

WORKERS' COMPENSATION UPDATE

Recent decisions by the Court of Civil Appeals and Oklahoma Supreme Court

City of Edmond, Own Risk #14514 v. Timothy K. Vernon and The Workers Compensation Court

Court of Civil Appeals (Division IV) – Filed December 22, 2008

Claimant, a firefighter, was diagnosed and treated for colon cancer while working for the City of Edmond. Claimant asserted that his cancer was a cumulative trauma injury caused by his repetitive exposure as a firefighter to hazardous materials, such as smoke, chemicals, and contaminants. Claimant relied on 11 O.S. Supp. 2008 § 49-110(A), which creates a presumption that municipal firefighters who are disabled by cancer incurred the disease while performing job-related duties. The Workers' Compensation Court affirmed the constitutionality of the Oklahoma Statute and awarded benefits to the Claimant based on the presumption. The City of Edmond appealed the decision.

The Court of Civil Appeals reviewed the constitutionality of the Oklahoma Statute de novo, and found the presumption to be based upon a legitimate legislative classification that does not deny the City its procedural due process. The Court ruled that the Oklahoma legislature was entitled to determine that firefighters are a particularly vulnerable class subject to disease, and therefore could enact a "special law" protecting them. The Court also found that the City was afforded due process because Claimant had filed his claim in a court to which the City had proper access to. Finally, the Court of Civil Appeals relied on the Workers' Compensation Court's determination regarding the factual issues in question. The Court noted that competent evidence had been shown to support the trial court's determination that the City had not overcome the presumption, and that benefits should be awarded. The Oklahoma Court of Civil Appeals sustained.

Matthews v. General Motors

Court of Civil Appeals, Division III

Claimant injured his foot on the job in March of 1995. According to the Workers' Compensation Court, the last order in the matter was file stamped on November 27, 1996. Claimant continued to see a doctor over the next several years while the employer continued to cover the costs through their workers' compensation carrier. In 2006 claimant sought to reopen his file alleging a "change in condition for the worse" from an accident on May 1, 1995. The Workers' Compensation Court denied the reopening because the claimant filed his form outside the 85 O.S. § 43(c) three year statute of limitations. Claimant argued that because the Employer had furnished medical treatment for almost 10 years after the claim, the 43(c) statute of limitations had been tolled. The Court of Civil Appeals, using canons of statutory construction, held that the general statute of limitations from § 43(a) does not apply because § 43(c) is specific, and the statute strictly states that reopening for a change in condition for the worse must be brought within 3 years of the last order. Further, the court noted there is no Oklahoma authority applying the "medical treatment" rule to tolling the 85 O.S. § 43(c) statute of limitations, therefore claimant's statute of limitations was not tolled, the filing was untimely, and the Workers' Compensation Court was correct.

Lowe's Home Center, Inc., Own Risk, v. Ott and the Workers' Compensation Court

Court of Civil Appeals, Division III

Elesar Falcon, a Lowe's employee, was killed in a work-related accident. The Workers' Compensation Court awarded death benefits to Stephanie Ott as Falcon's common-law wife. Dispute arose as to whether evidence supported the determination that Ott was Falcon's common-law wife entitling her to surviving spouse death benefits.

The court ruled that the person trying to establish a common-law marriage has the burden to prove its existence by clear and convincing evidence. Cohabitation, actions consistent with the relationship of spouses, recognition by the community of the marital relationship, and declarations by the parties are all indicia of consent to enter into a common-law marriage. Falcon and Ott were in an exclusive relationship, cohabited for a period of approximately two years prior to Falcon's death,

and had one child together. Furthermore, the record showed that the couple held themselves out as a married couple and that the community recognized the marital relationship. The couple filed separate tax returns, held separate bank accounts, and listed “single” designations on the deed to their jointly acquired house. Additionally, Falcon’s mother and step-father testified that Falcon made statements to them to the effect that he did not want to marry Ott and did not wish to stay with her anymore.

The record supported a finding that the parties themselves, through their actions and declarations, presented themselves as a married couple and the public perceived them as to have held themselves out to be married. The Workers’ Compensation Court’s determination that Ott had met her burden of proof in establishing her common-law marriage to Falcon was not against the clear weight of evidence.

Defender Servs. v. Diana Cooper

Court of Civil Appeals (Division I)

In *Defender Servs. v. Diana Cooper*, Claimant suffered injury to her hands during the course of employment at two jobs. At Defender Services (Defender), Claimant performed eight months of janitorial work. After her work at Defender, Claimant was employed at Direct Staffing, where she was involved in heavy lifting for twenty-five cumulative days. Claimant initially alleged a single accident injury to one hand as a result of the heavy lifting at Direct Staffing, but later amended the claim adding a cumulative trauma injury to both hands at Defender.

The Panel found Defender solely liable for Claimant’s injuries based on 85 Okla. Stat. § 11(b)(5) which holds the last employer who subjected Claimant to injurious exposure for ninety days or more solely liable for the injury. Defender appealed stating that at the time Claimant noticed the injury, she had not been employed at Defender for over two months, and further there was no finding that Claimant was exposed to injury during her janitorial duties. However, because the standard of review is whether the Panel decision is supported by “any competent evidence” the Court of Civil Appeals found evidence to sustain the Panel’s decision.

Campbell Specialty Co, Inc. and CompSource Oklahoma v. Stephen Hacker

Court of Civil Appeals (Division III) – Filed March 26, 2009

Trial court awarded claimant compensation for permanent partial disability for binaural hearing loss. Claimant filed his claim 16 months after he resigned from Employer. Employer raised a statute of limitations defense as set out in 85 O.S. 2005 Supp. §43. While the general statute of limitations found in §43 is two years, there is a special limiting section stating, “Post termination injury claims shall be filed within six (6) months of termination of employment.” The trial court found that Claimant suffered a pre-termination injury, not a post-termination injury, which made §43 inapplicable to his claim. The trial court also found that “reducing the period for filing a claim to six (6) months for those who would otherwise be entitled to a two (2) year statute of limitations but for the termination of employment results in an unconstitutional denial of equal protection through legislative enactment which relegates this claimant to a special class that is denied workers’ compensation as a consequence of termination.” The Court of Civil Appeals vacated holding that §43 did apply to the claim, was constitutional, and thus precluded Claimant’s recovery.

Ponca Iron & Metal, Inc. v. Wilkinson

The Court of Civil Appeals, Division I

Claimant, an employee at Ponca Iron & Metal, Inc., was terminated on December 18, 2005. On August 18, 2006, Claimant filed a Workers’ Compensation claim alleging carpal tunnel syndrome to both hands and arms with a last date of exposure on December 18, 2005. The trial court awarded Claimant medical treatment and temporary total disability (TTD) benefits for a period of fifty-two weeks.

On appeal, the Employer argued Claimant was not entitled to relief because she failed to file within the six-month time period set forth in 85 Okla. Stat. § 45(A). The Court of Civil Appeals disagreed, holding that the six-month SOL only applied to post-termination injuries (such as an injury occurring while vacating the premises) and that Claimant was subject to the more generous two-year SOL because her injury predated the termination. The court found this interpretation aligned with the legislative intent to “curtail retaliatory workers’ compensation claims filed by terminated employees.” The trial court’s order for medical treatment and TTD benefits was sustained.

Gilyard v. Cherokee Building Materials of Oklahoma City, Inc, et al.

Court of Civil Appeals (Division I) – Filed December 19, 2008.

Claimant sought review of a three-judge panel's review of the Trial Court's dismissal of his claim based upon the running of the limitations period. Gilyard initially alleged, on January 19, 2006, that he suffered an injury to his left arm, left hip, and back while working for Employer on April 1, 2004. He amended his claim to include an injury to his right shoulder in February 2006, indicating the date of last exposure in January 2005. In August 2006 the claimant amended his Form 3 to include an injury to his cervical spine. In January 2007, Claimant submitted to back surgery. In June 2007, the trial court directed Employer to provide Claimant with reasonable and necessary medical treatment. In November 2007, the Claimant amended his Form 3 to include injury to his left wrist and elbow. Claimant's authorized physician opined that these injuries resulted from a single-event in April 2004.

Okla. Stat. Tit. 85 § 43(A) (2001) provides a limitation period of two years after the date of accidental injury or death. Additionally, the limitations period allows a claim to be within two years of the last authorized medical treatment. Although § 43(A) was amended the Court held that the law at the time of the injury controls the applicable limitation period. In this case the Claimant received medical treatment relating to his April 2004 injury in May 2006 from an authorized physician, and additional treatment in the authorized chain of referrals until July 2007. "The authorized treatment of the Claimant's left arm pain, although later attributed to a discrete 2004 injury, tolled the running of the statute of limitations." Thus, Gilyard's claim for injury made in November of 2007 was not barred by the statute of limitations.

Lang v. Erlanger Tubular Corp., CAN

The Supreme Court of the State of Oklahoma

Claimant suffered a compensable injury and qualified as permanently and partially disabled. Claimant's condition worsened and he attempted to reopen his claim almost six years after his original award. His claim was denied by the Workers' Compensation Court on the grounds that the three year statute of limitations for reopening a claim had run pursuant to 85 O.S. § 43(C). The Supreme Court ruled that three dates are important when determining whether the statute of limitations have run for the reopening of a claim: (1) the date of the change in claimant's condition, (2) the date of last order (e.g. a vocational rehabilitation evaluation), and (3) the date of the application to reopen the claim. The date in claimant's change of condition determines which version of § 43(C) applies, the current version that was amended in 2005 or the superseded version. The date of the last order determines when the statute of limitations begins to run. Finally, the date of application must be within three years of the date of the last order for the claim to escape being barred by the statute of limitations. Here, the dates pertinent to Claimant's injury, order, and claim dictated that the statute of limitations had run.

Nordam Group, Inc. v. John E. Batey

Court of Civil Appeals of the State of Oklahoma, Division III

An employee sought benefits from his employer for permanent partial disability for his previous hernia operations. The Oklahoma statutes were amended in 2005 to delete the provision providing permanent partial disability for "other cases" in which the employee has had two or more hernia operations. This provision now provides permanent partial disability compensation for all other disabilities except those referred to in that section; hernias are previously referred to in the section and are therefore excluded. Additionally, the amendment provided permanent partial disability benefits for "Soft Tissue Injury," which is defined as "damage to one or more of the tissues that surround bones and joints." This definition does not provide protection for hernias. In sum, the employee cannot receive permanent partial disability benefits; he may only receive compensation for permanent total disability.

Roccato v. HSBC Beneficial, Zurich Insurance Company, and/or American International, LTD, and The Workers' Compensation Court

The Supreme Court of Oklahoma, Filed March 24, 2009

"The Court of Civil Appeals was vacated and the claim was remanded to the Workers' Compensation Court for on-the-record findings of fact and conclusions of law. The order must "(1) identify the legal theory relied on and (2) be sufficiently specific to enable the three-judge panel to ascertain the facts on which the order is based."



JACQUE BRAWNER DEAN

WORKERS' COMPENSATION DEFENSE

Jacquie Brawner Dean's practice is focused exclusively on the representation of employers in workers' compensation issues. Her extensive experience in the field includes serving as a Workers' Compensation Judge from 1984 to 1988 and as administrator of the Workers' Compensation Court from 1982 to 1984. During that time, she graduated from the Workers' Compensation College in Tucson, AZ, and completed three 40-hour sessions at the National Judicial College in Reno, NV.

In addition to representing insurance and own-risk clients at the Workers' Compensation Courts in Oklahoma City and Tulsa, Jacquie also counsels employers on a myriad of related matters, including proper reporting issues, advice on reserves and claim reduction. Throughout the course of her distinguished career, she has represented employers from virtually every industry, including retailing, manufacturing, healthcare and finance.

Jacquie is a frequent speaker on workers' compensation issues at continuing education seminars, legal conferences and employer-sponsored workshops and is the author of "Workers' Compensation in Oklahoma," *Women's Resource Law Manual*, 1988. She is a member of the Oklahoma County Bar Association, Oklahoma Bar Association, American Bar Association, Oklahoma Association of Defense Counsel and the National Workers' Compensation Defense Network.

Jacquie is "AV" Rated by Martindale-Hubbell. She also holds the distinction of being one of only 39 lawyers nationwide to be inducted as a fellow of The College of Workers' Compensation Attorneys at its first annual induction dinner on March 2, 2007. Her achievements in the area of workers' compensation law have earned her inclusion in *The Best Lawyers in America*.

The College of Workers' Compensation Lawyers

Recently established by the American Bar Association, The College of Workers' Compensation Lawyers honors attorneys who have distinguished themselves in the field of workers' compensation law and who have been identified as possessing the highest professional qualifications and ethical standards, character, integrity, professional experience and leadership. Members were selected based on the outstanding traits they have developed in their practice of 20 years or longer, either representing clients, serving as judges, or acting for the benefit of all in education, overseeing agencies and developing legislation.

National Workers' Compensation Defense Network

Jacquie's extensive experience and practice in the field of workers' compensation law has earned McAfee & Taft the distinction of being selected as the sole Oklahoma member of the National Workers' Compensation Defense Network, a network of independent law firms throughout the United States and Canada with an established workers' compensation practice committed to providing quality representation and information to employers and the insurance industry.
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