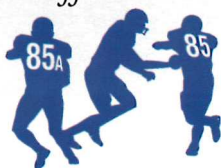


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Subrogation and the “Oklahoma Option” Drastic Re-Write of Comp Law Provides New Subrogation Options

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*In the 1970s,
the Oklahoma Sooners
football team
successfully began
implementing a new
offensive system
known as the
“option offense.”*



Sooner Coach Barry Switzer has been credited by many for having perfected the use of the wishbone offense, a staple of option offenses. Forty years later, the option has returned to Oklahoma, but this time taking the shape of workers' compensation reform.

On May 6, 2013, Oklahoma Governor, Mary Fallin, signed S.B. 1062 into law, creating a new Title 85A of the Oklahoma Workers' Compensation Act to ultimately replace, but temporarily operate in parallel with, existing Title 85, and once again reform state's workers' compensation laws, including the laws addressing subrogation.¹ With the new law Oklahoma joins Texas as the only states allowing employers to opt-out of the workers' compensation system, creating what is known as the “Oklahoma Option.” The law still

requires employers to provide workers' compensation coverage and benefits, but now they have two options which are outside the new “administrative” system.

The new law applies only to work-related injuries and/or accidents which occur on or after February 1, 2014. As a result, workers' compensation and subrogation practitioners will have to be familiar with two sets of laws in Oklahoma - one for injuries and death occurring prior to February 1, 2014 and governed by the outgoing Title 85 and the other for injuries and death occurring after February 1, 2014, controlled by newly-enacted Title 85A. The new reforms have already been challenged by an Oklahoma Firefighters Union and two state lawmakers, who filed a lawsuit on September 18, 2013, asking the Oklahoma Supreme Court to declare the new law unconstitutional.² One of the new options allows an employer to opt out of the traditional workers' compensation system and offer an “Injury Benefit Plan” (occupational accident plan) that offers the same or greater benefits to their employees as is available under the Workers' Compensation Act. This is the “Oklahoma Option.” An employer's / insurer's subrogation rights under this option relates to health insurance subrogation and will

be governed by existing ERISA and non-ERISA health insurance subrogation laws – both state and federal. The Oklahoma Option presents an entirely new market and tremendous underwriting opportunity for providers of Occupational and Accident Plans, and a corresponding subrogation opportunity for claims paid under those plans.

Injuries and Death Prior to February 1, 2014

Two years prior to the new reforms, the Oklahoma legislature had similarly overhauled its workers' compensation laws.³ The earlier overhaul – known as S.B. 878 – became effective August 26, 2011 and its overhaul was so complete that it even changed the name of their law from “The Oklahoma Workers' Compensation Act” to “The Oklahoma's Workers' Compensation Code.” Predictably, portions of the 2011 reform were challenged and ultimately struck down as unconstitutional.⁴ Nonetheless, for accidents which occur prior to February 1, 2014, workers' compensation subrogation in Oklahoma is governed by § 348 (former § 44 was repealed).⁵ For accidents occurring after February 1, 2014, workers' compensation subrogation is governed by a brand new statute known simply as § 43.

Injuries and Death After February 1, 2014

On May 6, 2013, Governor Mary Fallin signed into law S.B. 1062, once again overhauling Oklahoma's workers' compensation system.⁶ The new "Omnibus Bill" has three parts which offer employers three options:

(1) The Administrative Workers' Compensation Act (AWCA). This Act transforms the old "court-based" workers' compensation system into a new "administrative" system. Employers can opt to provide workers' compensation coverage under the new "administrative" system. The old "court-based" system is gone.

(2) The Oklahoma Employee Injury Benefit Act (OEIBA). This is the "Oklahoma Option" which allows the employer to establish an "Injury

Benefit Plan" providing benefits identical to those offered under the Administrative Act option above through fully-insured or self-funded occupational accident plans which may or may not be governed by ERISA. Section 44 of the new Act provides that any benefits payable to an injured employee under a group health care service plan, a group disability policy, a group loss of income policy, a group accident, health, or accident and health policy, a self-insured employee health or welfare benefit plan, or a group hospital or medical service contract, will serve as a credit toward and reduce any benefits payable to the employee under the new Administrative Act, above.⁷

(3) The Workers' Compensation Arbitration Act (WCAA). Employers can also opt to implement an

alternative dispute resolution process to resolve any dispute under the Administrative Act through a process of binding arbitration.⁸ This new law validates agreements to arbitrate claims for injuries under the AWCA if the employer has provided notice of the agreement and has filed an alternative dispute resolution program with the Workers' Compensation Commission. It is also the option which will be most aggressively challenged in court.

Under the new system the Workers' Compensation Court is renamed the Workers' Compensation Court of Existing Claims (CEC) for the purpose of hearing disputes that arise prior to the effective date of the Act. The new law applies only to work-related injuries and/or accidents which occur on or after February 1, 2014. As a result, claims and subrogation

The law still requires employers to provide workers' compensation coverage and benefits, but now they have two options which are outside the new "administrative" system.

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professionals will have to become familiar with two parallel systems of laws and procedures – one reviewing Oklahoma law for injuries and death occurring prior to February 1, 2014 and the other for injuries and death occurring after February 1, 2014. The following are some of the distinct differences between the old and new law with regard to their effect on workers' compensation subrogation in Oklahoma.

Subrogation Rights

For accidents which occur prior to February 1, 2014, workers' compensation subrogation in Oklahoma will continue to be governed by § 348 (former § 44 was repealed in 2011).⁹ Section 348(A) provides for reimbursement of benefits to the carrier when there is a third-party recovery, while § 348(C) provides for a right of subrogation.¹⁰

For accidents which occur on or after February 1, 2014, subrogation will no longer be governed by § 348, which is repealed, but instead will be determined by the newly-enacted §43.¹¹ Section 43 sets forth an employee can recover benefits under the new Act and simultaneously file a third-party claim. The employee must give the carrier/employer "reasonable notice" of the third-party lawsuit and an opportunity to join in the action. The carrier/employer must intervene into

an existing third-party action filed by the employee in order to properly protect its subrogation rights. Section 43 establishes any third-party recovery must be apportioned and distributed accordingly to a new formula, as follows:

- (1) Reasonable attorney's fees and costs of collection are deducted;
- (2) The employer or carrier receives two-thirds (2/3) of the balance or its entire past workers' compensation lien, whichever is less, and
- (3) The balance remaining will be paid to the injured employee or his beneficiaries.¹²

The carrier or employer also has a right to maintain a direct third-party tort action against the third-party tortfeasor responsible for causing the work-related accident and resulting injuries/death. It must give written notice to the employee informing him of his right to hire an attorney to pursue any third-party damages he may be entitled to above and beyond the workers' compensation lien. Section 43 also does away with future credits. It says that if the employer or carrier makes a third-party recovery, by suit or settlement, the carrier is entitled to recover (1) its past lien; (2) any future workers' compensation benefits for which it is liable; and (3) reasonable "costs of collection." The employee is entitled to any amount the employer/carrier recovers which is in excess of the above amounts the

employer/carrier is authorized to recover from the third party. There is very little guidance or existing case law to guide us in interpreting the nuances of workers' compensation subrogation under the new Act, but some of the basic changes are quite clear.

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Third Parties

Under the old law, § 12 provides the liability prescribed in the OWCA is exclusive “except in the case of an intentional tort, or where the employer has failed to secure the payment of compensation for the injured employee.”¹³ With regard to construction accidents, the majority rule in this country is liability for workers’ compensation benefits only runs up the ladder, not down.¹⁴ Oklahoma follows the minority rule in holding a general contractor’s employee who is injured by a subcontractor¹⁵ cannot sue a subcontractor because he was in the “same employment” as the subcontractors. In addition, a workers’ compensation carrier cannot seek reimbursement from or subrogate against the benefits paid from a JM/UIM policy.

As under the old law, § 5 continues to provide the exclusive remedy protection is not available to an employer who commits an intentional tort.¹⁶ An intentional tort occurs when there is willful, deliberate, specific intent of the employer to cause such an injury. Allegations or proof the employer had mere knowledge an injury was substantially certain to result does not rise to the level of an intentional tort. The employee must prove 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 is a question of law. The new law provides on construction projects, the Exclusive Remedy Rule does not extend to prevent suit against another employer, or its employees, on the same job as the injured or deceased worker where such other employer does not stand in the position of an “intermediate or principal employer to the immediate employer of the injured or deceased worker.”¹⁷ Section 2(18) has lengthy definitions of “employee”, “employer”, and “employment” which affect statutory employer situations in construction settings as well as owner-operator relationships in trucking accidents. Section 43, the new subrogation statute itself, also clearly spells out for the first time ever, an employer or carrier will be able to maintain a third-party action against an employer’s uninsured motorist coverage or underinsured motorist coverage. By exclusion, it would seem subrogation against the employee’s own uninsured and/or underinsured motorist coverage is not allowed.

Allocation of Third-Party Recovery

Under the old law, a carrier’s subrogation recovery depended on whether the third-party settlement constituted a “compromise settlement” – a confusing term which means settling for an amount “less than the

workers’ compensation carrier’s liability.” When a compromise settlement occurs, if the parties can’t agree on allocating attorney’s fees/costs, the court can dictate who gets what as is “just and reasonable.” When there is no compromise settlement something known as the Prettyman Formula, which applies when there is no “compromise settlement”, is applied. Simply put, the formula is: [ratio of past lien/gross recovery] x [net recovery] = [lien reimbursement].

However, for injuries or death occurring on or after February 1, 2014, where the employee makes the recovery, the new § 43 requires any third-party recovery be apportioned and distributed according to a more predictable formula:

- (1) Reasonable attorney’s fees and costs of collection are deducted;
- (2) The employer or carrier receives two-thirds (2/3) of the balance or its entire past workers’ compensation lien, whichever is less, and
- (3) The balance remaining will be paid to the injured employee or his beneficiaries.¹⁸

If, on the other hand, the carrier effects a third-party settlement on its own, by suit or settlement, the carrier is entitled to recover its past lien and any future workers’ compensation benefits for which it is liable, plus reasonable “costs of collection.” The employee is entitled to any amount the employer/carrier

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recovers which is in excess of the amounts the employer/carrier is authorized to recover from the third party.

Attorney's Fees and Costs

For pre-February 1, 2014 injuries, the carrier is required to contribute pro-rata toward the employee's attorney's fees and costs, incurred in prosecuting the third-party action. In the case of a "compromise settlement" (defined above), the court is allowed to equitably apportion attorney's fees and costs between the employee and carrier.

After February 1, 2014, however, neither the new § 43 nor the rest of the reformed Title 85A make any reference to the obligation of the carrier to contribute toward the employee's third-party attorney's fees or costs. There no longer appears to be any such obligation. Instead, the statute merely requires the application of the apportionment formula referenced above.

Future Credit/Advance

The old law provides for a future credit in the amount of any net recovery obtained by the employee or his dependents.¹⁹ The workers' compensation carrier is relieved from paying future benefits to the injured worker until the worker can show a deficiency between the net amount the worker received pursuant to the settlement of the third-party action and the amount to which the worker is statutorily entitled under the Workers' Compensation Code.²⁰ The settlement of the workers' compensation subrogation lien does not settle the

deficiency claim unless the deficiency is specifically addressed in a third-party settlement documents.²¹

However, for injuries and death occurring on or after February 1, 2014, there is no traditional future credit. Instead, neither the new § 43 nor the rest of the reformed Title 85A make any reference to the ability of the carrier to take a future credit for any net recovery pocketed by the employee in excess of the lien reimbursement received by the carrier or employer. Section 348 stated, with regard to future benefits owed to the employee, the carrier was liable only for the deficiency, if any, between the amount of the recovery against the third-party, and the compensation provided or estimated by the Workers' Compensation Code for such case. The new § 43 makes no such reference. Instead, § 43 provides if the carrier joins in the third-party action, it is entitled to a "first lien" on two-thirds (2/3) of the net proceeds recovered 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. In other words, it appears the carrier is entitled to recover both its past lien and any future benefits owed out of any third-party recovery, subject to the formula set forth in § 43.

Summary

The new Oklahoma Option reform laws recently passed in Oklahoma are already under attack by unions and trial lawyers. It remains to be seen if they will pass constitutional muster

and how they will be applied and interpreted by Oklahoma courts. The good news is subrogation rights under the new law survived lobbying by trial lawyers and have even been expanded. While the trifurcated approach to workers' compensation subrogation in Oklahoma (old law, new law, and benefit plan option) translate into additional work for subrogation professionals, the Oklahoma Option means new underwriting opportunities for carriers offering occupational accident insurance plans.

¹ 2013 Okla. Sess. Law Serv. Ch. 208 (S.B. 1062). This "Omnibus Bill" has three parts: (1) The Administrative Act (transforms the old "court-based" workers' compensation system into a new "administrative" system); (2) The Oklahoma Injury Benefit Act (the "option" which allows the employer to establish an occupational accident plan; and (3) The Workers' Compensation Arbitration Act (which allows employers to implement an alternative dispute resolution process to resolve any dispute under the Administrative Act.

² The Honorable Harry E. Coates, et al. v. The Honorable Mary Fallin, et al., Case No. 112167 (Supreme Court of the State of Oklahoma).

³ Workers' Compensation Code, 2011 Okla. Sess. Law Serv. Ch. 318 (S.B. 878) (West).

⁴ Oklahoma State Chiropractic Indep. Physicians Ass'n v. Fallin, 290 P.3d 1, reh'g denied (Okla. 2012).

⁵ Okla. Stat. Ann. Tit. 85, § 348 (2011).

⁶ 2013 Okla. Sess. Law Serv. Ch. 208 (S.B. 1062) (Effective February 1, 2014).

⁷ Okla. Stat. Ann. Tit. 85A, § 44.

⁸ Okla. Stat. Ann. Tit. 85A §§ 301 – 328.

⁹ Okla. Stat. Ann. Tit. 85, § 348 (2011).

¹⁰ Frank's Tong Serv. v. Lara, 2013 WL 7809847 (Okla. App. 2013).

¹¹ Okla. Stat. Ann. Tit. 85, § 44 (Effective February 1, 2014).

¹² Okla. Stat. Ann. Tit. 85A, § 43(A)(1)(c).

¹³ 85 O.S. § 12, repealed and recodified at 85 O.S. § 302(A).

¹⁴ A. Larson, The Law of Workmen's Compensation, § 111.04[1][e] (2004).

¹⁵ Alvis v. Bill Jackson Rig Co., Inc., 636 P.2d 910 (Okla. App. 1981).

¹⁶ 85 O.S. § 5(B)(2).

¹⁷ 85 O.S. § 5(E).

¹⁸ Okla. Stat. Ann. Tit. 85A, § 43(A)(1)(c).

¹⁹ Okla. Stat. Ann. Tit. 85, § 348(D).

²⁰ Caffey v. Soloray, Travelers Ins. Co., 57 P.3d 870 (Okla. 2002).

²¹ Milliser v. Mercury Drilling Co., 46 P.3d 962 (Okla. App. 1987).