

2020 OAJ WORKERS' COMPENSATION SUMMARY

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GEORGE v UMICORE AUTOCART USA, INC.

CASE NO. 118,115. [COCA DIV II]

1. On the job injury 12-2015. At that time **AWCA** defined "Permanent Disability" as "means the extent, expressed as a percentage, of the loss of a portion of the total psychological capabilities of the human body as established by competent medical evidence and based on the **current edition** of the AMA guides to the evaluation of impairment, **if the impairment is contained therein.**"
2. Dr. Chalkin rated Claimant at 6% right shoulder under the 6th Edition. Dr. Trinidad rated Claimant at 39% under the 5th Edition and 8% under the 6th Edition. 39% = \$44,089.50. 8% = \$9,044.00.
3. Claimant argued **current edition** was the 5th Edition because the Physician's Advisory Committee had failed to adopt the 6th Edition. Therefore, the **current edition** was the 5th Edition.

PLAINTIFF ARGUMENT:

1. *Hill v American Medical Response*, 2018 OK 57, 423 P.3d 1119, the Okl. Supreme Court addressed constitutionality of the 6th Edition but not whether the 6th Edition was the “**current edition**.”
- ALJ “unpersuaded” and stated, “*Hill* contemplates Claimant’s argument and ultimately found the 6th Edition is the appropriate Guides when evaluating impairment of non-scheduled members.”

ANALYSIS AND HOLDING:

- The ALJ **did not** err. “It is impossible to read *Hill* as not holding, that the 6th Edition constitutes the “current edition” as intended by the Legislature, and that use of the 6th Edition to evaluate PPD is mandatory.”
- *Hill*/Court stated, “This Court also *determines the mandatory use of the 6th Edition* for assessing impairment for non-scheduled members does not violate the Constitution.”

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- *Hill* “the idea that the Legislature has chosen to base PPD primarily on the AMA Guides, 6th Edition, impairment ratings” is supported by various statutory provisions.
 - The *Hill*/Court also stated that PPD, as defined in the AWCA, “is functionally equivalent to impairment as defined by the AMA Guides, 6th Edition,” and even stated that it was “compelled to adopt the interpretation that ‘most current edition’ and ‘current edition’ refer to the current edition of the AMA Guides when the relevant provisions were enacted: the AMA Guides, 6th Edition.”
 - **In accordance with *Hill*, we conclude the Commission properly affirmed the order of the ALJ. Therefore, we sustain.**
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What Does This Mean?

1. Unpublished, but likely what the Supreme Court would find on this exact question.
2. Any challenges are going to come from within the 6th Edition.
3. If there is an exception in the 6th Edition use it and take it up. If the book is mandatory, it is mandatory! Remember the Statute is to be "strictly construed".
 - Definition of "Strict Construction" = a literal interpretation of a statute or document by a court.
 - KEEP THIS IN MIND FOR LATER UNDER "WHIPPLE"

-SMITH v WHATABURGER RESTAURANT

2020 OK CIV APP 27

1. Injury March 9, 2017.
2. Filed on April 13, 2017 claiming an injury to the low back and right hip when slipping on ice water.
3. Store manager called for ambulance and she went to local ER.
4. Missed 5 days of work.
5. Returned to work for 2 months and quit.
6. *Employer denied Liability, denied TTD, refused to pay for medical expenses and refused to designate a treating physician.*
7. Claimant timely requested a trial.
8. Both Parties obtained medical
9. Employer continued to deny benefits and requested the appointment of an IME "to address causation."

-SMITH v WHATABURGER RESTAURANT

2020 OK CIV APP 27

- ALJ appointed Dr. Benjamin White as IME. He examined π in January 2018 and ordered MRI's
- IME issued his report on February 21, 2018. **Opinion: "within a reasonable degree of medical certainty that Claimant's symptomatic syrinx is causally related to her fall at work." He recommended Claimant undergo a "Chiari decompression".**
- Employer paid the expenses of Ime and Diagnostics as required by 85A O.S. Supp2014 §112(G).
- Employer continued to deny liability and refused to approve any other medical expenses or treatment.
- **ON June 18, 2018** within a week of IME Depo, but *longer than a year after the March 2017 injury* Claimant filed an amended form 3 adding **thoracic spine and neck**.
- Employer denied the claim and raised the affirmative defense of Statute of Limitations §69(A) barring a claim unless filed within one year from the date of injury.

TIMELINE:

3/9/17----->(FILED 4/9/17)-----> AMENDED FORM 3: (FILED 6/18/18)

§69(A)(1). TIME FOR FILING

- A claim for benefits under this act, ...shall be barred unless it is filed with the Commission within one (1) year from the date of injury. If during the one year period following the filing of the claim the employee receives **NO** weekly benefit compensation and receives **NO** medical treatment resulting from the alleged injury, the claim **SHALL** be barred...

§69(B)(1). TIME FOR FILING

- In cases in which *any compensation*, including disability or medical, has been paid on account of injury, a claim for additional compensation **SHALL** be barred unless filed with the Commission within one (1) year from last payment of disability compensation or two (2) years from the date of the injury whichever is greater.

STATUTORY DEFINITIONS:

Compensation: "includes the **medical services and supplies** provided for in Section 50 of this title..."

Section 50(A) provides: The employer SHALL promptly provide an injured employee with **medical...services**, along with any medicine, crutches, ambulatory devices, artificial limbs, eyeglasses, contact lenses, hearing aids, and other apparatus as may be reasonably necessary in connection with the injury received by the employee. [The employer SHALL have the right to choose the treating physician.

Section 69 = *Green Country P.T. v Sylvester*, 2018 OK CIV APP 64 ¶26, "last payment of disability compensation" in ¶69(B)(1) includes *employer's payment for medical services received by claimant.*"

- Payment of medical care more than 2 years after the date of injury and last paid medical RESET the Statute of Limitations so there was a new one (1) year to file a claim.
- Court noted: "...section 69(B) broadens the scope of 'reopening any cause' to the instance "in which **any compensation, including disability or medical has been paid on account of injury.**" ¶20.

ISSUE: Does the term "compensation" in §69(B) include payment of an IME evaluation where no treatment is initiated or approved for the purpose of tolling the statute of limitations?

- **Sub Issue:** Does it reset the statute for *other body parts even if the Ime is not authorized to address those body parts?*
- **ALJ finding:** "[n]othing in this section supports the contention that an independent evaluation is the same as providing **treatment**".
- **COCA response:** There is a significant flaw in the reasoning. "**Medical services**" is not interchangeable with "**Medical treatment**" in reference to the meaning of "**compensation paid**" in §69(B).
 - The AWCA clearly uses the term "**medical services**" in its definition of "**compensation**" at §2(10), and just as clearly differentiates medical "treatment" from other "services" provided by medical professionals, including IME's, elsewhere in the Act.
 - "**§45(A)(2)** permits an ALJ to appoint an IME to "determine if further medical treatment is reasonable and necessary and simultaneously prohibits an IME from "providing treatment to the injured worker, unless agreed upon by the parties." ¶20.

- **§112** (Ime provision) which requires an employer to designate a "treating physician" if an IME "determines that *more medical treatment is necessary*."
 - Authorizes Commission to set rules concerning IME's and that section of the rules are set forth in a chapter of Title 810 of the Ok. Administrative Code entitled, "*Medical Services*". OAC §§ 810-15 -9-1 through 810-15-9-6.
- **§50(D)** refers to recommendations by the claimant's *treating doctor* or *"an independent medical examiner."*
- It is noteworthy that **§50(E)** requires an employee to attend examinations ordered *by the court or requested by an employer*; **but does not suggest that mandatory examinations are not "medical services."**
- **§50** does not exclude the services of an IME from its coverage.

- **ANALYSIS.**

1. Reading the AWCA provisions as a whole strongly suggests that even though an IME may not provide "treatment" and IME's services are no less "Medical Services" than any other health care provider.

HOLDING:

- IME evaluation and testing services come within the definitions of "**compensation**" under the AWCA.
- The same also comes within the parameters of §69(B)(1) requiring compensation has been paid due to an injury before that statutory section applies.
- We find for the purposes of **tolling** the statute of limitations and **triggering** the extended limitations period of AWCA §69(B)(1), the services of the IME that were requested and paid for by Employer constitute "compensation... paid on account of [the] injury" sustained by Claimant.

NOTES:

1. *Green Country v Sylvester*, may stand for extending the reopen statute to 1 year from last date of payment of disability compensation. Does this mean you can reopen the case after a ppd award for one year from the last payment?
2. *Does this apply to situations where the IME is court appointed or requested by Claimant?* The Holding references "services from the IME, at Employer's own request and expense".
3. *The opinion both tolls and triggers the extended limitations, what does that mean?*

-WHIPPLE V PHILLIPS AND SONS TRUCKING, LLC

2020 OK 75

1. Whipple is the Natural Mother of Taylor Borth who worked for Phillips and Sons on October 6, 2016.
2. On 10-6-16, Borth was crushed between to pieces of Phillips and Sons equipment.
3. At the time of death: Borth was 23 years old without spouse or children.
4. **85A O.S. §47 only allowed wrongful death benefits to a spouse, child, or legal guardian, if the guardian was dependent on the employee.**
5. The Prior statute 85 O.S. §336 had allowed for up to \$5,000.00 pecuniary loss to the parent in this situation.

1. Whipple filed a District Court wrongful death and substantial certainty Petition vs Borth's employer, Phillips & Sons (and several others).
2. District Court found " Under this Act, workers' compensation is normally the exclusive remedy against an employer for job-related injuries." *Hughes Drilling Co. v Crawford*, 1985 OK 16, ¶18.
 - An exception exists when an employee "has been wilfully injured by his employer." *Paret v UNICCO Serv. Co.*, 2005 OK 54. (Substantial Certainty Case).
 - "Although the evidentiary material that has been presented arguably shows negligence and possibly recklessness, the record is devoid of evidence to allow a substantial certainty case to move forward.
 - GRANTED SUMMARY JUDGMENT.

WHAT WAS NOT DONE:

1. Constitutional arguments regarding the wrongful death negligence suit not addressed.
2. It was assumed the exclusive remedy barred a negligence suit.
3. Substantial Certainty is outside the workers compensation scheme not an exception. *Wells v Oklahoma Roofing & Sheet Metal, LLC.*, 2019 OK 45, ¶14.

CURRENT CONDITION OF THE CASE ON APPEAL:

1. S. J. granted on Substantial Certainty.
 2. Exclusive Remedy bars Wrongful Death negligence cause of action.
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ARGUMENTS ON APPEAL:

1. Trial Court was wrong on Substantial Certainty.
2. 85A O.S. §47 is Unconstitutional as it violates art. 23 §7.

HOLDING SUPREME COURT:

- THE RIGHT OF A PARENT AS NEXT OF KIN TO BRING A WRONGFUL DEATH ACTION WHEN THE DECEDENT IS AN ADULT, UNMARRIED AND CHILDLESS, IS ESTABLISHED PURSUANT TO 12 O.S. §1053 AND art. 23 §7 OF THE OKLAHOMA CONSTITUTION.
- THE LEGISLATURE ATTEMPT TO DENY RECOVERY FOR WRONGFUL DEATH PURSUANT TO **85A O.S.SUPP 2014 §47** BY LIMITING IT TO A SPOUSE, CHILD, OR LEGAL GUARDIAN DEPENDENT ON THE DECEDENT IS **UNCONSTITUTIONAL, LEAVING THE ONLY OPTION FOR RECOVERY IN THE DISTRICT COURT.**

Background:

- Originally art. 23 §7 preserved wrongful death actions outside of workers' compensation. This was the case until the Constitutional amendment in 1950.
- Current post-1950 version:
 - **The right of action to recover damages for injuries resulting in death shall never be abrogated**, and the amount recoverable shall not be subject to any statutory limitation, provided however, that the Legislature may provide an amount of compensation under the Worker's Compensation Law for death resulting from injuries suffered in employment covered by such law, in which case the compensation show provided shall be exclusive...

- According to caselaw what was preserved was the statutory cause of action in place on the date the Constitution was adopted. That statute, Section 4313 Oklahoma Statutes of 1893, has morphed and been changed but currently has been preserved in 12 O.S. 1981 §1053. ¶18.
- "Article 23, Section 7 is meant to guarantee the individuals protected under Section 1053 the right to bring an action for wrongful death." ¶12, citing *Roberts v Merrill*, 386 P.2d at 783.
- "Article 23, Section 7 says the legislature can never again reimpose the death of the injured person as an obstacle to an action by his survivors." ¶12.

- 12 O.S. §1053 provides parents can recover for pecuniary loss, grief and loss of companionship at the very least.
- *Capitol Steel and Iron Co., v Fuller*, 1952 OK 209, ¶14 notes, "...[f]or the same reason, any provision in said act which modifies the provisions of sections 1053 and 1054 of Title 12 O.S.1941, *except to 'provide an amount of compensation under the Workmen's Compensation Law for death resulting from injuries suffered in employment covered by such law,' is void.*"

When there is no spouse or children the NEXT of KIN to bring the wrongful death action are the parents. *Ouellette v Stat Farm Mut. Auto. Ins.Co.*, 1994 OK 79, 918 P.2d at 1366-1367.

- In *Ouellette* we explained a wrongful death claim may be brought by the persons authorized by the statute:
 - Personal Rep. of the Decedent, If NONE
 - Widow, If NONE
 - Decedent's Next of Kin.
- In this case Whipple was the Next of Kin.

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- ¶14 Under the facts of this cause, the mother is left without a remedy in the District Court, unless she meets the very high burden of showing that she is also left without a remedy in the Workers' Compensation system because of the 2014 statutory changes.
- Constitutionally, she cannot be cut off from a remedy altogether! Our only choice is to allow the mother to pursue her action for the wrongful death of her son in the District Court.

Conclusion

1. Right of a Parent as Next of Kin to bring a wrongful death action when decedent is unmarried and without children is established by §1053 and art. 23 §7.
2. The Legislative attempt to limit recovery for wrongful death pursuant to 85A O.S.Supp 2014 §47 to a spouse, child or legal guardian dependent on the decedent is UNCONSTITUTIONAL.

EXTRAS---THIRD PARTY.

- **A. Liability Unaffected.**
- 1. a. The making of a claim for compensation against any employer or carrier for the injury or death of an **employee shall not affect the right of the employee**, or his or her dependents, **to make a claim or maintain an action** in court against any third party for the injury.
- b. The employer or the employer's carrier shall be entitled to reasonable notice and opportunity to join in the action.
- c. **If the employer or employer's carrier join in the action against a third party for injury or death, they shall be entitled to a first lien on two-thirds (2/3) of the net proceeds recovered in the action that remain after the payment of the reasonable costs of collection, for the payment to them of the amount paid and to be paid by them as compensation to the injured employee or his or her dependents.**
- 2. **The commencement of an action by an employee or his or her dependents against a third party** for damages by reason of an injury to which this act is applicable, or the adjustment of any claim, shall not affect the rights of the injured employee or his or her dependents to recover compensation, but any amount recovered by the injured employee or his or her dependents from a third party shall be applied as follows:
 - a. **reasonable fees and costs of collection shall be deducted,**
 - b. **the employer or carrier, as applicable, shall receive two-thirds (2/3) of the remainder of the recovery or the amount of the workers' compensation lien, whichever is less, and**
 - c. **the remainder of the recovery shall go to the injured employee or his or her dependents.**

- 1. Who has the jurisdiction to determine what the employer or carrier receives? District Court or WC Commission. (Does not state).**
- 2. Diminish the size of available money. How?**
 - Settle the 3rd party.
 - Have a hearing on the 4.1 damages and let the Judge apportion them according to the statute.
 - Argue that employer and i.c. are not entitled to anything other the permanent disability and economic damages.
 - The Higher the fee the less the pool of recovery.