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2016 OK 89



ORIGINAL

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

SUPREME COURT
STATE OF OKLAHOMA

SEP 13 2016

MICHAEL S. RICHIE
CLERK OF
THE APPELLATE COURTS

JONNIE YVONNE VASQUEZ,

Plaintiff/Respondent,

Rec'd (date)	9-13-16
Posted	JE
Mailed	JE
Distrib	JE
Publish	yes no

v.

DILLARD'S, INC., QUALIFIED EMPLOYER,

Defendant/Petitioner.

No. 114,810

)
)
) FOR OFFICIAL
) PUBLICATION

**ON APPEAL FROM THE WORKERS' COMPENSATION COMMISSION
EN BANC**

¶ 0 Defendant/petitioner, Dillard's Inc. (Dillard's/employer), seeks review of the Workers' Compensation Commission's (Commission) order finding the Employee Injury Benefit Act (Opt Out Act), 85A O.S. Supp. 2014 §§201-213 inoperable based upon multiple constitutional infirmities. The plaintiff/respondent, Jonnie Yvonne Vasquez (Vasquez/employee), urges affirmance of the Commission's order finding the Opt Out Act unconstitutional. Having determined that we have authority to address the constitutional challenges presented, the Court addresses a single dispositive issue: whether the Opt Out Act is an unconstitutional special law. We hold that the Opt Out Act is an unconstitutional special law within the meaning of the Okla. Const. art. 5, §59 creating an impermissible select group of employees seeking compensation for work-related injuries for disparate treatment.

**ORDER OF THE WORKERS' COMPENSATION
COMMISSION EN BANC VACATED; CAUSE REMANDED.**

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WATT, J:

¶1 With the constitutionality of the Oklahoma Employee Injury Benefit Act, 85A O.S. Supp. 2014 §§201-213, squarely before this Court in the instant cause, we determine that we have authority to address the special law issues presented pursuant to the legislative directive contained in 85A O.S. Supp. 2014 §213(A)¹ and under Robinson v. Fairview Fellowship Home for Senior Citizens, Inc., 2016 OK 42, 371 P.3d 477. The core provision of the Opt Out Act, 85A O.S. Supp. 2015 §203² creates impermissible, unequal, disparate treatment of a select group of

¹Title 85A O.S. Supp.2014 §213(A), see note 8, *infra*.

²Title 85A O.S. Supp. 2015 §203(B) provides

“The benefit plan shall provide for payment of the same forms of benefits included in the Administrative Workers’ Compensation Act for temporary total disability, disfigurement, amputation or permanent total loss of use of a scheduled member, death and medical benefits as a result of an occupational injury, on a no-fault basis, and with dollar, percentage and duration limits that are at least equal to or greater than the dollar, percentage, and duration limits contained in Sections 45, 46, and 47 of this title. For this purpose, the standards for determination of average weekly wage, death beneficiaries, and disability under the Administrative Workers’ Compensation Act shall apply under the Oklahoma Employee Injury Benefit Act, but **no other provision of the Administrative Workers’ Compensation Act defining covered injuries, medical management, dispute resolution or other process, funding, notices or penalties shall apply or otherwise be controlling under the Oklahoma Employee Injury Benefit Act, unless expressly incorporated.**” [Emphasis supplied.]

injured workers. Therefore, we hold that the Oklahoma Employee Benefit Injury Act, 85A O.S. 2014 §§201-213, is an unconstitutional special law under the Oklahoma Constitution, art. 2, §59.³

PROCEDURAL POSTURE

¶2 Vasquez, Dillard’s employee, injured her neck and shoulder as she lifted shoe boxes while working on September 11, 2014.⁴ On that date and on September 24th, she filed claims for benefits under Dillard’s Opt-Out plan. Dillards denied the claims on October 3 and 10, 2014, respectively. The employee appealed to the Workers’ Compensation Commission, filing a Notice of Claim for Compensation on December 5, 2014.

¶3 The employer sought removal to federal court on August 6, 2015 on

³The Okla. Const. art. 5, §59 providing:

“Laws of a general nature shall have a uniform operation throughout the State, and where a general law can be made applicable, no special law shall be enacted.”

We do not address whether the Opt Out Act might violate another constitutional special laws provision. See, the Okla. Const. art. 5, §46 providing in pertinent part:

The Legislaure shall not, except as otherwise provided in this Constitution, pass any local or special law authorizing: . . . Regulating the practice or jurisdiction of, or changing the rules of evidence in judicial proceedings or inquiry before the courts . . .”

⁴We express no opinion on the merits of the employee’s claim. Rather, the issue is left to the Commission on remand. In addition, our holding that the Opt Out Act is unconstitutional eliminates the necessity of enumerating the multiple ways in which Dillard’s plan and its coverage provisions are more restrictive or different from those included in the Administrative Act.

grounds that the federal court had exclusive jurisdiction under the Employee Retirement Income Security Act (ERISA). The United States District Court for the Western District disagreed and remanded the cause to the Commission on September 30, 2015. The Commission heard arguments in the cause in February, issuing an order in the cause on September 26, 2015. It found that the Opt Out Act: 1) constituted an unconstitutional special law;⁵ 2) denied equal protection to Oklahoma's injured workers;⁶ and 3) denied injured workers the constitutionally protected right of access to courts.⁷

¶4 On March 17, 2016, Dillard's filed a petition for review with this Court. Extensive briefing ensued by the parties, the Attorney General,⁸ and various *amici curiae*. The most recent filing in the cause, the employee's Submission of Supplemental Authority, occurred on the afternoon of July 30th. We issue today's

⁵The Okla. Const. art. 5, §§59 and 46, see note 3, *supra*.

⁶Fair School Finance Council v. State, 1987 OK 114, ¶ 54, 746 P.2d 1135, 1148; McKeever Drilling Co. v. Egbert, 1934 OK 763, ¶15, 40 P.2d 32, 35-36. The terms of §7 are:

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

⁷The Okla. Const. art. 2, §6 providing in pertinent part:

"The courts of this state . . . shall be open to every person and justice . . . shall be administered without sale. . . ."

⁸Title 12 O.S. 2011 §1653©.

opinion in conjunction with the Legislature's directive that appeals alleging constitutional challenges to the Opt Out Act should be expedited⁹ and in recognition that multiple cases concerning challenges similar to the one presented here have currently been stayed by the Commission.

DISCUSSION

¶5 a. Constitutional issues are properly before this Court pursuant to the legislative mandate of 85A O.S. Supp. 2014 §213(A) and Robinson v. Fairview Fellowship Home for Senior Citizens, Inc., 2016 OK 42, 371 P.3d 477.

¶6 Dillard's assertions that this Court lacks jurisdiction to hear the instant cause are unconvincing. In §213(A) of the Opt Out Act,¹⁰ the Legislature directs that whenever the constitutionality of the Act is challenged, the Supreme Court shall¹¹ retain the appeal. Furthermore, we are instructed to expedite review.

⁹Title 85A O.S. Supp. 2014 §213(A) providing:

"In any action brought to challenge, in whole or in part, the constitutionality of this act, any party to such action may take a direct appeal from the decision of any lower court to the Supreme Court and the Supreme Court shall retain the appeal. The Supreme Court on an expedited basis shall consider the appeal."

¹⁰*Id.*

¹¹Generally, the use of "shall" signifies a command. Zeier v. Zimmer, Inc. 2006 OK 98, fn. 13, 152 P.3d 861; Cox v. State ex rel. Oklahoma Dept. of Human Services, 2004 OK 17, ¶27, 87 P.3d 607, 618; United States through Farmers Home Admin. v. Hobbs, 1996 OK 77, ¶7, 921 P.2d 338. Nevertheless, there may be times when the term is permissive in nature. Cox v. State ex rel. Oklahoma Dept. of Human Services, this note, supra; Minie v. Hudson, 1997 OK 26, ¶27, 934 P.2d 1082; Texaco, Inc. v. City of Oklahoma City, 1980 OK 169, ¶9, 619 P.2d 869.

¶7 We have recently determined in Robinson v. Fairview Fellowship Home for Senior Citizens, Inc., 2016 OK 42, 371 P.3d 477, that the Commission has no authority to determine the facial constitutionality of the Opt Out Act as a special law. Therefore, the Commission’s determinations of constitutionality were not authorized as a blanket strike of the Opt Out Act.

¶8 The portion of Robinson important to these proceedings is found at ¶14. It provides that “this Court has a duty to review the constitutionality of a challenged legislative enactment when presented with a justiciable case or controversy. . . .” We are presented with such a cause here.

¶9 At issue is a challenge to the constitutionality of the Opt Out Act. Robinson confirms that it is this Court’s responsibility to address the issue currently before us. Furthermore, the Legislature has directed us to do so in a timely manner. Therefore, we determine that issues related to the constitutionality of the Opt Out Act are properly before this Court.¹²

¹² Initially, Dillard’s asserted that the Court lacked the authority to address the constitutional issues on grounds that the cause was governed by ERISA and that the federal law preempted the Workers Compensation Act. The employer sought removal which was denied by the United States District Court for the Western District of Oklahoma. Its order provides in pertinent part at page 3 (located at p. 122 of the record):

“ . . . The court concludes that the OIEBA (sic) is part of Oklahoma’s statutory scheme governing occupational injuries and workplace liability; in other words, the OIEBA (sic) is part of Oklahoma’s statutory scheme governing workmen’s compensation. The court further concludes that this action arises under the

¶10 b. The Opt Out Act is an unconstitutional special law, creating an impermissible select group of employees seeking compensation for work-related injuries for disparate treatment, in violation of art. 5, §59 of the Oklahoma Constitution.

¶11 Before addressing the various arguments of the parties, it is helpful to understand the test for determining whether a law violates the special law prohibition of art. 5, §59. Its terms are that:

“Laws of a general nature shall have a uniform operation throughout the State, and where a general law can be made applicable, no special law shall be enacted.”

Statutes facing an art. 5, §59 challenge are considered pursuant to a three-part test to determine constitutional muster. First, is the law special or general? Second, if the law is special in nature, does a general law apply? And, finally, if a general law is not applicable, is the statute a permissible special law?¹³

¶12 The first prong requires us to identify the class. If the statute relates to all persons or things within the class, it is a general law. Where the law singles out

workmen’s compensation laws of Oklahoma. Accordingly, 28 U.S.C. §1445© makes this action nonremovable. The fact that the plan under which plaintiff claims may be (and is presumed to be, for present purposes) an ERISA plan, does not change these conclusions. . . .”

To the extent that issues are not briefed, they are considered waived. Rouse v. Oklahoma Merit Protection Comm’n, 2015 OK 7, fn. 2, 345 P.3d 366; Johnson v. Ford Motor Co., 2002 OK 24, fn.2, 45 P.3d 86; Burrows v. Burrows, 1994 OK 129, ¶ 3, 886 P.2d 984.

¹³Reynolds v. Porter, 1988 OK 88, ¶5, 760 P.2d 816.

less than an entire class of similarly affected persons or things for different treatment, it is a special law. Under the second prong, the question is whether the legislation is susceptible of general treatment or if some special situation makes treatment by a general law impossible. Third, it must be determined whether the special law is so substantially related to a valid legislative objective that it will survive the constitutional challenge.¹⁴

¶13 The above analysis was posited by this Court in Reynolds v. Porter, 1988 OK 88, 760 P.2d 818. We consider the arguments of the parties, in which many of the concerns of the Attorney General are subsumed, in making our determination as to whether the Opt Out is general or special in nature.

¶14. 1) The defined class for special law analysis is made up of injured employees.

¶15 Dillard's contends that there is no disparate treatment of the class at issue in the Opt Out Act. It does so by alleging that the relevant statutorily-created class is composed of "all employers" rather than injured employees. Vasquez insists that the class at issue is that of "injured employees." We consider the employer's argument unconvincing and agree with the employee.

¶16 The employer relies on Grimes v. City of Oklahoma City, 2002 OK 47,

¹⁴*Id.*

49 P3d 719 for the proposition that the defined class should be considered to be employers rather than employees. Grimes upheld, against a special law attack, the municipality's right to determine the manner in which to support economically the schools within its corporate limits. In so doing, we recognized that the members of the class were the municipalities, all of which were given the same option.

¶17 Grimes is distinguishable on its facts and provides no assistance to the employer's arguments. It did not address any issue related to the workers' compensation scheme or rights among injured employees. Rather, it concerned the authority of municipalities to manage tax revenues in support of select public schools. In determining that no special law was involved and in defining the class at issue, the Grimes court looked to the title of the legislative act, "Municipal support of public school systems." It determined that **the title of the act, referring to municipalities, indicated that the class at issue was made up of all municipalities of the state and was general in nature.**

¶18 Here, the **title of the Opt Out Act makes no mention of employers. Rather, the legislation is entitled as the "Employee Injury Benefit Act."** Furthermore, **the title of the Administrative Act refers to "workers" rather than employers.** Just as the title of the act was considered to encompass the identified class in Grimes, it also serves as legislative intent here that the identified class is

that of “injured employees.”¹⁵

¶19 2) The Opt Out Act does not guarantee members of the subject class, all employees, the same rights when a work related injury occurs.

Rather, it provides employers the authority to single out their injured employees for inequitable treatment.

¶20 The employer makes the rather incredible argument that the Opt Out Act provides a baseline of Core Coverage requirement in §203(B) guaranteeing individual injured employees equal treatment. Vasquez relies on the same statutory provision for the proposition that inequitable treatment is specifically allowed. We are convinced by the very language of the statutory provision that the employee’s position is viable.

¶21 Title 85A O.S. Supp. 2015 §203(B) provides:

The benefit plan shall provide for payment of the same forms of benefits included in the Administrative Workers’ Compensation Act for temporary total disability, disfigurement, amputation or permanent total loss of use of a scheduled member, death and medical benefits as a result of an occupational injury, on a no-fault basis, and with dollar, percentage and duration limits that are at least equal to or greater than the dollar, percentage, and duration limits contained in §§45, 46, and 47 of this title. For this purpose, the standards for determination of average weekly wage, death beneficiaries, and disability under the Administrative Workers’ Compensation Act shall apply under the

¹⁵Clearly, the class at issue under the Workers’ Compensation Act, is also defined as that of injured employees. Recently, in Torres v. Seaboard Foods, LLC, 2006 OK 20, ¶47, 373 P.3d 1057, we declined the employer’s invitation to adopt a distinction between the “class of employees” similarly injured under the Administrative Workers’ Compensation Act.

Oklahoma Employee Injury Benefit Act, but **no other provision of the Administrative Workers' Compensation Act defining covered injuries, medical management, dispute resolution or other process, funding, notices or penalties shall apply or otherwise be controlling under the Oklahoma Employee Injury Benefit Act, unless expressly incorporated.** [Emphasis supplied.]

¶22 Rather than providing employees of qualified plan employers equal rights with those of employees falling within the Workers' Compensation Act, the clear, concise, unmistakable, and mandatory language¹⁶ of the Opt Out Act provides that, absent the Act's express incorporation of some standard, **such employers are not bound by any provision of the Workers' Compensation Act for the purpose of: defining covered injuries; medical management; dispute resolution or other process; funding; notices; or penalties.** The statutory language itself demonstrates that injured workers under the Opt Out Act have no protection to the coverage, process, or procedure afforded their fellow employees falling under the Administrative Workers' Compensation Act. There is little question that §203 specifically allows the employers creating their own plans to include conditions for recovery making it more difficult for the injured employee falling within to recover for a work-related injury than a counterpart covered by the Administrative Act.

¹⁶See, note 11, supra, and the cases cited therein.

¶23 Analysis under the first prong of the three part test in determining the nature of a law as general or special in nature is accomplished. The class being that of “all employees” rather than “all employers” coupled with the reality that “all employees” are not guaranteed the same rights when injuries occur, we determine that the Opt Out Act is a special law.

**¶24 3) The applicable general law is the
Administrative Workers’ Compensation Act.**

¶25 The second prong of the test requires a determination of whether a general law applies. Dillard’s contends that there is no generally applicable legislative provision. Vasquez insists the general law exists in the form of the Workers’ Compensation Act. We agree with the employee.

¶26 There is undoubtedly a general law covering the issue of compensation for individuals injured during the course of their employment. Absent the existence of the Opt Out Act, all injured employees, not specifically excluded from the Workers’ Compensation Act’s coverage, could proceed to seek redress for work-related injuries. The Administrative Workers’ Compensation Act defines, with enumerated exceptions, an “employee” as “any person in the service of an employer under any contract of hire or apprenticeship.”¹⁷ Section 3 of 85A O.S.

¹⁷Title 85A O.S. Supp. 2013 § 2(8)(a).

Supp. 2014 provides that “every employer” and “every employee” shall be bound by the Administrative Act absent exclusivity enumerated in the Act. “Every” ordinarily means “any” or “all” and suggests a broad, expansive meaning inclusive in nature.¹⁸ There is no question that its subject is “general” in nature and that all employees covered by its provisions may seek relief thereunder.

¶27 3) The Opt Out Act is not a constitutionally permissive special law.

¶28 Dillard’s final contention is that even if the Opt Out Act is a special law, it is constitutionally permissible because the Act is substantially and reasonably related to a legitimate government objective. Some of the identified underlying goals posited by the employer include: providing a more effective system of identifying and treating workplace injuries; improving access to medical treatment; improving worker health and safety; and encouraging job creation. Dillard’s argues that the Legislature intended to accomplish these goals by giving employers the freedom to manage and administer the provision of benefits to their injured employees. Vasquez points to the general law as the Administrative Workers’ Compensation Act and argues that there is no distinctive characteristic which warrants treating less than all injured employees similarly. We agree with the

¹⁸Coffee v. Henry, 2010 OK 4, ¶3, 240 P.3d 1056.

employee's reasoning.

¶29 We remain convinced that the employer-enumerated goals of the Opt Out Act cannot save it from the constitutional challenge presented. This Court has previously made it clear we will not accept the invitation of employers to find a discriminatory state statute constitutional by relying on the interests of employers in reducing compensation costs.¹⁹

¶30 This Court recently visited an argument similar to the one presented here in Maxwell v. Sprint PCS, 2016 OK 41, 369 P.3d 1079. The Maxwell employer insisted that deferral of permanent partial disability benefits to a subclass of injured workers under the Administrative Workers' Compensation Act was a constitutionally permissive special law.

¶31 In Maxwell, we recognized the Legislature's authority to exclude entire classes of employees from coverage under the workers' compensation system generally. Nevertheless, the Court also acknowledged that the Legislature was without power to vary the effect of an award by excluding one group of claimants from benefits accorded other recipients. In so doing, we relied upon the following statement from Grant v. Goodyear Tire & Rubber Co., 2000 OK 41, ¶10, 5 P.3d 594, 598, wherein this Court wrote:

¹⁹Torres v. Seaboard Foods, Inc., see note 15, supra.

For a special law to be permissible, there must be some distinctive characteristic warranting different treatment and that furnishes a practical and reasonable basis for discrimination.... If there is neither a distinctive characteristic upon which a different treatment may reasonably be founded nor one which furnishes a practical and real basis for discrimination between the two groups within the class, the distinction becomes arbitrary and without relation to the subject matter. (citations omitted.)

¶32 The class at issue here is composed of workers seeking compensation for their work-related injuries. No distinctive characteristic exists for the disparate treatment of injured employees simply upon the basis that the employer has opted out of the general workers' compensation system.

**¶32 The heart of the Opt Out Act is §203.
Simple excision of the offending provision would
eviscerate the very foundation of the
Oklahoma Employee Injury Benefit Act.**

¶33 The Attorney General argues that the Compensation Commission and, presumably, this Court, should either read §203 to provide identical benefits as found within the confines of the Administrative Act, eliminating the disparate treatment of the class, or merely sever the unconstitutional portion of the statute. Although we recognize that the Opt Out Act contains a severance provision providing for severance of any offending provision,²⁰ the suggestion that the Act

²⁰Title 85A O.S. Supp. 2014 §213(B)(1) providing in pertinent part:

“ . . . To the extent this act, or any part thereof, is declared to be unconstitutional or

can be saved by simply requiring that qualified employers treat their employees exactly as the Administrative Act requires, would effectively frustrate any rational reason for an employer to go to the trouble and expense of developing a plan required to mirror the surviving statutory scheme. Such employers would be liable to the same extent as an employer having complied with the Administrative Act.

CONCLUSION

¶34 A general law encompasses all of a class. A special law is one that rests on a false or deficient classification.²¹ We do not correct the Legislature nor do we take upon ourselves the responsibility of legislating by judicial fiat. However, we are compelled to apply Oklahoma's Constitution.²²

¶35 Since the passage of the dual workers' compensation system, this Court has been asked to rule on a multitude of challenges to the new scheme's constitutionality. In each of those causes, we have begun with the premise that

unenforceable, it is specifically intended that:

1. For partial invalidity of this act, where any part thereof, is declared to be unconstitutional or invalid, the same shall not affect the validity of the act as a whole, or any part thereof other than the part so decided to be unconstitutional or invalid . . ."

²¹Zeier v. Zimmer, see note 11, supra; Jack v. State, 1937 OK 384 ¶8, 82 P.2d 1033; Barrett v. Board of Comm'rs of Tulsa County, 1939 OK 68, ¶ 0, 90 P.2d 442.

²²Zeier v. Zimmer, see note 11, supra; Hovat v. State ex rel. Dept. of Corrections, 2004 OK CIV APP 59, ¶10, 95 P.3d 190, cert. denied, 2004 OK 52, 94 P.3d 80, released for publication by order of the Supreme Court of the State of Oklahoma (2004).

such statutory provisions are presumed to be, and should be construed so as to be, constitutional whenever possible. Often over vigorous special writings, the Court decided the causes on the narrowest grounds possible. Nevertheless, this cause squarely presents the issue of whether the Opt Out Act is an unconstitutional special law demonstrated by the language of a statutory provision which is the heart of the Act's premise. As we consider this issue dispositive, we have not reached other constitutional challenges to the Opt Out Act based on denials of equal protection, due process, and access to courts.

¶36 The constitutionality of the Oklahoma Employee Injury Benefit Act, 85A O.S. 2014 §§201-213 is squarely before this Court in the instant cause. Therefore, we determine that we have authority to address the special law issues presented pursuant to the legislative directive contained in 85 O.S. Supp. 2014 § 213(A)²³ and under Robinson v. Fairview Fellowship Home for Senior Citizens, Inc., 2016 OK 42, 371 P.3d 477. The core provision of the Opt Out Act, 85A O.S. Supp. 2015 sec. 203,²⁴ creates impermissible, unequal, and disparate treatment of a select group of injured workers. Therefore, we hold that the Oklahoma Employee Benefit Injury Act, 85A O.S. 2014 §§201-213, is an unconstitutional special law

²³Title 85A O.S. Supp.2014 sec. 213(A), see note 9, supra.

²⁴Title 85A O.S. Supp. 2015 sec. 203, see note 2, supra.

under the Oklahoma Constitution, art. 2, §59.²⁵

¶37 This action is a direct attack on constitutional grounds pursued because the employee believed her rights were denied under an unconstitutional statutory provision. Neither the United States nor the Oklahoma Constitution delineates the effective date of judicial opinions. We are cognizant that there are a number of causes currently pending in the Commission which have been stayed because they concerned issues similar to those presented here. Therefore, this decision is to be given effect in the immediate cause, in the causes currently being challenged before the Commission and in the appellate pipeline, and prospectively to all future cases after the issuance of mandate.²⁶

¶38 The cause is remanded for proceedings consistent with the provision of the Court's opinion.

**ORDER OF THE WORKERS' COMPENSATION
COMMISSION EN BANC VACATED; CAUSE REMANDED.**

REIF, C.J., COMBS, V.C.J. (by separate writing), KAUGER, WATT, EDMONDSON, and COLBERT, JJ. – CONCUR
GURICH, J. (by separate writing) – CONCURS SPECIALLY
WINCHESTER (by separate writing), and TAYLOR, JJ. – DISSENT

²⁵The Okla. Constitution art. 5, §59, see note 1, supra.

²⁶DuLaney v. Oklahoma State Dept. of Health, 1993 OK 113, ¶20, 868 P.2d 676, 685.

