United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant, v. SABATIS MITCHELL, Respondent.	OSHRC DOCKET No. 14-0922 Before: Judge Bell

ORDER DENYING RESPONDENT'S MOTION TO DISMISS

This case is before the Occupational Safety and Health Review Commission ("Commission") pursuant to the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("OSH Act"). In response to the Secretary of Labor's ("Secretary") Complaint, Sabatis Mitchell ("Respondent") filed an Answer that included an assertion that the Commission does not have jurisdiction over this case. Resp't Answer, pgs. 3-4. Thereafter, on August 5, 2014, Respondent filed a Motion to Dismiss ("Motion") pursuant to Rule 2(b) of the Commission's Rules of Procedure[1] and Rule 12(b)(1) which asserts the defense of lack of subject matter jurisdiction[2] on three grounds: 1. Respondent is a member of the Passamaquoddy Tribe which is a sovereign Indian Tribe; 2. Respondent was operating a logging operation on lands owned by the Passamaquoddy Tribe; and 3. Respondent is not an employer within the meaning of the Act.[3] On August 21, 2014, the Secretary filed his Opposition to Respondent's Motion to Dismiss

[1] Rule 2(b) of the Commission's Rules of Procedure states, "[i]n the absence of a specific provision, procedure shall be in accordance with the Federal Rules of Civil Procedure." 29 C.F.R. § 2200.2(b).
[2] Fed. R. Civ. P. 12(b)(1).
[3] Interestingly, Respondent's assertion of being a "small logging operation" in its Motion to Dismiss is not made in connection to the affirmative defenses of "infeasibility/impossibility of compliance" and "greater hazard" as it is in its Answer. Instead, Respondent's Motion implies that the location of the logging operation (on tribal land) exempts it from jurisdiction under the Act.

("Opposition"). For the reasons that follow, Respondent's Motion to Dismiss is hereby DENIED.

Discussion: Motion to Dismiss Under Rule 12(b)(1) of Federal Rules of Civil Procedure

Sovereign Immunity

Under Rule 12(b)(1) of the Federal Rules of Civil Procedure, a case may be dismissed for lack of subject matter jurisdiction if the court "lacks the statutory or constitutional power to adjudicate it ." *Makarova v. United States,* 201 F.3d 110, 113 (2d Cir. 2000). When a defendant moves to dismiss a cause of action pursuant to Rule 12(b)(1), the court must take all facts alleged in the complaint as true and draw all reasonable inferences in favor of the plaintiff. *Raila v. United States,* 355 F.3d 118, 119 (2d Cir. 2004).

Here, Respondent's first two grounds for its Motion to Dismiss are both linked to a defense that the Passamaquoddy Indian Tribe, to which he (Sabatis Mitchell) belongs, has sovereign immunity thereby exempting his business from jurisdiction under the Act. However, Respondent's belief that such an assertion is dispositive of the issue concerning the Commission's jurisdiction over it is mistaken. To the contrary, further analysis is necessary before a decision can be made as to whether the Act applies. Because sovereign immunity "is a limitation on federal court jurisdiction, a motion to dismiss based on tribal immunity is appropriately examined under Fed. R. Civ. P. 12(b)(1)." *Bassett v. Mashantucket Pequot Museum & Research Ctr. Inc.,* 221 F.Supp.2d 271, 276 (D.Conn. 2002). In evaluating a Rule 12(b)(1) motion, "the court may resolve the disputed jurisdictional fact issues by referring to evidence outside of the pleadings, such as affidavits, and if necessary, hold an evidentiary

hearing."[4] *Zappia Middle E. Constr. Co. Ltd. v. Emirate of Abu Dhabi,* 215 F.3d 247, 253 (2d Cir.2000).

Previously, when addressing this issue, the Commission has applied the *Tuscarora rule* (also referred to as the *Tuscarora presumption*) in which the Supreme Court stated that federal statutes of general applicability apply to "Indians and their property interests." *Turning Stone Casino Resort*, 21 BNA OSHC 1059, 1061 (No. 04-1000) *("Turning Stone")* (citing *Fed. Power Comm'n v. Tuscarora Indian Nation*), 362 U.S. 99, 116 (1960) ("*Tuscarora*"). Circuit courts have recognized three exceptions to application of the *Tuscarora* rule:

> (1) the law [of general applicability] touches "exclusive rights of self-governance in purely intramural matters";
> (2) the application of the law to the tribe would "abrogate rights guaranteed by Indian treaties"; or
> (3) There is proof "by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations."

Donovan v. Coer d'Alene Tribal Farm, 751 F.2d 1113, 1116 (9th Cir. 1985) (quoting *United States v. Farris*, 624 F.2d 890, 893-94 (9th Cir. 1980)); *Fla. Paraplegic Ass'n. Inc. v. Miccosukee Tribe of Indians*, 166 F.3d 1126, 1129 (11th Cir. 1999); *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 177 (2d Cir. 1996) ("*Mashantucket"*); *Smart v. State Farm Ins. Co.*, 868 F.2d 929, 932-33 (7th Cir. 1989). The Commission has held that "[i]t is undisputed that the Act does not directly address Indian tribes." *Turning Stone*, 21 BNA OSHC 1059, 1060. Also, the logging activities Respondent is engaged in here do not fit the first exception's definition of "purely intramural matters" as outlined by the court in *Mashantucket* to include activities generally involving "tribal membership, inheritance rules, and domestic relations." *Mashantucket*, 95 F.3d at 179. Moreover, Respondent's Motion does not make any assertion, nor offer any evidence, that any of the exceptions to the *Tuscarora rule* apply to this case.

[4] Respondent's Motion to Dismiss makes "bare bones" assertions that are unsupported by any "outside" evidence such as affidavits.

The Second Circuit has stated that "[o]n a motion invoking sovereign immunity to dismiss for lack of subject matter jurisdiction, the plaintiff bears the burden of proving by a preponderance of evidence that jurisdiction exists." *Garcia v. Akwesana Hous. Auth.,* 268 F.3d 76, 84 (2d Cir. 2001). In his Opposition to Respondent's Motion, the Secretary argues that Sabatis Mitchell was operating as an "independent contractor" and that his business venture was not a tribal enterprise. Sec'y Opposition at 2. These arguments are supported by copies of two "timber cutting permits" between Respondent and the Passamaquoddy Forestry Department attached to the Secretary's Opposition. Exhibits A & B. Further, the Secretary's Opposition asserts facts obtained from the Occupational Safety and Health Administration Compliance Officer's interviews of Respondent and at least one employee. These facts reveal that Respondent hired non-tribe members to cut and harvest timber to be sold to a private, non-Native American broker, who in turn resold the product to a non-tribal lumber company for sale on the open market. Sec'y Opposition at 3. In his Complaint, the Secretary alleges that Respondent was engaged in business "affecting commerce" within the meaning of the Act. Sec'y Complaint ¶ 3. Finally, taking all of the facts alleged in the Secretary's Complaint as true and drawing all reasonable inferences in his favor, I find that the Secretary has established jurisdiction by a preponderance of the evidence. Accordingly, Respondent's claim that the Commission lacks subject matter jurisdiction over this case must fail.

Coverage

Respondent's third ground for establishing that the Commission lacks jurisdiction over this case is that it is not an "employer" within the meaning of the Act. However, the Commission has held that the threshold matter of whether an entity is an employer under the OSH Act is not a question of jurisdiction, but of coverage. *See Startran, Inc*., 21 BNA OSHC 1730 (No. 02-1140,

2006), *aff'd in relevant part*, 290 Fed Appx. 656 (5th Cir. 2008) (unpublished) ("*Startran")* (citing *Arbaugh v. Y&H Corp*., 126 S. Ct. 1235, 1244 (2006)) (finding that definitional issues are issues of coverage, not jurisdiction; Title VII employee-numerosity requirement is issue of coverage, not jurisdiction). In *Startran*, the Commission held that Respondent bore the burden of proof to show that it fell within the exception to the definition of employer under the OSH Act. *Startran*, 21 BNA OSHC at 1731 (citing *NLRB v. Ky. River Cmty. Care, Inc*., 532 U.S. 706 (2001)) (showing burden of proving applicability of exemption falls on party claiming exemption). In the case at bar, the Secretary's Complaint alleges that Respondent was an "employer" within the meaning of the Act and facts adduced in the Secretary's Opposition revealing that it had employees support this contention. Respondent's Motion fails to establish its claim that it is not an employer under the Act. Accordingly, its defense that it is not an "employer" within the meaning of the Act must also fail.

SO ORDERED:

Dated: October 15, 2014
Washington, D.C.

_/s/_____
Keith E. Bell
Judge, OSHRC