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Another issue of the Journal is now available. This issue delivers timely articles pertaining to topics significantly affecting the insurance industry, such as Florida's one-way attorney's fee statute fueling homeowners insurance AOB cases in the state, the universal health care ballot initiative in Colorado, legislative wrap-ups for Georgia and Florida, EU-US reinsurance collateral covered agreement negotiations, and constitutional challenges to Oklahoma's workers' compensation law. Thank you to our members who generously donated their time and expertise to this publication. Please share these authoritative and topical articles with your colleagues.

OKLAHOMA WORKERS' COMPENSATION LAW PROVISIONS RULED UNCONSTITUTIONAL

Richard J. Fidei, Esq.

GREENBERG TRAUIG LLP
(954) 768-8286

Fred E. Karlinsky, Esq.

GREENBERG TRAUIG LLP
(954) 768-8278

Celeste Lawrence, Esq.

GREENBERG TRAUIG, LLP
(954) 768-8279

The viability of Oklahoma's recently revised workers' compensation law has been severely threatened with recent rulings determining that key provisions of the law are unconstitutional. The law's changes, in effect for just a few years, were an attempt to reduce the increasing costs of the state workers' compensation insurance system and to limit fraud.

In a comprehensive restructuring, the Legislature changed the workers' compensation system from a court-based system to an administrative one. In doing so, it phased out the Oklahoma Workers' Compensation Court and created the Oklahoma Workers Compensation Commission (OWCC) to handle workers' compensation claims. The law's changes also authorized employers to "opt out" of the system if they were able to provide their own workers' compensation benefit plan that could offer coverage equivalent to the state's system. Moreover, the new law limited payments for temporary and permanent disability claims, and provided for the deferral of partial disability benefits in certain instances.

However, the law's new limitations on disability claims payments as well as its provision that deferred benefits if an employee returned to work, were overturned in recent decisions: In February, the OWCC held that the opt-out program was unconstitutional. And, in March and April, the Oklahoma Supreme Court ruled as unconstitutional the provisions within the law that barred benefits for cumulative trauma injuries if the employee did not work for at least 180 continuous days, and allowed the deferment of partial disability benefits to employees. The Court said those provisions violated the state's constitutional guarantee of due process.

In *Torres v. Seaboard Foods, LLC*, [1] the Oklahoma Supreme Court determined that under a due process rational basis test the Oklahoma statute, which barred benefits for cumulative trauma injuries if the employee did not meet the threshold of working a continuous 180 days, [2] was both "overinclusive" and "underinclusive" when analyzing the legitimate interests identified by the state in passing the reforms.

In this case, an employee filed a cumulative trauma workers' compensation claim but was barred because she had not worked the requisite continuous 180-day period. The statute defined cumulative trauma as an injury: (i) to an employee who has completed 180 days of continuous active employment with the employer; (ii) caused by the combined effect of repetitive physical activities extending over a period of time in the course and scope of employment; and (iii) resulting directly and independently of all other causes. The court said that the statute's definition conflicted with the state's constitutional due process rights by prohibiting employees from filing legitimate workers' compensation claims.

While the court agreed that the Legislature had a legitimate interest in defining an injury and preventing fraud, it still found that the law, as applied, was overinclusive because it included legitimate injuries with potentially fraudulent ones in establishing a continuous work threshold in order to file a workers' compensation claim. Noting that there is no argument against the fact that a cumulative injury can and does occur during the first 180 days of a person's employment, the court determined that this restriction impermissibly prohibits the filing of legitimate claims and does not truly define and measure the nature of an employment-related injury.

Moreover, the court also decided that this statute was underinclusive because it did not satisfy the law's overall purpose of assuring compensation for employees injured on the job, if it excludes those suffering a certain type of injury during the first 180 continuous days of employment. Ultimately, the court said the law discriminated by creating two classes of employees – those with less than 180 days of employment and those with more than 180 days – without any rational basis for the distinction. The effect was to prohibit injured workers from filing a claim for a legitimate injury that occurred on the job.

The Oklahoma Supreme Court's decision came just days after the OWCC held that a provision of the revised Oklahoma workers' compensation laws that allowed some employers to opt out of the traditional workers' compensation system was also unconstitutional. In the case of *Vasquez v. Dillard's, Inc.*, [3] the OWCC held the statute violates the equal protection rights afforded to injured workers under the state's constitution as it establishes a dual system that does not treat injured workers equally. The law allows employers opting out of the system to define covered injuries and pre-existing conditions, and the OWCC determined that those definitions

substantially differ from the definitions set forth under the standard state workers' compensation system.

In Oklahoma, the opt-out law provides certain qualified employers the right to establish an Employee Benefit Plan that aligns closely with the federal Employee Retirement Income Security Act of 1974 (ERISA). Once the employer forms their own plan, then it is able opt out of the state's workers' compensation system. In *Vasquez*, the employee filed a claim for benefits based on work-related shoulder and neck injuries. The employee's injuries were diagnosed as an aggravation of a pre-existing spine injury and her request for additional medical treatment – including an MRI – was denied. The employer argued that under its workers' compensation opt-out plan, her injury was not compensable as a pre-existing condition.

In analyzing the issue, the OWCC determined that the law was, as applied, a non-permissible special law. It said the law had the effect of creating a separate system for providing workers' compensation benefits under which a different class of injured workers was subject to a benefit plan that prescribed a different standard for liability. "What the Legislature has done here, is similar to enacting a dual system for tort recovery, requiring that all victims of torts have equal remedies available, then permitting a select class of tortfeasors to define what constitutes a tort. We can conceive of no rational basis to justify such unequal treatment." [4] Additionally, the opt-out system excluded a covered employee from pursuing any remedy for his or her injury as the employee is denied access to courts to recover damages.

In response to arguments raised on its jurisdiction, the OWCC opined it had sufficient authority to make a judgment on constitutionality issues relating to the state's workers' compensation laws because the Legislature established it as a "court of competent jurisdiction" when it created the Commission. Under Oklahoma law, a statute cannot be ruled unconstitutional until a court of competent jurisdiction makes that declaration. The OWCC's decision is immediately appealable to the Oklahoma Supreme Court.

Lastly, on April 14, the Oklahoma Supreme Court again held certain parts of the workers' compensation law unconstitutional – this time determining that the permanent partial disability deferral provision violated the due process clause under Oklahoma's Constitution.

In *Maxwell v. Sprint PCS*, [5] the court reviewed the section of the statute dealing with permanent partial disability deferrals. [6] The issue was whether payments for permanent partial disability can be deferred for those employees who return to their pre-injury work and pay. The court said the law violated an injured employee's due process because it took away their right to compensation for the physical injury sustained and for their potential reduction in earning capacity.

In this case, the named plaintiff suffered a knee injury and had surgery. She returned to work, but filed for permanent partial disability after she returned to work. A hearing, which was held six months after the filing, was resolved in her favor but her payments were deferred because she had returned to work. Oklahoma law provides that "payment of a permanent disability award shall be deferred and held in reserve by the employer or insurance company if the employee has reached maximum medical improvement and has been released to return to work by his or her treating physician, and then returns to his pre-injury or equivalent job." [7] The employee receives the partial permanent disability award if the employer terminates the

employee for some reason other than statutorily defined misconduct, or if the employer does not offer the employee a pre-injury or equivalent job and pay. But the court found that the law, as written, encourages an employer to allow an injured worker to return to work only until the deferred award is exhausted, and then terminate the employee for misconduct so that the employer could avoid paying permanent partial disability benefits to an employee admittedly injured on the job.

Declaring this provision unconstitutional, the court said the Legislature cannot pre-determine if an injured worker has had no loss of wage earning capacity because he or she returned to the job making the same wages. Noting that future earning capacity could still be reduced by shortening of life or limitation of employment opportunities, the court opined that the law had the effect of “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.’” [8] Additionally, the court pointed out that the statute called for the deferral of payments whether or not the injured employee refused to return to work, and stated that the “statutory deferral scheme” created blanket immunity for employers and punished all employees who suffered compensable injuries.

Special attention has been drawn to these Oklahoma cases challenging the state’s workers’ compensation law for many reasons, including what they will mean to any future efforts to revamp workers’ compensation systems in other states, particularly with the implementation of opt-out programs. Future developments will be closely monitored as state legislatures consider cost-effective alternatives to the standard workers’ compensation system, while providing injured workers with an equitable remedy for legitimate injuries suffered at work.

[1] No. 113649, 2016 WL 805519 (Okla. Mar. 1, 2016).

[2] 85A Okla. Stat. § 2(14) (Supp. 2013).

[3] No. CM-2014-11060L (Okla. Workers’ Comp. Comm’n Feb 26, 2016).

[4] *Id.* at ¶ 44.

[5] No. 113898, 2016 WL 1446537 (Okla. Apr. 12, 2016).

[6] 85A Okla. Stat. §§ 45(C)(5) & 46(C) (Supp. 2013).

[7] 85A Okla. Stat. § 45(C)(5) (Supp. 2013).

[8] *Maxwell*, 2016 WL 805519, at *9, quoting *Evans & Assocs. Util. Servs.*, 264 P.3d 1190, 1195 (Okla. 2011).