

# **SUMMARY OF COURT CHALLENGES**

## **TO TITLE 85A, THE ADMINISTRATIVE WORKERS' COMPENSATION ACT**

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### **Cases in Which Opinions Have Been Released for Publication or Issues Resolved:**

#### ***1. Carlock v. Workers' Compensation Commission, 2014 OK 29, Supreme Court No. 112,607***

##### **Challenge:**

Application for Original Jurisdiction to challenge seven provisions of 85A which gave the Workers' Compensation Commission (Commission) authority to hear appeals from the Court of Existing Claims (CEC) and exert administrative authority over the CEC.

##### **Supreme Court Decision:**

On April 17, 2014, a unanimous Supreme Court granted Original Jurisdiction and opined that “**All aspects** of the adjudication of claims for injuries occurring prior to February 1, 2014,” shall be vested in the CEC. The Commission was prohibited from reviewing any CEC orders. The effect of the decision created two separate workers' compensation systems in Oklahoma—one for injuries occurring before February 1, 2014, and another for new law claims occurring on or after that date.

#### ***2. True v. Workers' Compensation Commission, Supreme Court No. 113,321***

##### **Challenge:**

Petition for Original Jurisdiction and Writ of Mandamus to require Commission to hear appeals from administrative law judges.

##### **Supreme Court Decision:**

On November 5, 2014, the Supreme Court dismissed the action after the Commission agreed to immediately set appeals for hearing before the Commission en Banc.

#### ***3. Williams v. Workers' Compensation Commission, 2014 OK 98, Supreme Court No. 113,270***

##### **Challenge:**

Application for Original Jurisdiction and Petitions for Writ of Mandamus and Prohibition to require the Commission to provide court reporters for the reporting of hearings before the administrative law judges and the Commission en Banc.

Supreme Court Decision:

On November 17, 2014, the Supreme Court voted 7-2 to assume Original Jurisdiction and grant the Writs of Mandamus and Prohibition. The effect of the decision was to order the Commission to provide a court reporter to report all hearings and prohibit the Commission from providing only an audio recording in lieu of a court reporter.

**4. *Deason v. Integrus Baptist Medical Center*, Supreme Court No. 113,648**

Challenge:

The appeal challenges the constitutionality of Section 65(D)(2) which restricts compensability for infectious and communicable diseases to cases in which the disease is contracted in a hospital or sanitarium that treats such disease.

The case challenges the entire AWCA's drastic cut in benefits, limitations of compensability, and use of the AMA Guides as a breach of the Grand Bargain, bringing about an end to exclusive remedy.

The case challenges the grant of exclusive remedy, Section 5(C), even if there is no remedy available in Title 85A.

The appeal argues that this provision is a "special law" and is unconstitutional because it provides disparate treatment of members of a single class.

Supreme Court Decision:

**This case has been settled. Petitioner has dismissed the appeal because the legislature corrected the glaring problem of making many claims for police, fire, and emergency personnel not compensable. SB 776 has been signed into law and returns to the old law definition of compensability. An infectious or communicable disease will be compensable in Oklahoma if it "arises out of employment."**

**5. *Smith vs. State of Oklahoma, Oklahoma County*, No. CV-2015-1168**

Challenge:

A class action lawsuit filed to prohibit the Oklahoma Tax Commission, State Finance Director, and State Treasurer from transferring any funds from the Multiple Injury Trust Fund for use for any other state government program and agency. The lawsuit alleged that the annual MITF assessment is a "tax" and cannot be spent by the legislature for any other purpose than designated.

Resolution:

After assurances from state officials that there is no intention to use any of the MITF annual assessment paid by Insurance companies and Own Risk companies for any other purpose except paying MITF awards and administration, the case was dismissed.

## **6. Gillispie v. Estes, Supreme Court No. 113,508**

Challenge:

Claimant appealed ALJ order that he had no compensable injury because he had a previous injury to the same part of the body.

Decision:

Oklahoma Court of Appeals, Division IV, reversed ALJ's opinion and held:

- (1) An aggravation of a pre-existing condition is a new injury.
- (2) The appellate court will look at the entire record in determining if there is evidence to support the adjudicatory decision of an administrative agency acting in a quasi-judicial capacity.
- (3) Since most of the time, there is no substantial record before the Commission, the appellate court will look at the record and order of the administrative law judge on appeal.

## **7. Robison v. True, Supreme Court No. 113,528**

Challenge:

Employer appealed ALJ decision that traveling nurse, paid mileage for a special trip, suffered a compensable injury in automobile accident while traveling from work to his home.

Decision:

Oklahoma Court of Appeals, Division IV, sustained ALJ and Commission finding of compensability, holding:

- (1) The legislature did not abolish the long-held "special task" exception to the general rule of non-compensability for injuries going to and from work. If an injury occurs because the travel was solely due to a special task for the master, it is covered under the new comp law.
- (2) If the Employer pays mileage for the travel to and from work, an injury occurring during such travel is compensable.
- (3) The legislature intended to abolish certain formerly compensable injuries such as those that occur "off the clock," even though they occur during a break on employer's premises. This seems to open the door for common law negligence actions based upon accidents now deemed not work-related by AWCA.

## **8. Dolores Billy v. Burford Manor, Inc., Murray County District Court, CJ-2015-4**

Challenge:

Plaintiff was injured when a picnic table collapsed while she was on a lunch break. The claim was denied under workers' compensation because the injury did not fit the statutory requirement that it occur "inside the employer's facility."

The case was filed as a common law negligence action in Murray County. As expected, the Defendant moved to dismiss the district court action because it is a workers' compensation case. The Plaintiff has responded to the Motion to Dismiss, citing identical cases which have been denied by the Workers' Compensation Commission. The Plaintiff's position is that an injured person in Oklahoma must have a forum in which to bring a claim. If it can't be brought in workers' comp, the district court is the only other venue available.

Decision:

**This case was settled after the district judge believed that the district court had jurisdiction to decide the constitutional challenge and indicated that the statutory limitation of "inside the employer's facility" meant any place on the employer's premises to which access is available to the public and employees. Other cases on appeal deal with this specific issue.**

## **9. Torres v. Seaboard Foods, Supreme Court No. 113,649**

Challenge:

The appeal challenges the constitutionality of Section 2(14) which excludes a claim for cumulative trauma unless an employee works for an employer a minimum of 180 days continuously.

The case challenges the entire AWCA's drastic cut in benefits, limitations of compensability, and use of the AMA Guides as a breach of the Grand Bargain, bringing about an end to exclusive remedy.

The case challenges the grant of exclusive remedy, Section 5(C), even if there is no remedy available in Title 85A.

The appeal argues that this provision is a "special law" and is unconstitutional because it provides disparate treatment of members of a single class. In addition, the section is a denial of fundamental due process.

Supreme Court Decision:

**IN A 50-PAGE DECISION, THE COURT UNANIMOUSLY FOUND THAT THE ARBITRARY 180-DAY LIMIT ON CUMULATIVE TRAUMA WAS UNCONSTITUTIONAL AS A DENIAL OF FEDERAL AND STATE DUE PROCESS.**

**IN THE COMPREHENSIVE OPINION, THE SUPREME COURT SAID THAT THE LEGISLATURE MUST HAVE A RATIONAL STATE INTEREST IN CUTTING BENEFITS AND SHIFTING THE ECONOMIC BURDEN TO AN INJURED WORKER. IF THERE IS NO RATIONAL STATE INTEREST FOR SETTING AN ARBITRARY LIMITATION OF BENEFITS, IT IS A DENIAL OF FEDERAL AND STATE DUE PROCESS.**

## **10. Jenkins v. Doak, Oklahoma County District Court No. CV-2015-784**

### Challenge:

The district court action is a comprehensive constitutional challenge of OPT OUT, the Oklahoma Injury Benefit Act. The Plaintiff, whose claim was denied because she failed to report the injury within 24 hours to a toll-free number, requests the Court to prohibit the Insurance Commissioner from approving additional OPT OUT plans unless they provide reasonably similar benefits in dollar amount, percentage, and duration. After admitting the claim, Respondent has now denied any further benefits because of a New Mexico doctor's opinion that all claimant's problems are pre-existing.

### Decision:

**After the Workers' Compensation Commission ruled the OPT OUT scheme unconstitutional, this case was dismissed. An injunction against the Insurance Commissioner to keep his office from approving further OPT OUT plans is no longer needed. Also, Rachel Jenkins' opt out/Commission case against Res-Care Inc. has now been settled with a confidentiality agreement in regard to the amount of the settlement.**

## **11. Harrison v. Landair Logistics, Inc., Supreme Court No. 113,656**

### Challenge:

This appeal challenges the constitutionality of sections of Title 85A that limit Temporary Total Disability and the denial of benefits if claimant misses 3 or more medical appointments.

### Court Decision:

The Oklahoma Workers' Compensation Commission denied further indemnity and medical benefits because of 85A O.S. Sec. 57, which allows termination of future benefits upon two or more unexcused absences from medical treatment.

**In an unpublished opinion, Division III of the Oklahoma Court of Civil Appeals vacated the decision of the Commission and remanded the case "for further proceedings."** The Court of Civil Appeals rejected the Commission's conclusion that there was no good excuse for the absences. Presiding Judge Robert Bell, in the 3-0 decision, opined, "Claimant testified he missed several appointments to care for his daughter, who suffers from Crohn's disease. He also missed one physical therapy session because he was transporting his daughter to an out of town doctor's appointment..." Judge Bell called Claimant's testimony "reliable, material, probative and substantially competent." There was also testimony that the Claimant called the physical therapy clinic every time he was going to miss a scheduled appointment.

The case is remanded to the Commission "for further proceedings to address the competency and validity of Claimant's proffered excuses." Because the case was remanded, the appeals panel did not consider Claimant's allegation that the entire Sec. 57 penalty is arbitrary, capricious, and unconstitutional. That issue is pending. The Supreme Court has retained the appeal of a similar case, Gibby v. Hobby Lobby, which turns on the interpretation of Sec. 57.

## **12. Rogers v. Sims and UPS, Intervenor, Grady County District Court, CJ-2015-22.**

Challenge:

UPS was trying to recover its comp payments in a death case through Section 43 subrogation. The Plaintiff argued that subrogation in a workers' compensation death case in Oklahoma is unconstitutional.

Decision:

District Judge Richard Van Dyck ruled that Article 23, Section 7 of the Oklahoma Constitution prohibits the legislature from limiting the recovery in a wrongful death action against a negligent third party except in cases involving the state or other units of government covered by the Oklahoma Governmental Tort Claims Act. The judge specifically ruled that any subrogation right granted employers or their insurance carriers by Section 43 of Title 85A is "in violation of Article 23, Section 7 of the state constitution."

**UPS DID NOT APPEAL THE DECISION.**

**13. Maxwell v. Sprint PCS, Supreme Court No. 113,898.**

Challenge:

The appeal challenges (1) use of the AMA Guides, Sixth Edition, to rate disability, (2) the deferment of PPD if a worker returns to work, and (3) the use of the AMA Guides to rate disability to scheduled members.

Decision:

On April 12, 2016, the Supreme Court, in a 7-2 decision, opined on three major issues: (1) PERMANENT PARTIAL DISABILITY (PPD). No edition of the AMA Guides can be used to evaluate permanent disability to scheduled members of the body. (Since the Guides cannot be used in any of the four cases consolidated for the opinion, the Supreme Court said it was not necessary to comment upon the injured workers' allegation that exclusive use of the AMA Guides is unconstitutional.) THAT AWAITS A FUTURE DECISION OF THE COURT.

In addition, the majority opinion casts serious doubt on the Administrative Workers' Compensation Act (AWCA)'s statutory scheme of determining PPD at all. While pointing out that the legislature apparently intended for PPD to be based solely on loss of earning capacity with "no consideration as to the physical insult to the employee's body," Justice Gurich writes, "loss of function in the medical sense is still relevant to a disability determination."

At page 18 of the opinion is found a sweeping statement, "Ambiguities and inconsistencies abound in the AWCA, but regardless, as the system has been implemented by the Commission, the due process rights of injured employees have been unconstitutionally abrogated with regard to permanent partial disability determinations and compensation."

Other noteworthy quotes on PPD:

"The Legislature cannot pre-determine that an injured worker has in fact had no loss of wage-earning capacity because he or she returned to his or her job making the same wages."

"The Legislature is confined to mandating what facts must be adjudged. It may neither predetermine adjudicative facts nor direct that their presence or absence be found from any proof before a tribunal."

"Since its inception, the system has been designed to restore loss of earning capacity through four categories of benefits: permanent total disability, temporary total disability, temporary

partial disability, and permanent partial disability. Temporary total, temporary partial, and permanent total disability benefits have been, and continue to be, compensated based on an injured employees' disability, meaning 'incapacity or loss of function in the physical or medical sense' established by medical evidence, and the injured employee's 'inability to earn wages' as demonstrated by nonmedical evidence with regard to the employee's 'employment situation.'"

"Permanent partial disability benefits, and workers' compensation benefits generally, are not 'rewards' or punishment--these benefits replace something the employee lost for which the employer is liable."

(2) LOSING PPD IF WORKER RETURNS TO WORK. Much of the opinion addresses the legislature's attempt to take away any award of PPD for workers who return to their jobs. Justice Gurich wrote, "The deferral provision of Sec. 45(C)(5) tramples the due process rights of injured workers and is unconstitutional under Art. 2 Sect 7 of the Oklahoma Constitution."

The opinion criticizes the deferral or back to work penalty provision because "An injured employee who returns to work receives no compensation for the physical injury sustained and no compensation for a reduction in future earning capacity, UPENDING THE ENTIRE PURPOSE OF THE WORKERS' COMPENSATION SYSTEM, which is to compensate 'for loss of earning power and disability to work occasioned by injuries to the body in the performance of ordinary labor.'" Further, Justice Gurich opined, "The deferral scheme...punishes all employees who suffer compensable, admitted injuries."

In addition to finding that the deferral scheme was unconstitutional as a denial of due process of law, the Court found it also violated the Constitution as a special law, writing, "The Legislature is without power to vary the effect of a permanent partial disability award by excluding one group of claimants from benefits accorded other permanent partial disability recipients."

(3) CONVERSION OF PPD TO A SCHEDULED MEMBER TO THE BODY AS A WHOLE IS NOT PERMITTED. The Court opined, "If the AMA Guides do not apply to scheduled members, neither do the conversion tables to the body as a whole." That means that the percentage of PPD to a leg is based upon 100 % to the leg of 275 weeks at the applicable compensation rate, not being converted to the body as a whole and limited to 350 weeks for 100 % to the whole body. THIS PROVISION RESULTED IN A SIGNIFICANT REDUCTION IN BENEFITS FOR AN INJURY TO SCHEDULED MEMBERS.

The practice of converting PPD to a scheduled member to the body as a whole came from a April 16, 2014 Notice from a former executive director of the Workers' Compensation Commission. The Supreme Court slammed the Notice, "The issuance of this Notice lacked any semblance of the procedural due process protections required by the...Oklahoma Constitution and such action was clearly in excess of the Commission's jurisdiction."

(4) THE LAST WORD. In the closing paragraph of the opinion, Justice Gurich and the Court's majority held that:

"Any definitional provisions found in 85A O.S. Sec. 2 [the definitions section], as discussed herein, are invalid to the extent they are inconsistent with the views expressed today."

It is my humble opinion that that any sections of the definitions that tie disability to returning to work making the same amount of wages have been declared "invalid." As it should be, the

determination of PPD shall be based upon the entire picture of an individual worker's loss of future earnings and the loss of function in a physical or medical sense."

#### **14. *Smith v. Baze Corp Investments*, Supreme Court No. 113,811**

**The issues were the same as the Maxwell case above. The Supreme consolidated the two cases for a decision.**

#### **15. *Wells v. Oklahoma Roofing and Sheet Metal*, Supreme Court No. 112,844**

Challenge: The lawsuit in the District Court of Oklahoma County challenged the constitutionality of the identical sections in Titles 85 and 85A that limit a direct action for intentional tort against the employer.

##### Decision:

The Oklahoma Court of Civil Appeals, Division IV, has held the section of the Oklahoma workers' compensation law that severely limits district court actions for intentional torts UNCONSTITUTIONAL as a special law and in violation of equal protection and due process.

In the case, Chief Judge Jerry Goodman wrote a 15-page majority opinion that perhaps brings back direct lawsuits against employers allowed by the 2005 Parret case. Since that opinion, the legislature has twice tried to close the worker's option to file an intentional tort action in district court.

In this case, the Plaintiff's father, Robert Young, fell to his death because, the Plaintiff argues, the Employer's fall-protection system was not adequate. Plaintiff argues that the Employer was a repeat violator of safety rules and had been fined by OSHA. Plaintiff contends that the Employer's actions were intentional and negated the exclusivity of the workers' compensation law.

This case was decided on Section 12 of Title 85. However, the legislature copied the exact language in the exclusive remedy section of the new comp law, Title 85A (Section 5).

The Court of Civil Appeals based its finding of unconstitutionality on the basis that the statute is a special law because it provides for a different burden of proof for injured employees and non-employees. Art. 5 Sec. 46 of the Oklahoma Constitution provides that a law must treat everyone in a class of similarly situated persons the same. In this case, persons who suffered because of an intentional tort are lumped in a single class.

Judge Goodman wrote: If an employer's intentional act injures two persons, one its employee and the other a non-employee, while both persons must present their claims in district court, the latter may recover damages by proving either specific intent or substantial certainty, while the injured employee may only recover if specific intent is proven...Put another way, Sec. 12 strips an intentionally-injured claimant of the rights and remedies bargained-for under the Act...yet cripples the claimant's ability to prove the elements of his claim when compared to the



burden of a similarly-situated plaintiff. The industrial bargain has been fundamentally altered. We hold this is incompatible with the concepts of equal protection and due process.

The Court of Civil Appeals cited the recent Torres v. Seaboard Foods case and its discussion of the betrayal of the fundamental principles of justice that gave rise to the Grand Bargain.

**16. *DHS v. Bruce*, 2016 OK 43.**

Challenge:

The Claimant appealed a decision that denied a new injury claim because she had a pre-existing condition.

Decision:

The Oklahoma Supreme Court, in another 7-2 decision, reversed the trial judge and the Court of Civil Appeals that denied benefits for a neck injury and denied approval for a recommended two-level fusion. The Trial Judge and Court of Civil Appeals denied compensability of the claim because the claimant had pre-existing problems with her neck and experienced previous neck and arm pain. The Employer argued that the major cause of the need for surgery was the prior problems and not the latest injury.

Justice Gurich, writing for the 7-justice majority, gave a thorough analysis of the medical reports, including the court-appointed IME. Ultimately, the majority found that the clear weight of the evidence favored a finding of compensability and approval of the two-level fusion. Justice Gurich gave great credence to the opinion of the CIME who opined that the claimant had new symptoms after the latest injury.

This case points out the oft-misinterpreted meaning of "major cause" in workers' compensation in Oklahoma. Both old law and new law talks about major cause being "more than 50 percent of the resulting injury, disease, or illness." Major cause deals with the injury itself....not the recommended medical treatment. If a work activity is the major cause of what is found to be an injury--even if it is the aggravation of a pre-existing condition--the respondent is obligated to pay for whatever medical care is reasonable and necessary to correct the current problem.

**17. *Robinson v. Fairview Fellowship Home*, 2016 OK 42.**

Challenge:

The Claimant appealed a denial of benefits. Claimant challenges the constitutionality of the parking lot exception to compensability on the grounds that it is a special law and a denial of due process and equal protection.

Decision:

A unanimous Oklahoma Supreme Court ruled that the Oklahoma Workers' Compensation Commission and its administrative law judges have the power to determine whether a provision

of Title 85A, the 2013 workers' compensation reform law, is being unconstitutionally applied to a particular party in a Commission proceeding. In other words, the Commission can decide the constitutionality of any part of the new law as it applies to an injured worker or any party. That Commission decision will always be appealable to the Supreme Court.

The Court of Civil Appeals had ruled that the claimant would need to go to district court for a ruling on constitutionality. In the Per Curiam decision, the Supreme lays out a cogent, reasonable basis for the ALJ's and the Commission to be able to opine on the constitutionality of a statute that affects the parties in a particular case before them.

### **18. Wonder Bread v. Smith, Sup. Ct. No. 113,943**

Challenge:

The Respondent appealed from an order that authorized a total knee replacement for a compensable injury although the IME opined that 95 % of the need for the replacement was a pre-existing condition.

Decision:

The trial judge found that work-related activity was the major cause of the injury and appointed an IME to determine what medical treatment was necessary. The judge then authorized the total knee replacement as reasonable and necessary medical treatment resulting from the injury. **With the denial of certiorari**, the Supreme Court has allowed to stand perhaps the strongest language yet that makes "major cause" irrelevant to determine what medical treatment is needed for a compensable injury.

Judge Rapp wrote for the Court:

*"While a claimant is required to show that employment is a major cause of his injury, workers' compensation law does not require medical evidence stating the employment is the major cause of the need for a certain type of medical treatment."*

*"An IME may properly opine whether a claimant's employment is the major cause of a claimant's injury; it may not opine whether that employment is the major cause of the need for a specific course of treatment."*

### **19. Bober v Oklahoma State University, 2016 OK 78**

Challenge:

The constitutionality of 85A O.S. § 2(13)(c) which denies coverage for injuries that occur in parking lots or common areas ADJACENT to the employer's business.

Decision:

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In *Bober*, Justice Gurich, writing for a 6-3 majority, rejected the parking lot exception because 2(13)(c) exempts from coverage injuries that occur in parking lots or common areas ADJACENT to employer's premises. After defining words used in the statute, the Court reversed the denial of the claim by the Administrative Law Judge and the Commission and strongly held that the parking lot and sidewalk is not ADJACENT TO THE PREMISES.....but are in fact THE EMPLOYER'S PREMISES.

Justices Colbert and Watt agreed with the majority decision but, in a separate, concurring opinion, mildly scolded their colleagues of finding a way to reach the correct conclusion while avoiding consideration of the constitutional challenges of due process and access to the courts. Justices Colbert and Watt wrote, “[T]he court continues to dodge the inevitable.”

The three dissenting judges seem to forewarn of an unconstitutional future for another section, 85A O.S. 5(C), which gives employers immunity from district court tort liability EVEN IF A WORKER IS INELIGIBLE FOR WORKERS’ COMP BENEFITS UNDER THE NEW LAW. The dissent can be interpreted to say that an employer cannot rely upon an exception of workers’ comp coverage and still enjoy exclusive remedy.

I believe this dissent shows that all nine members of the Supreme Court of Oklahoma believe that if the legislature chooses to eliminate an injury from compensability, exclusive remedy rides off into the sunset and an Oklahoma business can be sued in district court for negligence. THIS ULTIMATE CONCLUSION IS A SIGNIFICANT PROBLEM FOR OKLAHOMA EMPLOYERS.

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**Cases and Issues Pending in the Supreme Court or District Court:**

**1. *Young v. Station 27, Inc.* Supreme Court No. 113,334**

Challenge:

Application for Original Jurisdiction to determine constitutionality of 85A O.S. § 7 which gives Commission authority to hear retaliatory discharge or discrimination claims arising under the AWCA. The Court will decide whether such claims will continue to be heard in district court or before the Workers’ Compensation Commission, with direct appeal to the Supreme Court.

Supreme Court Decision:

The Supreme Court accepted Original Jurisdiction but recast the Original Jurisdiction Application as an Appeal. The case is fully briefed and submitted.

**Decision Pending**

**2. *Mullendore v. Mercy Hospital Ardmore*, Supreme Court No. 113,560**

Challenge:

The appeal challenges the ALJ’s interpretation of Section 2(9)’s definition of a “compensable injury” to include an idiopathic injury. The term idiopathic is not included in the new law.

The case challenges the entire AWCA’s drastic cut in benefits, limitations of compensability, and use of the AMA Guides as a breach of the Grand Bargain, bringing about an end to exclusive remedy.

The case challenges the grant of exclusive remedy, Section 5(C), even if there is no remedy available in Title 85A.

The appeal argues that this provision is a “special law” and is unconstitutional because it provides disparate treatment of members of a single class.

Supreme Court Decision:

Case pending on Writ of Cert in Supreme Court.

**3. *Brown v. Claims Management Resources*, Supreme Court No. 113,609**

Challenge:

The appeal challenges the constitutionality of Section 2(13)(c) which excludes injuries that occur in a common area. Claimant slipped in the stairwell leaving his work station on the second floor on his way to an employer-controlled parking lot. The case will decide if ingress and egress to a worker’s work station, especially on Employer’s property, is an integral part of the employment.

The case challenges the entire AWCA’s drastic cut in benefits, limitations of compensability, and use of the AMA Guides as a breach of the Grand Bargain, bringing about an end to exclusive remedy.

The case challenges the grant of exclusive remedy, Section 5(C), even if there is no remedy available in Title 85A.

The appeal argues that this provision is a “special law” and is unconstitutional because it provides disparate treatment of members of a single class.

Supreme Court Decision:

This case is pending on Writ of Cert to Supreme Court.

**4. *Reiner v. Harsco Corporation*, WCC No. CM2014-09799A**

Challenge:

Disputes the constitutionality of 85A O.S. 45(E)(8), the vocational rehabilitation section in which the Employer is allowed to deduct the cost of tuition from PPD.

Our argument is that the award of PPD is a property right and deduction of the cost of another benefit under the act is not only unfair, it is the taking of property without due process of law. I have checked, and Oklahoma, in the 2013 reforms, is the only state that has ever even thought of **REQUIRING AN INJURED WORKER TO PAY FOR HIS OWN VOC REHAB OUT OF HIS PPD AWARD.**

Decision:

Pending before the Workers’ Compensation Commission.

**5. *Death of Jared Frank Clark v. Colburn Electric*, Supreme Court No. 114,798**

Challenge:

Asks for reversal of the ALJ decision that claimant's death in an automobile accident was not in the course and scope of employment. Claimant and other employees were asked to work on a Saturday on a time-sensitive job in Bartlesville from their home base in Tulsa. The employees met at a central location and then headed to Bartlesville. Claimant was driving his own vehicle. His wife produced evidence that he had in the past been reimbursed for purchase of gasoline. Claimant alleges that benefiting the employer by working on Saturday, a rarity, the claimant was on a special mission, an exception to the Going and Coming Rule.

Supreme Court Decision:

**Decision Pending**

#### **6. Pina vs. American Piping Inspection Inc., Supreme Court No. 113,899**

Challenge:

Constitutionality of the limitation on compensability while employee is going to and from work. Claimant alleges that supervisor buying his gasoline with a company credit card on the morning of the accident makes it a special mission on an out of town job. Court of Appeals, Division IV, sustained the denial by the Commission.

Supreme Court Decision:

The Supreme Court has accepted certiorari.

**Decision Pending**

#### **7. Gibby vs. Hobby Lobby Stores, Inc., Supreme Court No. 114,065**

Challenge:

Constitutionality of 85A O.S. § 57 which makes a claimant ineligible for further benefits if he or she misses two medical appointments without a valid excuse. Lack of transportation, according to the statute, is not a valid excuse. In an admitted injury, Claimant missed three doctors' appointments, so PPD and other further benefits were denied.

Supreme Court Decision:

**Supreme Court has retained the appeal. Record has been completed and case is fully briefed.**

#### **8. Vasquez v. Dillard's Inc., U.S. District Court, Western District of OK, CIV-15-861-F**

Challenge:

Dillard's denied this case under its Oklahoma Option (Opt Out) benefit plan. All administrative appeals within the plan have been exhausted and the case has been appealed to the Workers' Compensation Commission. HOWEVER, Dillard's has removed the case to federal court, claiming it is governed by ERISA, rather than state law that provides for appeal to the Workers' Compensation Commission and then to the Oklahoma Supreme Court.

Claimant filed a Motion to Remand to Workers' Compensation Commission.

Decision:

Federal Judge Stephen Friot remanded the case to the Workers' Compensation Commission on September 30, 2015, in a two-sentence order.

**On February 26, 2016, the Workers' Compensation Commission found the Opt Out scheme unconstitutional and unenforceable. Dillard's has appealed to the Oklahoma Supreme Court.**

**9. Pilkington v. Dillard's Inc., U.S. District Court, Western District of OK, CIV-15-938-M.**

Challenge:

Dillard's denied this case under its Oklahoma Option (Opt Out) benefit plan. All administrative appeals within the plan have been exhausted and the case has been appealed to the Workers' Compensation Commission. HOWEVER, Dillard's removed the case to federal court, claiming it is governed by ERISA, rather than state law that provides for appeal to the Workers' Compensation Commission and then to the Oklahoma Supreme Court.

Decision:

This case has been remanded to the Workers' Compensation Commission by agreement of all counsel. The case is pending before the Commission. Oral argument has been completed, but Commission will not issue decision until Supreme Court decides Vasquez.

**10. Graham v. D & K Oilfield Services, Commission no. 2016-02878J**

Challenge:

This case questions the constitutionality of the six week limitation of benefits for a hernia. Claimant's hernia injury was accepted and six weeks TTD were paid. However, Claimant's surgery was not successful and he is still TTD. The entire scheme will be contested as an unconstitutional arbitrary limitation with no rational state interest that shifts the economic burden to the injured worker. *Torres*.

Decision:

Pending before Workers' Compensation Commission.

**11. Darla Jean Camp v. Atwood Distributing, Supreme Court No. 114,575**

Challenge:

Commission ruled that the eight-week TTD scheme found in 85A O.S. § 62 does NOT apply in a case that starts out as a non-surgical soft tissue case, but turns into a surgery case. Commission opined that when an injury results in surgery, the soft tissue limitations do not apply

and worker is due for all time he is TTD, including the “gap” between 8-weeks and date of surgery.

Decision:

Pending in Supreme Court.

**12. Death of James O’Haver v. JRT Trucking, Oklahoma County District Court, CJ-2016-799.**

Challenge:

A common law negligence action has been filed against the Employer on the basis that title 85A effectively precludes a heart attack or stroke injury from being found compensable under workers’ compensation law. Plaintiff alleges that exclusive remedy has been lifted on such cases because the statute precludes the use of either physical or mental stress to prove an injury in comp. The workers’ comp case has been denied.

Decision:

Case pending in district court.

**13. Duck v. Hibdon Tire, Workers’ Compensation Commission no. 2014-03688A**

Challenge:

Constitutionality of using the Sixth Edition of the AMA Guides to injuries to body as a whole.

Attempt to recover **BOTH** PPD and Loss of Earning Capacity (LEC) based upon teaching of *Maxwell v. Sprint* and change of definitions in the AWCA.

Decision:

Pending before the Workers’ Compensation Commission.

**14. Ware v. BC Steel, Workers’ Compensation Commission no. 2014-09975A**

Challenge:

Constitutionality of denying medical benefits to an injured worker who is incarcerated. 85A O.S. § 94. This is a denial of due process and is an unconstitutional special law. I understand the denial of TTD because the person cannot work. However, denial of PPD or medical care is blatantly unconstitutional.

Decision:

Pending before the Workers’ Compensation Commission.

**15. Walker v. Oklahoma County Sheriff’s Office, Workers’ Comp Commission**

Challenge:

Constitutionality of using the Sixth Edition of the AMA Guides to injuries to body as a whole.

Attempt to recover **BOTH** PPD and Loss of Earning Capacity (LEC) based upon teaching of *Maxwell v. Sprint* and change of definitions in the AWCA.

Decision:

Pending before the Workers' Compensation Commission.

#### **16. Foote v. HK & S Iron Company, Workers' Comp Commission, 2014-08292R**

Challenge:

Constitutionality of the 104-week limitation of TTD as an unconstitutional arbitrary limitation with no rational state interest that shifts the economic burden to the injured worker. *Torres*. Claimant will be TTD beyond 104 weeks following latest surgery.

Decision:

Pending before the Workers' Compensation Commission.

#### **17. Edwards v. United Parcel Service, Workers' Comp Commission, 2016-02082X**

Challenge:

Constitutionality of using the Sixth Edition of the AMA Guides to injuries to body as a whole.

Attempt to recover **BOTH** PPD and Loss of Earning Capacity (LEC) based upon teaching of *Maxwell v. Sprint* and change of definitions in the AWCA.

Constitutionality of the TTD maximum. The 70 % AWW is fair and equitable, but the maximum is unconstitutional as an unconstitutional arbitrary limitation with no rational state interest that shifts the economic burden to the injured worker. *Torres*.

Decision:

Pending before the Workers' Compensation Commission.

#### **18. Mikes v. United Parcel Service, Workers' Comp Commission**

Challenge:

Constitutionality of using the Sixth Edition of the AMA Guides to injuries to body as a whole.

Attempt to recover **BOTH** PPD and Loss of Earning Capacity (LEC) based upon teaching of *Maxwell v. Sprint* and change of definitions in the AWCA.



Constitutionality of the TTD maximum. The 70 % AWW is fair and equitable, but the maximum is unconstitutional as an unconstitutional arbitrary limitation with no rational state interest that shifts the economic burden to the injured worker. *Torres*.

Decision:

Pending before the Workers' Compensation Commission.

### **19. Nash v. ANJ Transport, Workers' Comp Commission**

Challenge:

Constitutionality of the 104-week limitation of TTD as an unconstitutional arbitrary limitation with no rational state interest that shifts the economic burden to the injured worker. *Torres*. Claimant will be TTD beyond 104 weeks.

Decision:

Pending before the Workers' Compensation Commission.

### **20. Neill v. City of Oologah, Workers' Comp Commission**

Challenge:

Constitutionality of using the Sixth Edition of the AMA Guides to injuries to body as a whole.

Attempt to recover **BOTH** PPD and Loss of Earning Capacity (LEC) based upon teaching of *Maxwell v. Sprint* and change of definitions in the AWCA. Neill is a police officer shot in the head in the line of duty.

Constitutionality of the TTD maximum. The 70 % AWW is fair and equitable, but the maximum is unconstitutional as an unconstitutional arbitrary limitation with no rational state interest that shifts the economic burden to the injured worker. *Torres*.

Decision:

Pending before the Workers' Compensation Commission.

### **21. Goforth v. Wheeler Bros. Grain, WC Commission # CM-2014-10197F**

Challenge:

Constitutionality of abatement of PPD entitlement without traditional revivor statute for spouse. PPD is a property right and such taking is a denial of due process. *Maxwell v. Sprint*.

Decision:

Pending before the Workers' Compensation Commission.

### **22. Ismael Hernandez v. Rite-Way Construction, WC Commission # CM-2015-01763A**

Challenge:

Constitutionality of the TTD maximum. The 70 % AWW is fair and equitable, but the maximum is unconstitutional as an unconstitutional arbitrary limitation with no rational state interest that shifts the economic burden to the injured worker. *Torres*.

Decision:

Pending before Workers' Compensation Commission.