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ARTICLE

THE EVOLUTION OF WORKERS' COMPENSATION LAW IN OKLAHOMA: IS THE GRAND BARGAIN STILL ALIVE?

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I. INTRODUCTION

The concept of compensating injured workers for work-related accidents is not new. As early as 2050 B.C., the law of the city-state of Ur in the Fertile Crescent provided for payment for injuries to specific parts of the body.¹ “Ancient Greek, Roman, Arab, and Chinese law” allowed a

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1. Gregory P. Guyton, *A Brief History of Workers' Compensation*, 19 IOWA ORTHOPAEDIC J., 1999, at 106, 106 (1999). Guyton, a board-certified orthopedic surgeon, authored an excellent overview of the workers' compensation system in the United States

worker to collect monetary compensation for an injury to a specific body part according to a schedule.² Indeed, the seventeenth-century pirate Captain Morgan reportedly used a compensation schedule for injuries his sailors sustained while engaged in their rather injury-prone occupation.³ The concept of awarding scheduled benefits in workers' compensation continues in the twenty-first century.⁴

In the Middle Ages, scheduled payments for workers' injuries faded like the parchment on which they were written.⁵ Feudalism, as "the primary structure of government," gave injured workers little relief unless they served a benevolent lord who adhered to "the doctrine of noblesse oblige; an honorable lord would care for his injured serf."⁶

Prussia was the first country in Europe to legally protect injured workers, passing legislation in 1838 to protect railroad employees injured on the job.⁷ America owes its workers'-compensation-system heritage to Prussian Chancellor Otto von Bismarck.⁸ In an effort "to mitigate social unrest, [Bismarck] created the Employer's Liability Law of 1871."⁹ But

while at the Department of Orthopedics, University of North Carolina, Chapel Hill, North Carolina.

2. *Id.*

3. Michael C. Duff, *Worse than Pirates or Prussian Chancellors: A State's Authority to Opt-Out of the Quid Pro Quo*, 17 MARQ. BENEFITS & SOC. WELFARE L. REV. 123, 132 (2016).

4. Even the term *workers' compensation* has evolved through the ages. In Europe, laws were often referred to as *workmen's* protection. See LEE K. FRANKEL & MILES M. DAWSON, WORKINGMEN'S INSURANCE IN EUROPE 4 (1910); Lloyd Harger, *Workers' Compensation, A Brief History*, DIVISION OF WORKERS' COMPENSATION, <http://www.myfloridacfo.com/Division/WC/InfoFaqs/history.htm> [https://perma.cc/QE26-9728]. The first American statutes, including Oklahoma's initial law, were called *workmen's compensation* laws. *E.g.*, Workmens Compensation Law, ch. 246, 1915 Okla. Sess. Laws 471. (Inexplicably, the apostrophe was omitted from Oklahoma's first act.) After the middle of the twentieth century, legislatures and courts changed the term to *workers' compensation* to reflect the growing number of women in the labor force. Workers' Compensation Act, ch. 234, 1977 Okla. Sess. Laws 587.

5. See Guyton, *supra* note 1, at 106.

6. *Id.*

7. See John M. Kleeberg, *From Strict Liability to Workers' Compensation: The Prussian Railroad Law, the German Liability Act, and the Introduction of Bismarck's Accident Insurance in Germany, 1838-1884*, 36 N.Y.U. J. INT'L L. & POL. 53, 61-62 (2003). See generally *id.* (providing a detailed history on the evolution of workers' compensation in Germany).

8. See Guyton, *supra* note 1, at 107; Alan Pierce, *Workers' Compensation in the United States: The First 100 Years*, WORKERS' FIRST WATCH, Spring 2011, at 61, 62.

9. Pierce, *supra* note 8, at 62; accord Guyton, *supra* note 1, at 107.

Bismarck's motivation was not just social control; in his speech titled *Practical Christianity*, Bismarck made a moral, religious, and political case for requiring the compensation of injured workers.¹⁰ The law provided benefits for lost wages, medical treatment, and rehabilitation services, which became the template for workers' compensation nearly a century and a half later.¹¹ As Alan Pierce, a leading American workers' compensation attorney, has written, "The centerpiece of von Bismarck's plan was the shielding of employers from civil lawsuits; thus the exclusive remedy doctrine was born."¹²

The English Parliament passed the Employer's Liability Act in 1880 as industrialization flourished in Great Britain.¹³ But under English common law, a worker's only remedy was to sue his employer.¹⁴ Three common-law principles guided the employer's defense: contributory negligence, the fellow-servant rule, and the assumption-of-the-risk doctrine.¹⁵ Accordingly, the employer prevailed in three situations: if the worker was in any way responsible for the injury; if a fellow worker's negligence contributed in the least bit to the injury; or if the worker was aware of the inherent danger in the assigned task.¹⁶ These three legal concepts became known as the "unholy trinity of defenses."¹⁷

10. Otto von Bismarck, *Practical Christianity* (Edmund von Mach trans.), in 10 THE GERMAN CLASSICS: MASTERPIECES OF GERMAN LITERATURE 201, 229 (Kuno Francke et al. eds., 1914) ("[W]e felt the need of insisting by this law on a treatment of the poor which should be worthy of humanity."); see Duff, *supra* note 3, at 132 (discussing Bismarck's views).

11. See Pierce, *supra* note 8, at 62.

12. *Id.*

13. Guyton, *supra* note 1, at 107.

14. *Id.*

15. E.g., *id.* at 106; Martha T. McCluskey, *The Illusion of Efficiency in Workers' Compensation "Reform,"* 50 RUTGERS L. REV. 657, 669 (1998).

16. Guyton, *supra* note 1, at 106.

17. *Id.* And they were unholy indeed. See generally P. Blake Keeting, *Historical Origins of Workmen's Compensation Laws in the United States: Implementing the European Social Insurance Idea*, 11 KAN. J.L. & PUB. POL'Y 279, 279-90 (2001-2002) (examining the "futility of the injured worker's remedy" in the face of "the employer's 'unholy trinity' of defenses"). As to the irrationality and immorality of the assumption-of-the-risk doctrine, Judge Seymour D. Thompson wrote:

[T]he rule of judge-made law which holds the servant at all times and under all circumstances, bound to avoid [risks] at his peril, is a draconic rule. It is destitute of any semblance of justice or humanity. It is cruel and wicked. It illustrates the subserviency of the American judiciary to the great corporations. . . . Those who can reconcile their consciences to the cold brutality of the general rule with

Barristers and solicitors began representing injured workers on a contingent-fee basis, clogging civil court dockets.¹⁸ During the confusion caused by this flood, employers noticed they were losing a growing percentage of cases.¹⁹ They were uncomfortable, even though they still won most cases.²⁰ The occasional large jury verdicts in favor of workers and the resulting judgment liens that tied up factories and machinery created enough uncertainty for employers.²¹ Finally fed up with this status quo, at the turn of the twentieth century, England enacted its Workmen's Compensation Act.²²

The United States was slow to react to the changing methods of resolving disputes between injured workers and employers.²³ After the Civil War, as textile plants in New York and New Jersey turned from manufacturing uniforms to civilian clothing, "the plight of [sweatshop] workers" was in the spotlight.²⁴ The legal profession grew, and attorneys began taking work-related injury cases to jury trials.²⁵ Companies recognized the high cost of defending lawsuits even if they used available defenses and prevailed.²⁶

In the early years of the twentieth century, "the increase in lawsuits had the same effect . . . in the United States that it had in England."²⁷ Tort cases involving work injuries overburdened court dockets.²⁸ Oklahoma

reference to the servant accepting the risk, are at liberty to do so; I envy neither their heads nor their hearts.

Seymour D. Thompson, *Under What Circumstances a Servant Accepts the Risk of His Employment*, 31 AM. L. REV. 82, 85-86 (1897).

18. Harger, *supra* note 4.

19. *Id.*

20. *Id.* (reporting that workers were winning around fifteen percent of cases); *see also* Keeting, *supra* note 17, at 280-81.

21. Harger, *supra* note 4.

22. *See* Prudence, *Responsibility of Employers for Accidents to Their Workmen*, 2 STUDENT'S COMPANION 328, 332 (1912).

23. *See* Harger, *supra* note 4. *See generally* Keeting, *supra* note 17, at 283-96, for a discussion of the economic and philosophical conditions in the United States that resulted in its slower adoption of workers' compensation.

24. Harger, *supra* note 4.

25. *Id.*

26. *See id.*

27. *Id.*

28. *Cf.* Jordan H. Leibman & Terry Morehead Dworkin, *Time Limitations Under State Occupational Disease Acts*, 36 HASTINGS L.J. 287, 359 n.464 (1985) ("At the turn of the century, industrial accidents were claiming about 35,000 lives a year, and inflicting close to 2,000,000 injuries." (quoting LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW

Territory was no exception. When a worker was injured on the job, the sole remedy was to file a common-law negligence action in a territorial court.²⁹ By 1908, as the percentage of workers winning cases topped fifteen percent nationally, employers clamored for government action.³⁰

President Theodore Roosevelt used his bully pulpit to press Congress to approve the Federal Employer's Liability Act of 1908, which gave federal workers in some hazardous occupations protection from what Roosevelt called "the entire burden of an accident fall[ing] on the helpless man, his wife, and young children."³¹ The President called such a workplace system without a safety net "an outrage" and a "gross injustice."³² "It is a matter of humiliation to the nation," Roosevelt continued, "Exactly as the working man is entitled to his wages, so should he be entitled to indemnity for the injuries sustained in the natural course of his labor."³³

Individual states' legislators began to hear from workers whose benefits were often delayed or denied and from employers who paid high costs to defend cases and rolled the dice on high jury verdicts.³⁴ There was surely a better way. Prior to 1911, Maryland and New York passed legislation that attempted to set up a no-fault workers' compensation system, but both acts were declared unconstitutional.³⁵

The year 1911 became a benchmark year for state workers' compensation systems.³⁶ Wisconsin became the first state to enact such a

422 (1973))).

29. See, e.g., *Ruemmeli-Braun Co. v. Cahill*, 1904 OK 120, ¶¶ 1-2, 79 P. 260, 260-61 (relying on two members of the unholy trinity—the fellow-servant rule and assumption-of-the-risk doctrine—to find a company not liable in a negligence action for a worker's injuries).

30. Harger, *supra* note 4.

31. Theodore Roosevelt, Special Message of the President of the United States, 42 CONG. REC. 1347 (1908).

32. *Id.*

33. *Id.*; accord Matthew J. Kane, *The Need for Reform in Our Employers Liability Law*, 20 YALE L.J. 353, 355 (1911) ("The liberty of the wage earner to contract for extra pay for extra hazard and to seek some other employment if he does not like his master's methods, is a myth, or, as has been said, 'a heartless mockery.' The man and the machine at which he works should be recognized as substantially one piece of mechanism, and mishaps to either ought to be repaired and charged to the cost of maintenance." (footnote omitted) (quoting *Casper v. Lewin*, 109 P. 657, 667 (Kan. 1910))).

34. See generally Harger, *supra* note 4.

35. *Id.*

36. *Id.*

system, doing so only after an extended debate.³⁷ Proponents argued that a new system that provided quick medical care and reasonable compensation for lost wages without regard to fault was an excellent bargain for workers who would forever give up the right to sue their employers for negligence.³⁸ In March 1911, Justice Matthew J. Kane of the Oklahoma Supreme Court published an article in the *Yale Law Journal* “to call particular attention to the necessity for a system of laws, just alike to the employer of labor and to the employee, to supersede that now in vogue in this country pertaining to the master’s liability for servants’ injuries.”³⁹ With ten more states passing workers’ compensation laws in 1911, the “great trade-off,” “the industrial bargain,” or, the most common name, “the Grand Bargain”⁴⁰ came alive.⁴¹

A dozen more states enacted laws before Oklahoma adopted its first

37. *Id.*

38. *Id.*; see also PRICE V. FISHBACK & SHAWN EVERETT KANTOR, A PRELUDE TO THE WELFARE STATE 89–90 (2000) (describing the benefits employers would receive, including “labor peace,” reduced costs settling accident claims, and predictable accident costs). Professors Fishback and Kantor also noted that employers supported workers compensation “as a way to stem the tide of court rulings that increasingly favored injured workers.” *Id.* at 89. But as *Ruemmeli-Braun Co. v. Cahill* demonstrates, the courts were not the worry in Oklahoma; rather, the state’s progressive constitution had increased employers’ liability by partially abrogating the common-law fellow-servant rule and guaranteeing that the two other members of the unholy trinity would remain jury questions. See OKLA. CONST. art. IX, § 36; *id.* art. XXIII, § 6.

39. Kane, *supra* note 33, at 353.

40. The Grand Bargain has been a commercial success for more than a century. Oklahoma Supreme Court Justice Yvonne Kauger summarized the Grand Bargain in *Evans & Associates Utility Services v. Espinosa*:

The Workers Compensation Act was designed to provide compensation to covered workers for loss of earning capacity, incurred as a result of work-related accidents. It is a mutual compromise in which the employee relinquishes his/her right to sue for damages sustained in job-related injuries; and the employer accepts no-fault liability for a statutorily prescribed measure of damages. However, in exchange for the employer’s greater and more certain exposure, the Act also provides the employer with certain advantages. It offered the employer a maximum loss and protected employers from excessive judgments. The object of the Act is to compensate, within the limits of the act, for loss of earning power and disability to work occasioned by injuries to the body in the performance of ordinary labor.

Evans & Assocs. Util. Servs. v. Espinosa, 2011 OK 81, ¶ 14, 264 P.3d 1190, 1195 (footnotes omitted) (citing a long line of cases that describe the Grand Bargain).

41. Harger, *supra* note 4.

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workers' compensation law in 1915 after a vigorous debate.⁴² Ultimately, by 1948, every state had enacted statutes establishing a compulsory workers' compensation system⁴³ except Texas, which in 2017 is still the only state that does not legally require an employer to take responsibility for the costs associated with a workplace injury.⁴⁴

II. OKLAHOMA JOINS THE MOVEMENT

By 1915, experiences in other states highlighting the plight of injured workers and a national literary movement of "muckraking" fueled much of the effort toward passing workers' compensation laws in Oklahoma and the remaining half of the states that had no such laws.⁴⁵

One of the most infamous incidents of the time was a fire at the Triangle Shirtwaist Company factory in New York City.⁴⁶ The fire, which killed 146 workers, was largely preventable.⁴⁷ A majority of the victims died as a result of employer-neglected safety features and locked doors in the factory building.⁴⁸ Newspapers across the country, including *The Daily Oklahoman*, recognized the need for protecting workers from such tragedy.⁴⁹

Popular novels in the first decade of the twentieth century brought attention to the horrific, unsafe working conditions in sweatshops and the

42. See *id.* (noting that four states adopted workers' compensation laws in 1912 and eight more states adopted such laws in 1913); Workmen's Compensation Law, ch. 246, 1915 Okla. Sess. Laws 471 (repealed 2013).

43. Harger, *supra* note 4.

44. Duff, *supra* note 3, at 136-41 (describing Texas's unique approach to employers' liability); see also SCOTT D. SZYMENDERA, CONG. RESEARCH SERV., R44580, WORKERS' COMPENSATION: OVERVIEW AND ISSUES 26 (2016).

45. Guyton, *supra* note 1, at 107-08; see also U.S. DEP'T OF LABOR, DOES THE WORKERS' COMPENSATION SYSTEM FULFILL ITS OBLIGATIONS TO INJURED WORKERS? 6-7 (2016) [hereinafter OBLIGATIONS], <https://www.dol.gov/asp/WorkersCompensationSystem/WorkersCompensationSystemReport.pdf> [<https://perma.cc/W46X-SL46>] (noting the impact several major disasters and works of fiction had in the early twentieth century on the development of workers' compensation systems).

46. *Factory Owners' Trial on Today*, DAILY OKLAHOMAN, Dec. 4, 1911, at 1; see also Marcia L. McCormick, *Consensus, Dissensus, and Enforcement: Legal Protection of Working Women from the Time of the Triangle Shirtwaist Factory Fire to Today*, 14 N.Y.U. J. LEGIS. & PUB. POL'Y 645, 645-46 (2011) (recounting, in vivid detail, the fire and its impact).

47. See *id.*

48. *Id.*

49. See generally *Fatal Fire in Manhattan*, DAILY OKLAHOMAN, Mar. 31, 1911, at 1 (noting that multiple convictions and fines had been secured in a similar case).

many industrial plants and factories.⁵⁰ Upton Sinclair released *The Jungle* in 1906.⁵¹ Dedicated “to the working men of America,”⁵² the book was a slashing indictment of the unsafe conditions of industrialized cities, such as Chicago.⁵³ The novel detailed the horrors a Lithuanian immigrant experienced while working in a slaughterhouse.⁵⁴ It was a shocking book that included scenes American readers read and remembered:

Worst of any [of the slaughterhouse workers], however, were . . . those who served in the cooking-rooms. . . . [T]heir particular trouble was that they fell into the vats; and when they were fished out, there was never enough of them left to be worth exhibiting,—sometimes they would be overlooked for days, till all but the bones of them had gone out to the world as Durham’s Pure Leaf Lard!⁵⁵

Sinclair captured the nation’s conscience; the public’s predictable response was grave concern about contaminated food, unsafe working conditions, and the lack of care for injured workers.⁵⁶ Theodore Roosevelt, who called so passionately for workers’ compensation laws (and incidentally, the president who also welcomed the State of Oklahoma into the Union), was so moved by *The Jungle* that he launched an investigation and invited Sinclair to the White House.⁵⁷

The first attempt to pass a workers’ compensation law in Oklahoma came in 1912.⁵⁸ The bill, though supported by the Oklahoma State Manufacturers Association, never drew major attention from the legislature and failed to advance.⁵⁹ After the lack of action, *The Daily*

50. See Guyton, *supra* note 1, at 108.

51. UPTON SINCLAIR, *THE JUNGLE* (1906).

52. *Id.* (dedication).

53. See Guyton, *supra* note 1, at 108.

54. *Id.*

55. SINCLAIR, *supra* note 51, at 117; see also Guyton, *supra* note 1, at 108 (referring to this and other “graphic and compelling passages”).

56. See Guyton, *supra* note 1, at 108.

57. Roger Roots, *A Muckraker’s Aftermath: The Jungle of Meat-Packing After a Century*, 27 WM. MITCHELL L. REV. 2413, 2418 & n.30 (2001).

58. See generally *Workmen’s Compensation Laws*, DAILY OKLAHOMAN, Oct. 11, 1913, at 6 (noting that workers’ compensation legislation failed “because of the press of other business”).

59. *Underhanded Methods of State Secretary Manufacturers Association Exposed*, OKLA. LAB. UNIT, Nov. 28, 1914, at 1 (discussing letters from Paul Smith, Secretary of the

Oklahoman editorialized, “[We] hope[] to see Oklahoma step into the ranks of the states which have a just and humane statute of this nature in their codes.”⁶⁰

Supporters of a workers’ compensation law failed to pass anything again in 1913 and 1914.⁶¹ Much of the opposition came from insurance companies because the legislation proposed establishing a state-run insurance fund, with employers paying a percentage of their wages each quarter into it, guaranteeing compensation for injured workers.⁶²

Finally, in December 1914, Oklahoma business and labor leaders agreed on a workers’ compensation bill modeled after the state of New York’s system.⁶³ Several political candidates ran for office in 1914 on a platform that promised passage of a workers’ compensation law.⁶⁴ Newly elected legislators from Pittsburg County called a meeting in McAlester and invited manufacturers, coal mine operators, the State Federation of Labor, and other business and labor groups.⁶⁵ The result was a pronouncement of “no serious disagreement” on a workers’ compensation bill to be presented to the Fifth Oklahoma State Legislature in 1915.⁶⁶

Oklahoma House Bill 106 was the proponents’ vehicle for establishing a workers’ compensation system. In principle, the legislation required an employer with two or more employees in a “hazardous industr[y]” to buy a commercial insurance policy or prove it had sufficient financial resources to cover its obligation to compensate injured workers.⁶⁷ The Bill abolished the common-law right of an injured worker to sue his employer in state court, making workers’ compensation an exclusive remedy.⁶⁸ It

Oklahoma State Manufacturers Association, that advocated for an employer-friendly workers’ compensation bill and noted that the Association was “the only state-wide organization prepared to represent the employers in this fight”).

60. *Workmen’s Compensation Laws*, *supra* note 58, at 6.

61. Workers’ compensation legislation was not ultimately passed until 1915. *See Workmens Compensation Law*, ch. 246, 1915 Okla. Sess. Laws 471 (repealed 2013).

62. *See* FISHBACK & KANTOR, *supra* note 38, at 90.

63. *Compensation Act is Agreed Upon*, DAILY OKLAHOMAN, Dec. 11, 1914, at 9.

64. *See id.*; Governor Lee Cruce, Regular Biennial Message to the Legislature of 1913, in H.R. JOURNAL, 4th Leg., Reg. Sess., at 80–81 (Okla. 1913) (calling for the passage of a state “Workmen’s Compensation Act . . . framed with the view of dealing out absolute justice to the employer and employee alike”).

65. *Compensation Act is Agreed Upon*, *supra* note 63, at 9.

66. *Id.*

67. Workmens Compensation Law, ch. 246, art. 2, § 1, 1915 Okla. Sess. Laws 471, 474 (repealed 2013).

68. *Id.*

also authorized a State Industrial Commission⁶⁹ to carry out the legislative mandate of deciding which injuries were compensable and applying the law to award adequate benefits for medical care, loss of wages while a worker was under medical care, and any permanent disability that remained after the necessary period of healing.⁷⁰

Unlike any other workers' compensation system in the world,⁷¹ the Bill did not include benefits for deaths occurring on the job because of a provision in the Oklahoma Constitution that prohibited the legislature from passing any law that diminished the common-law right of recovery in a wrongful-death action.⁷² To address this problem, the 1915 legislature also passed a joint resolution placing a constitutional amendment on the 1916 ballot.⁷³ However, this proposed amendment failed.⁷⁴ Decades

69. Supplement to the Revised Statutes of Oklahoma of 1910, ch. 42-A, art. IV, sec. 3782z6, at 463. Jurisdiction over workers' compensation claims remained with the State Industrial Commission until 1959 when the legislature created the State Industrial Court. *See History of Oklahoma Workers' Compensation*, WORKERS' COMPENSATION L., <http://www.workerscompensationok.com/history> [<https://perma.cc/2U2L-5FA6>]. In 1978, the five-judge State Industrial Court "was replaced by a seven-judge Workers' Compensation Court." *Id.* "The Court . . . expanded to eight judges in 1981, to nine in 1985, and to ten [in] 1993." *Id.* With the establishment of the State Industrial Court and its successor, the Workers' Compensation Court, the legislature created a court of record responsible for determining claims for compensation, liability of employers and insurers, and any rights asserted under the workers' compensation laws. *See id.* In 2013, the legislature passed a major workers' compensation overhaul, codified in a new title of the Oklahoma Statutes, Title 85A. Act of May 6, 2013, ch. 208, 2013 Okla. Sess. Laws 862 (codified at OKLA. STAT. tit. 85A, §§ 1-400 (Supp. II 2013)). The act renamed the Workers' Compensation Court as the Court of Existing Claims and created a new administrative agency, the Workers' Compensation Commission, to decide claims for injuries occurring on or after February 1, 2014. OKLA. STAT. tit. 85A, § 400(a), (i) (Supp. II 2013). This bifurcation of forums in which to address workers' compensation claims is discussed in greater detail in following sections of this Article. *See infra* Part IX and notes 416-25 and accompanying text.

70. Supplement to the Revised Statutes of Oklahoma of 1910, ch. 42-A, art. II, sec. 3782j, at 455. Known as the "Workmens Compensation Law," this provision passed the House of Representatives easily but faced tough sledding in the Oklahoma Senate. H.R. JOURNAL, 5th Leg., Reg. Sess., at 1486-87 (Okla. 1915). It passed only when the title was stricken and the Bill went to a joint House-Senate conference committee. *Id.* at 1532-33. There, conferees made twenty-six amendments to the Bill and returned it to the floors of both houses. *Id.*

71. FIRST ANNUAL REPORT OF THE STATE INDUSTRIAL COMMISSION OF THE STATE OF OKLAHOMA TO THE GOVERNOR 6 (1917) [hereinafter FIRST REPORT].

72. OKLA. CONST. art XXIII, § 7 (amended 1950).

73. H.R.J. Res. 1, 1915 Okla. Sess. Laws 715.

74. FIRST REPORT, *supra* note 71, at 6.

passed before the constitution was amended to include workers' compensation death benefits.⁷⁵

After much debate, both houses of the Oklahoma State Legislature approved House Bill 106, and Governor Robert L. Williams signed it into law.⁷⁶ *The Daily Oklahoman* applauded the passage of the Bill, which took effect September 1, 1915: "It compels the employer to protect his employe[e]s and at the same time relieves the employer of the burden of heavy and sometimes unreasonable damage suits . . . [in] state courts."⁷⁷

Oklahoma's Commissioner of Labor, W.G. Ashton, used passage of the new Workmen's Compensation Law to entice employers to make their shops and factories safer to reduce the expected high workers' compensation insurance rates.⁷⁸ Ashton said, "The employer who keeps his plant in first-class shape has a much less risk than he who runs his shop in a haphazard manner."⁷⁹ Ashton also said he was aware of "an unusual amount of negligence in [Oklahoma] factories in regard to guarding against injury to employe[e]s" and announced multiple safety programs and inspections by his office to help businesses keep down the cost of workers' compensation insurance.⁸⁰

III. CONSTITUTIONAL CHALLENGES

After the new law took effect, cries of unconstitutionality rang loud. Oklahoma employers picked up on arguments made in other states that the mandatory law made them strictly liable for injuries without any employer negligence—injuries that they would not have been liable for in the past.⁸¹ On the other hand, attorneys for injured workers contended their clients' right to jury trial had been unlawfully abrogated.⁸²

Sixteen months after Oklahoma implemented the workers'

75. *Earnest, Inc. v. LeGrand*, 1980 OK 180, ¶ 11, 621 P.2d 1148, 1153. Death benefits in workers' compensation cases in Oklahoma were not allowed until voters approved a constitutional amendment which authorized the legislature to make an exception to the constitutional restriction on wrongful-death actions found in article XXIII, section 7 of the Oklahoma Constitution. *See id.* ¶ 11, 621 P.2d at 1153.

76. H.R. JOURNAL, 5th Leg., Reg. Sess., at 1620 (Okla. 1915).

77. *Compensation to Injured Workmen Puzzles Oil Men*, DAILY OKLAHOMAN, July 18, 1915, at 1.

78. *Compensation Law Rates Will Vary*, DAILY OKLAHOMAN, July 22, 1915, at 7.

79. *Id.*

80. *Id.*

81. *See Adams v. Iten Biscuit Co.*, 1917 OK 47, ¶ 3, 162 P. 938, 941.

82. *Id.* ¶ 14, 162 P. at 944.

compensation law, the Oklahoma Supreme Court, in *Adams v. Iten Biscuit Co.*,⁸³ unanimously upheld the law as constitutional.⁸⁴ Justice Summers T. Hardy wrote a lengthy opinion, considering one by one the multiple constitutional challenges to the new statutory system benefiting injured workers.⁸⁵ The decision was a victory for the Oklahoma State Manufacturers Association and other business groups supporting its passage. The benefits of having a viable workers' compensation law were evident in the procedural history of the *Adams* case—an injured worker filed a negligence action in district court, but it was dismissed based on the new law's exclusive remedy.⁸⁶

The worker, a baker, was injured when the natural gas used for heating ovens in the employer's baking plant exploded.⁸⁷ Permanent scars were left on the worker's "face, head, body, back, arms, and hands."⁸⁸ The court opined, and the attorney general agreed, that the negligence of the employer's foreman caused the accident, and the workers' compensation law did not adequately compensate the worker for his injuries, which caused "great damage in the loss of earning capacity and ability to do manual labor, and have caused, and will cause, physical pain, mental anguish, and humiliation."⁸⁹

Recognizing that the new workers' compensation law required an employer to pay far less in damages than one might expect from a common-law jury trial, the court nevertheless concluded that the 1915 legislature created an exclusive remedy, writing, "The compensation provided was intended to be exclusive, and a right of action in the courts therefor was abolished."⁹⁰

Attorneys for the worker alleged that the new law was not a valid

83. *Adams*, 1917 OK 47, 162 P. 938.

84. *Id.* ¶¶ 1, 18, 162 P. at 939–40, 946. The landmark decision was released for publication on January 9, 1917. *Id.* 1917 OK 47, 162 P. 938.

85. *See id.* Justice Summers T. Hardy served on the Oklahoma Supreme Court from 1917 to 1919. He is easily confused with Justice Hardy Summers who served from 1985 to 2003. *See generally Judge Owen Will Leave the Bench*, TULSA DAILY WORLD, Feb. 7, 1920, at 3; *Sharp is Chief Justice*, DAILY ARDMOREITE, Jan. 9, 1917, at 1; *Retired Justice Hardy Summers 1933–2012*, OKLA. BAR ASS'N, <http://www.okbar.org/news/Recent/2012/JusticeSummers.aspx> [<https://perma.cc/P28G-JJBP>].

86. *Adams*, 1917 OK 47, ¶¶ 1, 17–18, 162 P. at 939, 945–46.

87. *Id.* ¶ 17, 162 P. at 945.

88. *Id.*

89. *Id.*

90. *Id.* ¶ 17, 162 P. at 946.

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exercise of the legislature's police power.⁹¹ The court rejected the argument, observing that other jurisdictions had adopted similar legislation:

[W]hile [the changes] may appear to be revolutionary, . . . such legislation has been enacted in Great Britain and various British colonies and in some of the principal countries of Continental Europe, and at the time this case was submitted had been adopted in 31 states of the Union and in the territories of Alaska and Hawaii.⁹²

The court concluded that the constitution cloaked the legislature with authority to promulgate a workers' compensation law, reasoning:

The security of the state and the preservation of the peace and good order of society depends, in its final analysis, upon the power of the state to make and alter its laws in accordance with a sound public policy, and to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and every member of society obtains and holds all that he possesses through the aid and under the protection of the law and subject to the power mentioned, else the right of the community to prosper and advance and promote the public weal would be rendered subservient to the enjoyment of private rights.⁹³

To justify its departure from the common law, the Oklahoma Supreme Court cited the United States Supreme Court's holding in *Holden v. Hardy*⁹⁴:

While the cardinal principles of justice are immutable, the methods by which justice is administered are subject to constant fluctuation, and that the Constitution of the United States, which is necessarily and to a large extent inflexible and exceedingly

91. *Id.* ¶ 1, 162 P. at 939-40.

92. *Id.* ¶ 1, 162 P. at 940.

93. *Adams*, 1917 OK 47, ¶ 1, 162 P. at 941. The dictionary defines *weal*, which has only made rare appearances in decisions since the early twentieth century, as "a sound, healthy, or prosperous state." *Weal*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2004).

94. *Holden v. Hardy*, 169 U.S. 366 (1898).

difficult of amendment should not be so construed as to deprive the states of the power to so amend their laws as to make them conform to the wishes of the citizens as they may deem best for the public welfare without bringing them into conflict with the supreme law of the land.⁹⁵

Another argument against the new law's constitutionality was that it contradicted article II, section 6 of the Oklahoma Constitution, a provision guaranteeing every person suffering an injury access to the courts.⁹⁶ The court said "this was a mandate to the judiciary and was not intended as a limitation upon the legislative branch of the government."⁹⁷

A third, and vocal, objection to the new law was the loss of a trial by jury in certain employment-related common-law negligence actions.⁹⁸ The Oklahoma Supreme Court followed the Montana Supreme Court's reasoning in *Cunningham v. Northwestern Improvement Co.*⁹⁹ to support its finding that the Workmen's Compensation Law of Oklahoma did not deny a worker a constitutionally protected jury trial:

That the Legislature may regulate or entirely abolish the common law rules of liability and the defenses of fellow servants and contributory negligence and of assumption of risk is thoroughly established, and no valid reason exists why it may not require compensation to be made to an employé for accidental injuries received in the course of his employment in hazardous occupations, according to a different rule from that prescribed by the common law, and place the supervision of the new plan in the hands of an administrative commission instead of the courts.¹⁰⁰

95. *Adams*, 1917 OK 47, ¶ 1, 162 P. at 941 (quoting *Holden*, 169 U.S. at 387). In *Holden*, the United States Supreme Court upheld a Utah law that limited working hours for miners as a proper state exercise of police power. *Holden*, 169 U.S. at 398.

96. OKLA. CONST. art II, § 6. "The courts of justice of the State shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation; and right and justice shall be administered without sale, denial, delay, or prejudice." *Id.*

97. *Adams*, 1917 OK 47, ¶ 6, 162 P. at 942. For a full explanation of the court's reasoning that this "a remedy for every wrong" concept had been misconstrued see *id.* ¶¶ 10-17, 162 P. at 943-45.

98. *Id.* ¶ 14, 162 P. at 944.

99. *Cunningham v. Nw. Improvement Co.*, 119 P. 554 (Mont. 1911).

100. *Adams*, 1917 OK 47, ¶ 14, 162 P. at 944.

Less than two months after the Oklahoma Supreme Court declared Oklahoma's workers' compensation law constitutional, the United States Supreme Court considered the fate of New York's second workers' compensation act.¹⁰¹ In a landmark case in American master-servant law, *New York Central Railroad Co. v. White*,¹⁰² the high Court reaffirmed the right of legislatures to depart from the common law regarding employer liability for employee injuries, substituting instead a statutorily created exclusive remedy, a no-fault system with scheduled benefits for injured workers.¹⁰³

Justice Pitney concisely explained the Grand Bargain:

[I]t is not unreasonable for the State, while relieving the employer from responsibility for damages measured by common-law standards and payable in cases where he or those for whose conduct he is answerable are found to be at fault, to require him to contribute a reasonable amount, and according to a reasonable and definite scale, by way of compensation for the loss of earning power incurred in the common enterprise, irrespective of the question of negligence, instead of leaving the entire loss to rest where it may chance to fall—that is, upon the injured employee or his dependents.¹⁰⁴

In *White*, the Court also rejected arguments that New York's statute unconstitutionally violated freedom of contract, denied trial by jury, or created no-fault liability.¹⁰⁵ The Court expressly and unambiguously affirmed states' right to enact workers' compensation laws, displacing common-law negligence claims as long as the laws were "reasonably just substitute[s]."¹⁰⁶ Other conclusions by the highest court in the land had such a dramatic impact on workers' compensation law that very little has changed in the century that followed. As Supreme Court Reporter Ernest Knaebel summarized in his syllabus accompanying the case,¹⁰⁷ the Court

101. N.Y. Cent. R.R. Co. v. White, 243 U.S. 188 (1917) (decided March 6, 1917).

102. *White*, 243 U.S. 188.

103. *See id.* at 208-09.

104. *Id.* at 203-04.

105. *Id.* at 203-08.

106. *Id.* at 201; accord Duff, *supra* note 3, at 133 n.60 ("The logical corollary is that such a sudden set-aside without a 'reasonably just substitute' could be problematic" (quoting *White*, 243 U.S. at 201)).

107. *See generally* Frank D. Wagner, *The Role of the Supreme Court Reporter in*

also held:

(1) That neither (a) in rendering the employer liable irrespective of the doctrines of negligence, contributory negligence, assumption of risk, and negligence of fellow servants, nor (b) in depriving the employee, or his dependents, of the higher damages which, in some cases, might be recovered under those doctrines, can the act be said to violate due process.

(2) That, viewed from the standpoint of natural justice, the system provided by the act in lieu of former rules is neither arbitrary nor unreasonable.

(3) That the exclusion of farm laborers and domestic servants from the scheme of the act may not be judicially declared an arbitrary classification, violating the equal protection of the law.

(4) The common law rules respecting the rights and liabilities of employer and employee in accident cases, *viz.*, negligence, assumption of risk, contributory negligence, fellow-servant doctrine, as rules defining legal duty and guiding future conduct, may be altered by state legislation, and even set aside entirely—at least if some reasonably just substitute be provided.

(5) Since the matter of compensation for disability or death incurred in the course of hazardous employments is of direct interest to the public as a matter affecting the common welfare, the liberty of employer and employee to agree upon such compensation as part of the terms of employment is subject to be restricted by the state police power.

(6) The denial by a state of trial by jury is not inconsistent with due process of law, within the meaning of the Fourteenth Amendment.¹⁰⁸

But *White* also suggested the Grand Bargain might someday be breached if the statutory scheme legislated benefits that were either too high or too low: “This, of course, is not to say that any scale of compensation, however insignificant, on the one hand, or onerous, on the

History, 26 J. SUP. CT. HIST. 9, 12 (2001) (“[E]ach syllabus is carefully checked and approved by the Chambers whose writing it reflects. Technically, the syllabus is the work of the Reporter, not the Court I would suggest to you, however, that a Reporter unwilling to accept Chambers’ suggestions’ would not be a Reporter for very much longer.”).

108. *White*, 243 U.S. at 189 (syllabus).

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other, would be supportable. . . . Any question of that kind may be met when it arises.”¹⁰⁹

IV. THE “HAZARDOUS EXPOSURE” ERA, 1915–1978

Oklahoma’s first workers’ compensation law did not protect a majority of Oklahoma’s workers. The Workmen’s Compensation Law only covered workers engaged in “hazardous employment.”¹¹⁰ The vaguely defined term was the subject of hundreds of legal challenges and the reason for several legislative changes from 1915 until 1977, when a more inclusive workers’ compensation law was adopted, a period of more than a half century.¹¹¹

At first, a catch-all phrase in the 1915 law allowed the State Industrial Commission to find a majority of cases compensable. The provision was, “If there be or arise any hazardous occupation or work other than those herein above enumerated, it shall come under this act.”¹¹² It was obvious the legislature intended to give the commission great latitude in determining what constituted a hazardous occupation in the state.

But even with the perceived latitude, the supreme court denied benefits to Bishop Early Grimes, an employee of the Kingfisher County Highway Department, who was injured in an automobile accident on his way “to assist the county engineer in surveying a state highway.”¹¹³ The State Industrial Commission found the injury compensable because the statute clearly listed “engineering works” as a hazardous occupation, but the supreme court reversed the decision, refusing to extend “engineering works” to cover the “work of an engineer on a public highway.”¹¹⁴

The State Industrial Commission’s latitude did not please businesses frequently found liable for workplace injuries even though they considered their environment nonhazardous. Business groups convinced the legislature to repeal the catch-all phrase in 1919.¹¹⁵ Afterward, the State

109. *Id.* at 201–02.

110. Workmens Compensation Law, ch. 246, § 2, 1915 Okla. Sess. Laws 574, 574 (amended 1919).

111. Compare *id.* (containing the vague clause “any hazardous occupation or work”), with Workers’ Compensation Law, ch. 143, § 2, 1977 Okla. Sess. Laws 370, 370–71 (repealed 2013) (omitting the clause).

112. § 2, 1915 Okla. Sess. Laws at 574.

113. Bd. of Comm’rs v. Grimes, 1919 OK 239, ¶ 1, 182 P. 897, 897.

114. *Id.* ¶ 5, 182 P. at 897.

115. See Act of Mar. 10, 1919, ch. 14, sec. 1, § 2, 1919 Okla. Sess. Laws 14, 14–15

Industrial Commission had no authority to deviate from the statute's specific list of hazardous employments.¹¹⁶ The diverse list included jobs in "[f]actories, cotton gins, mills and workshops where machinery is used; . . . foundries, blast furnaces, mines, . . . gas works, gasoline plants, oil refineries, . . . water works, . . . smelters, . . . tanneries, . . . logging, lumbering, street[cars,] and interurban railroads not engaged in interstate commerce," among others.¹¹⁷

Still, the dilemma of whether a particular occupation was hazardous perplexed the State Industrial Commission and the supreme court. The fine line between a job being compensable or not was splendidly characterized in the 1922 case *Southwestern Grocery Co. v. State Industrial Commission*.¹¹⁸ An employee worked in a grocery-store meat market and was injured when the seven-inch knife he was using to dress a chicken "slipped and struck him in the right groin."¹¹⁹ It was not a trivial injury; the worker was hospitalized for "15 days and was unable to resume his work for . . . 17 weeks and 3 days."¹²⁰

Under the workers' compensation law it was possible that a single employer could have employees working in both hazardous and nonhazardous positions under the same roof, even conducting the same general nature of business.¹²¹ The State Industrial Commission found the worker's injury compensable, and the employer appealed.¹²²

The supreme court reversed the award of benefits, splitting hairs over the two types of employees in the grocery store.¹²³ The court reasoned (and the injured worker conceded) that ordinarily a "retail grocery store which handles goods in bulk, in cans and packages, and where no machinery of any kind is used, would not come within the scope of the 'Workmen's Compensation Act.'"¹²⁴ All five members of the supreme court recognized the possibility that employees in the grocery store's butcher shop, which was equipped with an electric meat grinder, might be covered under the

(omitting the catch-all language) (amending Workmens Compensation Law, ch. 246, § 2, 1915 Okla. Sess. Laws 574, 574).

116. *Id.*

117. *Id.*

118. *Sw. Grocery Co. v. State Indus. Comm'n*, 1922 OK 100, 205 P. 929.

119. *Id.* ¶ 1, 205 P. at 929.

120. *Id.*

121. *See id.* ¶ 13, 205 P. at 931.

122. *Id.* ¶ 1, 205 P. at 929.

123. *Id.* ¶ 18, 205 P. at 931.

124. *Id.* ¶ 12, 205 P. at 930.

Act.¹²⁵ But unfortunately for the injured worker knifed in the groin, the supreme court said that even assuming the meat grinder, which was used in a different room than where the injury occurred, brought the meat market within the statute, the grocery only had two employees, and the statute required at least three.¹²⁶ Therefore, the State Industrial Commission lacked jurisdiction over the claim.¹²⁷

In 1923, the legislature again tried to adequately define *hazardous employment* and *manual and mechanical labor*:

Compenstaion [sic] provided for in this Act shall be payable for injuries sustained by employees engaged in the following hazardous employments, to-wit: Factories, cotton gins, mills and work shops where machinery is used; printing, electrotyping, photo-engraving and stereo typing plants where machinery is used; foundries, blast furnaces, mines, wells, gas works, gasoline plants, well refineries and allied plants and works, water works, reduction works, elevators, dredges, smelters, powder works, glass factories, laundries operated by power, creameries operated by power, quarries, construction and engineering works, construction and operation of pipe space lines, tanneries, paper mills, transfer and storage, construction of public roads, wholesale mercantile establishments . . . ; operation and repair of elevators in office buildings; logging, lumbering, lumber yards, street[cars,] and interurban railroads not engaged in interstate commerce, buildings being constructed, repaired or demolished . . . ; telegraph, telephone, electric light or power plants or lines; steam heating or power plants and railroads not engaged in interstate commerce.¹²⁸

Excepted from this list were workers who, although engaged in a hazardous-employment field, were clerical or farm workers.¹²⁹ The amended definitions continued:

“1. ‘Hazardous employment’ shall mean *manual or mechanical*

125. *Id.* ¶¶ 12, 14–15, 205 P. at 230.

126. *Id.* ¶¶ 15–17, 205 P. at 931.

127. *See id.* ¶ 16, 205 P. at 931.

128. Compensation of Injured Employees Act, ch. 61, § 1, 1923 Okla. Sess. Laws 118, 118–19.

129. *Id.*

work, or labor, connected with or incident to one of the industries, plants, factories, lines, occupations or trades [listed above], . . . and shall not include any one engaged in agriculture, horticulture, or dairy or stock raising, or in operating any railroad engaged in interstate commerce.

. . . .

“3. ‘Employer,’ except when otherwise expressly stated, means a person . . . or [entity, including governments], employing workmen in hazardous employment,

“4. ‘Employee,’ means any person engaged in manual or mechanical work . . . in the employment of any person, firm, or corporation carrying on a business covered by the terms of this Act

. . . .

“15. Where several classes or kinds of work is [sic] performed, the Commission shall classify such employment, and the provisions of this Act shall apply only to such employees as are engaged in manual or mechanical labor of a hazardous nature.”¹³⁰

Even with these changes, the supreme court still struggled to determine whether a particular injury was from a hazardous employment and therefore within the jurisdiction of the State Industrial Commission. In the 1923 case *Harris v. Natural Gas Co.*,¹³¹ the court offered a legitimate excuse for its seemingly inconsistent decisions:

It must be fully realized that the ideas comprehended in the workmen’s compensation legislation are of comparatively recent formulation in this country, and that little uniformity exists. Therefore their expression in legislation and the construction placed upon such legislation by the courts are so diverse that little applicable authority is found in other jurisdictions by which to measure our own.¹³²

In each case the State Industrial Commission heard, attorneys for injured workers tried to prove that using tools made the employment hazardous, while defense attorneys pointed to the statute’s specific list of hazardous

130. § 2, 1923 Okla. Sess. Laws at 119–20.

131. *Harris v. Okla. Nat. Gas Co.*, 1923 OK 311, 216 P. 116.

132. *Id.* ¶ 5, 216 P. at 117.

occupations and argued their clients' workplace was not on the list.

Frequently, the workers' compensation law did not cover serious injuries. In *Russell Flour & Feed Co. v. Walker*,¹³³ the supreme court denied benefits to a traveling salesman for a wholesale and retail mercantile establishment—one of the listed hazardous employments.¹³⁴ While calling on a customer in Troy, Oklahoma, he was struck by “something flying off the wheel of a passing automobile which hit him in the eye, causing a complete loss of sight of that eye.”¹³⁵ The court went out of its way to deny the claim. Quoting an English law case from 1891, the Oklahoma justices concluded that being a traveling salesman was not “manual or mechanical labor of a hazardous nature” and so did not fall within the jurisdiction of the State Industrial Commission.¹³⁶

On one hand, the supreme court maintained that the Workmen's Compensation Law was adopted for a noble purpose. In 1935, in the case of *Corbin v. Wilkinson*,¹³⁷ the court opined:

The Compensation Act was passed for the special benefit of injured workmen. The Legislature intended the benefits of the act shall flow to the injured workmen and their dependents, in order to afford them a living and prevent them from becoming public charges. Many provisions are contained in the act in order to accomplish this purpose. There can be no defense of contributory negligence or assumption of risk. Only willful injuries will prevent an award. Claims for compensation cannot be assigned by the injured workmen. Such claims are exempt from attachment and execution and all other remedies for the collection of debts. The Industrial Commission is the instrument through which the act functions. The commission possesses administrative and quasi judicial powers. The powers of the commission, to some extent,

133. *Russell Flour & Feed Co. v. Walker*, 1931 OK 136, 298 P. 291.

134. *Id.* ¶ 22, 298 P. at 295.

135. *Id.* ¶ 2, 298 P. at 291.

136. *Id.* ¶ 13, 298 P. at 293 (quoting *Bound v. Lawrence*, [1892] 1 AC 226 (appeal taken from QB)). *Bound* held that an injured grocer's assistant was not covered by the Employees and Workmen Act of 1875, a precursor to England's first workers' compensation act, because his manual-labor tasks of carrying parcels from the shop to the cart at the door and bringing goods up from the cellar to the shop were “incidental and accessory” to his employment as a grocery salesman, an occupation not covered by the Employers and Workmen Act of 1875. See *Bound v. Lawrence*, [1892] 1 AC 226, 228–30 (appeal taken from QB).

137. *Corbin v. Wilkinson*, 1935 OK 977, 52 P.2d 45.

are fiduciary; that is, the relationship between the commission and the injured workmen is analogous to the relationship between the federal government and its Indian wards. Discretion is given the commission whether an award shall be paid in a lump sum or so much a week or a month. The commission is even given the power to protect the injured workmen against their own improvident acts, and also as against encroachments of their own doctors and lawyers.¹³⁸

But many of those same justices participated in a long line of cases in the 1930s, 1940s, and 1950s that consistently used the narrowest of statutory interpretations to overturn the State Industrial Commission's awards of benefits to workers in jobs that today would be considered hazardous.¹³⁹ In 1978, a unanimous court reaffirmed that conservative approach in *Neal v. Sears, Roebuck & Co.*¹⁴⁰ Justice Don Barnes wrote, “[I]n an effort to find service stations to be non-hazardous employment, stringent limitations have been read into the statutory definition of a workshop.”¹⁴¹

Indeed, the supreme court and the legislature tried to define a “workshop.” The 1951 legislative definition focused on whether machinery was present and the nature of employees’ work:

“Workshop” means any premises, yard, plant, room or place wherein machinery is employed and manual or mechanical labor is exercised by way of trade for gain or otherwise, or incidental to the process of making, altering, repairing, printing or ornamenting, cleaning, finishing, or adopting for sale or otherwise, any article, or part of article, machine or thing over which premises, room or place the employer of the person

138. *Id.* ¶ 17, 52 P.2d at 48 (citations omitted).

139. Perhaps I am too hard on the Oklahoma Supreme Court during this era. After all, they were left to interpret the Oklahoma Legislature’s ever-changing mood as to what constituted hazardous employment. The Oklahoma Supreme Court was following its own precedent when it tried to interpret the intent of the legislature. The problem grew worse as more Oklahoma workers were employed in occupations not covered by workers’ compensation. Toward the end of the “hazardous employment era,” a majority of Oklahoma workers were simply not provided benefits under the statutory workers’ compensation scheme even if they clearly were injured as a result of their employment.

140. *Neal v. Sears, Roebuck & Co.*, 1978 OK 47, 578 P.2d 1191.

141. *Id.* ¶ 16, 578 P.2d at 1194.

working therein has the rights of access or control.¹⁴²

If a worker were injured in a part of a business that could be classified as a workshop, the Workmen's Compensation Law covered the claim.¹⁴³ If the injury did not occur in a workshop or was otherwise not in an occupation the statute specifically listed as a hazardous employment, then workers' compensation did not cover the injury,¹⁴⁴ and the worker was left to pay the medical bills and suffer the consequence of being unable to work.

Time after time, the State Industrial Commission ruled in favor of the injured worker and awarded benefits. But when the employer appealed, the supreme court vacated the decision, often in short opinions that simply found that the worker was not employed in a hazardous occupation, and therefore concluded that the State Industrial Commission, and later the State Industrial Court, had no jurisdiction and could not award benefits.

For example, in *Drumright Feed Co. v. Hunt*,¹⁴⁵ the supreme court held that the job of an employee of a retail feed store who was injured when he fell off a vehicle while loading grain was not within the Workmen's Compensation Law's definition of *hazardous employment*.¹⁴⁶ The employee of a municipality's park department injured when lifting a heavy weight from a basketball court was not covered in *Rhoton v. City of Norman*.¹⁴⁷ In *City of Tulsa v. State Industrial Commission*,¹⁴⁸ the court said a parks-department laborer "loading concrete on a truck" was not engaged in a hazardous employment and not entitled to recover compensation benefits.¹⁴⁹ And in *Board of Education v. Wright*, a worker injured while lifting garbage cans in a school cafeteria was not engaged in hazardous employment.¹⁵⁰

In the 1970 case *Oklahoma City v. Acosta*,¹⁵¹ the Oklahoma Supreme Court denied benefits to a city employee who fell from a truck while unloading chairs for the U.S. Grant High School graduation at the State

142. OKLA. STAT. tit. 85, § 3(11) (1951) (repealed 2011).

143. See OKLA. STAT. tit. 85, § 2 (1951) (repealed 2011).

144. *Id.*

145. *Drumright Feed Co. v. Hunt*, 1923 OK 523, 217 P. 491.

146. *Id.* ¶¶ 1, 3, 8, 217 P. at 492.

147. *Rhoton v. City of Norman*, 1970 OK 44, ¶¶ 4, 9, 15, 466 P.2d 948, 948-50.

148. *City of Tulsa v. State Indus. Comm'n*, 1941 OK 181, 113 P.2d 987.

149. *Id.* ¶¶ 2, 8, 9, 113 P.2d at 987-89.

150. *Bd. of Educ. v. Wright*, 1969 OK 166, ¶¶ 6-7, 10, 460 P.2d 422, 423-24.

151. *Okla. City v. Acosta*, 1971 OK 106, 488 P.2d 1258.

Fairgrounds Arena.¹⁵² In 1955, the court held that a truck driver involved in a highway accident delivering goods to a tire-and-auto supply store was not covered.¹⁵³ The court opined, “An employee of a retail store is not an employee engaged in a hazardous employment within the definition of the Workmen’s Compensation Law.”¹⁵⁴ The court looked only at the occupation of the injured worker, ignoring how the injury occurred.¹⁵⁵

Attorneys frequently tried to make an injury that occurred during employment at a retail filling station compensable. In one instance, the State Industrial Commission agreed and awarded benefits to a worker injured while trying to open the hood of an automobile that was stuck.¹⁵⁶ When it came loose, the worker was thrown backward, injuring his lower back.¹⁵⁷ Because automobile service stations were not specifically listed in the workers’ compensation statute as a hazardous occupation, the supreme court, over a dissent, reversed the award and denied the claim.¹⁵⁸

Even when machinery such as hydraulic hoists for washing and greasing automobiles, wheel-alignment machines, and tools used in minor repairs were present in a retail oil-and-gas filling station, the supreme court still overturned State Industrial Commission awards in the late 1960s. In the case of *Woods v. Perryman*,¹⁵⁹ a worker was injured while unloading barrels of oil to be sold at the station.¹⁶⁰ The court added a new qualification to compensability: “It is not sufficient that the employer is primarily engaged in a hazardous business, but it must appear that the employee at the time of his injury was engaged in a branch or department of such business which is defined as hazardous by the Workmen’s Compensation Act.”¹⁶¹

The same analysis was used to deny the claim of a worker injured while loading a washing machine for delivery to a customer of his employer, a retailer of mobile homes and furniture.¹⁶² Because such retail

152. *Id.* ¶ 2, 488 P.2d at 1259.

153. *Okla. Tire & Supply Co. v. Summerlin*, 1955 OK 308, ¶¶ 1, 10, 280 P.2d 403, 403, 405.

154. *Id.* ¶ 4, 280 P.2d at 404.

155. *See id.*

156. *Skelly Oil Co. v. Waters*, 1959 OK 235, ¶¶ 1–2, 348 P.2d 320, 322.

157. *Id.* ¶ 2, 348 P.2d at 322.

158. *Id.* ¶ 25, 348 P.2d at 324.

159. *Woods v. Perryman*, 1969 OK 59, 452 P.2d 588, *abrogated in part by Neal v. Sears, Roebuck & Co.*, 1978 OK 47, ¶¶ 17–21, 578 P.2d 1191, 1194.

160. *Id.* ¶ 4, 452 P.2d at 589.

161. *Id.* ¶ 0, 452 P.2d at 588–89 (syllabus).

162. *Teany v. State Indus. Court*, 1969 OK 102, ¶¶ 7, 16, 458 P.2d 151, 152–53.

operations were not expressly listed in the statutory definition of hazardous employment, the supreme court denied benefits to the injured worker.¹⁶³ Another interesting denial is *Montgomery v. State Industrial Commission*,¹⁶⁴ where the court determined that the Workmen's Compensation Law did not cover a carpenter working in a hospital's carpenter shop because the shop was "incidental to a governmental function."¹⁶⁵

Despite what it appears, the supreme court did not deny all claims on appeal. Benefits were allowed for an employee of a county highway department that operated a garage,¹⁶⁶ a city employee engaged in construction of a road,¹⁶⁷ and a worker that drove a tractor for a city.¹⁶⁸

Subsequent legislatures added a provision to the Workmen's Compensation Law to aid some workers in their claims before the State Industrial Commission. The section provided that if an employer listed a certain worker or type of worker on its workers' compensation insurance policy, the employer was estopped from hiding from liability by asserting the listed worker or type of worker was in a nonhazardous occupation.¹⁶⁹

The estoppel theory was universally applied when a workers' compensation insurance policy listed a specific occupation, even though that occupation was not included in the statutory definition of *hazardous employment*.¹⁷⁰ However, the estoppel theory did not apply to injured employees of own-risk employers. In a spirited 5-4 decision, in *Miller v. Sears, Roebuck & Co.*,¹⁷¹ the supreme court held an injured worker was "not entitled to an award" because his own-risk employer, in the absence of a workers' compensation insurance policy, was not estopped from denying "that he was injured in . . . hazardous employment."¹⁷²

Dissenting in *Miller*, Justice Ralph Hodges argued that allowing compensability for a worker whose employer carried insurance and denying benefits for a worker whose employer was self-insured was a

163. *Id.* ¶¶ 9, 16, 458 P.2d at 152-53.

164. *Montgomery v. State Indus. Comm'n*, 1942 OK 149, 124 P.2d 726.

165. *Id.* ¶¶ 2, 5, 124 P.2d at 727.

166. *Bd. of Cty. Comm'rs v. Horne*, 1955 OK 270, ¶ 6, 288 P.2d 406, 407.

167. *City of Pryor v. Chambers*, 1929 OK 327, ¶¶ 1-2, 9, 280 P. 585, 585-86.

168. *City of Yale v. Jones*, 1933 OK 572, ¶¶ 2, 24, 26 P.2d 427, 428, 430.

169. Act of Apr. 17, 1947, ch. 3, § 2, 1947 Okla. Sess. Laws 626, 626-27 (codified at OKLA. STAT. tit. 85, § 65.2 (1951) (repealed 2011)).

170. tit. 85, § 65.

171. *Miller v. Sears, Roebuck & Co.*, 1976 OK 67, 550 P.2d 1330.

172. *Id.* ¶ 2, 550 P.2d at 1332.

violation of constitutionally guaranteed equal protection.¹⁷³ He wrote:

There is no rational basis for differentiation between employees of the same class because one employer pays premiums for coverage while another elects to be a self-insurer. By statutory declaration the self-insurer is as much an insurance carrier as private insurers No inequity results from applying the estoppel act uniformly to employees of the same class who are scheduled by either insurer. Whether an employer insures with a private carrier or elects to be a self-insurer is of no consequence.¹⁷⁴

Occasionally, the supreme court ruled favorably for an injured worker after the State Industrial Commission awarded benefits based upon the statutory presumption that favored employees. This was based on an early provision in the Workmen's Compensation Law: "In any proceeding for the enforcement of a claim for compensation under this act, it shall be presumed in the absence of substantial evidence to the contrary . . . [t]hat the claim comes within the provisions of this act."¹⁷⁵

The presumption simply meant that if the evidence was too close to call, the injured worker won and was awarded benefits as a matter of social policy.¹⁷⁶ The adoption of Oklahoma Senate Bill 680 in 1999 eliminated that presumption.¹⁷⁷ As of November 1, 1999, an injured worker has to prove the claim by a preponderance of the evidence, the evidentiary standard still in effect today.¹⁷⁸

V. IN THE COURSE AND SCOPE OF EMPLOYMENT

In my thirty-six years of practicing workers' compensation law in Oklahoma, the number-one source of litigation has been whether or not a worker's injury arose out of and was in the course of employment. On

173. *Id.* ¶ 5, 550 P.2d at 1335 (Hodges, J., dissenting).

174. *Id.* ¶ 4, 550 P.2d at 1335.

175. Supplement to the Revised Statutes of Oklahoma of 1910, ch. 42-A, art. II, § 3782o, at 458 (1915) (repealed 1999).

176. *See* Bishop v. Wilson, 1931 OK 37, ¶¶ 3-5, 296 P. 438, 439-40 (applying this presumption and ruling in favor of an injured worker), *abrogated in part by* Neal v. Sears, Roebuck & Co., 1978 OK 47, 578 P.2d 1191.

177. *See* Workers' Compensation Act, ch. 420, § 6, 1999 Okla. Sess. Laws 1983, 1996 (repealed 2011).

178. *See id.*

many occasions, all parties admitted a worker was injured and needed medical treatment, but a dispute arose over the course and scope of employment. A typical course-and-scope statute was: “‘Injury or personal injury’ means only accidental injuries arising out of and in the course of employment and such disease or infection as may naturally result therefrom and occupational disease arising out of and in the course of employment as herein defined.”¹⁷⁹ Because “injury” was not comprehensively defined, it was incumbent upon the courts to do so; indeed, as Justice Ralph Hodges said in *Fenwick v. Oklahoma State Penitentiary*,¹⁸⁰ “it [was] the duty of the courts to further define ‘accidental personal injury.’”¹⁸¹

The statute defining a compensable injury seems simple enough, but there is much more involved. Harold J. Fisher wrote in a 1961 article, “[I]t is doubtful that any other area of workmen’s compensation law has resulted in more litigation, on either the trial or appellate level, than has the requirement that the injury arise out of and in the course of employment.”¹⁸² The phrase “arising out of and in the course of employment” appears in the workers’ compensation laws of every state.¹⁸³

The phrase is derived from a British statute that England’s Court of Appeal notably interpreted in 1908, the year after Oklahoma’s statehood and seven years before Oklahoma enacted a workers’ compensation law: “[T]he first part of the phrase describes the character or quality of the accident, while the latter part introduces the idea that an accident to be compensable must in some sense be due to the employment, and must result from a risk reasonably incident to the employment.”¹⁸⁴ Even though modern lawyers and judges might use different words, the phrase’s interpretation remains strikingly similar to thoughts expressed in legal opinions more than a century ago.¹⁸⁵

179. OKLA. STAT. tit. 85, § 3(7) (1981) (repealed 2011).

180. *Fenwick v. Okla. State Penitentiary*, 1990 OK 47, 792 P.2d 60.

181. *Id.* ¶ 7, 792 P.2d at 61–62.

182. Harold J. Fisher, “*Injuries Arising Out of and in the Course of Employment*,” 26 MO. L. REV. 278, 279 (1961).

183. *Id.*

184. Charles S. Desmond, “*Arising Out of and in the Course of Employment*” in *New York*, 26 NOTRE DAME L. REV. 462, 462 (1951) (discussing the holding of *Fitzgerald v. W.G. Clarke & Son* [1908] 2 AC 796, 799 (appeal taken from KB)).

185. The arising-out-of-and-in-the-scope-of-employment section of Oklahoma’s original workers’ compensation law in 1915 was identical to the law in New York. For a comprehensive survey of how New York handled its first 40,000,000 workers’ compensation claims in the first half of the twentieth century, see *id.* at 462.

Professor Arthur Larson, in his leading treatise on workers' compensation law, noted that ever since the two-pronged requirement for declaring an injury compensable was adopted from the British Compensation Act, judicial interpretation of the requirement has in large part remained a universal problem.¹⁸⁶ When analyzing a particular injury, Harold J. Fisher, building off Larson's ideas in a 1961 article, suggested examining the arising-out-of prong first, noting two dominant views had evolved for doing so.¹⁸⁷ The first view identified the hazard that caused the injury and then looked at how closely associated the hazard was with the employment.¹⁸⁸ The test associated with this view was known as the "peculiar or increased risk doctrine" and it found an injury compensable if it "arose out of" a hazard peculiar to that employment.¹⁸⁹ To be peculiar to the employment at hand, this test required that the risk be generally uncommon outside of the employment, or inversely, that it be a risk uniquely enhanced by the work.¹⁹⁰ The second view was the "actual risk doctrine," which disregarded whether the risk might be common to the public: "We do not care whether this risk was also common to the public, if in fact it was a risk of *this* employment."¹⁹¹ Under this view, if the injury occurred because of a risk of the particular employment, it was compensable.¹⁹²

Fisher, again building off of Larson, also explained the "in the course of" requirement:

[I]t relates to the connection between the work and the injury in reference to the time, place and activity; that is, it demands that the injury be shown to have arisen within the time and space boundaries of the employment, and in the course of an activity

186. 1 ARTHUR LARSON, WORKMEN'S COMPENSATION LAW § 6.00, at 41 (1952).

187. See Fisher, *supra* note 182, at 281.

188. See *id.*

189. *Id.*

190. See *id.*; e.g., *In re Emp'r Liab. Assurance Corp. (McNicol's Case)*, 102 N.E. 697, 697 (Mass. 1916) ("The causative danger must be peculiar to the work and not common to the neighborhood."); *Brady v. Louis Ruffolo & Sons Constr. Co.*, 578 N.E.2d 921, 924 (Ill. 1991) ("If an industrial accident is caused by a risk unrelated to the nature of the employment, or is not fairly traceable to the workplace environment, but results instead from a hazard to which the claimant would have been equally exposed apart from his work, the injury cannot be said to arise out of the employment.").

191. Fisher, *supra* note 182, at 281 (quoting LARSON, *supra* note 186, § 6.30, at 43).

192. *Id.*

which has a purpose related to the employment.¹⁹³

An early Oklahoma Supreme Court case attempting to determine if an injury arose out of and was in the course of employment is *Willis v. State Industrial Commission*.¹⁹⁴ A worker warming himself by a fire on the employer's premises was injured when a "fellow employee . . . threw a piece of dynamite in the fire."¹⁹⁵ The supreme court surveyed decisions from other states struggling with the same legal issue and concluded that, in this instance, "if a workman is an active participant in what has been denominated 'horseplay,' he is not entitled to compensation, but if, while going about his duties, he is a victim of another's prank, to which he is not in the least a party, he should not be denied compensation."¹⁹⁶

In 1931, the supreme court used its first lightning-strike injury case, *Consolidated Pipe Line Co. v. Mahon*,¹⁹⁷ to assess the status of the arising-out-of-and-in-the-scope-of-employment doctrine. Justice Charles Swindall wrote a well-articulated opinion for a 7-1 majority.¹⁹⁸ In *Mahon*, lightning struck a worker while he was taking refuge from a ferocious Oklahoma thunderstorm north of Wewoka.¹⁹⁹ He and his fellow workers were laying a cross-country pipeline and had no shelter except an "old, dilapidated, frame house nearby."²⁰⁰ The State Industrial Commission awarded benefits, and the employer appealed.²⁰¹

After comparing inconsistent opinions from England, Ireland, Minnesota, and Wisconsin, the court held that since "no shelter was provided by the master for the employee, . . . who was acting as a reasonable person familiar with the whole situation," the injury arose out of the employment.²⁰² The court recognized that an "unexpected, violent thunderstorm accompanied by lightning and rain" was a risk in common with all people in the area.²⁰³ But, applying the peculiar-risk doctrine, the

193. *Id.* at 283.

194. *Willis v. State Indus. Comm'n*, 1920 OK 145, 190 P. 92.

195. *Id.* ¶ 12, 190 P. at 92.

196. *Id.* ¶ 18, 190 P. at 94 (citing George A. Kingston, "Arising Out of and in Course of Employment," 53 AM. L. REV. 67, 75 (1919)).

197. *Consol. Pipe Line Co. v. Mahon*, 1931 OK 582, 3 P.2d 844.

198. *See Mahon*, 1931 OK 582, 3 P.2d 844. The decision notes that Justice Andrews was "absent" on the day the opinion was circulated among justices. *Id.* ¶ 41, 3 P.2d at 853.

199. *Id.* ¶ 1, 3 P.2d at 845.

200. *Id.*

201. *Id.* ¶ 2, 3 P.2d at 845.

202. *Id.* ¶¶ 7-9, 35, 3 P.2d at 846-47, 852.

203. *Id.* ¶ 39, 3 P.2d at 853.

court posed this critical question: Did “the employment expose[] the employee to peculiar danger and risk of being struck by lightning more than others in the same locality . . . in the discharge of his duties, and” while taking shelter in order to resume work?²⁰⁴ The court answered in the affirmative and sustained the award of benefits of the State Industrial Commission.²⁰⁵

The *Consolidated Pipe Line* opinion formally endorsed the peculiar-risk doctrine, adopting the reasoning and rule that the Massachusetts Supreme Judicial Court announced in *McNicol’s Case*²⁰⁶:

“It is not easy nor necessary to the determination of the case at bar to give a comprehensive definition of these words which shall accurately include all cases embraced within the act and with precision exclude those outside its terms. It is sufficient to say that an injury is received ‘in the course of’ the employment *when it comes while the workman is doing the duty which he is employed to perform*. It arises ‘out of’ the employment *when there is apparent to the rational mind upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury*. Under this test, if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises ‘out of’ the employment. But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workmen would have been equally exposed apart from the employment. The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that

204. *Id.*

205. *Id.* ¶ 40, 3 P.2d at 853.

206. *Id.* ¶ 34, 3 P.2d at 851 (citing *In re Emp’r Liab. Assurance Corp. (McNicol’s Case)*, 102 N.E. 697 (Mass. 1916)).

source as a rational consequence.”²⁰⁷

One of the strangest arising-out-of-and-in-the-scope-of-employment cases in Oklahoma jurisprudence involved sex, death, and a speeding train. In *Darco Transportation v. Dulen*,²⁰⁸ two co-drivers of a tractor-trailer rig entered a railroad crossing after a signal arm malfunctioned.²⁰⁹ An oncoming train slammed into the truck, killing the female co-driver and severely injuring Dulen, who brought a claim for his injuries.²¹⁰

The employer denied the claim when it found out Dulen told an investigator at the accident scene that he and his co-driver, who also happened to be his girlfriend, were engaged in sex prior to the accident.²¹¹ The investigator said she found the girlfriend “clad only in a T-shirt . . . [and that] Dulen’s pants were unbuttoned, unzipped, and resting mid-hip” as he was loaded into an ambulance.²¹² The investigator testified that Dulen proclaimed, “I was f[—] her and now, oh, my God, I have killed her.”²¹³

Justice Marian Opala wrote the 5–4 opinion affirming the Workers’ Compensation Court’s finding of compensability: “We must be mindful that in this case we are applying *workers’ compensation law*. The concept of a worker’s *contributory fault*, which the compensation statute discarded, must not—under the guise of appellate re-examination of the evidence—be resurrected obliquely as a defense against the employer’s liability.”²¹⁴ The standard of review governing competing inferences from undisputed evidence added further support for compensability. Justice Opala pointed out that it was undisputed Dulen was at the wheel, “his assigned work station,” when the accident occurred, and “there [was]

207. *Id.* (emphasis added) (quoting *McNicol’s Case*, 102 N.E. at 697).

208. *Darco Transp. v. Dulen*, 1996 OK 50, 922 P.2d 591, *superseded by statute*, Act of June 10, 1997, ch. 361, § 5, 1997 Okla. Sess. Laws 2160, 2167, *as recognized in HAC*, Inc. v. Box, 2010 OK 89, ¶ 12, 245 P.3d 609, 614.

209. *Id.* ¶¶ 2–3, 922 P.2d at 593.

210. *Id.*

211. *Id.* ¶¶ 5–6, 922 P.2d at 593.

212. *Id.* ¶ 3, 922 P.2d at 593.

213. *Id.* ¶ 5, 922 P.2d at 593 (footnote omitted). Attorney John Oldfield of Oklahoma City, with whom I have conversed almost daily at the Workers’ Compensation Court for more than thirty years, represented the injured worker in this case. *Id.* ¶ 0, 922 P.2d at 592 (syllabus). Oldfield said that the couple had pulled to the side of the road a few minutes before the accident to have sex but were not engaged in the act at the time the train slammed into the truck.

214. *Id.* ¶¶ 10, 17–19, 922 P.2d at 595, 597 (emphasis omitted) (footnote omitted).

competent evidence to support the trial judge's finding [that] ascribe[d] the accident's cause, not to copulation-related inattention, but to defective railroad-crossing warning equipment."²¹⁵ Thus, the facts on appeal supported a finding that the injury arose out of and was within the scope of employment.²¹⁶

Justice Joseph Watt wrote the dissenting opinion and opened strongly, "Today's opinion sustains an award of workers' compensation benefits to a claimant for injuries sustained while engaging in sexual intercourse."²¹⁷ Watt continued, "By engaging in sexual intercourse, the claimant transformed his otherwise legitimate work-related conduct into conduct that did not 'arise out of . . . his employment.'"²¹⁸ Justice Watt also closed strongly:

Sustaining an injury while engaged in sexual intercourse is not the type of risk reasonably incident to driving a semi tractor-trailer rig. Claimant's employer neither condoned such acts nor could it have derived any benefit therefrom. Claimant's willing participation in such non-work-related activities were independent of and completely disconnected from the performance of any duties of his job as a truck driver. As such, his injuries did not "arise out of his employment" within the meaning of the Act and are not compensable.

It is my opinion that claimant's willing participation in sexual intercourse does not fall within the category of compensable activities contemplated by Oklahoma's workers' compensation regime.²¹⁹

A line of Oklahoma cases from 1935 to the present have held that the phrase "arising out of employment" contemplates the causal connection between the injury and the risks incident to employment.²²⁰

215. *Id.* ¶ 16, 922 P.2d at 597.

216. *Id.*

217. *Id.* ¶ 1, 922 P.2d at 597 (Watt, J., dissenting).

218. *Id.* ¶ 1, 922 P.2d at 597 (quoting OKLA. STAT. tit. 85, § 11 (1991) (repealed 2011)).

219. *Id.* ¶¶ 14-15, 922 P.2d at 599-600.

220. *See, e.g.,* Am. Mgmt. Sys., Inc. v. Burns, 1995 OK 58, ¶¶ 6-7, 903 P.2d 288, 291-92; Richey v. Commander Mills, Inc., 1974 OK 47, ¶ 13, 521 P.2d 805, 808; Graham v. Graham, 1964 OK 68, ¶ 5, 390 P.2d 892, 893; Stanolind Pipe Line Co. v. Davis, 1935 OK 646, ¶ 28, 47 P.2d 163, 168. For a discussion of the historical development of strict liability, see generally Vernon Palmer, *A General Theory of the Inner Structure of Strict Liability*:

Injuries occurring in a parking lot outside an employer's business have been litigated frequently. An employer customarily would argue that the worker was off the clock, so slipping on ice while getting into a car at the end of the work day did not arise out of employment. Such a defense was a mixed bag for an employer; if it won the workers' compensation case, it found itself defending a premises-liability claim for not doing a good-enough job cleaning ice from the parking lot.

Traditionally, the State Industrial Commission and later the Workers' Compensation Court considered parking lots part of the workplace. Injuries occurring during ingress and egress to work were found compensable, especially if the employer owned or was under control of the parking lot.

During the late 1990s, when new judges created a conservative trend on the Workers' Compensation Court, an injury in a parking lot was not automatically deemed compensable. In the case of *Turner v. B Sew Inn*,²²¹ the worker stepped in a hole in the parking lot while walking into work.²²² The Workers' Compensation Court judge denied the claim for compensation, "finding that her injury neither arose from nor occurred in the course of employment."²²³

In an 8-1 decision, the Oklahoma Supreme Court reversed the Workers' Compensation Court and found the claim compensable.²²⁴ The high court concluded that the shopping center parking lot was not owned by the employer, but it still constituted the employer's premises because the lot was for the "joint use and benefit of employees and customers."²²⁵ Plus, there was no other designated parking area.²²⁶

Justice Yvonne Kauger, writing for the majority, explained the concept of arising out of and in the scope of employment:

The "in the course of" prong relates to the time, place or circumstances under which the injury occurs. To be considered in

Common Law, Civil Law, and Comparative Law, 62 TUL. L. REV. 1303 (1988), and for a discussion of how strict liability applies to workers' compensation arising-out-of-and-in-the-course-of-employment claims, see *id.* at 1319-20.

221. *Turner v. B Sew Inn*, 2000 OK 97, 18 P.3d 1070, *superseded by statute*, Workers' Compensation Code, ch. 318, § 12, 2011 Okla. Sess. Laws 2549, 2565.

222. *Id.* ¶ 4, 18 P.3d at 1072.

223. *Id.* ¶ 5, 18 P.3d at 1072.

224. *Id.* ¶¶ 27-31, 18 P.3d at 1077.

225. *Id.* ¶¶ 10-12, 18 P.3d at 1072-73.

226. *Id.*

the course of employment, an accidental injury must occur within the period of employment at a place where the worker reasonably may be and while reasonably fulfilling a duty of employment, or engaged in doing something incidental thereto. It tests whether, at the critical moment, the claimant was on a mission for the employer. The “arise out of” prong contemplates a causal connection between the act engaged in at the time the injury occurs and the requirements of employment. To meet the “arising out of” test, it must appear to the rational mind, upon considering all the circumstances, that a causal connection exists between the conditions under which the work is to be performed and the resulting injury.

Ordinarily, an injury sustained while going to or from an employer’s premises is not one which arises out of and in the course of employment within the meaning of the Act. However, there is an exception to the rule if the injury occurs on premises owned or controlled by the employer. In *Swanson*, the Court recognized that:

“When landlord of several industrial tenants furnishes a parking yard for the joint use of such tenants and their employees, and the use thereof by employees is acquiesced in by the employers, such area constitutes premises of such employers in the application of the Workmen’s Compensation Law.”

The reason for this exception is that, for workers’ compensation purposes, the course of employment does not begin and end with the actual work a claimant was hired to do. It also covers the period between entering the employer’s premises a reasonable time before beginning any actual work and leaving within a reasonable time after the day’s work is done.²²⁷

Such holdings in parking-lot cases were prevalent until the legislature adopted the Workers’ Compensation Code²²⁸ in 2011 and the

227. *Id.* ¶ 15, 18 P.3d at 1073–74 (footnotes omitted) (quoting *Swanson v. Gen. Paint Co.*, 1961 OK 70, ¶ 0, 361 P.2d 842, 843 (syllabus)).

228. Workers’ Compensation Code, ch. 318, 2011 Okla. Sess. Laws 2549 (codified at

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Administrative Workers' Compensation Act²²⁹ in 2013. The radical statutory departure from case law to limit compensable claims is discussed below.

VI. A NEW WORKERS' COMPENSATION CONCEPT

In the fifty-five years following Oklahoma's first workers' compensation law in 1915, the nature of the workforce in Oklahoma and the nation changed dramatically. Of twenty-nine million workers surveyed in 1900, only five million were white-collar workers.²³⁰ The other twenty-four million were manual and farm laborers.²³¹ In 1970, of eighty million laborers surveyed, nearly thirty-eight million were in white-collar jobs.²³² The remaining forty-two million were manual and farm workers.²³³

In passing the Occupational Safety and Health Act of 1970,²³⁴ Congress recognized that "the vast majority of American workers and their families are dependent on workmen's compensation for their basic economic security in the event such workers suffer disabling injury or death in the course of their employment."²³⁵ In addition, Congress acknowledged "serious questions" existed

concerning the fairness and adequacy of present workmen's compensation laws in the light of the growth of the economy, the changing nature of the labor force, increases in medical knowledge, changes in the hazards associated with various types of employment, new technology . . . , and increases in the general level of wages and the cost of living.²³⁶

In light of this, Congress established the National Commission on

OKLA. STAT. tit. 85, §§ 301-413 (2011) (repealed 2013)).

229. Act of May 6, 2013, ch. 208, 2013 Okla. Sess. Laws 862 (codified at OKLA. STAT. tit. 85A, §§ 1-400 (Supp. II 2013)).

230. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970, at 139 tbl. Series D 182-232 (1975).

231. *Id.*

232. *Id.*

233. *Id.*

234. Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (codified at 29 U.S.C. §§ 651-678 (2012)).

235. *Id.* § 27(a)(1)(A), 84 Stat. at 1616 (codified at 29 U.S.C. § 676 (1970) (omitted 1976)).

236. *Id.* § 27(a)(1)(B), 84 Stat. at 1616.

State Workmen's Compensation Laws to study and evaluate state workers' compensation laws to determine if such laws provided an "adequate, prompt, and equitable system" of delivering benefits to injured workers.²³⁷ President Richard M. Nixon appointed University of Chicago Professor John F. Burton, Jr. as chair of a fifteen-member commission that began meeting in July 1971 and delivered to the President and Congress its report on July 31, 1972.²³⁸

The National Commission listed five major objectives for a modern workmen's²³⁹ compensation system:

Broad coverage of employees and of work-related injuries and diseases

Protection should be extended to as many workers as feasible, and all work-related injuries and diseases should be covered.

Substantial protection against interruption of income

A high proportion of a disabled worker's lost earnings should be replaced by workmen's compensation benefits.

Provision of sufficient medical care and rehabilitation services

The injured worker's physical condition and earning capacity should be promptly restored.

Encouragement of safety

Economic incentives in the program should reduce the number of work-related injuries and diseases.

. . . .

An effective system for delivery of benefits and services

The basic objectives should be met comprehensively and efficiently.²⁴⁰

The National Commission determined that Oklahoma was one of

237. NAT'L COMM'N ON STATE WORKMEN'S COMP. LAWS, REPORT OF THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS 15 (1972) [hereinafter REPORT ON STATE LAWS].

238. *Id.* at 3-4, 13-14.

239. *Id.* at 15. It was at about this juncture in 1972 that many federal and state publications and state legislatures began using the term *workers' compensation* rather than *workmen's compensation*, a term that was derived from European statutes. *See supra* note 4.

240. REPORT ON STATE LAWS, *supra* note 237, at 15.

fifteen states that protected less than seventy percent of its workers under its workers' compensation laws.²⁴¹ That was a direct result of Oklahoma's legislature employing the decades-old hazardous-employment doctrine that did not cover injuries to school teachers, retail workers, and most government workers.²⁴²

The fact that workers' compensation benefits were not available to a large segment of Oklahoma workers because of their nonhazardous employment did not go unnoticed. Members of the legislature and other leaders recognized the need for a more comprehensive workers' compensation statutory scheme. When David L. Boren was elected governor of Oklahoma in 1974, he suggested reforming the workers' compensation system to curb perceived abuses and raise benefits for workers.²⁴³ He appointed a committee of legislators, business leaders, and worker advocates to survey other states' recent reforms in light of criticism from the National Commission on State Workmen's Compensation Laws.²⁴⁴

The legislature did not seriously address workers' compensation reform in 1975 or 1976, but it feverishly tackled the issue in 1977. Several bills were introduced. State Representative Glenn Floyd of Norman proposed abolishing the State Industrial Court and placing the adjudication of workers' compensation cases in district court.²⁴⁵ But Chris Sturm,

241. NAT'L COMM'N ON STATE WORKMEN'S COMPENSATION LAWS, COMPENDIUM ON WORKMEN'S COMPENSATION 149 (1973).

242. See FRANK ELKOURI, WORKERS' COMPENSATION IN OKLAHOMA I (1978) (pointing out that the hazardous-employment requirement resulted in "a large portion of Oklahoma workers, including many whose employment was hazardous in fact, [not being] covered by the Oklahoma workers' compensation law"); REPORT ON STATE LAWS, *supra* note 237, at 45-46 (recommending "workmen's compensation coverage be extended to all occupations and industries, without regard to the degree of hazard"); Laurence M. Huffman, Note, *Workmen's Compensation: National Commission on State Workmen's Compensation Laws: Import for Oklahoma*, 26 OKLA. L. REV. 446, 447, 452 (1973) (highlighting the Commission's "relevant criticisms of the hazardous employment classification system as embodied in the Oklahoma law").

243. See *Prison Plea Irks Boren*, DAILY OKLAHOMAN, Mar. 8, 1975, at 21 (noting Boren's concerns about the existing system); *Compensation 'Mess' Long-Lived*, SUNDAY OKLAHOMAN, Aug. 10, 1975, at 14. *Boren Outlines Hopes to Legislature*, DAILY OKLAHOMAN, Jan. 5, 1977, at 12.

244. Letter from Governor David Boren to Senator Ed Berrong (Aug. 3, 1975), in ELKOURI, *supra* note 242, at 31-33; see also Message of the Governor, S. JOURNAL, 36th Leg., 1st Reg. Sess., at 21-22 (Okla. 1977).

245. John Greiner, *Plan Offers Boost to Rural Courts*, DAILY OKLAHOMAN, Jan. 23, 1977, at 5 [hereinafter *Plan Offers Boost*].

commissioner of the State Insurance Fund and a member of Governor Boren's interim-study task force, said such a plan would create chaos and result in unequal and discriminatory awards in different counties for workers with the same injuries.²⁴⁶

A plan put forth by State Senator Gene Stipe of McAlester would have abolished the workers' compensation system and returned to the days of common-law negligence claims in district court.²⁴⁷ Governor Boren severely criticized Stipe's plan as being nothing but a "Stipe Compensation Bill."²⁴⁸ Still another bill proposed raising the maximum weekly workers' compensation payment from \$60 to \$110.²⁴⁹

A national Workers' Compensation Task Force was invited to review the Oklahoma system and recommend changes. State Industrial Court Judge Yvonne Sparger asked members of the task force to meet with Boren and legislators.²⁵⁰ Task force members representing various federal agencies, such as the departments of Labor, Commerce, Housing and Urban Development, and Health, Education, and Welfare, warned Oklahoma about a pending federal takeover of workers' compensation if the state did not begin meeting the minimum standards that the National Commission on State Workmen's Compensation Laws laid down five years earlier.²⁵¹

Boren and Representative Floyd worked together with legislative

246. *Id.* Sturm also played a major role in drafting Governor Boren's ideas of workers' compensation and converting them to legislative bill form. *Id.* Following the 1977 legislative session, Sturm published an excellent article reviewing the new Workers' Compensation Act. *See generally* Chris Sturm, *The Workers' Compensation Act of 1977*, 3 OKLA. CITY U. L. REV. 1 (1978).

247. Mike Hammer, *Boren Attack on Stipe May Backfire, Legislators Say*, DAILY OKLAHOMAN, Jan. 30, 1977, at 1.

248. *Id.* Senator Stipe was a well-known workers' advocate and workers' compensation lawyer to whom many legislators looked to as the expert on the evolution of workers' compensation law. He served in Oklahoma's legislature longer than anyone else in state history. John Greiner & Randy Ellis, *Former Oklahoma State Sen. Gene Stipe Dies at 85*, OKLAHOMAN (July 21, 2012, 8:59 PM), <http://newsok.com/article/3694504> [<https://perma.cc/9SKX-AZUQ>]. In fact, his service from 1948 to 2003 makes him the second longest-serving state legislator in American history. *See id.*

249. *House Panel Ok's Interim Comp Plan*, DAILY OKLAHOMAN, Mar. 11, 1977, at 7.

250. *See Industrial Meeting Set*, DAILY OKLAHOMAN, Apr. 3, 1975, at 38.

251. Mike Hammer, *Expenses Bite 'Comp' Pay*, SUNDAY OKLAHOMAN, Mar. 6, 1977, at 1; accord A.L. Voth, *Impending Federal Legislation in the Field of Workmen's Compensation*, 46 OKLA. B.J. Q-67, Q-67 (1975) ("[T]hese recommendations merit very serious consideration because Federal intervention is a certainty if such improvements are not made in this Legislative Session.").

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leaders to hammer out a compromise bill. Using his bully pulpit, Boren touted reform, citing statistics that showed Oklahoma had the lowest maximum Temporary Total Disability (TTD) and Permanent Partial Disability (PPD) rates in the nation at \$60 and \$50 per week, respectively.²⁵² There was general consensus that weekly compensation for injured workers should be raised to two-thirds of the state's average weekly wage.²⁵³

A public debate evolved over the assessment of blame for Oklahoma's poor ranking in workers' compensation. Chamber of Commerce officials and industry representatives complained of high awards for permanent disability, while Judge Sparger blamed insurance companies with substandard claims adjusters and doctors who did not correctly assess an injured worker's true disability and its effect upon earning capacity.²⁵⁴ Sparger said the State Industrial Court's motivation could not possibly be the pocketbook:

"Our concern . . . is with the needs of the working people and not with compensation premiums or trial lawyers or associated manufacturers or chambers of commerce"

. . . .

"It's time for everyone to assume responsibility for the defects in the workers' compensation system"

"There's no question that the benefits are too low, . . . but the problem is, according to the insurance industry, that 'comp' premiums are too high"

"I don't know what happens to the money. Is the overhead

252. See David L. Boren, Message of the Governor, S. JOURNAL, 36th Leg., 1st Reg. Sess., at 21-22 (Okla. 1977); *House Panel Oks Interim Comp Plan*, *supra* note 249, at 7.

253. Mike Hammer, *State 'Comp' Ranking: Are We Really Last?*, SUNDAY OKLAHOMAN, Mar. 6, 1977, at 76. The annual report of the State Industrial Court for 1976 showed that Oklahoma was near the top nationally in the amount of the average Permanent Partial Disability award. *See id.* In addition, a press release from Governor Boren's office claimed that Oklahoma provided the lowest benefits in the nation, but workers' compensation premiums were the fourth highest among the states. *See id.* In my view, a set of workers' compensation statistics can be used by opposing forces to prove a desired point on opposite sides of nearly any issue. There are so many variables among state laws and labor markets; it is difficult, if not impossible, to meaningfully compare Oklahoma statistics with those of other jurisdictions.

254. See Andrew Tevington, *Judge Blames Firms, Doctors for Imbalance*, DAILY OKLAHOMAN, Dec. 24, 1975, at 5.

excessive? Are the insurance agents getting a big bite? Is the medical profession milking the premium dollar?"²⁵⁵

Against that backdrop of disagreement among interested parties, a compromise workers' compensation bill was hammered out in May 1977 in closed-door meetings that often denigrated into name-calling and loud threats that no workers' compensation reform would pass that legislative session.²⁵⁶

On March 5, 1977, the compromise bill by Senators Bob Funston of Broken Arrow and John Luton of Muskogee gained traction after winning approval from the senate's Business and Industry Committee.²⁵⁷ Oklahoma House Bill 1228 would replace the State Industrial Court with a Workers' Compensation Court.²⁵⁸ The governor would appoint judges "from a list submitted by the judicial nominating commission," part of the court reform state voters approved in the late 1960s.²⁵⁹ "The [new] court also would have an administrator" and cover nearly all Oklahoma workers.²⁶⁰

The Funston-Luton plan was a radical departure from Representative Glenn Floyd's original plan to abolish the State Industrial Court and to have state district courts decide workers' compensation cases.²⁶¹ The Bill's lead author in the Oklahoma House of Representatives, Representative Floyd, said he could accept the new plan because it provided an opportunity for judges of the new court to hold hearings outside of

255. *Id.*

256. *Cf.* S. JOURNAL, 36th Leg., 1st Reg. Sess., at 705 (Okla. 1977) (recording that the Oklahoma House rejected the Senate's amendments and requested a conference on May 17, 1977). This is also based upon my personal recollections. I was twenty-eight years old, Executive Director of the Oklahoma Department of Economic and Community Affairs, a position now known as Oklahoma Secretary of Commerce, and in my second year of law school at Oklahoma City University School of Law. As a member of the Governor's Mini-Cabinet on Economic Development, I was invited to provide input for the final draft of the Joint House-Senate Conference Committee compromise bill, HB 1228. I shall never forget one particular meeting when Senator Gene Stipe marched out of a meeting room and declared, "Maybe we just ought to do away with workers' compensation and let everyone fend for themselves down at the county courthouse."

257. *Industrial Court Measure Gains*, DAILY OKLAHOMAN, May 5, 1977, at 33.

258. *See id.*

259. *Id.*

260. *Id.*; *see also* S. JOURNAL, 36th Leg., 1st Reg. Sess., at 657 (Okla. 1977) (recording Senator Funston's amendment adding the administrator position to House Bill 1228).

261. John Greiner, *Industrial Court Revamp Drafted*, SUNDAY OKLAHOMAN, May 1, 1977, at 215.

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Oklahoma City and Tulsa.²⁶² Decentralizing the workers' compensation decision-making process was one of Floyd's goals in reforming the system.²⁶³

On May 10, 1977, the Oklahoma Senate approved the amended Bill 39-3.²⁶⁴ There was much debate on the provision mandating that judges use the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (AMA Guides) to assess the amount of permanent disability a worker was left with after reaching maximum medical recovery.²⁶⁵ Senator Stipe argued against using the AMA Guides, complaining that using a set amount of disability would not allow a judge to consider the loss of future earnings a worker might have because of lasting effects of an injury.²⁶⁶ Stipe preferred a traditional manual-labor standard for determining disability.²⁶⁷ Senate-author Funston countered, "[I]f we are to eliminate the biggest area for the possibility of fraud, we're going to have to adopt new standards'"²⁶⁸ Funston noted that State Industrial Court judges could presently award any amount of disability based on reports of doctors who were not required to follow any guideline.²⁶⁹

On May 17, 1977, the house formally rejected a vast number of senate amendments, and House Bill 1228 went to a legislative conference committee to work out differences in the two versions.²⁷⁰ Senate conferees were Senators Funston, Luton, and Stipe, along with Ed Berrong of Weatherford and Kenneth Butler of Okmulgee.²⁷¹ House members of the conference committee were Representative Floyd and Representatives Jim Fried of Oklahoma City, Charlie Morgan of Prague, and David Riggs and

262. *Id.*

263. *See id.*

264. S. JOURNAL, 36th Leg., 1st Reg. Sess., at 659 (Okla. 1977).

265. John Greiner, *Workers' Compensation Bill Approved by Senate*, DAILY OKLAHOMAN, May 11, 1977, at 4.

266. *See id.*

267. *See id.*

268. *Id.*

269. *See id.*

270. S. JOURNAL, 36th Leg., 1st Reg. Sess., at 705 (Okla. 1977); *see also* John Greiner, *Workers' Compensation Bill Goes to Conference*, DAILY OKLAHOMAN, May 18, 1977, at 4.

271. S. JOURNAL, 36th Leg., 1st Reg. Sess., at 712 (Okla. 1977); *see also* Greiner, *supra* note 265, at 4. Senators Stipe and Luton were accomplished trial lawyers and both represented injured workers before the State Industrial Court.

Bill Wiseman of Tulsa.²⁷²

The major disagreement among conferees remained the method the new Workers' Compensation Court would use to determine disability—the AMA Guides or the traditional doctor's opinion based upon the injured worker's "ability to perform manual labor."²⁷³ On May 26, 1977, the "logjam" was broken when conferees approved the use of the AMA Guides.²⁷⁴

After additional, often-heated discussion, the conferees approved the workers' compensation reform bill on June 1.²⁷⁵ The only dissenting vote was from Senator Stipe, who declared to a reporter that he was not certain that the Bill contained any increase in benefits for injured workers.²⁷⁶

With the conference-committee version of the Bill headed to the house and senate for final approval, Governor Boren and legislative leaders claimed victory.²⁷⁷ An editorial in *The Daily Oklahoman* said the Bill was in final form "[a]fter some of the longest legislative studies and conflicts in recent years."²⁷⁸ The newspaper editorial conceded the legislation was not perfect:

The bill will not satisfy everyone and probably has some flaws which will not become evident until it is applied in practice. It is a long and complex piece of legislation. But Gov. David Boren is probably correct when he says it is a good compromise that includes the major ingredients necessary to reform . . . the present workmen's compensation system.²⁷⁹

The new Oklahoma Workers' Compensation Act placed most workers in the state, except for agricultural and domestic workers, under workers' compensation coverage and required cities, counties, and other government bodies to insure their employees.²⁸⁰ The new Workers'

272. S. JOURNAL, 36th Leg., 1st Reg. Sess., at 712 (Okla. 1977); see also Greiner, *supra* note 270, at 4.

273. John Greiner, *Comp Jam Gives Way*, DAILY OKLAHOMAN, May 27, 1977, at 2.

274. *Id.*

275. John Greiner, *Conferees Approve Workers' Comp Bill*, DAILY OKLAHOMAN, June 2, 1977, at 1.

276. *Id.*

277. *See id.*

278. *Workers' Compensation*, DAILY OKLAHOMAN, June 3, 1977, at 8.

279. *Id.*

280. OKLA. STAT. tit. 85, §§ 2, 2.1 (1981) (repealed 2011).

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Compensation Court was made up of seven members, who no longer required senate confirmation.²⁸¹ Instead, the Judicial Nominating Commission would provide the governor a list of judges from which the governor could choose and appoint.²⁸² The editorial board of *The Daily Oklahoman* heartily approved such a change:

Such confirmation has been used in the past to force Senate patronage appointments on the governor, with certain senators threatening to block confirmation of anyone else. With the governor to make the appointments, at least there will not be the problem of a senator-lawyer representing a worker client before a court of his own patronage appointees. That system has bred resentment.²⁸³

After the compromise bill passed the house and senate, Governor Boren signed the measure into law, taking effect July 1, 1978.²⁸⁴ Meanwhile, the governor appointed Marian Opala, administrative director of the state court system, as presiding judge of the State Industrial Court to ensure a smooth transition from the State Industrial Court to the Workers' Compensation Court.²⁸⁵ Also appointed to the bench was Boren's assistant legal counsel, Charles Cashion.²⁸⁶ Boren hailed the adoption of the legislation "as one of the most important . . . reforms in recent Oklahoma history."²⁸⁷

281. *Workers' Compensation*, *supra* note 278, at 8.

282. John Greiner, *Workers' Comp Bill Goes to Governor*, DAILY OKLAHOMAN, June 8, 1977, at 1.

283. *Workers' Compensation*, *supra* note 278, at 8.

284. Greiner, *supra* note 282, at 1.

285. Ed Montgomery, *Opala Will Head Industrial Court*, DAILY OKLAHOMAN, June 7, 1977, at 1. In 1978, Opala was appointed by Governor Boren to the Oklahoma Supreme Court. *Id.*; see also *Supreme Court of the State of Okla., Justice Marian P. Opala, District No. 3*, OSCN, <http://www.oscn.net/oscn/schome/opala.htm> [<https://perma.cc/YD9W-NQBH>]. During the next thirty-five years, he authored many significant workers' compensation opinions for the high court. See Michael McNutt, *Oklahoma Supreme Court Justice Marian Opala Recalled as Great Intellectual*, NEWSOK (Oct. 12, 2010, 9:20 AM), <http://newsok.com/article/3503474> [<https://perma.cc/7PEU-5WUC>].

286. Montgomery, *supra* note 285, at 1.

287. Greiner, *supra* note 282, at 1.

VII. A PERIOD OF RELATIVE CALM

After the new Workers' Compensation Court began exercising jurisdiction over work-related injury claims on July 1, 1978,²⁸⁸ a period of relative calm and stability began. There was no widespread criticism of the comprehensive coverage of most Oklahoma workers, rather than just those in hazardous occupations as had been the case since 1915. There were predictable ups and downs in the sizes of permanent disability awards, depending, in part, on the judge.

It is difficult, if not impossible, to correlate a particular judge's decisions with the political philosophy of the governor appointing the judge. However, veterans of the workers' compensation system in Oklahoma generally agree that Republican governors appointed more conservative, pro-business judges, and appointees of Democratic governors tended to favor injured workers.²⁸⁹

Even though the Workers' Compensation Court brought stability to resolving workers' compensation disputes, there was a continuous clamor to amend title 85—to either close a loophole in the reform package or add new components, such as allowing mediation and providing counselors to assist workers without an attorney. In the thirty-three years from 1977 to 2010, nineteen different legislative sessions passed changes to the Workers' Compensation Act.²⁹⁰

Many of the law's changes during this period came from case law and the legislature's response to a particular holding. An example is the carving out of exceptions to the general rule that workers' compensation was an exclusive remedy and therefore traditional tort-law actions could not be pursued in district court. Matthew K. Brown explained the exception for an intentional tort:

288. Workers' Compensation Act, ch. 234, §§ 2-3, 63, 1977 Okla. Sess. Laws 587, 588-90, 629.

289. I speak for no one but myself, having practiced before dozens of excellent judges appointed by both Republican and Democratic governors. Occasionally, a judge who was thought to be conservative became a champion of the worker, and vice versa.

290. From my "reform" file cabinet that contains files of countless draft bills presented because someone was unhappy with the result of a single case or batch of cases. *Accord* L. Brad Taylor, *All That Glitters May be Gold-Plated When it Comes to Workers' Compensation in Oklahoma*, 71 OKLA. B.J. 343, 343-44 (2000) (discussing an amendment made because a certain case "did not sit well with the Legislature"). Many good changes also have been proposed and made since the major rewrite of the law in 1977.

When an employer intentionally injures an employee . . . the public policy rationale motivating workers' compensation exclusivity is weakened. In fact, many states have recognized an exception to the exclusive remedy limitation if the employer intentionally injures the employee. In those situations, the employee's remedy is not limited to those available under the workers' compensation system. Instead, the employee may choose to pursue his or her claim either through the workers' compensation system or through the traditional common law court system.²⁹¹

The exclusivity language in the Workers' Compensation Act remained the same for four decades after the 1977 reform:

The liability prescribed in Section 11 of this title shall be exclusive and in place of all other liability of the employer and any of his employees, any architect, professional engineer, or land surveyor retained to perform professional services on a construction project, at common law or otherwise, for such injury, loss of services, or death, to the employee, or the spouse, personal representative, parents or dependents of the employee, or any other person.²⁹²

In 1962, the Oklahoma Supreme Court recognized that in some cases, "an employee who has been willfully injured by his employer may have a common-law action for damages."²⁹³ A 1984 case gave support to the idea of allowing additional remedies if the injury is caused by willful, intentional, or violent acts because such acts are not accidental. In the case of *Thompson v. Madison Machinery Co.*,²⁹⁴ a coworker struck the worker "in the face with a twelve-inch crescent wrench during an argument."²⁹⁵ The *Madison* court explained that workers' compensation was "not designed to shield employers or co-employees from willful, intentional or

291. Matthew K. Brown, Note, *How Exclusive Is the Workers' Compensation Exclusive Remedy? 2010 Amendments to Oklahoma Workers' Compensation Statute Shoot Down Parret*, 65 OKLA. L. REV. 75, 75 (2012) (footnotes omitted).

292. OKLA. STAT. tit. 85, § 12 (1991) (repealed 2011).

293. *Roberts v. Barclay*, 1962 OK 38, ¶ 4, 369 P.2d 808, 809.

294. *Thompson v. Madison Mach. Co.*, 1984 OK CIV APP 24, 684 P.2d 565.

295. *Id.* ¶ 2, 684 P.2d at 566.

even violent conduct.”²⁹⁶

A unanimous supreme court used the 2001 case of *Davis v. CMS Continental Natural Gas, Inc.*²⁹⁷ to review an employer’s immunity from common-law tort damages when an employee’s injury arose out of and was in the scope of the employment.²⁹⁸ The gas-company “employee died instantly when a blow-down valve assembly, attached to a natural gas compressor package, blew apart.”²⁹⁹ The employee’s family filed a tort action alleging the employer was negligent.³⁰⁰

After the plaintiff conceded that it could not prove “wilful and wanton [conduct] evincing a reckless disregard for the employee’s safety,” the district court granted summary judgment for the employer, and the supreme court affirmed.³⁰¹ The court noted a split of authority that increasingly allowed an employer to be sued for negligence in extreme cases in which the employer had knowledge that an incident was certain to occur and willfully disregard that knowledge.³⁰² Justice Kauger, writing for the court, summarized one of two possible standards:

Employer negligence is insufficient for a finding of substantial certainty required to strip the employer from the exclusive remedies offered by the Workers’ Compensation Act. At the very least, the employee must establish an employer’s intentional conduct engaged in with the knowledge that the employee’s serious injury or death is a substantial certainty.³⁰³

The supreme court left unanswered whether the substantial-certainty

296. *Id.* ¶ 17, 684 P.2d at 568.

297. *Davis v. CMS Cont’l Nat. Gas, Inc.*, 2001 OK 33, 23 P.3d 288.

298. *Id.* ¶ 1, 23 P.3d at 288.

299. *Id.* ¶ 2, 23 P.3d at 290.

300. *Id.* ¶ 3, 23 P.3d at 290.

301. *Id.* ¶¶ 3, 16, 23 P.3d at 290, 296.

302. *Id.* ¶ 13, 23 P.3d at 294.

303. *Id.* ¶ 14, 23 P.3d at 295. Although the issue was not involved in this case, the supreme court recognized that an injured worker could maintain a tort action against an employer not covered by the Workers’ Compensation Act. *Id.* ¶¶ 0, 13, 15–16, 23 P.3d at 289, 292, 294–96. For example, title 85, section 178 allowed negligence actions to be filed against agricultural and domestic employers exempted from the Workers’ Compensation Act. OKLA. STAT. tit. 85, § 178 (1991) (repealed 2011). *See generally* 1 LEX K. LARSON, LARSON’S WORKERS’ COMPENSATION LAW § 2.08 (2010) (pointing out that the National Commission on State Workmen’s Compensation Laws recommended in its report that occupational exemptions should be eliminated).

standard would apply in future cases when deciding whether an employer's conduct was intentional.³⁰⁴

The court revisited the exclusivity issue four years later in *Parret v. UNICCO Service Co.*³⁰⁵ In a 6–3 decision, Justice Tom Colbert authored a comprehensive opinion answering two certified questions from the United States District Court for the Western District of Oklahoma.³⁰⁶ Judge Joe Heaton asked the supreme court to clarify the “intent necessary for an employee’s tort claim against an employer to fall outside the protection of the workers’ compensation exclusivity provision . . . [and to define] the scope of the test for determining [whether an employer was a] statutory employer” and thus immune from a tort action.³⁰⁷

Mr. Parret, an employee of UNICCO, “was electrocuted while replacing emergency lights at the Dayton Tire Plant” in Oklahoma City.³⁰⁸ The defendant, Bridgestone/Firestone Inc., owned the plant and hired UNICCO to provide maintenance services.³⁰⁹ Parret’s widow received workers’ compensation benefits and filed a tort action against both UNICCO and Bridgestone/Firestone Inc.³¹⁰ In the tort action, the widow alleged that the defendant required the decedent “to work on the emergency lighting system while it was ‘hot,’ . . . without turning the electricity off, [and that] death was substantially certain to occur.”³¹¹

The supreme court adopted the substantial-certainty standard:

This pronouncement is not intended to expand the narrow intentional tort exception to workers’ compensation exclusivity. Rather, it constitutes this Court’s refusal to apply a stricter standard of intent to a worker’s tort claim against the employer than the Restatement standard of intent which would be applied to any other intentional tort. By adopting the “substantial certainty” standard in workers’ compensation, this Court furthers the workers’ compensation objective of work-place safety while

304. *Davis*, 2001 OK 33, ¶ 15, 23 P.3d at 295–96.

305. *Parret v. UNICCO Serv. Co.*, 2005 OK 54, 127 P.3d 572, *superseded by statute* Act of June 10, 2010, ch. 452, § 3, 2010 Okla. Sess. Laws 2024, 2032 (codified at OKLA. STAT. tit. 85, § 12 (Supp. IV 2010) (repealed 2011)).

306. *Id.* ¶¶ 1, 34, 127 P.3d at 573–74.

307. *Id.* ¶¶ 0–1, 127 P.3d at 573–74.

308. *Id.* ¶ 3, 127 P.3d at 574.

309. *Id.*

310. *Id.* ¶¶ 4–5, 127 P.3d at 574.

311. *Id.* ¶ 5, 127 P.3d at 574.

balancing the interests of employer and employee. At the same time, it furthers the general tort principle that [“]injuries are to be compensated and anti-social behavior is to be discouraged.”³¹²

The court further recognized that some courts might blur the line between intentional and accidental injuries; therefore, it was necessary to lay down what it called the “parameters of the standard”:

In order for an employer’s conduct to amount to an intentional tort, the employer must have (1) desired to bring about the worker’s injury or (2) acted with the knowledge that such injury was substantially certain to result from the employer’s conduct. Under the second part of this standard, the employer must have intended the act that caused the injury with knowledge that the injury was substantially certain to follow. The issue is not merely whether injury was substantially certain to occur, but whether the employer knew it was substantially certain to occur. The employer’s subjective appreciation of the substantial certainty of injury must be demonstrated. In most cases, however, it will be necessary to demonstrate the employer’s subjective realization by circumstantial evidence. Thus, an employer’s knowledge may be inferred from the employer’s conduct and all the surrounding circumstances.

To satisfy the “substantial certainty” standard, “more than knowledge and appreciation of the risk is necessary.” As Professor Prosser explains:

[T]he mere knowledge and appreciation of a risk, short of substantial certainty, is not the equivalent of intent. The defendant who acts in the belief or consciousness that he is causing an appreciable risk of harm to another may be negligent, and if the risk is great his conduct may be

312. *Id.* ¶ 27, 127 P.3d at 579 (quoting WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 1, at 3 (4th ed. 1971)). For attorneys and judges, reading the *Parret* decision is like returning to Tort class in law school. The court leaned heavily upon the writings of Professors William L. Prosser and Arthur Larson, and scholar Lex K. Larson, as well as *The Restatement (Second) of Torts* and legal encyclopedias, such as *American Jurisprudence Proof of Facts*. *Id.* ¶¶ 1, 10, 13, 17, 25, 127 P.3d at 575-77, 579. Reading the entire decision is a worthy review of the law of torts and its relationship to workers’ compensation law both nationally and in Oklahoma.

characterized as reckless or wanton, but it is not classified as an intentional wrong.

Thus, the employer must have acted, or have failed to act, with the knowledge that injury was substantially certain, not merely likely, to occur. The employer must have knowledge of more than “foreseeable risk,” more than “high probability,” and more than “substantial likelihood.” Nothing short of the employer’s knowledge of the “substantial certainty” of injury will remove the injured worker’s claim from the exclusive remedy provision of the Workers’ Compensation Act, thus allowing the worker to proceed in district court.³¹³

Prior to 2010, “there was not a statutory exception in Oklahoma to the workers’ compensation exclusive remedy provision for intentional injuries”; therefore, no statutory definition of *intent* was needed.³¹⁴ But the legislature deemed it necessary to define *intent* because of the growing number of negligence cases surviving motions for summary judgement following the *Parret* decision.³¹⁵ Oklahoma House Bill 2540 added the following language to title 85, section 12 of the Oklahoma Statutes—the exclusive-remedy statute:

An intentional tort shall exist only when the employee is injured as a result of willful, deliberate, specific intent of the employer to cause such injury. Allegations or proof that the employer had knowledge that such injury was substantially certain to result from its conduct shall not constitute an intentional tort. The issue of whether an act is an intentional tort shall be a question of law for the court.³¹⁶

The new language created a bright-line rule that eliminated most intentional tort actions against Oklahoma employers. In fact, based upon

313. *Id.* ¶¶ 24–25, 127 P.3d at 579 (citations omitted) (quoting PROSSER, *supra* note 312, § 8, at 32).

314. Brown, *supra* note 291, at 87.

315. Indeed, in the *Parrett* case, after a federal judge denied the employer’s motion for summary judgment and remanded for trial the case was settled. *Parret v. UNICCO Serv. Co.*, No. CIV-01-1432-HE, 2006 BL 58119, at *1, *3 (W.D. Okla. 2006).

316. Workers’ Compensation Act, ch. 452, § 3, 2010 Okla. Sess. Laws 2024, 2032 (codified at OKLA. STAT. tit. 85, § 12 (Supp. IV 2010) (repealed 2011)).

the true-intent standard, only injuries in the most egregious of cases can survive summary judgment.³¹⁷

The post-*Parret* atmosphere regarding exceptions to exclusive remedy was in harmony with Professor Larson's opinion on the subject:

Negligence, and, for the most part, fault, are not in issue and cannot affect the result. Let the employer's conduct be flawless in its perfection, and let the employee's be abysmal in its clumsiness, rashness and ineptitude; if the accident arises out of and in the course of the employment, the employee receives an award. Reverse the positions, with a careless and stupid employer and a wholly innocent employee and the same award issues.

Thus, the test is not the relation of an individual's personal quality (fault) to an event, but the relationship of an event to an employment. The essence of applying the test is not a matter of assessing blame, but of marking out boundaries.³¹⁸

But in 2016, the Oklahoma Court of Civil Appeals issued a 2–1 decision that cast some doubt upon the effectiveness of the legislature's attempt to eliminate *Parret* cases in the future. Chief Judge Jerry L. Goodman authored the unpublished opinion in *Wells v. Oklahoma Roofing & Sheet Metal, L.L.C.*³¹⁹ The daughter of a roofer who fell to his death filed an intentional-tort action in district court against her father's employer.³²⁰ The suit alleged the employer's willful failure to provide an adequate fall-protection system caused the worker's death.³²¹ The single-line lanyard system in use at the time of the accident "required [the worker] to temporarily unhook his safety anchor when moving past co-workers."³²² The worker fell to his death during one of these times when he was moving past a coworker.³²³

317. See 48 AM. JUR. 2D *Proof of Facts* § 2, at 12 (1987) ("In a jurisdiction following this [specific-intent] view, unless the case involves an assault or a battery, recovery will probably be denied." (footnotes omitted)).

318. LARSON, *supra* note 303, § 1.03(1).

319. *Wells v. Okla. Roofing & Sheet Metal, L.L.C.*, No. 112,844, (Okla. Civ. App. Apr. 28, 2016). In an appeal from the District Court of Oklahoma County, Judge Wiseman joined Judge Goodman in the majority opinion, which reversed the dismissal of the tort action by District Judge Bryan C. Dixon and remanded the case. *Id.* slip op. at 2, 15.

320. *Id.* slip op. at 2.

321. *Id.* slip op. at 3.

322. *Id.*

323. *Id.*

The plaintiff also alleged the amended exclusive-remedy statute, title 85, section 12 of the 2010 Oklahoma Statutes, which severely limited intentional-tort actions against an employer, was unconstitutional as a special law.³²⁴ Sections 46 and 49 of article V of the Oklahoma Constitution prohibit a special law that provides disparate treatment to members of the same class.³²⁵

The district court relied on section 12 and dismissed the plaintiff's claim.³²⁶ The Oklahoma Court of Civil Appeals reversed the trial court, declaring that the 2010 amendments to section 12, "created two different definitions of an intentional tort: one which applies exclusively to an employer in a workers' compensation claim, and a different one which applies to all other intentional tortfeasor defendants."³²⁷ Judge Goodman wrote:

[Plaintiff] contends the general definition of an intentional tort was unconstitutionally narrowed by the Legislature because employers are now given special protections unavailable to non-employers not covered by the Act or Code, or even to co-workers covered by the Act or Code, who commit an intentional tort, as defined by the broader, tort-related definition, against a fellow employee.

We agree and find § 12 "targets for different treatment less than an entire class of similarly situated persons or things."³²⁸

Judge Goodman reasoned that the statute's disparate treatment of plaintiffs in a district-court tort action violated the Grand Bargain in workers' compensation:

Put another way, § 12 strips an intentionally-injured claimant of the rights and remedies bargained-for under the Act, compels the claimant to seek damages in district court along with other intentionally-injured plaintiffs who are not subject to the Act, yet cripples the claimant's ability to prove the elements of his claim when compared to the burden of a similarly-situated plaintiff. The

324. *Id.* slip op. at 2.

325. *Id.* slip op. at 4 & nn.5-7.

326. *Id.* slip op. at 2.

327. *Id.* slip op. at 9.

328. *Id.* slip op. at 10 (quoting *Montgomery v. Potter*, 2014 OK 118, ¶ 6, 341 P.3d 660, 661).

industrial bargain has been fundamentally altered. We hold this is incompatible with the concepts of equal protection and due process.³²⁹

Another workers' compensation issue that has significantly evolved is how Oklahoma law treats a heart attack as a compensable, work-related injury. Prior to 1971, the general rule in Oklahoma was that a heart attack in a hazardous occupation was compensable if there was a causal connection between the injury and the worker's usual job.³³⁰ The doctrine, commonly called the usual-exertion rule, was established throughout the country.³³¹ Indeed, the Oklahoma Supreme Court had used the usual-exertion rule to affirm death-benefits awards for years.³³² The court's position was aptly described in the 1968 case *Flint Construction Co. v. Downum*³³³:

This court is definitely committed to the rule that a disability attributable to a heart condition caused or precipitated by an antecedent strain or exertion occurring while the employee is doing his work in the usual and customary manner as an employee coming within the provisions of the Oklahoma Workmen's Compensation Act is compensable although nothing unusual occurred to cause the strain or exertion.³³⁴

Then the court changed the heart-attack rule. In *Ideal Cement Co. v. Oklahoma State Industrial Court*,³³⁵ the Oklahoma Supreme Court

329. *Id.* slip op. at 13-14 & n.13 (citing *Torres v. Seaboard Foods, L.L.C.*, 2016 OK 20, ¶ 6, 373 P.3d 1057, 1084 (Combs, J., concurring)).

330. Robert C. Butler, Jr., Note, *Cardiac Cases Under Oklahoma's Workmen's Compensation Act—A Rejection of the Usual Exertion Rule*, 8 TULSA L.J. 253, 253-57 (1972).

331. *See id.* at 253. Also, for an expanded discussion of Oklahoma's acceptance of the usual-exertion rule, see Larry D. Derryberry & Harry H. Selph, II, Note, *Workmen's Compensation: Recovery for Heart Attack—Waiver Needed*, 22 OKLA. L. REV. 345, 348-50 (1969). For a discussion of heart-related injuries nationally, see Arthur Larson, *The "Heart Cases" in Workmen's Compensation: An Analysis and Suggested Solutions*, 65 MICH. L. REV. 441 (1967).

332. *See, e.g.*, *Farmers Co-Op Exch. of Weatherford v. Krewall*, 1969 OK 27, ¶¶ 23-24, 450 P.2d 506, 510-11; *H.J. Jeffries Truck Line v. Grisham*, 1966 OK 242, ¶¶ 12-14, 397 P.2d 637, 641.

333. *Flint Constr. Co. v. Downum*, 1968 OK 103, 444 P.2d 200.

334. *Id.* ¶ 17, 444 P.2d at 203.

335. *Ideal Cement Co. v. Okla. State Indus. Court*, 1971 OK 75, 486 P.2d 712.

reversed a State Industrial Court decision that awarded death benefits to the widow of a worker who suffered a fatal heart attack while performing his normal clean-up job for his employer.³³⁶ The court held that in the absence of evidence of unusual strain or exertion, beyond that encountered normally, no causal connection was possible.³³⁷ The court's decision that a claimant must prove the heart attack was caused by an "accidental" work-related injury³³⁸ relied on a rationale that Professor Larson strongly denounced. He called the by-an-accident formula "one of the great tragedies of the workmen's compensation story."³³⁹ He feared that this standard would cause "genuinely work-connected injur[ies]" to go uncompensated, which, in his words, "would be a gross violation of the legislative purpose and of the workman's rights."³⁴⁰

Despite Professor Larson's concerns, the Oklahoma Legislature later codified the court's rule, requiring that the exertion producing the heart attack to be "extraordinary and unusual in comparison to other occupations and that the occupation was the major cause of the harm."³⁴¹ When the Workers' Compensation Code was adopted in 2011, the language requiring extraordinary exertion was retained, but the comparison applied only to the worker's usual tasks, not to other occupations:

"Compensable injury" means a cardiovascular, coronary, pulmonary, respiratory, or cerebrovascular accident or myocardial infarction causing injury, illness, or death, only if, in relation to other factors contributing to the physical harm, a work-related activity is the major cause of the physical harm. Such injury 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 usual work of the employee, or alternately, that some unusual incident occurred which is found to have been the major cause of the physical harm.³⁴²

336. *Id.* ¶¶ 12-14, 486 P.2d at 715.

337. *Id.* ¶ 12, 486 P.2d at 715.

338. *Id.*

339. Larson, *supra* note 331, at 441.

340. *Id.*

341. Act of June 6, 2005, ch. 1, § 9(13)(d), 2005 Okla. Sess. Laws 2339, 2361 (codified at OKLA. STAT. tit. 85, § 3(13)(b) (Supp. II 2005) (repealed 2011)).

342. OKLA. STAT. tit. 85, § 308(10)(b) (2011) (amended 2013).

A third issue that has dramatically evolved over time involves mental injuries. In 1964, the supreme court held that any “disease of the mind or body” that arose in the course of employment was not compensable unless it was accompanied by a physical injury.³⁴³ This was decided in *Keeling v. State Industrial Court*.³⁴⁴

A seamstress suffered a nervous breakdown because of pressure to meet quotas.³⁴⁵ She also blamed her posture, the way in which she was required to sit at a sewing machine, for the nervous breakdown.³⁴⁶ In denying compensability, the supreme court wrote:

In this case the distinction between a disease produced by the posture and an actual physical injury is recognized. This distinction is commented upon in the case of *Shoren v. United States Rubber Company*, where in the opinion appears the following:

“A high degree of discrimination must be exercised to determine whether the real cause of an injury is disease or the hazard of the employment. A disease, which under any rational work is likely to progress so as finally to disable the employee, does not become a “personal injury” under the act merely because it reaches the point of disablement while work for a subscriber is being pursued. It is only when there is a direct causal connection between the exertion of the employment and the injury that an award of compensation can be made.’ This distinction was more clearly marked out and compensation denied in *Maggelet’s Case*. The act, the court therein observed, ‘awards compensation for disease when it rightly may be described as a personal injury. A disease of mind or body which arises in the course of employment, with nothing more, is not within the act. It must come from or be an injury, although that injury need not be a single definite act but may extend over a continuous period of time. The disease must be, or be traceable directly to, a personal injury peculiar

343. *Keeling v. State Indus. Court*, 1964 OK 25, ¶ 12, 389 P.2d 487, 491 (quoting *In re Maggelet*, 116 N.E. 972, 972 (Mass. 1917) (syllabus)).

344. *Keeling*, 1964 OK 25, 389 P.2d 487.

345. *Id.* ¶¶ 3-4, 389 P.2d at 488.

346. *Id.* ¶ 4, 389 P.2d at 488.

to the employment.”³⁴⁷

Requiring a physical injury to accompany a mental injury in order for the mental injury to be compensable frequently led to harsh results. In *Fenwick v. Oklahoma State Penitentiary*, a psychological assistant at the Oklahoma State Penitentiary negotiated the release of three hostages in exchange for himself.³⁴⁸ “After being held hostage for approximately four and one-half hours, [the assistant] was released without physical injury,” but he later claimed a psychiatric injury consisting of “major depression, generalized anxiety disorder, and post-traumatic stress disorder.”³⁴⁹ Justice Hodges wrote for a deeply divided court:

Since the Legislature has not substantially changed the statutory definition of injury, nor has it enacted any statute which would conflict with our prior decision, we must presume that the Legislature is in agreement with our judicial interpretation. Therefore, without a legislative mandate, we decline to alter the rule that disability unaccompanied by physical injury is not compensable under the Act. The Workers' Compensation Court was correct in ruling that Claimant was not entitled to compensation.³⁵⁰

Justice Yvonne Kauger dissented from the majority, finding authority to support compensability for this narrow set of facts:

A plain reading of the applicable statutory provisions leads invariably to two conclusions: 1) psychological injury in the absence of accompanying physical trauma is not excluded from workers' compensation coverage; and 2) it never has been. The facts presented here support the conclusion that the hostage suffered accidental personal injury during the course of his employment. Under the authority of *Vanderpool v. State*, recovery should be allowed in this case, but in no others until the

347. *Id.* ¶ 13, 389 P.2d at 491 (first quoting *Shoren v. U.S. Rubber Co.*, 140 A.2d 768, 771 (R.I. 1958); and then quoting *In re Maggelet*, 116 N.E. at 974).

348. *Fenwick v. Okla. State Penitentiary*, 1990 OK 47, ¶ 2, 792 P.2d 60, 61.

349. *Id.* ¶¶ 2, 5, 792 P.2d at 61.

350. *Id.* ¶ 16, 792 P.2d at 63. The Court decided the issue 5-4, with Justices Marian Opala, John Doolin, Alma Wilson, and Yvonne Kauger dissenting. *Id.* ¶ 19, 792 P.2d at 63.

Legislature acts.³⁵¹

The legislature did act. In 2010, the definition of “injury” was amended to allow compensability of a mental injury that resulted from rape that arose out of and in the course of employment.³⁵² In the Workers’ Compensation Code adopted in 2011, the exception was expanded to “in the case of rape or other crime of violence which arises out of and in the course of employment.”³⁵³

VIII. THE CALL FOR DRASTIC CHANGE

In the first decade of the new millennium, the Oklahoma State Chamber of Commerce (State Chamber) and other business leaders called for drastic changes to the workers’ compensation system. They believed that Workers’ Compensation Court judges handed out excessive awards for PPD to injured workers. In early 2011, State Chamber vice-president Mike Seney cited statistics from the Workers’ Compensation Court’s annual reports to support his contention that the average court award for PPD rose from \$13,176 in 2001 to \$32,452 in 2010, and the average final settlement (joint petition) increased from \$11,105 to \$22,688.³⁵⁴

Shortly after she was inaugurated, Governor Mary Fallin appointed a working group to rewrite the Workers’ Compensation Act, including codifying many case-law principles established since the 1977 reform.³⁵⁵

351. *Id.* ¶ 1, 792 P.2d at 66–67 (Kauger, J., dissenting).

352. Act of June 10, 2010, ch. 452, § 1, 2010 Okla. Sess. Laws 2024, 2027 (codified at OKLA. STAT. tit. 85, § 3(13)(c) (Supp. IV 2010) (repealed 2011)).

353. Workers’ Compensation Code, ch. 318, § 8, 2011 Okla. Sess. Laws 2549, 2559 (codified at OKLA. STAT. tit. 85, § 308(10)(f) (2011) (amended 2013)).

354. *Chamber Asks for Comp Reform*, DAILY OKLAHOMAN, January 15, 2011, at 8. Indeed, statistics contained in the annual reports of the Workers’ Compensation Court for 2001 and 2010 confirmed Seney’s statement. In 2001, 11,699 cases were joint petitioned for \$129,916,643, compared to 9,335 cases in 2010 for \$211,793,320. In 2001, the court wrote 3,828 PPD orders for \$50,478,984, compared to 4,405 PPD orders in 2010 for \$142,953,284. In addition, the number of Permanent Total Disability orders rose from 46 in 2001 to 85 in 2010. *Compare* OKLA. WORKERS’ COMPENSATION COURT, 2002 ANNUAL REPORT 86 (2003), *with* OKLA. WORKERS’ COMPENSATION COURT, 2010 ANNUAL REPORT 64 (2011).

355. I was honored to be requested to draft a complete rewrite of Title 85 for the Governor’s working group that resulted in the introduction of Senate Bill 878. When passed and signed into law by Governor Fallin, the Oklahoma Workers’ Compensation Code took effect August 26, 2011. Workers’ Compensation Code, ch. 318, 2011 Okla. Sess. Laws 2549 (codified at OKLA. STAT. tit. 85, §§ 301–413 (2011) (repealed 2013)).

Without any notable controversy, Oklahoma Senate Bill 878 made its way through the legislature and onto the governor's desk.³⁵⁶

After nineteen "patch jobs" to the old law, the new Oklahoma Workers' Compensation Code was the first major rewrite of the state's workers' compensation law since 1977. *The Daily Oklahoman* summarized the hallmark provisions of the Code, saying it would:

- Require physicians and the workers' compensation court to adhere to nationally recognized treatment guidelines. The intent is to limit unnecessary surgeries and significantly reduce medical costs.
- Direct the workers' compensation court administrator to develop a schedule of medical and hospital fees intended to reduce the cost of medical care by 5 percent.
- Limit when an injured worker can change from the treating physician chosen by the employer. If surgery is recommended, the employer would have an automatic right to a second opinion to determine its necessity.
- Eliminate a penalty for employers who in good faith delay payment of medical bills while bills are being audited.
- Require physicians to disclose any ownership in other health-related businesses, hospital facilities or diagnostic centers.
- Expand a counselor or mediation program; mediators don't have to be lawyers.
- A number of provisions remove the involvement of attorneys, and the measure would give more power to the workers' compensation court administrator in reaching settlements. The administrator could approve settlements reached in mediation, without the intervention of an attorney or a judge.
- The employer must provide medical care within seven days, and employers or insurance companies would be fined for not paying medical bills promptly.
- Return the workers' compensation court to a 10-member court. A measure passed in 2010 reduced the court

356. See Michael McNutt, *Fallin Signs Bill Overhauling Workers' Compensation*, DAILY OKLAHOMAN, May 25, 2011, at 12A. Senate Bill 878 passed the Oklahoma State Senate 48-0 and the House of Representatives 88-8. *Id.*

membership to eight. Of the 10 on the court, no more than seven would be from Oklahoma City, and no fewer than three would be from Tulsa.³⁵⁷

The nationally recognized guidelines were the Work Loss Data Institute's Official Disability Guidelines (ODG).³⁵⁸ The new Code required ODG guidelines to be followed for treatment of injuries to all parts of the body except the spine.³⁵⁹ The law authorized the Physicians Advisory Committee to create Oklahoma Treatment Guidelines (OTG) for the treatment of the spine.³⁶⁰

Despite the Workers' Compensation Code's major changes and Governor Fallin's prediction that the Code would save Oklahoma employers \$30 million a year,³⁶¹ it was never given a reasonable chance to succeed. Before the ink was dry on the governor's signature, a small group of large Oklahoma companies began lobbying for additional reform. In 2012, the legislature narrowly defeated legislation that would allow employers in the state to opt out of the workers' compensation system and develop their own plans for delivering benefits.³⁶²

357. *Oklahoma Senate Bill 878 Provisions Update Workers' Compensation Guidelines*, DAILY OKLAHOMAN, May 25, 2011, at 16. For a section-by-section explanation of the Workers' Compensation Code, see Tish Sommer, *Summary of SB 878 (Enacted)*, OKLA. WORKERS' COMP. COURT (June 1, 2011), http://www.owcc.state.ok.us/PDF/LegChanges/SB878_Summary%20of%20Enacted_FINAL.pdf [https://perma.cc/SFH8-NSD6]. At the time, Sommer was Special Counsel of the Workers' Compensation Court. *Administrative Law Judges*, OKLA. WORKERS COMP. COMM'N, https://www.ok.gov/wcc/About_the_Commission/Administrative_Law_Judge_Bios/ [https://perma.cc/LK6S-5GA8]. In 2014, after the enactment of the Administrative Workers' Compensation Act (AWCA), she was appointed as the first administrative-law judge of the new Workers' Compensation Commission. *Id.*

358. *ODG State Adoptions*, WORK LOSS DATA INST., http://www.worklossdata.com/uploads/2/4/1/6/24166932/odg_state_adoptions_07-22-2016.pdf [https://perma.cc/65QA-BBB2].

359. § 26, 2011 Okla. Sess. Laws at 2573 (codified at OKLA. STAT. tit. 85, § 326 (2011) (repealed 2013)).

360. § 73(A), (B)(5), 2011 Okla. Sess. Laws at 2617 (codified at OKLA. STAT. tit. 85, § 371 (2011) (repealed 2013)).

361. Michael McNutt, *Workers' Comp Again Looms as Key Issue for Lawmakers*, OKLAHOMAN, Dec. 6, 2012, at 4B.

362. H.B. 2155, 53rd Leg., 1st Reg. Sess. (Okla. 2011). House Bill 2155 was authored by the leaders of the two houses of the legislature, House Speaker Kris Steele and Senate President Pro Tempore Brian Bingman. *Id.*

IX. MOVEMENT TO DUAL SYSTEMS

Months before the start of the 2013 legislative session, *The Oklahoman*, the state's largest newspaper, began clamoring for the legislature to abolish the Workers' Compensation Court and create an administrative system to hear disputes between employers and workers injured on the job. A November 16, 2012 editorial stated:

Tinkering at the edges of the system has had negligible impact; a restructuring of the entire system may be necessary. That's why policymakers are reportedly considering a plan to transform workers' comp into an administrative system next year, which would largely take the issue out of the courtroom and avoid the constitutional problems of past reforms.³⁶³

At a State Chamber-sponsored-legislative panel on December 5, 2012, Oklahoma Senate President Pro Tempore Brian Bingman charged that Oklahoma was no longer competitive because of workers' compensation costs.³⁶⁴ He said, "This is more important than tax reform."³⁶⁵ Bingman promised to spearhead the plan, hoping to transition to an administrative system that would replace the Workers' Compensation Court.³⁶⁶

The State Chamber announced on January 2, 2013, that its top priority was overhauling Oklahoma's workers' compensation system. Fred Morgan, the State Chamber's president, said, "We have to stop tinkering around the edges with our state's broken workers' compensation system and start over with an administrative approach that has seen much success in lowering rates in other states, all while continuing to protect the workers."³⁶⁷

Oklahoma House Speaker T. W. Shannon joined Bingman in calling for comprehensive workers' compensation reform.³⁶⁸ To provide support for the legislature, several state employers had formed the Oklahoma

363. *Same Song... Workers' Comp Costs Continue to Hurt State*, OKLAHOMAN, Nov. 16, 2012, at 8A.

364. *See* McNutt, *supra* note 361, at 4B.

365. *Id.*

366. *See id.*

367. Michael McNutt, *Chamber Targets Workers' Comp*, OKLAHOMAN, Jan. 3, 2013, at 9A.

368. McNutt, *supra* note 361, at 4B.

Injury Benefit Coalition (OIBC) in 2011.³⁶⁹ Former Oklahoma Republican Party chairman Steve Edwards was the group's legislative director.³⁷⁰

Two large Oklahoma companies urged the legislature to reform the workers' compensation system—Hobby Lobby, a national crafts and hobby supply chain founded and headquartered in Oklahoma City, and Unit Drilling, a Tulsa oil and gas firm.³⁷¹ Becky Robinson, Hobby Lobby's risk manager and OIBC's chair, summarized OIBC's concerns: "The current system is broken. It no longer functions in a way that allows employers and employees to effectively and efficiently address injury claims. It is a huge impediment to economic growth in the state. We can do better."³⁷²

Oklahoma Insurance Commissioner John Doak also called for bold legislative action. He said, "[S]everal large employers have indicated if workers' comp isn't aggressively addressed in the next legislative session, they may have no choice but to leave the state."³⁷³

The legislative vehicle for workers' compensation reform was Oklahoma Senate Bill 1062.³⁷⁴ The Bill's primary movers in the senate were Pro Tempore Bingman and Senator Anthony Sykes, chairman of the senate's Judiciary Committee.³⁷⁵ After the senate passed the Bill, Hobby Lobby's Robinson said in a prepared statement, "Today's passage . . . is an important step [in] providing Oklahoma a solution to one of the worst workers' compensation systems in the country."³⁷⁶

369. *About Us*, OIBC, <http://okibc.org/about-us/> [<https://perma.cc/TXL2-SMFX>].

370. Michael Grabell & Howard Berkes, *Inside Corporate America's Campaign to Ditch Workers' Comp*, PROPUBLICA (Oct. 14, 2015), <https://www.propublica.org/article/inside-corporate-americas-plan-to-ditch-workers-comp> [<https://perma.cc/JBS3-ZTDT>].

371. *Id.*

372. *Businesses Say Repairing Workers' Compensation System is Top Priority for 2013 Legislature*, OIBC (Jan. 8, 2013), <http://okibc.org/wp-content/uploads/2013/09/WC-Reform-Number-Top-Priority-for-2013-FINAL.pdf> [<https://perma.cc/V4AY-6WJG>].

373. *Study Shows Oklahoma Workers' Compensation Costs Remain Among Highest in Nation*, OIBC (Nov. 13, 2012), <http://okibc.org/wp-content/uploads/2013/09/National-Study-Says-OK-WC-Cost-Sixth-Highest.pdf> [<https://perma.cc/5SSC-HLAA>]. However, Commissioner Doak never identified any specific business that threatened to leave the state. *See id.*

374. S.B. 1062, 54th Leg., 1st Reg. Sess., ch. 208, 2011 Okla. Sess. Laws 862.

375. *Statement from Becky Robinson, Chair of the Oklahoma Injury Benefit Coalition on the Passage by the Oklahoma Senate of SB 1062*, OIBC (Feb. 27, 2013) [hereinafter *Statement from Robinson*], <http://okibc.org/wp-content/uploads/2013/09/OIBC-Chair-Becky-Robinson-on-Senate-Passage-of-SB-1062.pdf> [<https://perma.cc/MEQ4-GS6Q>] (thanking Senators Bingman and Sykes "for their leadership on this issue").

376. *Id.*

The Oklahoma House cut more than forty provisions from the senate-passed version before approving the measure.³⁷⁷ The Bill went back to the senate where it was approved and sent to Governor Fallin for her signature.³⁷⁸ On May 6, the governor signed the Bill, which took effect February 1, 2014.³⁷⁹ Fallin issued a statement praising the legislation:

“For decades, Oklahoma has had one of the most expensive and inefficient workers’ compensation systems in the country, a constant obstacle for business owners looking to expand operations or create more jobs,” . . . “Senate Bill 1062 completely overhauls our flawed workers’ comp system, dramatically reducing the costs to businesses and freeing up private-sector resources that can be invested in jobs rather than lawsuits.”³⁸⁰

Senate Bill 1062 included many key provisions:

- It abolished the old Workers’ Compensation Court but created a Court of Existing Claims to handle claims for injuries occurring before February 1, 2014.³⁸¹
- A Workers’ Compensation Commission of three members appointed by the Governor was created to handle injuries occurring on or after February 1, 2014. The Commission, an administrative agency under the executive branch of state government, was to hire administrative-law judges to decide disputes between employers and employees.³⁸²

377. See H.R. JOURNAL, 54th Leg., 1st Reg. Sess., at 1085–88 (Okla. 2013).

378. See S. JOURNAL, 54th Leg., 1st Reg. Sess., at 1106, 1151 (Okla. 2013); see also Michael McNutt, *Oklahoma Workers’ Compensation Measure Signed Into Law*, OKLAHOMAN (May 7, 2013, 12:00 A.M.), <http://newsok.com/article/3807094> [https://perma.cc/2EWR-6JSY].

379. Act of May 6, 2013, ch. 208, 2013 Okla. Sess. Laws 862, 975. Senate Bill 1062 was codified in the newly created title 85A as the Administrative Workers’ Compensation Act in sections 1–125, the Oklahoma Employee Injury Benefit Act in sections 200–213, and the Oklahoma Arbitration Act in sections 300–328. See §§ 1, 107, 121, 2013 Okla. Sess. Laws at 867, 941, 951. The Arbitration Act is not discussed in this review because no worker or employer has taken advantage of its complicated provisions.

380. Stephanie K. Jones, *Oklahoma Governor Signs Workers’ Compensation Overhaul*, INS. J. (May 8, 2013), <http://www.insurancejournal.com/news/southcentral/2013/05/08/291282.htm> [https://perma.cc/5XPB-E62A].

381. § 169, 2013 Okla. Sess. Laws at 973–75 (codified at OKLA. STAT. tit. 85A, § 400 (Supp. II 2013)).

382. §§ 19–20, 2013 Okla. Sess. Laws at 885–87 (codified at OKLA. STAT. tit. 85A,

- Doctors and judges had to follow the latest edition of the AMA Guides (sixth edition) when assessing an injured worker's PPD after reaching maximum medical improvement.³⁸³
- The basis for awards of PPD was reduced from 520 weeks to 350 weeks.³⁸⁴
- The TTD maximum rate was reduced from the state's average weekly wage to seventy percent of the state's average weekly wage.³⁸⁵
- Fifty provisions of the bill cut actual benefits to workers or limited rights, but no cuts in medical costs were enacted.³⁸⁶
- No PPD was allowed for workers who returned to work and

§§ 19–20 (Supp. II 2013)).

383. §§ 2(31)(a)(2)(b), 45(C)(1)–(3), 2013 Okla. Sess. Laws at 873, 905 (codified at OKLA. STAT. tit. 85A, §§ 2(31)(a)(2)(b), 45(C)(1)–(3) (Supp. II 2015)). Oklahoma's workers' compensation statutes employed the AMA Guides since the 1977 reform; however, the Guides, while mandatory, allowed for some deviation if the facts of a particular case merited it. *See Davis v. B.F. Goodrich*, 1992 OK 14, ¶ 4, 826 P.2d 587, 598–99 (Wilson, J., dissenting) (“Any deviation from the AMA Guides must be specifically provided for by the AMA Guides.”); Steven E. Hanna, *The Role of Medical Evidence and the AMA Guides in Oklahoma Workers' Compensation Cases*, 77 OKLA. B.J. 2753, 2755–56 (2006) (“The guides require extensive documentation . . . to support such a departure, but it can be done.”). Senate Bill 1062 also prohibited physicians or judges from disregarding the Guides. § 45(C)(1), (3), 2013 Okla. Sess. Laws at 905 (codified at tit. 85A, § 45(C)(1), (3)) (“A physician's opinion of the nature and extent of permanent partial disability to parts of the body other than scheduled members *must be based solely* on criteria established by the current edition of the [AMA Guides] The examining physician shall not deviate from the Guides except as may be specifically provided for in the Guides.”).

384. § 45(C)(4), 2013 Okla. Sess. Laws at 905 (codified at tit. 85A, § 45(C)(4)).

385. § 45(A)(1), 2013 Okla. Sess. Laws at 904 (codified at tit. 85A, § 45(A)(1)). This has been especially detrimental to higher paid workers, a fact that escaped the best-intentioned legislators at the time they were voting for the bill. I have been told by at least fifteen members of the legislature that they never understood the effect of that provision. For example, a highly-paid worker at an Oklahoma tire plant making \$1,150 per week was allowed to draw seventy percent of his average weekly wage, up to \$805, under the Oklahoma Workers' Compensation Code prior to 2014. However, if the same worker were injured after the effective date of the AWCA, he was limited to \$561 weekly for injuries occurring in 2014. That difference in wage replacement benefits for the worker under active medical treatment and kept off work by his physician was \$1,049.20 per month, a large reduction for working families.

386. *Cf. David Torrey, The Opt-Out of Workers' Compensation Legislation in the Southern States*, MCLE N. ENG. 2 (Nov. 20, 2015), http://www.davetorrey.info/files/Torrey.MCLE_Mass_Opt-out.10.26.15final.pdf [<https://perma.cc/9UE7-3DVT>] (“[T]he *ultimate retraction* of benefits has recently been enacted in Oklahoma.”).

refused the same or similar employment.³⁸⁷ It did not matter how serious the injury was.

- It limited total benefits for hernia injuries to six weeks, regardless of how long the worker was off work.³⁸⁸
- It limited total benefits for workers who suffered mental injuries to twenty-six weeks, even if all physicians agreed the worker could not yet return to work.³⁸⁹
- It prohibited the introduction of evidence of mental or physical stress to prove compensability of a heart attack injury.³⁹⁰
- It set a 104-week limitation on TTD regardless of whether the injured worker could return to work or was still under active medical treatment.³⁹¹

The Republican governor and the Republican super majority in both legislative houses pushed through Senate Bill 1062 despite opposition from several experts and the Oklahoma Advisory Council on Workers' Compensation, a statutory body the governor and leaders of the house and senate appoint that represents employers, workers, and medical groups.³⁹²

The Advisory Council voted 8–1 in opposition to Senate Bill 1062, and the chairman, Michael Carter, a longtime workers' compensation attorney who primarily represents employers, "called the bill 'unworkable.'"³⁹³ The Advisory Council complained that while many members agreed with some of the policy considerations, the Bill suffered from poorly written and contradictory language that weakened medical-treatment guidelines and inadequately provided for the transition from the old court system to the new administrative system.³⁹⁴

387. § 45(C)(5)(c), 2013 Okla. Sess. Laws at 905–06 (codified at tit. 85A, § 45(C)(5)(c)). This provision was found unconstitutional by the Oklahoma Supreme Court, to be discussed later in this review. *See infra* notes 443–54 and accompanying text.

388. *Id.* § 61(B)(1), 2013 Okla. Sess. Laws at 918–19 (codified at OKLA. STAT. tit. 85A, § 61(B)(1) (Supp. II 2013)).

389. *Id.* § 13(B)(1), 2013 Okla. Sess. Laws at 881–82 (codified at OKLA. STAT. tit. 85A, § 13(B)(1) (Supp. II 2013)).

390. *Id.* § 14 (B)(2), 2013 Okla. Sess. Laws at 882 (codified at OKLA. STAT. tit. 85A, § 14(B)(2) (Supp. II 2013)).

391. *Id.* § 45(A)(1), 2013 Okla. Sess. Laws at 904 (codified at tit. 85A, § 45(A)(1)).

392. Shawn Ashley, *Legislature Approves Workers Compensation Reform*, OKLA. ASSOC. OF ELEC. COOPS., <http://www.oeac.coop/custom/legislative/articles/7-213%20work%20comp.pdf> [https://perma.cc/VJ87-46BU].

393. Zeke Campfield, *Workers' Comp Bill is Called 'Unworkable,' OKLAHOMAN*, Mar. 8, 2013, at 8A.

394. *Id.*

As early as March 14, 2013, I was quoted in *The Oklahoman* predicting that many provisions of Senate Bill 1062 violated the Oklahoma Constitution and that the legislation would result in taxpayers funding dual systems for many years.³⁹⁵ A month later, after amendments were added to the Bill, I wrote an op-ed in *The Oklahoman* and called the legislation “blatantly unconstitutional” and warned that it “could literally cost taxpayers an arm and a leg while eroding the basic rights and freedoms of all Oklahoma workers in favor of corporate control.”³⁹⁶

After Democratic Representative Scott Inman called the Bill “a ‘Trojan horse for rolling back significant workers’ benefits,’ Nathan Atkins, spokesman for Senate President Pro Tempore Bingman . . . , said the bill is a good product and would withstand ‘any kind of constitutional challenge.’”³⁹⁷

As of April 2017, the Oklahoma Supreme Court, several district courts, and the Workers’ Compensation Commission have declared forty provisions of Senate Bill 1062, codified as title 85A of the Oklahoma Statutes, “unconstitutional, invalid or inoperable.”³⁹⁸ Another twenty-

395. Randy Ellis, *Chamber Disputes Claims on Cost of Workers’ Comp Changes*, OKLAHOMAN, Mar. 9, 2013, at 1A. The story centered on the response of the State Chamber of Commerce to a letter written by Michael Clingman, administrator of the Workers’ Compensation Court and former State Budget Director, Secretary of the State Election Board, and Director of the State Insurance Fund. Clingman alleged that operating a dual system would cost an extra \$20 million during the first three years. *Id.* In the news story, I was quoted as predicting that seventeen provisions of the law would be found “blatantly unconstitutional.” *Id.* I later issued a paper titled, “52 Provisions of the New Comp Law are Unconstitutional.” Bob Burke, *52 Provisions of the New Comp Law are Unconstitutional* (Mar. 18, 2013) (unpublished manuscript) (on file with author).

396. Bob Burke, *Workers’ Comp Plan Desperate, Costly*, OKLAHOMAN, Apr. 14, 2013, at 19A. For several years prior to 2013, I publicly admitted that the only thing wrong with Oklahoma’s workers’ compensation was the high average award for PPD. The cost of our medical delivery system and payment of TTD both were in acceptable ranges for both employers and injured workers. But, I could not defend the cost of PPD. Looking back, many informed observers of the Oklahoma workers’ compensation system admit that appointment of judges, not the law, was the reason for the high PPD awards. See Randy Ellis, *Workers’ Compensation Awards in Oklahoma Drop Under New Judges*, OKLAHOMAN (Feb. 18, 2013, 12:00 AM), <http://newsok.com/article/3756286> [<https://perma.cc/4C2N-UST6>] (highlighting the fact that four new judges appointed by Republican Governor Fallin were awarding \$5,092 or 15.6 percent less per average PPD order than the four judges they replaced that had been appointed by Democratic Governor Brad Henry).

397. Michael McNutt, *Workers’ Comp Bill’s Legality Disputed*, OKLAHOMAN, Mar. 22, 2013, at 10A.

398. Barbara Hoberock, *Many Provisions of 2013 Workers’ Compensation Law Have Been Tossed*, TULSA WORLD (Sept. 21, 2016, 12:01 AM), <http://www.tulsaworld.com/>

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seven provisions were being challenged as unconstitutional and are pending before the supreme court, district courts, or the Workers' Compensation Commission.³⁹⁹

The Republican leadership also ignored questions by Senate Minority Leader Sean Burrage about the lack of any reduction of medical fees in the Bill. Burrage criticized the measure as putting the entire burden of cutting costs on the injured worker and the legislature for shelving a “plan to limit medical reimbursements to 150 percent of Medicare costs,” potentially saving employers an additional twelve million dollars annually.⁴⁰⁰ “Richard Victor, executive director of the Workers' Compensation Research Institute,” an independent, not-for-profit research organization based in Cambridge, Massachusetts, “said medical costs for the workers' comp system in Oklahoma increased by 10.2 percent between 2009 and 2010, the highest cost increase in the nation.”⁴⁰¹

The Oklahoman published statistics confirming that fact.⁴⁰² The differences between the costs of certain neck and back surgeries under Medicare and the Oklahoma Workers' Compensation Fee Schedule were startling. Under workers' compensation, Oklahoma surgeons were paid 234% of Medicare for an anterior interbody fusion with discectomy and decompression; 204% of Medicare for application of a biomechanical device; and at least 183% of Medicare for a posterolateral lumbar fusion, anterior lumbar fusion, and neck fusion.⁴⁰³

Michael Clingman, former administrator of the Workers' Compensation Court and current director of the Oklahoma Coalition for Workers Rights, a worker-safety advocacy group, released a comparison of benefits for injured workers under the new Oklahoma law and those in

news/capitol_report/many-provisions-of-workers-compensation-law-have-been-tossed/article_6d72c537-ce0e-55a1-8f93-b55201f017c1.html [https://perma.cc/G5KH-HENY].

399. Bob Burke, Questionable Provisions of Title 85A Administrative Workers' Compensation Act (Nov. 8, 2014) (unpublished report) (on file with author); Bob Burke, Summary of Court Challenges to Title 85A, the Administrative Workers' Compensation Act (Sept. 14, 2016) (unpublished report) (on file with author) (monthly reports made available to members of the legislature, media, and hundreds of attorneys, adjusters, claims managers, lobbyists, physicians, and worker advocates). Updates are always available at bob@bobburkelaw.com.

400. Zeke Campfield, *Workers' Comp Bill Ignores Medical Costs*, OKLAHOMAN, Apr. 7, 2013, at 3A.

401. *Id.*

402. *See id.*

403. *Spinal Fusion Reimbursements: Workers' Comp Versus Medicare*, OKLAHOMAN, Apr. 7, 2013, at 4A.

other states.⁴⁰⁴ He concluded that Senate Bill 1062 gave Oklahoma the lowest injured-worker benefits in the nation.⁴⁰⁵

Clingman said that while the new law might be saving money, any savings come on the backs of injured workers.⁴⁰⁶ Clingman's white paper on the effects of Senate Bill 1062 argued that the reason the Bill cut Oklahoma's injured-worker benefits by perhaps fifty percent was the lethal combination of three factors: (1) mandating that administrative-law judges of the Workers' Compensation Commission only use impairment ratings listed in the sixth edition of the AMA Guides; (2) cutting the maximum number of weeks one can collect PPD from 520 to 350; and (3) setting Oklahoma's PPD rate at \$323 per week, third lowest in the nation.⁴⁰⁷ Indeed, according to Clingman's report, the new law's maximum weekly PPD benefit paled in comparison with other jurisdictions. Oklahoma's \$323 was lower than Arizona's \$768, the District of Columbia's \$1,441, Illinois's \$721, Mississippi's \$449, New Mexico's \$760, and Tennessee's \$835.⁴⁰⁸

The Bill also gave Oklahoma workers the third-lowest weekly maximum TTD benefit in the nation.⁴⁰⁹ Only Mississippi and Georgia paid injured workers less in weekly wage-replacement benefits than Oklahoma.⁴¹⁰ As of 2015, only twelve states and the District of Columbia had adopted the sixth edition of the AMA Guides to determine the amount of an injured worker's permanent impairment.⁴¹¹ The State Chamber's president, Fred Morgan, defended the inclusion of the sixth edition in Senate Bill 1062.⁴¹² "Using the AMA Guides to [evaluate] permanent impairment make[s] sense, Morgan said. 'Using trial lawyers, and their

404. Michael Clingman, *Oklahoma's Workers' Compensation Benefits, Lowest in the United States*, OCWR (Sept. 8, 2015), <http://www.ocwr.org/> [<https://perma.cc/6GFK-DFEB>].

405. Randy Krehbiel, *New Workers' Comp Law is Saving Money but at Workers' Expense, Former Administrator Claims*, TULSA WORLD (Sept. 10, 2015, 12:00 AM), http://www.tulsaworld.com/business/employment/new-workers-comp-law-is-saving-money-but-at-workers/article_801b9cd1-dcbd-5ccd-b9c9-aeaa6f2c63be.html [<https://perma.cc/5UVJ-3WUU>].

406. *Id.*

407. Clingman, *supra* note 404.

408. *Id.*

409. *Id.*

410. *Id.*

411. *Id.*

412. Krehbiel, *supra* note 405.

friendly judges, doesn't."⁴¹³

X. CONSTITUTIONAL CHALLENGES AND THEIR IMPACT

To state the obvious, the status of Oklahoma's workers' compensation law has been in limbo since the legislature enacted the Administrative Workers' Compensation Act (AWCA) in 2013. Even before the Act took effect, it was challenged in the case of *Coates v. Fallin*.⁴¹⁴ The Oklahoma Supreme Court denied a challenge that the law violated the Oklahoma Constitution's single-subject rule, but the court made it clear it would review challenges to the law's constitutionality on a case-by-case basis as issues became ripe for judicial review.⁴¹⁵

As the Commission's administrative-law judges began deciding cases, a bevy of constitutional challenges began flowing to the supreme court. One of the first disputes involved what power the Commission, an executive-branch agency, had over appointing judges and administering the Court of Existing Claims, a court of record in the judicial branch.⁴¹⁶ The legislature's goal of having one state agency handle all claims, regardless of when the injury occurred, was shot down in a short, concise order from the supreme court in *Carlock v. Workers' Compensation Commission*.⁴¹⁷ A unanimous court held, "**All aspects**⁴¹⁸ of the adjudication of claims for injuries occurring prior to February 1, 2014," shall be vested in the Court of Existing Claims.⁴¹⁹

The effect of the decision was that Oklahoma will have two workers' compensation systems well into the future, undoubtedly at an additional cost to taxpayers. The Court of Existing Claims has jurisdiction of the approximate 75,000 existing claims for injuries occurring before February 1, 2014, and the Workers' Compensation Commission has authority over all claims for injuries occurring on or after that date.⁴²⁰

413. *Id.*

414. *Coates v. Fallin*, 2013 OK 108, 316 P.3d 924.

415. *Id.* ¶ 3, 316 P.3d at 925.

416. *Carlock v. Workers' Comp. Comm'n*, 2014 OK 29, ¶ 1, 324 P.3d 408, 408.

417. *Carlock*, 2014 OK 29, 324 P.3d 408.

418. *Id.* ¶ 2, 324 P.3d at 408. Oddly, the words "all aspects" were written in bold type in the supreme court opinion, a use of emphasis I had not seen in an Oklahoma Supreme Court holding in my nearly four decades of practicing law.

419. *Id.*

420. Memorandum from Bob Burke on Estimate of Open Old Law Claims to Members of the Legislature and the Media (Feb. 1, 2015) (on file with author).

The new Workers' Compensation Commission got off to a rough start, with newspaper stories about violations of the Open Meetings Act and lawsuits filed to force the Commission to hear appeals from administrative-law judges.⁴²¹ Another writ of mandamus had to be filed against the Commission to force the use of court reporters in hearings before administrative-law judges and the Commission en banc.⁴²² Even though the AWCA required "stenographic reporting of all hearings," the Commission initially used tape recorders in an attempt to save administrative costs.⁴²³ The supreme court voted 7-2 on November 17, 2014, to assume original jurisdiction and issue the writ requiring the Commission to provide court reporters and prohibiting the Commission from using only audio recordings in lieu of a stenographer.⁴²⁴

After the Commission's executive director and two of the three members of the Commission were replaced,⁴²⁵ the dual-system's operations greatly improved, and the leadership of the Commission and the Court of Existing Claims began to cooperate. But the constitutional challenges kept coming. In *Deason v. Integris Baptist Medical Center*,⁴²⁶ the plaintiff challenged the constitutionality of a section of the AWCA that denied compensability for an infectious or communicable disease unless the disease was contracted in a hospital or "sanitarium" that treats such disease.⁴²⁷ The appeal was dismissed, and the case was settled after the legislature eliminated the restrictive language and returned to the

421. See Petition for Writ of Mandamus, *True v. Workers' Comp. Comm'n*, No. 113321 (Okla. Oct. 20, 2014). I filed a writ of mandamus to require the Commission to hear the employer's appeal of Mr. True's case, which was found compensable by the administrative-law judge. *Id.* The supreme court dismissed the writ after the Commission publicly agreed to set appeals before the Commission en banc. See Order Granting Joint Motion to Dismiss, *True v. Workers' Comp. Comm'n*, No. 113321 (Okla. Nov. 5, 2014).

422. *Williams v. Workers' Comp. Comm'n*, 2014 OK 98, ¶ 1, 339 P.3d 427, 427.

423. *Id.*

424. *Id.*

425. *Head of Oklahoma Workers' Compensation Agency to Resign*, KGOU (May 15, 2015), <http://kgou.org/post/head-oklahoma-workers-compensation-agency-resign> [<https://perma.cc/AY3R-5RXX>]; *accord Oklahoma Workers' Comp Commissioner Resigns; New Appointees Named*, *INS. J.* (Apr. 1, 2015), <http://www.insurancejournal.com/news/southcentral/2015/04/01/363123.htm> [<https://perma.cc/C8D4-27RW>]; see Tim Talley, *Oklahoma AG: Workers' Comp Commission Broke Open Meeting Act*, *INS. J.* (Aug. 7, 2014), <http://www.insurancejournal.com/news/southcentral/2014/08/07/337091.htm> [<https://perma.cc/QH99-WZME>].

426. Petition for Review, *Deason v. Integris Baptist Med. Ctr.*, No. 113648 (Okla. Feb. 10, 2015).

427. *Id.* at 1; see also OKLA. STAT. tit. 85A, § 65(D)(2) (Supp. II 2015).

requirement in the Workers' Compensation Code that contraction of an infectious or communicable disease simply had to arise out of and be in the scope of employment.⁴²⁸

When the Workers' Compensation Commission denied benefits because the worker had a pre-existing condition to the same part of the body, the Oklahoma Court of Civil Appeals reversed the Commission and held that a second injury to a body part is not necessarily an aggravation of a pre-existing condition but can be a new injury "caused solely as the result of" an accident arising out of the course and scope of employment."⁴²⁹

In *Robison Medical Resources Group v. True*,⁴³⁰ the Oklahoma Court of Civil Appeals held that the legislature, in enacting the AWCA, did not abolish the long-standing "special task" exception to the general rule that injuries sustained going to and from work are not compensable.⁴³¹ If an injury occurs because the travel was solely due to a special task for the employer, the AWCA covers it.⁴³² The court also held that if an employer paid mileage for travel to and from work, an injury occurring during such travel is compensable.⁴³³

An interesting finding in the *Robison* decision is the Court of Civil Appeals' comment about the legislature's intent to abolish certain injuries that were previously compensable under the Workers' Compensation Code. Judge Deborah Barnes wrote:

On the other hand, it appears the Legislature, in § 2(13), has expressly abolished or changed other formerly recognized exceptions. For example, under § 2(13)(b), the Legislature has expressly excluded "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." Accordingly, it would appear it is now the intent of the Legislature that an employee

428. Act of June 4, 2015, ch. 390, § 3, 2015 Okla. Sess. Laws 1554, 1563-65 (codified at OKLA. STAT. tit. 85A, § 65 (Supp. II 2015)).

429. *Gillispie v. Estes Express Lines, Inc.*, 2015 OK CIV APP 93, ¶¶ 21, 25-26, 361 P.3d 543, 549-50 (quoting OKLA. STAT. tit. 85A, § 2(9)(a) (Supp. II 2013)).

430. *Robison Med. Res. Grp. v. True*, 2015 OK CIV APP 94, 362 P.3d 1155. The court of appeals affirmed the Commission's finding of a compensable injury. *Id.* ¶ 27, 362 P.3d at 1162.

431. *Id.* ¶¶ 21-26, 362 P.3d at 1161-62.

432. *Id.* ¶ 26, 362 P.3d at 1162.

433. *Id.* ¶¶ 22-24, 362 P.3d at 1161-62.

engaged in a “dual purpose trip” no longer be compensated for injuries occurring during such travel.⁴³⁴

Does such language open the door to common-law negligence claims for injuries the AWCA specifically excludes? The worry is that if the legislature keeps trimming the list of injuries compensable under workers’ compensation, employers will be hit with more district-court claims and jury trials.

On March 1, 2016, the Oklahoma Supreme Court released its decision in *Torres v. Seaboard Foods, L.L.C.*,⁴³⁵ a challenge to the constitutionality of a section of the AWCA that excluded claims for cumulative trauma unless a worker was employed for a minimum of 180 days.⁴³⁶

The unanimous *Torres* decision, which one nationally renowned workers’ compensation expert hailed as the most important workers’ compensation opinion a state supreme court has released in twenty-five years,⁴³⁷ held that the 180-day limitation violated the due process provision in the Oklahoma Constitution⁴³⁸ because the limitation was “not rationally related to [the] legitimate State interests of (1) preventing workers’ compensation fraud and (2) decreasing employers’ costs.”⁴³⁹

Justice James Edmondson wrote the court’s opinion, which will have impacts far beyond just the viability of the 180-day cumulative-trauma limitation with its holding that an arbitrary legislative limitation that shifts the economic burden to the injured worker without a legitimate state interest was a violation of due process. Justice Edmondson wrote:

[I]t is clear that a State’s legitimate interests in regulating business practices are not exempt from the requirements of substantive Due Process. The Court essentially held that the imposition of arbitrarily imposed economic liability violated due process. When the Legislature decreases workers’ compensation liability (and

434. *Id.* ¶ 24, 362 P.3d at 1161–62 (quoting tit. 85A, § 2(13)(b)).

435. *Torres v. Seaboard Foods, L.L.C.*, 2016 OK 20, 373 P.3d 1057.

436. *Id.* ¶ 5, 373 P.3d at 1062.

437. Statement of Alan S. Pierce, Pierce, Pierce & Napolitano of Salem, Mass., April 3, 2016. Pierce is the former president of the Workers’ Injury Law & Advocacy Group, the most prominent national association of lawyers representing injured workers. *See Officers, WORKERS’ INJ. L. & ADVOC. GRP.*, <https://www.wilg.org/index.cfm?pg=Officers> [<https://perma.cc/7X2H-C4Y5>].

438. OKLA. CONST. art. II, § 7.

439. *Torres*, 2016 OK 20, ¶¶ 54–55, 373 P.3d at 1081.

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costs) for the class of employers by barring an injured employee from filing a claim, such legislation also increases potential economic liability to employees and increased economic risk allocation by a diminished duty owed to the employees. In other words, the creation of an *arbitrarily* designed employer immunity by shifting economic loss to an innocent injured employee would also violate State and federal Due Process.⁴⁴⁰

The State Chamber, in its amicus curiae brief, contended that the AWCA served a legitimate state interest by lowering employers' costs.⁴⁴¹ The supreme court, for the purpose of its analysis, assumed that cutting costs for employers was a legitimate state interest, but the court still found the limitation unconstitutional:

[The State Chamber and employer's] argument repeats a similar flaw. They argue a rational basis for legislation is shown if the purpose of a statute, as articulated by a legitimate State interest, is accomplished in any degree regardless of the irrationality of the classifications created by the statute. Their first argument is that a statute with a purpose to decrease workers' compensation fraud is constitutional if workers' compensation fraud is, or potentially will be, decreased in any degree by operation of the statute. Their second argument using the legitimate State interest in lowering costs to employers becomes: A statute with a purpose to lower an employer's costs is constitutional if employer's costs are, or potentially will be, decreased in any degree by operation of the statute. Just as their first argument fails to include concepts of overinclusive and underinclusive constitutional flaws in statutes receiving a rational basis review, so does their second argument. We decline their invitation to adopt their position that class distinctions between employees with similar injuries is rationally related to a legitimate State interest although principles of underinclusiveness and overinclusiveness show irrationality in the classification.⁴⁴²

Six weeks after the *Torres* decision, on April 12, 2016, the supreme

440. *Id.* ¶ 36, 373 P.3d at 1076.

441. *Id.* ¶ 46, 373 P.3d at 1079.

442. *Id.* ¶ 47, 373 P.3d at 1079.

court released another important decision in the case *Maxwell v. Sprint PCS*,⁴⁴³ a constitutional challenge of an AWCA section that “deferred” an award of PPD if the injured worker returned to work or was fired for cause.⁴⁴⁴ The effect of the statute was that, except for an amputation, an injured worker’s PPD award from the Commission was deferred and decreased “by seventy percent . . . of the employee’s average weekly wage” for every week the worker was employed after returning to the same or an equivalent job.⁴⁴⁵ Further, if the employee either refused to return to the same or an equivalent job or was fired for “misconduct,” as broadly defined in the AWCA,⁴⁴⁶ the award was also deferred or decreased.⁴⁴⁷ For example, as originally calculated, Ms. Maxwell’s award for her PPD would have been completely depleted seven weeks after she returned to work.⁴⁴⁸

Justice Noma Gurich, writing for a 7–2⁴⁴⁹ majority, opined that the PPD-deferral provision, or PPD “forfeiture” provision, as the opinion more candidly put it, “tramples the due process rights of injured workers.”⁴⁵⁰ The court held that workers have a property right in a PPD award that, under both the state and federal constitutions, cannot be

443. *Maxwell v. Sprint PCS*, 2016 OK 41, 369 P.3d 1079. *Maxwell* and three other cases, all challenging the same section of the AWCA, were consolidated for consideration by the supreme court, which held a rare oral argument on September 30, 2015. *Id.* ¶ 2 & n.1, 369 P.3d at 1083 & n.1; cf. Joseph T. Thai & Andrew M. Coats, *The Case for Oral Arguments in the Supreme Court of Oklahoma*, 61 OKLA. L. REV. 695, 698 & n.12 (2008) (“[I]n the last decade, the Court heard barely more than a dozen oral arguments out of more than a thousand published cases.”). Other issues, not constitutional in nature, were also decided in favor of the injured worker. See *Maxwell*, 2016 OK 41, ¶ 31, 369 P.3d at 1094.

444. *Maxwell*, 2016 OK 41, ¶ 11, 369 P.3d at 1087.

445. OKLA. STAT. tit. 85A, §§ 45(C)(5) (Supp. II 2015); see also OKLA. STAT. tit. 85A, § 46(B) (Supp. II 2013).

446. See OKLA. STAT. tit. 85A, § 2(30) (Supp. II 2013).

447. § 45(C)(5)(b)–(c).

448. See *Maxwell*, 2016 OK 41, ¶ 2, 369 P.3d at 1082–83 (stating that the administrative-law judge ordered that her award of \$2,261.00 was to be reduced by \$323.00 per week worked).

449. *Id.* ¶¶ 32–34, 369 P.3d at 1094. As in this case, in several other decisions interpreting the 2013 reforms, Justices Winchester and Taylor were the only dissenting votes. See *Vasquez v. Dillard’s Inc.*, 2016 OK 89, 381 P.3d 768 (Winchester and Taylor, JJ., dissenting). In *Maxwell*, Justices Watt and Colbert only dissented in part because they thought the majority should have declared several other provisions unconstitutional as well. See *Maxwell*, 2016 OK 41, ¶¶ 1, 7–8, 369 P.3d at 1095–96 (Colbert and Watt, JJ., concurring in part, dissenting in part).

450. *Maxwell*, 2016 OK 41, ¶¶ 25, 27, 369 P.3d at 1092–93 (majority opinion).

forfeited without due process.⁴⁵¹ Illustrating the constitutional flaws with this provision, Justice Gurich wrote:

Under the deferral scheme, an employee's permanent partial disability award is *not* deferred upon his or her termination for misconduct—it is deferred immediately upon the return to work. Therefore, an employee could not “reap rewards in the form of disability payments” based upon a subsequent termination as the Attorney General suggests. As the deferral provision is written, the employer is encouraged to allow the injured worker to return to work only until the deferred award is exhausted. The deferral provision then incentivizes the employer to terminate the employee for misconduct—a very broadly defined term under the AWCA. So after re-employing the injured worker for only a short time, the employer pays no permanent partial disability benefits to an employee who was admittedly injured on the job *and* the employer may “legally” rid himself of the undesirable employee. Termination for misconduct becomes a second-stage defense to avoid paying an award for an admitted or adjudicated compensable injury that occurred in the course and scope of employment.⁴⁵²

In addition to ruling the PPD-forfeiture provision unconstitutional, the *Maxwell* decision pointed out that the statute may have exposed Oklahoma employers to not only paying for PPD benefits but also benefits for loss of future earnings. Justice Gurich noted that the legislature, in the AWCA, changed the definition of PPD from the loss of function of an injured part of the body to the loss of earning capacity:

Under the AWCA, the newly defined term “[d]isability” is defined as “incapacity because of compensable injury to earn, in the same or any other employment, substantially the same amount of wages the employee was receiving at the time of the compensable injury[.]” Additionally, permanent partial disability is now defined as “a permanent disability or loss of use after maximum medical improvement has been reached which prevents the injured employee, who has been released to return to work by

451. *Id.* ¶¶ 15–21, 369 P.3d at 1089–90.

452. *Id.* ¶ 24, 369 P.3d at 1091–92 (footnote omitted).

the treating physician, from returning to his or her pre-injury or equivalent job. All evaluations of permanent partial disability must be supported by objective findings[.]” According to this definition, permanent partial disability is no longer a mere equivalent to physical impairment or functional disability unrelated to industrial performance. The above statutory language suggests the Legislature intended for permanent partial disability to be based solely on loss of earning capacity with no consideration as to the physical insult to the employee’s body.⁴⁵³

The *Maxwell* decision also stands for the proposition that forbidding PPD to workers who return to work violates the Oklahoma Constitution as a special law that provides disparate treatment to members of the same class:

Under the AWCA, the Legislature has arbitrarily determined that employees who suffer injuries to scheduled members and who receive permanent partial disability awards under § 46(A) are unable to return to work, and thus, entitled to receive the permanent partial disability award. But even an employee who suffers the total loss of use of a hand, for example, may in some circumstances be able to return to his or her pre-injury job. We find no valid reason for the differential treatment of injured employees under § 46(A) and § 46(C). Although the Legislature has the power to exclude classes of employees from coverage under the workers’ compensation system generally, the Legislature is without power to vary the effect of a permanent partial disability award by excluding one group of claimants from benefits accorded other permanent partial disability recipients. The deferral of permanent partial disability benefits to a subclass of injured workers is an unconstitutional special law under Art. 5, § 59 of the Oklahoma Constitution.⁴⁵⁴

One week later, in *Robinson v. Fairview Fellowship Home for Senior Citizens, Inc.*,⁴⁵⁵ the supreme court held that the Workers’ Compensation

453. *Id.* ¶ 13, 369 P.3d at 1088 (alterations in original) (footnotes omitted) (quoting OKLA. STAT. tit. 85A, §§ 2(16), (34) (Supp. II 2013)).

454. *Id.* ¶ 30, 369 P.3d at 1093-94 (footnote omitted).

455. *Robinson v. Fairview Fellowship Home for Senior Citizens, Inc.*, 2016 OK 42, 371

Commission, in its quasi-judicial adjudicatory function, has the authority to rule on the constitutionality of a section of the AWCA if that section has a bearing upon the worker's rights in an individual case.⁴⁵⁶

What followed was a flurry of new constitutional attacks on the AWCA. In one of these, the supreme court, in a 6–3 decision, rejected the legislature's attempt to exclude parking lot injuries.⁴⁵⁷ After the high court denied certiorari in *Wonder Bread v. Smith*,⁴⁵⁸ the Oklahoma Court of Civil Appeals found the question of whether employment was a “major cause” of an injury is irrelevant when assessing an injured worker's “need for a certain type of medical treatment”⁴⁵⁹:

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

. . . . [A]n [Independent Medical Examiner (IME)] may properly opine whether a claimant's employment is the major cause of a claimant's injury; it may not opine whether that employment is the major cause of the need for a specific course of medical treatment.⁴⁶⁰

In more than one of these opinions, Oklahoma appellate courts sidestepped constitutional challenges using statutory interpretation to rule in favor of the injured worker, a procedure that was looked upon unfavorably by concurring judges or justices.⁴⁶¹

At the time of writing, there are at least nine significant constitutional

P.3d 477.

456. *Id.* ¶ 15, 371 P.3d at 484.

457. *Bober v. Okla. State Univ.*, 2016 OK 78, ¶¶ 1, 11, 378 P.3d 562, 562, 565 (interpreting OKLA. STAT. tit. 85A, § 2(13)(c) (Supp. II 2013), which exempted from coverage injuries that occur in parking lots or common areas “adjacent” to employers premises). The majority opinion strictly construed the language set out in section 2(13)(c) by holding that an employer-owned parking lot or sidewalk is not “adjacent to the [employer's] premises” but is in fact “the employer's premises.” *Id.* ¶¶ 9–11, 378 P.3d at 564–65.

458. *Wonder Bread v. Smith*, No. 113943 (Okla. Civ. App. Dec. 1, 2015).

459. *Id.* slip op. at 11.

460. *Id.* slip op. at 11–12.

461. *See Bober*, 2016 OK 78, ¶ 1, 378 P.3d 562, 565 (Colbert, J., concurring) (“I write separately, however, to express my concern in the majority's continued side-stepping of constitutional challenges properly raised before this Court.”).

challenges of the AWCA pending before the supreme court or the Workers' Compensation Commission: (1) the section moving jurisdiction for workers' compensation retaliatory-discharge claims from district court to the Commission;⁴⁶² (2) the statute allowing an employer to deduct the cost of vocational rehabilitation from a worker's PPD award;⁴⁶³ (3) the provision that cuts off all future benefits for a worker who misses two or more medical appointments without a valid excuse;⁴⁶⁴ (4) the provision that denies medical and PPD benefits to a worker who is later incarcerated;⁴⁶⁵ (5) the statute that limits total benefits in a hernia injury to six weeks;⁴⁶⁶ (6) the provision that mandates exclusive use of the AMA Guide's sixth edition to evaluate PPD;⁴⁶⁷ (7) the provision that limits TTD to 104 weeks;⁴⁶⁸ (8) the provision reducing the maximum TTD rate as an arbitrary limit that shifts the economic burden to the injured worker;⁴⁶⁹ and (9) a challenge to the AWCA based on *Maxwell* that attempts to gain an award for both PPD and loss of earning capacity.⁴⁷⁰

462. Amended Petition in Error, *Young v. Station 27, Inc.*, No. 113334 (Okla. filed Jan. 20, 2015) (challenging OKLA. STAT. tit. 85A, § 7(B) (Supp. II 2013)).

463. Notice of Constitutional Challenges and Brief in Support Thereof, *Reiner v. Harsco Corp.*, No. CM2014-09799A (Okla. Workers' Comp. Comm'n filed June 13, 2016) (challenging OKLA. STAT. tit. 85A, § 45(E)(8) (Supp. II 2015)).

464. Petition for Review, *Gibby v. Hobby Lobby Stores, Inc.*, No. 114065 (Okla. filed June 26, 2015) (challenging OKLA. STAT. tit. 85A, § 57 (Supp. II 2013)).

465. Notice of Constitutional Challenge and Brief in Support, *Ware v. BC Steel*, No. CM2014-09975A (Okla. Workers' Comp. Comm'n filed May 31, 2016) (challenging OKLA. STAT. tit. 85A, § 94 (Supp. II 2013)).

466. Notice of Constitutional Issues and Brief in Support, *Graham v. D & K Oilfield Servs.*, No. CM2016-02878J (Okla. Workers' Comp. Comm'n filed May 18, 2016) (challenging OKLA. STAT. tit. 85A, §§ 5(c), 61 (Supp. II 2013)).

467. Appeal to the Workers' Compensation Commission, *Hill v. Am. Med.*, No. CM2015-1094H (Okla. Workers' Comp. Comm'n filed Aug. 3, 2016) (challenging OKLA. STAT. tit. 85A, § 2(31), (33), (Supp. II 2013) and OKLA. STAT. tit. 85A, § 45(C) (Supp. II 2015)); Appeal to the Workers' Compensation Commission, *Jared Upton v. City of Tulsa*, No. CM2014-07767R (Okla. Workers' Comp. Comm'n filed Aug. 3, 2016) (same).

468. Notice of Constitutional Challenge and Brief in Support, *Foote v. HK & S Iron Co. Inc.*, No. CM2014-08292R (Okla. Workers' Comp. Comm'n filed May 17, 2016) (challenging § 5(c) and § 45(A)(1)).

469. Response to Claimant's Notice of Constitutional Challenge to Limitation of Weekly Temporary Total Disability Maximum at 2, *Hernandez-Bercerra v. Rite-Way Constr.*, No. CM2015-01763-A (Okla. Workers' Comp. Comm'n filed June 30, 2016) (challenging § 45(A)(1)).

470. See generally Entry of Appearance, *Edwards v. United Parcel Serv.*, No. CM2016-02082X (Okla. Workers' Comp. Comm'n filed May 31, 2016); Motion for Award of Both Permanent Partial Disability and Loss of Earning Capacity, and Brief in Support Thereof, *Purgason v. J & L Oilfield Servs.*, No. CM2014-05169X (Okla. Workers' Comp. Comm'n

XI. THE NATIONAL SPOTLIGHT ON OKLAHOMA'S OPT OUT

Opt out, the ability of an employer to withdraw from a state's workers' compensation system and develop its own benefit plan, was legal only in Texas until Oklahoma's legislature passed Oklahoma Senate Bill 1062 in 2013.⁴⁷¹ *Opt out* is perhaps an imprecise term when referring to Texas because that state does not require its employers to carry insurance against employee injuries in the first place.⁴⁷² It is the only state that does not hold an employer legally responsible for injuries to its employees by default.⁴⁷³ Texas employers have three options: (1) forego insurance; (2) cover employees with a benefit plan; or (3) "opt in" to the Texas workers' compensation system.⁴⁷⁴

The 2012 Oklahoma Legislature narrowly defeated an opt-out provision, but its supporters came back with strength in numbers in 2013.⁴⁷⁵ The OIBC made passage of the Oklahoma Employee Injury Benefit Act (OEIBA) its priority.⁴⁷⁶ The OEIBA, with its opt-out provision, was introduced as part of the Senate Bill 1062 reform package.⁴⁷⁷

Joining Hobby Lobby and Unit Drilling in pushing for opt-out legislation were some of the state's leading employers: "Quik Trip, . . . Sysco, Express Employment Professionals, Reasor's, Sonic, Melton Truck Lines, CompChoice, Advance-Pierre Foods, ResCare, ACME Fan,

filed July 15, 2016).

471. Michael Grabell & Howard Berkes, *Corporate Campaign to Ditch Workers' Comp Stalls*, PROPUBLICA (Feb. 29, 2016, 6:03 PM), <https://www.propublica.org/article/corporate-campaign-to-ditch-workers-comp-stalls> [<https://perma.cc/ZL7V-TJZ2>].

472. See Jason Ohana, Note, *Texas Elective Workers' Compensation: A Model of Innovation?*, 2 WM. & MARY BUS. L. REV. 323, 339-40 (2011).

473. Meagan Flynn, *Don't Fall Down on the Job in Texas: Employers Don't Have to Provide Injury Coverage*, HOUSTONPRESS (Feb. 2, 2016, 5:00 AM), <http://www.houstonpress.com/news/don-t-fall-down-on-the-job-in-texas-employers-don-t-have-to-provide-injury-coverage-8120319> [<https://perma.cc/JMF8-6NSX>].

474. SZYMENDERA, *supra* note 44, at 26.

475. *Oklahoma House Defeats Workers Comp. Opt-Out Measure*, YAHOO! (Apr. 26, 2012, 10:47 AM), <https://www.yahoo.com/news/okla-house-defeats-workers-comp-144733306.html> [<https://perma.cc/V3EY-7BAB>].

476. *Businesses Say Repairing Workers' Compensation System is Top Priority for 2013 Legislature*, OIBC (Jan. 8, 2013) [hereinafter *Top Priority*], <http://okibc.org/wp-content/uploads/2013/09/WC-Reform-Number-Top-Priority-for-2013-FINAL.pdf> [<https://perma.cc/9MQ7-VZ8S>].

477. Act of May 6, 2013, ch. 208, §§ 107-120, 2013 Okla. Sess. Laws 862, 941-51 (codified at OKLA. STAT. tit. 85A, §§ 200-213 (Supp. II 2013)).

Brookdale Senior Living, Dollar General, Regis, AutoZone, . . . and Best Buy.⁴⁷⁸ In addition, the State Chamber made passage of an opt-out provision its priority.⁴⁷⁹

In announcing its push to pass an opt-out provision in the 2013 legislative session, the OIBC issued a press release claiming that opt-out legislation would “result[] in better medical outcomes, allow[] companies . . . to increase the efficiencies of their operations, and provide the state with an important economic advantage in the race to attract and retain jobs.”⁴⁸⁰ According to “Chris Davis, president of SYSCO Oklahoma and a member of OIBC, . . . ‘The companies that support this alternative strive to be great places to work. They would not support such an approach if it weren’t the right thing to do for their employees.’”⁴⁸¹

When Senate Bill 1062 passed the senate with the opt-out scheme intact, Hobby Lobby risk-manager Becky Robinson said, “SB 1062 takes the best parts of an administrative system approach and combines it with a stronger version of the Texas opt-out option to provide a fair and balanced Oklahoma solution.”⁴⁸² Robinson thanked Senators Brian Bingman and Anthony Sykes for “the months of work that they and their staffs have committed to developing an Oklahoma solution.”⁴⁸³

Proponents described the opt-out legislation as a benefit plan for injured workers similar to employer-health-insurance plans.⁴⁸⁴ Each employer would set its own benefits, with the benefit-plan administrator settling most claims rather than the Workers’ Compensation Commission.⁴⁸⁵ The father of the opt-out scheme is Bill Minick, a Dallas, Texas, attorney and founder of PartnerSource, a company that has successfully provided services for years to companies wanting to opt out in the Lone Star state and develop their own benefit plans.⁴⁸⁶ These plans must comport with the Employment Retirement Income Security Act of

478. *Oklahoma Senate Adopts Workers’ Compensation Alternative That Will Help Retain Jobs*, OIBC (Apr. 18, 2012, 5:49 PM), <http://www.prnewswire.com/news-releases/oklahoma-injury-benefit-coalition-oklahoma-senate-adopts-workers-compensation-alternative-that-will-help-retain-jobs-and-protect-workers-148000625.html> [<http://perma.cc/A3NJ-ANCL>].

479. *Id.*

480. *Top Priority*, *supra* note 476.

481. *Id.*

482. *Statement from Robinson*, *supra* note 375.

483. *Id.*

484. *See id.*; *Top Priority*, *supra* note 476.

485. *See Top Priority*, *supra* note 476.

486. *See Grabell & Berkes*, *supra* note 370.

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1974 (ERISA),⁴⁸⁷ a federal law that establishes minimum standards for pension plans in private industry and provides extensive rules to govern employee-benefit plans.⁴⁸⁸

The OEIBA, which the legislature passed and Governor Mary Fallin signed into law, allowed Oklahoma employers to opt out of the workers' compensation system if they satisfied the Oklahoma Insurance Commissioner's requirements to become a "Qualified Employer."⁴⁸⁹ Once recognized as such, a Qualified Employer was free to develop its own benefit plan.⁴⁹⁰

The OEIBA required employers to provide comparable benefits to those available in the regular workers' compensation system:

The benefit plan shall provide for payment of the same forms of benefits included in the Administrative Workers' Compensation Act for temporary total disability, temporary partial disability, permanent partial disability, vocational rehabilitation, permanent total disability, disfigurement, amputation or permanent total loss of use of a scheduled member, death and medical benefits as a result of an occupational injury, on a no-fault basis, with the same statute of limitations and with dollar, percentage, and duration limits that are at least equal to or greater than the dollar, percentage, and duration limits contained in Sections 45, 46 and 47 of this [title].⁴⁹¹

Yet more than sixty Oklahoma Qualified Employers failed to achieve "the same forms of benefits" during the first two-and-a-half years of the opt-out scheme.⁴⁹² The difference in benefits between the AWCA and opt-

487. Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1461 (2012).

488. 29 U.S.C. § 1001 (2012).

489. OKLA. STAT. tit. 85A, §§ 202, 201(A)(8) (Supp. II 2013).

490. § 202(A)(2); *see also* OKLA. STAT. tit. 85A, § 203(A) (Supp. II 2015).

491. § 203(B).

492. Before the 2015 legislature deemed opt-out plans on file at the Insurance Commissioner's office to be an exception to an Open Records Act request, Act of June 4, 2015, ch. 390, sec. 4, § 110, 2015 Okla. Sess. Laws 1554, 1565-66 (amending tit. 85A, § 203), I obtained copies of the benefit plans for each of the sixty companies then designated as qualified employers. A provision-by-provision comparison with the AWCA and an analysis of each plan was prepared and widely distributed to Oklahoma and national media. *See, e.g.*, Bob Burke, Anatomy of an Oklahoma Opt Out Benefit Plan #1 (May 9, 2015) [hereinafter Benefits Plan #1] (unpublished report) (on file with author); Bob Burke,

out benefit plans was striking. The statute of limitations under the AWCA is generally one year,⁴⁹³ yet an employee under an opt-out plan had to report an accident within twenty-four hours and in some cases before the end of the shift on which the injury occurred.⁴⁹⁴

In the majority of opt-out plans, at least fifty benefits were reduced compared to the AWCA.⁴⁹⁵ For example, Social Security disability and retirement benefits were not deducted from AWCA benefits for TTD, PPD, and Permanent Total Disability weekly benefits.⁴⁹⁶ But in an opt-out plan, any money received from Social Security for disability, retirement, or death benefits was deducted from the amount of compensation the employer owed in both injury and death claims.⁴⁹⁷

Even more troubling was what the opt-out plans did *not* cover. Traditional injuries covered under workers' compensation such as carpal tunnel and other cumulative trauma injuries; exposure to mold, mildew, and chemicals; contraction of contagious diseases; and exposure to asbestos were not covered by opt-out plans.⁴⁹⁸ In addition, under opt-out plans, the employer completely controlled medical treatment, including the selection of every doctor and surgeon.⁴⁹⁹

Opt-out plans also allowed the employer to unilaterally control claim settlement.⁵⁰⁰ The employer would select a doctor and an actuary to determine the cost of future medical care—the worker would have no

Anatomy of an Oklahoma Opt Out Benefit Plan #2 (May 14, 2015) (unpublished report) (on file with author); Bob Burke, Anatomy of an Oklahoma Opt Out Benefit Plan #5 (May 16, 2015) (unpublished report) (on file with author); Bob Burke, Anatomy of an Oklahoma Opt Out Benefit Plan #3 (May 18, 2015) (unpublished report) (on file with author); Bob Burke, Anatomy of an Oklahoma Opt Out Benefit Plan #4 (May 18, 2015) (unpublished report) (on file with author).

493. OKLA. STAT. tit. 85A, § 69(A) (Supp. II 2013).

494. *E.g.*, Benefits Plan #1, *supra* note 492.

495. *Id.* Because Minick wrote “nearly 90 percent” of the opt-out-benefit plans in Oklahoma, Grabell & Berkes, *supra* note 370, it is unsurprising that there are substantial similarities between plans.

496. *Cf.* OKLA. STAT. tit. 85A, § 10 (Supp. II 2013) (providing that no claims or garnishments can be made against a workers' compensation award for anything other than child-support obligations); OKLA. STAT. tit. 85A, § 45 (Supp. II 2015) (fixing the rates for the different disability levels and making no mention of any reductions based on retirement or Social Security benefits).

497. *E.g.*, Benefits Plan #1, *supra* note 492.

498. *Id.*

499. *Id.*; *see also* Grabell & Berkes, *supra* note 370.

500. *See* Grabell & Berkes, *supra* note 370.

input.⁵⁰¹ If the worker refused the settlement offer, he or she was cut off from any future benefit under the plan.⁵⁰²

When the coverage differences between opt-out plans and traditional workers' compensation came to light in early 2015, National Public Radio (NPR) and an investigative news organization, ProPublica, featured several Oklahoma workers and highlighted how the coverage differences and the reduced benefits under the 2013 AWCA impacted injured workers. The NPR and ProPublica investigation uncovered numerous problems:

1. The benefits available under Oklahoma opt-out plans were impecunious, even though they were supposed to be "of the same forms," as those found in the state's workers' compensation law. For example, one Oklahoma plan would not cover illness from mold exposure, bacterial infection, or asbestos exposure.⁵⁰³
2. Technicalities could easily bar serious claims. For example, some Oklahoma plans required that the worker report his or her injury by the end of the shift, or the claim was barred.⁵⁰⁴
3. The State of Oklahoma failed to effectively regulate these new operations. For example, when the journalists contacted the Oklahoma Insurance Commissioner about plans that were obviously not complying with the law, they were told that the Commissioner had no power over such things.⁵⁰⁵ An Oklahoma official stated that his job was to "confirm" an opt-out plan, not to "approve" one.⁵⁰⁶

In sum, the benefits afforded injured workers under opt-out were by no means equivalent to benefits under traditional workers' compensation.⁵⁰⁷

When the U.S. Department of Labor was presented with information about opt-out plans, then-Secretary Thomas Perez launched an investigation. Perez called opt-out plans a disturbing trend and said he would use his agency's bully pulpit to fight it:

"What opt-out programs really are all about is enabling

501. *Id.*

502. *Id.*

503. *See id.*

504. *Id.*

505. *Id.*

506. *Id.*

507. *See id.*

employers to reduce benefits.” . . . Opt-out programs “create really a pathway to poverty for people who get injured on the job.”

. . . .

“If you work in a full-time job, you ought to be able to put food on the table.” . . . “If you get hurt on the job, you still should be able to put food on the table, and these laws are really undermining that basic bargain.”⁵⁰⁸

As Judge Torrey has put it, opt out “is the ultimate *backslide*.”⁵⁰⁹ Both Torrey’s and Perez’s words echo those Theodore Roosevelt bellowed from the original bully pulpit 110 years earlier:

It is a great social injustice to compel the employee, or rather the family of the killed or disabled victim, to bear the entire burden of such an inevitable sacrifice. . . . [S]ociety shirks its duty by laying the whole cost on the victim, whereas the injury comes from what may be called the legitimate risks of the trade. Compensation for accidents or deaths due . . . to the actual conditions under which that industry is carried on, should be paid . . . by those who profit by the industry.⁵¹⁰

Today that burden is also laid on the taxpayers.⁵¹¹ The federal government became interested in opt-out schemes over concerns that employers will use benefit plans to shift their costs of caring for injured workers onto Medicare, Medicaid, and Social Security.⁵¹²

In 2015, attorneys for Jonnie Vasquez, an employee of Dillard’s Department Stores, filed a constitutional challenge to Dillard’s opt-out plan after an employer-selected appeals panel denied her benefits for an injury suffered on the job.⁵¹³ When Vasquez filed her claim with the Workers’ Compensation Commission, Dillard’s tried to remove the case

508. Howard Berkes, *Labor Secretary Calls Workers’ Comp Opt-Out Plans a ‘Pathway to Poverty*,’ NPR (Mar. 25, 2016, 1:29 PM), <http://www.npr.org/sections/thetwo-way/2016/03/25/471849458/labor-secretary-calls-workers-comp-opt-out-plans-a-pathway-to-poverty> [<https://perma.cc/YE6G-BNKQ>].

509. Torrey, *supra* note 386, at 17.

510. Theodore Roosevelt, President’s Annual Message, 41 CONG. REC. 26 (1906).

511. OBLIGATIONS, *supra* note 45, at 3 (faulting the benefit-cutting measures adopted in some states for “further burdening the federal Medicare and Social Security Disability Insurance programs”).

512. Torrey, *supra* note 386, at 16. For thorough analyses of the national impact of opt out, see generally Torrey, *supra* note 386, and Duff, *supra* note 3.

513. Vasquez v. Dillard’s Inc., 2016 OK 89, ¶¶ 2–3, 381 P.3d 768, 770–71.

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to federal district court in the Western District of Oklahoma, alleging that ERISA should govern a worker's benefits and not the Workers' Compensation Commission.⁵¹⁴ On September 30, 2015, United States District Judge Stephen P. Friot remanded the case to the Workers' Compensation Commission.⁵¹⁵

In February 2016, the Commission heard oral arguments from attorneys for Vasquez and Dillard's.⁵¹⁶ On February 26, the Commission issued an order unanimously finding the OEIBA inoperable because its key provision was unconstitutional:

Although at first blush it appears that the Opt-Out Act requires that injured workers under an authorized benefit plan must be afforded benefits equal to or better [than] those under the Administrative Workers' Compensation Act, this is decidedly not so. A closer look at the statutorily authorized plan requirements reveals that the benefit plans permitted to be used to opt-out establish a dual system under which injured workers are not treated equally.

The appearance of equal treatment under the dual system is like a water mirage on the highway that disappears upon closer inspection.⁵¹⁷

The Commission declared the provision unconstitutional because it violated article V, section 59 of the Oklahoma Constitution:

We conclude that the statute is **not** a valid special law, as we can conceive of no rational basis upon which to establish a separate system for providing workers' compensation benefits under which a subclass of injured workers is subjected to a Benefit Plan in which their employer, by defining "injury" as authorized under the Act, can determine when it will be liable and when it will not be liable, by excluding from the definition of injury the damages

514. *Vasquez v. Dillard's Inc.*, No. CIV-15-0861-F, 2015 WL 9906300, at *1 (W.D. Okla. Sept. 30, 2015).

515. *Id.* at *2. The case continued before the Workers' Compensation Commission under No. CM2014-11060L.

516. *Vasquez*, 2016 OK 89, ¶ 3, 381 P.3d at 770-71.

517. Commission Order paras. 17-18, *Vasquez v. Dillard's Inc.*, CM2014-11060L (Okla. Workers' Comp. Comm'n), *aff'd*, *Vasquez*, 2016 OK 89, 381 P.3d 768.

or harm to *their workers* for which it will not be responsible.⁵¹⁸

NPR reported the Commission's decision in *Vasquez*: "A campaign by some of America's biggest companies to 'opt-out' of state workers' compensation—and write their own plans for dealing with injured workers—was dealt a major blow Friday [(February 26, 2016)] when an Oklahoma commission ruled the alternative system unconstitutional."⁵¹⁹

Dillard's appealed the Commission's order to the Oklahoma Supreme Court.⁵²⁰ Amicus curiae briefs on Mrs. Vasquez's behalf came from a diversity of sources: the American Insurance Association, the Property and Casualty Insurance Association of America, and the National Association of Mutual Insurance Companies filed a joint brief;⁵²¹ the Workers' Injury and Law Advocacy Group⁵²² and the National Employment Law Project each filed one;⁵²³ and finally, the "Father of Modern Workers' Compensation," Professor John Burton, Jr., filed one with former Northeastern University School of Law Dean Emily Spieler and Professor Leslie Boden of Boston University School of Public Health.⁵²⁴

Vasquez's effects were felt well beyond Oklahoma's borders. Opt-out-plan proponents were promoting similar legislation in several Southern states.⁵²⁵ After the Oklahoma Workers' Compensation Commission declared Oklahoma's opt-out provision unconstitutional, bills in Tennessee and South Carolina were put on hold.⁵²⁶ David Torrey, a workers' compensation judge in Pennsylvania and a nationally recognized expert in the field, said, "The fate of Opt Out in the United States may well depend upon how it fares in the Oklahoma judicial system."⁵²⁷

518. *Id.*

519. Grabell & Berkes, *supra* note 471.

520. *Vasquez*, 2016 OK 89, ¶ 4, 381 P.3d at 771.

521. AIA, PCI, AND NAMIC's Amicus Curiae Brief in Support of Respondent, *Vasquez*, and in Favor of Affirmance, *Vasquez*, 2016 OK 89, 381 P.3d 768 (No. 114810).

522. Brief of Amicus Curiae Workers' Injury Law & Advocacy Group, *Vasquez*, 2016 OK 89, 381 P.3d 768 (No. 114810).

523. Brief of Amicus Curiae National Employment Law Project, *Vasquez*, 2016 OK 89, 381 P.3d 768 (No. 114810).

524. Brief of Amicus Curiae Academic Experts in Support of Respondent *Vasquez*, *Vasquez*, 2016 OK 89, 381 P.3d 768 (No. 114810).

525. See Duff, *supra* note 3, at 134-35 & nn.72-77; Grabell & Berkes, *supra* note 471.

526. Grabell & Berkes, *supra* note 471.

527. Conversation with Judge David B. Torrey, Penn. Dep't of Labor & Indus., at the Tenth Annual Induction Dinner, College of Workers' Compensation Lawyers, New Orleans, La., Mar. 12, 2016. After *Vasquez* was decided, Judge Torrey published the first article exploring its import. See generally David B. Torrey, *The Opt-Out of Workers'*

Judge Torrey's words rang true. On September 23, 2016, the Oklahoma Supreme Court, in a 7–2 decision, declared the OEIBA, with its opt-out provision, unconstitutional in its entirety.⁵²⁸ The court held that the key opt-out provision violated article V, section 59 of the Oklahoma Constitution as a special law, providing disparate treatment for members of a single class, injured workers in Oklahoma.⁵²⁹

Justice Joseph Watt wrote for the majority:

The Opt Out Act does not guarantee members of the subject class, all employees, the same rights when a work related injury occurs. Rather, it provides employers the authority to single out their injured employees for inequitable treatment.

The employer makes the rather incredible argument that the Opt Out Act provides a baseline of Core Coverage . . . guaranteeing individual injured employees equal treatment. Vasquez relies on the same statutory provision for the proposition that inequitable treatment is specifically allowed. We are convinced by the very language of the statutory provision that the employee's position is viable.⁵³⁰

Thus, rather than merely declaring certain offending provisions of the OEIBA unconstitutional, the supreme court declared that the entire opt-out statutory scheme violated the state constitution.⁵³¹ The majority opinion directly confronted Dillard's claim that employers should be given the right to control workers' compensation benefits in order to cut costs:

Dillard's final contention is that even if the Opt Out Act is a special law, it is constitutionally permissible because the Act is substantially and reasonably related to a legitimate government objective. Some of the identified underlying goals posited by the

Compensation Legislation: A Critical Briefing and the Vasquez v. Dillard's Case, 52 TORT TRIAL & INS. PRAC. L.J. 39 (2016).

528. *Vasquez v. Dillard's Inc.*, 2016 OK 89, ¶ 36, 381 P.3d 768, 775; *see also* OKLA. CONST. art. V, § 59 ("Laws of a general nature shall have a uniform operation throughout the State, and where a general law can be made applicable, no special law shall be enacted.").

529. *Vasquez*, 2016 OK 89, ¶¶ 36, 38, 381 P.3d at 775–76; *see also* OKLA. CONST. art. V, § 59.

530. *Vasquez*, 2016 OK 89, ¶¶ 19–20, 381 P.3d 773 (emphasis omitted).

531. *See id.*

employer include: providing a more effective system of identifying and treating workplace injuries; improving access to medical treatment; improving worker health and safety; and encouraging job creation. Dillard's argues that the Legislature intended to accomplish these goals by giving employers the freedom to manage and administer the provision of benefits to their injured employees. Vasquez points to the general law as the Administrative Workers' Compensation Act and argues that there is no distinctive characteristic which warrants treating less than all injured employees similarly. We agree with the employee's reasoning.

We remain convinced that the employer-enumerated goals of the Opt Out Act cannot save it from the constitutional challenge presented. This Court has previously made it clear we will not accept the invitation of employers to find a discriminatory state statute constitutional by relying on the interests of employers in reducing compensation costs.⁵³²

National media, especially in the field of insurance and workers' compensation, heralded the importance of the *Vasquez* decision. One publication by *Corporate Counsel*, with a headline of "Is Wal-Mart Losing its Push to Opt Out of Workers' Comp?," underscored the significance of the court's decision:

The Oklahoma ruling "was probably the strongest signal that the [opt-out] attempts are going to have a difficult battle in front of them," says Albert Randall Jr., a principal in the Baltimore office of Franklin & Prokopik and past president of the National Workers Compensation Defense Network. "For [the opt-out movement] to be able to expand is probably unlikely under the current climate, and I think that some of the advocates for this may be forced to retreat a bit."⁵³³

In the same story, however, Bill Minick, the nation's leading

532. *Id.* ¶¶ 28-29, 381 P.3d at 774.

533. Kristen Rasmussen, *Is Wal-Mart Losing Its Push to Opt Out of Workers' Comp?*, CORP. COUNS. (Sept. 16, 2016), <http://www.corpcounsel.com/id=1202767654366/Is-Wal-Mart-Losing-Its-Push-to-Opt-Out-of-Workers-Comp?sreturn=20160914200130> [https://perma.cc/43FM-J52Z].

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proponent of opt-out plans, said, “The results in Texas and Oklahoma make it so clear that dramatic change and innovation in workers’ comp is needed.”⁵³⁴ The twenty-first-century revolution in workers’ compensation is far from over.

534. *Id.*