

OKLAHOMA

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1. Citation for the state's workers' compensation statutes.

Pre 2/1/2014 injury date:

The Workers' Compensation Act, 85 O.S. §§ 301-413 (the "Act").

Post 2/1/2014 injury date:

The Administrative Workers' Compensation Act, 85A O.S. §§ 1-401.1 (the "Administrative Act").

SCOPE OF COMPENSABILITY

2. Who are covered "employees" for purposes of workers' compensation?

Pre 2/1/2014 injury date:

Pursuant to 85 O.S. § 308(17), the term "employee" means any person engaged in the employment of an employer covered by the terms of the Act except for such persons as may be excluded elsewhere. Any person excluded as an employee may, if otherwise qualified, be eligible for benefits under the Act if specifically covered by any policy of insurance covering benefits under the Act. "Employee" also includes a member of the Oklahoma National Guard while in the performance of duties only while in response to state orders and any authorized voluntary or uncompensated worker, rendering services as a firefighter, peace officer or emergency management worker. "Employee" also includes a participant in a sheltered workshop program which is certified by the United States Department of Labor.

Post 2/1/2014 injury date:

Pursuant to 85A O.S. § 2(18), the term "employee" means any person in the service of an employer under any written, oral, express, or implied contract for hire or apprenticeship, "but excluding one whose employment is casual and not in the course of the trade, business, profession, or occupation of his or her employer and excluding one who is required to perform work for a municipality or

county or the state or federal government on having been convicted of a criminal offense or while incarcerated.” “Employee” also includes a member of the Oklahoma National Guard while in the performance of duties only while in response to state orders and any authorized voluntary or uncompensated worker, rendering services as a firefighter, peace officer or emergency management worker.

3. Identify and describe any “statutory employer” provision.

Pre 2/1/2014 injury date:

Under 85 O.S. § 308(18), the term “Employer” means, unless otherwise expressly stated, “a person, partnership, association, limited liability company, corporation, and the legal representatives of a deceased employer, or the receiver or trustee of a person, partnership, association, corporation, or limited liability company, departments, instrumentalities and institutions of this state and divisions thereof, counties and divisions thereof, public trusts, boards of education and incorporated cities or towns and divisions thereof, employing a person included within the term ‘employee’ as defined in this section. Employer may also mean the employer’s workers’ compensation insurance carrier, if applicable.”

Furthermore, with limited exceptions, pursuant to 85 O.S. § 314(3), “[t]he person entitled to such compensation shall have the right to recover the same directly from the person’s immediate employer, the independent contractor or intermediate contractor, and such claims may be presented against all such persons in one proceeding. If it appears in such proceeding that the principal employer has failed to require a compliance with the [Act] by the independent contractor, then such employee may proceed against such principal employer without regard to liability of any independent, intermediate or other contractor.”

Post 2/1/2014 injury date:

Pursuant to 85A O.S. § 2(19), the term “Employer” means, unless, otherwise excluded, “a person, partnership, association, limited liability company, corporation, and the legal representatives of a deceased employer, or the receiver or trustee of a person, partnership, association, corporation, or limited liability company, departments, instrumentalities and institutions of this state and divisions thereof, counties and divisions thereof, public trusts, boards of education and incorporated cities or towns and divisions thereof, employing a person included within the term ‘employee’ as defined in this section. Employer may also mean the employer’s workers’ compensation insurance carrier, if applicable.”

Additionally, if a subcontractor fails to secure required compensation, the prime contractor shall be liable for compensation to the employees of the subcontractor, unless there is an intermediate subcontractor who has coverage. 85A O.S. § 36(A).

4. What types of injuries are covered and what is the standard of proof for each:

Pre 2/1/2014 injury date:

A. Traumatic or “single occurrence” claims.

“Compensable injury” means “any injury or occupational illness, causing internal or external harm to the body, which arises out of and in the course of employment if such employment was the major cause of the specific injury or illness. An injury, other than cumulative trauma, is compensable only if it is caused by a specific incident and is identifiable by time, place and occurrence unless it is otherwise defined as compensable in this act. A compensable injury must be established by objective medical evidence. The employee has the burden of proof to establish by a preponderance of the evidence that such unexpected or unforeseen injury was in fact caused by the employment. There is no presumption from the mere occurrence of such unexpected or unforeseen injury that the injury was in fact caused by the employment.” 85 O.S. § 308(10)(a).

“Compensable injury” means “a cardiovascular, coronary, pulmonary, respiratory, or cerebrovascular accident or myocardial infarction causing injury, illness, or death, only if, in relation to other factors contributing to the physical harm, a work-related activity is the major cause of the physical harm. Such injury shall not be deemed to be a compensable injury unless it is shown that the exertion of the work necessary to precipitate the disability or death was extraordinary and unusual in comparison to the usual work of the employee, or alternately, that some unusual incident occurred which is found to have been the major cause of the physical harm.” 85 O.S. § 308(10)(b).

“Compensable injury” includes “personal property which is established by objective medical evidence to be medically necessary and which replaces or improves normal physical function of the body, such as artificial dentures, artificial limbs, glass eyes, eye glasses and other prostheses which are placed in or on the body and is damaged as a result of the injury.” 85 O.S. § 308(10)(d).

“Major cause” means “more than fifty percent (50%) of the resulting injury, disease or illness. A finding of major cause shall be established by a preponderance of the evidence. A finding that the workplace was not a major cause of the injury, disease or illness shall not adversely affect the exclusive remedy provisions of this title and shall not create a separate cause of action outside of this act.” 85 O.S. § 308(28).

B. Occupational disease (including respiratory and repetitive use).

“Occupational disease” means only that disease or illness which is due to causes and conditions characteristic of or peculiar to the particular trade, occupation, process or employment in which the employee is exposed to such disease. An occupational disease arises out of the employment only if was the major cause of the resulting occupational disease and such is supported by objective medical evidence, as defined in this section. 85 O.S. § 308(33).

Post 2/1/2014 injury date:

A. Single-event or “Accidental” Injuries:

“Compensable injury” means “damage or harm to the physical structure of the body, or prosthetic appliances, including eyeglasses, contact lenses, or hearing aids, caused solely as the result of either an accident, cumulative trauma or occupational disease arising out of the course and scope of employment.” “Accident” is further defined as “an event involving factors external to the employee that (1) was unintended, unanticipated, unforeseen, unplanned and unexpected, (2) occurred at a specifically identifiable time and place, (3) occurred by chance or from unknown causes, and (4) was independent of sickness, mental incapacity, bodily infirmity or any other cause.” 85A O.S. § 2(9)(a).

An injured employee must prove that he or she has suffered a compensable injury by a preponderance of the evidence. 85A O.S. § 2(9)(e). Additionally, a compensable injury must be established by “medical evidence supported by objective findings.” 85A O.S. § 2(9)(d). “Objective findings” are “those findings which cannot come under the voluntary control of the patient.” 85A O.S. § 2(31).

B. Cumulative Trauma:

“Cumulative trauma” means an injury to an employee that is caused by the combined effect of repetitive physical activities extending over a period of time in the course and scope of employment. Cumulative trauma shall not mean fatigue, soreness or general aches and pain that may have been caused, aggravated, exacerbated or accelerated by the employee’s course and scope of employment. Cumulative trauma shall have resulted directly and independently of all other causes and the employee shall have completed at least one hundred eighty (180) days of continuous active employment with the employer. 85A O.S. §2(14).

Cumulative trauma is to be considered a soft tissue injury governed by 82A O.S. §62.

C. Occupational diseases:

Except as otherwise stated, if an employee suffers from an occupational disease and is disabled or dies as a result of the disease, the employee or his or her dependents shall be entitled to compensation as if the disability or death were caused by injury arising out of work activities within the scope of employment. 85A O.S. § 65(A).

“Occupational disease” means “any disease that results in disability or death and arises out of and in the course of the occupation or employment of the employee or naturally follows or unavoidably results from an injury as that term is used: in the Administrative Act. 85A O.S. § 65(D)(1).

A causal connection between the occupation or employment and the occupational disease must be established by a preponderance of the evidence. 85A O.S. § 65(D)(1).

5. What, if any, injuries or claims are excluded?

Pre 2/1/2014 injury date:

“Compensable injury” shall not include “the ordinary, gradual deterioration or progressive degeneration caused by the aging process, unless the employment is a major cause of the deterioration or degeneration and is supported by objective medical evidence; nor shall it include injury incurred while engaging in or performing, or as the result of engaging in or performing, any recreational or social activities.” 85 O.S. § 308(10)(c).

“Compensable injury” shall not include “an injury resulting directly or indirectly from idiopathic causes; any contagious or infectious disease unless it arises out of and occurs in the scope and course of employment; or death due to natural causes occurring while the worker is at work.” 85 O.S. § 308(10)(e).

“Compensable injury” shall not include “mental injury that does not arise directly as a result of a compensable physical injury, except in the case of rape or other crime of violence which arises out of and in the course of employment.” 85 O.S. § 308(10)(f).

Post 2/1/2014 injury date:

Pursuant to 85A O.S. § 2(9)(b), the following injuries are expressly excluded from the definition of “compensable injury”:

1. injury to any active participant in assaults or combats which, although they may occur in

the workplace, are the result of non-employment-related hostility or animus of one, both, or all of the combatants and which assault or combat amounts to a deviation from customary duties. Injuries caused by horseplay, however, are not compensable injuries, “except for innocent victims.”

2. injury incurred while engaging in or performing or as the result of engaging in or performing any recreational or social activities for the employee’s personal pleasure.

3. injury which was inflicted on the employee at a time when employment services were not being performed or before the employee was hired or after the employment relationship was terminated.

4. injury where the accident was caused by the use of alcohol, illegal drugs, or prescription drugs used in contravention of physician’s orders. If, within twenty-four (24) hours of being injured or reporting an injury, an employee tests positive for intoxication, an illegal controlled substance, or a legal controlled substance used in contravention to a treating physician’s orders, or refuses to undergo the drug and alcohol testing, there shall be a rebuttable presumption that the injury was caused by the use of alcohol, illegal drugs, or prescription drugs used in contravention of physician’s orders. This presumption may only be overcome if the employee proves by clear and convincing evidence that his or her state of intoxication had no causal relationship to the injury.

5. any strain, degeneration, damage or harm to, or disease or condition of, the eye or musculoskeletal structure or other body part resulting from the natural results of aging, osteoarthritis, arthritis, or degenerative process including, but not limited to, degenerative joint disease, degenerative disc disease, degenerative spondylosis/spondylolisthesis and spinal stenosis.

6. any preexisting condition except when the treating physician clearly confirms an identifiable and significant aggravation incurred in the course and scope of employment.

6. What psychiatric claims or treatments are compensable?

Pre 2/1/2014 injury date:

Mental injury not arising directly as a result of a compensable physical injury, except in the case of rape or other crime of violence which arises out of and in the course of employment, is *not* compensable. 85 O.S. § 308 (10)(f). However, physical injuries caused by work-related mental stress are compensable. *Ponca City Pub. Sch. v. Ritcheson*, 1993 OK CIV APP 42, 853 P.2d 782.

In *Fenwick v. Okla. State Penitentiary*, 1990 OK 47, 792 P.2d 60, the court held that a psychological assistant at a state penitentiary had not suffered “accidental injury,” and thus could not recover

workers' compensation benefits. Although he was suffering from depression, anxiety and posttraumatic stress disorder arising from a hostage situation, the assistant had not suffered any physical injury.

Post 2/1/2014 injury date:

A "mental injury or illness" is not a "compensable injury" unless caused by a physical injury to the employee, and will not be considered an injury arising out of and in the course and scope of employment or compensable unless demonstrated by a preponderance of the evidence. This limitation, however, does not apply to any victim of a crime of violence. 85A O.S. § 13(A).

To be compensable, a mental injury or illness must also be diagnosed by a licensed psychiatrist or psychologist and the diagnosis must meet "the criteria established in the most current issue of the Diagnostic and Statistical Manual of Mental Disorders." 85A O.S. § 13(A).

7. What are the applicable statutes of limitations?

Pre 2/1/2014 injury date:

The employee must file a claim within two (2) years of the date of the accident or within two (2) years of the date of: (1) the last payment of compensation; or (2) the last payment for authorized medical treatment. 85 O.S. § 318(A).

A cumulative trauma claim must be filed within two (2) years of the date on which the employee was last employed by the employer. 85 O.S. § 318(B).

Asbestosis, silicosis or exposure to nuclear radiation claims causally connected with employment must be filed within two (2) years of the date of last hazardous exposure or within two (2) years from the date said condition first becomes manifest by a symptom or condition from which one learned in medicine could, with reasonable accuracy, diagnose such specific condition, whichever last occurs. 85 O.S. § 318(C).

Post-termination injury claims are also subject to the two-year statute of limitations. *Ponca Iron & Metal, Inc. v. Wilkinson*, 2010 OK 75, 242 P.3d 534.

If a hearing or a final determination is not brought within two (2) years from the date of the filing of the claim or two (2) years from the date of the last payment of compensation or wages in lieu of the claim is barred and shall be dismissed by the Workers' Compensation Court (the "Court") for want of prosecution. 85 O.S. § 318(E).

Post 2/1/2014 injury date:

Except for claims related to an occupational disease, the employee must file a claim for benefits with the Workers' Compensation Commission (the "Commission") within one (1) year from the date of the injury. Moreover, "[i]f 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 may also be barred. 85A O.S. § 69(A)(1).

The "date of the injury" is the date an injury is caused by an "accident" as defined by the Administrative Act. 85A O.S. § 69(A)(1); *see* 85A O.S. § 2(9)(a).

A claim for compensation for disability on account of an occupational disease or infection must be filed with the Commission within two (2) years from the date of the last injurious exposure to the hazards of the disease or infection. 85A O.S. § 69(A)(2)(a).

A claim for compensation on account of silicosis or asbestosis must be filed within one (1) year after the time of disablement, and the disablement must occur within three (3) years from the date of the last injurious exposure to the hazard of silicosis or asbestosis. 85A O.S. § 69(A)(2)(b).

A claim for compensation related to a disease or condition caused by exposure to x-rays, radioactive substances, or ionizing radiation must be filed within two (2) years from the date the condition is made known to the employee following an examination and diagnosis by a medical doctor. 85A O.S. § 69(A)(2)(c).

A claim for compensation on account of death must be filed within two (2) years of the date of the death. 85A O.S. § 69(A)(3).

If no request for a hearing has been made within six (6) months after the claim is filed, the claim may, on motion and after hearing, be dismissed with prejudice. 85A O.S. § 69(A)(4). In an unpublished opinion, the Oklahoma Court of Civil Appeals has interpreted this to mean that a request for a hearing by *any party*, not just the claimant, tolls the six month dismissal period.

A claim for additional compensation must be filed within one (1) year from the date of the last payment of disability compensation, or two (2) years from the date of the injury, whichever is greater. 85A O.S. § 69(B)(1).

Failure to file a claim within the applicable limitations period will not bar the right to benefits unless objection to the failure is made at the first hearing on the claim in which all parties have been given a reasonable notice and opportunity to be heard. If no request for a hearing has been made within six (6) months after the claim is filed, the claim may, on motion and after hearing, be dismissed with prejudice. 85A O.S. § 69(E).

The right to claim compensation for benefits from the Multiple Injury Trust Fund, 85A O.S. § 31, shall be forever barred unless a notice of claim, on a form prescribed by the Commission, shall be filed with the Commission within two (2) years of the date of the last order for permanent partial

disability from the latest claim against the employer. When a claim for benefits from the Fund is filed, the claimant must request a hearing and final determination within three (3) years of filing. 85A O.S. § 33(A)-(B).

8. What are the reporting and notice requirements for those alleging an injury?

Pre 2/1/2014 injury date:

A rebuttable presumption that an injury is not work related arises unless an employee gives oral or written notice to the employer within thirty (30) days of the date an injury occurs or the employee receives medical attention from a licensed physician during the thirty-day period from the date a single event injury occurred. The presumption may be overcome by a preponderance of evidence. 85 O.S. § 323(A).

Similarly, a rebuttable presumption that an occupational disease or cumulative trauma injury does not arise in and out of the course of employment arises unless the employee gives oral or written notification within ninety (90) days of the employee's separation from employment. Such presumption must be overcome by a preponderance of the evidence. 85 O.S. § 323(B).

Post 2/1/2014 injury date:

Unless an employee gives oral or written notice to the employer within thirty (30) days of the date the injury occurs, there shall be a rebuttable presumption that the injury was not work-related. Such presumption must be overcome by a preponderance of the evidence. 85A O.S. §68(A).

Unless an employee gives oral or written notice to the employer within thirty (30) days of the employee's separation from employment, there shall be a rebuttable presumption that an occupational disease or cumulative trauma injury did not arise out of and in the course of employment. Such presumption must be overcome by a preponderance of the evidence. 85A O.S. §68(B).

Except as otherwise provided, notice of disability resulting from an occupational disease or cumulative trauma shall be the same as in cases of accidental injury. 85A O.S. § 67(A)(1).

Written notice shall be given to the employer of an occupational disease or cumulative trauma by the employee, or a representative of the employee in the case of incapacity or death, within six (6) months after the first distinct manifestation of the disease or cumulative trauma or within six (6) months after death. 85A O.S. § 67(A)(2).

9. Describe available defenses based on employee conduct:

Pre 2/1/2014 injury date:

A. Willful/Self-inflicted injury.

An injury occasioned by the willful intention of the employee to bring about injury to himself or herself or another is not compensable. 85 O.S. § 312(1).

Post 2/1/2014 injury date:

There shall be no liability for compensation under the act where the injury or death was substantially occasioned by the willful intention of the injured employee to bring about such compensable injury or death. 85A § 35(A)(2)

B. Willful misconduct, horseplay, etc.

Pre 2/1/2014 injury date:

An injury resulting directly from the willful failure of the injured employee to use a guard or protection against accident furnished for use pursuant to any statute or by order of the Commissioner of Labor is not compensable. 85 O.S. § 312(2).

Except for innocent victims, an injury caused by prank, horseplay or similar willful conduct, is not compensable. 85 O.S. § 312(4).

Post 2/1/2014 injury date:

An injury is not compensable where it is suffered by any active participant in assaults or combats which, although they may occur in the workplace, are the result of non-employment-related hostility or animus of one, both, or all of the combatants and which assault or combat amounts to a deviation from customary duties. 85A O.S. § 2(9)(b)(1).

Injuries caused by horseplay are not compensable injuries, “except for innocent victims.” 85A O.S. § 2(9)(b)(1).

C. Injuries involving drugs and/or alcohol.

Pre 2/1/2014 injury date:

An injury which occurs when an employee's use of illegal drugs or chemicals or alcohol is the major cause of the injury or accident is not compensable. The employee shall prove by a preponderance of the evidence that the use of drugs, chemicals or alcohol was not the major cause of the injury or accident. For the purposes of this paragraph, post-accident alcohol or drug testing results shall be admissible as evidence. A public or private employer may require an employee to undergo drug or alcohol testing if the employee has sustained an injury while at work. For purposes of workers' compensation, no employee who tests positive for the presence of substances defined and consumed pursuant 63 O.S. § 465.20, alcohol, illegal drugs, or illegally used chemicals, or refuses to take a drug or alcohol test required by the employer, shall be eligible for such compensation. 85 O.S. § 312(3).

Post 2/1/2014 injury date:

An injury is not compensable where the accident was caused by the use of alcohol, illegal drugs, or prescription drugs used in contravention of physician's orders. If, within twenty-four (24) hours of being injured or reporting an injury, an employee tests positive for intoxication, an illegal controlled substance, or a legal controlled substance used in contravention to a treating physician's orders, or refuses to undergo the drug and alcohol testing, there shall be a rebuttable presumption that the injury was caused by the use of alcohol, illegal drugs, or prescription drugs used in contravention of physician's orders. This presumption may only be overcome if the employee proves by clear and convincing evidence that his or her state of intoxication had no causal relationship to the injury." 85A O.S. § 2(9)(b)(4).

D. Injuries not during employment.**Pre 2/1/2014 injury date:**

An injury occurring at a time when employment services were not being performed before the employee was hired or after the employment relationship was terminated is not compensable. 85 O.S. § 312(5).

An injury which occurs outside the course of employment. Employment shall be deemed to commence when an employee arrives at the employee's place of employment to report for work and shall terminate when the employee leaves the employee's place of employment, excluding areas not under the control of the employer or areas where essential job functions are not performed; provided, however, when the employee is instructed by the employer to perform a work-related task away from the employee's place of employment, the employee shall be deemed

to be in the course of employment when the employee is engaged in the performance of job duties directly related to the task as instructed by the employer, including travel time that is solely related and necessary to the employee's performance of the task. Travel by a policeman, fireman, or a member of a first aid or rescue squad, in responding to and returning from an emergency, shall be deemed to be in the course of employment. 85 O.S. § 312(6).

Post 2/1/2014 injury date:

An injury which was inflicted on the employee at a time when employment services were not being performed or before the employee was hired or after the employment relationship was terminated is not compensable. 85A O.S. § 2(9)(b)(3). An injury is only compensable if it occurred in the "course and scope of" employment. Pursuant to 85A O.S. § 2(13), this term does not include (a) an employee's transportation to and from his or her place of employment, (b) travel by an employee in furtherance of the affairs of an employer if the travel is also in furtherance of personal or private affairs of the employee, (c) any injury occurring in a parking lot or other common area adjacent to an employer's place of business before the employee clocks in or otherwise begins work for the employer or after the employee clocks out or otherwise stops work for the employer, or (d) any injury occurring while an employee is on a work break, unless the injury occurs while the employee is on a work break inside the employer's facility and the work break is authorized by the employee's supervisor. The Supreme Court of Oklahoma, however, recently clarified that, frequently, stairways and parking lots are actually "part of the premises" of the employer, and injuries occurring there on will be compensable. The Court narrowly construed the term "adjacent to an employer's place of business. See *Brown v. Claims Mgmt. Res. Inc.*, 2017 OK 13, 391 P.3d 111, 117.

10. What, if any, penalties or remedies are available in claims involving fraud?

Pre 2/1/2014 injury date:

Any person who commits workers' compensation fraud, upon conviction, is guilty of a felony punishable by imprisonment of up to seven years, a fine up to \$10,000.00, or both. 21 O.S. §1663.

Post 2/1/2014 injury date:

Any person who commits workers' compensation fraud, or who aids and abets any person for the purpose of (1) obtaining any benefit or payment, (2) increasing any claim for benefit or payment, or (3) obtaining workers' compensation coverage under the act, shall be guilty of a felony punishable by imprisonment of up to seven years, a fine up to \$10,000, or both. 85A O.S. § 6(A); 21 O.S. § 1663(A).

11. Is there any defense for falsification of employee records regarding medical history?

Pre 2/1/2014 injury date:

No.

Post 2/1/2014 injury date:

No.

12. Are injuries during recreational and other non-work activities paid for or supported by the employer compensable?

Pre 2/1/2014 injury date:

Recreational activities of an employee are within the scope of employment for purposes of workers' compensation if they meet one of three criteria: the activity occurs on employer's premises during lunch or recreational period as a regular incident to employment; if employer expressly or implicitly induces employee's participation in such activity; or if employer derives substantial benefits from activity beyond intangible value activity would generally be expected to have with regard to the employee's health or morale improvement. *Val Gene's & Assocs. v. Balogun*, 1992 OK CIV APP 85, 833 P.2d 1265.

Post 2/1/2014 injury date:

An injury incurred while engaging in or performing or as the result of engaging in or performing any recreational or social activities for the employee's personal pleasure is not compensable. 85A O.S. § 2(9)(b)(2).

13. Are injuries by co-employees compensable?

Pre 2/1/2014 injury date:

Although not specifically addressed in the Act, employers are liable for all injuries arising out of in the course of an employee's employment. 85 O.S. § 310(A). Further, injuries by co-employees are not a class of injury listed as a non-compensable injury. *See* 85 O.S. § 312.

Post 2/1/2014 injury date:

No change.

14. Are acts by third parties unrelated to work, but committed on the premises, compensable (e.g. “irate paramour” claims)?

Pre 2/1/2014 injury date:

An injury to an employee by that employee’s “irate paramour” are not compensable. Where an employee is assaulted by a third person because of animosity, ill-will, or other personal cause wholly unconnected with his or her employment, or where an intentional injury is inflicted by unknown assailant for no apparent reason, the injury is not regarded as arising out of employment and therefore the disability is not compensable. *Mullins v. Tanksleary*, 1962 OK 239, 376 P.2d 590. However, injury by a third party stranger (e.g. robbery) is compensable. When a willful injury is inflicted by a third party aggressor upon an employee performing tasks he is hired to perform, and the assault is not motivated solely by personal animosity, wholly disconnected from employment, resulting injury is regarded as having arisen out of and in course of employment, for purposes of workers' compensation. *Wal-Mart Stores, Inc. v. Reinholtz*, 1998 OK 11, 955 P.2d 223.

Post 2/1/2014 injury date:

The Administrative Act does not specifically address the situation of an injury by an employee’s “irate paramour.” However, an injury is not compensable where it is suffered by “any active participant in assaults or combats which, although they may occur in the workplace, are the result of non-employment-related hostility or animus of one, both, or all of the combatants and which assault or combat amounts to a deviation from customary duties.” 85A O.S. § 2(9)(b)(1). Existing case law discussed *supra* could be instructive in determining whether an injury caused by a third party would be regarded as arising out of and in the course of employment.

BENEFITS

15. What criteria are used for calculating the average weekly wage?

Pre 2/1/2014 injury date:

If the injured employee shall have worked for the same employer for the year immediately

preceding the injury, his or her average weekly wage shall be one fifty-second (1/52) of his or her total wages for the fifty-two (52) weeks preceding the injury; provided, however, that if the employee shall have received a pay raise or promotion during the year, the average weekly wage shall be one fifty-second (1/52) of 260 times the average daily wage at the increased rate of pay. 85 O.S. § 331(1).

If the injured employee shall not have worked for the employer for one year prior to the injury, his or her average weekly wage shall be his or her total wages divided by the number of weeks employed; provided, however, that if the employee shall have received a pay raise or promotion during the time employed, the average weekly wage shall be one fifty-second (1/52) of 260 times the average daily wage at the increased rate of pay. 85 O.S. § 331(2).

If either of the foregoing methods of arriving at the annual average earnings of an injured employee cannot reasonably and fairly be applied, the Court may consider average wages in the same or similar employment in the same area of the state where the injury occurred. 85 O.S. § 331(3).

The benefit level for members of the National Guard and any authorized voluntary or uncompensated worker rendering services as a firefighter, peace officer or civil defense worker shall be determined by using the wages of the employee in his or her regular occupation. 85 O.S. § 331(4).

Post 2/1/2014 injury date:

Compensation based on the employee's average weekly wage is computed by dividing the employee's gross earnings by the number of full weeks of employment with employer, up to a maximum of fifty-two (52) weeks. 85A O.S. § 59(A)(1).

If the injured employee was working on piece basis, the average weekly wage is determined by dividing the earnings of the employee by the number of hours required to earn the wages during the period, not to exceed fifty-two weeks, preceding the week in which the accident occurred and by multiplying this hourly wage by the number of hours in a full-time workweek in the employment. 85A O.S. § 59(A)(1).

Overtime earnings are to be added to the regular weekly wages and shall be computed by dividing the overtime earnings by the number of weeks worked by the employee in the same employment under the contract of hire in force at the time of the accident, not to exceed a period of fifty-two (52) weeks preceding the accident. 85A O.S. § 59(B).

If, because of exceptional circumstances, the average weekly wage cannot be fairly and justly

determined by the above formulas, the Commission may determine the average weekly wage by a method that is just and fair to all parties concerned. 85A O.S. § 59(C).

The benefit level for members of the National Guard and any authorized voluntary or uncompensated worker rendering services as a firefighter, peace officer or civil defense worker shall be determined by using the wages of the employee in his or her regular occupation. 85A O.S. § 59(D).

16. How is the rate for temporary/lost time benefits calculated, including minimum and maximum rates?

Pre 2/1/2014 injury date:

In cases of Temporary Total Disability (“TTD”), the injured employee shall be paid seventy percent (70%) of his or her average weekly wages, but not in excess of the state’s average weekly wage, during continuance thereof; provided, there shall be no payment for the first seven (7) days of the initial period of TTD unless the Court declares the employee to be temporarily totally disabled for more than twenty-one (21) days. In that event, compensation shall be due from the first day of the period of temporary total disability. Total payments of compensation for TTD shall not exceed one hundred fifty-six (156) weeks, except if the Court makes a finding of a consequential injury. In that event, the Court may order an additional period of TTD not to exceed fifty-two (52) weeks. Any party may request overpayment or underpayment of TTD compensation. 85 O.S. § 332(A).

Additionally, see Number 19 *infra* regarding limitations on payment of TTD disability payments for non-surgical soft tissue injuries.

In cases of Temporary Partial Disability (“TPD”), an injured employee shall receive seventy percent (70%) of the difference between the employee’s average weekly wages and the employee’s wage-earning capacity thereafter in the same employment or otherwise, if less than before the injury, during continuance of the partial disability. Total payments of TPD may not exceed one hundred fifty-six (156) weeks. In no event shall the total payment of wages and TPD exceed eighty percent (80%) of the average weekly wage of the injured employee at the time of the accident. 85 O.S. § 332(J).

Post 2/1/2014 injury date:

TTD: In cases of TTD, the injured employee shall receive compensation equal to seventy percent (70%) of the injured employee’s average weekly wage, not to exceed seventy percent (70%) of the state average weekly wage, for one hundred and four (104) weeks. There shall be no payment for

the first three (3) days of the initial period of TTD. If an administrative law judge determines that a consequential injury has occurred and that additional time is needed for medical improvement, TTD compensation may continue for up to fifty-two (52) additional weeks. Such finding shall be based upon a showing of medical necessity by clear and convincing evidence. 85A O.S. § 45(A)(1).

Notwithstanding any other provision of the Administrative Act, no compensation for TTD shall be payable to an employee for any week for which the employee receives unemployment insurance benefits under Oklahoma law, or the unemployment insurance law of any other state. If a claim for TTD is controverted and later determined to be compensable, TTD shall be payable to an injured employee for any week for which the injured employee receives unemployment benefits but only to the extent that the TTD otherwise payable exceeds the unemployment benefits. 85A O.S. § 49.

Notwithstanding the provisions of 85A O.S. § 45, if an employee suffers a nonsurgical soft tissue injury, TTD compensation shall not exceed eight (8) weeks, regardless of the number of parts of the body to which there is a nonsurgical soft tissue injury. An employee who is treated with an injection or injections shall be entitled to an extension of an additional eight (8) weeks. An employee who has been recommended by a treating physician for surgery for a soft tissue injury may petition the Commission for one extension of TTD compensation and the Commission may order an extension, not to exceed sixteen (16) additional weeks. 85A O.S. § 62(A).

“Soft tissue injury” means damage to one or more of the tissues that surround bones and joints. Soft tissue injury includes, but is not limited to, sprains, strains, contusions, tendonitis and muscle tears. Cumulative trauma is to be considered a soft tissue injury. 85A O.S. § 62(B).

TPD: In cases of TPD, the employee shall receive compensation equal to the greater of seventy percent (70%) of the difference between the injured employee’s average weekly wage before the injury and his or her weekly wage for performing the alternative work offered by the employer, but only if his or her weekly wage for performing the alternative work is less than the TTD rate. Compensation may not exceed fifty-two (52) weeks. If the employee refuses to perform the alternative work offered by the employer, he or she will not be entitled to TTD. 85A O.S. § 45(B).

17. How long does the employer/insurer have to begin temporary benefits from the date disability begins?

Pre 2/1/2014 injury date:

Temporary disability shall be payable without an award by the Court. The first payment of temporary disability compensation shall become due on the tenth day after the employer has received notice of injury. All compensation owed on that date shall be paid and thereafter payments shall be made weekly except when otherwise ordered by the Court. 85 O.S. § 332(N). *But see* Number 18 *infra* regarding seven (7) day waiting period.

If the employer has actual notice of the injury and the injury is not disputed and weekly TTD

payments are not commenced within ten (10) days or if any subsequent installment of TTD is not made within ten (10) days after it becomes due, the insurer of the employer shall pay to the employee a penalty of fifteen percent (15%) of the unpaid or delayed weekly benefits. 85 OS. § 332(E).

Further, if the employer has actual notice of the injury, the injury is not disputed, and weekly TTD payments are not commenced within ten (10) days or if any subsequent installment of TTD is not made within ten (10) days after it becomes due, the insurer of the employer shall pay to the employee a penalty of fifteen percent (15%) of the unpaid or delayed weekly benefits. 85 O.S. § 332(E).

Post 2/1/2014 injury date:

The Administrative Act contains no provisions requiring an employer to pay benefits without a Commission order.

18. What is the “waiting” or “retroactive” period for temporary benefits?

Pre 2/1/2014 injury date:

There shall be no payment for the first seven (7) days of the initial period of TTD unless the Court declares the employee to be temporarily totally disabled for more than twenty-one (21) days. 85 O.S. § 332(A).

Post 2/1/2014 injury date:

There shall be no payment for the first three (3) days of the initial period of TTD. 85A O.S. § 45(A).

19. What is the standard procedure for terminating temporary benefits?

Pre 2/1/2014 injury date:

When the injured employee is released from active medical treatment by the treating physician for all body parts found by the Court to be injured, or in the event that the employee, without a valid excuse, misses three (3) consecutive medical treatment appointments, fails to comply with medical orders of the treating physician, or otherwise abandons medical care, the employer shall be entitled to terminate TTD by notifying the employee, or if represented, his or her counsel. If there

is no objection within ten (10) days, TTD compensation shall be terminated. If, however, an objection to the termination is filed by the employee within ten (10) days, the Court shall set the matter within twenty (20) days for a determination if TTD compensation shall continue or be terminated. The Court shall terminate TTD unless the employee proves the existence of a valid excuse for his or her failure to comply with medical orders of the treating physician or his or her abandonment of medical care. The Court may appoint an independent medical examiner to determine if further medical treatment is reasonable and necessary. The independent medical examiner shall not provide treatment to the injured worker, unless agreed upon by the parties. The employer shall bear the cost of the independent medical examination. 85 O.S. § 332(B).

Temporary compensation may be terminated if the worker has no claim for compensation (Form 3 or Form 3B) on file with the Court. If there is a Form 3 or Form 3B on file, the employer may terminate temporary compensation without a Court order only if one of the following events occur:

1. The claimant returns to full-time employment;
2. The claimant fails to:
 - a. object within ten (10) days of receipt of written notification from the employer of the employer's intent to terminate TTD benefits for any reason provided in 85 O.S. § 332(B). Notification from the employer shall be sent to the claimant's attorney of record or to the claimant if unrepresented; or
 - b. object within fifteen (15) days of receipt of written notification from the employer of the employer's intent to terminate TTD benefits as provided in 85 O.S. § 332(G). Notification from the employer shall be sent to the claimant's attorney of record or to the claimant if unrepresented.
3. Except as otherwise provided in 85 O.S. § 332(I), the claimant is incarcerated for a misdemeanor or felony conviction in this state or another jurisdiction;
4. The claimant files a permanent partial impairment or permanent total disability rating report or a Form 9 requesting a hearing on permanent partial impairment or permanent total disability;
5. The parties voluntarily agree in writing to terminate temporary compensation;
6. The claimant dies; or

7. Any other event that causes temporary total disability benefits to be lawfully terminated without Court order pursuant to 85 O.S. § 332 or as otherwise permitted in the Act.

In all other instances, temporary compensation may be terminated only by Court order. A respondent may request a hearing on the termination of temporary total disability benefits by filing a Form 13 with the Court and concurrently mailing a copy thereof to the opposing parties. The Form 13 mailed to the opposing parties shall include a copy of all evidentiary exhibits relied upon by the respondent in support of terminating temporary compensation.

If a respondent is found to have improperly terminated temporary compensation, the Court shall order the compensation reinstated retroactive to the date of termination and assess a fifteen percent (15%) penalty against the respondent on all unpaid benefits as of the date of the trial. The Court also may require the respondent to file a new Form 13 and show full compliance with this rule before a trial on the respondent's request to terminate temporary compensation will be conducted.

If the claimant objects to the termination of TTD benefits, the claimant may request an expedited hearing on the issue of reinstatement of TTD benefits as provided in 85 O.S. § 332(B) or pursuant to 85 O.S. § 332(G), as applicable. Workers' Compensation Court Rule 15.

In case of a nonsurgical soft tissue injury, in which the employer has provided medical care within seven (7) days after receipt of oral or written notice of the injury, TTD compensation shall not exceed eight (8) weeks, regardless of the number of parts of the body to which there is a nonsurgical soft tissue injury. A claimant who has been recommended by a treating physician for one or more injections may petition the Court for one extension of temporary total disability compensation and the Court may order an extension, not to exceed eight (8) additional weeks. A claimant who has been recommended by a treating physician for surgery for a soft tissue injury may petition the Court for one extension of TTD compensation and the Court may order an extension, not to exceed sixteen (16) additional weeks, if the treating physician indicates that an extension is appropriate or as agreed to by all parties. In the event the surgery is not performed within ninety (90) days of the approval of the surgery by the employer or employer's insurance carrier or an order of the Court authorizing the surgery, the benefits for the extension period shall be terminated by the Court, unless the Court finds the delay was beyond the control of the claimant. In the event surgery is performed, the period of TTD is subject to the limitations established by subsection A of this section. This subsection shall apply to all cases coming before the Court after the effective date of this act, regardless of the date of injury. 85 O.S. § 332(K).

Post 2/1/2014 injury date:

When the injured employee is released from active medical treatment by the treating physician for

all body parts found by the Commission to be injured, or in the event that the employee, without a valid excuse, misses three (3) consecutive medical treatment appointments, fails to comply with medical orders of the treating physician, or otherwise abandons medical care, the employer shall be entitled to terminate TTD by notifying the employee, or if represented, his or her counsel. If, however, an objection to the termination is filed by the employee within ten (10) days of termination, the Commission shall set the matter within twenty (20) days for a determination if TTD compensation shall be reinstated. The TTD shall remain terminated unless the employee proves the existence of a valid excuse for his or her failure to comply with medical orders of the treating physician or his or her abandonment of medical care. The administrative law judge may appoint an independent medical examiner to determine if further medical treatment is reasonable and necessary. The independent medical examiner shall not provide treatment to the injured worker, unless agreed upon by the parties. 85A O.S. § 45(A)(2).

20. Is the amount of TTD credited toward the amount entitled for Permanent Partial Disability?

Pre 2/1/2014 injury date:

No. 85 O.S. § 345(E).

Post 2/1/2014 injury date:

No. The Administrative Act does not specifically address this issue. However, “awards for permanent partial disability shall be made pursuant to 85A O.S. §§ 45 and 46, less any sums previously paid which the Workers’ Compensation Commission may find to be a proper credit thereon.” 85A O.S. § 116(A). This provision refers to credit for overpayment of TTD as pre-payment of PPD.

21. What disfigurement benefits are available and how are they calculated?

Pre 2/1/2014 injury date:

Benefits up to \$50,000.00 can be awarded for serious and permanent disfigurement. An employee cannot recover for disfigurement and Permanent Partial Disability to the same body parts. 85 O.S. § 334.

Post 2/1/2014 injury date:

If an injured employee incurs serious and permanent disfigurement to any part of the body, the Commission may award compensation to the injured employee in an amount not to exceed Fifty Thousand Dollars (\$50,000.00). No award for disfigurement shall be entered until twelve (12)

months after the injury. An injured employee cannot recover compensation for disfigurement if he or she receives an award for Permanent Partial Disability (“PPD”) to the same part of the body. 82A O.S. § 45(F).

22. How is PPD calculated, including the minimum and maximum rates?

Pre 2/1/2014 injury date:

In case of PPD, the compensation shall be seventy percent (70%) of the employee’s average weekly wages, and shall be paid to the employee for the period prescribed by a schedule of weeks are available for scheduled members/parts. 85 O.S. § 333(E).

The compensation payments under the provisions of the Act for PPD shall not:

1. Exceed the sum of Three Hundred Twenty-three Dollars (\$ 323.00) per week for injuries occurring on or after August 27, 2010, through August 26, 2015, or fifty percent (50%) of the state’s average weekly wage beginning August 27, 2015;
2. At any time be less than One Hundred Fifty Dollars (\$ 150.00) per week for injuries occurring on or after August 27, 2010. 85 O.S. § 333(F).

A. How many weeks are available for scheduled members/parts, and the standard for recovery?

Scheduled members/parts are assigned different weeks. The maximum weeks are: Arm/Leg – 275; Hand/Foot – 220, Thumb – 66, First Finger – 39, Second Finger – 33, Third Finger – 22, Fourth Finger – 17, Big Toe – 33, Other Toes – 11, Ear – 110, Both Ears – 330, Eye – 275. 85 O.S. § 333(E).

B. Number of weeks for “whole person” and standard for recovery.

A “whole person” rating is based upon 500 weeks. 85 O.S. §333(E).

Post 2/1/2014 injury date:

A “whole person” rating is based on three hundred and fifty (350) weeks. 85A O.S. § 45(C)(4)

A. How many weeks are available for scheduled members/ parts, and the standard for recovery?

The PPD rate of compensation for amputation or permanent total loss of use of a scheduled member specified in Section 46 of the act shall be seventy percent (70%) of the employee's average weekly wage, not to exceed Three Hundred Twenty-three Dollars (\$323.00), multiplied by the number of weeks set forth for the member in Section 46 of this act, regardless of whether the injured employee is able to return to his or her pre-injury or equivalent job. 85A O.S. § 45(C)(9).

Scheduled members/parts are assigned different weeks. The maximum weeks are: Arm amputated at or above elbow- 275; Arm amputated below elbow – 220; Leg amputated at or above knee- 275; Leg amputated below knee – 220; Hand - 220; Thumb – 66; First finger – 39; Second finger – 33; Third finger – 22; Fourth finger – 17; Foot- 220; Great toe – 33; Other toes – 11; Eye – 275; One ear- 110; both ears -330; One testicle – 53; Both testicles – 158.

The determination of PPD shall be the responsibility of the Commission through its administrative law judges. Any claim by an employee for compensation for PPD must be supported by competent medical testimony of a medical doctor, osteopathic physician, or chiropractor, and shall be supported by objective medical findings. The opinion of the physician shall include employee's percentage of PPD and whether or not the disability is job-related and caused by the accidental injury or occupational disease. A physician's opinion of the nature and extent of PPD to parts of the body other than scheduled members must be based solely on criteria established by the current edition of the American Medical Association's "Guides to the Evaluation of Permanent Impairment." 85A O.S. § 45(C)(1).

23. Are there any requirements/benefits for vocational rehabilitation, and what is the standard for recovery?

Pre 2/1/2014 injury date:

When, as a result of the injury, the employee is unable to perform the same occupational duties the employee was performing prior to the injury, the employee shall be entitled to such vocational rehabilitation services provided by a technology center school, a public or private vocational skills center or public secondary school offering vocational-technical education courses, or a member institution of The Oklahoma State System of Higher Education, which shall include retraining and job placement so as to restore the employee to gainful employment. 85 O.S. § 338(A).

If appropriate, the Court shall refer the employee to a qualified expert for evaluation of the practicability of, need for and kind of rehabilitation services or training necessary and appropriate in order to restore the employee to gainful employment. The cost of the evaluation shall be paid by the employer. Following the evaluation, if the employee refuses the services or training ordered by the Court, or fails to complete in good faith the vocational rehabilitation training ordered by the Court, then the cost of the evaluation and services or training rendered may, in the discretion of the Court, be deducted from any award of benefits to the employee which remains unpaid by the employer. Upon receipt of such report, and after affording all parties an opportunity to be heard,

the Court shall order that any rehabilitation services or training, recommended in the report, or such other rehabilitation services or training as the Court may deem necessary, provided the employee elects to receive such services, shall be provided at the expense of the employer. Except as otherwise provided in this subsection, refusal to accept rehabilitation services by the employee shall in no way diminish any benefits allowable to an employee. 85 O.S. § 338(C).

Post 2/1/2014 injury date:

A Vocational Rehabilitation Director (“Director”) oversees the Commission’s rehabilitation program, and must help injured workers return to the work force. 85A O.S. § 45(E).

If the injured employee is unable to return to his or her pre-injury or equivalent position due to permanent restrictions as determined by a physician, upon the request of either party, the Director shall determine if it is appropriate for a claimant to receive vocational rehabilitation training or services, and will oversee such training. If appropriate, the Director shall issue administrative orders, including, but not limited to, an order for a vocational rehabilitation evaluation for any injured employee unable to work for at least ninety (90) days. In addition, the Director may assign injured workers to vocational rehabilitation counselors for coordination of recommended services. The cost of the services shall be paid by the employer. 85A O.S. § 45(E)(2).

There shall be a presumption in favor of ordering vocational rehabilitation services or training for an eligible injured employee if the employee’s occupation is:

1. truck driver or laborer and the medical condition is traumatic brain injury, stroke or uncontrolled vertigo,
2. truck driver or laborer performing high-risk tasks and the medical condition is seizures,
3. manual laborer and the medical condition is bilateral wrist fusions,
4. assembly-line worker and the medical condition is radial head fracture with surgical excision,
5. heavy laborer and the medical condition is myocardial infarction with congestive heart failure,
6. heavy manual laborer and the medical condition is multilevel neck or back fusions greater than two levels,
7. laborer performing overhead work and the medical condition is massive rotator cuff tears, with or without surgery,
8. heavy laborer and the medical condition is recurrent inguinal hernia following unsuccessful surgical repair,
9. heavy manual laborer and the medical condition is total knee replacement or total hip replacement,
10. roofer and the medical condition is calcaneal fracture, medically or surgically treated,

11. laborer of any kind and the medical condition is total shoulder replacement,
12. laborer and the medical condition is amputation of a hand, arm, leg, or foot,
13. laborer and the medical condition is tibial plateau fracture, pilon fracture,
14. laborer and the medical condition is ankle fusion or knee fusion,
15. driver or heavy equipment operator and the medical condition is unilateral industrial blindness, or
16. laborer and the medical condition is 3-, 4-, or 5-level positive discogram of the cervical spine or lumbar spine, medically treated.

85A O.S. § 45(E)(3).

Upon the request of either party, or by order of an administrative law judge, the Director shall assist the Commission in determining if it is appropriate for a claimant to receive vocational rehabilitation training or services. If appropriate, the administrative law judge shall refer the employee to a qualified expert for evaluation of the practicability of, need for and kind of rehabilitation services or training necessary and appropriate in order to restore the employee to gainful employment. The cost of the evaluation shall be paid by the employer. Following the evaluation, if the employee refuses the services or training ordered by the administrative law judge, or fails to complete in good faith the vocational rehabilitation training ordered by the administrative law judge, then the cost of the evaluation and services or training rendered may, in the discretion of the administrative law judge, be deducted from any award of benefits to the employee which remains unpaid by the employer. Upon receipt of such report, and after affording all parties an opportunity to be heard, the administrative law judge shall order that any rehabilitation services or training, recommended in the report, or such other rehabilitation services or training as the administrative law judge may deem necessary, provided the employee elects to receive such services, shall be provided at the expense of the employer. Except as otherwise provided in this subsection, refusal to accept rehabilitation services by the employee shall in no way diminish any benefits allowable to an employee. 85A O.S. § 45(E)(4).

24. How are permanent total disability benefits calculated, including the minimum and maximum rates?

Pre 2/1/2014 injury date:

In case of total disability adjudged to be permanent, seventy percent (70%) of the employee's average weekly wages, but not in excess of the state's average weekly wage, shall be paid to the employee during the continuance of the disability until such time as the employee reaches the age of maximum Social Security retirement benefits or for a period of fifteen (15) years, whichever is longer. In the event the claimant dies of causes unrelated to the injury or illness, benefits shall cease on the date of death. Provided, however, any person entitled under provisions of Section 49 to revive the action shall receive a one-time lump sum payment equal to twenty-six (26) weeks of weekly benefits for permanent total disability awarded the claimant. 85 O.S. § 336(A).

Post 2/1/2014 injury date:

In case of total disability adjudged to be permanent, seventy percent (70%) of the employee's average weekly wages, but not in excess of the state's average weekly wage, shall be paid to the employee during the continuance of the disability until such time as the employee reaches the age of maximum Social Security retirement benefits or for a period of fifteen (15) years, whichever is longer. In the event the claimant dies of causes unrelated to the injury or illness, benefits shall cease on the date of death. Provided, however, any person entitled to revive the action shall receive a one-time lump-sum payment equal to twenty-six (26) weeks of weekly benefits for permanent total disability awarded the claimant. If more than one person is entitled to revive the claim, the lump-sum payment shall be evenly divided between or among such persons. In the event the Commission awards both permanent partial disability and permanent total disability benefits, the permanent total disability award shall not be due until the permanent partial disability award is paid in full. If otherwise qualified according to the provisions of this act, permanent total disability benefits may be awarded to an employee who has exhausted the maximum period of temporary total disability even though the employee has not reached maximum medical improvement. 85A O.S. § 45(D)(1).

25. How are death benefits calculated, including the minimum and maximum rates?

Pre 2/1/2014 injury date:

A. Funeral expenses.

In the event that no benefits under other provisions of this section are paid to the dependents or the heirs-at-law of the deceased, an amount not to exceed Eight Thousand Dollars (\$ 8,000.00) shall be paid for funeral expenses. 85 O.S. § 337(F).

B. Dependency claims.

85 O.S. § 337(A) provides if there is a surviving spouse, to such surviving spouse who shall remain unmarried, seventy percent (70%) of the average weekly wages the deceased was earning. In no event shall this spousal weekly income benefit be diminished by the award to other beneficiaries. In addition to the benefits theretofore paid or due, two (2) years' indemnity benefit in one lump sum shall be payable to a surviving spouse upon remarriage;

If there is a surviving spouse and a child or children, fifteen percent (15%) of the average weekly wages the deceased was earning for each child. Where there are more than two such children, the

income benefits payable for the benefit of all children shall be divided among all children, to share and share alike, subject to the maximum limits in subsection D;

To the children, if there is no surviving spouse, fifty percent (50%) of the average weekly wages the deceased was earning for one child, and twenty percent (20%) of such wage for each additional child, divided among all children, to share and share alike, subject to the maximum limits in subsection D;

The weekly income benefits payable for the benefit of any child under this section shall cease when the child dies, marries, or reaches the age of eighteen (18), unless the child is over eighteen (18) years of age and remains enrolled as a full-time student in high school or is being home-schooled in a high-school course approved by the Oklahoma Department of Education; or unless a child is over eighteen (18) years of age and is physically or mentally incapable of self-support; or unless the child is under the age of twenty three (23) and enrolled as a full-time student in any accredited institution of higher education or vocational or technology education;

If there is no surviving spouse or children, to each parent, if actually dependent, twenty-five percent (25%) of the average weekly wages the deceased was earning, subject to the maximum limits in subsection D.

Section 337(D) places the maximum amount of the award: The aggregate weekly income benefits payable to all beneficiaries under this section shall not exceed one hundred percent (100%) of the average weekly wages of the employee or one hundred percent (100%) of the state's average weekly wage, whichever is less.

Post 2/1/2014 injury date:

A. Funeral expenses.

The employer shall pay the actual funeral expenses, not exceeding the sum of Ten Thousand Dollars (\$10,000.00). 85A O.S. § 47(5)

B. Dependency Claims.

Pursuant to 85A O.S. § 47(C), if an injury or occupational illness causes death, weekly income benefits are payable as follows:

If there is a surviving spouse, a lump-sum payment of One Hundred Thousand Dollars (\$100,000.00) and seventy percent (70%) of the lesser of the deceased employee's average weekly

wage and the state average weekly wage. In addition to the benefits theretofore paid or due, two (2) years' indemnity benefit in one lump sum shall be payable to a surviving spouse upon remarriage.

If there is a surviving spouse and a child or children, a lump-sum payment of Twenty-five Thousand Dollars (\$25,000.00) and fifteen percent (15%) of the lesser of the deceased employee's average weekly wage and the state average weekly wage to each child. If there are more than two children, each child shall receive a pro rata share of Fifty Thousand Dollars (\$50,000.00) and thirty percent (30%) of the deceased employee's average weekly wage.

If there is a child or children and no surviving spouse, a lump-sum payment of Twenty-five Thousand Dollars (\$25,000.00) and fifty percent (50%) of the lesser of the deceased employee's average weekly wage and the state average weekly wage to each child. If there are more than two children, each child shall receive a pro rata share of one hundred percent (100%) of the lesser of the deceased employee's average weekly wage and the state average weekly wage. With respect to the lump-sum payment, if there are more than six children, each child shall receive a pro rata share of One Hundred Fifty Thousand Dollars (\$150,000.00).

If there is no surviving spouse or children, each legal guardian, if financially dependent on the employee at the time of death, shall receive twenty-five percent (25%) of the lesser of the deceased employee's average weekly wage and the state average weekly wage until the earlier of death, becoming eligible for social security, obtaining full-time employment, or five (5) years from the date benefits under this section begin.

26. What are the criteria for establishing a "second injury" fund recovery?

Pre 2/1/2014 injury date:

For actions in which the subsequent injury occurred on or after November 1, 2005, if such combined disabilities constitute Permanent Total Disability ("PTD"), the employee shall receive full compensation as provided by law for the disability resulting directly and specifically from the subsequent injury. In addition, the employee shall receive compensation for PTD if the combination of injuries renders the employee permanently and totally disabled. The employer shall be liable only for the degree of percent of disability which would have resulted from the subsequent injury if there had been no preexisting impairment. Tit. 85 O.S. § 404(A).

Post 2/1/2014 injury date:

Multiple Injury Trust Fund: For actions in which the subsequent injury occurred on or after November 1, 2005, if such combined disabilities constitute PTD, the employee shall receive full compensation as provided by law for the disability resulting directly and specifically from the

subsequent injury. In addition, the employee shall receive compensation for PTD if the combination of injuries renders the employee permanently and totally disabled. The employer shall be liable only for the degree of percent of disability which would have resulted from the subsequent injury if there had been no preexisting impairment. Tit. 85A O.S. § 32(A).

27. What are the provisions for re-opening a claim for worsening of condition, including applicable limitations periods?

Pre 2/1/2014 injury date:

Within the time prescribed by 85 O.S. § 18, the Court may find that the injured employee has suffered a change of condition for the worse and order TTD, additional PPD, PTD, and medical benefits. Provided, that any change of condition shall only be found to those body parts adjudicated by the previous award or as a result of a consequential injury and must be proved by objective medical evidence of a change of condition. Additional PPD awarded after a change of condition and the PPD from the previous award shall not exceed five hundred twenty (520) weeks, except for additional PPD resulting from amputation or surgery as a result of the change of condition. 85 O.S. § 342.

The jurisdiction of the Court to reopen any cause upon an application based upon a change in condition for the worse shall extend for three (3) years from the date of the last order in which monetary benefits or active medical treatment was provided, and unless filed within such period of time, shall be forever barred. An order denying an application to reopen a claim shall not extend the period of the time set out in this act for reopening the case. A failure to comply with a medical treatment plan ordered by the Court shall bar reopening of a claim. This subsection shall be considered to be substantive in nature. 85 O.S. § 318(F).

Post 2/1/2014 injury date:

Except where a joint petition settlement has been approved, the Commission may review any compensation judgment, award, or decision. Such review may be done at any time within six (6) months of termination of the compensation period fixed in the original compensation judgment or award, on the Commission's own motion or on the application of any party in interest, on the ground of a change in physical condition or on proof of erroneous wage rate. On review, the Commission may make a judgment or award terminating, continuing, decreasing, or increasing for the future the compensation previously awarded, subject to the maximum limits provided for in this act. 85A O.S. § 80(A).

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 the date of the last payment of disability compensation or two (2) years from the

date of the injury, whichever is greater. 85A O.S. § 69(B)(1).

28. What situation would place responsibility on the employer to pay an employee's attorney fee?

Pre 2/1/2014 injury date:

There is no statutory or case law authority for the award of attorney fees to the successful employee at the trial court level. However, there are several cases supporting the award of extra attorney fees to the employee's attorney when the respondent files a frivolous appeal. *See, generally, King Mfg. v. Meadows*, 2005 OK 78, 127 P.3d 584; *Tibbetts v. Sight 'n Sound Appliance Ctrs., Inc.*, 2003 OK 72, 77 P.3d 1042; *Matter of Estate of Sneed*, 1998 OK 8, 953 P.2d 1111; *Melinder v. Southlands Dev., Inc.*, 1985 OK 98, 715 P.2d 1341.

Post 2/1/2014 injury date:

No change.

EXCLUSIVITY/TORT IMMUNITY

29. Is the compensation remedy exclusive?

Pre 2/1/2014 injury date:

A. Scope of immunity.

In general, workers' compensation is the exclusive remedy for an employee against the employer. 85 O.S. § 302(A).

B. Exceptions (intentional acts, contractual waiver, "dual capacity," etc.).

There is an exception to the exclusive remedy provision in the case of an intentional tort or where the employer has failed to secure the payment of compensation for the injured employee. 85 O.S. § 302(A). An intentional tort exists only when the employee is injured as a result of willful, deliberate, specific intent of the employer to cause such injury. Allegations or proof that the

employer had knowledge that such injury was substantially certain to result from the employer's conduct do not constitute an intentional tort. 85 O.S. § 302(B).

If an employer has failed to secure the payment of compensation for his or her injured employee as the Act requires, an injured employee, or his or her legal representatives if death results from the injury, may maintain an action in the district court for damages, and the employer may not assert the defenses that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his or her employment, or that the injury was due to the contributory negligence of the employee. 85 O.S. § 302(C).

Post 2/1/2014 injury date:

A. Scope of Immunity

Like the Act, the rights and remedies granted by the Administrative Act are exclusive, and the negligent acts of co-employees cannot be imputed to the employer. 85A O.S. § 5(A).

B. Exceptions

The exclusive remedy provision shall not apply if an employer fails to secure the payment of compensation due to the employee as required by the act. 85A O.S. § 5(B)(1). Additionally, the employee may sue in district court due to the employer's willful, deliberate injury of the employee with specific intent. As before, statutorily, allegations or proof that the employer knew that injury was substantially certain to result from the employer's conduct is not an intentional tort. The employee shall plead facts that show it is at least as likely as it is not that the employer acted with the purpose of injuring the employee. The issue of whether an act is an intentional tort shall be a question of law. 85A O.S. § 5(B)(2). However, the 2019 case of *Wells v. Oklahoma Roofing & Sheet Metal*, 2019 OK 45, 437 P.3d 1020 rejected the statutory definition of "intentional tort" and reinstated the "substantial certainty" standard. How this ruling affects election of remedies is yet to be determined.

C. Employer Liability for Failure to Pay Award.

If any employer fails to comply with a final compensation judgment or award, any beneficiary of the judgment or award, or the Commission, may file a certified copy of the judgment or award in the district court where the employer's property may be found. The district court clerk shall enter the judgment or award in the judgment record of the county, and the judgment or award so recorded shall be a judgment and lien as are judgments of the district court, and enforceable as such. 85A O.S. § 79.

30. Are there any penalties against the employer for unsafe working conditions?

Pre 2/1/2014 injury date:

There are none.

Post 2/1/2014 injury date:

No change.

31. What is the penalty, if any, for an injured minor?

Pre 2/1/2014 injury date:

Minors collect the same benefits as adults. A previous statute, located at 85 O.S. § 21(5), provided that if an employee was a minor when injured, and under normal conditions his wages would be expected to increase, that fact could be considered in arriving at his average weekly wages. *Matthews v. Purcell Seed & Grain Co., Inc.*, 1993 OK CIV APP 190, 867 P.2d 1359, 1360. The last version of the Act does not contain a similar provision. 85 O.S. § 331.

An employer who illegally hires a minor is subject to suit and tort damages in district court. The minor can elect coverage under workers' compensation or may pursue damages in the district court. *Baker v. Hunn Roofing, Inc.*, 399 F. Supp. 628 (W.D. Okla. 1975).

Post 2/1/2014 injury date:

When an injury or death is sustained by a minor employed in violation of federal or state statutes relating to minimum ages for employment of minors, disability or death benefits provided for by the Administrative Act shall be doubled; provided, however, such penalty shall not apply when the minor misrepresents his or her age, in writing, to the employer. 85A O.S. § 48.

32. What is the potential exposure for “bad faith” claims handling?

Pre 2/1/2014 injury date:

Oklahoma courts recognize a common-law tort action for an insurance carrier's bad faith in refusing to pay a workers' compensation award. The Oklahoma Supreme Court adopted the rule that where a workers' compensation claimant has followed the certification requirements set out in 85 O.S. § 346, and the insurer fails to act in good faith and deal fairly by paying the award, the

insurer may be liable for bad faith. *Sizemore v. Cont'l Cas. Co.*, 2006 OK 36, 142 P.3d 47. When an insurer has failed to provide court-ordered benefits and cannot demonstrate good cause for its failure to do so, a reasonable inference arises that the reason for the failure to obey the award involves a refusal to comply, not mere negligence. The remedy for such conduct is an action for bad faith. *Summers v. Zurich Am. Ins. Co.*, 2009 OK 33, 213 P.3d 565, 569.

Post 2/1/2014 injury date:

It is unlikely that enactment of the Administrative Act will alter the Oklahoma courts' position on bad faith claim handling.

33. What is the exposure for terminating an employee who has been injured?

Pre 2/1/2014 injury date:

The Act provides that an employer cannot terminate an employee for filing a workers' compensation case or during an employee's period of TTD solely on the basis of absence from work. The exposure for the employer is actual and punitive damages. However, after an employee's period of TTD has ended, the employer shall not be required to rehire or retain an employee who is determined to be physically unable to perform the assigned duties. 85 O.S. §§ 341(B) and (C).

Post 2/1/2014 injury date:

An employer may not discriminate or retaliate against an employee when the employee has in good faith:

1. Filed a claim under the Administrative Act;
2. Retained a lawyer for representation regarding a claim;
3. Instituted or caused to be instituted any proceeding; or
4. Testified or is about to testify in any proceeding.

If the Commission determines that an employer has violated one of these provisions, it may award the employee back pay up to a maximum of One Hundred Thousand Dollars (\$100,000.00). Interim earnings or amounts earnable with reasonable diligence by the person discriminated against shall reduce the back pay otherwise allowable. The prevailing party shall also be awarded costs and attorney fees. 85A O.S. § 7(A), (C), (D).

An employer may not discharge an employee during a period of temporary disability for the sole reason of being absent from work or for the purpose of avoiding payment of TTD benefits to the

injured employee. However, an employer shall not be required to rehire or retain an employee who, after TTD has been exhausted, is determined by a physician to be physically unable to perform his or her assigned duties, or whose position is no longer available. 85A O.S. § 7(E)-(F).

THIRD PARTY ACTIONS

34. Can an injured employee sue third parties?

Pre 2/1/2014 injury date:

Yes. However, a person entitled to compensation under the Act must, before any claim is filed under the Act, elect whether to pursue a remedy against a third party. 85 O.S. § 348. If the person entitled to compensation under the Act elects to receive workers' compensation benefits, the cause of action against the third party must be assigned to the insurance carrier liable for the payment of benefits.

Post 2/1/2014 injury date:

Yes. Pursuant to 85A O.S. § 43(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. The employer or the employer's carrier shall be entitled to reasonable notice and opportunity to join in the action.

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.

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.

35. Can co-employees be sued for work-related injuries?

Pre 2/1/2014 injury date:

No. 85 O.S. § 302. However, if the injury by the co-employee was something such as intentional infliction of emotional distress, sexual harassment, violation of an individual's civil rights, etc., an action could be maintained in district court.

Post 2/1/2014 injury date:

No. The Administrative Act's remedies are exclusive of all other rights and remedies of the employee against "the employer, or any principal, officer, director, employee, stockholder, partner, or prime contractor of the employer on account of injury, illness, or death." 85A O.S. § 5(A).

36. Is subrogation available?

Pre 2/1/2014 injury date:

Yes. The employer/insurer also has the right of subrogation to recover money paid by the employer/insurer for the expenses of the last illness or accident under the Act from third persons. The Act also permits subrogation for death claims. Additionally, the Act grants the employer/insurer a credit against future workers' compensation benefits in an amount equal to the net recovery of the injured employee in a third-party action. 85 O.S. § 348.

Post 2/1/2014 injury date:

Yes. An employer or carrier liable for compensation under the Administrative Act shall have the right to maintain an action in tort against any third party responsible for the injury or death. However, the employer or the carrier shall notify the claimant in writing that the claimant has the right to hire a private attorney to pursue any benefits to which the claimant is entitled in addition

to the subrogation interest against any third party responsible for the injury or death. 85A O.S. § 43(B). The statutory subrogation right of employers or their insurance carriers has been successfully challenged on state constitutional grounds at the district court level, but the issue has not reached an appellate court. *See Rogers v. Sims*, Grady County District Court No. CJ-2015-2.

MEDICALS

37. Is there a time limit for medical bills to be paid, and are penalties available for late payment?

Pre 2/1/2014 injury date:

Oklahoma has a medical fee schedule. 85 O.S. § 327, available at http://www.cec.ok.gov/fee_schedule.htm. Medical bills must be paid within forty-five (45) days of the receipt by the employer/insurer, unless the employer/insurer has a good-faith reason to request additional information about an invoice. Thereafter, a judge may assess a penalty up to twenty-five percent (25%) for any amount due under the Fee Schedule that remains unpaid upon the finding by the Court that no good-faith reason existed for the delay in payment. If the Court finds a pattern of an employer/insurer willfully and knowingly delaying payments for medical care, the Court may assess a civil penalty of up to \$ 5,000.00 per occurrence.

Post 2/1/2014 injury date:

Payment for medical care as required by the Administrative Act shall be due within forty-five (45) days of the receipt by the employer or insurance carrier of a complete and accurate invoice, unless the employer or insurance carrier has a good-faith reason to request additional information about such invoice. Thereafter, the Commission may assess a penalty up to twenty-five percent (25%) for any amount due under the Fee Schedule that remains unpaid on the finding by the Commission that no good-faith reason existed for the delay in payment. If the Commission finds a pattern of an employer or insurance carrier willfully and knowingly delaying payments for medical care, the Commission may assess a civil penalty of not more than Five Thousand Dollars (\$5,000.00) per occurrence. 85A O.S. § 50(H)(11).

38. What, if any, mechanisms are available to compel the production of medical information (reports and/or an authorization) at the administrative level?

Pre 2/1/2014 injury date:

Oklahoma workers' compensation judges, although special judge who hear only compensation matters, nevertheless have the full powers of the district-court judges. This means the usual discovery tools are available, as in any other court proceeding, i.e., orders to compel,

interrogatories, subpoenas, etc. 85 O.S. § 303(E).

Post 2/1/2014 injury date:

The Commission shall have the power to preserve and enforce order during any proceeding before it, to issue subpoenas for and administer oaths to and compel the attendance and testimony of witnesses, and require the production of books, papers, documents, and other evidence. 85A O.S. § 73.

39. What is the rule on (a) Claimant's choice of physician; (b) Employer's right to second opinion and/or Independent Medical Examination?

Pre 2/1/2014 injury date:

Within seven (7) days of actual knowledge of an injury, the employer shall provide the employee reasonable and necessary medical care with a physician of the employer's choice. The physician selected by the employer shall become the treating physician.

The procedure for changing a treating physician differs depending upon whether the employee is covered by a certified workplace medical plan (CWMP).

If the employee is **not covered by a CWMP**, the employee is entitled to one change of physician for any affected body part upon application to the Court. No change of treating physician can be authorized for a part of the body if no authorized medical care was provided for that part of the body for 180 days before the date of the filing of the application for a change. No more than two changes of physician are allowed in a claim. 85 O.S. §326.

If the employee is **covered by a CWMP**, the employee may apply for a one-time change of physician to another appropriate physician within the network of the CWMP using the dispute resolution process set out in the CWMP. Once the dispute resolution process has been exhausted, the employee may petition the Court for a change of physician within the plan. If no physician within the plan is qualified to treat the employee's injuries, a physician outside of the plan may be selected if the physician agrees to comply with all the rules, terms and conditions of the certified workplace medical plan. 85 O.S. § 328.

The Court at any time may appoint an Independent Medical Examiner ("IME") to assist in determining any issue before the Court. In the event surgery is recommended by a treating physician, upon request of the employer, the Court shall appoint an IME to determine the reasonableness and necessity of the recommended surgery. 85 O.S. §329(B).

Post 2/1/2014 injury date:

The employer shall have the right to choose the treating physician. 85A O.S. § 50(A). If, however, the employer fails or neglects to provide medical treatment within five (5) days after actual knowledge is received of the injury, the employee may select a physician to provide medical treatment. 85A O.S. § 50(B).

If the employer **is covered by a CWMP**, the employee may apply for a change of physician through the dispute resolution process set out in the CWMP on file with the State Department of Health. 85A O.S. § 56(A).

If the employer **is not covered by a CWMP**, the employer shall select the treating physician. The Commission on application of the employee shall order one change of treating physician. The employer shall provide a list of three physicians from whom the employee may select the replacement. 85A O.S. § 56(B).

An administrative law judge may appoint an IME to assist in determining any issue before the Commission. 85A O.S. § 112(B). In the event surgery is recommended by a treating physician, upon request of the employer, the Commission shall appoint an IME to determine the reasonableness and necessity of the recommended surgery. 85A O.S. § 56(B).

40. What is the standard for covered treatment (e.g. chiropractic care, physical therapy, etc.)?

Pre 2/1/2014 injury date:

The Act covers treatment from any person licensed in Oklahoma as a medical doctor, chiropractor, podiatrist, dentist, osteopathic physician or optometrist. The Court may accept testimony from a psychologist if the testimony is requested by the Court. 85 O.S. §326(D).

Post 2/1/2014 injury date:

An employer must provide an injured employee with medical, surgical, hospital, optometric, podiatric, and nursing services. 85A O.S. § 50(A). The Fee Schedule adopted by the Commission establishes the maximum rates that medical providers shall be reimbursed for medical care, including, but not limited to, charges by physicians, dentists, counselors, hospitals, ambulatory and outpatient facilities, clinical laboratory services, diagnostic testing services, and ambulance services.

41. Which prosthetic devices are covered, and for how long?

Pre 2/1/2014 injury date:

Employers must furnish necessary prosthetic devices for the lifetime of an injured worker whose compensable injury resulted in certain anatomical losses or the replacement of a joint. Employers must also repair or replace a prosthetic device damaged as a result of a compensable injury. An employer's duty to provide a prosthetic device is terminated upon subsequent injury to the body part for which the device was provided. 85 O.S. §335.

Post 2/1/2014 injury date:

When a compensable injury results in the loss of one or more eyes, teeth, or members of the body, or the replacement of a joint, the employer shall furnish such prosthetic devices as may be necessary as determined by the Commission for the lifetime of the worker. When a worker sustains a compensable injury, arising out of and in the course of his or her employment, which results in damage to a prosthetic device with which such worker is equipped, the employer shall repair or replace such device. Provided, that a subsequent injury to the part of the body for which a prosthetic device is provided shall terminate the obligation of the employer to provide such prosthetic device. 85A O.S. § 114.

42. Are vehicle and/or home modifications covered as medical expenses?

Pre 2/1/2014 injury date:

Yes, if they are reasonable and necessary. 85 O.S. § 326; *Okla. Gas & Elec. Co. v. Chronister*, 2004 OK CIV APP 32, 114 P.3d 455.

Post 2/1/2014 injury date:

Though vehicle and home modifications are not specifically addressed in the Administrative Act, an employer is responsible for providing all "reasonably necessary" apparatus in connection with the injury. 85A O.S. § 50.

43. Is there a medical fee guide or schedule, or other provisions for cost containment?

Pre 2/1/2014 injury date:

Yes. For the express purpose of reducing the overall cost of medical care for injured workers in the workers' compensation system by 5%, the Administrator of the Workers' Compensation Court

developed a new “Oklahoma Workers’ Compensation Medical Fee Schedule” that was implemented on January 1, 2012. 85 O.S. § 327, available at http://www.cec.ok.gov/fee_schedule.htm.

Post 2/1/2014 injury date:

Yes. The 2012 Fee Schedule can be found at http://www.cec.ok.gov/fee_schedule.htm. The Commission shall conduct a review of the Fee Schedule every two (2) years. The Fee Schedule shall establish the maximum rates that medical providers shall be reimbursed for medical care provided to injured employees. Reimbursement for medical care shall be prescribed and limited by the Fee Schedule as adopted by the Commission, after notice and public hearing, and after approval by the Legislature by joint resolution. 85A O.S. § 50(H).

44. What, if any, provisions or requirements are there for “managed care”?

Pre 2/1/2014 injury date:

Managed-care plans are available and must be certified by the State Commissioner of Health. The criteria for managed-care plans are set forth in tit. 85 O.S. § 328.

Post 2/1/2014 injury date:

Managed-care plans are available and must be certified by the State Commissioner of Health. The criteria for managed-care plans are set for in tit. 85A O.S. § 64.

PRACTICE/PROCEDURE

45. What is the procedure for contesting all or part of a claim?

Pre 2/1/2014 injury date:

The Court has a pre-printed form with stipulations, defenses, etc., that must be filed with subsequent to the employee filing a request for a hearing in the claim. This form requires all exhibits and all witnesses to be listed twenty (20) days before trial. Workers’ Compensation Court Rule 16. Forms are available here: http://www.cec.ok.gov/court_forms.htm.

Post 2/1/2014 injury date:

Each employer desiring to controvert an employee's right to compensation shall file with the Commission on or before the fifteenth day following notice of the alleged injury or death a statement on a form prescribed by the Commission that the right to compensation is controverted and the grounds for the controversion, the names of the claimant, employer, and carrier, if any, and the date and place of the alleged injury or death. 85A O.S. § 86(A).

Failure to file the statement of controversion shall not preclude the employer's ability to controvert the claim or cause it to waive any defenses. The employer can make additional defenses not included in the initial notice at any time. 85A O.S. § 86(A).

If an employer is unable to obtain sufficient medical information as to the alleged injury or death within fifteen (15) days following receipt of notice, although the employer has acted in good faith and with all due diligence, the employer may apply in writing for an extension of time for making payment of the first installment or controverting the claim. This written application is to be postmarked within the fifteen-day period. The Commission may, in its discretion, grant the extension and fix the additional time to be allowed. Filing of application for an extension shall not be deemed to be a controversion of the claim. This provision shall not apply in cases where the physician is an employee of, on retainer with, or has a written contract to provide medical services for the employer. 85A O.S. § 86(B)-(C).

46. What is the method of claim adjudication?

Pre 2/1/2014 injury date:

A. Administrative level.

Under the Act, there is no administrative level.

B. Trial court.

There are ten workers' compensation judges. An individual case is heard before one of the judges without a jury. 85 O.S. § 303.

C. Appellate.

Once a final order has been filed by the trial court, review of the trial court's decision may be sought before a Three Judge Panel comprised of any three judges who did not originally hear the case or directly before the Oklahoma Supreme Court. No new evidence is permitted to be presented to the panel. The panel will only overturn a finding if it is against the clear weight of the evidence or contrary to law.

The next level of appeal is filing a Petition for Review to the Oklahoma Supreme Court (although a party is allowed to skip the Three Judge Panel review and file an appeal directly with the Oklahoma Supreme Court). The Supreme Court will assign the matter to one of the divisions of the Court of Civil Appeals, which will determine whether there is any competent evidence to support the lower court's finding and which will review the lower court's judgment for errors of law.

Once the appellate court has rendered a decision, either side may seek certiorari to the Supreme Court which may modify, reverse, remand for rehearing, or set aside the order or award upon any of the following grounds: (1) the Court acted without or in excess of its powers; (2) the order or award was contrary to law; (3) the order or award was procured by fraud; or (4) the order or award was against the clear weight of the evidence. 85 O.S. § 340.

Post 2/1/2014 injury date:

A. Administrative Level.

The Administrative Act applies to all claims for injuries and death occurring on or after February 1, 2014. 85A O.S. § 3. The Commission is comprised of three full-time commissioners who appoint administrative law judges to hear all compensation claims. 85A O.S. §§ 19, 20.

The administrative law judges hear all claims without a jury. Except as otherwise provided, the decision of the administrative law judge shall be final as to all questions of law and fact. 85A O.S. § 27.

B. Trial court.

The Administrative Act dissolved the Court and renamed it the Workers' Compensation Court of Existing Claims for the purpose of deciding pre-February 1, 2014 claims. 85A O.S. §§ 3, 400. The Existing Claims Court hears all claims without a jury.

C. Appellate.

Pursuant to 85A O.S. § 78, any party aggrieved by the judgment, decision, or award made by the administrative law judge may, within ten (10) days of issuance, appeal to the Commission. 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.

The appellant shall pay a filing fee of One Hundred Seventy-five Dollars (\$175.00) to the Commission at the time of filing his or her appeal. The fee shall be deposited in the Workers' Compensation Fund.

The 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 Oklahoma Supreme Court to review the judgment, decision or award within twenty (20) days of being sent to the parties; to assure timely filing, calculate the due date from the date the judgment is file-stamped. Any judgment, decision or award made by an administrative law judge shall be stayed until all appeal rights have been waived or exhausted. 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.

47. What are the requirements for stipulations or settlements?

Pre 2/1/2014 injury date:

The Court has pre-printed forms for the employees and employers to use to identify the issues upon which the parties can agree and further identify the issues that are in controversy. Using this form, the respondent is required to stipulate to those items not in controversy and advise the court of the matters being controverted. Additionally, on this same form (which functions much like a pre-trial order) the respondent lists witnesses and exhibits to be introduced at trial. Workers' Compensation Court Rule 19.

Post 2/1/2014 injury date:

If the employer or carrier and the injured employee desire to settle the claim, they shall file a joint petition for settlement with the Commission. After the joint petition has been filed, the Commission shall order that all claims between the parties have been settled. 85A O.S. § 87. The Commission has a "Joint Petition" form that shall be signed by both the employer and employee, or representatives thereof, and shall be approved by an administrative law judge and filed with the Commission. Forms are available at <https://ok.gov/wcc/Forms/index.html>. In cases in which the employee is not represented by legal counsel, the Commission or an administrative law judge is authorized to approve a full, final and complete settlement of any issue upon the filing of an Employer's First Notice of Injury. 85A O.S. § 115(A).

In the absence of fraud, a Joint Petition shall be deemed binding upon the parties thereto and a final adjudication of all rights pursuant to this act or the workers' compensation law in effect at the time of the injury or final order of the Court. An official record shall be made by an official Commission reporter of the testimony taken to effect the Joint Petition. 85A O.S. § 115(C).

48. Are full and final settlements with closed medicals available?

Pre 2/1/2014 injury date:

Yes.

Post 2/1/2014 injury date:

Yes. 85A O.S. § 115.

49. Must stipulations and/or settlements be approved by the state administrative body?

Pre 2/1/2014 injury date:

Yes. A settlement must be approved by a judge or by the Administrator of the Workers' Compensation Court. 85 O.S. § 339.

Post 2/1/2014 injury date:

Yes. A settlement must be approved by an administrative law judge. 85A O.S. § 115(A).

RISK FINANCE FOR WORKERS' COMPENSATION

50. What insurance is required, and what is available (e.g. private carriers, state fund, assigned risk pool, etc.)?

Pre 2/1/2014 injury date:

Workers' compensation insurance is required by statute. This is commonly provided by private insurer. If an employer is large enough, it can qualify to go "own risk". There are "self insured associations" which are non-profit in nature, *e.g.* Lumbermens Association, Restaurant Association, etc. CompSource Oklahoma, a quasi state agency, provides coverage which is often less expensive than private insurers offer. 85 O.S. § 351.

Post 2/1/2014 injury date:

Pursuant to 85A O.S. § 38, an employer must secure compensation by:

1. insuring and keeping insured the payment of compensation with any stock corporation, mutual association, or other concerns authorized to transact the business of workers' compensation insurance in Oklahoma;
2. obtaining and keeping in force guaranty insurance with any company authorized to do guaranty business in Oklahoma;
3. furnishing satisfactory proof to the Commission of the employer's financial ability to pay the compensation;
4. forming a group self-insurance association; or
5. any other security as may be approved by the Commission and the Insurance Department.

51. What are the provisions/requirements for self-insurance?

Pre 2/1/2014 injury date:

A. For individual entities.

An individual entity may self insure if it furnishes satisfactory proof to the Administrator of a financial ability to pay such compensation. 85 O.S § 351. Such proof generally consists of depositing an irrevocable letter of credit or a surety bond and providing proof of excess coverage. All individual own-risk or self-insured risk employers must pay an annual application fee of \$1000 to

the Administrator. Tit. 85 O.S § 369.

B. For groups or “pools” of private entities.

Group self-insurance associations may be formed. 85 O.S. § 398. An employer, upon application to become a member of a group self-insurance association, must acknowledge that it accepts joint and several liability. 85 O.S § 351. All group self-insureds must pay a \$1000 annual application fee.

Post 2/1/2014 injury date:

A. For individual entities.

An employer may self-insure by furnishing satisfactory proof to the Commission of the employer’s financial ability to pay compensation.

If the employer has less than one hundred employees or less than One Million Dollars in net assets, the employer will be required to:

1. deposit with the Commission securities, an irrevocable letter of credit or a surety bond payable to the state, in an amount determined by the Commission which shall be at least an average of the yearly claims for the last three (3) years, or

2. provide proof of excess coverage with such terms and conditions as is commensurate with their ability to pay the benefits required by the provisions of the Administrative Act.

85A O.S. § 38(A)(3)(a).

If the employer has one hundred or more employees and One Million Dollars or more in net assets, the employer will be required to:

1. secure a surety bond payable to the state, or an irrevocable letter of credit, in an amount determined by the Commission which shall be at least an average of the yearly claims for the last three (3) years, or

2. provide proof of excess coverage with terms and conditions that are commensurate with their ability to pay the benefits required by the provisions of the Administrative Act.

85A O.S. § 38(A)(3)(b).

B. For groups or “pools” of private entities.

An employer may form a group self-insurance association consisting of two or more employers which shall have a common interest and which shall have entered into an agreement to pool their

liabilities under the Administrative Act. Such agreement shall be subject to rules of the Commission. Any employer, upon application to become a member of a group self-insurance association, shall file with the Commission a notice, in such form as prescribed by the Commission, acknowledging that the employer accepts joint and several liability. Upon approval by the Commission of such application for membership, said member shall be a qualified self-insured employer. 85A O.S. § 38(A)(4).

52. Are “illegal aliens” entitled to benefits of workers’ compensation in light of The Immigration Reform and Control Act of 1986, which indicates that they cannot lawfully enter into an employment contract in the United States, although most state acts include them within the definition of “employee”?

Pre 2/1/2014 injury date:

The Act does not preclude compensation for an employee who is an illegal alien, and the Oklahoma courts have determined that an illegal alien who is injured on the job is entitled to benefits under the Act. *Lang v. Landeros*, 1996 OK CIV APP 4, 918 P.2d 404.

Post 2/1/2014 injury date:

Compensation to alien nonresidents of the United States or Canada shall be the same in amount as provided for residents, except that alien nonresident dependents in any foreign country shall be limited to the surviving spouse or children or, if there is no surviving spouse or children, to the surviving father or mother whom the employee has supported, either wholly or in part, for the period of one (1) year before the date of the injury. 85A O.S. § 11.

53. Are terrorist acts or injuries covered or excluded under workers’ compensation law?

Pre 2/1/2014 injury date:

Terrorist acts are covered, assuming the terrorist act is not motivated solely by personal animosity toward the employee. A terrorist act is subject to the same principles applicable to injuries by other third parties. See Number 14 *supra*.

Post 2/1/2014 injury date:

No change.

54. Are there any state specific requirements which must be satisfied in light of the obligation of the parties to satisfy Medicare’s interests pursuant to the Medicare Secondary Payer Act?

Pre 2/1/2014 injury date:

There are no state specific requirements which must be satisfied in light of the Medicare Secondary Payer Act.

Post 2/1/2014 injury date:

No change.

55. How are subrogation liens of Medicaid and health insurers treated under workers' compensation law?

Pre 2/1/2014 injury date:

The Federal Medicaid statute requires states to include in their plan for medical assistance provisions (1) that the individual will assign to the state any rights to payment for medical care from any third party and (2) that the individual will cooperate with the state in pursuing any third party who may be liable to pay for care and services available under the Medicaid plan. 42 U.S.C.A. § 1396k(a). The State is authorized to retain such amount as is necessary to reimburse it (and the federal government as appropriate) for medical assistance payments and to pay the remainder to the individual. 42 U.S.C.A. § 1396k(b).

Post 2/1/2014 injury date:

No change.

56. What are the requirements for confidentiality and privacy of medical records under workers' compensation law and how are they affected by state and federal law (HIPAA)?

Pre 2/1/2014 injury date:

HIPAA, 45 C.F.R. parts 160-164 and 65 F.R. 82462, provides an exception for workers' compensation claims so as to allow the collection of medical records by employers and insurers. 45 C.F.R. 164.512(l). Therefore, a HIPAA compliant medical authorization could be used.

Post 2/1/2014 injury date:

No change.

57. What are the provisions for “Independent Contractors”?

Pre 2/1/2014 injury date:

An independent contractor, who cannot claim benefits under the Act, is one who engages to perform certain services for another according to his own manner and method, free from control and direction of the other in all matters connected with performance of the service, except as to result of product of the work. *Page v. Hardy*, 1958 OK 283, 334 P.2d 782.

An independent contractor is liable for compensation due to his or her direct employees, or the employees of his or her subcontractor, and the principal employer is also liable for compensation due to all direct employees, employees of the independent contractor, subcontractors, or other employees engaged in the general employer's business.

If an independent contractor relies in good faith on proof of a valid workers' compensation insurance policy issued to a subcontractor of the independent contractor or on proof of an Affidavit of Exempt Status under the Act properly executed by the subcontractor under 36 O.S. § 924.4, the independent contractor shall not be liable for injuries of any employees of the subcontractor. The independent contractor is not liable for injuries of any subcontractor of the independent contractor unless an employer-employee relationship is found to exist by the Court despite the execution of an Affidavit of Exempt Status under the Act.

A person entitled to such compensation has the right to recover the same directly from the person's immediate employer, the independent contractor or intermediate contractor, and such claims may be presented against all such persons in one proceeding. If it appears that the principal employer has failed to require a compliance with the Act by the independent contractor, then such employee may proceed against such principal employer without regard to liability of any independent, intermediate or other contractor. However, if a principal employer relies in good faith on proof of a valid workers' compensation insurance policy issued to an independent contractor of the employer or to a subcontractor of the independent contractor or on proof of an Affidavit of Exempt Status under the Act properly executed by the independent contractor or subcontractor under 36 O.S. § 924.4, the principal employer shall not be liable for injuries of any employees of the independent contractor or subcontractor. Furthermore, such principal employer shall not be liable for injuries of any independent contractor of the employer or of any subcontractor of the independent contractor unless an employer-employee relationship is found to exist by the Court despite the execution of an Affidavit of Exempt Status. In any proceeding where compensation is awarded against the principal employer under these provisions, the award does not preclude the principal employer from recovering the same, and all expense in connection

with the proceeding from any independent contractor, intermediate contractor or subcontractor whose duty it was to provide security for the payment of such compensation. The recovery may be had in supplemental proceedings in the cause before the Court or by an independent action in any court of competent jurisdiction to enforce liability of contracts. 85 O.S. §314.

Post 2/1/2014 injury date:

Independent contractors do not meet the Administrative Act's definition of "employee" and are therefore not covered. 85A O.S. § 2(18)(a);

If a subcontractor fails to secure compensation required by the Administrative Act, the prime contractor shall be liable for compensation to the employees of the subcontractor unless there is an intermediate subcontractor who has workers' compensation coverage. 85A O.S. § 36(A).

If work is performed by an independent contractor on a single-family residential dwelling occupied by the owner, or the premises of such dwelling, or for a farmer whose cash payroll for wages, excluding supplies, materials and equipment, for the preceding calendar year did not exceed One Hundred Thousand Dollars (\$100,000.00), the owner or farmer shall not be liable for compensation under this act for injuries to the independent contractor or his or her employees. 85A O.S. § 36(E).

58. Are there any specific provisions for "Independent Contractors" pertaining to professional employment organizations/temporary service companies/leasing companies?

Pre 2/1/2014 injury date:

No.

Post 2/1/2014 injury date:

No change.

59. Are there any specific provisions for "Independent Contractors" pertaining to owner/operators of trucks or other vehicles for driving or delivery of people or property?

Pre 2/1/2014 injury date:

Yes. The Act does not apply to an owner-operator who owns or leases a truck-tractor or truck for hire, if the owner-operator actually operates the truck-tractor or truck, and if the person contracting with the owner-operator is not the lessor of the truck-tractor or truck.

An owner-operator shall not be precluded from workers' compensation coverage, however, if he or she elects to participate as a sole proprietor. 85 O.S. §311.

Post 2/1/2014 injury date:

Yes, an owner-operator is not an "employee" and thus is not covered by the Administrative Act if he or she owns or leases a truck-tractor or truck for hire and actually operates the truck-tractor or truck, and if the person contracting with the owner-operator is not the lessor of the truck-tractor or truck. 85A O.S. § 2(18)(b)(9).

A "drive-away owner-operator" is not an "employee" if he or she privately owns and utilizes a tow vehicle in drive-away operations and operates independently for hire, if the drive-away owner-operator actually uses the tow vehicle and the person contracting with the drive-away owner-operator is not the lessor of the vehicle. 85A O.S. § 2(18)(b)(10).

In either case, however, an owner-operator shall not be precluded from workers' compensation coverage if he or she elects to participate as a sole proprietor.

60. What are the "Best Practices" for defending workers' compensation claims and controlling workers' compensation benefits costs and losses?

Financial exposure to workers' compensation is an expensive and complex challenge for every business. Every business must deal with the expense of workers' compensation in its risk management and in dealing with the inevitable claim. The best approach to ameliorating a business exposure is a strong and individualized "Best Practices" plan.

The ALFA affiliated counsel who compiled this State compendium offers an expert, experienced and business-friendly resource for review of an existing plan or to help write a "Best Practices" plan to guide your workers' compensation preparation and response. No one can predict when the need will arise, so ALFA counsels that you make it a priority to review your plan with the ALFA Workers' Compensation attorney for your state, listed below:

61. Are there any state specific requirements which must be satisfied in light of the obligation of the parties to protect Medicare's interests when settling the right to medical treatment benefits under a claim?

No.

62. Does your state permit medical marijuana and what are the restrictions for use and for work activity in your state Worker's Compensation law?

Oklahoma does not currently permit medical marijuana. On June 26, 2018, however, Oklahoma voters will decide State Question 788, a ballot initiative that, if approved, will legalize the licensed cultivation, use, and possession of marijuana for medicinal purposes. Under the bill, there would be no specific qualifying medical conditions to obtain a state-issued medical marijuana license. An individual would need a board-certified physician's signature. The law would prevent employers from penalizing persons for holding a medical marijuana license unless failing to do so causes a loss of benefits under federal law. Employers would be allowed to penalize license-holders who possess or use marijuana while at the holder's place of employment or during hours of employment. Employers would not be allowed to take action against a license holder based on the results of a drug test showing positive for marijuana.

63. Does your state permit the recreational use of marijuana and what are the restrictions for use and for work activity in your state Worker's Compensation law?

Oklahoma does not permit the recreational use of marijuana.

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