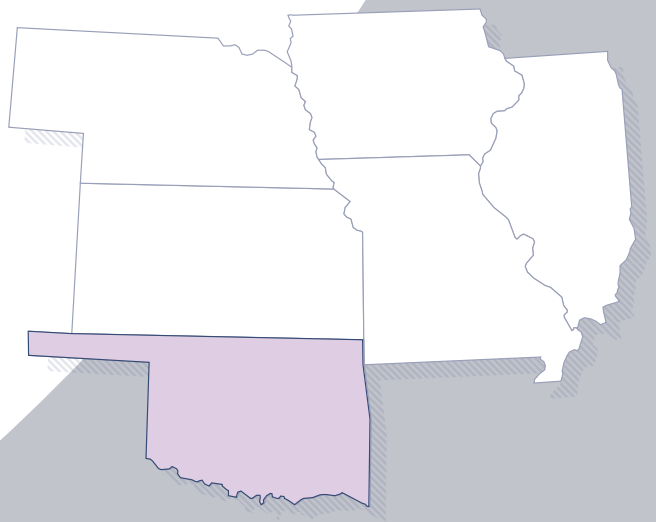
Workers' Compensation Reference Guide

Oklahoma



OKLAHOMA WORKERS' COMPENSATION
FOR ACCIDENTS OCCURRING ON OR AFTER 5/28/2019

I. JURISDICTION – (85A O.S. § 3)

A. Act will apply where:

1. Injuries received and occupational diseases contracted in Oklahoma.
2. Contract of employment made in Oklahoma and employee was acting in the course of such employment under the discretion of the employer.
3. Claimant may not receive workers' compensation benefits in Oklahoma if claimant filed a claim in another jurisdiction unless the WCC determines there is a change of circumstances that create a good cause. Claimant cannot receive duplicate benefits. Oklahoma time limitations still apply per Section 69.

II. ACCIDENTS - (85A O.S. § 2):

A. Compensable Injury:

1. Compensable injury is defined as damage or harm to the physical structure of the body or prosthetic appliance including eyeglasses, contact lenses or hearing aids of which the major cause is either accidental, cumulative trauma or occupational disease arising out of the course and scope of the employment.
2. The accident should be unintended, unanticipated, unforeseen, unplanned and unexpected; occur at a specifically identifiable time and place; occur by chance from unknown cause; is independent of sickness, mental incapacity, body infirmity or other cause.
3. Compensable injury shall be established by objective medical evidence.
4. An employee has to prove by a preponderance of the evidence that he or she suffered a compensable injury.
5. Benefits shall not be payable for condition which results from a non-work- related independent intervening cause following a compensable injury which prolongs disability, aggravation or requires treatment.

B. Consequential injury:

1. Injury or harm to a part of the body that is a direct result of the injury or medical treatment to the body part originally injured in the claim.

C. Cumulative trauma:

1. The combined effect of repetitive physical activities expending over a period of time in the course and scope of claimant's employment. Cumulative trauma shall have resulted directly and independently of all other causes. There is no minimum time of employment or injurious exposure requirement for a compensable injury.

III. NOTICE - (85A O.S. §§ 67-68):

A. Cumulative Trauma and Occupational Disease Notice:

1. Written notice must be given to the employer of occupational disease or cumulative trauma by the employee within six months after first distinct manifestation of disease or cumulative trauma or within six months after death.

B. Single Event Notice:

1. Unless an employee gives oral or written notice to the employer within 30 days of the date the injury occurs, there will be a rebuttable presumption that the injury is not work related.

C. Rebuttable Presumption:

1. Unless an employee gives oral or written notice to the employer within 30 days of the employee's separation from employment, there is a rebuttable presumption that the occupational disease or cumulative trauma did not arise out of or in the course of the employment.

IV. EMPLOYER'S NOTICE TO THE COMMISSION (85A O.S. § 63):

A. Within ten days of the date of receipt of notice or knowledge of injury or death, the employer must send the Commission a report providing factual information regarding the parties and injury.

1. CC – FORM 2

V. CLAIM FOR COMPENSATION – (85A O.S. § 111(A)):

A. Any claim for any benefit under this act is commenced with the filing of an Employee's First Notice of Claim for Compensation by the employee with the Workers' Compensation Commission.

1. CC – FORM 3

VI. EMPLOYER'S ACCEPTANCE OR CONTROVERSION OF CLAIM – (85A O.S. § 111(B)):

A. If an employer controverts any issue related to the Employee's First Notice of Claim for Compensation, the employer must file a Notice of Contested Issues on a form prescribed by the Commission.

1. CC – FORM 2A – Filing of the Form 2A is no longer mandatory

VII. MEDICAL TREATMENT - (85A O.S. § 50):

A. The employer has the right to choose the treating physician.

B. If the employer fails or neglects to provide medical treatment within five days after actual knowledge is received of the injury, the employee may select the treating physician at the expense of the employer.

C. Diagnostic testing shall not be performed shorter than six months from the date of the last test without good cause shown.

D. Unless recommended by a treating physician or an independent medical examiner, continued medical maintenance should not be awarded by the Commission.

E. An employee claiming benefits under this Act shall submit him/herself to medical examination, otherwise rights and benefits shall be suspended.

F. Mileage is reimbursed to the claimant for mileage in excess of 20 miles not to exceed 600 miles.

G. Payment for medical care as required by this Act is due within 45 days of receipt by the employer or insurance carrier of a completed and accurate invoice unless there is a good faith reason to request additional information. Thereafter, the Commission may assess a penalty of up to 25% of any amount due under the fee schedule that remains unpaid on the finding by Commission that no good faith existed for the delay. A pattern of willfully and knowingly delaying payments can result in a civil penalty of not more than $5,000.00.

H. If an employee misses a scheduled appointment with a physician, the employer‘s insurance company shall pay the physician a reasonable charge determined by the Commission for the missed appointment. In absence of a good faith reason for missing the appointment, the Commission shall have the employee reimburse the employer and insurance carrier.

VIII. VOCATIONAL REHABILITATION – (85A O.S. § 45):

A. An injured employee who is eligible for permanent partial disability under this section is entitled to receive vocational rehabilitation services. Vocational rehabilitation services and training shall not exceed a period of 52 weeks.

B. On application of either party or by order of an ALJ the Vocational Rehabilitation Director shall assist the Commission to determine if a claimant is appropriate to receive vocational rehabilitation services. If appropriate, the ALJ can refer the employee for an evaluation. The cost of evaluation shall be paid by the employer. If following the evaluation, the employee refuses services, or training ordered by the ALJ or fails to make a good faith attempt in vocational rehabilitation, the cost of the evaluation and services or training may, in the discretion of the ALJ, be deducted from any remaining PPD award.

C. Request for vocational services must be filed within 60 days of permanent restrictions.

D. If retraining requires residence away from employee’s residence, reasonable room, board, tuition and books shall be paid.

E. If the employee is actively and in good faith participating in a retraining program to determine permanent total disability, he may be entitled to 52 weeks of temporary total disability benefits, plus all tuition and vocational services. The employer or employer’s insurance carrier may deduct the amount paid in tuition from compensation awarded to the employee.

IX. AVERAGE WEEKLY WAGE – (85A O.S. 59):

A. Average weekly wage is determined by dividing the gross wages by the number of weeks of employment for maximum of 52 weeks.

B. If an injured employee works for wages by the job, the average weekly wage is determined by dividing the earnings of the employee by the number of hours required to earn the wage, then multiplying the hourly rate by the number of hours in a full time work week for employment.

X. DISABILITY BENEFITS

A. Temporary Total Disability (85A O.S. § 45/ §62) If the injured worker is temporarily unable to perform his job or any alternative work, he is entitled to receive compensation equal to 70% of his average weekly wage.

1. Maximum TTD is 156 weeks.
2. TTD is not paid for the first three days of the initial period of TTD.
3. TTD shall not exceed 8 weeks for nonsurgical soft tissue injuries regardless of the number of body parts.
    a. If a claimant receives an injection or injections, they should be entitled to additional 8 weeks of TTD.
    b. Injection shall not include facet injections or IV injections.
4. If there is a surgical recommendation the injured employee can be entitled to an additional 16 weeks of TTD. If the surgery is not performed within 30 days of approval by the employer's insurance carrier and the delay is caused by the employee acting in bad faith, the benefits for the extended period shall be terminated and reimbursed all TTD beyond 8 weeks.
5. Soft tissue includes but is not limited to sprains, strains, contusion, tendinitis and muscle tears, cumulative trauma is considered soft tissue unless corrective surgery is necessary.
    a. Soft tissue does not include injury or disease to the spine, disks, nerves or spinal cord where corrective surgery is performed, many brain or closed head injuries as evidenced by sensory or motor disturbance, communication disturbance, disturbances of cerebral function, neurological disorders or other brain and closed head injuries at least as severe in nature as above, and any joint replacement.
6. If the Administrative Law Judge finds a consequential injury, the claimant may receive an additional period of 52 weeks of TTD; such finding shall be by clear and convincing evidence.
7. If the employee is released by the treating physician for all body parts, misses three consecutive medical treatment appointments without valid excuse, fails to comply with medical orders of the treating physician or abandons care, the employer may terminate TTD by giving notice to the employee or their counsel.
8. If employee objects to determination of TTD, the Commission shall set a hearing within 20 days to determine if TTD should be reinstated.

9. If otherwise qualified according to the provisions of this act, PTD benefits may be awarded to an employee who has exhausted the maximum TTD even though the employee has not reached MMI.
10. Benefits under this subsection shall be permanently terminated by order of the Commission if the employee is noncompliant or abandons treatment for sixty (60) days, or if benefits under this subsection have been suspended under this paragraph at least two times.
11. An employee who is incarcerated shall not be eligible to receive temporary total disability benefits under this title. Any medical benefits available to an incarcerated employee shall be limited by other provisions of this title in the same manner as for all injured employees.

B. Temporary partial disability (85A O.S. § 45):

1. If claimant is only able to work part-time, he can receive the greater of 70% of the difference between the pre-injury average weekly wage and the weekly wage for performing alternative work but only if his or her weekly wage in performing the alternative work is less than the TTD rate.
2. If the employee refuses alternative work, they are not entitled to temporary total or temporary partial disability benefits.
3. TPD benefits are limited to 52 weeks.

C. Permanent Partial Disability (85A O.S. § 45-46):

1. Permanent Partial Disability may not exceed 100% to the body part or body as a whole. (The language indicating that surgical body parts are not included is no longer in the Workers' Compensation Act)
2. A physician's opinion of the nature and extent of permanent partial disability benefits to parts of the body other than scheduled members, must be based solely on criteria established under the 6th edition of the AMA Guides. All parties may submit a report from an evaluating physician.
3. Permanent disability should not be allowed to a body part for which no medical treatment has been received.
4. Permanent partial disability shall be 70% of the average weekly wage, not to exceed $350.00 per week. PPD shall increase to Three Hundred Sixty Dollars ($360.00) per week on July 1, 2021.
5. Maximum permanent disability is 360 weeks to the body as a whole.
6. In the event there exists a previous PPD, including non-work related injury or condition which produces PPD and the same is aggravated or accelerated by an accidental personal injury or occupational disease, compensation for PPD shall be only for such amount as was caused by such accidental personal injury or occupations disease and no additional compensation shall be allowed for the pre-existing PPD or impairment.
7. An employee cannot receive payment on two permanent partial disability orders at the same time.

8. Permanent partial disability for amputation or permanent total loss of a scheduled member shall be paid regardless of whether or not claimant returns to work in his/her pre-injury or equivalent job.

D. Permanent Total Disability (85A O.S. § 45):

1. 70% of the average weekly wage not to exceed the maximum TTD rate for the DOA.
2. Benefits are payable until claimant reaches the age maximum of social security retirement benefits or for period of 15 years whichever is longer.
3. If claimant dies of causes unrelated to the injury or illness, benefits cease on the date of death.
4. Any person entitled to revive the claim shall receive a one time lump sum payment equal to 26 weeks of permanent total disability benefits.
5. In the event the Commission awards both permanent partial disability and permanent total disability, permanent total disability does not start until permanent partial disability benefits have been paid in full.
6. Permanent total disability benefits may be awarded to an employee who has exhausted the maximum period of temporary total disability even thought the employee has not reached MMI.
7. The Commission shall annually review the status of an employee receiving permanent total disability benefits against the last employer and shall require the employee to file an affidavit noting that he/she has not returned to gainful employment and is not able to return to gainful employment. Failure to file the affidavit shall result in suspension of benefits which can be reinstated.
8. Benefits for a single event injury are determined by the law in effect at the time of the injury. Benefits for cumulative trauma or occupational disease or illness are determined by the law in effect at the time the employee knew or reasonably should have known of the injury. Benefits for death are determined at the time of death.

E. Disfigurement (85A O.S. § 45):

1. Maximum disfigurement is $50,000.00.
2. No award for disfigurement shall be entered until 12 months from the injury unless the treating physician deems the wound or incision to be fully healed.

F. Revivor of PPD(85A O.S.§71 (E)):

1. No compensation for disability of an injured employee shall be payable for any period beyond his or her death; provided, however if an injured employee is awarded compensation for permanent partial disability by final order and then dies, a reviver action may be brought by the injured employee's spouse, child or children under disability as defined in Section 67 but limited to the number of weeks of disability awarded to the injured employee minus the number of weeks of benefits paid for the PPD to the injured worker at the time of the death of the injured employee. An award of compensation for PPD may be made after the death of the injured employee. Such reviver action may be brought only by the injured employee's spouse, minor child or children under Section 67.

XI. DEATH BENEFITS - (85A O.S. § 47):

A. If death does not arise within one year from the date of accident or within the first three years of the period for compensation payments fixed by the compensation judgment, a rebuttable presumption shall arise that the that the death did not result from the injury.

B. A Common law spouse shall not be entitled to benefits unless he/she obtains an order form the Commission ruling that a common-law marriage existed. The Commission's ruling shall be exclusive regardless of any district court decision.

C. A surviving spouse is entitled to a lump sum payment of $100,000.00, weekly checks at 70% of the average weekly wage, and a 2-year indemnity benefit upon remarriage.

D. Children get $25,000.00 lump sum and 15% of the average weekly wage up to two children. If more than two children they divide $50,000.00 equally, and split 30% of the average weekly wage equally. If there are children but no surviving spouse, each child $25,000.00 and 50% of the average weekly wage to each child. I more than two children, this is split equally, not to exceed $150,000.00 maximum lump sum benefit.

E. Funeral expenses shall not exceed $10,000.00.

XII. SUBROGATION

A. Primary Contractor Liability (85A O.S. § 36):

1. If a subcontractor fails to secure compensation required by this act, the primary contractor shall be liable for compensation to the employees of the subcontractor unless there is an intermediate subcontractor who has workers' compensation coverage. In this event the primary contractor would have a cause of action against the subcontractor to recover compensation paid.

B. Third Party Liability (85A O.S. § 43):

1. The making of a claim for compensation against an employer or carrier for injury or death by an employee, shall not affect the right of the employee to have a cause of action against a third party.
2. The employer or employer's carrier shall be entitled to reasonable notice and opportunity to join the third part action.
3. If the employer or carrier join the third party action for injury or death, they shall be entitled to a first lien of 2/3 of the net proceeds recovered in the action that remain after payment of reasonable cost of collection.
4. An employer or carrier, liable for compensation under this act shall have the right to maintain an Action in Tort against any third party responsible for injury or death; however, the employer or carrier shall notify the claimant in writing that the claimant has right to hire a private attorney and pursue benefits.

XIII. PROCEDURE

A. Workers' Compensation Commission Proceedings (85A O.S. § 72):

1. In making investigation or inquiry or conducting a hearing, the Administrative Law Judge and Commission shall not be bound by technical or statutory rules of evidence of by technical or formal rules of procedure except provided by this act.
2. Hearings to be Public – Records.
    a. Hearings before the Commission shall be open to the public and shall be stenographically reported. The Commission is authorized to contract for the reporting of the hearings.
    b. The Commission shall, by rule, provide for the preparation of a record of all hearings and other proceedings before it.
    c. The Commission shall not be required to stenographically report or prepare a record of joint petition hearings. (Editor's note: The joint petition record has always been used to protect the employer as to the terms of the joint petition. It would be my recommendation to continue making a record for joint petitions so all parties are clear about the terms of the settlement and the rights the claimant is waiving.)
    d. All oral and documentary evidence shall be presented to the ALJ during the initial hearing on a controverted claim. Medical reports shall be furnished to opposing party at least 7 days prior to the hearing. Witness shall be exchanged 7 days prior to hearing.
    e. Expert testimony should not be allowed unless it satisfies the requirements of Federal Rules of Evidence 702.

B. Workers' Compensation Commission Powers (85A O.S. § 73):

1. The Commission shall have the power to preserve and enforce order during, or proceeding before it, issue subpoenas, administer oaths and compel attendance and testimony as well as production of documents. Any person or party failing to take the oath, attend, produce documents or comply with final judgment of Administrative Law Judge or Commission or willfully refuses to pay uncontroverted medical or related expenses within 45 days can be held in contempt and fined up to $10,000.00.

C. Appeals (85A O.S. § 78):

1. Any party feeling aggrieved by a judgment decision or award made by Administrative Law Judge may within 10 days of issuance appeal to the Workers' Compensation Commission. The Commission may reverse, modify or affirm the decision that was against the clear weight of evidence or contrary to law.
2. The judgment decision or award of the Commission shall be final and conclusive on all questions within its jurisdiction between the parties unless an action is commenced with the Supreme Court within 20 days of the award or decision.

D. Certification to District Court (85A O.S. § 79):

1. If an employee fails to comply with final compensation judgment or award, any beneficiary may file a certified copy of the judgment or award in the office of the district court of any county in this state where any property of the employer may be found.

E. Workers' Compensation Commission – Limited Review of Compensation Judgment (85A O.S. § 80):

1. Except in the case of joint petition settlement, the Commission may review a compensation judgment, award or decision any time within six months of termination of the compensation fixed in the original compensation judgment or award on the Commission's own motion or application of either party, on the ground of a change of physical condition or on proof of erroneous wage rate. On review, the Commission may make judgment or award terminating, continuing, decreasing or increasing the compensation previously awarded subject to the maximum limits provided for this in Act.

XIV. DEFENSES

A. "Course and scope of employment" (85A O.S. §2(13)): Injury must derive from an activity of any kind or character for which the employee was hired and that relates to and derives from the work, business, trade or profession of an employer, and is performed by an employee in the furtherance of the affairs or business of an employer. The term includes activities conducted on the premises of an employer or at other locations designated by an employer and travel by an employee in furtherance of the affairs of an employer that is specifically directed by the employer. This term does not include:

1. An employee's transportation to and from his or her place of employment,
2. Travel by an employee in furtherance of the affairs of an employer if the travel is also in furtherance of personal or private affairs of the employee,
3. Any injury occurring in a parking lot or other common area adjacent to an employer's place of business before the employee clocks in or otherwise begins work for the employer or after the employee clocks out or otherwise stops work for the employer unless the employer owns or maintains exclusive control over the area or
4. Any injury occurring while an employee is on a work break, unless the injury occurs while the employee is on a work break inside the employer's facility or in an area owned by or exclusively controlled by the employer and the work break is authorized by the employer's supervisor.

B. Injury to any active participant in assaults or combats which, although they may occur in the workplace, are the result of non-employment-related hostility or animus of one, both, or all of the combatants and which assault or combat amounts to a deviation from customary duties; provided, however, injuries caused by horseplay shall not be considered to be compensable injuries, except for innocent victims (85A O.S. §2(9)(b)(1)).

C. Injury incurred while engaging in or performing or as the result of engaging in or performing any recreational or social activities for the employee's personal pleasure (85A O.S. §2(9)(b)(2)),

D. Injury which was inflicted on the employee at a time when employment services were not being performed or before the employee was hired or after the employment relationship was terminated(85A O.S. §2(9)(b)(3)),

E. Intoxication - Injury where the accident was caused by the use of alcohol, illegal drugs, or prescription drugs used in contravention of physician's orders (85A O.S.§2(9)(b)(4)). If a biological specimen is collected within twenty-four (24) hours of the employee being injured or reporting an injury, or if at any time after the injury a biological specimen is collected by the Oklahoma Office of the Chief Medical Examiner if the injured employee does not survive for at least twenty-four (24) hours after the injury and the employee tests positive for intoxication, an illegal controlled substance, or a legal controlled substance used in contravention to a treating physician's orders, or refuses to undergo the drug and alcohol testing, there shall be a rebuttable presumption that the injury was caused by the use of alcohol, illegal drugs, or prescription drugs used in contravention of physician's orders. This presumption may only be overcome if the employee proves by clear and convincing evidence that his or her state of intoxication had no causal relationship to the injury.

F. Major Cause - Any strain, degeneration, damage or harm to, or disease or condition of, the eye or musculoskeletal structure or other body part resulting from the natural results of aging, osteoarthritis, arthritis, or degenerative process including, but not limited to, degenerative joint disease, degenerative disc disease, degenerative spondylosis/spondylolisthesis and spinal stenosis (85A O.S. §2(9)(b)(5)).

- "Major cause" means more than fifty percent (50%) of the resulting injury, disease or illness. A finding of major cause shall be established by a preponderance of the evidence. A finding that the workplace was not a major cause of the injury, disease or illness shall not adversely affect the exclusive remedy provisions of this act and shall not create a separate cause of action outside this act

G. Preexisting condition - except when the treating physician clearly confirms an identifiable and significant aggravation incurred in the course and scope of employment (85A O.S. §2(9)(b)(6)).

H. Mental Injury or Illness (85A O.S. § 13):

1. A mental injury or illness is not a compensable injury unless caused by a physical injury to the employee, and shall not be considered an injury arising out of and in the course and scope of employment or compensable unless demonstrated by a preponderance of the evidence
    a. Physical injury limitation shall not apply to any victim of a crime of violence.
2. No mental injury or illness under this section shall be compensable unless it is also diagnosed by a licensed psychiatrist or psychologist and unless the diagnosis of the condition meets the criteria established in the most current issue of the Diagnostic and Statistical Manual of Mental Disorders.

3. Where a claim is for mental injury or illness, the employee shall be limited to twenty-six (26) weeks of disability benefits unless it is shown by clear and convincing evidence that benefits should continue for a set period of time, not to exceed a total of fifty-two (52) weeks.
4. In cases where death results directly from the mental injury or illness within a period of one (1) year, compensation shall be paid the dependents as provided in other death cases under this act.
    a. Death directly or indirectly related to the mental injury or illness occurring one (1) year or more from the incident resulting in the mental injury or illness shall not be a compensable injury.

I. Heart claims (85A O.S. § 14):

1. A cardiovascular, coronary, pulmonary, respiratory, or cerebrovascular accident or myocardial infarction causing injury, illness, or death is a compensable injury only if, in relation to other factors contributing to the physical harm, the course and scope of employment was the major cause.
2. An injury or disease included in subsection A of this section shall not be deemed to be a compensable injury unless it is shown that the exertion of the work necessary to precipitate the disability or death was extraordinary and unusual in comparison to the employee's usual work in the course of the employee's regular employment, or that some unusual and unpredicted incident occurred which is found to have been the major cause of the physical harm.

J. Notice - (85A O.S. § 67-68)

1. Single event Notice – Unless an employee gives oral or written notice to the employer within 30 days of the date of injury occurs, there will be a rebuttable presumption that the injury is not work related.
2. Cumulative/Occupational Notice – written notice must be given to the employer of occupational disease or cumulative trauma by the employee within 6 months after the first distinct manifestation of the disease or cumulative trauma. Unless an employee gives oral or written notice to the employer within thirty (30) days of the employee's separation from employment, there shall be a rebuttable presumption that an occupational disease or cumulative trauma injury did not arise out of and in the course of employment. Such presumption must be overcome by a preponderance of the evidence.

K. Statute of Limitations – (85A O.S. § 69):

1. Other than occupational disease, a claim for benefits under this Act shall be barred unless it is filed with the Commission within one year from the date of injury or within 6 months from the date of the last issuance of benefits. A claim for occupational disease or occupational infection shall be barred unless it is filed within two years from the date of last injurious exposure.
2. A claim for compensation for disability on account of silicosis or asbestosis shall be filed with the Commission one year after the time of disablement and the disablement shall occur within three years from the last date of injurious exposure.

3. A claim for compensation for death benefits shall be barred unless it is filed within two years from the date of death.
4. If a claim for benefits has been timely filed under section and the employee does not: A) make a good-faith request for a hearing to resolve a dispute regarding the right to receive benefits, including medical treatment, under this title within six (6) months of the date the claim is filed, or B) receive or seek benefits, including medical treatment, under this title for a period of six (6) months, then on motion by the employer, the claim shall be dismissed with prejudice.
5. Replacement of medical supplies or prosthetics shall not toll the statute of limitations.
6. Failure to file a claim within the period prescribed in subsection A of this section shall not be a bar to the right to benefits hereunder unless objection to the failure is made at the first hearing on the claim in which all parties in interest have been given a reasonable notice and opportunity to be heard by the Commission.
7. Any claimant may, upon the payment of the Workers' Compensation Commission's filing fee, dismiss any claim brought by the claimant at any time before final submission of the case to the Commission for decision. Such dismissal shall be without prejudice unless the words "with prejudice" are included in the order. If any claim that is filed within the statutory time permitted by Section 18 of this act is dismissed without prejudice, a new claim may be filed within one (1) year after the entry of the order dismissing the first claim even if the statutory time for filing has expired.

RECENTLY ASKED QUESTIONS IN OKLAHOMA
FROM ISSUES ADDRESSED IN RECENT OKLAHOMA CASES

Q: Must a claimant file a claim for compensation before the Oklahoma Workers' Compensation Commission before one year to defeat the Statute of Limitation?

A. Maybe. In *Schumberger Technology Corp. v. Paredes*, the Oklahoma Supreme Court found that an injured worker in Oklahoma has ***at least*** one year from the date of an injury in which to file his or her claim.

In *Paredes*, the Court interpreted 85A O.S. Sec. 69, "[a] claim...shall be barred unless it is filed...within one (1) year from the date of injury or, if the employee has received benefits under this title for injury, six (6) months from the date of the last issuance of benefits" finding the Legislature intended for injured workers to have ***at least one year*** from the date of an injury in which to file a workers' compensation claim before the Workers' Compensation Commission.

The employer's insurance company admitted the injury and voluntarily provided treatment for two months. A Form 3 was filed 10 months after the accident, well within the one-year SOL. However, the insurance carried denied the claim, alleging that the SOL was only 8 months. The ALJ and the Commission en Banc ruled that the SOL was at least one year. The carrier appealed and the Supreme Court retained the appeal.

Justice Gurich opined the Legislature had created a method to extend payment of benefits beyond an arbitrary SOL, noting that "Commission's decision applied the statute as intended, which was to give the claimant the benefit of the longer period because of the employer's payment of benefits… the phrase 'whichever is greater' is superfluous."

The opinion also holds that the SOL is "not an absolute time bar." The burden is on the employer to take affirmative action. There must not only be an objection based upon the running of the SOL, but **ALSO A HEARING**.

The six months provision of Sec. 69 only extends the SOL in cases in which the employer admits the injury and pays benefits. If a badly injured worker is off four years when treatment is terminated, he or she has six months from that date to file a claim before the Commission.

Schumberger Technology Corp. v. Paredes, 2023 OK 42.

Q: May a doctor consider a claimant's expression of pain and take it into account when determining the cause of an injury to meet the "objective findings" standard for an injury?

A: Yes. In *Pilot Travel Centers v. Stephens*, the Oklahoma Supreme Court found a doctor may consider a claimant's expression of pain when determining the cause of an injury to meet the "objective findings" standard for an injury found in 85A O.S. Sec. 2(9)(c).

The decision emphasizes that subsection of the statute only prohibits consideration of expressions of pain ***under the voluntary control of the patient***. However, if pain is found during a physical manipulation, the doctor's opinion that an injury has occurred is "objective medical evidence under the statute."

Respondent argued to the Court that an IME's report was not competent objective evidence of injury because it was based entirely (so they claimed) on Claimant's expressions of pain, in opposition to the statute. However, the Court emphasized an expression of pain may ***voluntary or involuntary***.

In this case, the IME doctor conducted physical manipulation of Claimant and determined she had "pain with motion." The Court stated, the doctor may then consider, consistent with statute, the expression of pain made during physical examination, and the opinion resulting IS objective medical evidence.

In *Stephens*, the Court also found considered opinions of doctors at the Johns Hopkins School of Medicine and quoted language in their opinion in defining a rhizotomy as "a minimally invasive **SURGERY**."

Pilot Travel Centers v. Brenda Stephens, OK Supreme Court Case No. 119,260.

Q: May a claimant maintain an Intentional Tort claim in district court at the same time as a Workers' Compensation claim?

A: No. In *Kpiele-Poda v. Patterson-UTI Energy, Inc.*, the Oklahoma Supreme Court found that 85A O.S. Sec. 5(I) unambiguously permits an employee to maintain an action ***either*** before the Commission or in district court, ***but not both***.

In *Patterson-UTI Energy*, the injured employee suffered injuries to his legs and lower back while repairing a conveyor at a wellsite. He filed a workers' compensation claim, and while that claim was still pending, filed a petition asserting negligence and products liability in district court against employer, two wellsite operators, and manufacturers and distributors of conveyor.

Employee's employers moved to dismiss the district court action arguing the Administrative Workers' Compensation Act and Oklahoma precedent preclude employees from simultaneously maintaining an action before the Workers' Compensation Commission and in the district court. The district court granted each dismissal motion and certified each order as appealable.

The worker appealed the dismissal order and the Supreme Court held the district court properly dismissed Employee's intentional tort action for lack of subject matter jurisdiction due to the pending claim before the Commission.

Therefore, because the employee invoked the jurisdiction of the Commission first, by filing the workers' compensation claim, and maintained the action in that forum, he is statutorily prohibited from maintaining simultaneous action in district court, and the district court matter must be dismissed.

Kpiele-Poda v. Patterson-UTI Energy, Inc., 2023 OK 11.

Q*: If a Claimant unsuccessfully recovers workers' compensation benefits for an injury, can he then file suit in trial court and plead a claim for relief that is legally possible if an employer may have assumed the duty to provide a safer crosswalk for access to an employer designated parking lot?*

A. Yes. In *Harwood v. Ardagh Group, Ardagh Glass, Inc.*, the Oklahoma Supreme Court held that the employer may have assumed the duty to provide a safer crosswalk for access to the employer designated parking lot and therefore, the employee pled a case for relief which was legally possible. The trial court's decision was premature and the question of whether the actions of the employer were the proximate cause of the employee's injuries is a matter for a jury to decide.

In *Harwood*, the Plaintiff was struck by Defendant's automobile while leaving his work shift and attempting to cross a state highway to an employer provided parking lot. Plaintiff attempted to recover workers' compensation benefits for his injuries but was not successful since he was not injured "in the course of employment." Plaintiff then filed a lawsuit against his employer and the Defendant driver. The trial court dismissed the lawsuit against the employer for failure to state a claim upon which relief could be granted. Plaintiff appealed and the Court of Civil Appeals confirmed the decision.

Plaintiff argued that Defendant caused his injuries when he negligently failed to stop at the crosswalk and that his employer was also a cause of his injuries because the employer negligently failed to ensure adequate lighting and protection for employees crossing at the crosswalk. The employer argued that it did not have a duty to make the crosswalk safer because it did not own, operate, or control the crosswalk and because Plaintiff was not within the course and scope of employment at the time of the accident.

The Court notes that while Plaintiff's workers' compensation benefits were denied, a workers' compensation analysis is still useful in this case. Here, Plaintiff's workers' compensation benefits were denied because his injuries were not within the "course and scope of employment." However, negligence for a parking lot or crosswalk injury can be covered under tort law. The Court agrees that if there is an actionable claim for negligence in Plaintiff's case, it is covered by tort law rather than workers' compensation law and may be brought in the district court. Denial of workers' compensation benefits does not preclude such an action.

Plaintiff alleges several facts to make the argument that the employer had a duty of care. The employer provided parking for employees and instructed them to park across a busy highway. The employer stated it would make crossing the highway as safe as possible and took certain precautions such as creating a walkway with railings and placing strobe lights on the four-way stop when the crosswalk lights were out. Because the employer had previously taken steps to make the crossing safer, the employees relied on the employer to make the crossing safe, and the employer failed to do so on this occasion which increased the risk of harm to Plaintiff. Under these facts, the Court held that the trial court's dismissal for failure to state a claim for which relief can be granted was premature.

Harwood v. Ardagh Group, Ardagh Glass, Inc., 2022 OK 51.

Q*: May a claimant's permanent partial disability award be reduced because wages were paid in excess of the statutory temporary disability maximum?*

A. Yes. In *Martin v. City of Tulsa*, the Oklahoma Court of Civil Appeals found that reduction of Claimant's benefits was statutorily required, and that this reduction did not conflict with municipal code requiring payment of a firefighter's salary during period of disability.

In *Martin*, the Claimant sustained a work-related injury to his right wrist. Pursuant to both 11 O.S. Supp. 2012 § 49-111 and his collective bargaining agreement, Claimant was paid his full wages during his time away from work. The wages received while recovering exceeded the statutory maximum for a temporary total disability award by a total of $13,526.19. Pursuant to 85A O.S. Supp. 2014 § 89, the city requested a reduction of Claimant's PPD award for this amount. The ALJ granted the request, and the Commission affirmed the award, rejecting all Claimant's arguments that the reduction should not apply to him. Claimant appealed.

Section 89 requires the reduction of a PPD award by the amount of any wages paid in excess of the statutory temporary disability maximum. Claimant argued the ALJ, and thus the Commission, erred in applying § 89 to reduce his PPD award.

Claimant first argued that § 89 did not apply to him because that section only applies in cases where an employer has made "advance payments for compensation," which the Court agreed was not applicable. The payments to Claimant were simply payments of his full salary, which the city was statutorily and contractually obligated to pay.

Next, Claimant argued that his collective bargaining agreement with the city precluded the application of § 89. The Court rejected this argument finding it clear that the Claimant's complaint is that the agreement simply requires firefighters to receive their full salary during periods of disability. Additionally, it was clear that Claimant received the salary and the application of § 89 to reduce his total workers' compensation benefit does not alter that fact. Nothing in the collective bargaining agreement precluded the application of §89.

Martin v. City of Tulsa, Court of Civil Appeals, Division 3, 2021 OK CIV APP 19; *see also Burson v. City of Tulsa*, Court of Civil Appeals, Division 1, 2021 OK CIV APP 8 (holding that Respondent was entitled to reimbursement of wages paid to Claimant during the temporary disability period in the amount that was excess of statutory limit).

Q*: Are injuries that occur during the employee's transportation to or from their place of employment compensable when the employee had been paid mileage to relocate for the employer but was not directly reimbursed for daily travel?*

A. No. In *Brown v. Infrastructure & Energy Alts., LLC*, the Oklahoma Court of Civil Appeals held that Claimant's injury did not occur within course and scope of employment when Claimant was involved in a motor vehicle accident during daily commute to a job site.
In *Brown*, Claimant and three other co-workers were carpooling to a job site on July 17, 2017, when they were involved in a collision. Claimant was a passenger in the car owned and driven by a co-worker. Respondent did not provide lodging or transportation but expected its workers to be onsite by 7:00 a.m. daily for a mandatory safety meeting.

Claimant had temporarily relocated from Texas to work on a specific project for Respondent. He had been paid mileage to relocate but was not otherwise directly reimbursed for his daily travel from his temporary residence to the job site, except for $100 per day as *per diem*.

The case's largest contention was related to Claimant's status at the time of the accident in question. Claimant argued the accident as having occurred during employer-directed travel. While Respondent argued the accident as having occurred during the employee's commute to work, which is not included in the Act's definition.

The legislature's intent was clearly to exclude commutes from the definition of scope and course of employment even though such commutes could be considered employer-directed travel generally, and certainly might be in particular situations. Further, the only direction given to the petitioner here was to get to the job site by 7 a.m. The employer was completely indifferent to how that happened and gave no direction to the petitioner as to how to get there.

Finally, the Court addressed the issue surrounding the *per diem* paid to Claimant, finding that it was simply an additional payment to the employee intended to cover the cost of working far from home. Such a payment does not convert a commute to work into employer-directed travel or make the employee incapable of commuting to work from his temporary residence.

The employer gave no direction to the employee other than where to be and when. The employee was not on any special errand but was on the way to the job site where he was to clock in and begin work each day. The employee was solely responsible to choose the method and means of his own transportation. Under these facts, the Court held that the accident occurred during the employee's transportation to and from his place of employment and therefore not compensable.

Brown v. Infrastructure & Energy Alts., LLC, Court of Civil Appeals, Division 3, 2021 OK CIV APP 10.

Q*: Is an ALJ's order denying compensability valid when it is based on medical opinions that are not stated within a reasonable degree of medical certainty but instead based on Claimant's self-diagnosis with no other reasoning?*

A. No. In *Stripling v. Department of Public Safety*, the Oklahoma Court of Civil Appeals vacated the Commission's order affirming the ALJ's decision to deny compensability, finding it was affected by errors of law and not supported by substantial evidence because the ALJ did not consider the medical report submitted to the court finding evidence of cumulative trauma.

In *Stripling*, Claimant was a state trooper with the Oklahoma Highway Patrol that filed his action in May 2017, asserting cumulative trauma injuries to his low back and left hip as a result of his employment. Claimant requested temporary total disability as well as permanent partial disability to the low back.

Claimant presented to his family doctor to receive steroid pills, steroid injections, an X-ray, as well as an MRI of his hip that revealed "significant disc protrusions in the lumbar spine, after which Claimant testified his condition did not improve. Claimant later

underwent surgery to repair the herniated discs, began physical therapy, and returned to his duties as a state trooper.

Counsel for Respondent relied on a medical report that opined the disc herniation was not a result of his work as a state trooper after Claimant reported to him that the onset of his pain was after "jogging." They also focused on Claimant's own opinion and belief that the pain he was experiencing was not work related, combined with the fact that he sought medical treatment with his own private insurance carrier.

However, Claimant provided a medical report that stated that Claimant sustained a significant injury to his lumbar spine due to his work-related duties. The report also opined "the sole and major cause of the significant and identifiable injury and need for treatment to his lumbar spine is directly related to the repetitive work-related duties that he was involved in while employed by [DPS]."

On appeal, the Court emphasized that Claimant's testimony was clear and uncontroverted that until December of 2016, he was under the impression that he was suffering from a leg or hamstring injury, despite suffering from a different injury altogether in his lumbar spine. Thus, the Court agreed that Claimant's non-expert self-diagnosis should not have been relied upon as a basis for denying his claim.

Additionally, the Court held that the ALJ did not apply a "major cause" test, but instead applied a "sole cause" test to Claimant's claim. The only medical report in the record to opine on major cause is that of Claimant's. The medical reports asserting the sole cause of Claimant's spinal degeneration as jogging rely exclusively on Claimant's above-discussed self-diagnosis and offer no further reasoning. Thus, they are not stated within a reasonable degree of medical certainty and do not constitute substantial evidence.

Stripling v. Dep't Public Safety, Court of Civil Appeals, Division 2, 2021 OK CIV APP 11.

Q*: Is a Claimant entitled to permanent temporary disability (PTD) benefits from the Multiple Injury Trust Fund (MITF) despite previously receiving PTD benefits for the full statutory allotted time on a claim that involved other previous injuries?*

A. Yes. In *Butler v. Multiple Injury Trust Fund*, the Oklahoma Court of Civil Appeals reversed the Commission's interpretation and construction of 85A O.S. Supp. 2014 § 32(B) as barring Claimant from a PTD award against MITF, finding it was affected by error of law, reinstating Claimant's award of PTD benefits.

In *Butler*, Claimant received PTD benefits from MITF's predecessor, the Special Indemnity Fund (SIF), for a combination of adjudicated work-related injuries to Claimant's legs from July 24, 1991, to August 22, 2007. Benefits were discontinued because Claimant, born in 1942, reached age 65 in August 2007.

Claimant had previously returned to work, and in May 2010 sustained an injury to her left shoulder and left hand, for which she received a permanent partial disability (PPD) award. In May 2014, she sustained work-related injuries to her right knee, right shoulder, right hip, right arm, and right hand. She settled her claim for those injuries in November 2016 and received PPD as part of that agreement.

Claimant filed a claim against MITF, seeking PTD benefits due to the combination of her injuries. MITF admitted Claimant was PTD due to a combination of injuries but denied

liability for PTD. MITF asserted that because the SIF had paid PTD benefits for more than 16 years, until Claimant reached age 65, MITF's statutory obligation had been fulfilled, and that a “second award” of PTD to Claimant against MITF was beyond the court's jurisdiction. An ALJ heard Claimant's case and rejected MITF's argument, awarding Claimant PTD pursuant to § 32 of the Administrative Workers' Compensation Act (AWCA).

MITF appealed to the WCC. While stating they agreed with the ALJ that an individual may be PTD “more than once if more than one injury is involved,” the Commissioners reversed the ALJ's award.

The Court found that the Commission’s interpretation of 85A O.S. Supp. 2014 § 32(B) finds legislative intent in a presumption for which we fail to find support in the law, or the evidence presented in this case. Additionally, the Court found nothing in the language of the statutes governing MITF awards suggesting the legislature intended § 32(B) to impose a “once in a lifetime” restriction barring a “physically impaired person” who timely files a claim — regardless of the claimant's age or prior awards — from receiving PTD benefits.

Butler v. Multiple Injury Trust Fund, Court of Civil Appeals, Division 2, 2020 OK CIV APP 10.

Q*: May an employee prevail in a wrongful discharge action when they are terminated from an at-will position for violating the employer’s social media policy?*

A. No. In *Peuplie v. Oakwood Retirement Village*, Plaintiff sought review of the district court’s April 19, 2018, order granting Defendant, Oakwood Retirement Village’s motion for summary judgment, upon Plaintiff's wrongful termination claim, alleging her employer fired her in violation of a clearly established public policy.

Plaintiff began working for the Defendant nursing home as a CNA on March 5, 2016, and her employment was terminated on February 2, 2017, for what Defendant said was a violation of its social media policy. On January 23, 2017, Plaintiff posted two entries on her Facebook account, making negative comments about her employer and fellow employees, although Defendant, nor any fellow employees were mentioned by name within the text of the posts.

The district court found Defendant was permitted to implement and enforce a social media policy and Plaintiff violated that policy, her comments having failed to rise to the level of whistleblower complaints or public policy goals. The complaints lacked any specifics about the nature of the conduct she was criticizing, whether the conduct violated a statutory or otherwise articulated duty of care, or whether conduct she observed rose to the level of a crime or neglect against the elderly people in Defendant's care.

Plaintiff also argued that Defendant's stated reason for her termination, violation of the nursing home's social media policy, was a pretext and she was fired for reporting patient abuse. However, the record did not support Plaintiff's pretext argument. The Court found that Plaintiff’s attempts to offer record facts in support of her pretext claims were not sufficient to elevate her argument beyond mere conjecture that a pretext existed. Further,

the Court held that Defendant's social media reasoning for her termination from employment was not implausible or inconsistent with the record. Meanwhile, Plaintiff was wholly unable to demonstrate she was terminated from her at-will employment for any reason other than the Facebook posts at issue.

Peuplie v. Oakwood Retirement Village, Court of Civil Appeals, Division 1, 2020 OK CIV APP 40.

Q*: Is an ALJ's order denying compensability proper when the Judge did not consider whether Claimant's injury was compensable pursuant to 85A O.S. § 2(9)(b)(6) and there is a report from the treating physician finding claimant sustained a significant and identifiable aggravation of a preexisting injury?*

A. No. In *Fitzwilson v. AT&T Corp*, Claimant filed a CC-Form 3 on December 8, 2016, for injuries to her back and right leg, which she alleged occurred on November 22, 2016, while she "was rolling forward in chair when it toppled over." Claimant's employer denied Claimant suffered an injury arising out of and in the course of her employment.

At trial, Claimant described the accident: "We have roller chairs, and we sit in groups so that we can ask each other questions during phone calls. I had rolled back to ask a question, when I went to roll forward, my chair fell over, and I fell out of my chair." Claimant said she believes her right hip and buttocks struck the ground.

Claimant testified she had four surgeries prior to this event. She had an L4-5 and L5-S1 fusion, she had hardware removed, she had another surgery in the same area, and she had hardware removed again. None of her surgeries involved the L3-4 disk. She had been seeing a pain management physician every three months. She began experiencing new symptoms after this fall—her pain levels were higher, and she had pain radiating down her right leg. According to Claimant, her prior issues were in her left leg.

The ALJ found that, in light of Claimant's medical records, her testimony was less than credible. The ALJ further found "that Dr. [Hendricks'] opinion is based on inaccurate history as her right leg radiculopathy was clearly present prior to November 22, 2016." The ALJ determined, "age-related degenerative conditions, including stenosis, are specifically excepted from the definition of compensable injury pursuant to Title 85A O.S. § 2(9)(b)(5)" and was not persuaded that [Claimant's] employment was the sole or major cause of her resulting lumbar spine deterioration or degeneration that ultimately necessitated surgery.

On appeal, the Court reviewed recent case law that was found to be persuasive and applicable to the facts of the present case, holding, that even if Claimant's work-related incident, which Employer admitted occurred, was not "the sole or major cause of her resulting lumbar spine deterioration or degeneration that ultimately necessitated surgery" and is excluded from being compensable pursuant to § 2(9)(b)(5), the WCC was required to determine if her injury was compensable pursuant to § 2(9)(b)(6) because Claimant's treating physician, Dr. Hendricks, "found that Claimant sustained a significant and identifiable aggravation of her preexisting injury."

Fitzwilson v. AT&T Corp, Court of Civil Appeals, Division 4, 2019 OK CIV APP 48.

Q*: May the Workers' Compensation Commission depart from its duty to determine if evidence supports an ALJ's order, and instead take it upon itself to comment on, reject, and weigh the evidence?*

A. No. In *Rose v. Berry Plastics Corp.*, The Court of Civil Appeals reversed the WCC's order, reinstating the ALJ's order awarding claimant benefits. In reversing the ALJ's order, the Court emphasized that the role of the WCC in reviewing administrative decisions is only to determine if the evidence is supportive of the order and possesses sufficient substance as to induce a conviction as to the material facts.

Claimant's CC Form 3 was filed April 11, 2017, and alleged that Claimant's left hand and wrist were crushed in a "guillotine" machine while working as a machine operator for Respondent on April 5, 2017. Employer initially provided medical treatment, but denied the claim was compensable because Claimant tested positive for marijuana and therefore Employer raised the affirmative defense of intoxication.

The ALJ found that Claimant admitted to smoking marijuana at 11:00 p.m. the night before the accident, but denied its use was a factor in the accident. His admission was later confirmed by the results of a post-accident drug test which showed Claimant "positive THC & Morphine."

On appeal, the Court emphasized that when Claimant's post-accident blood test revealed the presence of marijuana in his system, the presumption was created that the intoxication caused the injury. Further, the Court noted that it became incumbent upon Claimant to overcome this presumption by clear and convincing evidence. Regarding the WCC's actions, the Court stated that upon being presented with the ALJ's conclusion, the WCC's role was to "reverse or modify the decision only if it determines that the decision was against the clear weight of the evidence."

The Court stated that the WCC, acting in its appellate capacity, was not entitled to substitute judgment for that of the agency as to the weight of the evidence on fact questions. Several statements made the WCC demonstrated its lapse into that of a finder of fact, rather than confining its review to determine if the evidence supported the ALJ's conclusions. The WCC's error was compounded when the WCC went on to comment about the quality of Claimant's testimony as uncorroborated.

The Court of Civil Appeals held that it must reject the WCC's underlying inference that the mere presence of marijuana in Claimant's bloodstream inevitably means he was intoxicated. The Court concluded that the ALJ found that Claimant overcame the presumption by clear and convincing evidence, the WCC departed from its duty to determine if the evidence supported the ALJ's order, instead taking it upon itself to comment on, reject, and weigh the evidence, and thus affected by error.

Rose v. Berry Plastics Corp., Court of Civil Appeals, Division 4, 2019 OK CIV App 55.

Q*: Is a slip and fall injury compensable when it occurs in the parking lot of a smoke-free school campus while the employee was walking back from an off-campus cigarette break on an adjacent city street?*

A. Yes. In *Johnson v. Midwest Del City Public Schools*, the employer did not allow the use of tobacco on its property. Claimant went off property for an authorized smoke break and was injured in the school parking lot while returning to her workstation. The employer denied the claim on the grounds that claimant was on a work break and was not in the course and scope of employment because the injury did not occur inside the employer's facility.

It was undisputed that (1) no injury occurred to Claimant while she was outside of the employer's facility premises, (2) Claimant was "clocked in" when she fell in the parking lot, and (3) her supervisor authorized her work break. It was further undisputed that the location where Claimant smoked her cigarette complied with the employer's policy.

Employer acknowledged that Claimant was injured in the school parking lot but argued to the Commission that the injuries fell outside the definition of "course and scope of employment." The ALJ determined that because Claimant was on an authorized work break at the time she fell inside the employer's facility (parking lot), her injuries arose in the course and scope of her employment.

The Commission reversed the decision of the ALJ, concluding that Claimant was not in the course and scope of employment because she was in the parking lot at the time of injury following her authorized work break. On appeal, Claimant focused on whether the Commission's findings were against the clear weight of the evidence, contrary to Oklahoma law or not supported by testimony presented at trial. After an analysis of the conclusions of the Commission, the Court of Civil Appeals found that the Commission's order was not affected by error of law or clearly erroneous in view of the evidence and sustained the decision of the ALJ.

The Supreme Court of Oklahoma found that the Commission's authority to modify or reverse the decision of the ALJ was limited to either finding that the decision was not supported by the clear weight of the evidence or contrary to law. The Court held that the evidence met the clear weight of the evidence standard and supported the findings and conclusions of the ALJ. Accordingly, the Commission acted in excess of its authority and contrary to law in reversing the order finding compensability and awarding TTD benefits.

Johnson v. Midwest Del City Public Schools, 2021 OK 29.

Q*: Must the employer pay for reasonably necessary medical treatment if a Claimant's injury is found to be compensable?*

A. Yes. In *Cameron International Corp. v. Selene Castro*, the Oklahoma Court of Civil Appeals reversed the ALJ's order denying medical treatment, finding that the employer must provide reasonably necessary medical treatment connected to the injury.

In Cameron, the claimant suffered an admitted injury to her back and was symptomatic from a disc protrusion. The Form A doctor recommended surgery. The ALJ denied Claimant's request for authorization of further treatment, which included a recommended

microdiscectomy, because the ALJ believed the recommended surgery was not reasonably necessary in connection to the lumbar contusion Claimant received.

After a subsequent hearing, the Workers' Compensation Commission reversed the ALJ and found the denial of Claimant's request for surgery authorization was against the clear weight of the evidence and, accordingly, remanded the ALJ's decision for entry of an order authorizing further treatment, including surgery.

Judge Thomas Prince, the newest Court of Civil Appeals judge, wrote a unanimous opinion, and said: "The claimant was asymptomatic before the November 12, 2018, accident...We therefore find, like the Commission *en Banc* before us, that the recommended [surgery] is reasonably necessary in connection with the injury..."

Cameron Int'l Corp. v. Selene Castro, Supreme Court Case No. 119,305

Q*: Does major cause apply to the need for medical treatment even if the Independent Medical Examiner says the major cause of the need for a total knee replacement is pre-existing arthritis?*

A. No. In *Bryan Linn Farms v. Monsebais*, the employer, Bryan Linn Farms, appealed an Oklahoma WCC order reversing the decision of the ALJ, authorizing a total knee replacement surgery for Claimant's left knee.

In *Bryan Linn Farms*, the WCC held that the statutory term, "major cause," is the test for a compensable injury, but that it does not apply to medical treatment.

The claimant had pre-existing, non-symptomatic arthritis. He had an admitted injury to his knee. The treating doctor and the IME said the injury aggravated the pre-existing condition. Both agreed that a total knee replacement was reasonable and necessary. However, the treating doctor and the IME said the major cause of the need for a total knee replacement was the pre-existing condition and not the injury.

Because the Court of Civil Appeals will not reweigh evidence, they instead reviewed the record to determine if there was substantial evidence to support the Commission's decision. The Commission's decision that there was a connection between the on-the-job accident and the need for a total left knee replacement was supported by substantial competent evidence and was not contrary to law.

In the unanimous opinion of the COCA panel, Judge Keith Rapp wrote: "The 'major cause' analysis is not involved in determining the need for or against a particular course of medical treatment for a compensable injury. Major cause is used in the analysis of determining a compensable on-the-job injury...The employment must be the major cause of the injury, but employment does not need to be the major cause of the need for a particular course of treatment for a compensable injury. Claimant is not required to prove that the employment is the major cause of the need for a total knee replacement."

Bryan Linn Farms v. Monsebais, Supreme Court Case No. 119,058.

Q*. Is the payment of costs for an independent medical examiner considered "compensation" for purposes of tolling the statute of limitations?*

A. Yes. In *Brittany Smith v. Whataburger Restaurant, LLC*, Supreme Court Case No. 117,832, the Oklahoma Court of Civil Appeals found that a respondent's payment of the

costs of an independent medical examiner is compensation and therefore extends the statute of limitations.

In *Smith*, the Claimant filed a CC-Form-3 on April 13, 2017, for an injury that occurred on March 9, 2017, to her low back and right hip when she slipped and fell on an ice water accumulation on the floor at her job at Whataburger. The employer denied liability and refused to pay TTD and claimant's medical expenses. In October of 2017 the employer requested the appointment of an independent medical examiner (IME) "to address causation." The ALJ appointed Dr. Benjamin White as the IME, who examined the claimant in January of 2018, and ordered MRI's of the claimant's cervical, thoracic, and lumbar spine.

Dr. White issued a report dated February 21, 2018 recommending the claimant undergo a "Chiari decompression," a surgical procedure with an estimated recovery time of 4 to 6 months. The Respondent paid the expenses of the IME and diagnostic testing as required by 85A O.S. Supp. 2014 § 112(G). However, the Respondent continued to deny liability and refused to approve any other medical expenses or treatment. On June 18, 2018, within a week of the IME deposition but more than a year after her March 9, 2017 date of injury, Claimant filed an amended CC-Form-3, adding as injured body parts, her cervical spine, thoracic spine and her spinal cord. The employer denied the claim and raised the affirmative defense of the statute of limitations at 85A O.S. Supp. 2014 § 69(A), which bars a claim unless filed within one year from the date of injury.

The matter went to trial and the ALJ issued an order on August 7, 2018, finding a work-related injury to Claimant's low back, but holding that the one-year limitations period barred the claim of injury to her cervical spine, thoracic spine and spinal cord. The ALJ rejected the Claimant's contention that Employer's payment for services and testing provided by the IME constituted payment of "compensation" under § 69(B)(1), meaning that § 69(A) applied and barred the amended claim. The Claimant appealed to the Commission en banc, which affirmed the ALJ's decision. The Claimant then sought review by the Court of Civil Appeals.

The Court of Civil Appeals reversed and remanded the decision of the Commission. In doing so, they found the definition of "compensation" under the AWCA includes medical services and supplies. So even though an IME may not provide medical "treatment" per se, an IME's services are no less "medical services" than those of any other services provided by a medical professional. As such, an IME evaluation and testing services clearly come within the definition of "compensation" under the AWCA, and thus within the parameters of § 69(B)(1) requiring that "compensation" has been paid due to an injury before that statutory section applies.

For this reason, the Court ruled that the services received by Claimant from the IME, at employers own request and expense, triggered the extended limitations time period of § 69(B)(1) and rendered Claimant's amended CC-Form-3 timely for purposes of seeking additional compensation.

Brittany Smith v. Whataburger Restaurant, LLC, Court of Civil Appeals, Division II, Supreme Court No. 117,832

Q. *Can an Insurance Company intervene in a wrongful death action and assert subrogation for death benefits paid in the workers' compensation claim?*

A. No. In the case of *Fanning v. Travelers Insurance Company*, Supreme Court Case No. 119,037, District Judge Barry V. Denney found that 85A O.S. Section 43 is unconstitutional as it relates to subrogation in a death case.

Travelers Ins. Company paid death benefits in a claim in which the worker was killed in a job-related head-on collision. Travelers intervened in the wrongful death action and asserted a subrogation for death benefits paid. The estate of the decedent filed a Declaratory Judgment Action, alleging that the Oklahoma Constitution prohibits workers' compensation subrogation in a death case.

District Judge Barry V. Denney found that 85A O.S. Sec. 43 is unconstitutional as it relates to subrogation in a death case. Section 43 provides that the employer or workers' compensation carrier paying death benefits is entitled to two-thirds of the net recovery in a third-party wrongful death district court action up to the amount of benefits paid, or to be paid in the future.

Judge Denney based his opinion upon Article 23, Section 7 of the Oklahoma Constitution that prohibits the Legislature from diminishing damages in a wrongful death action. Judge Denney wrote: Article 23, Section 7 provides that workers' compensation laws will provide for the exclusive remedy against the employer and that the legislature can only limit death claims against the state or its political subdivisions. This action does not involve a political subdivision and yet, the legislature has enacted a statute that attempts to expand the limitations on death claims--the only thing Oklahoma's Constitution forbids.

Fanning v. Travelers Insurance Company, Ottawa County District Court, CJ-2018-172, Oklahoma Supreme Court No. 119037

Q*. Can a Court of Existing Claims Judge defer to the Workers' Compensation Commission to determine if an injury after the effective date of the Administrative Workers' Compensation Act (February 1, 2014) is the major cause of the need for medical treatment when there is a finding of a cumulative trauma injury prior to the AWCA?*

A. No. In *Deckard v. Danny's Muffler & Tire*, Supreme Court Case No. 117,246, the Oklahoma Court of Civil Appeals ruled the Workers' Compensation Commission has no jurisdiction to "review an order or award made by the Court of Existing Claims for an injury occurring prior to February 1, 2014." So in turn, the Workers' Compensation Commission has no jurisdiction to determine the question of major cause of Claimant's injury in December 2013, occurring prior to February 1, 2014, the effective date of the Administrative Workers' Compensation Act.

In *Deckard*, the claimant filed a Form 3 to assert an injury to his back and left hip occurring on November 25, 2016. Claimant testified that, on that date, he picked up a tire while performing the duties of his employment, felt a pop in his left hip, and he shortly suffered a burning pain in his back. However, the claimant also admitted that, previous to the "pop," he suffered a job-related injury to his back in December 2013 for which he received treatment but alleged that the November 25, 2016 event aggravated his previous

injury. The claimant also admitted he fell from his pickup truck the previous day on November 24, 2016, in a non-job-related event.

Upon consideration of the testimony and evidence, the trial court held that Claimant sustained a cumulative trauma injury to his low back, date of awareness November 1, 2013, and date of last exposure November 23, 2016. However, the trial court also found the need for TTD and medical care is due to new intervening injuries, either at work on November 25, 2016, or off the job on November 24, 2016. The Court would not decide which of those incidents was the major cause for Claimant's current troubles as it was outside of the Court's jurisdiction and was to be properly decided by the Workers Compensation Commission. Both parties appealed and the three-judge panel affirmed the trial court's decision.

In reversing the order of the Workers Compensation Court and remanding back to the Workers' Compensation Court of Existing Claims to fully adjudicate the claim, the Court of Civil Appeals reasoned his cumulative trauma injury is the date of awareness, and he became aware of the injury in 2013, so the law in effect at that time governs his claim. So, the Workers' Compensation Court of Existing Claims possesses the exclusive jurisdiction to determine this matter, and the Workers' Compensation Commission is without jurisdiction to adjudicate any part of his claim.

Deckard v. Danny's Muffler & Tire, Court of Civil Appeals, Division 1, Supreme Court Case No. 117,246

Q*. Does the "identifiable and significant aggravation" standard of 85A O.S. § 2(9)(b)(6) violate the substantive due process clause of Oklahoma Constitution, Article 2, § 7?*

A. No. In a companion case of *Deckard v. Danny's Muffler & Tire*, Supreme Court Case No. 117,085, filed with the Workers' Compensation Commission, the Oklahoma Court of Civil Appeals found the "identifiable and significant aggravation" standard is a reasonable standard to "insure an identifiable and definite causal nexus between a pre-existing condition and a job-related aggravation thereof."

In this claim, the claimant sought review of an order of the Workers' Compensation Commission en banc which affirmed the trial courts denial of his claim for benefits for an injury to his back and left hip after the ALJ determined claimant failed to prove "an identifiable and significant aggravation of his pre-existing condition." The Claimant argued the definition of "compensable injury" contained in 85A O.S. § 2(9)(b)(6), excluding from coverage "any preexisting condition except when the treating physician clearly confirms an identifiable and significant aggravation incurred in the course and scope of the employment," unconstitutionally denied a claimant due process under Okl. Const. 2, § 7, unconstitutionally denied a claimant an adequate remedy at law under Okl. Const. art. 2, § 6, and amounts to an unconstitutional special law in violation of Okl. Const. art. 5, § 46.

In affirming the decision of the lower court, the Court of Civil Appeals reasoned that it appears reasonably clear the legislature intended that, in cases of aggravation of a pre-existing condition, it must be shown there exists a demonstrable, and not merely tangential, relationship between the pre-existing condition and the aggravation thereof by

on-the job events. The Court viewed such a legislatively mandated relationship to be reasonably related to a valid public interest to insure an identifiable and definite causal nexus between a pre-existing condition and a job-related aggravation thereof and therefore found no due process violation.

Similarly, the Court found the legislature did not violate art. 2, § 6 by enactment of § 2(9)(b)(6), as "Section 6 was intended to guarantee that the judiciary would be open and available for the resolution of disputes, but not to guarantee that any particular set of events would result in court-awarded relief." Lastly, the Court held § 2(9)(b)(6) creates no subclass of claimants for special treatment in violation of art. 5, § 46 since all claimants seeking recovery of benefits for aggravation of a pre-existing condition must demonstrate the causal nexus between the pre-existing condition and the job-related aggravation, a valid state interest.

Deckard v. Danny's Muffler & Tire, Court of Civil Appeals, Division 1, Supreme Court Case No. 117,085

Q. ***After a workers' compensation death case is admitted and benefits paid, can an intentional tort case be filed in district court?***

A. No. In the case of *Farley v. City of Claremore*, the Supreme Court explained the legal rights of recovery for survivors of a worker who dies in the course and scope of employment. The opinion eliminates any right to double recovery of both workers' compensation benefits and wrongful death benefits from the same injury.

Jason Farley, a captain in the Claremore Fire Department, died while responding to a flash flood emergency. His widow and minor child were awarded statutory workers' compensation death benefits under the Administrative Workers' Compensation Act.

The widow filed a district court action (1) alleging negligence of the City of Claremore and (2) seeking benefits for the widow and child not covered by workers' compensation, i.e. grief and loss of consortium, and (3) benefits for the parents and siblings of the decedent. Such beneficiaries have a remedy in a wrongful death action, but not in workers' compensation, unless they were dependent upon the decedent.

The Supreme Court in a 7-1 decision affirmed the district court's dismissal of the widow's petition based upon the exclusivity of workers' compensation. The courts discussion focused on the exclusive remedy of workers' compensation and the remedy of intentional torts allowed by *Wells v. Oklahoma Roofing & Sheet Metal, LLC,* 2019 OK 45, 457 P.3d 1010.

Justice Edmondson made clear and straightforward findings regarding the interaction of a workers' compensation claim prosecuted to conclusion and a subsequent wrongful death action, even if an intentional tort can be proved. Below are some of the key findings from Justice Edmondson:

A tort action seeking damages for a surviving spouse, surviving child, and parents of a deceased adult child does not survive... in a wrongful death action when (a) an exclusive worker's compensation remedy for survivors is substituted for a wrongful death action,

and (b) the decedent's employer possesses government tort claim sovereign immunity barring a tort action for damages at the time of decedent's death...

Wells did not approve the concept that an injured employee possessed one cause of action with a workers' compensation remedy, three actions based upon each degree of negligence, and one action based upon an intentional tort...

Wells determined an injured employee could bring an action in District Court against an employer based upon the employer's intentional conduct as shown by the substantial certainty standard. Wells did not authorize double or multiple recovery for the same injury.

When the workers' compensation statutes provide an exclusive remedy for an alleged wrongful conduct, this is the remedy that must be pursued...Wells explains, a remedy for an injury caused by an intentional tort by an employer lies in a District Court, but an "accidental" harm or injury arising from negligence is provided for by the workers' compensation statutes.

A cognizable workers' compensation death-benefits award of compensation, available at the time of a decedent's death, bars a subsequent tort action for the same injury against the employee's employer.

Farley v. City of Claremore, 2020 OK 30

Q*. If an injury occurs behind employer's retail location, but in a general parking lot, is the claim compensable?*

A. No. In the case of *Yvonne Lobb v. Dyne Hospitality Group*, Division II of the Oklahoma Court of Civil Appeals affirmed the Workers Compensation Commissions denial of compensability.

In *Lobb*, the Claimant walked out to her car after her shift had ended and fell in the parking lot on ice. The Respondent denied compensable injury to the left knee as the claimant's alleged injury did not arise out of the course and scope of employment since she had stopped work for the day and was in a parking lot not owned or maintained by the Respondent when she fell.

The Court of Civil Appeals determined that an injury that occurred behind the employer's retail location, but in a general parking lot, is not compensable. The opinion sets out a detailed defense of 85A § 2(13)(c) that excludes the compensability of injuries that occur in a parking lot or other common area adjacent to an employer's place of business before or after work.

In this case, the injury occurred in a parking lot over which the employer had no control. The employer was not responsible for maintenance, including snow or ice removal, per the lease agreement. The COCA rejected claimant's contention that the statute was arbitrary, capricious, or unfair. In 2019, the legislation made compensable any injury that occurs in a parking lot or common area if the employer has control. That fact pattern did not occur in this case.

Yvonne Lobb v. Dyne Hospitality Group, Supreme Court No. 118,843

Q*. When the AWCA prohibits a parent of an adult child from receiving benefits under 85A O.S. § 47, does exclusive remedy prevent a district court action for wrongful death?*

A. No. In the case of *Whipple v. Phillips and Sons Trucking, LLC*, the Oklahoma Supreme Court has ruled that the mother of an unmarried and childless son who was killed in a work-related accident is allowed to bring a wrongful death action in district court despite the exclusivity of the workers' compensation law.

A parent cannot receive benefits for the death of an adult child under the Administrative Workers' Compensation Act (AWCA). Death benefits are generally available only for a spouse, minor children, or disabled children. The appeal came from the district court of Canadian County where a judge granted summary judgment on the grounds that the mother's remedy was in workers' compensation.

Justice Kauger authored the opinion that says that the mother's remedy lies only in district court even though the AWCA says all work-related injuries are under the jurisdiction of the Oklahoma Workers' Compensation Commission.

Justice Kauger said the right of a parent as the next of kin to bring a wrongful death action when the decedent is an adult, unmarried, and childless, is "crystalized in the law" pursuant to Article 23, Section 7 of the Oklahoma Constitution. Justice Kauger wrote, "Therefore, the Legislative attempt to deny recovery for wrongful death pursuant to [the compensation death statute] to the mother of her unmarried, childless son is unconstitutional.

The employer argued that not allowing benefits to the mother in workers' compensation was not abrogating the right of the mother to recover under workers' compensation, but just limited any recoverable amount (which was zero).

Justice Kauger said, "Constitutionally, [the mother] cannot be cut off from a remedy altogether. Accordingly, our only choice it to allow her to pursue her action for the wrongful death of her son in the District Court."

In commenting on Article 23, Section 7, the opinion says, "In 1950, art. 23 section 7 transferred work-related death claims to the purview of the workers' compensation laws. However, the constitution contains a caveat that precludes the Legislature from ever abrogating the right to recover for wrongful death as it existed when 23 Section 7 was adopted."

Whipple v. Phillips and Sons Trucking, LLC, 2020 OK 75

Q*. Is the one-year from date of injury statute of limitations period, under 85A O.S. 69(A)(1), a minimum that may be extended under certain circumstances?*

A. Yes. In *Erasmo Paredes v. Schlumberger Technology Group*, the Oklahoma Workers' Compensation Commission held that the one-year statute of limitations period under the 85A statute is only a minimum that may be extended, unanimously affirming a prior judgment made by a Commission administrative law judge.

Oklahoma Statute 85A section 69(A)(1) provides that a claim shall be barred unless filed within one year of the date of the injury. The second part of that section, after the word,

"or," states that if a claimant has received benefits, the statute of limitations period is six months after the payment of a benefit.

In *Paredes v. Schlumberger Technology Group*, the Respondent argued that since the employer provided three months of benefits, the statute of limitations period ran six months later, nine months after the date of injury. The Claimant filed a Form 3 with the Commission ten months after the injury.

The administrative law judge held that the second part of the statute was meant to extend the statute period where the employer admits the claim and benefits are paid beyond one year, and that the official statute of limitations period is the greater of the two independent limitation provisions. The judge wrote, "the word 'or' is used to express alternative statutes of limitations, with claimant receiving the benefit of whichever of those is longer."

Erasmo Paredes v. Schlumberger Technology Group

Q. Is an employer protected by the exclusive remedy provision of the Oklahoma Administrative Workers' Compensation Act when a Claimant asserts a claim for benefits in another state?

A. No, In *Whited v. Parish*, the Oklahoma Supreme Court has refused to accept original jurisdiction of a Creek County case in which the district judge allowed a wrongful death action and an intentional tort against the employer to continue. The district judge ruled that the employer was not protected by the exclusive remedy provisions of the Oklahoma Administrative Workers' Compensation Act even though workers' compensation benefits were paid in Minnesota.

Justice Gurich of the Oklahoma Supreme Court, in a concurring decision, distinguished this case from *Farley v. City of Claremore*, 2020 OK 30 (mentioned above), in which the direct action against the employer was not allowed because there was an Oklahoma workers' compensation case that had been carried to conclusion.

Justice Gurich cited the case of *Whipple v. Phillips & Sons Trucking*, 2020 OK 75 (also mentioned above), in which the Court held that the parents of an unmarried employee without children could proceed in a direct action against the employer because the Administrative Workers' Compensation Act provided no benefits.

Finally, Justice Gurich opined, "[l]acking an Oklahoma workers' compensation remedy, the Creek County district court action brought by the [personal representative], is not precluded by the exclusive remedy provided by the [Administrative Workers' Compensation Act]."

Whited v. Parish, Supreme Court No.119,789.

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