ORIGINAL

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

BRANDON MICHAEL GIBBY, Petitioner, vs. HOBBY LOBBY STORES, INC., INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, and THE OKLAHOMA WORKERS' COMPENSATION COMMISSION. Respondents.	)	Supreme Court No. 114,065

AMICUS CURIAE BRIEF OF THE STATE CHAMBER OF OKLAHOMA IN SUPPORT OF RESPONDENTS

V. Glenn Coffee, OBA # 14563
Denise K. Davick, OBA # 31532
Glenn Coffee & Associates, PLLC
P.O. Box 437
Oklahoma City, OK 73101
(405) 601-1616
gcoffee@cox.net
denisedavick@glenncoffee.com

Attorneys for the State Chamber of Oklahoma

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

BRANDON MICHAEL GIBBY, Petitioner, vs. HOBBY LOBBY STORES, INC., INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, and THE OKLAHOMA WORKERS' COMPENSATION COMMISSION. Respondents.	)	Supreme Court No. 114,065

AMICUS CURIAE BRIEF OF THE STATE CHAMBER OF OKLAHOMA IN SUPPORT OF RESPONDENTS

V. Glenn Coffee, OBA # 14563
Denise K. Davick, OBA # 31532
Glenn Coffee & Associates, PLLC
P.O. Box 437
Oklahoma City, OK 73101
(405) 601-1616
gcoffee@cox.net
denisedavick@glenncoffee.com

Attorneys for the State Chamber of Oklahoma

TABLE OF CONTENTS

I. Introduction

The State Chamber represents more than 1,000 Oklahoma businesses and 350,000 employees. It has been and continues to be the state's leading advocate for business since 1926. The State Chamber provides a voice for Oklahoma employers and employees in the executive, legislative and judicial branches of government in Oklahoma. The State Chamber is in a unique position to advise the Court on the impact of workers' compensation reform in Oklahoma.

II. Oklahoma's Workers' Compensation System established by the Administrative Worker's Compensation Act is Constitutional.

Oklahoma long had one of the worst workers' compensation systems in the country in terms of the cost of claims. That system effectively drove employers and jobs out of the State. It also hampered economic development by discouraging out of state employers from moving their businesses and jobs here. The accomplishment of meaningful workers' compensation reform through the Administrative Workers' Compensation Act ("AWCA") in Oklahoma has reenergized confidence and interest in our State. Local employers are looking for ways to keep their businesses and jobs here, and out of state employers are looking to relocate or develop their businesses here.

According to the Workers' Compensation Court of Oklahoma, as of January 14, 2014, the net result of the old workers' compensation system in Oklahoma was an average Permanent Partial Disability Order of $34,580 per order—the highest in the last 24 years, landing Oklahoma 6th in the national ranking of most expensive state in terms of premium rates. Since that time the AWCA has enacted various reforms to combat the high costs historically associated with the workers' compensation scheme in Oklahoma. The exclusions in 85A O.S. § 57 are a part of those reforms, and are an important protection for employers who are frequently subject to fraudulent claims and

claims by employees who are actively trying to prolong their medical treatment schedules and the related TTD payments by skipping appointments.

The cost savings realized by the AWCA are also important. As recently published in a report by the National Council of Compensation Insurance, Oklahoma's decision to move away from the antiquated, adversarial court-based system to a modernized administrative system has been an overall loss cost level decrease of 14.8% for next year. This is the third straight reduction in the lost cost filing, bringing the total savings to Oklahoma employers of over $368 million since the passage of the historic workers' compensation reforms in 2013. As will be discussed below, the Legislature put forth a monumental effort when it overhauled the antiquated workers' compensation system—efforts that are finally beginning to result in the monetary savings they intended—and these important reforms should not be unraveled based upon a simple attendance and notice requirement.

a. The Oklahoma Legislature is uniquely tasked with proscribing the rights and remedies for occupational injuries.

It is beyond question that the Oklahoma Legislature has the authority to prescribe rights and remedies for addressing occupational injuries. *Adams v. Iten Biscuit Co.*, 1917 OK 47, 162 P. 938. *Adams* was a case that addressed the constitutionality of Oklahoma's newly-enacted "Workmen's Compensation Law" of 1915. *Id.* (first syllabus). This Court held:

> Master and Servant--Workmen's Compensation Law-- Constitutionality--Police Power. Said [Workmen's Compensation Law], which requires all employers engaged in certain hazardous occupations therein enumerated to provide compensation according to certain schedules for all accidental injuries without regard to fault upon the part of said employer arising out of or in the course of employment, and such diseases or infections as may naturally and unavoidably result therefrom, by one of three methods prescribed in the act, and places the supervision and administration thereof under the State Industrial Commission,

> provides penalties for violations of the act, and abrogates the right of action to recover damages not resulting in death, except a right of action reserved to the State Industrial Commission for the benefit of an injured employee, is within the authority of the Legislature, and the enactment thereof was a legitimate exercise of the police power of the state.

Id. (second syllabus). This Court recently held in *Coates v. Fallin*, 2013 OK 108, 316 P.3d 924, that the Oklahoma Administrative Workers' Compensation Act (Administrative Act), 85A O.S. Supp. 2014 §§ 1 *et seq.*"is not unconstitutional as a multiple-subject bill and that the Legislature has exercised proper authority in a matter over which it has the power to act by adopting a code for the future execution of workers' compensation law in Oklahoma which comports with the Okla. Const. art. 5, §57." *Accord Adams*, 1917 OK 47, 162 P. 938 (ninth syllabus, holding that the Oklahoma Constitutional provision "providing that the right of trial by jury shall be and remain inviolate ... does not operate to prevent the Legislature from abrogating the common law right of action for injuries not resulting in death by persons employed in certain hazardous occupations, and substituting therefor the scheme embraced in [the Oklahoma Workmen's Compensation Law], in which the compensation awarded is determined without a trial by jury").

Legislation carries with it a presumption of constitutionality and can only be found in violation of Oklahoma Constitution Article 5, Section 45, if it bears ***no*** rational relationship to a "conceivable legitimate state purpose." *Oklahoma State Election Bd. v. Coats*, 1980 OK 65, 610 P.2d 776, 780. Under rational basis analysis, the Court must refrain from judging "the wisdom, fairness, or logic of legislative choices." *Gladstone v. Bartlesville Indep. Sch. Dist. No. 30 (I-30)*, 2003 OK 30, ¶ 12, 66 P.3d 442, 448 (*citing F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 313, 113 S.Ct. 2096, 2101, 124 L.Ed.2d 211 (1993)). It is for this reason that "legislative bodies are generally presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality." *Id.* (Internal citations omitted.)

Petitioner simply cannot prove that the attendance and notification requirements of 85A O.S. § 57 bear no rational relationship to a legitimate state purpose. The very heart of the idea of workers' compensation is that workers should be able to receive expedient treatment for certain injuries that are sustained while on the job. However, this system is undermined if injured workers simply choose not to attend their scheduled medical appointments and yet still expect their workers' compensation benefits to continue. Thus, the Legislature adopted 85A O.S. § 57 to address this problem. Along these lines, it is important to note that the Legislature built in exceptions to § 57 that allow for excused absences in certain circumstances. In short, this section is not an unjust exercise of Legislative power as Petitioner argues, but instead an attempt by the Legislature to further the goals of the AWCA by crafting a provision that addresses the problem of excessive or unreasonable absenteeism.

b. Section 57 of Title 85A applies equally to all claimants and any distinctions are consistent with Legislative goals and structure.

Petitioner claims that § 57 of the AWCA establishes "special classes" in violation of the Oklahoma Constitution. Specifically, Petitioner argues that the 85A O.S. § 57 of the AWCA violates Article 5, Section 46 of the Oklahoma Constitution because it creates "disparate treatment" based on a particular criteria (whether the employee has missed a certain number appointments) "without a reasonable basis." Pet'rs' Br. 6. The threshold question for special class inquiries is whether the law "targets for different treatment less than an entire class of similarly situated person or things." *Zeir v. Zimmer, Inc.*, 2006 OK 98, P 11, 152 P.3d, 861, 866. However, 85A O.S. § 57 simply does not meet this standard. The very language used in this provision ("[i]f an injured employee...") unambiguously applies to *all* injured employees claiming benefits under the AWCA. All are subject to this same requirement regardless of the type of injury they have

suffered. To say it a different way—there is within the class of claimants subjected to § 57 of the AWCA no omitted claimants to which § 57 does not apply. Thus, this section does not provide "differential treatment for certain claimants"—instead, it negates such a class designation by clearly and explicitly pertaining to *all* injured employees.

Additionally, *even if* Petitioner could prove that § 57 unfairly targets and subjects certain employees, in order to be successful in proving that this constitutes a "special law " in violation of Article 5, Section 46, Petitioner has a high burden to meet. In fact, "the legislature has wide discretion...in the matter of classification [and] is not subject to judicial review unless such discretion appears to have been exercised arbitrarily and without any show of good cause." *McCarroll v. Doctors General Hosp.*, 1983 OK 54, ¶ 23. Thus, even if this Court was to find that § 57 created a subset of a class, it should be upheld because its creation was neither arbitrary nor without good cause. In 2010, the Oklahoma Court of Civil Appeals addressed a similar issue with regard to a portion of the workers' compensation law that limited pre-surgery temporary total disability benefits for non-surgical soft tissue. The Court held that the pre-surgery limitation of temporary total disability benefits was not a special law, stating:

> It is clear the limitation is designed, in part, to encourage the claimant to go determine whether surgery is recommended and to have it performed. The legislative structure would be thwarted if the Claimant could wait months or years to decide to have surgery and then receive compensation up to the regular TTD limits for time preceding surgery.

Scott v. Sprint PCS, 2012 OK CIV APP 36, ¶ 10.

The reasoning of the Court of Civil Appeals in addressing the limitation described above applies in this context as well. Specifically, the legislative intent of the AWCA would be thwarted if a claimant could decide not to attend consecutively schedule appointments for medical treatment without a valid excuse and not suffer any consequences. Claimants who miss more than two

consecutively scheduled medical appointments extend the period of their recovery at cost to employers and to treating medical professionals as well. Thus, even if this Court was to hold that § 57 creates a special class of individuals, it should also hold that good cause has been shown in its creation, and that such creation was neither arbitrary nor capricious.

It is also important to note that the 2014 Oklahoma Legislature passed a bill, House Bill 2903, which clarified the language used in Article V, Section 46 of the Oklahoma Constitution. Title 75, Section 11c of the Oklahoma Statutes now reads, to wit:

> For purposes of Title 75 of the Oklahoma Statutes the constitutional provision found in Section 46 of Article V of the Oklahoma Constitution dealing with the prohibition of local and special laws on certain subjects is restricted to the following definition and all case law to the contrary is hereby null and void:
>
> 1. "Local laws" shall mean those laws confined in their application to a geographic subunit of the State of Oklahoma; and
>
> 2. "Special laws" are those that favor a particular person or corporation without reference to location.

75 O.S. § 11c (eff. Nov. 1, 2014). Petitioner's argument unravels under the clear wording of this provision. The statute at issue—85A O.S. § 57—does not favor a particular person or corporation because its mandates apply to all injured workers equally. Petitioner simply cannot manufacture a "class" of individuals every time an individual is denied coverage because their injury or their subsequent conduct makes them ineligible for benefits under the terms of the AWCA. If certain individuals end up receiving benefits and others are denied benefits under 85A O.S. § 57 it is not because the *law* treats them different, but because their *actions* were different.

c. Petitioner's exclusivity argument has already been determined by the Legislature and this Court.

Petitioner claims that by limiting the compensability of a workers' compensation claim, the Legislature breached the Grand Bargain. In consequence, Petitioner asserts that the statutory

scheme in Oklahoma is no longer an adequate exclusive remedy in place of common law tort. However, this argument is untenable for two reasons.

First, Petitioner would have this Court to rewrite the AWCA and substitute Petitioner's preferred policy for that of the Legislature's. Petitioner asks this Court to remove exclusive remedy protection from all employers because the AWCA denies benefits if an employee has missed "two or more scheduled appointments for treatment" *unless* (1) the absence was caused by "extraordinary circumstances beyond the employees control," or (2) the employee gave the employer "at least two (2) hours prior notice of the absence and had a valid excuse." *See* 85A O.S. § 57. But courts should not inquire into "a statute's propriety, desirability, wisdom or its practicality as a working proposition." *Fent v. Oklahoma Capitol Improvement Auth.,* 1999 OK 64, ¶ 4, 984 P.2d 219, 204. A court's inquiry is "limited to the one of power upon the part of the Legislature to enact such legislation; and, when the existence of this power is determined, the question of details is within the province of the Legislature." *Adams,* 1917 OK 47, 162 P. 938, 946. The Legislature was well within its proper scope of authority in passing AWCA, and this Court should decline Petitioner's request to revise these legislative policy considerations.

The Legislature chose to make vast revisions to the workers' compensation scheme in an effort to provide cost-saving benefits to employers, and time and health benefits to employees. The Court should decline Petitioner's invitation to invalidate particular provisions of this law merely because employees cannot miss more than two schedule appointments absent one of the two circumstances described above. To do so would erode the foundation of the Legislature's decision-making authority.

Second, the Oklahoma Constitution protects the Legislature's ability to prescribe an exclusive remedy in certain workers' compensation cases. Specifically, Article 23, Section 7 of the Constitution provides that the Legislature may provide for compensation for death resulting in injuries covered by the Act, "in which case the *compensation so provided shall be exclusive.*" (Emphasis added.) Of interest, Article 23, Section 7 of the Oklahoma Constitution, giving exclusive remedy in workers' compensation cases, was adopted in 1950 with 82.5% voter approval. In other words, the ability of the Legislature to define the contours of workers' compensation requirements and proscribe exclusive remedies in such cases is well established in this Court's precedent, the Oklahoma Constitution, and has been ratified by the will of the people.

Stripping the Act of its exclusive remedy provision undercuts the fundamental goals of the reforms found in the AWCA—that employees can receive timely urgent care and return to work more quickly, resulting in benefits to the employee and employer alike. The requirements of 85A O.S. § 57 fall in line with these goals. Simply allowing employees to skip or reschedule medical appointments increases the duration of the employee's recovery period and levies a heavier financial burden put upon treating physicians and employers alike. In short, the mere addition of a particular requirement that mandates attendance at scheduled appointments absent compelling circumstances or proper notice does not breach the "Grand Bargain" and is not a justifiable basis to strip the AWCA of its exclusivity provision.

d. The "Grand Bargain" still stands strong in Oklahoma.

Petitioner's claim that the "Grand Bargain" has been breached simply does not hold weight. Workers' compensation laws have always enumerated specific requirements, and the mere inclusion of a particular attendance requirement does not fundamentally alter the balance between

employer and employee. (*See Parret v. UNICCO Serv. Co.*, 2005 OK 54, ¶ 21, 127 P.3d 572, 578, "statutory exceptions to workers' compensation coverage...must be factored into any balancing of interests between employer and employee.") Under Petitioner's logic, the inclusion of *any* limiting factor that excludes any particular employee from coverage would breach the so-called "Grand Bargain" by singling out that employee as a "special class," even when that exception applies to *all employees equally*—much like 85A O.S. § 57. In effect, Petitioner is requesting this Court to encroach on the Legislature's role by redefining the AWCA anytime that an individual does not qualify for coverage. The Court can and should decline that request.

Whether the Legislature chose to include an attendance requirement or not in the AWCA is a policy decision that has no bearing on whether this law passes rational basis review. The only pertinent question for this Court is whether there was a "conceivable legitimate state purpose" for the requirement that, absent certain circumstances, individuals attend their scheduled medical appointments. *See Coats*, 1980 OK 65, 610 P.2d 776, 780. We urge this Court to find that there was, and to uphold the important reforms in the AWCA.

III. Conclusion

The AWCA is a much-needed breath of fresh air for the State of Oklahoma, and it has pushed our state to the forefront of reforming an anachronistic system that benefitted a select few to the detriment of the general well-being of the State. The AWCA does not create special classes—it creates parameters based on well thought out policy arguments and decisions on the best way to address injuries that occur on the job. Each of these parameters has been tested and proven in other jurisdictions. Recent reports have already shown the benefits that the AWCA has shepherded Oklahoma, and this progress should not be undone with a mere stroke of the judicial pen. Thus, the State Chamber and its membership urge this Court to decline Petitioner's invitation

to line-item veto certain provisions of the AWCA and to leave these kinds of policy decisions to the branch of government property tasked with making these determinations—the Legislature.

Respectfully Submitted,

V. Glenn Coffee, OBA # 14562
Denise Davick, OBA #31532
Glenn Coffee & Associates, PLLC
P.O. Box 437
Oklahoma City, OK 73101
(405) 601-1616
gcoffee@cox.net
denisedavick@glenncoffee.com

CERTIFICATE OF MAILING

I hereby certify that on this 11th day of September, 2015, a true and correct copy of the foregoing was mailed by First Class U.S. Mail, postage prepaid, addressed to the following:

Bob Burke
5100 N. Classen
Suite 100
Oklahoma City, OK 73118

Gary Prochaska
PO Box 890008
Oklahoma City, OK 73189

Attorneys for Petitioner

James Ferguson
941 East Britton Road
Oklahoma City, OK 73114
Attorneys for Respondents

The Honorable Scott Pruitt
Attorney General of Oklahoma
313 N.E. 21st Street
Oklahoma City, OK 73105

Court Clerk
Workers' Compensation Commission
1915 N. Stiles
Oklahoma City, OK 73102

Glenn Coffee