ELIAS v. CITY OF TULSA

2022 OK CIV APP 18
Case Number: 119526
Decided: 09/17/2021
Mandate Issued: 05/25/2022
DIVISION I
THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA, DIVISION I

Cite as: 2022 OK CIV APP 18, __ P.3d __

JEFFREY ELIAS, Petitioner,
v.
CITY OF TULSA and OWN RISK #10435,
and
THE WORKERS' COMPENSATION COMMISSION, Respondents.

APPEAL FROM THE WORKERS' COMPENSATION COMMISSION EN BANC

AFFIRMED

Michael R. Green, LAW OFFICE OF MICHAEL R. GREEN, Tulsa, Oklahoma, for Petitioner/Appellant,

Conner E. Brittingham, Cyrus Nathaniel Lawyer, LATHAM, STEELE, LEHMAN, KEELE, RATCLIFF, FREIJE & CARTER, P.C., Tulsa, Oklahoma, for Respondents/Appellees.

THOMAS E. PRINCE, JUDGE:

¶1 Jeff Elias ("Appellant") seeks review of an Order Affirming Decision of Administrative Law Judge by the Oklahoma Workers' Compensation Commission En Banc ("Commission") . The issues here are: (1) whether the Order denying Appellant monetary benefits was based on the appropriate interpretation of 85A O.S. § 46H; and (2) whether § 46H violates the fundamental protections of due process, Okla. Const., art. II, § 6, or represents a special law, prohibited by Okla. Const. art. 5, § 59. We base our holding on the fundamental principle that it is not the role of the judiciary to weigh the wisdom of legislation, as such decisions are the proper province of the Legislature--regardless of the harshness of the outcome. For the reasons stated, we answer the questions presented in the negative and affirm the decision of the Commission.

BACKGROUND

¶2 The relevant factual background is straightforward and essentially uncontested. Elias sought workers' compensation benefits for cumulative trauma binaural hearing loss stemming from his twenty-six (26) years on the job as a Tulsa Police Officer, with a date of last exposure of November 30, 2017.[1] He sought permanent partial disability benefits ("PPD") and continuing medical maintenance and repair of hearing aids. In response, the Respondent admitted a compensable work-related injury as to the ears, but asserted that Elias was ineligible for a PPD award pursuant to 85A O.S. § 46(H).[2]

¶3 A hearing was conducted before an ALJ on August 18, 2020. During the hearing, Elias requested a PPD award for his ears, since he has never received an award for his ears or, alternatively, the assignment of a percentage of disability for his compensable work-related injury to his ears. An Order was entered on August 26, 2020, in which the ALJ determined that Elias had sustained a 38% PPD to the ears (hearing loss) over and above a preexisting 13.8% disability. The ALJ rejected the

Respondent's assertion that the award for binaural hearing loss should be converted to a whole person impairment, citing § 46A(16). Significantly, the ALJ determined that the 38% PPD award (equating to 125.4 weeks) to the ears was not payable to Elias based on the cumulative cap set forth in § 46H, writing, in part, that: "the sum total of all combined PPD awards cannot exceed 350 weeks pursuant to Title 85A O.S. § 46(H)", and that "Claimant is ineligible to receive a monetary award for PPD based on Title 85A O.S. § 46(H)." As the evidentiary support for application of the limitation in § 46H, the ALJ identified six prior awards of PPD that Elias had received, and determined that "[t]he sum total of" Elias' prior awards of PPD equals 698.74 weeks of PPD, exceeding the § 46H limit of three hundred fifty weeks. [3]

¶4 The ALJ's Order specifically delineated the award to Elias, as follows:

1. That on November 30, 2017, Claimant sustained compensable cumulative trauma injury to his BILATERAL EARS.

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3. That as a result of said injury, Claimant has sustained a 38% (125.4 weeks) permanent partial disability to the BILATERAL EARS over and above a preexisting 13.8% disability.

4. That the award is not payable to Claimant pursuant to Title 85A O.S. § 46(H).

5. Claimant is awarded continuing medical maintenance in the form of maintenance, repair and replacement of hearing aids.

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¶5 Elias appealed the case to the Workers' Compensation Commission En Banc, which conducted a hearing on August 18, 2020. By Order dated April 7, 2021, the Commission affirmed the ALJ's decision. This appeal followed.

STANDARD OF REVIEW

¶9 An appellate court "may modify, reverse, remand for rehearing, or set aside the judgment or award" of the Workers' Compensation Commission "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. § 78C.

¶10 Elias has alleged legal error with respect to statutory interpretation and constitutional claims. The issues of a statute's constitutional validity, together with its interpretation and application, are questions of law subject to *de novo* review. *Brown v. Claims Management. Resources Inc.*, 2017 OK 13, ¶ 10, 391 P.3d 111, 115; *Gillispie v. Estes Express Lines, Inc.,* 2015 OK CIV APP 93, ¶ 18, 361 P.3d 543, 549.

ANALYSIS

¶11 Elias has asserted two propositions of error in the Exhibit "C" of his Amended Petition in Error: (1) whether the Order denying Elias monetary benefits was based on a proper interpretation of 85A O.S. § 46H; and (2) whether § 46H violates the fundamental protections of due process, Okla. Const., art. II, § 6, and represents a special law, prohibited by Okla. Const. art.

5, § 59. We will address each issue in turn.

The Commission Properly Interpreted and Applied § 46H's Cumulative PPD Cap

¶12 The proper meaning of § 46H is at the core of this appeal. It is our duty to give meaning and effect to the words chosen by the Legislature, unless to do so would result in an absurdity. *See Tate v. Browning-Ferris, Inc.*, 1992 OK 72, ¶ 15, 833 P.2d 1218, 1228 ("To ascertain legislative intent we look to the language of the pertinent statute. Statutory words are to be given their ordinary sense except when a contrary intention plainly appears.") (citations omitted); *Hill v. Board of Education, District I-009, Jones, Oklahoma*, 1997 OK 11, ¶ 5, 944 P.2d 930, 931 ("The fundamental rule of statutory construction is to ascertain and, if possible, give effect to the Legislature's intention and purpose as expressed in a statute.") (citations omitted). We begin our analysis by looking to the language of the pertinent statutes because "it is our duty to apply the law as written." *Greenwood Centre, Ltd. v. Nightingale*, 2020 OK 59, ¶ 3, 465 P.3d 1269, 1270 (Rowe, J., concurring) (citations omitted). Consequently, in the absence of an ambiguity, the text of a statute is the sole legitimate expression of legislative intent.

¶13 The text of § 46H, is as follows:

> The sum of all permanent partial disability awards, excluding awards against the Multiple Injury Trust Fund, shall not exceed three hundred fifty (350) weeks.

¶14 With the enactment of §46H, the maximum number of PPD weeks that can be awarded over the course of a claimant's lifetime is 350 weeks (rather than the 520 weeks provided under the prior law). Elias urges the Court to apply the rule of statutory construction that considers the history of the various prior versions of §46H to ascertain legislative intent. Appellant's Br.-in-chief at 9; Appellant's Reply Br. at 4-5; *see also McNeill v. City of Tulsa*, 1998 OK 2, ¶ 9, 953 P.2d 329, 332 (where the Court stated, in part, that where "judicial interpretation becomes necessary to . . . ascertain the true meaning of the particular words in accord with the legislative intent . . . it is proper to consider the history and consistent purpose of the legislation on the subject and to discover the policy of the Legislature as disclosed by the course of the legislation"). However, we find the language in § 46H to be plain and unambiguous, and decline Elias' use of legislative history to interpret § 46H. On the other hand, we find it useful to note that the text of § 46H was taken in substance from 85 O.S. 2011, § 333 (which was in effect at the time the AWCA was adopted):

> **The sum of all permanent partial disability awards, excluding awards against the Multiple Injury Trust Fund, shall not exceed five hundred twenty (520) weeks**, except for awards for amputations and disability to the parts of the body for which surgery was received in the latest injury.

(emphasis added). In light of the fact that § 46H significantly reflects the law that was in effect at the time the AWCA was enacted (with a concomitant reduction of 520 weeks to 350 weeks), it is difficult to conclude that any further review of prior statutory versions of this language would aid the Court in a resolution of this case.[4]

¶15 Elias also urges that a conflict exists between the language in § 45C(6) and § 46H. Section 45C(6), provides, in part, that "[t]he fact that an employee has suffered previous disability or received compensation therefor shall not preclude the employee from compensation for a later accidental personal injury or occupational disease." Based on this alleged conflict, Elias appears to argue that an ambiguity exists, arguably justifying the use of another rule of statutory construction. *See Keating v. Edmondson*, 2001 OK 110, ¶ 8, 37 P.3d 882, 886 ("Only where the legislative intent cannot be ascertained from the statutory language, i.e. in cases of ambiguity or conflict, are rules of statutory construction employed."). In this case, however, the use of the phrase "shall not preclude" (in § 45C(6)) does not create a conflict or ambiguity with § 46H's phrase "shall not exceed." The use of these words demonstrates the usefulness of the canon known as "*expressio unius est exclusio alterius*," *Greenberg v. Wolfberg*, 1994 OK 147, ¶ 24, 890 P.2d 895, 906, or the "rule that the mention of one thing in a statute implies exclusion of something else," *OCPA Impact, Inc. v. Sheehan*, 2016 OK 84, ¶ 6, 377 P.3d 138, 146 (Edmondson, J., concurring in part and dissenting in part). Simply put, the plain meaning of the word "preclude"[5] represents a legislative expression that is completely different from the meaning of "exceed."[6] The use of these words and phrases clearly demonstrates that the Legislature intended to provide that compensation is possible to any claimant who has previously received PPD compensation, while such a compensation also is subject to a cumulative cap.

¶16 Additionally, Elias argues for a limitation with respect to the legislature's use of the term "all" in § 46H, where the statute references "all permanent partial disability awards." In substance, Elias requests that we limit the meaning of "all," so that PPD that predated enactment of the AWCA be excluded (*i.e.*, not included for purposes of calculating the sum of "all permanent disability awards"). The error with Elias' proposition is that "all" means "all" in § 46H because the statute contains no qualifier or other limitation, such as "all, except . . ." or "all, not including . . . ." Therefore, the term "all" includes all PPD awards, both those that predated enactment of the AWCA and those that were entered subsequent to enactment of the AWCA.

¶15 Under the plain and unambiguous language of § 46H, all of Elias' permanent disability awards, including those that predated enactment of AWCA, were properly combined for purposes of calculating the cap on permanent partial disability awards. Consequently, we find that the Commission properly interpreted and applied § 46H, to bar payment of the adjudicated award to Elias because the sum total of all combined PPD awards cannot exceed 350 weeks.

Section 46H Does Not Infringe Any Constitutional Protections

Okla. Const. art. 5, § 59

¶16 Elias erroneously claims that § 46H violates the prohibition on the enactment of a special law, as established by Okla. Const. art. 5, § 46. In *Glasco v. State ex rel. Oklahoma Department of Corrections*, 2008 OK 65, ¶ 21, 188 P.3d 177, 184, the Court described the required analysis for purposes of art. 5, § 46, as follows:

> Generally, a special law singles out particular persons or things upon which it operates, while a general law embraces and operates upon all or all within a class. **Where a statute operates upon a class, the classification must be reasonable and pertain to some peculiarity in the subject of the legislation and there must be some distinctive characteristic upon which different treatment is reasonably founded**.

(citations omitted) (emphasis added); *see also City of Edmond v. Vernon*, 2009 OK CIV APP 36, ¶ 2, 210 P.3d 860, 864 (where the Court denied an art. 5, § 46 challenge to the constitutionality of a workers' compensation provision that established a presumption that a firefighter disabled as a result of heart disease "shall be presumed to have incurred the heart disease . . . while performing the firefighter's duties . . . .").

¶17 We find that § 46H does not treat similarly situated persons differently. Rather, the requirements of § 46H are even-handed. Thus, the special law proscription in Okla. Const. art. 5, § 46 has not been violated.

Okla. Const., art. II, § 6

¶18 Elias further improperly asserts that §46H violates the prohibition in Okla. Const. art. II, § 6, establishing the "right to a remedy":

> 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.

¶19 The Court addressed a challenge to a prior version of § 46H, under Okla. Const. art. II, § 6, in *Rivas*, 2000 OK 68. In rejecting the challenge in *Rivas*, the Court stated, in part, that art. II, § 6, is intended to establish a limitation on the authority of the judiciary and is not a substantive limitation on the Legislature:

> In interpreting our constitutional remedy guarantee, the Oklahoma Supreme Court has held that [art. 2, § 6] . . . does not impose any substantive limitation on the legislature. In *Adams v. Iten Biscuit,* this Court held that the right to remedy guarantee afforded by Art. 2, § 6 is a mandate to the judiciary and is not intended to be a limitation on the authority of the legislature. *Id.* **The constitutional guarantee mandates that the courts should be open and afford a remedy for those wrongs that are recognized by the law of the land**.

Id. ¶ 17 (citations omitted) (emphasis added).

¶20 The flaw with Elias' argument is that the courts are not able to provide a remedy where the Legislature has not acted to provide one. *Rivas ¶20.* Moreover, contrary to Elias' argument, §46H does not cause a forfeiture of any vested property rights. In short, as also stated in *Rivas,* a claimant "cannot be heard to complain if the rule is changed before any rights have accrued to him thereunder." *Id.* ¶24, quoting *Adams v. Iten Biscuit Co.*, 1917 OK 47, 162 P. 938, 943. Thus, the protections of art. II, § 6 are not violated by § 46H.

Due Process

¶21 Elias' substantive due process challenge also fails. Elias asserts that "the balance of . . . struck by the Grand Bargain has been tipped to[o] far in employer's favor . . . ." Appellant's Br.-in-chief at 11. This argument fails, simply, because, for due process analysis, the proper test is not whether the "scales" between the claimant and employer are in balance, but whether §46H is rationally related to a legitimate government interest and if the challenged legislation reasonably advances that interest. *See Hill v. American Medical Response*, 2018 OK 57, 423 P.3d 1119. In *Hill*, the Court rejected several challenges to the requirement in § 45C, that physician opinions are to be based on the criteria established by the current edition of the AMA Guides. *Id.* ¶ 20. The Court in *Hill* held that substantive due process "encompasses a general requirement that all government actions have a fair and reasonable impact on the life, liberty, or property of the person affected . . . the analysis requires an adjudication of whether the legislation is rationally related to a legitimate government interest and if the challenged legislation reasonably advances that interest." *Id*. ¶¶ 49-50 (citations omitted). *See Maxwell v. Sprint PCS*, 2016 OK 41, ¶ 27, 369 P.3d 1079, 1092-93 (where the Court found that the deferral provision in §45C violated due process, in part, because "[a]n injured employee who returns to work receives no compensation for the physical injury sustained and no compensation for a reduction in future earning capacity, upending the entire purpose of the workers' compensation system, which is to compensate 'for loss of earning power and disability to work occasioned by injuries to the body in the performance of ordinary labor.' (citation omitted).").

¶22 Section 46H is rationally related to and reasonably advances a legitimate governmental interest, as follows: the establishment of the cumulative PPD cap provides an employee "a statutorily prescribed measure of damages . . . and [an] employer [receives assurance of] a maximum loss and [protection from] . . . excessive judgments." *Evans & Associates Utility Services v. Espinosa,* 2011 OK 81, 264 P.3d 1190, 1195. Moreover, subject only to specific constitutional constraints, the establishment of the public policy for the parameters of "the grand bargain and economic-welfare shifting" fall exclusively within the purview of the legislative branch of government. *Torres v. Seaboard Foods, LLC*, 2016 OK 20, ¶ 51, 373 P.3d 1057, 1080, *as corrected* (Mar. 4, 2016). Under our fundamental separation of powers doctrine, the Legislature solely possesses the decision-making authority concerning the policy choices that underlie the grand bargain - not the judiciary. *Id.* Therefore, Elias' substantive due process claim must fail.

CONCLUSION

¶25 For the reasons stated, the April 7, 2021, Order of the Commission is affirmed.

GOREE, P.J., and MITCHELL, J., concur.

FOOTNOTES

THOMAS E. PRINCE, JUDGE:

[1] The Parties do not dispute that the law in effect at the time of the injury controls the award of benefits. *See Hill v. Am. Med. Response*, 2018 OK 57, ¶ 7, 423 P.3d 1119, 1124.

[2] Title 85A O.S. § 46H, provides that "[t]he sum of all permanent partial disability awards, excluding awards against the Multiple Injury Trust Fund, shall not exceed three hundred fifty (350) weeks."

[3] The Administrative Workers' Compensation Act ("AWCA") became effective February 1, 2014. *See Vasquez v. Dillard's, Inc.,* 2016 OK 89, 381 P.3d 768, 778, n.17 ("Senate Bill 1062 was enacted during the 2013 legislative session and repealed the Workers' Compensation Code."). The Parties do not dispute that all six of Elias' prior awards of PPD were under Title 85 as they were awarded prior to enactment of the AWCA.

[4] Elias argues that, to ascertain legislative intent, the Court should consider all prior versions of the language in §46H, including the statute that existed when *Rivas v. Parkland Manor*, 2000 OK 68, ¶ 3, 12 P.3d 452, *superseded by statute*, 85 O.S. § 22(7) (as amended), *as recognized in Evans & Associates Utility Services v. Espinosa*, 2011 OK 81, 267 P.3d 1190, was decided (where the Court considered the constitutionality of 85 O.S. Supp.1995, § 22(7). Section 22(7) was repealed in 2011, when § 333 was enacted. *See* Okla. Sess. Laws 2011, c. 318, § 87.

[5] *Preclude*, Merriam-Webster, *available* at https://www.merriam-webster.com/dictionary/preclude (explaining that "preclude" means "to make impossible by necessary consequence**:** rule out in advance").

[6] *Exceed*, Merriam-Webster, *available at* https://www.merriam-webster.com/dictionary/exceed (explaining that "exceed" means "to be greater than or superior to").

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Oklahoma Court of Civil Appeals Cases

Cite	Name	Level
2009 OK CIV APP 36, 210 P.3d 860,	CITY OF EDMOND v. VERNON	Discussed
2015 OK CIV APP 93, 361 P.3d 543,	GILLISPIE v. ESTES EXPRESS LINES, INC.	Discussed

Oklahoma Supreme Court Cases

Cite	Name	Level
1992 OK 72, 833 P.2d 1218, 63 OBJ 1507,	Tate v. Browning-Ferris, Inc.	Discussed
1994 OK 147, 890 P.2d 895, 65 OBJ 4220,	Greenberg v. Wolfberg	Discussed
1997 OK 11, 932 P.2d 1128, 68 OBJ 575,	Ingram v. Wal-Mart Stores, Inc.	Cited
1997 OK 107, 944 P.2d 930, 68 OBJ 2775,	HILL v. BOARD OF EDUCATION	Cited
1917 OK 47, 162 P. 938, 63 Okla. 52,	ADAMS v. ITEN BISCUIT CO.	Discussed
2001 OK 110, 37 P.3d 882, 72 OBJ 3672,	KEATING v. EDMONDSON	Discussed
2008 OK 65, 188 P.3d 177,	GLASCO v. STATE ex rel. OKLAHOMA DEPARTMENT OF CORRECTIONS	Discussed
2011 OK 81, 264 P.3d 1190,	EVANS & ASSOC. UTILITY SERVICES v. ESPINOSA	Discussed at Length
2016 OK 20, 373 P.3d 1057,	TORRES v. SEABOARD FOODS, LLC	Discussed
2016 OK 41, 369 P.3d 1079,	MAXWELL v. SPRINT PCS	Discussed
2016 OK 84, 377 P.3d 138,	OCPA IMPACT, INC. v. SHEEHAN	Discussed
2016 OK 89, 381 P.3d 768,	VASQUEZ v. DILLARD'S, INC.	Discussed
2017 OK 13, 391 P.3d 111,	BROWN v. CLAIMS MANAGEMENT RESOURCES INC.	Discussed
2018 OK 57, 423 P.3d 1119,	HILL v. AMERICAN MEDICAL RESPONSE	Discussed at Length
2020 OK 59, 465 P.3d 1269,	GREENWOOD CENTRE, LTD v. NIGHTINGALE	Discussed
1998 OK 2, 953 P.2d 329, 69 OBJ 208,	McNEILL v. CITY OF TULSA	Discussed
2000 OK 68, 12 P.3d 452, 71 OBJ 2366,	RIVAS v. PARKLAND MANOR	Discussed at Length

Title 85. Workers' Compensation

Cite	Name	Level

Cite Name	Level	
85 O.S. 333,	Repealed	Cited
85 O.S. 22,	Repealed	Discussed

Title 85A. Workers' Compensation

Cite	Name	Level
85A O.S. 46,	Permanent Partial Disability Compensation - Amputation - Loss of Vision - Loss of Hearing	Discussed at Length