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There Will Be Blood: The New Rules of Oklahoma Oil and Gas Civil Liability

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ONE J

Oil and Gas, Natural Resources, and Energy Journal

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THERE WILL BE BLOOD: THE NEW RULES OF OKLAHOMA OIL AND GAS CIVIL LIABILITY

HUNTER W. MATTOCKS*

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* To my mother and father—Amy and Wayne Mattocks—who have empowered me to dare mighty things and live out my dreams.

I. Introduction

The energy industry is the engine of Oklahoma history. The discovery of oil predates statehood by almost fifty years.¹ In fact, it is fair to say that Oklahoma as we know it owes its existence to the economic incentive that Oklahoma's vast natural resources offer. Oklahoma's history and economy depend on employment activities of the oil and gas industry that are as lucrative as they are dangerous. This symbiotic relationship has resulted in a continued predilection by Oklahoma's Legislature for protecting the oil and gas industry.

When the United States government forced Native Americans onto the lands that would become Oklahoma, their motive was clear. People of the time viewed the "Great American Desert," including modern day Oklahoma,² as a land devoid of natural resources and other basic necessities of civilization. In 1859, an enterprising Cherokee nation citizen, Lewis Ross, upended that belief when he discovered a plentiful pocket of oil while drilling for water in present day Mayes County, Oklahoma.³ Perhaps to the eventual chagrin of Mr. Ross and his fellow Native Americans, the future of Indian Territory forever changed.

Oil exploration continued at a slow pace in Indian Territory with encouragement from tribal governments until 1897.⁴ Oklahoma welcomed its first "gusher," the Nellie Johnstone #1 in 1897.⁵ With the well came more proficient and dangerous techniques of developing the state's vast resources. Employing a technique known as "shooting," a progenitor of fracking, the Cudahy Oil Company lowered a nitro glycerin filled "torpedo" into the well.⁶ The experiment succeeded in turning an exploratory well into a "gusher" producing between fifty and seventy-five barrels of oil per day.⁷ The experiment further foreshadowed the dangerous nature of the industry that would come to dominate Oklahoma.

Nitro glycerin torpedoes were only the beginning of the dangers that would face oil and gas workers. These explosive extraction techniques and

1. *First Oklahoma Oil Well*, THE AMERICAN OIL & GAS HISTORICAL SOCIETY, <https://aoghs.org/petroleum-pioneers/first-oklahoma-oil-well/> (last visited Jan. 10, 2019).

2. See Richard H. Dillon, *Stephen Long's Great American Desert*, VOL. 111, NO. 2 AMERICAN PHILOSOPHICAL SOC'Y PROC. (1939), https://www.jstor.org/stable/986036?seq=1#metadata_info_tab_contents.

3. THE AMERICAN OIL & GAS HISTORICAL SOCIETY, *supra* note 1.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

other dangers of the oil and gas industry are well-known and canonized in almost every literary work on the subject. Death and injury featured prominently in the seminal oil and gas favorite, *There Will be Blood*, which depicts dramatized versions of the very real danger oil and gas workers face.⁸ Not even self-proclaimed oil men are safe from the dangers of the profession. The entrepreneurial silver-miner turned “oil man” played by Daniel Day Lewis breaks his leg during extraction in the first few minutes of the film.⁹ Not long after, a young father, and member of Lewis’ crew, meets his untimely end inside an oil well leaving Lewis’ character to raise the man’s child as his own.¹⁰

While these are dramatized accounts of the industry, their substance could not be more real. Oil and gas employees are, on average, seven-times more likely to befall workplace injuries and fatalities than those in other professions.¹¹ Not only would nitro glycerin torpedoes pose explosive possibilities for employees and wildcatters, but the intense physical demands of the job, among other dangerous conditions, would lead to a future of tort and workers’ compensation liabilities in the state oil and gas helped create.

Despite the inherent dangers of the field, the oil fever that followed the gushing potential of Oklahoma’s resources changed the course of Oklahoma history. The lucrative enterprises that grew from these discoveries crowned Tulsa the “Oil Capital of the World” and created an economic incentive for Oklahoma’s statehood.¹² Owing its existence and vitality to its resources, Oklahoma grants preferential policies to the energy industry. The Oklahoma Administrative Workers’ Compensation Act¹³ granted civil immunity to owners and operators of oil and gas wells and other related operations. The law made workers’ compensation the sole remedy for those workers killed or injured while employed by owners or operators, by deeming these parties intermediate or principal employers for services performed.¹⁴ This type of civil immunity was uniquely Oklahoman

8. *THERE WILL BE BLOOD* (Paramount Vantage 2007).

9. *Id.*

10. *Id.*

11. *Oil & Gas Extraction*, UNITED STATES DEPARTMENT OF LABOR: OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, <https://www.osha.gov/SLTC/oilgaswelldrilling/index.html> (last visited Mar. 5, 2019).

12. *Oklahoma Oil History*, THE AMERICAN OIL & GAS HISTORICAL SOCIETY, <https://aoghs.org/oil-almanac/oklahoma-oil-history/> (last visited Jan. 10, 2019).

13. Okla. Stat. Ann. tit. 85A, §5(A) (West 2018).

14. *Id.*

until it was declared unconstitutional in January of 2018.¹⁵ In the shadow of this landmark decision, oil and gas employers in Oklahoma must now face new and important business considerations. Oil and gas employers can count on increased litigation costs considering the fact that on the job oil and gas industry related fatalities are seven times greater than the rate for all United States industries.¹⁶

It is no wonder that Oklahoma's government is incentivized to protect and prefer the oil and gas industry. Until recently, the industry benefited greatly from this preferred position. Under Oklahoma workers' compensation law, oil and gas employers were not only immune from civil liability as expected under workers' compensation claims, but they were also statutorily the pocket of last resort.¹⁷ Workers could not go after oil and gas employers if there was any other person or company that might be liable for their workers' compensation claims. The Oklahoma Supreme Court, however, changed the course of the Oklahoma history when it stripped the oil and gas industry of its unique civil liability exemption in *Strickland v. Stephens Production Company* and *Benedetti v. Cimarex Energy Company* in 2018.¹⁸ These cases critically change the way employers must operate in the oil and gas industry in Oklahoma going forward.

This note will explore the ways that the State of Oklahoma has attempted to balance respect towards its economic engine, the oil and gas industry—by mitigating its oversized liabilities—with its obligations to the state's people and their health, safety, and welfare. This note will further examine the history of Oklahoma's workers' compensation legislation; the *Strickland* and *Cimarex* cases¹⁹ that changed its implementation; and the effects of these cases on oil and gas employers doing business in the state.

15. *Strickland v. Stephens Production Co.*, 411 P.3d 369 (Okla. 2018).

16. UNITED STATES DEPARTMENT OF LABOR: OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, *supra* note 11.

17. *See Strickland v. Stephens Prod. Co.*, 411 P.3d 369 (Okla. 2018); *Benedetti v. Cimarex Energy Co.*, 415 P.3d 43 (Okla. 2018).

18. *Id.*

19. *Id.*

II. Law before the case

A. Workers' Compensation: A Primer

Workers' compensation can be regarded as one of the many modern "grand bargains" people make as part of the social contract.²⁰ Before the days of workers' compensation laws, employee's only remedy for death or injury on the job was a suit in tort.²¹ This system tied up rightful damages for the needy families of those who were hurt and cost businesses tremendous legal fees in defending actions as well as in lucrative payouts.²² Because of these inherent issues, governments around the world began to ponder a cost-sharing solution.²³ Succinctly put, workers' compensation is a "mutual compromise."²⁴ Employees surrender their ability to sue employers for damages in all but a few cases.²⁵ In exchange for this forfeiture, employers accept no-fault liability for stipulated injuries and deaths.²⁶ In an effort to compensate the employer for accepting liabilities for which they may have no fault, awards for these injuries and deaths are capped and scaled through administrative processes.²⁷ In theory, this system saves the company from the cost of excessive litigation and exorbitant jury verdicts while insuring rightful compensation to those injured or killed and their families.

B. Legislative History

After several failed attempts, Oklahoma implemented its first workers' compensation system in 1915.²⁸ Oklahomans were leery to limit the damages due to their fellow citizens stemming from an honor-bound

20. See Jean-Jacques Rousseau, *The Social Contract*, G. D. H. Cole (translator) (2018).

21. See Matthew K. Brown, *How Exclusive Is the Workers' Compensation Exclusive Remedy? 2010 Amendments to Oklahoma Workers' Compensation Statute Shoot Down Parret*, 65 OKLA. L. REV. 75 (2012).

22. *Id.* at 76-79.

23. See Bob Burke, *The Evolution of Workers' Compensation Law in Oklahoma: Is the Grand Bargain Still Alive?*, 41 OKLA. CITY U.L. REV. 337 (2016).

24. *Evans & Assocs. Util. Servs. V. Espinosa*, 264 P.3d 1190, 1195 (OK 2011).

25. *Id.*

26. *Id.*

27. *Id.*

28. Bob Burke, *The Evolution of Workers' Compensation Law in Oklahoma: Is the Grand Bargain Still Alive?*, 41 OKLA. CITY U.L. REV. 337, 343 (2016).

attitude of the state's early populist roots and populist constitution.²⁹ However, after implementing its workers' compensation scheme, Oklahoma's legislature wasted no time in employing the system to protect and benefit employers.³⁰ The Oklahoma legislature has a long history of selecting certain industries and professions for special treatment under its workers' compensation laws.³¹ There have been at least three incarnations of the exemption for oil and gas employers throughout Oklahoma's workers' compensation history.³² The first of these three incarnations came in 1984 and included similar protections for architects, engineers, and land surveyors.³³ The protections were winnowed down in 2011 when the Oklahoma legislature first reformed the Oklahoma Workers' Compensation Code.³⁴ The 2011 legislation contained, verbatim, the language at issue in this note.³⁵ When the time once again to amend the Oklahoma workers' compensation system, only the exemption for the oil and gas industries survived.

In 2013, co-authors Speaker Shannon and Senator Bingman introduced SB 1062 with the goal of repealing and replacing Oklahoma's former workers' compensation system, Title 85, with Title 85A.³⁶ The proposed Title 85A would create a workers' compensation system and allow for employers to voluntarily opt out by creating their own benefit plans.³⁷ Speaker Shannon later successfully amended the bill to include the relevant language:

29. *See generally id*; Matthew K. Brown, *How Exclusive Is the Workers' Compensation Exclusive Remedy? 2010 Amendments to Oklahoma Workers' Compensation Statute Shoot Down Parret*, 65 OKLA. L. REV. 75 (2012).

30. *Id.* at

31. *See generally* Okla. Sess. Laws 1984, chp. 81, § 1; 85A O.S. 2013 Supp. § 5H; Okla. Sess. Laws 2011, chp. 318, §§ 1 & 2H; 85 O.S. 2011, § 302H; Okla. Stat. Ann. tit. 85A.

32. *Id.*

33. Okla. Sess. Laws 1984, chp. 81, § 1; 85A O.S. 2013 Supp. § 5H.

34. *Id.*; *see also* Okla. Sess. Laws 2011, chp. 318, §§ 1 & 2H; 85 O.S. 2011, § 302H.

35. Okla. Sess. Laws 2011, chp. 318, §§ 1 & 2H; 85 O.S. 2011, § 302H ("For the purpose of extending the immunity of this section, any operator or owner of an oil or gas well or other operation for exploring for, drilling for, or producing oil or gas shall be deemed to be an intermediate or principal employer for services performed at a drill site or location with respect to injured or deceased workers whose immediate employer was hired by such operator or owner at the time of the injury or death.").

36. *Bill Summary SB1062*, OKLAHOMA STATE LEGISLATURE, http://webserver1.lsb.state.ok.us/cf_pdf/2013-14%20SUPPORT%20DOCUMENTS/BILLSUM/House/SB1062%20CS%20BILLSUM.PDF (last visited Jan. 10, 2019).

37. *Id.*

For the purpose of extending the immunity of this section, any operator or owner of an oil or gas well or other operation for exploring for, drilling for, or producing oil or gas shall be deemed to be an intermediate or principal employer for services performed at a drill site or location with respect to injured or deceased workers whose immediate employer was hired by such operator or owner at the time of the injury or death.³⁸

By including this language, the Oklahoma legislature granted automatic immunity from civil suit—other than intentional torts—for the death, injury, and occupational diseases of their employees to the oil and gas industry alone.³⁹ The bill passed the House of Representatives: seventy-four to twenty-four; and passed the Senate: thirty-five to twelve.⁴⁰ Codified as Okla. Stat. Ann. tit. 85A, it guaranteed oil and gas employers civil immunity until ruled unconstitutional in 2018.⁴¹

C. Effects of the Legislation

The Oklahoma Administrative Workers' Compensation Act created a compulsory system requiring all employers, other than those falling within eleven specified exemptions,⁴² to carry workers' compensation insurance or self-insure through a deposit with the Oklahoma Workers' Compensation Commission.⁴³ The Oklahoma Administrative Workers' Compensation Act is the exclusive remedy for covered employees in Oklahoma.⁴⁴ The Oklahoma Administrative Workers' Compensation Act operates as a type of tort reform and also as social insurance. The Act created a grand bargain forcing employees to trade their right to common law remedies in exchange for a state mandated employer insurance regime. Oklahoma employees are assured of employer's ability to reimburse them for on-the-job injuries and deaths. Thus, Oklahoma employers are free from suit for the same.

38. *Floor Amendment SB1062*, OKLAHOMA STATE LEGISLATURE, http://webserver1.lsb.state.ok.us/cf_pdf/2013-14%20FLOOR%20AMENDMENTS/House/SB1062%20FA1%20SHANNONTW-SD.PDF (last visited Jan. 10, 2019).

39. *See generally Strickland v. Stephens Prod. Co.*, 411 P.3d 369 (Okla. 2018); *Benedetti v. Cimarex Energy Co.*, 415 P.3d 43 (Okla. 2018).

40. *Bill Information for SB1062*, OKLAHOMA STATE LEGISLATURE, <http://www.oklegislature.gov/BillInfo.aspx?Bill=sb1062&Session=1300> (last visited Jan. 10, 2019).

41. OKLA. STAT. ANN. tit. 85A, §38(A) (West 2018).

42. OKLA. STAT. ANN. tit. 85A, §2(18)(b)(1)-(11) (West 2018).

43. OKLA. STAT. ANN. tit. 85A, §38(A) (West 2018).

44. *Id.*

Oklahoma oil and gas employers were doubly assured. A complex web of contractors and subcontractors permeate the oil and gas industry because of the industry's inter-occupational requirements. Under the Oklahoma Administrative Workers' Compensation Act, subcontractors are also required to maintain workers' compensation coverage.⁴⁵ Okla. Stat. Ann. tit. 85A §5(a) automatically deemed oil and gas employers "intermediate or principal employers" "[f]or the purpose of extending immunity" even if they were not.⁴⁶ This system virtually assured that large oil and gas companies would be the last pockets emptied for deaths or injuries that befell their workers.

The oil and gas industry uniquely enjoyed this presumption. Other industries had to prove their status as a "principal employer"⁴⁷ or "prime contractor"⁴⁸ under the "necessary and integral" test.⁴⁹ Thus, the Oklahoma Administrative Workers' Compensation Act automatically required persons seeking redress for injuries or death in the oil and gas industry to first seek compensation from other employers in the employment chain.⁵⁰ Oil and gas employers prior to 2018, as intermediate or principal employers, were, therefore, secondarily liable to their employees.⁵¹ This tiered system of liability insured that oil and gas employer's workers' compensation fund was the last resort. These employers would only foot the bill if those further down the employment chain were unable to compensate the victims. The law undoubtedly saved oil and gas employers untold sums, and its severance from the law is sure to increase the costs of these companies going forward.

III. Statement of the Case

All good things come to an end, and the oil and gas industry's preferred position in Oklahoma's workers' compensation scheme met its end in *Strickland v. Stephens Production Company* on January 23, 2018.⁵² On interlocutory appeal from the District Court of Oklahoma County, the Supreme Court of Oklahoma ruled the Oklahoma Administrative Workers'

45. *Id.*

46. OKLA. STAT. ANN. tit. 85A §5(a) (West 2018).

47. *See generally* OKLA. STAT. ANN. tit. 85A §5(a) (West 2018).

48. *See generally Id.*; *Strickland v. Stephens Prod. Co.*, 411 P.3d 369 (Okla. 2018).

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

Compensation Act's specific treatment of oil and gas employers violated the Oklahoma Constitution.⁵³

A. Facts

David Chambers, an employee of RDT Trucking, Inc., suffered severe burns that eventually led to his death while working near a heater treater on a trip to retrieve waste water.⁵⁴ The injuries resulting in his death took place on a well site owned and operated by Stephens Production Company and Stephens Production Company Continental Properties, LLC ("SPC").⁵⁵ Mr. Chambers daughter sued SPC for wrongful death as Special Administratrix of his estate.⁵⁶

B. Procedural History

SPC filed a motion for summary judgment in the District Court of Oklahoma County claiming civil immunity under Okla. Stat. Ann. tit. 85A §5(a).⁵⁷ Following briefing and arguments, the court found that the provision granting specific civil immunity to oil and gas employers was unconstitutional and certified the order for interlocutory appeal to the Supreme Court of Oklahoma.⁵⁸ The District Court's reasoning flowed from a provision of the Oklahoma Constitution that prohibits the legislature from establishing special laws that concern "[r]egulating the practice or jurisdiction of . . . judicial proceedings or inquiry before the courts" among other things.⁵⁹ In order to survive as a special law under, Okla. Const. Art. 5, § 46, a law must meet the test from *Glasco v. State ex rel. Oklahoma Department of Corrections*.⁶⁰ The *Glasco* case first defines a "special law" as one that "singles out particular persons or things upon which it operates."⁶¹ Laws of this strain must "pertain to some peculiarity in the subject of the legislation and there must be some distinctive characteristic upon which different treatment is reasonably founded"⁶² The court offered an example of a special law that offered sufficiently distinctive

53. *Strickland v. Stephens Prod. Co.*, 411 P.3d 369, 372 (Okla. 2018).

54. *See generally id.*

55. *Strickland v. Stephens Prod. Co.*, 411 P.3d 369, 372 (Okla. 2018).

56. *See generally Id.*

57. *Id.* at 371-72.

58. *Id.* at 376.

59. OKLA. CONST. ART. 5, § 46.

60. 188 P.3d 177 (Okla. 2008).

61. *Id.* at 184.

62. *Id.*

characteristics in *City of Edmond v. Vernon*.⁶³ The special law upheld in *Vernon* presumed that firefighters who developed heart disease did so in the course of their employment for the purposes of workers' compensation.⁶⁴ The *Edmond* court upheld the special law based on the fact that firefighters are exposed to smoke and other hazardous materials as a unique danger associated with their profession.⁶⁵

The court reasoned that for a law to meet the *Glasco* test, there must be a justified and thought-out reason for special treatment by the legislature which corresponds to a law tailored to address that special condition.⁶⁶ The Oklahoma Administrative Workers Compensation Act contained no justification for special treatment of the oil and gas industry and, thus, failed to meet the test.⁶⁷ The order was certified for interlocutory appeal on this issue, to the Supreme Court of Oklahoma.⁶⁸

IV. Decision

On appeal, the Oklahoma Supreme Court considered the constitutionality of the special treatment of oil and gas employers in the Oklahoma Administrative Workers' Compensation Act.⁶⁹ The court reviewed the issue *de novo*. In order to invalidate a law in Oklahoma on constitutional grounds, the party seeking invalidation must show that the law is "clearly, palpably, and plainly inconsistent with the constitution."⁷⁰ Under this charge, the Court analyzed the special immunity of oil and gas employers under the three elements of the *Goodyear Test*⁷¹: (1) Is the statute a special or general law? (2) If special, is there a general law applicable? (3) If a general law is not applicable, is the statute a permissible special law?⁷²

The Court concluded that the last sentence of, Okla. Stat. Ann. tit. 85A §5(a), operated as a special law.⁷³ Most of §5(a) treats all employers equally under generally applicable principles. The last sentence, however,

63. 210 P.3d 860 (2009).

64. *Id.* 863-64.

65. *Id.* 865-66.

66. *Strickland v. Stephens Prod. Co.*, 411 P.3d 369, 371 (Okla. 2018).

67. *See generally Id.*

68. *Id.* at 371.

69. *Id.*

70. *Lafalier v. Lead-Impacted Cmty's. Relocation Assistance Tr.*, 237 P.3d 181, 188 (Okla. 2010).

71. *Grant v. Goodyear Tire & Rubber Co.*, 5 P.3d 594, 597 (Okla. 2000).

72. *Strickland v. Stephens Prod. Co.*, 411 P.3d 369, 375 (Okla. 2018).

73. *Id.*

automatically deemed oil and gas employers “principal employers” granting them a special and privileged position.⁷⁴ Oil and gas employers were automatically deemed immune to civil suit for deaths or injuries and were slated as the last available source of redress in the workers compensation scheme. The court was, therefore, tasked with deciding whether the oil and gas exemption was a permissible special law. In order to qualify as a permissible special law, a law must be reasonably and substantially related to a valid legislative objective.⁷⁵ A valid special law is reasonably and substantially related when it demonstrates distinctive characteristics of the protected class that warrant such special treatment.⁷⁶

By automatically deeming oil and gas employers principal employers, the statute exempted an entire industry from bearing the burden of proof of the actual nature of their employment scheme. Barring protections such as these, employers bear the burden of showing their employer relationship to the deceased or injured under the necessary and integral test. The necessary and integral test uses a three-tiered analysis to adjudge which party should be held liable in vertical employment schemes.⁷⁷ The test was summarized as follows by the court:

[W]hether the work being performed by the independent contractor is specialized or non-specialized. If the work is specialized per se, then the hirer is not the statutory employer of the independent contractor. If the work is not specialized per se, the second tier asks whether the work being performed by the independent contractor is the type of work that, in the particular hirer's business, normally gets done by employees or normally gets done by independent contractors. If the work normally gets done by independent contractors, then the hirer is not the statutory employer of the independent contractor. If the work is normally performed by employees, the third tier focuses on the moment in time the worker was injured and asks whether the hirer was engaged in the type of work being performed by the independent contractor at the time the worker was hurt. If not, then the hirer is not the statutory employer of the independent contractor.⁷⁸

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 373.

Because all other industries must prove their employment liabilities under this test, the court required a distinctive characteristic of the oil and gas industry that would warrant its immunity from the test.

SPC argued that by its nature, the oil and gas industry utilizes a variety of labor and industries in its operation.⁷⁹ The vast majority of the industry's employment happens through the use of contractors and subcontractors.⁸⁰ SPC also argued that the oil and gas industry needed certainty with regard to their exposure to civil liability.⁸¹ The court concluded that while both of these arguments may be true, many industries utilize similar employment schemes and every industry would likely benefit from statutory certainty with regard to their civil liabilities.⁸² Neither of these arguments, the court reasoned, exemplified sufficient distinctive characteristics of the oil and gas industry so as to warrant special protections under Oklahoma workers' compensation law.⁸³

The court severed the last sentence of §5(a) leaving the remainder of the act intact.⁸⁴ The court then remanded the case without precluding SPC from rearguing the theory of exclusive remedy under principle employer theory through the necessary and integral test.⁸⁵

V. Concurrent Developments

As previously mentioned, the now unconstitutional language of §5(a) was first formulated in the Oklahoma Workers' Compensation Code of 2011.⁸⁶ In another 2018 case, the Supreme Court of Oklahoma determined that the language of the 2011 Act also constituted an unconstitutional special law.

In 2013 Frank Benedetti, an employee of Schlumberger, was injured in El Reno.⁸⁷ Mr. Benedetti fell more than thirty-feet after slipping on an icy platform on an oil rig.⁸⁸ Mr. Benedetti then sued the operator of the well site and the owner of the rig for negligence in the District Court of

79. *Id.* at 375.

80. *Id.*

81. *Id.* at 375-76.

82. *Id.* at 376

83. *Id.* at 369.

84. *Id.* at 376.

85. *Id.* at 375-76

86. Okla. Sess. Laws 2011, chp. 318, §§ 1 & 2H; 85 O.S. 2011, § 302H.

87. *Benedetti v. Cimarex Energy Co.*, 415 P.3d 43, 44 (Okla. 2018).

88. *Id.*

Canadian County.⁸⁹ Cimarex Energy Company, the operator of the well site, filed a motion to dismiss based on the exclusive remedy language of the 2011 law.⁹⁰ The district court granted the motion and the Court of Civil Appeals, Division II affirmed.⁹¹

The Supreme Court of Oklahoma granted certiorari based on its recent decision in *Strickland*.⁹² In a short opinion, the court explained that its decision in *Strickland* disposed of Cimarex's argument.⁹³ It held that because the language of the 2011 Act was identical to that of §5(a), it too constituted an unconstitutional special law without sufficient characteristics to support such specialized protections.⁹⁴ The decision severed the language from the 2011 Act and remanded the decision without precluding Cimarex from proving its immunity through the necessary and integral test.⁹⁵

VI. Analysis

A. AWCA Overview

Lacking its former statutory protection, the oil and gas industry in Oklahoma must now fully navigate the Oklahoma Administrative Workers' Compensation Act. Oil and gas employers should already be familiar with most of the Act but should appreciate their increased liability and its effect on how to best comply with the AWCA. A thorough understanding of the law will allow oil and gas employers to minimize the potential negative effects of *Strickland* and *Cimarex*.

1. Requirements

Nearly all Oklahoma employers and employees are subject to the requirements of the AWCA. Oil and gas employers and their employees do not meet any criteria for exemption from the act.⁹⁶ Oil and gas employers, therefore, must comply with the insurance requirements of the Act. Employers can satisfy the insurance requirements of the Act in several ways. Employers can elect to purchase insurance through insurance corporations certified with the Oklahoma Workers' Compensation

89. *Id.*

90. *Id.* at 45.

91. *Id.*

92. *Benedetti v. Cimarex Energy Co.*, 415 P.3d 43, 45-46 (Okla. 2018).

93. *Id.*

94. *Id.* 45-47.

95. *Id.* at 47.

96. *See generally*, OKLA. STAT. ANN. tit. 85A, § 2 (18)-(19) (West 2018).

Commission.⁹⁷ Upon issuance of a workers' compensation insurance policy, the insurer shall file a notice containing information required by the statute within thirty days.⁹⁸

Employers can also contract with guaranty insurance companies likewise certified with the Commission.⁹⁹ Such guaranty insurance companies must also file a copy of the contract to insure within thirty days.¹⁰⁰ Finally, certain employers may self-insure. Employers with less than one hundred employees or less than one million dollars in assets may self-insure by depositing an amount determined by the Commission not less than the average of the yearly claims for the last three years.¹⁰¹ Self-insurers under this provision must also provide proof of excess coverage to ensure their ability to compensate claimants.¹⁰² Employers with more than one hundred employees or more than one million dollars in assets may self-insure by securing a surety bond payable to the state or an irrevocable letter of credit for no less than the average of the yearly claims for the last three years.¹⁰³ These employers must also provide proof of excess coverage to ensure their ability to compensate claimants.¹⁰⁴

Adequate insurance under the Act is especially important for employers in the oil and gas industry considering the relatively dangerous nature of employment in the field as a whole. There is generally a higher risk of on-the-job fatalities; injury; and occupational disease within the industry.¹⁰⁵ Importantly, under the Oklahoma Workers' Compensation Act, employers are not relieved of their duty to provide for injured and deceased employees by the purchase of insurance.¹⁰⁶

Employers without sufficient coverage can be personally liable for what their insurance policies fail to cover.¹⁰⁷ These potential liabilities include the obvious considerations like medical treatment; mileage; per diem;

97. *See* OKLA. STAT. ANN. tit. 85A, § 38 (West).

98. OKLA. STAT. ANN. tit. 85A, § 38 (A)(1) (West).

99. *Id.* at § (A)(2).

100. *Id.*

101. *Id.* at (A)(3)(a).

102. *Id.*

103. *Id.* at (A)(3)(b).

104. OKLA. STAT. ANN. tit. 85A, § 38 (A)(3)(b) (West).

105. UNITED STATES DEPARTMENT OF LABOR: OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, *supra* note 11.

106. *See generally* OKLA. STAT. ANN. tit. 85A (West).

107. OKLA. STAT. ANN. tit. 85A, § 38(5)(C) (West 2018).

meals; hotels and weekly wages of over eight hundred dollars.¹⁰⁸ Surprisingly enough, these liabilities can also leave oil and gas employers on the hook for tuition; room and board; books and necessary equipment; and funeral expenses of up to ten-thousand dollars in certain situations.¹⁰⁹ Given the likelihood and potential severity of the claims, oil and gas employers must consider the new liabilities created by these cases. Without adequate coverage, oil and gas employers may quickly find themselves providing not only medical care and wages but also college educations for their injured employees.

If SPC's arguments hold true, however, change may be neither imminent nor business-threatening for oil and gas employers. Oil and gas employers that operate through the complex system of subcontractors envisioned in SPC's arguments will still be the last resort for redress of injured employees in the oil and gas industry. To avoid non-meritorious claims, however, oil and gas employers in tiered employment schemes must timely and accurately file an Employer's Intent to Controvert Form.¹¹⁰ An employee must notify the employer of a workers' compensation covered incident within thirty days of the incident.¹¹¹ Thereafter, the insurer should promptly file the Intent to Controvert Form in order to arrange a hearing with an administrative law judge appointed by the Commission.¹¹² A copy of the form should also be sent to the employee.¹¹³

Oil and gas employers, however, should anticipate increased litigation costs resulting from having to prove that they are, in fact, primary or general contractors. So long as the employers are primary contractors, they will be the last pocket emptied for injuries and deaths associated with their enterprise. Nonetheless, employers should prepare themselves to become very familiar with the Oklahoma Workers' Compensation Commission as plaintiffs logically go after those with the deepest pockets. Employers should also consider procuring a more comprehensive workers' compensation insurance. Under the Oklahoma Workers' Compensation Act, employers are not relieved of their duty to provide for injured and

108. *See generally*, OKLA. STAT. ANN. TIT. 85A §47 (West 2018); Okla. Admin. Code §810:10-1-5 (2018).

109. OKLA. STAT. ANN. tit. 85A §45 (West 2018); Okla. Stat. Ann. tit. 85A §47 (West 2018).

110. OKLA. STAT. ANN. tit. 85A, § 69 (West 2018).

111. *Id.*

112. *Id.*

113. *Id.*

deceased employees by the purchase of insurance.¹¹⁴ The Act makes clear that employers without sufficient coverage can be personally liable for what their lackluster insurance policies do not cover.¹¹⁵

Large oil and gas employers will be favored under this new regime. Employers with over one hundred employees and one million dollars in net assets are afforded the option to self-insure under the Act.¹¹⁶ Employers that fail to meet that requirement must insure through third-party insurance policies that meet a mandated minimum threshold.¹¹⁷

Regardless of increased litigation, employers will certainly face an increase in the number of claims without their former favored status under the Act. Oklahoma oil and gas employers are no longer spared from the vast cost of workers' compensation. According to the Bureau of Labor Statistics, workers' compensation claims cost natural resources employers an average of twenty-two dollars and sixty-eight cents per hour in 2015.¹¹⁸ This cost is highlighted by the incidence rate for injuries in the field. According to the same study, the incidence rate for natural resource related employment was 191.6 per 10,000 workers—the second-highest rate behind “production, transportation, and material moving employment.”¹¹⁹ Employees in natural resource related fields are by far more likely than average to be injured in every aspect examined.¹²⁰ The 2014 guidelines allow for liabilities ranging from over one hundred thousand dollars for three-hundred and fifty weeks permanent partial disability to over ten thousand for lesser injuries like that to the “great” toe.¹²¹ Head, shoulders, knees, and “great” toes, oil and gas workers are more likely to be injured and, thus, seek redress from their employers. Employers in Oklahoma are liable for what their insurance does not cover and, therefore, should be wary of under insuring and self-insuring

114. OKLA. STAT. ANN. tit. 85A, § 38(5)(C) (West 2018).

115. *Id.*

116. OKLA. STAT. ANN. tit. 85A, § 38(3)(b) (West 2018).

117. *Id.* at (3)(a).

118. *Workplace injuries and illnesses and employer costs for workers' compensation*, UNITED STATES DEPARTMENT OF LABOR: BUREAU OF LABOR STATISTICS, <https://www.bls.gov/spotlight/2016/workplace-injuries-and-illnesses-and-employer-costs-for-workers-compensation/home.htm> (last visited Mar. 4, 2019).

119. *Id.*

120. *Id.*

121. *Permanent Partial Disability – Estimate Benefit Computation*, OKLAHOMA WORKERS' COMPENSATION COMMISSION, https://www.ok.gov/wcc/documents/5-4-16%20new%2085A%20PPD%20Rate%20Charts_revised.pdf (last visited Mar. 4, 2019).

because the benefit amounts have recently increased.¹²² The 2019 death benefit table further allows for over eight hundred and sixty dollars a week plus up to ten thousand in funeral expenses.¹²³ Oklahoma oil and gas employers can no longer afford to be acquiescent. Statistically speaking, there will be blood, and the energy industry must be prepared for the liabilities to come.

2. Arbitration

The saving grace of the new civil liability regime is the Oklahoma Workers' Compensation Arbitration Act.¹²⁴ Oil and gas employers can counteract the issue of increased litigation by handling claims internally, by implementing an arbitration program under the Act. By limiting the need for expensive, frivolous litigation, the Oklahoma Workers' Compensation Arbitration Act is the promise of the grand bargain come to pass. Savvy employers in oil and gas should seriously consider the benefits of an arbitration agreement considering their new position in the Oklahoma workers' compensation scheme.

Arbitration has become a favored method of dispute resolution in recent times. It is a legal hot topic for good reason. Arbitration has been praised by the Supreme Court as "less expensive . . . faster. . . less disrupti[ve] . . . and more flexible" than litigation.¹²⁵ Experts estimate that companies operating under workers' compensation schemes could cut associated costs by up to forty-four percent by implementing mandatory arbitration clauses.¹²⁶ An additional benefit of arbitration is privacy. Arbitration enables companies

122. *Permanent Partial Disability – Estimate Benefit Computation*, OKLAHOMA WORKERS' COMPENSATION COMMISSION, https://www.ok.gov/wcc/documents/5-4-16%20new%2085A%20PPD%20Rate%20Charts_revised.pdf (last visited Mar. 4, 2019); *Benefit Charts*, OKLAHOMA WORKERS' COMPENSATION COMMISSION, https://www.ok.gov/wcc/Legal/Benefit_Charts/index.html (last visited Mar. 4, 2019).

123. *Weekly Death Benefits for Deaths Occurring During the Period of January 1, 2019 through December 31, 2019*, OKLAHOMA WORKERS' COMPENSATION COMMISSION, <https://www.ok.gov/wcc/documents/Revised%20death%20benefit%20rates%201-1-19%20thru%2012-31-19%20%28FINAL%29.pdf> (last visited Mar. 4, 2019).

124. OKLA. STAT. ANN. tit. 85A § 301 (West 2018).

125. *Allied-Bruce Terminex Co., Inc. v. Dobson*, 513 U.S. 265, 280 (1995).

126. See, Miriam Wasserman, *Companies reduce costs by opting out of workers' compensation for private plans, Stanford research shows*, STANFORD NEWS (Mar. 21, 2016), <https://news.stanford.edu/2016/03/21/workers-comp-morantz-032116/> (citing Morantz, Alison D., *Rejecting the Grand Bargain: What Happens When Large Companies Opt Out of Workers' Compensation?*, Olin Working Paper No. 488, STANFORD LAW AND ECONOMICS (March 18, 2016) Available at SSRN: <https://ssrn.com/abstract=2750134> or <http://dx.doi.org/10.2139/ssrn.2750134>).

not only to handle issues quickly and cheaply, but also to do so without the public scrutiny of trials. This added benefit could be invaluable in the anti-energy climate of today. Federal judges are requiring arbitration of workers' compensation claims and prominent law firms are advising employers to seriously consider arbitration agreements.¹²⁷ The arbitration movement is upon us. Considering the new rules of Oklahoma civil liability for oil and gas employers, it would be a mistake for the industry not to join it.

The arbitration provision of the Oklahoma Workers' Compensation Act allows employers to mandate arbitration of workers' compensation claims. The decisions of the arbitrators is binding.¹²⁸ These decisions are only reviewable in a circumscribed set of circumstances, and the review standard is strict and statutorily based.¹²⁹ Awards will be overturned only in extreme cases like fraud, partiality of the arbitrator, or corruption.¹³⁰ The Oklahoma standards mimic the Uniform Arbitration Act, on which they are based.¹³¹ Because these awards are practically iron-clad, Oklahoma employers can move on from the accident without anticipating a long, drawn-out appeals process. Additionally, under the law, the insurer can cover the arbitrator's fee.¹³² This provision serves as yet another incentive to arbitrate because it will not cost the employer any extra. In fact, the money saved on litigation, in addition to the fact that the arbitration cost is baked into the cost of insurance, makes the implementation of an arbitration plan a no-brainer for oil and gas employers.

Under the Act, there are four options to validly create an arbitration agreement.¹³³ First, an employer may provide notice of the existence of said agreement to arbitrate to both its employees and the insurance provider.¹³⁴ This option is the most self-contained.¹³⁵ However, this option is only available to employers choosing to insure through third party workers' compensation insurance companies.¹³⁶ An employer should consider the ease of this arbitration option when deciding whether to self-insure under

127. 7 No. 8 W. Va. Emp. L. Letter 1 (West 2018).

128. *Id.*

129. OKLA. STAT. ANN. TIT. 85A § 323 (West 2018).

130. *Id.*

131. OKLA. STAT. ANN. tit. 85A § 323-24 (West 2018).

132. OKLA. STAT. ANN. tit. 85A § 321(D) (West 2018).

133. OKLA. STAT. ANN. tit. 85A § 301 (West 2018).

134. OKLA. STAT. ANN. tit. 85A § 3012 (West 2018).

135. OKLA. STAT. ANN. tit. 85A § 301 (West 2018).

136. *See generally id.*

the Act. Second, the employer may file an alternative dispute resolution program with the state Workers' Compensation Commission.¹³⁷ Third, the employer's certified medical plan may file an alternative dispute resolution program with the commission.¹³⁸ Finally, the employer may require arbitration subject to the Federal Arbitration Act which allows for the opportunity to appeal the decision of the arbitrator to the Workers' Compensation Commission.¹³⁹ The last option reserves the most oversight for employers over the proceedings, however, it limits the ultimate authority of the arbitration by requiring it be appealable to the Commission. Arbitration is generally favored by courts, and Oklahoma oil and gas employers should likewise favor this method under the new construction of the Oklahoma Administrative Workers' Compensation Act. By putting work in on the front end and constructing a thorough arbitration agreement, employers can avoid the impending increase in litigation and claims under the new construction of the Act.

B. Industry Impact

Realistically, Oklahoma oil and gas employers face no more liabilities than they did previously, however, the impact of these cases will be felt in insurance costs and frivolous litigation. Employers have two viable options to avoid this increase of liability. First, they can rethink their compliance and coverage under the Act. Second, they can restructure their enterprise to assure their status as principal employers.

Strickland and *Cimarex* make clear that no valid reasons exist to automatically exempt oil and gas employers from civil liability under Oklahoma law.¹⁴⁰ However, both cases left open the option to argue workers' compensation as an exclusive remedy under the law. The Oklahoma Supreme Court made clear that when oil and gas employers are, in fact, principal employers their pockets will be the last ones emptied for injuries and deaths.¹⁴¹ This interpretation leaves an interesting door open for prudent businesspersons and legally-minded employers.

As argued by Strickland Petroleum Company, employers in the industry operate under a complex system of contract labor.¹⁴² If oil and gas

137. *Id.*

138. *Id.*

139. *Id.*

140. See *Strickland v. Stephens Prod. Co.*, 411 P.3d 369 (Okla. 2018); *Benedetti v. Cimarex Energy Co.*, 415 P.3d 43 (Okla. 2018).

141. *Id.*

142. *Strickland v. Stephens Prod. Co.*, 411 P.3d 369, 373 (Okla. 2018).

employers embrace this system whole-heartedly, they can reduce their liability and avoid the effects of the landmark cases. For example, in order to limit liability, larger companies could divest themselves of operations that involve direct employment subject to immediate employer liability. In doing so, oil and gas employers could limit their liability through contracting with other companies for the more dangerous services necessary to the industry. This option, being a non-operator, is most viable for employers in the upstream sector. Under this system, employers would operate as usual in most ways, but would refrain from engaging in vertical integration. The company would seek to directly hire only the safest employees. The company could invest in land men; management; and other low-risk employees while avoiding those with the highest class codes for workers' compensation claims. Instead, the company should seek to contract for these high-risk employees through other companies in a cost-shifting calculation. Companies that engage in these types of employment already carry premium workers' compensation insurance and would be the first line of redress should something unfortunate occur. Additionally, the courts have decided that subcontractors that agree to carry workers' compensation insurance policies that benefit the general contractor as such have no right to reimbursement from the general contractor.¹⁴³ Such a clear hierarchy renders it much harder for employees to wage misdirected suits or workers' compensation claims at the principal oil and gas employer. Under a system like this, there may be price shifting from the immediate employers that bear the brunt of the workers' compensation liability. However, these employers are experienced with such matters and have already factored the liabilities into their business models. Additionally, energy is an all-important economic force in Oklahoma. Companies will gladly form or restructure to participate in energy's economic engine.

VII. Conclusion

The ultimate impact of the Supreme Court of Oklahoma's decision remains to be seen. Doing business in Oklahoma as an oil and gas employer will likely be more expensive because the court stripped the industry of its favored status. The complex nature of the industry's employment, however, makes it likely that oil and gas employer's pockets will remain the last to be emptied. Nonetheless, oil and gas employers must rethink their liabilities under the law. A thorough look into the adequacy of their insurance policies

143. *Standard Roofing & Material Co. v. Chas. M. Dunning Constr. Co.*, 224 F.2d 449 (10th Cir. 1955).

will prevent them from being held personally liable for the excess cost of medical care; rehabilitation; education; and funeral expenses. Consultation with experienced attorneys regarding arbitration agreements will be a prudent business decision going forward. Companies should likewise retain attorneys to handle the inevitable, misdirected workers' compensation claims. These attorneys will be able to defend employers from misdirected suits using the necessary and integral test as articulated by the Supreme Court of Oklahoma.