

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

THE HONORABLE HARRY E. COATES,)
as a member of the Senate of the State of)
Oklahoma, THE HONORABLE EMILY)
VIRGIN, as a member of the House of)
Representatives of the State of Oklahoma,)
PROFESSIONAL FIRE FIGHTERS OF)
OKLAHOMA, a not-for-profit Oklahoma)
corporation by and through its President)
RICK BEAMS, who also appears as an)
individual,)

Petitioners,)

v.)

THE HONORABLE MARY FALLIN,)
in her Official Capacity only as Governor)
of the State of Oklahoma, THE)
HONORABLE SCOTT PRUITT,)
in his Official Capacity only as)
Attorney General of the State of Oklahoma,)

Respondents.)

**FILED
SUPREME COURT
STATE OF OKLAHOMA**

DEC 16 2013

**MICHAEL S. RICHIE
CLERK OF
THE APPELLATE COURTS**

No. 112,167

FOR OFFICIAL PUBLICATION

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COMBS, J., concurring and writing separately:

¶1 I agree with the Court's decision that the legislation at issue does not violate the single-subject rule.

¶2 As the law has not yet taken effect, it is unclear exactly how these issues will manifest themselves in future cases or controversies, but it is necessary to acknowledge the constitutional problems these Acts will produce when claimants

begin to receive disparate treatment in their recourse to the law based upon decisions made by their employers.

¶3 I write separately to express my concern that certain provisions of the Administrative Workers' Compensation Act, 85A O.S. Supp. 2013 §1 *et seq.*, and the Oklahoma Employee Injury Benefit Act, 85A O.S. Supp. 2013 §200 *et seq.*, are unconstitutional because they provide for differential treatment in appellate procedure for claimants and therefore violate the special law prohibitions of Article V of the Oklahoma Constitution and do not provide adequate due process protections.

¶4 The Oklahoma Employee Injury Benefit Act (referred to by Petitioners as the Opt Out Act), 85A O.S. Supp. 2013 §§200-213, sets out a minimum appeals process that must be available for injured workers of employers who have opted out of the new system created by Administrative Workers' Compensation Act. Section 211 requires that all employers who opt-out must provide the claimant with the ability to appeal to a committee of at least three people not involved in the original adverse benefit determination.

¶5 If part of the adverse benefits decision is upheld by the committee, then the claimant may file a petition for review with the Workers' Compensation Commission (Commission) sitting en banc, which must "rely on the record established by the internal appeal process and use an objective standard of review

that is not arbitrary or capricious.” Title 85A O.S. Supp. 2013 §211(B)(6). If the Commission upholds any part of the adverse determination, the claimant may:

appeal to the Oklahoma Supreme Court by filing with the Clerk of the Supreme Court a certified copy of the decision of the Commission attached to a petition which shall specify why the decision is contrary to law within twenty (20) days of the decision being issued. **The Supreme Court may modify, reverse, remand for rehearing, or set aside the decision only if the decision was contrary to law.** (Emphasis added).

Title 85A O.S. Supp. 2013 §211(B)(7).

¶6 My concern is that in addition to being somewhat nebulous, this minimum process and standard of review differs markedly from that available to claimants who are employees of an entity who has not chosen to “opt out”. The controlling provision for claimants of those employers who have not opted out is 85A O.S. Supp. 2013 §78. Section 78(A) provides in pertinent part:

[a]ny party feeling aggrieved by the judgment, decision, or award made by the administrative law judge may, within ten (10) days of issuance, appeal to the Workers' Compensation Commission. After hearing arguments, the Commission may reverse or modify the decision **only if it determines that the decision was against the clear weight of the evidence or contrary to law.** (Emphasis applied)

85A O.S. Supp. 2013 §78(C) then provides in pertinent part:

[t]he judgment, decision or award of the Commission shall be final and conclusive on all questions within its jurisdiction between the parties unless an action is commenced in the Supreme Court of this state to review the judgment The Supreme Court may modify, reverse, remand for rehearing, or set aside the judgment or award only if it was:

1. In violation of constitutional provisions;
2. In excess of the statutory authority or jurisdiction of the Commission;
3. Made on unlawful procedure;
4. Affected by other error of law;
5. Clearly erroneous in view of the reliable, material, probative and substantial competent evidence;
6. Arbitrary or capricious;
7. Procured by fraud; or
8. Missing findings of fact on issues essential to the decision.

¶7 A few major differences are apparent between the two appellate procedures. First, a claimant whose employer has opted out and is required to set up the minimum procedures set out in 85A O.S. Supp. 2013 §§200-213 must make their first appeal to what is likely to be an interested party. All §211(B) requires is that no members of the three member (minimum) committee have been involved in the original adverse determination. The members may still be fellow employees, or in other words, interested parties to the dispute with a perceived presumption of partiality on the side of the employer.¹ The claimant under §211 therefore appears

¹ It is worth noting that the Workers' Compensation Arbitration Act, 85A O.S. Supp. 2013 §300 *et seq.*, requires that arbitrators, before accepting an appointment, must disclose to the parties to the arbitration any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator in the arbitration proceeding. 85A O.S. Supp. 2013 §312. No such disclosure is required of the Committee members in 85A O.S. Supp. 2013 §211(B). There is no guarantee that the Committee members will be impartial at all. There is only a guarantee that they cannot have been involved in the original determination of the claim that is being appealed.

to be subject to differential treatment from a claimant employed by an entity that has not chosen to opt out. Pursuant to §78, the claimant with whose employer has not opted out is entitled to go from an administrative law judge, to the Workers' Compensation Commission, to this Court, and along each step is entitled to the perceived presumption of an impartial reviewer. A further concern is whether adequate due process will be afforded when there is a potential for the §211 committee to be partial to the employer.

¶8 Section 211 replaces the administrative law judge provided for in §78 with a committee chosen by the employer. In *Arbuckle Simpson Aquifer Protection Federation of Okla., Inc. v. Okla. Water Resources Bd.*, 2013 OK 29, --- P.3d ----, this Court stressed the importance of avoiding even the appearance of impartiality in adjudicatory proceedings. In that case, the Court was concerned that a hearing officer in an administrative proceeding conducted by the Oklahoma Water Resources Board was engaged in ex parte communications with witnesses. The Court held that:

[b]ecause they function much like a court when conducting adjudicative proceedings, agencies and their representatives are bound by minimum standards of due process....

Even though a judge personally believes themselves to be unprejudiced, unbiased and impartial, they should nevertheless certify their disqualification when there are circumstances of such a nature to cause doubt as to their partiality, bias or prejudice. *Merritt v. Hunter*, 1978 OK 18, ¶5, 575 P.2d 623. This rule applies equally to

administrative boards acting in an adjudicatory capacity as it does to judges. *Johnson*, 1996 OK 41 at ¶33.

Okla. Water Resources Bd., 2013 OK 29, ¶11.

Claimants whose employer has not opted out are entitled to have their claim heard by an administrative law judge who is required to avoid even the appearance of impartiality. Claimants whose employers have chosen to opt out receive no such protections. The initial appeal of their claim is made to a committee chosen by their employer, giving rise to an immediate appearance of partiality. Right out of the gate, claimant's whose employers have opted out receive a lower level of due process protection than claimants whose employers chose not to, and that decision is not made by the claimant, but by the employer.

¶9 Further, depending on the precise meaning of the ambiguous phrase "contrary to law" the claimant whose employer has opted out will have their appeal subjected to either a more rigorous or less rigorous standard of review than a claimant whose employer is subject to the Administrative Workers' Compensation Act. Whereas 85A O.S. Supp. 2013 §78(C) sets forth detailed grounds upon which this Court may review and reverse a decision of the Commission, 85A O.S. Supp. 2013 §211(B)(6) states that this Court may reverse only a determination that is "contrary to law".

¶10 Finally, there is an issue with development of the record. Deprivation of a property interest subject to the Due Process Clause of the Fourteenth Amendment

requires that the holder of the right be given an opportunity to create a record sufficient to permit meaningful appellate review of a trial court order that acts as an end-of-the-line disposition. *Cotner v. Golden*, 2006 OK 25, ¶6, 136 P.3d 630; *Towne v. Hubbard*, 2000 OK 30, ¶13, 3 P.3d 154. Section 211 does not provide for the development of such a record.

¶11 Title 85A O.S. Supp. 2013 §211(B)(2)-(3) sets out the minimum procedure for a claimant's first appeal to the three person (minimum) committee, and provides:

2. The committee may request any additional information it deems necessary to make a decision, including having the claimant submit to a medical exam;

3. The committee shall notify the claimant in writing of its decision, including an explanation of the decision and his or her right to judicial review;

After the committee makes a determination, 85A O.S. Supp. 2013 §211(B)(6) provides that when the Workers' Compensation Commission reviews the decision:

6. The Commission shall rely on the record established by the internal appeal process and use an objective standard of review that is not arbitrary or capricious. Any award by the administrative law judge or Commission shall be limited to benefits payable under the terms of the benefit plan and, to the extent provided herein, attorney fees and costs... (Emphasis added).

¶12 After the Commission makes a decision, the Claimant may appeal to this Court, and 85A O.S. 2013 §211(B)(7) provides:

7. If the claimant appeals to the Commission and any part of the adverse benefit determination is upheld, he or she may appeal to the Oklahoma Supreme Court by filing with the Clerk of the Supreme Court a certified copy of the decision of the Commission attached to a petition which shall specify why the decision is contrary to law within twenty (20) days of the decision being issued. The Supreme Court may modify, reverse, remand for rehearing, or set aside the decision only if the decision was contrary to law.

The Supreme Court shall require the claimant to file within forty-five (45) days from the date of the filing of an appeal a transcript of the record of the proceedings before the Commission, or such later time as may be granted by the Supreme Court on application and for good cause shown. The action shall be subject to the law and practice applicable to comparable civil actions cognizable in the Supreme Court. (Emphasis added).

Taken together, these provisions indicate that the only opportunity a Claimant has to develop a factual record under the minimum requirements of §211 is before the committee **chosen by his or her employer**. The Workers' Compensation Commission is limited to the record developed in the internal appeals process, and this Court in turn is limited to the record considered by the Commission.

¶13 This minimum required procedure to develop a record is in stark contrast with that provided by The Administrative Workers' Compensation Act.

Title 85A O.S. Supp. 2013 §27(A) provides:

A. The Workers' Compensation Commission shall be vested with jurisdiction over all claims filed pursuant to the Administrative Workers' Compensation Act. All claims so filed shall be heard by the administrative law judge sitting without a jury. **The Commission shall have full power and authority to determine all questions in relation to claims for compensation under the provisions of the Administrative Workers' Compensation Act. The Commission,**

upon application of either party, shall order a hearing. Upon a hearing, either party may present evidence and be represented by counsel. Except as provided in this act, the decision of the administrative law judge shall be final as to all questions of fact and law. The decision of the administrative law judge shall be issued within thirty (30) days following the submission of the case by the parties. The power and jurisdiction of the Commission over each case shall be continuing and it may, from time to time, make such modifications or changes with respect to former findings or orders relating thereto if, in its opinion, it may be justified. (Emphasis added).

Concerning appeals, 85A O.S. Supp. 2013 §78(A) provides:

A. Any party feeling aggrieved by the judgment, decision, or award made by the administrative law judge may, within ten (10) days of issuance, appeal to the Workers' Compensation Commission. After hearing arguments, the Commission may reverse or modify the decision only if it determines that the decision was against the clear weight of the evidence or contrary to law. **All such proceedings of the Commission shall be recorded by a court reporter, if requested by any party. Any judgment of the Commission which reverses a decision of the administrative law judge shall contain specific findings relating to the reversal.** (Emphasis added).

¶14 The underlying problem raised, therefore, is the differential treatment of **claimants** under the Administrative Workers' Compensation Act and the Oklahoma Employee Injury Benefit Act, not the differential treatment of employers who may choose or not choose to opt out. Functionally, the claimant has very little choice. They may choose their employer but they have no choice as to whether their potential claims will be subject to the appellate process of 85A O.S. Supp. 2013 §78 or 85A O.S. Supp. 2013 §211. That decision is made by their employer. They may therefore have had their rights expanded or reduced through

no choice of their own. If claimants whose employers have not opted out are treated markedly different in terms of appellate process than claimants whose employers have opted out, this would implicate Okla. Const., Art. V, §46, which provides, in pertinent part:

The Legislature shall not, except as otherwise provided in this Constitution, pass any local or special law authorizing:

...

Regulating the practice or jurisdiction of, or changing the rules of evidence in judicial proceedings or inquiry before the courts, justices of the peace, sheriffs, commissioners, arbitrators, or other tribunals, or providing or changing the methods for the collection of debts, or the enforcement of judgments or prescribing the effect of judicial sales of real estate;

¶15 I would address at the very least these constitutional issues.