants' Second Motion for Summary Judgment*, App. 541, ¶ 36). It is undisputed KSI, LLC was Brock's contributing employer at the time of injury—this fact does not change regardless of whether KSI, LLC is an alter ego of KSI, LP—entitling KSI, LLC and Price to immunity from suit.

V. **Brock is collaterally estopped from claiming KSI, LLC was not his contributing employer because he failed to request reconsideration of or otherwise challenge WSI's Notice of Decision Accepting Liability and Awarding Benefits.**

[¶59] Brock asserts collateral estoppel with respect to WSI's Notice of Decision awarding him benefits under KSI, LLC's employer account should not apply because: the issue of employment was not adjudicated, Brock cannot be held to the appeal standard, and because WSI was reimbursed. Brock's arguments are meritless.

[¶60] Within seven days from the date of a workplace injury, an employer is required to file a first report of injury. N.D.C.C. § 65-05-01.4. "All original claims for benefits must be filed by the injured employee, or someone on the injured employee's behalf, within one year after the injury." N.D.C.C. § 65-05-01. "Benefits may not be allowed...unless that person, or someone on that person's behalf, files a written claim for benefits." N.D.C.C. § 65-05-04; *see Rogers v. N. Dakota Workers Comp. Bureau*, 482 N.W.2d 607, 608-09 (N.D. 1992). "Each claim must be signed by the person entitled to compensation or by the person acting on that person's behalf." N.D.C.C. § 65-05-02.

[¶61] When a timely claim for benefits is made, WSI's decision accepting the claim is final and "entitled to the same faith and credit as a judgment of a court record," subject to the employee's right to request reconsideration and appeal. N.D.C.C. § 65-05-03. Section 65-01-16 provides the procedure for disputed decisions up and until an appeal is taken in accordance with Chapter 65-10. Specifically, "[t]he organization may issue a notice of decision for any decision made by informal internal review." N.D.C.C. § 65-01-16(3). The notice of decision is required to include "a statement of the decision, a short summary of the reason of the decision, and notice of the right to reconsideration." N.D.C.C. § 65-

01-16(4). “Absent a timely and sufficient request for reconsideration, the notice of decision is final and may not be reheard or appealed.” *Id.*

[¶62] In this case, Brock was injured on March 31, 2011 while working for KSI, LLC. A First Report of Injury was signed by Brock, dated April 4, 2011. (*Brock Report of Injury*, App. 324). KSI, LLC did not contest the claim and WSI agreed to accept Brock’s claim based on the information provided by KSI, LLC as well as the fact that Brock signed the First Report of Injury. (*WSI Notepad Entries*, App. 658-73, pgs. 2-7 of 73).

[¶63] WSI issued its Notice of Decision accepting liability and awarding Brock benefits on April 6, 2011. (*WSI Notice of Decision*, App. 201). According to the Notice of Decision, WSI reviewed the file and awarded benefits, finding the evidence established Brock had sustained an injury by accident arising out of and in the course and scope of his employment with KSI, LLC. *Id.* The Notice of Decision provided Brock notice

[i]f you feel this decision is incorrect, please write to your claims adjuster within 30 days of the date on this notice to request reconsideration...If a request for reconsideration is not received within 30 days, this decision will be final. If you agree with this decision, nothing more is required.

*Id.* Brock’s wife signed a First Report of Injury on Brock’s behalf. (*WSI Notepad Entries*, App. 571, at pg. 5 of 73; *First Report of Injury Signed by Stephanie Brock*, App. 700).

[¶64] WSI’s Notice of Decision correctly found Brock was employed by KSI, LLC, Brock was injured during the course and scope of his employment, and that KSI, LLC did not challenge WSI’s determination that Brock’s injuries were covered by KSI, LLC’s WSI employer account. Rather than requesting reconsideration or challenging this adjudication on appeal, Brock’s then-counsel authored a letter to WSI on May 5, 2011 (within the 30-day time period to request reconsideration) acquiescing to WSI’s determination: “per our discussion, it is my understanding that the Workman’s Comp carrier has approved the

claim and will be following the laws of North Dakota in regard to payment.” (*May 5, 2011 Letter to WSI*, App. 640-41). This letter, which was sent within Brock’s statutory window to request reconsideration, affirms Brock’s receipt and acceptance of WSI’s determination of coverage and the award of benefits under KSI, LLC’s employer account. Had Brock wished to contest the Notice of Decision he had until May 6, 2011 to do so. Brock failed to request reconsideration and WSI’s decision that Brock was covered under KSI, LLC’s employer account became final and is entitled to full faith and credit under North Dakota law. N.D.C.C. § 65-05-03. This forecloses Brock’s claim.

[¶65] The sole issue before WSI was whether Brock was entitled to benefits. Brock was entitled to benefits if he suffered a compensable injury. Compensable injury is defined as “an injury by accident arising out of and in the course of hazardous employment.” N.D.C.C. § 65-01-02(10). Hazardous employment is defined as “any employment in which one or more employees are employed regularly in the same business or in or about the establishment.” N.D.C.C. § 65-01-02(20). Employer is defined as “a person who engages or received the services of another for remuneration.” N.D.C.C. § 65-01-02(17). Employee is defined as “an individual who performs hazardous employment for another for remuneration.” N.D.C.C. § 65-01-02(16). To award benefits, WSI was required by law to determine whether Brock was an employee, as defined by Section 65-01-02(16), and if he was an employee, by whom was he employed, as defined by Section 65-01-02(17). Consistent with that analysis, WSI issued its Notice of Decision finding Brock was injured during the course of his employment with KSI, LLC.

[¶66] Section 65-01-16 governs Brock’s right to request reconsideration. N.D.C.C. § 65-01-16. Absent a request for reconsideration no appeal may be taken. *Id.* Section 65-01-

16 does not limit a request for reconsideration solely to denials of claims or reduction of a claimant's right to participate in the fund. In fact, Brock's status as an employee of KSI, LLC goes directly to his right to participate in the fund for without that status he would not have been entitled to WSI benefits. Brock had every opportunity to request reconsideration to clarify this issue and instead intentionally availed himself of the benefits available to him under KSI, LLC's employer account. (*May 5, 2011 Letter to WSI*, App. 640-41).

[¶67] Brock contends it defies logic to suggest he should have requested reconsideration or otherwise appealed WSI's Notice of Decision which extended medical benefits to him while in the hospital as a newly-diagnosed quadriplegic. However, in every case in which WSI issues a decision awarding benefits a compensable injury has occurred, and in many cases the injury is debilitating. In fact, this Court previously held Section 65-10-01, when read together with Section 28-32-15, authorizes "a claimant to appeal from a decision of the Bureau which grants benefits if that decision substantially affects the rights of the claimant." *Westman v. N. Dakota Workers' Comp. Bureau*, 459 N.W.2d 540, 542-43 (N.D. 1990) (emphasis added).

[¶68] Westman was involved in a motor vehicle accident in a truck owned by Kedney Warehouse Company ("Kedney") and driven by its employee, David Dessellier. *Id.* at 543. Westman signed a claim form for WSI benefits while in the hospital. His claim was accepted. *Id.* Six months post-accident and following receipt of WSI benefits, Westman sought to withdraw his claim for benefits because he had initiated a personal injury suit against Kedney. *Id.*<sup>5</sup> WSI issued its final decision finding Westman eligible for benefits as an employee of Kedney. Westman appealed that decision to this Court. *Id.*

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<sup>5</sup> Eight years post-accident and receipt of WSI benefits, Brock is now attempting to do the

[¶69] Kedney moved to dismiss Westman’s appeal, arguing the decision was not appealable. *Id.* at 541. Even though WSI’s decision awarded Westman benefits as an employee of Kedney, the decision was appealable as it affected Westman’s substantial rights. *Id.* at 542-43. In so holding, this Court reaffirmed that “an unappealed workers compensation decision is a final decision entitled to full faith and credit.” *Id.* at 542. This Court more recently confirmed “where a party fails to avail himself of the statutory remedy of an appeal, the administrative decision becomes final and cannot be collaterally attacked in another proceeding.” *Sabo v. Job Serv. N. Dakota*, 2019 ND 98, ¶ 7, 925 N.W.2d 437.

[¶70] WSI’s Notice of Decision was appealable and had Brock wished to contest the award of benefits as an employee of KSI, LLC, he should have followed WSI’s statutory scheme. His failure to do so entitles the decision to full faith and credit and collaterally estops him from alleging in this action that he was not an employee of KSI, LLC at the time of injury to avoid application of the exclusive remedy rule. Brock also contends collateral estoppel cannot be invoked with respect to WSI’s Notice of Decision because it was not final as WSI was reimbursed for the monies paid. Specifically, Brock points to the WCAB’s Opinion regarding Reimbursement to WSI which required KSI, LP and ACIG to reimburse WSI “for workers’ compensation benefits provided to applicant by WSI as a result of applicant, through the incorrect reporting of the applicant’s industrial injuries to WSI by the erroneous employer KSI, Industries, LLC [sic] in North Dakota.” (*WCAB Findings and Order dated January 25, 2018*, App. 507).

[¶71] This argument is unavailing for several reasons. First, this Court is not bound by the WCAB’s decision as is outlined above. Second, North Dakota law is clear “once a

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same.

claimant is allowed to participate in the fund, he or she may no longer elect to bring a lawsuit against the employer...or a coworker.” *Westman v. Dessellier*, 459 N.W.2d 545 (N.D. 1990). Immunity attached at the time KSI, LLC contributed premiums on Brock’s behalf. (*Schumacher Aff.*, App. 308, ¶ 6). Third, WSI’s Notice of Decision and Demand for Payment is consistent with the prohibition against double recovery. North Dakota law expressly recognizes that an injured worker may be entitled to benefits in multiple states. *See* N.D. Admin. Code § 92-01-02-50. However, an injured worker who elects to receive benefits under the workers’ compensation laws of another state waives the right to seek benefits from WSI. *See* N.D. Admin. Code § 92-01-02-50(3).

[¶72] WSI “[i]s empowered to hear and determine ‘all questions within its jurisdiction.’” *Stine v. Weiner*, 238 N.W.2d 918, 926 (N.D. 1976). Among these questions are whether a claimant is employed by an employer who is subject to Chapter 65-05 and whether the employee was injured in the course of his employment. *Id.*; N.D.C.C. § 65-05-05(1). There is no doubt that “[s]uch determinations by the North Dakota Workmen’s Compensation Bureau [are] Res judicata...unless such decision is timely appealed from....” *Stine*, 238 N.W.2d 918, 926 (N.D. 1976). Brock has not and cannot establish the prerequisite of a timely appeal to undermine the claim and issue preclusive effect of WSI’s April 6, 2011 Notice of Decision in this case. WSI’s April 6, 2011 Notice of Decision is therefore entitled to full faith and credit. N.D.C.C. § 65-05-03.

### **CONCLUSION**

[¶73] KSI, LLC was required by law, under the threat of criminal sanction, to provide workers’ compensation coverage to Brock and Price. It did so, and in exchange, is entitled to immunity from suit. The fact Brock sought and received California workers’ compensation benefits and that during those proceedings the WCAB determined Brock

was employed by KSI, LP, do not retroactively vitiate KSI, LLC's and Price's immunity under North Dakota law. Immunity had already attached. WSI concurs the California proceedings are meaningless with respect to KSI, LLC's and Price's immunity.

[¶74] KSI, LLC is entitled to judgment as a matter of law as Brock's contributing employer under *Trinity*. For similar reasons, Price is entitled to judgment as a matter of law as Brock's co-worker. Neither the District Court nor this Court are bound by the California proceedings, in which KSI, LLC and Price were not involved. Instead, the application of collateral estoppel should be invoked in KSI, LLC's and Price's favor with respect to WSI's April 6, 2011 Notice of Decision awarding benefits to Brock. For the reasons outlined above, this Court should affirm the District Court.

Respectfully submitted May 15th, 2019.

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## **CERTIFICATE OF COMPLIANCE**

[¶75] Pursuant to Rule 32(e) of the North Dakota Rules of Appellate Procedure, this brief complies with the page limitation and consists of 38 pages including the Certificate of Compliance.

Respectfully submitted May 15th, 2019.

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**IN THE SUPREME COURT  
STATE OF NORTH DAKOTA**

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Huey Brock,

Appellant,

vs.

Richard Price and KS Industries, LLC,

Appellees.

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**SUPREME COURT NO. 20190092**

Civil No. 31-2015-CV-00106

ON APPEAL FROM SUMMARY JUDGMENT ORDER AND  
JUDGMENT OF DISTRICT COURT, NORTH CENTRAL  
JUDICIAL DISTRICT

ORAL ARGUMENT REQUESTED

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STATE OF NORTH                    )  
DAKOTA                               )  
COUNTY OF BURLEIGH        ) ss.

Alicia Rash, being first duly sworn, does depose and state that she is of legal age and not a party to the above-entitled matter. Affiant states that on May 15, 2019, **Appellees' Brief and Appellees' Appendix** were filed electronically with the Clerk of Court of the North Dakota Supreme Court through the Supreme Court E-Filing Portal, and that the same documents were electronically served through the portal:

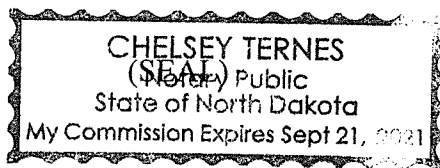
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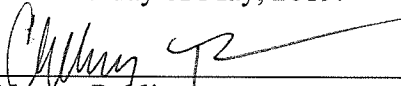
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Subscribed and sworn to before me this 15 day of May, 2019.



  
Notary Public