

ORDER FILED

WORKERS'  
COMPENSATION COMMISSION

Claimant's Social Security  
Number: xxx-xx-9715

## Introduction.

The request for MRI was denied and after review of her claims under the Plan, Ms. Vasquez was denied benefits in an Adverse Benefit Determination Letter on the basis that the medical condition for which she was requesting additional benefits was a pre-existing condition and not an "injury" as defined by the Plan. This denial of benefits based on pre-existing condition was upheld by the Plan's Appeals Committee.

### Jurisdiction.

1. As the Oklahoma Supreme Court recognized in *Coates v. Fallin*, 316 P.3d 924 (Okla. 2013), in enacting Senate Bill 1062 (2013 Okla. Sess. Laws, Ch. 208), the Oklahoma Legislature replaced the Workers' Compensation Code with the Administrative Workers' Compensation Act and also passed the Oklahoma Employee Injury Benefit Act, 85 O.S.Supp.2015, §§ 201 through 213, which allowed employers to adopt and administer **benefit plans** consistent with the Act. *Id.* Under Section 202 of Title 85A "an Employer otherwise subject to the Administrative Workers' Compensation Act that voluntarily elects to be exempt from such Act **by satisfying the requirements under this Act,**" can become a "Qualified Employer." *Id.* and 85A O.S.Supp.2015, § 201(8)(emphasis added).

2. This is the first appeal from a denial of benefits under an employee's Benefit Plan pursuant to the Oklahoma Employee Injury Benefit Act. The first issue to be addressed by the Commission is its jurisdictional power over such an appeal.

3. The employer here, Dillard's, Inc., asserts that its Employee Benefit Plan is governed by the Federal Employee Retirement Income Security Act (ERISA). Because the Dillard's Plan includes non-occupational death benefits, in addition to the benefits required under Section 203 of the Opt-Out Act, it does not fall within the ERISA exemption for plans "maintained solely for the purpose of complying with applicable... workmen's compensation laws..." 29 U.S.C. § 1003(b)(3). Accordingly, the Commission finds that the Dillard's Plan is governed by ERISA. *Id.* However, Dillard's election to provide the benefits required under the Opt-Out Act by including them in an ERISA Plan does not automatically leave Dillard's "completely free to circumvent" Oklahoma law. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 108 (1983); *Contract Servs. Employee Trust v. Davis*, 55 F.3d 533, 536 (10th Cir. 1995).

4. Under ERISA, at 29 U.S.C. § 1132, a civil action may be brought by a participant or beneficiary under an ERISA plan “to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan . . .” *Id.* at subsection (a)(1)(B).

5. Under 29 U.S.C. § 1132(d)(1)—which preempts state law—only two types of tribunals have jurisdiction to hear such claims:

- **state courts of competent jurisdiction, and**
- **district courts of the United States.**

Under Subsection (e)(1) these tribunals have concurrent jurisdiction over such claims.

Thus, under Section 1132, in order for the Commission to have jurisdiction over Ms. Vasquez’s appeal, the Commission must either be a federal district court—which it is not—or it must be a state court of competent jurisdiction.

6. In providing for appeals under Oklahoma’s Employee Injury Benefit Act, the Legislature, at 85A O.S. § 211, made it clear that the Commission constituted a state court of competent jurisdiction when deciding appeals under the Employee Injury Benefit Act:

**Commission shall act as the court of competent jurisdiction under 29 U.S.C.A. § 1132(e)(1)** and shall possess adjudicative authority to render decisions in individual proceedings by claimants to recover benefits due the claimant under the terms of the claimant’s plan to enforce the claimant’s rights under the terms of the plan or to certify the claim as right to future benefits under the terms of the plan.

*Id.* at subsection (b)(5) (emphasis added).

7. Accordingly, the Commission concludes that for the purposes of hearing appeals under the “Opt-out” Act, the Commission is a state court of competent jurisdiction. Indeed, to hold otherwise would result in the Commission lacking jurisdiction.

8. Generally, administrative agencies do not have the authority to determine constitutional questions due to the Oklahoma Supreme Court's decision in *Dow Jones & Co., Inc. v. State ex rel. Okla. Tax Commission*, 787 P.2d 843, 845 (Okla. 1990), which states that "Every statute is hence constitutionally valid until a court of competent jurisdiction declares otherwise." Here, however, the Oklahoma legislature has established the Commission as the court of competent jurisdiction in Section 211.

9. Therefore, the Commission further concludes that as a court of competent jurisdiction in considering appeals under Section 211, the Commission is empowered, as any court of competent jurisdiction is, to consider constitutional challenges when, as here, a party with standing raises a constitutional challenge to a statute that affects a Claimant's right to benefits as an injured worker.

10. As discussed, Claimant Vasquez raised several constitutional issues in her appeal. Her constitutional challenges of several statutes are inextricably intertwined with her claim for benefits under her employer's ERISA plan. Thus, we must address the constitutional issues in order to determine her rights under Dillard's ERISA plan. Accordingly, the constitutional issues fall within the Commission's jurisdiction as the state's court of competent jurisdiction under Section 211.

## II.

### Findings of Facts and Conclusions of Law Regarding the Pre-emptive Effect of ERISA and Claimant Vasquez's Constitutional Challenges.

11. Under the United States Supreme Court's holding in *AETNA Health, Inc. v. Davila*, 542 U.S. 200 (2004), an ERISA plan member's claims for benefits is completely pre-empted by ERISA if two conditions are met:

if an individual, at some point in time, could have brought his claim under ERISA § 502(a)(1)(B), and **where there is no other independent legal duty that is implicated by a defendant's actions**, then the individual's cause of action is completely pre-empted by ERISA § 502(a)(1)(B).

*Id.* at 211 (emphasis added).

12. Appellee Dillard's claims that the two-pronged *Davila* test is met here because Ms. Vasquez's claims for benefits cannot be resolved without reference to Dillard's ERISA plan, and it is only because of the terms of the Plan that she may assert a right to relief. Dillard's claims the second prong of the test is met because Section 209 of the Opt-Out Act expressly provides that a Plan participant's claim for benefits under a Plan is exclusive, and therefore, a participant cannot have any independent cause of action under state law. Dillard's Motion/Brief pg. 11.

13. Claimant Vasquez, however, challenges the constitutionality of Section 209's exclusivity provision, attacking the Opt-Out Act as violating her equal protection rights and her access to courts and that the Opt-Out Act, in providing for an Employer's option to establish a benefit plan under the Act, is a special law or local law. These state constitutional claims are independent state claims, and accordingly, under the teachings of *Davila*, the total preemption claimed by Dillard's does not exist here.

14. Further, as noted above, these constitutional claims are directly related to Claimant Vasquez's right to benefits under Dillard's Plan and accordingly, must be considered in determining what rights, if any, she has to benefits under the Plan.

15. Claimant Vasquez also claims that the Plan as constructed violates her right to due process, claiming that the Dillard's Plan deprives her of the right to an independent tribunal and the right to cross examine witnesses and present testimony. As we find the other constitutional issues dispositive of this case, we need not today address these due process challenges.

### III.

#### **Findings of Fact and Conclusions of Law Related to Claimant Vasquez's Equal Protection and Special and Local Law Challenges.**

16. Claimant Vasquez argues that the Oklahoma Employee Injury Benefit Act's authorization of separate benefit plans, the establishment of which permits employers to opt-out of the Administrative

Workers' Compensation system, is a special or local law because it treats members of a class—injured workers—differently, and that the different treatment also violates her equal protection rights under the Oklahoma Constitution.

17. Although at first blush it appears that the Opt-Out Act requires that injured workers under an authorized benefit plan must be afforded benefits equal to or better to those under the Administrative Workers' Compensation Act, this is decidedly not so. A closer look at the statutorily authorized plan requirements reveals that the benefit plans permitted to be used to opt-out establish a dual system under which injured workers are **not** treated equally.

18. The appearance of equal treatment under the dual system is like a water mirage on the highway that disappears upon closer inspection.

19. The Oklahoma Employee Injury Benefit Act defines the term "Qualified Employer" at Section 201 of Title 85A to mean "an employer otherwise subject to the Administrative Workers' Compensation Act that **voluntarily elects to be exempted from such Act by satisfying the requirements under this Act.**" (Emphasis added).

20. Under the Opt-Out Act, an employer is not eligible to opt-out of the Administrative System unless the employer sets up a Qualifying Employee Benefit Plan. The conditions that an employee benefit plan must meet in order to be a Qualified Benefit Plan are established in Section 203 of the Opt-Out Act.

21. The qualifying condition set forth in the first portion of subsection (B) of Section 203 appears to require equal benefits, Section 203 providing:

The benefit plan shall provide for payment of the same **forms of benefits** included in the Administrative Workers' Compensation Act for temporary total disability, temporary partial disability, permanent partial disability, vocational rehabilitation, permanent total disability, disfigurement, amputation or permanent total loss of use of a scheduled member, death and medical benefits as a result of an occupational injury, on a no-fault basis, and **with dollar, percentage, and duration limits that are at least**

equal to or greater than the dollar, percentage, and duration limits contained in Sections 45, 46 and 47 of this title.

*Id.* (emphasis added).

22. The following sentence in subsection (B) makes it clear that except for the listed provisions, **no other provision of the Administrative Workers' Compensation Act—including the definition of covered injuries**—applies to Qualified Benefit Plans authorized in the Opt-Out Act:

For this purpose, the standards for determination of average weekly wage, death beneficiaries, and disability under the Administrative Workers' Compensation Act shall apply under the Oklahoma Employee Injury Benefit Act; **but no other provision of the Administrative Workers' Compensation Act defining covered injuries, medical management, dispute resolution or other process, funding, notices or penalties shall apply or otherwise be controlling under the Oklahoma Employee Injury Benefit Act**, unless expressly incorporated.

85A O.S.Supp.2015, § 203(B) (emphasis added).

23. Thus under the statute, while to some extent employees who suffer a compensable injury receive like benefits under both the Administrative Workers' Compensation system and an Opt-Out Benefit Plan, a Qualified Benefit Plan can remove the right to benefits, because under Section 203 the employer—the very party who will have to pay the compensation—is authorized to define “injury.”

24. For example, the Administrative Workers' Compensation Act specifically permits benefits to be paid for bodily harm caused by exposure to asbestos and establishes the conditions upon which recovery is available (85A O.S.Supp.2015, §§ 65 and 66). The Dillard's Plan, however, does not cover harm caused by asbestos, as it includes within its laundry list of Non-covered Injuries “**any damage or harm** arising out of the use of or caused by:

(A) **Asbestos, Asbestos fibers or Asbestos products . . .**” (Administrative Record 0161, Dillard Plan Section 1.29(c)(14)).

25. The Dillard's Plan's definition of “injury”, which differs from that in the Administrative Workers' Compensation Act, is directly related to Ms. Vasquez's claim for benefits based on an identifiable

and significant aggravation of a pre-existing condition, because the Dillard's Plan's definition of aggravation of a pre-existing injury is more restrictive than that under the Administrative Workers' Compensation Act. Accordingly, the constitutionally challenged dual system has a direct effect on Claimant Vasquez's right to benefits.

26. In defining compensable injury and what a compensable injury does not include, the Administrative Workers' Compensation Act specifies that compensable injury does **not** include, "any preexisting condition **except when the treating physician clearly confirms an identifiable and significant aggravation** incurred in the course and scope of employment." 85A O.S.Supp.2015, § 2(b)(6) (emphasis added).

27. On the other hand, the Dillard's Plan, in defining types of **non-covered injuries**, defines pre-existing condition and in doing so defines the exception for an identifiable and significant aggravation, making it more difficult for a claimant to be entitled to benefits. The Dillard's Plan provides:

(10) any Preexisting Condition, except to the limited extent (if any) that an **Approved Physician** clearly confirms an identifiable and significant aggravation (incurred in the Course and Scope of Employment) of a Preexisting Condition; **provided, however, that:**

(A) coverage for such aggravation will be **provided only if** and to the **extent that the Approved Physician -**

(i) confirms that the Preexisting Condition **has been previously repaired or rehabilitated**, and

(ii) prescribes services or supplies that are Medically Necessary to treat such aggravation and **likely to return the Participant to pre-injury status.**

(B) **no coverage will be provided if the Preexisting Condition was a major contributing cause of the injury.**

Dillard's Benefit Plan, Section 1.29(b)(10), Admin Record 0160 (emphasis added).



28. It is in light of this dual and differing system of compensation that we address Appellant Vasquez's claim that the statute establishing the requirements of a Qualified Benefit Plan permitting the use of such a dual compensation system constitutes a special law under the Oklahoma Constitution and therefore, is unconstitutional.

29. The Oklahoma Constitution contains several provisions regarding special laws and, as the Oklahoma Supreme Court held in *EOG Resources Marketing, Inc. v. Oklahoma State Board of Equalization*, 196 P.3d 511, 520 (Okla. 2008), the broadest of these is the prohibition against special laws at Article 5, Section 59, which provides, "that where a general law may be made applicable, no special law may be enacted."

30. Over the years, the Oklahoma Supreme Court has developed a three pronged test to determine whether a statute violates Article 5, § 59. The three inquiries under this three pronged test are:

- (1) Is the statute a special or general law?
- (2) If the statute is a special law, is a general law applicable? and,
- (3) If a general law is not applicable, is the statute a permissible special law?

See e.g., *EOG Resources Marketing, Inc. v. Oklahoma State Board of Equalization*, 196 P.3d 511, 520 (Okla. 2008); *Reynolds v. Porter*, 760 P.2d 816, 822 (Okla. 1988).

31. In applying this analysis, the Court has found that a statute relating to all persons or things of a class is a general law. *Porter*, 760 P.2d at 822.

32. On the other hand, a statute relating to a particular person or things of a class is a special law. *EOG Resources Marketing, Inc.* 196 P.3d at 521.

33. The general purpose of both the Oklahoma Administrative Workers' Compensation Act and the Employees' Injury Benefit Act is to provide compensation to injured workers. Accordingly, we conclude that the class for purposes of special law analysis is composed of all injured workers. We are not persuaded

by Dillard's argument that the class is all employers. After all, the purpose of the Act is to provide injured workers with benefits and the Act is titled the "Oklahoma **Employee Injury** Benefit Act" (emphasis added). This being the case, the Opt-Out Act is **not** a general law, as it addresses only a portion of the class of all injured workers. It addresses only injured workers employed by employers that have voluntarily elected to exempt themselves from the Administrative Act by establishing a Benefit Plan that qualifies under the Opt-Out Act. Thus, in answer to the first question in the Article 5, Section 59 three-pronged special law test, we conclude that the Oklahoma Employee Injury Benefit Act is a special law.

34. In answer to the question posed by the second prong of the Section 59 analysis, we conclude that a general law is **applicable**—a law providing for equal benefits to all injured workers without vesting legislative power in select employers to "define away" eligibility for benefits is possible.

35. Under the Article 5, Section 59 three-pronged test, the conclusion that a general law is applicable ends the analysis, for the third question is asked only if a general law is **not** applicable. In that case, the third question is whether the special law is a permissible special law.

36. Although we conclude that a general law is applicable here, we will, nevertheless, address the third prong and answer whether the Opt-Out Act is a permissible special law. In answering the question whether the statute is a permissible special law, we must determine whether the classification is "reasonable and pertinent to some particularity in the subject of the legislation, and there must be some distinctive characteristic upon which different treatment is reasonably found." *EOG Resources*, 196 P.3d at 521.

37. In answering this inquiry, it is not our role to question the "desirability, wisdom or logic of a valid statutory classification." *Id.* We conclude that the statute is **not** a valid special law, as we can conceive of no rational basis upon which to establish a separate system for providing workers' compensation benefits under which a subclass of injured workers is subjected to a Benefit Plan in which their employer, by defining "injury" as authorized under the Act, can determine when it will be liable and when it will not be liable, by

excluding from the definition of injury the damages or harm to *their workers* for which it will not be responsible.

38. Under this dual, differing system created by the Oklahoma Employee Injury Benefit Act, the Legislature defines "injury," for injured workers seeking benefits under the Administrative system. On the other hand, it is the employer under the Opt-Out Act who acts as the legislature and defines "injury" for its injured workers.

39. Based upon the findings and conclusions above, we conclude that the Oklahoma Employee Benefit Injury Act is a non-permissible, special law, as its establishment of the conditions of a Qualifying Benefit Plan in Section 203 creates impermissible, unequal, special treatment of a select group of the class of injured workers. It is thus an unconstitutional special law.

#### IV.

#### **Findings of Facts and Conclusions of Law Related to Appellant Vasquez's Equal Protection Challenge.**

40. The Oklahoma Constitution does not have an equivalent to the federal Equal Protection Clause; however, the Oklahoma Supreme Court has identified a functional equivalent in our State Constitution's Due Process provision. *Hendricks v. Jones, et al.*, 349 P.3d 531, 534 (Okla. 2013). Unless heightened scrutiny is required because of a suspect class, or a fundamental right is implicated, an equal protection challenge to a legislative enactment is judged on the rational-basis test which, although a deferential standard, is not without teeth, as the standard guards against arbitrary discrimination. *Id.*

41. In arguing that the challenged enactment is related to a legitimate government goal, Dillard's, at paragraphs 6 and 7 of its Brief on constitutional issues, cites to studies on higher workers' compensation premium rates in Oklahoma; higher permanent partial disability payments in Oklahoma, and other economic data that workers' compensation reformers have annually trotted out for the past decade or

more. While such arguments may support the need for reform, they have nothing to do with a rational-basis for the unequal treatment provided in the statute.

42. More particularly, Dillard's argues that the dual benefit program and the Opt-Out provision resulted in a more efficient process for adjudicating workers' injury benefits. This argument is unpersuasive, as under the current statute, after all of the employer, in-house adjudication is completed, cases are appealed to the Workers' Compensation Commission and are heard on a "trial *de novo* basis." 85A O.S.Supp.2015, § 211(B)(5) ("the Commission shall appoint an Administrative Law Judge to hear any appeal of an adverse benefit determination as a trial *de novo*."). Thus, as opposed to being more efficient, as Dillard's claims, under the current statutory scheme, the entire employer-in-house adjudicatory process may be mere prologue.

43. Of equal unpersuasiveness is Dillard's argument that the dual system reduces the work of the Commission. In fact, the work load is the same under either system. If the parties are not satisfied, they appeal to the Commission and in both instances, the procedure before the Commission begins with the case being considered by an ALJ.<sup>1</sup>

44. While the Legislature has much discretion, it does not have unfettered discretion under the Equal Protection provisions of the Oklahoma Constitution. Here, the Legislature, in establishing what constitutes a qualified Employee Benefit Plan in Section 203, has defined a qualified Plan in such a manner that the employer acts as the Legislator, by defining the "injuries" for which benefits will be available. What the Legislature has done here, is similar to enacting a dual system for tort recovery, requiring that all victims of torts have equal remedies available, then permitting a select class of tortfeasor to define what constitutes a tort. We can conceive of no rational basis to justify such unequal treatment.

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<sup>1</sup> The case at hand is being considered under a prior version of Section 211 under which appeals came to the Commission directly based on the record developed during the employer's in-house adjudicatory process.

45. Based upon these findings and conclusions we hold that the Oklahoma Employee Injury Benefit Act, in establishing and defining the conditions to be a Qualified Benefit Plan at Section 203, denies equal protection to injured workers in Oklahoma, and that Section 203, which is the foundation upon which all Benefit Plans are built, is unconstitutional. In finding that the linchpin provision of the Act—the very foundation upon which qualified Plans can be established- unconstitutional, we find the Act as a whole is not enforceable.

## V.

### Findings of Facts and Conclusions of Law Related to Appellant Vasquez's Access to Courts Challenge.

46. Under the provisions of Article 2, Section 6, of the Oklahoma Constitution, the courts of the State are required to be open to every person for remedy of wrongs.

The courts of justice of the State shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation; and right and justice shall be administered without sale, denial, delay, or prejudice.

47. In considering this access to court provision in 2006 in *Zeier v. Zimmer, Inc.*, 152 P.3d 861 (Okla. 2006), the Supreme Court discussed the meaning of Article 2, Section 6 as follows:

The clear language of art. 2, § 6 requires that the courts **must be open to all on the same terms without prejudice**. The framers of the Constitution intended that **all individuals, without partiality, could pursue an effective remedy designed to protect their basic and fundamental rights**. Although we recognize that the Legislature may facilitate speedy resolution of differences, legislation cannot be used to deny the constitutional guarantee of court access—a fundamental right. Therefore, **this Court strictly scrutinizes actions which deny such opportunity**.

*Id.* at 872 (emphasis added).

48. Then, based on the access to court requirements of Article 2, Section 6, the Supreme Court struck down a provision that singled out medical malpractice plaintiffs from other plaintiffs by requiring them to attach an affidavit containing a professional's opinion that the cause was meritorious before the

case could be filed. In striking this provision down the Court stated that, "a statute that so conditions one's right to litigate impermissibly denies equal protection and closes the courthouse doors to those financially incapable of attaining a pre-petition medical opinion. Then the Court determined that . . . the statute "creates an unconstitutional **monetary barrier** to access of the courts . . ." *Id.* at 873 (emphasis added).

49. In the case at hand, the provisions of the Oklahoma Employee Injury Benefit Act do not merely create a monetary barrier to access to the courts, but establish a system which creates **absolute barriers** to seek compensation, when the bodily harm at issue does not fall within the employer's chosen definition of "injury." The Act allows for creation of absolute bars, because the Act, at Section 209, provides that remedies under the Opt-Out Act are "exclusive and in place of all other liability that the Qualified Employer and any of its employees at common law or otherwise, for a covered employee's occupational injury or loss of services, to the covered employee."

50. Note that this exclusive remedy provision speaks of "covered employees" but does not use the term "covered injury"—which the employer gets to define. Rather, the exclusive remedy provision speaks in terms of "occupational injuries". Thus, for harm excluded in cases where an occupational injury is not included within the employer's chosen definition of "injury," the covered employee is not entitled to compensation and, under the exclusive provisions of Section 209, is additionally deprived of any remedy. Accordingly, covered employees are denied access to courts under the Oklahoma Employee Injury Benefit Act.

### **CONCLUSION**

Having found that Section 203, which establishes the requirements for qualifying Employee Benefit Plans: (1) unconstitutionally deprives injured workers of equal protection; (2) is a special law; and (3) in combination with Section 209 deprives injured workers of access to the Court, we conclude that the

provisions of the Oklahoma Employee Injury Benefit Act are inoperable, as the very foundation for establishing a qualified Plan, Section 203, is unconstitutional.

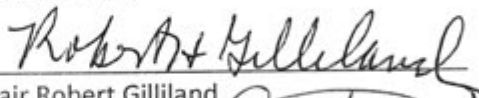
Accordingly, we order that this cause be referred to a Commission Administrative Law Judge for trial on the merits under the Administrative Workers' Compensation Act, but stay that referral until appeals from this Order are decided. In so ruling, we note that under the provisions of Section 213 of Title 85A, Dillard's is not deemed to have failed to secure workers' compensation insurance, and that under that section, Dillard's liability is limited to that of an employer who had complied with the provisions of the Administrative Workers' Compensation Act.

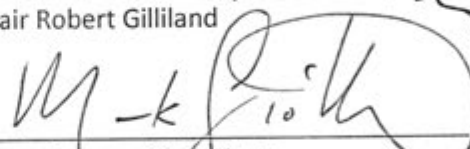
Under the provisions of Section 213, our decision is immediately appealable to the Oklahoma Supreme Court and that Court is required to retain the appeal and must consider the case on an expedited basis. Finally, we note that Section 213 gives Dillard's ninety (90) days from any final decision in this cause to secure compliance with the Administrative Workers' Compensation Act.

**IT IS SO ORDERED**

**DONE this 26<sup>th</sup> day of FEBRUARY, 2016**

BY ORDER OF:

  
Chair Robert Gilliland

  
Commissioner Mark Liotta

  
Special Commissioner Neal Leader\*

\*Special Commissioner is sitting on this case due to Commissioner Young's disqualification.

MP/EButler

A copy of the above and foregoing Commission Order was mailed, by regular or certified United States Mail, on this filed stamped date to:

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I, Clerk of the Workers' Compensation Commission,  
do hereby certify that I have compared  
the foregoing copy of Commission Order  
with the original now on file in this office, and  
the same is a full, true and exact copy thereof.

In witness whereof, I have hereunto set my hand and  
affixed the official seal of this Commission this 26<sup>th</sup>  
day of February, 2011

Meredith  
Clerk, Oklahoma  
Workers' Compensation Commission

