



OADC OUTLOOK

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President's Message

by Jeromy Brown

Well, as summer fades and the temperatures across our state finally start to cool, OADC is still heating up for the year! This summer's annual meeting was a great success. It was telling how much hard work and effort went into the meeting this year by Malinda Matlock and Leslie Lynch for the CLE's. I sincerely thank both of them for running with me down a path we had not previously traveled. Their ideas and efforts truly paid off. For all of those who attended, the panel of judges – consisting of one federal and four state, one of whom was retired – was truly a learning experience. The judges spoke very frankly with our group about what was expected when appearing before them, whether it be for a simple hearing or a significant trial. That type of information is invaluable, and is precisely the type of opportunities we will continue to strive to provide our members.

The presentation on ethics by Travis Pickens was truly innovative and allowed us to consider some very practical ethical concerns in a unique way – thanks to all of those who spread their wings and took a shot at a new career in acting – Hollywood's got nothing on OADC members! I really do appreciate all of you helping on that.

The remainder of the CLE schedule was just as effective as that already mentioned. We had very strong practice tips on technology issues and using facebook and other social media to impeach witnesses. Even the members of the judiciary who spoke on the panel commented as to how well these presentations were done.

The golf tournament was not rigged, and Grady Parker will always hold that line. I simply find it amazing he can't win the tournament with me in his grouping, but yet he seems to always win with others in his grouping – the distinction is that I kept score when I played with his group, and he did in all the tournaments he has won – I'll let you decide for yourself where the truth lies.....

Sizemore, Summers, and Certification Orders – The Current Status of Workers’ Compensation Bad Faith

By: Amy R. Steele
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A cause of action for workers’ compensation bad faith is relatively young in Oklahoma jurisprudence. It has only been since 2006 that a workers’ compensation claimant could bring a claim against his employer’s insurer for bad faith when an insurer failed to comply with an order from the Workers’ Compensation Court. See, *Sizemore v. Continental Cas. Co.*, 2006 OK 36, 142 P.3d 47. However, after *Sizemore*, there was confusion among practitioners and courts regarding what, if any, procedural prerequisites existed prior to a district court action for workers’ compensation bad faith.

Specifically, in *Sizemore*, the Court stated, “[a] claimant seeking to enforce an award must first utilize the mechanism provided in section 42(A) of the Act and have the [workers’ compensation] award certified for enforcement.” *Sizemore* at ¶ 26, 54. Then, in denying the parties’ petitions for rehearing, the *Sizemore* Court noted that the Court’s opinion did not require the *district court* to issue a certification for enforcement. *Id.* at 57. Some claimants interpreted this statement to mean that the Workers’ Compensation Court did not need to have the award certified for enforcement prior to bringing the district court bad faith action.

In 2009, in *Summers v. Zurich American Ins. Co.*, 2009 OK 33, 213 P.3d 565, the Oklahoma Supreme Court clarified the issue. Acknowledging the confusion caused by *Sizemore*, the *Summers* Court noted, “an award of workers’ compensation benefits [must] be certified as unpaid before a claimant may proceed in the district court on a claim against a workers’ compensation insurer for its failure to exercise its duty of good faith and fair dealing.” ¶ 1, 566. This requirement is akin to party exhausting his administrative remedies or otherwise completing appropriate conditions precedent before

attempting to proceed with a separate lawsuit in district court. Without such a certification order, a claimant’s district court bad faith action should fail.

In order to assess whether there is a certification order and, hopefully, argue to the district court the absence of such an order, defendants should compare the orders present in *Summers* against those present in the workers compensation file at issue. In *Summers*, there were essentially three orders relating to the payment of medical treatment for the claimant. The first was an order to provide “reasonable and necessary medical treatment” by particular doctors. *Summers* at ¶ 3, 566. The second order instructed the insurance company to pay for particular treatment requested by the claimant. *Summers* at ¶ 4, 566 (Note: The *Summers* case contained a number of orders each relating to specific medical treatment the claimant requested, but because each of these orders relates to approval of specific treatment, they are collectively referred to as the “second order”). Then, the crucial and case-determinative difference between *Summers* and many cases presenting to the district courts is a subsequent **third** order from the Workers’ Compensation Court demonstrating that specific medical treatment or payments previously ordered by the Workers’ Compensation Court had not been satisfied. *Summers* at ¶ 18, 570.

In order to circumvent the certification order requirement, many plaintiffs argue that the court should treat the original order for “reasonable and necessary medical treatment” as an order for specific treatment and argue that any subsequent orders clarifying whether particular treatment was reasonable and necessary as the *functional equivalent* of a certification order.

However, this is absolutely not the standard created by the recent *Summers* opinion. It is important to demonstrate to the district court that if it treated orders clarifying whether treatment was reasonable and necessary, the court would be stripping employers and insurers of their right to dispute whether particular treatment was reasonable and necessary without being faced with a district court bad faith lawsuit. Such a result is not the intent of *Summers* and subverts the requirement of a certification order.

Instead, the *Summers* case is clear that insurers are entitled to a forum in the Workers' Compensation Court for presenting good cause for failure to pay an order. For example, employers are still permitted to argue that a particular surgery or medical device is not reasonable or necessary, even if the Workers' Compensation Court previously issued an order for reasonable and necessary treatment. Similarly, if payments were somehow stopped because of an administrative glitch or failure of the plaintiff to update his address, insurers are entitled to explain what happened to the Workers' Compensation Court without immediate fear of a district court bad faith suit. Providing such a forum is a key component and purpose of the certification order process. *Summers* at ¶ 11, 568; ¶ 14, 569; ¶ 17, 569.

In order to qualify as a certification order (or permissible functional equivalent), *Summers* demands that insurers have the opportunity to provide a good faith basis for failing to pay an order, and that the certification order from the Workers' Compensation Court "make specific findings as to the basis for the court's determination that the insurer has not demonstrated good cause why the award should not be certified." *Summers* at ¶ 11, 568. Plaintiffs and the district court are not permitted to infer that the Workers' Compensation Court made such findings – the findings must be explicit in the order.

One issue not explicitly resolved in *Summers* is the extent to which it applies retroactively to conduct occurring prior to its issue date of May 26, 2009. Given that the Oklahoma Supreme Court already noted that the certification order requirement is a procedural issue and that *Summers* was intended to cure procedural confusion (*Summers* at ¶ 7, 568), it should be applied retroactively. See also, *Dean v Multiple Injury Trust Fund*, 2006 OK 78, ¶ 18, FN 4, 145 P.3d 1097, 1103 (85 O.S. § 42, from which the Certification Order requirement stems, is a procedural rule). Procedural amendments have retroactive applicability in Oklahoma. *Triple D. Excavation v. Edwards*, 2003 OK CIV APP 38, ¶ 6 70 P.3d 884, 885 ("the general rule of prospective application does not apply to statutes affecting only procedure- i.e., the manner or mode of protecting or enforcing a substantive right-and statutes which alter or change procedures rather than substantive or vested rights will be given retrospective effect"). See also, *Dean* at ¶ 18, FN 4, 1103 (statutes relating solely to remedies and therefore affecting only modes of procedure operate retroactively and apply to pending proceedings).

When arguing in favor of retroactive application, it should also be noted that even without a certification order, the plaintiff still has a remedy for when an insurer fails to provide a court-ordered benefit. The plaintiff can, and should, seek redress directly from the Workers' Compensation Court. The Workers' Compensation Court is in the best position to ascertain whether the insurer failed to comply with one of the court's own orders and whether the insurer had a justification for doing so.

Workers' compensation bad faith is still in its infancy in Oklahoma. However, the certification order requirement provides a strong defensive sword for keeping the claims out of district court. Every effort should be made at the Workers' Compensation Court level to explain any failures to comply with an order and bar the issuance of a certification order.

President's Letter Continued....

Yet the pinnacle of the annual meeting this year was without a doubt the dinner on Friday night. For those who were not able to be there, I really wish you could have been, but Joe Pickard is glad you weren't so he could enjoy all the lobster planned for you! We had a Carolina boil and the caterers did a great job with the lobster, crab, shrimp, mussels and all the trimmings – man, I think I'm ready to go back for that! I think everyone had a great time that night, and that was certainly the point – there are very few organizations that give you a chance to connect with other attorneys facing the same issues



and battles as you do on a daily basis – the connections you can make on a night like that one are unforgettable.

Well, once we get through the annual meeting we often tend to slow down in OADC and start to plan for the following year, but this year we still have a lot to finish. On November 5th, we will have a CLE and golf tournament at the Hard Rock Hotel and Casino in Tulsa that will address issues defense counsel are struggling with in regard to Medicare settlement issues. We will have a national speaker there to guide us, and we will have the opportunity to hear a presentation from the DRI President, Carey Hiltgen (technically he will be the past President by then, but

we'll still call him Mr. Prez). Then, later this year, there will be a final CLE geared toward younger lawyers – a trial academy with the focus of that CLE to be released in the coming weeks.

**Need MORE CLE
Hours? OADC Can Help!**

**Want to Play Golf?
OADC Can Help!**

*3hrs CLE Credit
(Pending Approval)*



TULSA

November 5, 2010
8am - Noon CLE
1:30pm Golf

"Handling Medicare Liens" - Mary Knack - Williams Kastner & Gibbs, Seattle, WA

"Preparation for Deposing Experts" - Cary Hiltgen, Hiltgen & Brewer - OKC, OK

"Using the Deposition Databank" - Dennis Brown - Professional Reporters - OKC, OK

For more information and a registration form go to: www.OADC.org

Oklahoma Association of Defense Counsel 1.888.990.0010

OADC

Application for Membership

New Member Discount Price for 2011
Join now thru 11/30/10 to cover your dues for 2011!

\$50 practice less than 5 years
\$75 practice 5 years or more

ARTICLE III of the Bylaws provides that the Associations shall be the sole judge of the qualifications of a prospective member for membership in this association, as well as of the continuing qualifications of its individual members. To be eligible (1) for election to membership in this association and (2) to continue to hold membership herein, a lawyer (a) must be in good standing of the State Bar of Oklahoma; (b) must be in private practice and engaged in the trial of litigation or have an interest in the trial of litigation, primarily for the defense; and (c) must have manifested a genuine interest in, or sympathy with the purpose of the associations as expressed in ARTICLE II of the By-Laws.

Any two (2) members of this Association may nominate any eligible lawyer for membership by submitting his name and qualifications in writing the Secretary who shall promptly refer such nomination to the Membership committee for investigation and report. Following the filing of the Membership Committee's report, the Board shall vote upon the nomination.

Every member, at the time of admission to membership, shall pay the annual dues for the fiscal year for which he or she is admitted to membership. Dues for the current fiscal year are \$100 for those in practice less than 5 years, and \$150 for those in practice 5 years or more.

The following questions must be answered by the applicant/nominee and the application must be endorsed by two (2) members of the Association.

Name: _____ Age: _____

Law Firm or Company: _____

Address: _____

City: _____ State: _____ Zip: _____

Phone: _____ FAX: _____ Email: _____

Admitted States Dates Federal Courts Dates

Oklahoma Bar # _____

Association Membership (Professional): _____

My Name Appears in (Law Lists): _____

I currently devote a substantial amount of my professional time to the handling of litigated cases, primarily for the defense and I am otherwise qualified within the purview of ARTICLE III as state above.

Date: _____ Signature of Applicant: _____

We, the undersigned members of OADC, hereby nominate this applicant for membership in the OADC. We believe the application to be qualified for membership and that the election of the applicant to membership will continue to the general welfare of the OADC.

Nominating Member: _____ Nominating Member _____

Signature: _____ Signature: _____

Deductibility of Dues

OADC dues are not deductible as charitable contributions for the federal tax purposes. However, they may be tax deductible as ordinary and necessary business expenses subject to restrictions imposed as a result of association lobbying in activities. OADC estimates that the nondeductible portion of your dues – the portion which is allocable to lobbying is thirty percent (30%).

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DRI REPORT

H. Grady Parker, Jr., Oklahoma DRI Representative

On August 27 and 28, 2010, OADC hosted the Southwest Regional DRI meeting at the Marriott Waterford in Oklahoma City. The meeting was kicked off with cocktails and dinner at the National Cowboy & Western Heritage Museum. One of the main topics of interest was DRI's new website, DRI Today at dritoday.org. This website allows you to select current news articles by topic, such as, Drug & Medical Device, Oil Spill Litigation, Labor & Employment, etc. You can customize the website to display the local weather, utilize its search engine or search Google directly, obtain stock market information, or just about anything from this site.

As a reminder, the DRI Annual Meeting is October 20th through October 24th, at the San Diego Hotel and Marina. As usual, DRI has lined up some great blockbuster speakers. Those will feature Marcus Luttrell and Soledad O'Brien. Mr. Luttrell is a Navy Seal, lone survivor and compelling author. Ms. O'Brien is a CNN Special Correspondent and powerful advocate of mentoring young people. In addition, you will be able to tour the USS Midway and see 25 restored aircraft, over 60 exhibits and walk in the footsteps of over 225,000 Midway sailors who served our country. You can register online at www.dri.org.

Finally, if you are a new member to OADC and are not a member of DRI, you are eligible for a free one year membership. Please take advantage of this opportunity and see everything that DRI has to offer.

