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IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Case No. 115717

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RUSSELL STUBBLEFIELD,

Petitioner,

vs.

BUDDYS HOME FURNISHINGS, ZURICH INSURANCE CO., AND THE WORKERS' COMPENSATION COMMISSION

Respondents.

APPEAL FROM THE OKLAHOMA WORKERS' COMPENSATION COMMISSION

PETITIONER'S BRIEF-IN-CHIEF

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ATTORNEYS FOR PETITIONER

January 27, 2017

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SUMMARY OF THE RECORD

Petitioner, a manual laborer, suffered a compensable injury to his low back on August 8, 2014, after the effective date of the Administrative Workers' Compensation Act. Petitioner timely filed a CC-Form 3 (Record p. 3). The injury was found compensable by the Commission in an order of April 8, 2015 (Record, p. 15-17) The Petitioner underwent a lumbar fusion with instrumentation.

After the Petitioner was released at maximum medical improvement by physicians, he was evaluated for the extent of his Permanent Partial Disability (PPD) by physicians retained by the parties.

At trial, the ALJ accepted Petitioner's medical evidence in a report from Dr. Stephen Wilson of June 6, 2016. (Record, p. 54-59) Dr. Wilson opined that Petitioner's Permanent Partial Disability (PPD) was 55 percent to the body as a whole under the 5th Edition of the AMA Guides.

Petitioner timely lodged a Daubert objection to Respondent/Employer's medical evidence in which Dr. Andrew John evaluated claimant's PPD at eight percent to the body as a whole based upon the AMA Sixth Edition. (Record, p. 60-68). In addition, Petitioner argued that the mandatory use of the AMA Guides to determine Petitioner's residual disability was unconstitutional on several grounds.

The ALJ awarded eight percent to the back or $8,994.72 (for a back fusion with instrumentation for a manual laborer) and indicated he was bound by the AMA Guides—Sixth Edition. Had the ALJ rejected the Sixth Edition rating of the Respondent, he could have

awarded up to 55 percent PPD to the back, or $62,177.50. The substantial difference in the PPD ratings is illustrated by the Comparison of Benefits. (Record p. 92-93).

The decision of the ALJ was affirmed by the Workers' Compensation Commission on January 23, 2014. (Record, p. 94-95). The case was timely appealed to the Supreme Court.

The Petitioner relies upon the record to support its objection to any PPD evaluation based upon the Sixth Edition of the AMA Guides, as follows:

(1) Excerpts (116) pages of the AMA Guides, Sixth Edition, explaining the use, purpose, and limitations of the Sixth Edition. (Record, item 26)

(2) A transcript of the Congressional hearing in regard to use of the Sixth Edition. (Record, item 26.)

(3) The affidavit and curriculum vitae of Dean Emily Spieler of the Northeastern University School of Law, one of the nation's preeminent workers' compensation experts. (Record, item 26)

(4) The affidavit of Dr. William Gillock, a member of the Oklahoma Physician Advisory Committee (PAC) in 2009 when the PAC unanimously rejected the use of the Sixth Edition of the AMA Guides in Oklahoma. (Record, item 26)

(5) Minutes of the Physician Advisory Committee in 2009 when use of the Sixth Edition was rejected. (Record, item 26.)

(6) Report of Dr. John Munneke, a longtime member of the PAC, which was the basis for the PAC rejection of the use of the Sixth Edition in Oklahoma. (Record, item 26)

In support of the Petitioner's constitutional challenge of the use of the AMA Guides, specifically the Sixth Edition, to evaluate Petitioner's PPD, the following portions of the record are relied upon:

(1) Report of Dr. Stephen Wilson of March 21, 2016 (Record, p. 54-59).

(2) The Comparison of Benefits under the Fifth and Sixth Editions. (Record, 92-93)

(3) Portions of the record listed in paragraphs 1-6 of the previous section.

STANDARD OF REVIEW

Historically, the appellate standard of review in a workers' compensation case has been determined by the law in effect on the date of the injury. *Williams Companies, Inc. v. Dunkelgod,* 2012 OK 96, 295 P.3d 1107, 1113. Further, questions of law were reviewed by a de novo standard under which there is plenary, non-deferential, and independent authority to determine whether the trial court erred in its legal rulings. *American Airlines v. Hervey*, 2001 OK 74, 33 P.3d 47.

This workers' compensation claim has a date of injury after the effective date of Title 85A, Administrative Workers' Compensation Act (AWCA), making it the applicable law. The AWCA provides that 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. 85A O.S. §78.

PROPOSITION I

The expert witness testimony provided by Respondent/Employer in regard to the extent of Petitioner's PPD should be excluded as a violation of the Daubert Rule.

ARGUMENT AND AUTHORITIES

1. The admission of evidence in a hearing before the Oklahoma Workers' Compensation Commission, including expert testimony, is governed by 85A O.S. § 72:

A. Conduct of Hearing or Inquiry.
1. In making an investigation or inquiry or conducting a hearing, the administrative law judges and the Commission shall not be bound by technical or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this act. The administrative law judges and the Commission may make such investigation or inquiry, or conduct the hearing, in a manner as shall best ascertain the rights of the parties.
2. Declarations of a deceased employee concerning the injury may be received in evidence and may, if corroborated by other evidence, be sufficient to establish the injury.
3. When deciding any issue, administrative law judges and the Commission shall determine, on the basis of the record as a whole, whether the party having the burden of proof on the issue has established the proof by a preponderance of evidence.
4. Administrative law judges are required to make specific, on-the-record findings of ultimate facts responsive to the issues shaped by the evidence as well as conclusions of law on which its judgment is to be rested.

B. Hearings to be Public - Records.
1. a. Hearings before the Commission shall be open to the public and shall be stenographically reported. The Commission is authorized to contract for the reporting of the hearings.
b. The Commission shall, by rule, provide for the preparation of a record of all hearings and other proceedings before it.
2. The Commission shall not be required to stenographically report or prepare a record of joint petition hearings. The administrative law judge or legal advisor shall record the hearing at no cost to the parties.

C. Introduction of Evidence.
1. All oral evidence or documentary evidence shall be presented to the designated representative of the Commission at the initial hearing on a controverted claim. The oral evidence shall be stenographically reported. Each party shall present all evidence at the initial hearing. Further hearings for the purpose of introducing additional evidence shall be granted only at the discretion of the hearing officer or Commission. A request for a hearing for the introduction of additional evidence shall show the substance of the evidence desired to be presented.
2. a. Any party proposing to introduce medical reports or testimony of physicians at the hearing of a controverted claim shall, as a condition precedent to the right to do so, furnish to the opposing party and to the Commission copies of the written reports of the physicians of their findings and opinions at least seven (7)

days before the date of the hearing. If no written reports are available to a party, the party shall notify in writing the opposing party and the Commission of the name and address of the physicians proposed to be used as witnesses and the substance of their testimony at least seven (7) days before the hearing.
b. If the opposing party desires to cross-examine the physician, he or she should notify the party who submits a medical report to him or her as soon as practicable, in order that he or she may make every effort to have the physician present for the hearing.
3. A party failing to observe the requirements of this subsection may not be allowed to introduce medical reports or testimony of physicians at a hearing, except in the discretion of the hearing officer or the Commission.
4. The time periods may be waived by the consent of the parties.

D. Expert testimony shall not be allowed unless it satisfies the requirements of Federal Rule of Evidence 702 with annotations and amendments. *(Emphasis added)*

2. A Rule 702 objection made in regard to Subsection D of 85A O.S. § 72 is otherwise known as a Daubert objection based on the U.S. Supreme Court ruling in *Daubert v. Merrell Dow Pharms. Inc.,* 509 U.S. 579 (1993) and its prodigy.

3. In this case, the expert's opinion relying upon the Guides, Sixth Edition is not relevant to the task at hand of establishing the nature and extent of Claimant's permanent partial disability, thus violating FRE 702. The expert opinion is based upon impairment, yet the Workers' Compensation Commission, through its administrative law judges, is charged with determining disability of the injured worker. (See 85A § 45, 46, and 116). Nowhere in the Administrative Workers' Compensation Act is there any mention of awarding "impairment."

The major shortcoming of the Guides, Sixth Edition is its concept of evaluating "impairment" of an injured worker. "Impairment" is NOT the same as "disability." The AMA Guides do not evaluate "disability." The Sixth Edition of the AMA Guides defines both terms:

> *"Impairment" is a significant deviation, or loss of use of any body structure or body function in an individual with a health condition, disorder, or disease.*

> *"Disability" has been defined as activity limitations and/or participation restrictions in an individual with a health condition, disorder, or disease.* (AMA Guides to the Evaluation of Permanent Impairment, Sixth Edition, second printing, 2011, definitions.) (Record, item 26)

Understanding the difference between "impairment" and "disability" is critical to correctly admitting evidence and correctly determining the nature and extent of an injured worker's disability.

The Sixth Edition clearly indicates that **disability** is a determination for a judge or trier of fact and may or may not have a relationship to an **impairment**. The Sixth Edition states that an impairment rating is not EQUAL to a disability rating and is not intended to be a measure of disability since disability has to do with limitations or restrictions in job functions rather than the actual anatomic limitation. (Record, item 26)

The Sixth Edition contains an **Example:**

Both a lawyer and a pianist sustain a severe injury of the non-dominant little finger.

- Both have the same "impairment" under the AMA Guides: 75 % of the digit or 4 % of the whole person.
- The lawyer has little or no "disability" because of the major loss of use of the finger. It has little effect upon his ability to earn a living.
- The pianist is unable to perform his occupation and is therefore totally disabled from his occupation, although he may be retrained to perform other jobs. (Record, item 26)

In each case, a trier of fact in Oklahoma should be able to receive evidence of limitations of job function, because such limitations genuinely affect the ability of the injured worker to earn wages in the future. In Oklahoma, with mandatory use of the Sixth Edition, both the lawyer and the pianist would receive the same permanent partial disability award. Claimant suggests such a "cookie-cutter" approach unconstitutionally limits the trier of fact in considering all circumstances of the individual case.

Therefore, since the AWCA provides for awards of "disability" and not "impairment," the Guides, Sixth Edition are wholly insufficient to provide a reasonable basis for evaluation of disability. Any mandatory standard such as the Guides that is based upon "impairment" and does not consider work participation restrictions, is irrelevant to the Oklahoma legislature's mandate to consider an injured worker's "disability."

The Supreme Court of Vermont faced a similar issue when they grappled with the inconsistency of one section of the statute mandating use of the AMA Guides AND the Employer's responsibility to hold up its end of the Grand Bargain. The Vermont statute was similar to Oklahoma statutes mandating use of the AMA Guides,. "Any determination of the existence and degree of permanent partial impairment shall be made only in accordance with the whole person determination as set out in the fifth edition of the [*AMA Guides*]. 21 V.S.A. §648(b).

In *Brown v. W.T. Martin Plumbing & Heating, Inc.*, 2023 VT 38, Vermont's highest court said that mandatory use of the AMA Guides was not enough and that OTHER evidence was necessary to carry out the intent of the Legislature to award reasonable benefits to an injured worker:

> *Nowhere does the statute state that the AMA Guides provide the exclusive mechanism for determining the existence of, or diagnosis associated with, a compensable injury.*

Instead, the Vermont Supreme Court deferred to the opinion of a qualified expert that trumped any provisions of the AMA Guides.

4. The expert's opinion relying upon the Guides, Sixth Edition in this case is not based upon a reliable foundation, thus violating FRCP 702 and the standards of Daubert. There is no good foundation for the expert opinion of the nature and extent of disability because the

physician has relied upon the charts and graphs that only measure function impairment and do not assess all elements of permanent partial disability.

5. The expert opinion relying on the Guides, Sixth Edition is this case is not based on sufficient facts or data, thus violating FRCP 702 and the standards of Daubert. The expert's opinion contains no data in regard to the educational background, vocational training, work history, transferrable skills, or loss of wage-earning capacity of the Claimant. Such data is a necessary element of a foundation for an opinion of the nature and extent of permanent partial disability. *Maxwell v. Sprint PCS,* 2016 OK 41, 369 P.3d 1079.

6. The expert opinion relying on the Guides, Sixth Edition in this case fails to provide a nondispositive, nonexclusive, flexible set of general observations that are relevant to the determination of permanent partial disability, thus violating FRCP 702 and the standards of Daubert.

7. Criticism of the use of the AMA Guides has risen to the halls of Congress. The U.S. House Education and Labor Committee's Subcommittee on Workforce Protection held hearings on the development of workers' compensation systems.

A powerful witness was Emily Spieler, Dean of the Northeastern University School of Law and former administrator of the workers' compensation system in West Virginia. About the AMA Guides, Dean Spieler said, "There are core problems with this quantification system. The impairment numbers are not based on any evidence, and are therefore simply numbers that have been created out of thin air." (Record, item 26)

Dean Spieler's criticism of states such as Oklahoma using the AMA Guides was direct and to the point:

> *In the 40 years since the publication of the first edition of the Guides, the AMA has made no attempt to conduct validation*

> *studies of these numeric ratings in terms of the relationships of the impairment rating numbers to the actual functional loss or disability of the injured worker...*
>
> *The process for development of the impairment numbers is quite opaque. The numbers are developed based upon consensus of a small number of physicians. The result is that public programs are tied to a publication from a nongovernmental organization that has developed without public comment or full peer review.*
> (Record, item 26)

Dean Spieler discussed the failure of the "impairment" ratings in the AMA Guides to correlate with "disability" evaluations in state workers' compensation systems. She said:

> *The Guides pretend to quantify impairment. Impairment is often not a good predictor of the economic consequences of injury or disease, and there has never been any attempt by the AMA to correlate their percentage values to any ability to function at work.*
> (Record, item 26)

Dean Spieler, in preparation for the constitutional challenge in this case, presented an Affidavit of April 28, 2016, in which she continues her solid opposition to the Sixth Edition. She wrote:

> *Six years later, I continue to strongly believe that the AMA Guides, Sixth Edition, is not evidence-based, is only one component of the disability evaluation process, is unreliable because of restrictions on assessment of functional loss and the elimination of range of motion for rating spine and pelvic impairments, and invades the territory of triers of fact within the states' workers' compensation systems by defining terms which have heretofore been defined by state statute.*
> (Record, item 26)

The full testimony of Dean Spieler is contained in the record. (Record, item 26)

8. Oklahoma has thoroughly reviewed the use of the Sixth Edition of the AMA Guides in the past and rejected its use as irrelevant. After a public hearing and open meeting, the Physician Advisory Committee (PAC) issued its report. Dr. William Gillock, a member of the PAC, and

coincidentally the evaluating physician for the Respondent Employer in this case, stated in an Affidavit of April 27, 2016:

> *After a public hearing and open meeting, the PAC unanimously rejected the Guides, Sixth Edition for the reason that the PAC believed that* ***the Sixth Edition was a "paradigm shift" away from previous reliable methods of evaluating permanent partial disability of Oklahoma's injured workers.*** (Record, item 26) (Emphasis added)

The PAC relied upon an assessment of the AMA Guides, Sixth Edition, by Dr. John Munneke, for 35 years an expert whose opinions were relied upon by the Workers' Compensation Court as an Independent Medical Examiner. Among a list of scathing criticisms of the Sixth Edition, Dr. Munneke said:

> *There are no evidence-based studies to show it [Sixth Edition] is any better than the fifth edition in rating impairment.*
>
> *A group of doctors got together and agreed on it. Even it is touted as "Evidence Based" the basis of the 6th Ed. is "consensus based."*
>
> *It appears that the 6th Ed. is promoted by the AMA and special interest groups.*
>
> *The 6th Ed. emphasis is on function rather than permanent anatomical abnormality, which is what the OK legislature has directed as impairment. Impairment is based on diagnosis and not on function.*
>
> *It throws out range of motion for impairment calculations (for the most part).* (Record, item 26)

PROPOSITION II

The mandatory use of the AMA Guides under the AWCA is an unconstitutional restraint upon an administrative law judge, the trier of fact.

ARGUMENT AND AUTHORITIES

The AWCA requires the Oklahoma Workers' Compensation Commission, through its administrative law judges, to fairly weigh evidence in hearings to determine benefits. The administrative law judges are given sweeping powers to adjudicate all issues arising from the implementation of Title 85A. Section 71(C) provides:

C. Evidence and Construction.
1. a. At the hearing the claimant and the employer may each present evidence relating to the claim. Evidence may be presented by any person authorized in writing for such purpose. The evidence may include verified medical reports which shall be accorded such weight as may be warranted when considering all evidence in the case.
b. Any determination of the existence or extent of physical impairment shall be supported by objective and measurable physical or mental findings.
2. When deciding any issue, administrative law judges and the Commission shall determine, on the basis of the record as a whole, whether the party having the burden of proof on the issue has established it by a preponderance of the evidence.
3. Administrative law judges, the Commission, and any reviewing courts shall strictly construe the provisions of this act.
4. In determining whether a party has met the burden of proof on an issue, administrative law judges and the Commission shall weigh the evidence impartially and without giving the benefit of the doubt to any party.

The administrative law judge's (ALJ) obligation to evaluate an injured worker's permanent partial disability (PPD) is unconstitutionally limited by prohibiting any medical evidence that does not conform to the latest edition of the American Medical Association Guides to the Evaluation of Permanent Impairment. The current edition is the Sixth Edition. (AMA Sixth).

The AWCA is clear. The AMA Guides must be followed. Several sections of the AWCA leave no discretion for the ALJ:

85A O.S. Section 2 (31) (a) (2) (b):
For the purpose of making permanent disability ratings to the spine, physicians shall use criteria established by the most current edition of the American Medical Association "Guides to the Evaluation of Permanent Impairment".

85A O.S. Section 2 (33):
"Permanent disability" means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the current edition of the American Medical Association guides to the evaluation of impairment, if the impairment is contained therein;

85A O.S. Section 45 (C):
Permanent Partial Disability.

> *1. A permanent partial disability award or combination of awards granted an injured worker may not exceed a permanent partial disability rating of one hundred percent (100%) to any body part or to the body as a whole. The determination of permanent partial disability shall be the responsibility of the Commission through its administrative law judges. Any claim by an employee for compensation for permanent partial disability must be supported by competent medical testimony of a medical doctor, osteopathic physician, or chiropractor, and shall be supported by objective medical findings, as defined in this act. The opinion of the physician shall include employee's percentage of permanent partial disability 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 permanent partial disability 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".*** *A copy of any written evaluation shall be sent to both parties within seven (7) days of issuance. Medical opinions addressing compensability and permanent disability must be stated within a reasonable degree of medical certainty. Any party may submit the report of an evaluating physician.* (Emphasis added).....
> *3. The examining physician shall not deviate from the Guides except as may be specifically provided for in the Guides.*

Yocum v. Greenbriar Nursing Home, 2005 OK 27, 130 P.2d 220, examined a statute which gave precedence to one medical opinion over other medical opinions in a workers' compensation case.

Yocum held:

> *A legislative command to adjudicate a fact by a predetermined statutory directive would constitute an impermissible invasion into the judicial independence... Were the legislature to require that the Workers' Compensation Court accord an elevated degree of probative value to an [Independent Medical Examiner] report, its enactment would impermissibly* ***rob that tribunal of its independent power to establish impairment or disability within the range of received competent evidence.*** *[emphasis added] The legislature is confined to mandating what facts must be adjudged. It may neither predetermine adjudicative facts nor direct that their presence or absence be found from any proof before a tribunal. (paragraph 14)*

Yocum's principle that the legislature cannot impermissibly invade the independence of a trier of fact was recognized in *Conaghan v. Riverfield Country Day School,* 2007 OK 60, 163

P.3d 557. The Court held a statute unconstitutional because it restricted the workers' compensation court's determination of disability.

Even though Oklahoma's new administrative system is not a court, it nevertheless provides a forum for an administrative law judge to adjudicate an issue—akin to a judicial decision by the former Workers' Compensation Court. If the AWCA is to provide a "remedy" under the Constitution, there must be a fair adjudication of any issue.

In *Maxwell v. Sprint PCS, supra,* the Supreme Court held:

> *By statutory directive, the ALJs undoubtedly act in an adjudicative capacity in the administrative workers' compensation system because adjudication includes "the authority to hear and determine forensic disputes." Yocum v. Greenbriar Nursing Home, 2005 OK 27, ¶ 13, 130 P.3d 213, 220. "When an administrative board acts in an adjudicative capacity, it functions much like a court" and such proceedings are quasi-judicial in nature. Thus, "[t]he constitutional guaranty of due process of law applies," and proceedings before the Commission require certain constitutional safeguards.*

In *Valued Services, LLC v. Tregenza,* 2013 OK 79, 311 P.3d 839, the Supreme Court spoke directly to the independence of a trier of fact. Justice Watt wrote for a unanimous Court, "The Trial court must be free to find the facts and apply the law to the facts." The AWCA's mandatory use of the AMA Guides to determine an injured worker's disability flies in the face of allowing an administrative law judge of the Workers' Compensation Commission to ONLY consider opinions of physicians that conform to the AMA Guides.

PROPOSITION III

Mandatory use of the AMA Guides is an impermissible legislative predetermination of an adjudicatory scientific fact.

ARGUMENT AND AUTHORITIES

For the past 80 years, the Oklahoma Supreme Court has prohibited the legislature from allowing one entity to predetermine *evidence* that must then be used by another entity to adjudicate an *issue* that is properly delegated to the second entity. In *Sterling Refining Co. et al v. Walker et al,* 1933 OK 446, 25 P.2d 312, the Supreme Court considered the legislature's granting to the Supreme Court itself the right to fix or determine "profitable" prices of oil that a second entity, the Oklahoma Corporation Commission, would use to limit production in Oklahoma's oil and gas fields. Overproduction had caused oil prices to plummet, adding to the chokehold that the economic downturn had upon the state.

The Supreme Court clearly ruled that the legislature could not give, even to the Court itself, the power to fix or determine prices of oil, a standard that would be used by the Corporation Commission to adjudicate claims of overproduction.

PROPOSITION IV

Under the doctrine of *delegata potestas non potest delegarai*, the mandatory use of the AMA Guides constitutes an unlawful delegation of the state's legislative power to a private, nongovernmental entity, the American Medical Association.

ARGUMENT AND AUTHORITIES

The principle, *delegata potestas non potest delegarai,* stands for the proposition that "no delegated power can be re-delegated." In other words, one to whom power is delegated cannot himself further delegate that power. The principle first appeared in American courts in 1794 and in the U.S. Supreme Court in 1881. *United States v. Sav. Bank,* 104 U.S. 728 (1881).

Under the new workers' compensation law, AWCA, the legislature has delegated the power to adjudicate the extent of permanent partial disability to the Workers' Compensation Commission, and then *re-delegated* such power to the American Medical Association of

Chicago, Illinois, through absolutely requiring Commission administrative law judges to follow the AMA Guides when determining any disability an injured worker is left with.

In *American Home Products v. Homsey,* 1961 OK 91, 361 P.2d 297, the Court struck down, as an unlawful delegation of legislative power, a provision of the Oklahoma Fair Trade Act because "it delegated to private persons the right to prescribe a rule governing conduct for the future which is binding upon those who do not consent." That is exactly what has occurred in the AWCA. **The legislature has given absolute power to evaluate disability of Oklahoma's injured workers to a group of doctors based in Chicago.**

An earlier Supreme Court case, *Associated Industries v. Industrial Welfare Commission,* 1939 OK 90, 90 P.2d 899, distinguished a state agency's administrative authority to promulgate rules—to execute a law—from legislative power. The former, rule-making authority, may be exercised to carry out the law's policy and to apply it to various conditions. On the other hand, legislative power is non-delegable. By passing the AWCA, the legislature has handcuffed administrative law judges of the Workers' Compensation Commission to consider ONLY physicians' reports that rate impairment based upon the AMA Guides. It clearly is giving a nongovernmental entity the ability to materially affect evidence before a trier of fact.

PROPOSITION V

The mandatory use of the AMA Guides to determine permanent partial disability is a denial of due process because such use shifts the economic burden to the injured worker without a legitimate state interest.

ARGUMENT AND AUTHORITIES

The concept of due process originated in English Common Law. Due process is a fundamental, constitutional guarantee that all legal proceedings will be fair and that one will be given notice of the proceedings and an opportunity to be heard before the government acts to

take away one's life, liberty, or property. Also, due process guarantees that a law shall not be unreasonable, arbitrary, or capricious.

The rule predates written constitutions. The Magna Carta, an agreement signed in 1215 that defined the rights of English subjects against the king, is an early example of a constitutional guarantee of due process. That document includes a clause that declares:

> *[39] No freeman is to be taken or imprisoned or disseized of his free tenement or of his liberties or free customs, or outlawed or exiled or in any way ruined, nor will we go against such a man or send against him save by lawful judgement of his peers or by the law of the land. To no-one will we sell or deny of delay right or justice.*

This concept of the law of the land was later transformed into the phrase "due process of law." By the seventeenth century, England's North American colonies were using the phrase "due process of law" in their statutes.

The constitutional guarantee of due process of law, found in the Fifth and Fourteenth Amendments to the U.S. Constitution, prohibits all levels of government from arbitrarily or unfairly depriving individuals of their basic constitutional rights to life, liberty, and property. The Due Process Clause of the Fifth Amendment, ratified in 1791, asserts that no person shall "be deprived of life, liberty, or property, without due process of law." This amendment restricts the powers of the federal government and applies only to actions by it.

The Due Process Clause of the Fourteenth Amendment, ratified in 1868, declares,"[N]or shall any State deprive any person of life, liberty, or property, without due process of law" (§ 1). This clause limits the powers of the states, rather than those of the federal government.

The Due Process Clause of the Fourteenth Amendment has also been interpreted by the U.S. Supreme Court in the twentieth century to incorporate protections of the Bill of Rights, so that those protections apply to the states as well as to the federal government. Thus, the Due

Process Clause serves as the means whereby the Bill of Rights has become binding on state governments as well as on the federal government.

When Oklahoma joined the Union, due process was an enumerated right for all citizens. Article 2, Section 7 of the Oklahoma Constitution guarantees due process of law:

> *No person shall be deprived of life, liberty, or property, without due process of law.*

In *Torres v. Seaboard Foods LLC,* 2016 OK 20, 373 P.3d 1057, the Oklahoma Supreme Court summarized, in footnote 43, the importance of the Due Process Clause:

> *Northeast Oklahoma Elec. Co-op., Inc. v. State ex rel. Corp. Com'n, 1989 OK 18, 768 P.2d 901, 904, quoting Oklahoma Natural Gas Co. v. Choctaw Gas Co., 1951 OK 224, 236 P.2d 970, 977 (the Court stated "we agree that "'the police power must at all times be exercised with scrupulous regard for private rights guaranteed by the Constitution.'"). Cf. Battaglia v. General Motors Corp., 169 F.2d 254, 257 (2d Cir. 1948), cert. denied, 335 U.S. 887, 69 S.Ct. 236, 93 L.Ed. 425 (1948) (" . . . while Congress has the undoubted power to give, withhold, and restrict the jurisdiction of courts other than the Supreme Court, it must not so exercise that power as to deprive any person of life, liberty, or property without due process of law or to take private property without just compensation.").*

The statutory right to an award of permanent partial disability is "property" within the meaning of the Due Process Clause. Justice Gurich wrote in *Maxwell, supra*:

> *In accordance with Title 85A, the ALJ's order awarding Petitioner Maxwell compensation in the amount of $2,261.00 clearly vested in Petitioner Maxwell a property interest worthy of the protections of due process. ¶19 At a minimum, "due process requires notice and a meaningful opportunity to appear and be heard." Crownover, 2015 OK 35, ¶ 14, 357 P.3d at 474*

Because the Claimant's property interest in permanent disability is protected by the Due Process Clause, Claimant is entitled to cross-examine the authors of the AMA Guides, Sixth Edition, because such Guides absolutely control the permanent disability award that can be made

by the ALJ of the Workers' Compensation Commission. Since such confrontation is not possible, use of the Sixth Edition is a violation of due process.

In *Torres*, the Oklahoma Supreme Court struck down, as a denial of due process, a section of the AWCA that limited cumulative trauma claims to workers who had 180 days of continuous employment. The unanimous Court opined:

> *A court determines (1) if there is a legitimate government interest (a) articulated in the legislation or (b) championed by the parties or (c) expressed by a recognized public policy in support of the legislation, and (2) if that interest is reasonably advanced by the legislation. We have expressed often this two-part test in a negative form when explaining an unconstitutional exercise of the police power is an arbitrary and capricious exercise of power; i.e., the exercise of legislative power is unconstitutional when it was not reasonably devoted to a legitimate interest or end, or when the legitimate police-power interest was not regulated within reasonably necessary means for the identified State interests.*
>
> *However, it is clear that a State's legitimate interests in regulating business practices are not exempt from the requirements of substantive Due Process. The Court essentially held that the imposition of arbitrarily imposed economic liability violated due process. When the Legislature decreases workers' compensation liability (and costs) for the class of employers by barring an injured employee from filing a claim, such legislation also increases potential economic designed employer immunity by shifting economic loss to an innocent injured employee would also violate State and federal Due Process.*

The mandatory use of the AMA Guides, Sixth Edition is an arbitrarily designed employer immunity that shifts the economic loss to an innocent injured employee, and therefore is unconstitutional as a denial of due process.

PROPOSITION VI

The use of the AMA Guides to determine permanent partial disability fails to provide an adequate remedy at law.

ARGUMENT AND AUTHORITIES

Long before Oklahoma became a state, American jurisprudence demanded that an injured person must have access to a forum in which to seek a remedy AND recognized limitations on legislative pronouncement. Chief Justice John Marshall, paraphrasing Sir William Blackstone's commentary a half-century before, wrote in *Marbury v. Madison,* 5 U.S. 137 (1803):

> *The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. [The] government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested right...*

In Oklahoma, delegates to the 1906 Constitutional Convention adopted, and the people approved, a powerful restatement of the promise. All Oklahomans are guaranteed access to the courts to seek a remedy for an injury. Article 2, Section 6 of the Oklahoma Constitution provides:

> *The courts of justice of the State shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation; and right and justice shall be administered without sale, denial, delay, or prejudice.*

If an ALJ of the Workers' Compensation Commission is bound by law to use the AMA Sixth Edition upon which to base an injured worker's disability, such disability has been prejudged by the Legislature and the American Medical Association. Such prejudgment is a denial of access to justice.

Other states, including Pennsylvania, Florida, Kansas, and Iowa are seriously considering eliminating the AMA Guides as an element of determining PPD for injured workers. Missouri

has completely done away with the AMA Guides and its system is now one of the most respected in the nation. Only 21 states now employ the AMA Sixth Edition.

Adopting the AMA Sixth Edition is yet another attempt by conservative legislatures in Oklahoma and throughout the South to gut benefits for injured workers. But, they have gone too far by denying access to justice.

PROPOSITION VII

The use of the AMA Guides, coupled with other cuts in benefits, has destroyed the Grand Bargain, and exclusive remedy in workers' compensation is dead.

ARGUMENT AND AUTHORITIES

After the State of New York passed one of the first workers' compensation statutes, the U.S. Supreme Court considered the constitutionality of legislative replacement of a common law tort for work-related injuries with an exclusive remedy, no-fault system with scheduled benefits for injured workers. The "Grand Bargain" or "Industrial Bargain" was upheld by the Court in *New York Central Railroad v. White,* 243 US 188, 37 S.Ct. 247, 61 L. Ed 667 (1917).

The 99-year-old decision concisely explained the Grand Bargain:

> *It is not unreasonable for the state, while relieving the employer from responsibility for damages measured by common-law standards and payable in cases where he or those for whose conduct he is answerable are found to be at fault, to require him to contribute a reasonable amount, and according to a reasonable and definite scale, by way of compensation for the loss of earning power incurred in the common enterprise, irrespective of the question of negligence, instead of leaving the entire loss to rest where it may chance to fall,-that is, upon the injured employee or his dependents.* (At page 203)

The landmark case, holding that the use of workers' compensation laws in place of tort remedies must provide "significant" benefits, was quick to recognize that there was a limit to a

legislature's authority to provide a statutory remedy that abolished an injured workers' longstanding right to sue his employer for an array of common law damages. In the paragraph above, consideration for the Grand Bargain was a **"reasonable amount, and according to a reasonable and definite scale, by way of compensation for the loss of earning power incurred in the common enterprise..."**

The Oklahoma Supreme Court has recently discussed the Grand Bargain and the drastic cuts in benefits for injured workers in several opinions in the past two years since the Administrative Workers' Compensation Act became effective.

In Torres, supra, Justice Edmondson, in a 9-0 decision, wrote:

> *Employee argues that when the workers' compensation statutes were originally created in several States a grand bargain was created. This bargain consisted of an injured worker relinquishing a common-law right to bring an action in a District Court against the worker's employer and the worker gained more certain statutory compensation but the compensation was less in amount. On the other hand, the employer relinquished certain common-law defenses in a District Court action and gained an economic liability that was less and fixed by statute. Employee argues that statutorily barring both a workers' compensation remedy and a District Court remedy violates the grand bargain and the Oklahoma Constitution. She argues for a right to proceed against her employer by an action filed in a District Court.*

Also in *Torres,* Justice Colbert wrote in a concurring opinion:

> *I must again emphasize that the foundation of the Oklahoma workers' compensation scheme is the "Industrial Bargain" also known as the "Grand Bargain." Yet, I am constrained to repeat ad nauseam the underlying policies and purposes behind it. That system...provides an expeditious, inexpensive means to compensate workers for injuries, disabilities, and deaths sustained in the course of their employment, without a determination of fault. The employee is afforded swift and certain payment of benefits sufficient to cure or relieve the effects of the injury, while giving up a myriad of potential damages available to him in tort. The employer, on the other hand, assumes liability for an employee's injury or death, but benefits from the limited liability fixed to loss wages, medical, and vocational rehabilitation occasioned by the work-related injury or death. Clearly, the linchpin of this legislatively created bargain is that the employer assumes liability for work-related injuries and death; while the employee gives up any common law action sounding in tort. In essence, the system strikes a balance between the*

> *rights and duties of Oklahoma employers and employees. But with the enactment of the Administrative Workers' Compensation Act (AWCA), the balance is now off kilter and has become one-sided to the benefit of the employer.*

Vice Chief Justice Combs, in a concurring opinion in *Torres,* wrote:

> *The grand bargain is not merely the starting point for an analysis to inform the court of what may or may not be legitimate state interests, but the cornerstone of the entire workers' compensation system's legitimacy. By cutting off all recovery for an injured worker, excluding them from both workers' compensation coverage and from filing a tort claim, the Legislature has violated the grand bargain and betrayed the fundamental principles of justice that gave rise to it in the first place.*

To the date of this filing, the Oklahoma Supreme Court, district courts, or the Workers' Compensation Commission have declared 38 provisions of the AWCA unconstitutional, invalid, or inoperable. Other provisions such as allowing employers to deduct the cost of vocational rehabilitation from an injured worker's PPD award (85A O.S. § 45(E)(8)); giving the Commission authority to force an employer to fire a worker who has tested positive for asbestosis (85A O.S. § 66(E); or providing different death benefits for resident beneficiaries and non-resident alien beneficiaries, 85A O.S. § 11, are repugnant to the Oklahoma Constitution, but employers have chosen not to claim benefit from them.

A discussion of the Draconian cuts in workers' compensation benefits in Oklahoma during the past 22 years, with the deepest cuts coming in the Administrative Workers' Compensation Act in 2013, is necessary to frame the issues in this case. The Grand Bargain truly is the cornerstone of a statutory workers' compensation system and Petitioner humbly requests this Honorable Court, **the last possible enforcer of the Grand Bargain**, to consider the following:

The Grand Bargain was based upon a "no-fault" workers' compensation system. But the AWCA has crossed the line and breached the Grand Bargain by introducing many elements of

fault. 85A O.S. § 2(9)(b)(4) shifts the burden of proof to clear and convincing if an injured worker tests positives for drugs. That removes the "no-fault" nature of the AWCA. If a worker violates a safety regulation, the claim is not compensable. 85A O.S. § 2.

85A O.S. § 2(30), defines "misconduct," a qualifier for benefits in several sections, as "unexplained absenteeism or tardiness; willful or wanton indifferent to or neglect of the duties required; willful or wanton breach of any duty required by the employer; the mismanagement of a position of employment by action or action, actions or omissions that place in jeopardy the healthy, life, or property of self or others; or a violation of a policy or rule adopted to ensure orderly work or the safety of self or others." This list of the basic elements of negligence is an overt reintroduction of **fault** to workers' compensations.

The AWCA is filled with other examples of fault as a limit to compensability. Missing two medical appointments, with the worker absolved only if he can prove the absences were justified, **cuts off all future benefits of any kind.** 85A O.S. § 57. Employees are not covered by workers' compensation if involved in horseplay or injuries from "combat not deemed relevant to employment." There is no such requirement for employer to prove he was not at fault, just for employee. 85A O.S. § 2(9)(b). Section 54 introduces fault to cut off benefits if the employee refuses to submit to surgery.

85A O.S. § 48 prohibits any benefits for an injured minor if the minor misrepresented his age…again adding the element of fault. 85A O.S. § 50(H)(12) requires the injured worker to reimburse the insurance carrier for a missed physician appointment, unless the worker can prove he was not at fault for missing the appointment.

Even though fault on the part of the employee appears frequently in the AWCA, employers can be grossly at fault and are still given immunity in even the most serious of cases.

A drunk employer who runs a tractor over an employee and cuts off his legs is immune from an action in district court. That is a concrete example of how the Grand Bargain has been breached and the AWCA should be found unconstitutional.

Before the Commission En Banc, Petitioner's counsel, Richard Bell, recited the many provisions of the AWCA that had been found unconstitutional by the Supreme Court, and observed, "So how many parts of a Thoroughbred have to be declared unusable until you put him out to pasture?" (Transcript of Appeal before the Commission En Banc, January 20, 2017, p. 9)

Counsel Bell talked about the importance of a "no fault" system that shields employers from negligence jury verdicts that would put them out of business. He told of an employer who visited a worker who suffered an horrific burn injury in a tragic helicopter crash. The Employer informed the employee that Oklahoma is an exclusive remedy state and, "even if I'm drunk, you can't sue me." (Transcript of Appeal before the Commission En Banc, January 20, 2017, p. 7)

In 1994, the Oklahoma Workers' Compensation Act was a reasonable alternative to tort litigation. In 2017, however, benefits provided by the AWCA fall short of the reasonable benefit standard of the Grand Bargain. The list of benefit cuts is long...all in the name of "reform," and always at the expense of injured workers.

Perhaps the most onerous "reform" in the 2013 law in the reduction of the base of an award for PPD for an injury to the body as a whole from 520 to 350 weeks. The combination of a one third reduction of the BASIS for PPD and the dramatic reductions in PPD available under the AMA Sixth Edition result in benefits for Oklahoma's injured workers that are woefully short of any reasonable standard that justifies workers' compensation as an exclusive remedy.

In the instant case, Oklahomans should be embarrassed by a law that forces the judge, who heard the Petitioner's complaints about residual problems that no doubt will affect his

earning capacity in the future, to limit Petitioner's Permanent Partial Disability award for a low back fusion surgery with instrumentation **to less than $10,000.**

The Grand Bargain has suffered a slow and painful "death by a thousand cuts." The final blow was the passage of the AWCA in 2013.

SUMMARY

Petitioner respectfully requests this Honorable Court to restore the rights of Oklahoma injured workers by finding the AWCA unconstitutional for the many reasons herein cited, and for further relief deemed just and proper.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed by first class mail, postage prepaid, on January 27, 2017, to:

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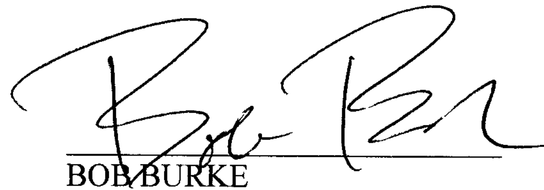

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