Case No. 114,810

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Dillard's Inc., Qualified Employer

Respondent--Petitioner,

v.

Jonnie Yvonne Vasquez,

Claimant--Respondent.

Appeal from the Oklahoma Workers' Compensation Commission
Commission File No. CM-2014-11060L

BRIEF OF *AMICUS CURIAE* NATIONAL EMPLOYMENT LAW PROJECT

Brandon Burton, OBA #16973
P.O. Box 2666
Oklahoma City, OK 73101
405-232-0555

Darin M. Dalmat
Daniel M. Rosenthal
JAMES & HOFFMAN, P.C.
1130 Connecticut Avenue, NW
Suite 950
Washington, DC 20036
(202) 496-0500
(202) 496-0555 (fax)
dmdalmat@jamhoff.com
dmdrosenthal@jamhoff.com

Attorneys for *Amicus Curiae*

June 23, 2016

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INDEX

INTEREST OF *AMICUS CURIAE*

The National Employment Law Project (**NELP**) is an advocacy organization that promotes positive change for working people on the local, state, and national levels. Operating from offices in four states, NELP focuses on bolstering enforcement of existing laws that protect employees, while supporting new approaches that expand access to work, improve the social safety net, and defend workers in an evolving economy.

NELP's priorities include advocating for safety and health protections for workers, especially low-wage workers, recognizing that work injuries often cause serious physical suffering and enormous negative economic consequences. NELP's efforts in this area are led by Deborah Berkowitz, who formerly worked in the Occupational Safety and Health Administration as senior policy advisor and chief of staff.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court should affirm the well-reasoned decision of the Oklahoma Workers' Compensation Commission. The Oklahoma Employee Injury Benefit Act (**Opt-Out Act** or **Statute**) represents an unprecedented perversion of the workers' compensation system in place in Oklahoma—and in virtually every other state—for decades. It subverts the longstanding premises of workers' compensation: coverage of necessary treatment for work-related injuries, as defined by the state (not at the whim of employers), and a fair adjudicatory process that permits workers easy access to an impartial arbiter with fact-finding authority.

The Statute drastically weakens safety and health protections for a subclass of workers, drawing an irrational and unjustifiable distinction between two groups: those whose employers have chosen to play by the traditional rules in place around the country, and those whose employers have chosen to opt out and write their own rules.

In doing so, the Opt-Out Act drastically weakens workers' compensation at a time when states should instead be fortifying it. Workplace injuries remain a significant problem in today's economy, but workers' compensation programs currently compensate only 21% of the cost of treatment and missed work for workplace injuries.[1] The Opt-Out Act threatens to take away even this basic support for many workers. Just as the Florida Supreme Court did in a recent case,[2] this Court should reject the legislature's attempt to alter the fundamental precepts of workers' compensation to the detriment of working people.

ARGUMENT

I. The Opt-Out Act subverts the time-tested workers' compensation system.

The Opt-Out Act represents a significant and unprecedented deviation from workers' compensation as it has existed for decades. This Court is surely aware of the long history of workers' compensation. Oklahoma passed its first workers' compensation statute in the 1910's,[3] and by the end of that decade, 44 of the 50 states had passed workers' compensation statutes.[4]

Several factors led to the states' rapid adoption of workers' compensation programs. Before the enactment of these systems, employees were often unable to secure any effective recourse for workplace injuries and deaths: civil litigation, their only path to relief, was

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1 David Michaels, Assistant Secretary for Occupational Safety and Health, *Adding Inequality to Injury: The Costs of Failing to Protect Workers on the Job* 6 (June 2015) (hereinafter **Adding Inequality to Injury**), *available at* https://www.dol.gov/osha/report/20150304-inequality.pdf.

2 *Castellanos v. Next Door Co.,* No. SC13-2082, 2016 WL 1700521, at *15 (Fla. Apr. 28, 2016).

3 *See* Price V. Fishback & Shawn Everett Kantor, *A Prelude to the Welfare State* 102-05 (2000) (hereinafter **Prelude**).

4 *See* National Commission on State Workmen's Compensation Laws, Report 34 (July 31, 1972) (hereinafter **National Commission Report**), *available at* http://workerscompresources.com/?page_id=28.

expensive and often left them with no remedy.[5] In such litigation, workers struggled to overcome "powerful legal defenses" of employers, such as contributory negligence and assumption of risk.[6] But injured employees sometimes prevailed in court and won large judgments, while employers incurred the costs of litigation regardless of the outcome.[7] Meanwhile, as society came to understand the severity of the problem of workplace injuries, pressure built in support of laws increasing employers' liability.[8] As a result, employers faced "increased costs and greater uncertainty,"[9] while workers' access to relief remained "inadequate, inconsistent, and uncertain."[10]

Advocates for both workers and employers agreed this system was far from optimal for workers, employers, and society at large. Forging the so-called "grand bargain," they jointly supported laws that guaranteed benefits to workers for medical treatment and lost income, regardless of fault, while limiting employers' liability to the provision of these defined benefits.[11] This basic system has remained in place for a century.

The modern workers' compensation continues to serve the purposes that originally animated workers' compensation statutes, albeit imperfectly. Current programs, including the pre-2013 Oklahoma workers' compensation program, share several commonalities. First, the programs generally provide benefits for injuries "arising out of the course and scope of

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5 Leslie I. Boden & Emily A. Spieler, *Workers' Compensation*, Oxford Handbooks, 2 (2014) (hereinafter **Workers' Compensation**).

6 *Id.*

7 *Id.*

8 *Id.*; Prelude, at 94.

9 Workers' Compensation, at 2.

10 National Commission Report, at 34.

11 *Id.*

employment," with few exceptions.[12] Second, they generally pay for treatment "reasonably necessary" to treat the injury, along with additional benefits for disability and death.[13] Third, they generally grant the power to assess claims to impartial administrative law judges with fact-finding power, while granting a right of appeal to state courts.[14]

The Opt-Out Act threatens each of the basic elements of workers' compensation described above, and others—each to the detriment of injured workers.

As to the scope of covered injuries and treatment, the Opt-Out Act professes to require plans to provide the same coverage as the state workers' compensation system.[15] But as the Workers' Compensation Commission found in this case, "[t]he appearance of equal treatment . . . is like a water mirage on the highway that disappears upon closer inspection." Order, at ¶ 18. In reality, the Opt-Out Act permits a drastic reduction in the scope of covered injuries and treatment by granting employers vast discretion to narrowly interpret and apply the broad pronouncements quoted above, while limiting the ability of courts and agencies to curtail abuses of the system.

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[12] Okla. Stat. tit. 85A, § 2(9)(a). *See, e.g.,* Ariz. Rev. Stat. § 23-1021; Colo. Rev. Stat. § 8-41-301 (same); Iowa Code § 85.3(1) (same); N.C. Gen. Stat. Ann. § 97-2(6) (same); S.C. Code § 42-1-160(A) (same); Va. Code § 65.2-101 (same). *See also* Workers' Compensation, at 3.

[13] Okla. Stat. tit. 85A, § 50(A); *see, e.g.,* Ark. Code § 11-9-508(a) (same); Ala. Code § 25-5-77(a) (same); Colo. Rev. Stat. § 8-42-101(c) ("reasonable and necessary"); N.M. Stat. § 52-1-49(A) ("reasonable and necessary"); *West v. SAIF Corp.,* 74 Or. App. 317, 320 (1985) ("reasonable and necessary").

[14] Okla. Stat. tit. 85A, § 27(A); *see, e.g.,* Colo. Rev. Stat. § 8-43-201(1) (granting original jurisdiction to state administrative courts to resolve any claim); Ind. Code § 22-3-1-2, 22-3-4-5(a) (granting jurisdiction to state board to administer workers' compensation and to resolve any claim not settled voluntarily by the parties); Kan. Stat. § 44-534 (granting jurisdiction to state agency over any claim not settled voluntarily by the parties); Va. Code § 65.2-700 (granting jurisdiction to state commission over any claim not settled voluntarily by the parties with approval of the commission).

[15] The Statute says that plans must cover injuries "aris[ing] out of and in the course of employment," Okla. Stat. tit. 85A, § 201(A)(7), and "provide for payment of the same forms of benefits" as those in the traditional state workers' compensation system, Okla. Stat. tit. 85A, § 203(B).

To accomplish this result, the Statute first makes clear that employers need not follow Oklahoma statutes or regulations as to the scope of coverage. The Statute states that "no . . . provision of the Administrative Workers' Compensation Act defining covered injuries [or] medical management . . . shall apply or otherwise be controlling" for employer plans, thereby ensuring that employers need not match the particular coverage rules in state law.[16] The Statute further establishes that no governmental entity may "promulgate rules or any procedures related to design, documentation, implementation, administration, or funding of a qualified employer's benefit plan."[17] Thus, regardless of what state agencies say, employers may adopt plans that include numerous exceptions and exclusions to the traditional scope of workers' compensation coverage, and provide workers with limited procedural protections to challenge those exceptions and exlusions. This is exactly what Dillard's has done here. *See* Order, at ¶¶ 24-27.

The second relevant feature of the Opt-Out Act, and perhaps the most critical, is that it closes off avenues for judicial review of whether the employer has in fact complied with even the very loose requirements of the Statute, making it difficult if not impossible to enforce those requirements. To be sure, workers can eventually appeal a benefits determination to the state Workers' Compensation Commission (and to the Oklahoma Supreme Court), after first submitting those claims to employers themselves, and then appealing to an "appeals committee" also appointed by their employers.[18] Crucially, however, when a case finally arrives at the Commission, the Statute limits the Commission's jurisdiction to **enforcing the terms of the**

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16 Okla. Stat. tit. 85A, § 203(B). The only exceptions relate to "the standards for determination of average weekly wage, death beneficiaries, and disability under the Administrative Workers' Compensation Act." *Id.*

17 Okla. Stat. tit. 85A, § 202(D).

18 Okla. Stat. tit. 85A, § 211(A)-(B).

benefit plan as written by the employer, stating that awards "shall be limited to benefits payable under the terms of the benefit plan."[19] And the Statute then says that the Oklahoma Supreme Court can review only the Commission's award, *i.e.* its construction of the benefit plan, not the legality of the plan terms themselves.[20]

In other words, the Statute purports to strip jurisdiction from the Commission and this Court to assess whether employer plans have in fact provided benefits that remotely compare to those enshrined in state law; the only authority it grants them is to enforce the plans' written terms.

In addition to employers' free reign in crafting plan terms and the lack of governmental review of such terms, the claims process deviates substantially from the traditional workers' compensation system established in nearly every other state (and in Oklahoma until 2013). First, as noted above, workers must initially submit their claim to the employer itself, then appeal to a commission appointed by the employer, with the procedural rules for this multi-layer process totally within the discretion of employers.[21] Dillard's, for example, has established suffocating deadlines for claim submission, requiring workers to report injuries before the end of the shift in which they occur. By contrast, Oklahoma's regular workers' compensation law gives workers six months to notify employers of injuries,[22] and one or two years to file a claim, depending on the

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19 Okla. Stat. tit. 85A, § 211(B)(6).

20 Okla. Stat. tit. 85A, § 211(B)(7).

21 Okla. Stat. tit. 85A, § 211(A)-(B); *see supra* at 4-5 (describing statutory provisions freeing employer benefit plans from the dictates of state laws and regulations).

22 Okla. Stat. tit. 85A, § 67(A)(2).

type of condition.[23] Most other states also provide employees with much more time to report injuries and make claims than the plan adopted by Dillard's under the Opt-Out Act.[24]

Moreover, the imposition of two layers of employer review, with procedures dictated by employers, is sure to deter many employees from ever submitting a claim. Exacerbating this problem, the anti-retaliation provision of the state workers' compensation law apparently does not apply to employers who have opted out, leaving workers vulnerable to adverse consequences from their employers, including termination.[25]

Absent any protection from retaliation, many workers will hesitate to file meritorious claims for workers compensation—leaving them to bear the full cost of medical treatment and lost income. This risk is especially pronounced for low-wage workers, who cannot afford any interruption in their income, and therefore will be even more reluctant to file claims.

In addition, if a worker perseveres through an appeal to the Workers' Compensation Commission, the Commission is barred from conducting any independent fact finding, but must rely solely on the record established by the employer's internal appeals process.[26] This rule further weakens workers' procedural protections and diminishes accountability for employers.

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23 Okla. Stat. tit. 85A, § 69(A).

24 *See, e.g.,* Alaska Stat. §§ 23.30.100, 105(a) (30 days to give notice of injury to employer; two years to file claim); Del. Code tit. 19, §§ 2341, 2361(a) (90 days to give notice; 2 years to file claim); Iowa Code §§ 85.23, 85.26 (90 days to give notice; two years to file claim); Mont. Code § 39-71-601(1), 603(1) (30 days to give notice; one year to file claim); Tenn. Code §§ 50-6-201, 50-6-203 (30 days to give notice; one year to file claim). *See* Alison D. Morantz, *Rejecting the Grand Bargain: What Happens When Large Companies Opt Out of Workers' Compensation* 25 n.79 (March 18, 2016) (noting that most states provide workers at least 15 days to notify employers of injuries), *available at* http://siepr.stanford.edu/sites/default/files/publications/16-007.pdf.

25 *See* Okla. Stat. tit. 85A, § 7 (protecting workers from retaliation); Okla. Stat. tit. 85A, § 203(B) (stating that "no . . . provision of the Administrative Workers' Compensation Act," with limited exceptions, will apply to employers who opt out).

26 *Id.*

In short, the Opt-Out Act dismantles the longstanding and well-accepted basics of workers' compensation. It subverts the established system both with respect to the scope of coverage and the procedural rights of workers, giving employers vast discretion in both areas, and stripping workers of traditional protections.

II. A strong workers' compensation system is vital to today's workers and the employment system.

The Opt-Out Act undermines workers' compensation at a time when states should instead be fortifying it. The United States Department of Labor concluded last year that occupational injuries and illnesses are "exact[ing] a tremendous toll on society," while the National Safety Council estimated the cost of such injuries at $198 billion in 2012.[27] Although workplace injuries are less common today than when workers' compensation was first created, they remain extensive: in 2014, employees nationwide missed more than one million days of work due to nonfatal occupational injury and illnesses.[28] In addition, nearly 5,000 individuals died from work injuries in 2014.[29]

Unfortunately, even regular workers' compensation systems—let alone the much more limited plans that employers can craft under Oklahoma's opt-out program—provide too few benefits to too few workers. "[W]orkers' compensation payments cover only a small fraction (about 21 percent) of lost wages and medical costs of work injuries and illnesses; workers, their

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27 Adding Inequality to Injury, at 2.

28 Press Release, Bureau of Labor Statistics, *Nonfatal Occupational Injuries and Illnesses Requiring Days Away From Work*, 2014 (Nov. 19, 2015) *available at* http://www.bls.gov/news.release/osh2.nr0.htm. Work-related injuries and illnesses were particularly common for particular categories of workers such as tractor and truck drivers (more than 50,000 cases) and nurse assistants (more than 20,000 cases)

29 Press Release, Bureau of Labor Statistics, *National Census of Fatal Occupational Injuries in 2014 (Preliminary Results)* (Sept. 17, 2015), *available at* http://www.bls.gov/news.release/cfoi.nr0.htm.

families and their private health insurance pay for nearly 63 percent of those costs."[30] And a large proportion of injured employees receive no workers' compensation at all. For example, even where employers have reported to the federal government that an employee has suffered a work-related amputation, upwards of one in five of the workers will receive no benefits at all from workers' compensation.[31]

The gaps in workers' compensation create the greatest problems for low-wage workers, exacerbating disparities in the workforce. For working families already struggling to meet basic necessities, a work injury to a primary wage earner can be especially devastating, resulting in both loss of income due to inability to work and significant medical expenses. Workplace injuries can push these families into poverty. Yet, "[m]any lower-wage jobs . . . are also high-hazard jobs, and low-wage workers are injured on the job at a disproportionate rate."[32] Moreover, numerous low-wage workers—for example, millions in the construction industry alone—are misclassified as independent contractors, and thereby face steep hurdles to recovering any workers compensation at all.[33] For all of these reasons, the poorest members of the workforce are the most in need of strong workers' compensation systems.

States should now focus on strengthening workers' compensation systems. Yet, in passing the Opt-Out Act, the Oklahoma Legislature moved in the opposite direction, dealing a crippling blow to workers' compensation and the people who need it.

III. This Court should affirm the Commission and strike down the Opt-Out Act.

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30 Adding Inequality to Injury, at 6.
31 *Id.* at 6-7.
32 *Id.* at 5.
33 *Id.* at 8.

The Oklahoma Workers' Compensation Commission correctly recognized that the Opt-Out Act creates a dual scheme of workplace injury protection in which one group of workers—those whose employers opt out—receive vastly inferior substantive and procedural protections, for no rational reason. *See* Order, ¶¶ 33-45. The Statute, moreover, denies meaningful access to the courts for workers who are subject to plans that provide inappropriately narrow coverage. *See id.*, ¶¶ 49-50. This Court should affirm the Commission's ruling on all points.

In doing so, the Oklahoma Supreme Court would join at least one other state high court that has rebuffed an intrusion into the traditional balance of power in workers' compensation systems. In *Castellanos v. Next Door Co*, the Florida Supreme Court found a violation of due process where the legislature imposed limits on attorneys' fees available to workers who prevailed in litigating for benefits, thereby making it harder for workers to hire qualified counsel and diminishing employers' incentives to comply with the law.[34]

The Opt-Out Act is, in fact, much more pernicious than the statute at issue in *Castellanos*, but it has the same general effect: it impedes workers' practical ability to receive benefits, while freeing employers to evade traditional requirements of workers' compensation. The Statute should be clearly and firmly rejected.

CONCLUSION

For the reasons described above, along with those expressed in the brief of Vazquez and the other amici supporting his position, the Court should affirm the ruling of the Oklahoma Workers' Compensation Commission.

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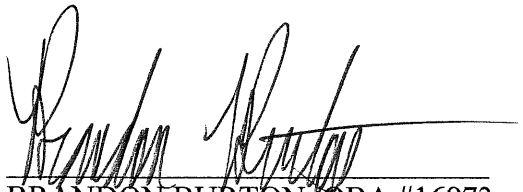
[34] No. SC13-2082, 2016 WL 1700521, at *15 (Fla. Apr. 28, 2016).

Dated: June 23, 2016

Respectfully Submitted,



BRANDON BURTON, OBA #16973
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Suite 950
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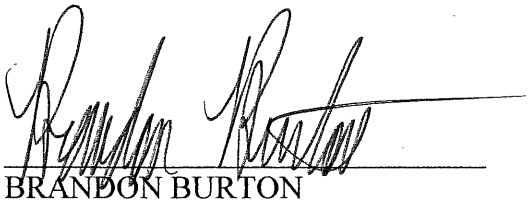
(202) 496-0555 (fax)
dmdalmat@jamhoff.com
dmdrosenthal@jamhoff.com

Certificate of Service

I hereby certify that on this 23rd day of June, 2016, I mailed a copy of this brief to all Counsel of Record in this case by U.S. mail, postage prepaid.



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