

ANATOMY OF AN OKLAHOMA OPT OUT BENEFIT PLAN

A comparison of injured workers' benefits and rights under traditional Oklahoma workers' compensation and Opt Out plans authorized by the Oklahoma Injury Benefit Act (OIBA), specifically the plan of Dillard's Department stores effective September 1, 2014

May 9, 2015

By Bob Burke, Secretary of Commerce and Secretary of Industrial Development in the administration of Governor David Boren; Chairman of the Legal Committee of the Fallin Commission on Workers' Compensation Reform; 16 years as member of the Oklahoma Advisory Council on Workers' Compensation; rewrote entire Oklahoma workers' compensation statute in 2011; and representative of injured workers for 35 years.

Conclusion

The Opt Out plan which is the subject of this report is typical of other plans prepared by PartnerSource of Dallas, Texas, which have been approved by the Oklahoma Insurance Commissioner.

The Opt Out plan provides **only a fraction of benefits and rights** afforded Oklahoma injured workers under traditional workers' compensation insurance policies.

Far fewer types of injuries are covered under Opt Out plans; medical care is greatly limited under Opt Out; the statute of limitations for reporting a claim is severely restricted; the appeal scheme under Opt

Out is rigged in favor of the Employer; and the Employer can force an injured worker to give up future medical and weekly benefits and settle the case on the Employer's terms.

In all, there are 50 specific issues in which the Opt Out plan provides **LESS** benefits or **RESTRICTED** rights as compared to traditional workers' compensation. I could find no area where benefits under the Opt Out plan were better than traditional workers' compensation.

The following chart shows **differences** in the two methods by which an Employer fulfills responsibility for injured workers. Citations note specific sections of Title 85A or the Dillard's Injury Benefit Plan for Oklahoma Employees.

ISSUE: What injuries are covered?

Traditional WC, 85A O.S.

Injuries arising out of and in the scope of employment; work activity must be major cause of injury; with exceptions for aging, aggressor in horseplay; 85 O.S. § 2 (9)

Opt Out Plan or OIBA

Mold exposure not covered, 1.29 (b)(6);
Mental injury from personnel action not covered, 1.29 (b)(4);
Bacterial infection not covered, 1.29 (b)(5)
Tornado or lightning injury not covered, 1.29 (c)(11);
Asbestos exposure and biological or nuclear contamination not covered, 1.29 (c)(14);
Innocent person in attack not covered, 1.29 (c)(6);
Aviation accidents in aerial photography, power

line or pipeline monitor,
not covered, 1.29 (16)

Cumulative trauma covered if
work activity is major cause of
injury, 85A O.S. § 2(14)

Repetitive use of
keyboard injuries not
covered, 1.29 (b)(1);
Any cumulative trauma
injury covered ONLY
if from “rapid” movement.
1.15 (b); **(effectively
eliminates all carpal
tunnel claims and sends
them to district court)**

Aggravation of pre-existing
condition covered if significant
and identifiable, 85A O.S. § 9(b)(6)

Covered only if Company
doctor says pre-existing
condition was completely
repaired and new treatment
returns worker to pre-
injury condition, 1.13 (e);
**(Effectively eliminates
coverage for any Worker
with a significant past
injury, sending those
claims to district court)**

ISSUE: Which workers are covered?

Traditional WC, 85A O.S.

Any worker who has any oral or

Opt Out Plan or OIBA

Covered only if worker

written contract of employment who is injured in scope of employment, 85A O.S. § 2 (18)(a)

receives a W-2 from Employer, 1.22;
Not covered if worker works outside state for 90 days, 1.14;

ISSUE: Medical care allowed.

Traditional WC, 85A O.S.

Treatment that is reasonably necessary to treat injury, 85A O.S. § 50

Unsuccessful surgery covered if authorized, 85A O.S. § 50

Opt Out Plan or OIBA

Medical treatment paid only if pre-approved by Company representative, 1.13 (b)(1);

Medical treatment not covered if 60-day gap in treatment, 1.13 (a)(2);

Medical treatment not covered unless worker sees Company doctor within 14 days of injury, 1.13 (a)(1);

Medical treatment covered only if Claims Administrator finds it necessary, 1.13 (e);

Surgery covered only if successful and returns worker to “normal pre-injury function.” Cost of failed surgeries not covered, 1.13 (d)(8);

Hospital admission and diagnostic tests covered if reasonable and necessary, 85A O.S. § 50

Emergency care at hospital emergency room, 85A O.S. § 50

Emergency care at urgent care clinic covered if reasonable and necessary, 85A O.S. § 50

Rehabilitation in nursing home or chronic disease facility covered if prescribed as reasonable and necessary, 85A O.S. § 50

(Effectively eliminates coverage for back surgery that seldom returns a Worker to “normal pre-injury function)

Not covered unless pre-approved in writing or by email prior to admission, 1.13 (d); **(eliminates hospital admission from an emergency room in a serious injury)**

Covered only if Company is notified within 24 hours and worker has followup treatment, 1.13 (b)(2)(i)(ii);

Not covered unless Claims Administrator deems it necessary, 1.21;

Not covered, 1.33 (g); **(Would have devastating effect upon Worker sent to nursing home to rehab in rural Oklahoma)**

All costs covered if doctor prescribes care in a skilled nursing facility, 85A O.S. § 50

The cost of food and housing not covered, 1.58 (a); **(How can an injured Worker in a skilled nursing facility pay for his own food?)**

Commission may approve medical treatment if found to reasonable and necessary, 85A O.S. § 50

All aspects of medical care the “sole prerogative and responsibility” of Company-selected doctor, 4.2 (e);

ISSUE: Who chooses doctor?

Traditional WC, 85A O.S.

Employer chooses physician if done within five days, otherwise worker chooses doctor; even if Employer chooses first doctor, worker is entitled to change to a different specialist, 85 O.S. § 50, 56

Commission can appoint an Independent Medical Examiner (IME) on any issue at any time, 85A O.S. § 112 (B)

Opt Out Plan or OIBA

Medical not paid unless by Company approved doctor, hospital, lab, or surgery center. 1.13 (b);

A second opinion doctor is chosen by Company, worker has no input, 4.2 (g);

Medical care continues as long as Commission finds it to be reasonable and necessary, 85A O.S. § 50

Medical benefits can be terminated at any time by Claims Administrator, 3.5 (c);

Benefits can be terminated for use of non-approved doctor, 4.3 (c);

Benefits can be terminated if worker is late for 2 medical appointments without an extraordinary excuse, 4.3 (i);

ISSUE: Statute of Limitations

Traditional WC, 85A O.S.

Worker has one year from date of injury to file claim before the Workers' Compensation Commission; two years on certain occupational diseases, 85A O.S. § 67, 69

Opt Out Plan or OIBA

Claim is barred unless reported before the end of the shift on which injury occurs and an incident report is completed before the end of the shift, 4.1 (a), 4.1 (b);

Worker must sign a "pledge" that recognizes that an injury must be reported to toll-free number within 24 hours and that medical care must be received within 14 days, Plan Appendix A;

Death Claim:

Family of deceased worker has two years from the date of death to file claim before the Commission, 85A O.S. § 69

Notice of claim must be made within 90 days, 6.1;

ISSUE: Who decides contested issues?

Traditional WC, 85A O.S.

Worker is entitled to a hearing before an impartial Administrative Law Judge to determine compensability, need for medical treatment, and temporary weekly compensation due, 85A O.S. § 71

Worker is allowed to introduce doctors' reports and other evidence to prove compensability of claim, need for medical, and compensation due, 85 O.S. § 72.

Opt Out Plan or OIBA

Claims Administrator has sole discretion to decide what constitutes an injury. Administrator appointed by Employer, 1.29 (b)(1);

Claims Administrator has sole discretion to select treating doctor and decide what medical care will be provided, 1.9;

Claims Administrator has "discretionary and final authority" to make legal and factual determinations, 5.1 (b);

Worker has no input into determination of benefits, there is no impartial arbiter, and no opportunity for hearing, 1.9;

ISSUE: Temporary Total Disability (TTD)

Traditional WC, 85A O.S.

70 % of average weekly wage,
tax-free, not subject to
reduction except for child
support lien; ends when
active treatment is
concluded; cannot be
garnished,
85A O.S. § 45

Opt Out Plan or OIBA

85 % of average weekly
wage. However, **TTD**
is subject to federal and
state income tax. Using
an average of 22.5 % for
withholding, net TTD is
less for a Worker making
\$45,000 per year or less--
a majority of Oklahoma
Workers. **In addition,** Plan
allows **reduction in TTD**
by subtracting (1) Social
Security benefits, (2) health
insurance premiums, (3)
garnishments, (4) retire-
ment plan contributions,
7.1

****Note: because benefits under Opt Out plans are taxable, a vast majority of workers for Oklahoma Opt Out companies will receive less money for TTD. All Opt Out Workers will receive less PPD.

ISSUE: Permanent Partial Disability (PPD)

Traditional WC, 85A O.S.

Worker is entitled to present his own doctor's evaluation of disability and object to the report and depose Employer doctor. The worker can testify about lasting effects of injury. At a full, open hearing, an impartial Administrative Law Judge awards PPD. 85A O.S. § 72

Opt Out Plan or OIBA

PPD not allowed if worker returns to pre-injury or equivalent job, 1.46; Extent of PPD determined solely by Company-selected doctor. 3.1 (c); No hearing or opportunity for worker to be heard;

Because PPD benefits are taxable, Opt Out Workers automatically receive 22.5 % LESS PPD than other Workers.

ISSUE: Job security

Traditional WC, 85A O.S.

Employer cannot retaliate against Worker for filing a claim or retaining an attorney. Such action creates a separate cause of action, 85A O.S. § 7

Opt Out Plan or OIBA

Employer can terminate Worker "at any time" for "any or no reason." 9.4;

ISSUE: Subrogation

Traditional WC, 85A O.S.

Employer has right to recover comp benefits paid from third party negligence recovery, but Employer's subrogation is limited to two-thirds AFTER attorney's fees and case expenses, 85A O.S. § 43

Opt Out Plan or OIBA

Employer entitled to 100 % of third party recovery up to total lien for benefits, costs of claims handling, and attorney's fees. No deduction for Worker's attorney's fee or expenses of third party case, 7.3;

Employer has right to select lawyer for third party case and have "total control" of the case, 7.5; (Makes it nearly impossible for Workers to access the district court system to recover from a negligent third party)

ISSUE: Appeal of Adverse Determination

Traditional WC, 85A O.S.

ALJ decision is appealed to the Commission en banc, 85A O.S. § 78 (A). Panel hears oral arguments and can reverse

Opt Out Plan or OIBA

Appeals Committee is appointed by Company, 1.4, 85A; Appeals Committee can

if ALJ decision is against the clear weight of the evidence or contrary to law.

Commission order can be appealed to the Oklahoma Supreme Court which can review an **independent record** of evidence from ALJ and Commission en banc hearings. 85A O.S. § 78 (C). Supreme Court can reverse if decision is unconstitutional, against the clear weight of the evidence, and on other grounds, 85A O.S. § 8 (C)

only consider medical opinion of Company-selected doctor, 6.2 (d)(4); Worker is not afforded an opportunity to testify, 6.2 (d)(1);

Appeals Committee decision can be appealed to Workers' Comp Comm **en banc. Panel is limited** to review of benefits allowed by Opt Out plan, 85A O.S. § 211 (B)(6); De novo review prohibited by "any arbitrator or court." 5.1 (b); Commission en banc can only review record from the "internal appeals process." No independent record, 85A O.S. § 211 (B)(6);

A final appeal is to the Oklahoma Supreme Court. There is no independent record, 85A O.S. § 211 (B)(7);

Supreme Court can reverse or modify **ONLY** if the decision is contrary to law. Supreme Court cannot disturb denial of benefits

even if it is against the clear weight of the evidence, 85A O.S. § 211 (B)(7);

ISSUE: Option of Worker to Leave Case Open

Traditional WC, 85A O.S.

Worker has absolute right to leave case open for lifetime medical benefits if awarded by Commission. Settlement can never be forced upon Worker, causing him to forfeit future benefits. In serious injury cases, it is the responsibility of the Employer to provide medical and indemnity benefits for as long as it is needed. 85A O.S. § 87

Opt Out Plan or OIBA

The most shocking and repugnant provision of the Opt Out plan is the right of the Employer to **force** a Worker to settle and forfeit future benefits, no matter how serious the injury is, 4.4; The mandatory final settlement is totally rigged in favor of Employer which selects the doctor to evaluate future medical and the appraiser to determine the value of the claim. Worker has no input, no right to submit evidence as to the value of the claim. If Worker refuses offer to settle, all benefits under the Plan are terminated, 4.4;
