ORIGINAL

2016 OK 41

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Theresa Maxwell,

Petitioner,

v.

Sprint PCS, American Casualty Co. of Reading Pennsylvania and The Workers' Compensation Commission,

Respondents,

and

Damien Lequint Smith,

Petitioner,

v.

Baze Corp Investments, Inc. and Compsource Mutual Ins. Co.,

Respondents,

and

Jerry D. Hoffman,

Petitioner,

v.

Tulsa Gas Technologies, Inc., and Commerce & Industry Insurance Co.,

Respondents,

and

Case No. 113,898
Case No. 113,811
Case No. 113,941
Case No. 114,161
For Official Publication

Delano Majors,

Petitioner,

v.

Accent Staffing, Inc., Compsource Mutual Ins., Co., and The Workers' Compensation Commission,

Respondents.

Colbert, J., concurring in part, dissenting in part with whom Watt, J., joins.

¶1 I agree that scheduled members are exempt from the AMA Guides, Sections 45(C)(5)(a-e) are an unconstitutional violation of due process under Art. 2, § 7, and Section 46(C) is an unconstitutional special law under Art. 5, § 59. But, I write separately to shed light on the remaining ambiguities that exist in this Court's piecemeal attempt to cure the Legislature's unconstitutional scheme.

¶2 The majority opinion intimates–without expressly stating–that the Legislature's enactment of the AWCA has transmogrified the previous workers' compensation scheme from a no-fault system into a fault system. Op. at ¶ 25. In so concluding, the majority strikes the expressed provisions related to deferral and misconduct found in § 45(C)(5)(a-e), but ignores the other interrelated provisions found in the AWCA–namely, §§ 2(16), (34) and (37).

¶3 The Oklahoma workers' compensation system, from its inception, was designed to compensate injured employees solely on the basis of loss of function, as expressed in terms of "impairment," i.e. permanent total disability or

permanent partial disability (PPD), regardless of the employee's industrial performance.[1] But, since the AWCA's enactment, an employee's compensation is now wholly dependent upon the impact such impairment has on the employee's ability to resume employment. It is the impact of the impairment that drives whether or not the employee meets the newly defined definition of "disability."

¶4 In striking Sections 45(C)(5)(a-e), but leaving intact the remaining interrelated provisions, the majority exacerbates the ambiguities and inconsistencies found in the AWCA. As it stands, today's pronouncement does nothing more than prohibit the employer from deferring the payment of a PPD award. But, before an employee may receive a PPD award, that employee must have a PPD as defined by the AWCA.

¶5 Consider the remaining interrelated sections 2(16), (34) and (37). Those provisions define "disability" as an employee's incapacity to earn at least one hundred percent of the employee's pre-injury wages and renders any PPD determination contingent upon the employee's inability to return to "his or her pre-injury or equivalent job."[2] Id. at § 2(34). That is, despite a treating physician's

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[1] It should be noted that the term "impairment" originates from the American Medical Association guides.

[2] The AWCA now defines "disability" as the 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

determination the employee has reached maximum medical improvement (MMI), is released to and has in fact resumed employment, but has experienced a "loss of a portion of the total physiological capabilities," i.e. impairment rating,– as required in § 2(33) and acknowledged in § 2(34)–the employee is nonetheless **not "permanently partially disabled" as defined under the AWCA**. See Id. at § 2(34).

¶6 Obviously, this ambiguity has numerous unintended consequences. For instance, the remaining provisions of section 45(C) contemplate compensating an employee for a "permanent partial disability . . . as defined in this act." Id. at § 45(C)1. Again, the Act narrowly defines "PPD" as an employee's inability to resume his or her pre-injury or equivalent job. Id. at § 2(34). And, subsection 4 prescribes the computation for compensation only "in cases of permanent partial disability . . . ."[3] But, because section 2(34) continues to limit a PPD

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compensable injury. Id. at § 2(16). The phrase "the same or any other employment" is defined further in § 2(37) and states, a "pre-injury or equivalent job" means the job that the claimant was working for the employer at the time the injury occurred or any other employment offered by the claimant's **employer that pays at least one hundred percent (100%) of the employee's average weekly wage**. The AWCA goes on to limit a "permanent partial disability" to 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 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. Id. at § 2(34).

[3] "[T]he compensation shall be seventy percent (70%) of the employee's average weekly wage, not to exceed Three Hundred Twenty-three Dollars

determination to only those employees who are "prevent[ed] . . . from returning to his or her pre-injury or equivalent job" regardless of impairment, an employer may successfully defend against an employee's claim for a PPD award when the injured employee has resumed his or her pre-injury or equivalent job. That unintended consequence is no different than the deprivation an employee suffered when the unconstitutional deferral provision was applied to his or her claim.

¶7 As I have previously stated, the provisions of the AWCA, like its predecessor, are clearly interrelated. The above-referenced provisions are merely a glimpse of the parade of horribles the majority creates in its piecemeal approach in remedying the AWCA's unconstitutional provisions. If one provision is constitutionally offensive, so too are its interrelated provisions.

¶8 I would therefore amend the majority's opinion to read: "And to the extent that any other provision of the AWCA, as applied, reinstates the concept of fault into a no-fault system and is inconsistent with the views expressed today, those offensive provisions must be declared unconstitutional." Further, just as the majority strikes sections 45(C)(5)(a-e) as constitutionally infirm, I would similarly

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($323.00) per week, for a term not to exceed a total of three hundred fifty (350) weeks for the body as a whole."

strike sections 2(16) and the offending portions of (34)[4] as those provisions are interrelated.[5] Anything short of those amendments renders today's pronouncement an illusory victory for claimants who find themselves permanently partially **impaired** should they resume their pre-injury or equivalent jobs.

Newly Proposed Section 34:

"Permanent partial disability" means a permanent disability or loss of use after maximum medical improvement has been reached ~~**which prevents the injured employee, who**~~ **[and the employee]** has been released to return to work by 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.

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[4] See Conaghan v. Riverfield Country Day Sch., 2007 OK 60 (where this Court previously struck constitutionally infirm provisions while leaving the remaining provisions intact).

[5] Striking section 2(16) would not create an additional ambiguity and is arguably superfluous. The remaining provision, section 2(33) "permanent disability" is applicable to both PTD and PPD determinations after an employee has reached MMI. That section defines "permanent disability" as the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the current edition of the American Medical Association guides to the evaluation of impairment, if the impairment is contained therein.