

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

<p>Richard Price and KS Industries LLC, Petitioners, vs. The Honorable Douglas L. Mattson, Judge of the District Court, North Central Judicial District and Huey Brock, Respondents.</p>	<p>SUPREME COURT NO. 20160368 Civil No. 31-2015-CV-00106</p>
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**PETITIONERS RICHARD PRICE AND KS INDUSTRIES LLC'S REPLY
BRIEF IN SUPPORT OF PETITION FOR SUPERVISORY WRIT**

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TABLE OF CONTENTS

	<u>Paragraph</u>
TABLE OF CASES	1
TABLE OF AUTHORITIES	1
LAW AND ARGUMENT	1
I. THE CALIFORNIA SYSTEM FOUND THAT BROCK WAS EMPLOYED BY KSI, LP. IT DID NOT FIND THAT KSI, LP WAS A CONTRIBUTING EMPLOYER ON BROCK’S BEHALF	1
II. KSI, LLC UNDISPUTEDLY COMPLIED WITH NORTH DAKOTA LAW AS A CONTRIBUTING EMPLOYER, ENTITLING IT TO IMMUNITY.	5
1. KSI, LLC’S IMMUNITY AS A CONTRIBUTING EMPLOYER AND THE CALIFORNIA DECISION CAN CO-EXIST.....	9
III. WSI’S SUBROGATION INTERESTS IN BROCK’S RECOVERY, IF ANY.....	15
1. BROCK’S THIRD-PARTY RECOVERY FROM JIM HIPNER, LLC	18
CONCLUSION.....	22

TABLE OF CASES

	<u>Paragraph</u>
<u>Trinity Hosps. v. Mattson</u> 2006 ND 231, 723 N.W.2d 684	1, 8, 10, 11, 13 and 25
<u>State v. Clary</u> 389 N.W.2d 347,348 (N.D. 1986)	16
<u>Century Sur. Co. v. Jim Hipner LLC</u> No. 4:12-CV-164, 2015 WL 11143135 (D.N.D. Apr. 24, 2015)	18 and 20
<u>Century Sur. Co. v. Jim Hipner LLC</u> 2016 WY 81, 377 P.3d 784 (Wyo. 2016)	18 and 20
<u>Century Sur. Co. v. Jim Hipner LLC</u> ---F.3d---, No. 15-2120, 2016 WL 6892210 (8th Cir. Nov. 23, 2016)	18 and 20
<u>Bartholomay v. Plains Grain & Agronomy, LLC</u> 2016 ND 138, ¶ 15, 881 N.W.2d 249	25

TABLE OF AUTHORITIES

Paragraph

North Dakota Century Code

N.D.C.C. § 65-01-02(16).....7
N.D.C.C. § 65-01-02(17).....7 and 11
N.D.C.C. § 65-04-33(1).....8
N.D.C.C. § 65-04-3312
N.D.C.C. § 65-01-08.....10 and 11
N.D.C.C. § 65-05-05.....16
N.D.C.C. § 65-01-09.....16

Other Authorities

Cal. Lab. Code § 53052 and 4

LAW AND ARGUMENT

I. The California system found that Brock was employed by KSI, LP. It did not find that KSI, LP was a contributing employer on Brock's behalf.

[¶1] Brock continuously asserts that the ‘issue of employment’ (i.e., whether Brock was hired by KSI, LP or KSI, LLC) was litigated in California, which is true. However, the “issue of employment” is not a finding of which entity was Brock’s contributing employer, which is what WSI immunity law is concerned with. Trinity Hosps. v. Mattson, 2006 ND 231, ¶ 12, 723 N.W.2d 684.

[¶2] To qualify for workers compensation benefits in California, Brock had to show he was “(1) a resident of this state at the time of the injury and (2) the contract of hire was made in this state.” Cal. Lab. Code § 5305. It was undisputed Brock was a California resident; thus, a determination had to be made whether Brock’s contract for hire was made in California or North Dakota.

[¶3] After analyzing the offer of employment, California determined that Brock entered into a contract for hire with KSI, LP in California, ultimately holding:

[A]pplicant credibly testified that for the work in North Dakota, he accepted employment via the telephone from his residence in Long Beach, California and took a 2 to 3 day bus ride from Long Beach, California to the site in North Dakota based on the belief and reliance that he had been offered an accepted employment over the telephone.¹

App. 103 (Opinion on Decision).

[¶4] Finding Brock was hired in California by KSI, LP satisfied the requirements for coverage of out-of-state injuries under § 5305 of the California Labor

¹The California decision, affirmed on appeal, determined KSI, LP and all of its related companies were alter egos. App. 306: (“KS Industries, LLC . . . and all others . . . are merely alter egos of . . . KSI, LP.”). As such, KSI, LP and KSI, LLC are one and the same, both having immunity. Brock ignores this finding.

Code. Consequently, Brock was determined eligible for workers compensation coverage in California through KSI, LP. The California decision did not consider which KSI entity was the contributing employer for purposes of North Dakota workers compensation coverage, which is what North Dakota's WSI immunity law turns on.

II. KSI, LLC undisputedly complied with North Dakota law as a contributing employer, entitling it to immunity.

[¶5] It is undisputed KSI, LLC identified Brock as an employee and paid WSI benefits on his behalf. Brock asserts that KSI, LLC's WSI contributions on his behalf were, in essence, a mistake, as Brock was "misclassified as a KSI LLC employee." Brock Response, ¶ 28. He further attempts to paint a picture that KSI, LLC's "unilateral" payments to WSI are now a "nullity," having no legal consequence because of the California finding:

Although KSI LLC "contributed" to the WSI fund, it wasn't Brock's "employer" at that time (or at any time) according to the California ruling. Thus, any "contribution" by KSI LLC is a nullity. Essentially, KSI LLC is arguing that its unilateral decision to contribute to WSI's fund makes it Brock's "employer," contrary to the finding of the California court (and two appellate courts).

Brock Response, ¶ 61.

[¶6] Brock fails to explain why KSI, LLC's mandated WSI contributions on his behalf should be nullified or to explain how the California decision can retroactively erase the statutory immunity granted KSI, LLC as a contributing employer.

[¶7] It is undisputed Brock performed hazardous employment for KSI, LLC for remuneration. See N.D.C.C. § 65-01-02(16) (defining "employee" as "a person who performs hazardous employment for another for remuneration."). It is undisputed KSI, LLC received the services of Brock for remuneration. See N.D.C.C. § 65-01-02(17)

("Employer," under the Act, is defined as "a person who engages or receives the services of another for remuneration.").

[¶8] Because KSI, LLC received Brock's services for remuneration, KSI, LLC was **mandated** by North Dakota law to report Brock's wages and provide him WSI coverage. Under N.D.C.C. § 65-04-33(1):

An employer may not employ any person, or receive the fruits of the labor of any person, in a hazardous employment as defined in this title, without first applying for workforce safety and insurance coverage for the protection of employees by notifying the organization of the intended employment, the nature of the intended employment, and the estimated payroll expenditure for the coming twelve-month period.

N.D.C.C. § 65-04-33(1).

KSI, LLC fulfilled its obligations under North Dakota law and is a "contributing employer," immunized from Brock's suit, even if KSI, LP employed Brock. Trinity Hosps., 2006 ND 231, ¶ 12, 723 N.W.2d 684.

1. **KSI, LLC's immunity as a contributing employer and the California decision can co-exist.**

[¶9] The California finding that Brock was employed by KSI, LP and the fact that KSI, LLC is a contributing employer under North Dakota law can both be true.

[¶10] Indeed, even if KSI, LLC was barred from arguing it was Brock's actual employer, the undisputed evidence shows KSI, LLC was the entity that identified Brock as an employee to WSI and paid premiums for coverage on his behalf. This entitles KSI, LLC to immunity. See N.D.C.C. § 65-01-08 (entitled "Contributing employer . . . relieved from liability for injury to employee."); Trinity Hosps., 2006 ND 231, ¶ 12, 723 N.W.2d 684.

[¶11] There is no requirement that a contributing employer hire the employee; it is required to engage **or** receive the services of another to be immunized under the

exclusive remedy provisions of N.D.C.C. § 65-01-08. N.D.C.C. § 65-01-02(17). That is why this Court in Trinity stated the contributing employer is the “entity” who pays the WSI premiums.

[¶12] To provide broad coverage for workers, North Dakota law mandates an entity that “employs . . . or receives the fruits of the labor” of a person for remuneration notify WSI of the employee and claim their wages on a payroll report to provide WSI coverage. N.D.C.C. § 65–04–33. The Affidavit of WSI’s Chief of Employer Services, Barry Schumacher, acknowledges KSI, LLC met these statutory requirements. Indeed, that is why it does not matter to WSI if Brock was employed by KSI, LLC or KSI, LP:

5. WSI has been notified that the California Workers Compensation system accepted Huey Brock’s Claim for benefits for his March 31, 2011 workplace injuries, finding that Mr. Brock was an employee of the California-based entity, KS Industries, LP at the time of injury.
6. 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.

App. 182, ¶¶ 5-6 (Schumacher Aff.).

[¶13] Accordingly, even if the District Court granted Brock’s motion to preclude KSI, LLC from arguing it was Brock’s employer, KSI, LLC still has immunity because it was “the entity who paid the WSI premium to secure workers compensation coverage for” Brock. See Trinity Hosps., 2006 ND 231, ¶ 12, 723 N.W.2d 684.

[¶14] Both parties’ positions can co-exist, with KSI, LLC and Richard Price still being immune from suit.

III. WSI's subrogation interests in Brock's recovery, if any.

[¶15] Brock claims that because “WSI is asserting its subrogation rights against any recovery Brock may receive,” WSI must “believe KSI LLC was a third party (susceptible to civil liability) from whom Brock could recover damages.” Brock Response, ¶ 80 (parenthetical in original). WSI has made no such statement. This unfounded assertion directly contradicts the Schumacher Affidavit.

[¶16] WSI has broad subrogation rights. In fact, North Dakota's worker's compensation agency “has had subrogation rights since the worker's compensation fund was established in 1919.” State v. Clary, 389 N.W.2d 347, 348 (N.D.1986). If an injured worker applies for and receives workers' compensation benefits in another state for the same injury, N.D.C.C. § 65-05-05 requires that person to reimburse WSI for the entire amount of WSI benefits paid. Conversely, if an injured worker recovers from a third party, N.D.C.C. § 65-01-09 allows WSI subrogation rights on any recovery.

[¶17] Brock speculates that WSI believes KSI, LLC is liable to Brock as a third party, but fails to disclose at least one third-party settlement and ongoing litigation with that party's excess carrier.

1. Brock's third-party recovery from Jim Hipner, LLC.

[¶18] The accident in this matter involved 4 vehicles. Petition, at ¶¶ 6; 16; see also App. 47 (Traffic Collision Rpt.). Brock reached a settlement in March 2013 with Great West Insurance Company, the insurance company for Jim Hipner, LLC (the entity whose truck was backing up on Highway 2), for \$1,000,000:

2. Release. Huey Brock, upon payment of the \$1,000,000.00 liability limits by Great West Insurance Company, hereby releases Jim Hipner LLC, its owners, employees (including Robert Lopez), or any other person or entity affiliated with Jim Hipner LLC, and Great West Insurance Company, from any and all liability arising out of the injuries and

damages which he sustained as a result of the motor vehicle collision of March 31, 2011, on US Highway 2 east of Williston, North Dakota, except as such claims are preserved herein and satisfiable out of liability insurance coverage provided by Century Surety Company or any other liability insurance company.

Century Sur. Co. v. Jim Hipner LLC, No. 4:12-CV-164, 2015 WL 11143135, at *3 (D.N.D. Apr. 24, 2015), opinion after questions certified, 2016 WY 81, 377 P.3d 784 (Wyo. 2016), and aff'd, ---F.3d---, No. 15-2120, 2016 WL 6892210 (8th Cir. Nov. 23, 2016).

[¶19] After settling, Jim Hipner, LLC's excess carrier, Century Surety Company, filed a declaratory action against Jim Hipner, LLC; Robert Lopez (the driver of the Jim Hipner truck); Huey Brock; Jose Chavez (the driver of the Flint Energy truck KSI, LLC employee Richard Price drove into); and Abraham Reyes (a passenger in the Flint Energy truck) asserting it did not owe a defense or indemnity under a \$2,000,000 umbrella policy.

[¶20] Brock was represented by the same California and North Dakota counsel in the District of North Dakota matter, the Eighth Circuit appeal, and when the Eighth Circuit certified a question to the Wyoming Supreme Court. Ultimately, the 8th Circuit held Century Surety Company could not deny coverage based on a delay in receiving notice of the loss. See Century Sur. Co. v. Jim Hipner LLC, ---F.3d---, No. 15-2120, 2016 WL 6892210, at *5 (8th Cir. Nov. 23, 2016).

[¶21] In sum, Brock offers the existence of WSI's subrogation efforts as "proof" WSI thinks KSI, LLC is a third party liable to Brock, yet fails to inform the Court of his third-party settlement and continuing litigation against an excess carrier.

CONCLUSION

[¶22] It is undisputed KSI, LLC was the contributing employer who paid the WSI premiums on Brock's behalf. It is undisputed that a contributing employer is immune from tort suit. Even if the California finding that KSI, LP was Brock's employer was given collateral estoppel effect, precluding KSI, LLP from arguing it employed Brock, KSI, LLC was still the contributing employer. KSI, LLC and its employee Richard Price are immune from suit.

[¶23] Brock implores this Court that "[a] supervisory writ would result in Brock's inability to bring an action against KS Industries LP (due to California's exclusivity law) and both separate corporations would escape liability." Brock Response, ¶ 85. Brock again ignores the California finding that KSI, LP and KSI, LLC are alter egos.

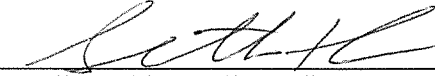
[¶24] Brock's inability to sue KSI, LP is the result of his own litigation strategy. And nothing precludes him from suing other responsible third parties, as he already has.

[¶25] The fact that Brock cannot sue his contributing employer in tort is how the "grand bargain" works in North Dakota. See, e.g., Trinity Hosps., 2006 ND 231, ¶ 11, 723 N.W.2d 684. That is because "[t]he Legislature has spoken and set the public policy on the limits of a covered employer's liability." Bartholomay, 2016 ND 138, ¶ 15, 881 N.W.2d 249. If Brock disagrees, his dispute is with the Legislature, not the entity who identified him as a covered employee to WSI, paid him wages, paid WSI premiums on his behalf, and secured him WSI coverage after the accident.

Respectfully submitted December 6, 2016.

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