

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 E. SCOTT PRUITT, in his Official Capacity only as Attorney General of the State of Oklahoma,

Respondents.

Rec'd (date)	12-16-13	FILED SUPREME COURT STATE OF OKLAHOMA DEC 16 2013 MICHAEL S. RICHIE CLERK OF THE APPELLATE COURTS
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REIF, V.C.J.: concurring in part, dissenting in part.

¶1 I concur with the majority's conclusion that the Legislature did not violate Article 5, § 57 of the Oklahoma Constitution by including multiple measures in SB 1062. All measures in SB 1062 were germane to the subject of workers' compensation and represent the adoption of a new code on the subject.

¶2 I also believe that the rule of judicial restraint calls for the denial of relief at this point in time for most of the challenges to the administrative system raised by the Petitioners. The vast majority of the challenges should be presented to and

decided by the Commission before they are ripe for judicial review.

¶3 In a few cases, however, there are provisions that are unconstitutional on their face. One of those provisions - the appeal process in the Opt Out System - is the subject of the separate concurring writing by Justice Combs. While I agree with the analysis of Justice Combs, I also believe the appeals process, along with the initial determination by the employer, work prejudice in the administration of a statutory right forbidden by Article 2, § 6 of the Oklahoma Constitution, and are a denial of due process forbidden by Article 2, § 7 of the Oklahoma Constitution.

¶4 A fundamental element of due process is a fair and impartial trial. *Clark v. Board of Education of Ind. Sch. Dist. No. 89*, 2001 OK 56, ¶ 6, 32 P.3d 851, 854. This includes a neutral and detached decision maker. *Id.* This Court has said that every litigant is entitled to nothing less than the cold neutrality of an impartial judge, and defined such neutrality to be the disinterest of a total stranger. *State ex rel. Bennett v. Childers*, 1940 OK 389, ¶¶ 6-7, 105 P.2d 762, 763. Under the Opt Out System, the employer and any “appeals” committee chosen by the employer cannot satisfy the impartiality requirement of due process, because the employer has a direct pecuniary interest in the decision of a claim.

¶5 At common law, a judge was disqualified to sit in a case in which the judge had an “interest in his own behalf in the result.” *Ex parte Clanahan*, 72 So. 833, 836 (Ala. 1954). A disqualification is something that makes one ineligible to act. *Black’s Law Dictionary*, 485 (7th ed. 1999). Both the Oklahoma Legislature by

statute and this Court by rule have similarly declared self interest in a decision to be a disqualifying circumstance. The Legislature has said: “No judge of any court shall sit in any cause or proceeding in which he may be interested, or in the result of which he may be interested.” 20 O.S.2011, § 1401(A). This Court has similarly declared: “A judge shall disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonable questioned, including but not limited to the following circumstances . . . (3) The judge knows that he or she, individually or as a fiduciary . . . has an economic interest in the subject matter in controversy or is a party to the proceeding.” Rule 2.11(A)(3), Code of Judicial Conduct, 5 O.S.2011, Ch.1, App. 4.

¶6 Both appeal procedures set forth in section 118 of SB 1062, codified as 85A O.S. § 211, fail to meet due process standards for impartiality. This section should be severed in its entirety, along with language in section 110, codified as 85A O.S. § 203, that excludes the application of administrative provisions for determining claims to Opt Out Plans. With such severance, Opt Out System claims would follow the same determination and appeal process as administrative claims.

¶7 There is likewise constitutional infirmity in the appeal process prescribed for cases decided by the Court of Existing Claims, designated as a court of record. Determination of claims for injuries that occurred prior to February 1, 2014, are “cases at law,” not administrative proceedings. As such, appellate

review of such cases falls under the appellate jurisdiction of the Supreme Court set forth in Article 7, § 4 of the Oklahoma Constitution. Legislation authorizing the Workers' Compensation Commission, an Executive Branch administrative agency, to exercise appellate jurisdiction over cases at law, when jurisdiction in such cases is expressly vested in this Court by the Constitution, violates the doctrine of separation of powers set forth in Article 4, § 1 of the Oklahoma Constitution. More particularly, such legislation violates the proscription that none of the three branches "shall exercise the powers properly belonging to either of the others." The language authorizing appeals to the Workers' Compensation Commission from the Court of Existing Claims should be severed, leaving appeals to be taken directly to this Court without any intermediate review.

¶8 In addition to the constitutional defects in these procedural areas, two substantive areas of the Act have facial constitutional infirmities. The first area is in the interplay between the exclusive remedy provision of section 5 of SB 1062, codified as 85A O.S. § 5, and (1) the non-coverage of mental injury, under section 13 of SB 1062, codified as 85A O.S. § 13 and (2) the exclusion of same sex spouses from death benefits under section 47 of SB 1062, codified as 85A O.S. § 47. The second substantive area is the deferral of permanent partial disability/employer deduction in section 45 of SB 1062, codified as 85A O.S. § 45.

¶9 As for the first substantive area, the Act **expressly** (1) excludes coverage for mental injury unaccompanied by physical injury (except for victims of violent

crimes) and (2) makes same sex spouses ineligible for death benefits. The Act does so, while at the same time declaring the Act to be the exclusive remedy for work related injuries even if compensation is denied or the claimant is deemed ineligible for compensation under the Act. These provisions exile workers who sustain mental injury from work-place stresses, and same sex spouses with a valid marriage in another jurisdiction who are eligible for death benefits, to a legal no-man's-land without remedy for the loss they have sustained.

¶10 The effect is to immunize employers for detriment sustained by employees from work place conditions beyond the control of the employees. The most obvious instance of such detriment is the psychological harm experienced by law enforcement officers, fire fighters and emergency medical personnel from the danger, tragedies and suffering they encounter in their work. While the legislature may properly exclude mental injury unaccompanied by physical injury from coverage under the Act, the legislature is prohibited from granting any exclusive immunities to any association, corporation or individual by Article 5, § 51 of the Oklahoma Constitution. The language in section 5 that makes the Act the exclusive remedy even if the claim is denied or the claimant is ineligible should be severed and a declaratory relief should be entered that states the exclusive remedy provision does not apply to detriment not compensated by the Act.

¶11 Equally egregious is the denial of death benefits to a same sex spouse

even in cases where their spouse is killed in Oklahoma in the course of his or her work requiring interstate travel through Oklahoma. This restriction denies the equal protection component of due process under Article 2, § 7 of the Oklahoma Constitution. It also violates the Interstate Commerce Clause as well as the Privileges and Immunities Clause of the United States Constitution. The language denying a same sex spouse death benefits should be severed.

¶12 Finally, section 45 of SB 1062, codified as 85A O.S. § 45, treats recipients of permanent partial disability differently. The Act allows for such compensation in cases of impairment without complete loss of use of a body part or parts, amputation and loss of scheduled members. In cases of impairment without complete loss of use, if the injured employee returns to pre-injury employment or its equivalent, the employer is authorized to subsidize the re-employment of the injured worker out of the award for the physical detriment that has been adjudicated. The Act does not allow such subsidy in cases of amputations and loss of scheduled members. It appears that the Legislature believes that an injured and permanently impaired worker who returns to pre-employment work or its equivalent, has suffered no detriment from the injury and impairment.

However, the worker who can return to his or her job only with the aid of a crutch, cane or a walker, or who must live and function with some other diminishment in their physical health, has suffered the equivalent physical loss as an amputee or worker who has lost a scheduled member. The language that allows the

employer to subsidize re-employment by deductions from the permanent partial disability award is a special law that does not operate uniformly on all persons who are similarly situated in violation of Article 5, § 59 of the Oklahoma Constitution. It also violates the equal protection component of due process under Article 2, § 7 of the Oklahoma Constitution.

¶13 For the foregoing reasons, I respectfully concur in part and dissent in part.