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Insurer Misconduct and the Workers' Compensation Act: Will There Be a Remedy

INSURER MISCONDUCT AND THE WORKERS' COMPENSATION ACT: WILL THERE BE A REMEDY?

I. INTRODUCTION

The workers' compensation system, both in Oklahoma and in other states, is designed to provide immediate benefits to the injured worker in an effort to prevent financial destitution and undue hardship on the part of the worker and his family.[1] To be eligible for workers' compensation benefits, the worker must prove only that he was injured on the job and that the injury occurred in the course of his employment.[2]

Although many of the injuries suffered on the job in Oklahoma each year are job-related, insurance companies[3] will prematurely terminate or refuse to ever begin benefits due under the Act.[4] By terminating benefits, they can force the injured worker from a bad situation in to what soon becomes a desperate one.[5] The worker may face a delay of several months before receiving his benefits.[6] In the months that intervene, he

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1. The Oklahoma Supreme Court states as follows:

> The intention of [the workers' compensation acts], therefore, is to prevent workmen and their dependents from becoming objects of charity by affording reasonable compensation for all such calamities as are incidental to hazardous employment. Injury to the employee is now, therefore, no longer regarded as the result of negligence, but as the necessary product of industry, and, as such, to be compensated by the industry.

United States Fidelity & Guar. Co. v. Cruce, 129 Okla. 60, __, 263 P. 462, 464 (1928).

2. *See* OKLA. STAT. tit. 85, § 3(7) (1981 & Supp. 1986). Many injuries which occur are without question covered under the Workers' Compensation Act [hereinafter the Act]. This comment will deal with the conduct of the insurer/employer associated with the provision of benefits in a situation where the injury is unquestionably compensable.

3. Here and throughout this Comment, the terms "employer" and "insurer" or "insurance company" will be used interchangeably. For purposes of this Comment, these usually distinct entities operate jointly or in the same capacity to provide benefits to the injured worker.

4. *See, e.g.*, Robertson v. Travelers Ins. Co., 448 N.E.2d 866 (Ill. 1983) (insurance company paid benefits until statute of limitations ran then terminated them despite plaintiff's ongoing inability to work); Coleman v. American Universal Ins. Co., 86 Wis. 2d 615, 273 N.W.2d 220 (1979) (benefits to injured employee arbitrarily terminated three times despite uncontradicted evidence that he was unable to work).

5. A worker injured between 1986 and 1987 could draw a maximum temporary total disability benefit of $217.00 per week. *See* OKLA. STAT. tit. 85, § 22(6) (1981 & Supp. 1985). This amount represents two thirds of a state employee's weekly wages. No matter what the worker was paid on the job, he can only receive two thirds of his weekly wage up to a maximum of $217.00 per week. In many working families, this cut in income is enough to throw an already tight budget into disarray. At higher income levels, it forces a substantial drop in the standard of living. When the benefits are terminated while the worker is still disabled, a desperate search for money begins.

6. If a request for hearing was filed in October 1987, it would be two to four months before a

must have money for food, housing, utilities. Faced with this situation, the worker may be willing to compromise his claim and any future claims that he might have for the promise of a quick settlement. Through this technique, the insurance company may potentially save itself thousands of dollars.[7]

Should the injured worker hold on until he receives a hearing, no independent remedy is provided to him for this tactical termination of benefits. The monies that will be received are merely those to which he would have been entitled anyway, along with a surcharge which may or may not be assessed by the judge.[8] There is no compensation for the humiliation suffered by the worker who has been forced in the interim to

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hearing is granted on the issue of temporary total disability; hearings for permanent disability take from four months to a year. Telephone interview with Michael Clingman, administrator of the Oklahoma Workers' Compensation Court (Oct. 1987).

7. Settlement offers made to unrepresented claimants are generally made on what is termed a joint petition settlement (final settlement) as provided under OKLA. STAT. tit. 85, § 84 (1981). When a claimant settles by joint petition, it acts as a final settlement and he has, in effect, given up any rights he might have to later reopen his case, to claim rehabilitative services, or for job placement services. *See id.* at §§ 16, 28. The insurance company has thus spared itself the threat of future claims for this injury. Otherwise, it might look forward to paying for another operation on the claimant's back, along with additional temporary total disability benefits and/or permanent disability benefits.

8. OKLA. STAT. tit. 85, § 22(5) (1981 & Supp. 1987) provides:

> . . . .
>
> If any compensation payments owed without an award are not paid within ten (10) days after becoming due there shall be added to such owed payments an amount equal to ten percent (10%) of the amount due which shall be paid at the same time in addition to the owned payments unless such nonpayment is excused by the Court after a showing by the employer that conditions exist over which the employer had no control in that either payments were not made within the prescribed time or the employer denies coverage within the time specified for the employer to respond.

Id.

If the benefits wrongfully terminated are for permanent partial disability awarded by the court, then OKLA. STAT. tit. 85, §§ 41-42 (1981 & Supp. 1987) apply. Section 41 provides, in pertinent part, that

> [f]ailure for ten (10) days to pay any final award or any portion thereof, as ordered shall immediately entitle the beneficiary to an order finding the respondent and/or insurance carrier to be in default and all unpaid portions, including future periodic installments unpaid, shall immediately become due and may be immediately enforced as provided by Section 42 of this title.

Section 42 provides that the court may certify the order to the district court clerk for entry as a judgment on the judgment docket to be collected through the district court. Payments so ordered bear an interest rate of eighteen percent per annum. The statute further provides for revocation of the license of an insurer who "intentionally, knowingly, or willfully violates any of the provisions of the Workers' Compensation Act." *Id.*

These penalties do not constitute a "remedy" to the injured worker. In the case of the ten percent assessed for termination of the payment of temporary total disability, this amount can be equated with a payment of interest, the rate of which would vary depending upon how long payment was withheld. The eighteen percent payable on permanent disability awards is designated as interest by the statute, again not constituting a true penalty. Interest is not a penalty, but is the sum paid for the temporary use of someone else's money. *See supra* note 100 and accompanying text.

and those in which the insurer's misconduct occurs after the injury, producing a second injury or loss.[16] Larson's theory recognizes that the initial on-the-job injuries and the subsequent mental injuries inflicted by insurer misconduct are separate causes of action and should be treated as such. Where the conduct precedes the injury, any injuries are assumed to merge together and thus bar a separate cause of action for the conduct.[17] However, where the conduct is post-accident, a second separate injury results. Particularly when the second injury is non-physical, the majority of decisions have allowed the claimant a cause of action in district court, as well as recovery through workers' compensation.[18] In cases where there is also a physical component to the second injury, recovery may be allowed if the physical component is only an element of damages. The main thrust of the action must be for a non-physical injury with any physical injury being a by-product.[19] Whether an action is barred by the exclusive remedy provisions of workers' compensation act, then, depends both upon the legal ingredients, which differ in each jurisdiction, and the results of the tortious act.

Larson applied his "second injury" analysis to *Unruh*[20] and, in a better-reasoned approach, reached the same conclusion as the California court.[21] In *Unruh*,[22] there were indeed two injuries: the back injury and the mental breakdown. The tort alleged by Unruh in the common law action was separate from the original workers' compensation injury. The tort did not in any way contribute to the job-related injury and occurred many months after the physical injury. By recognizing this emotional injury as a "distinct event," the court specifically placed it outside the

16. LARSON, *supra* note 9, at § 68.32. In this section, Larson addresses the tort of deceit, but his arguments are equally applicable to other torts arising from the conduct of the employer or insurer.

17. *Id.*

18. *Id.* at § 68.32(b). This section pertains to a non-physical injury in the form of impairment of legal rights, but the arguments made in favor of allowing district court pursuit of this cause of action are equally persuasive for other non-physical injuries.

19. *Id.* at § 68.33. Larson states that "[i]f the essence of the wrong, then is personal injury or death, and if the usual conditions of coverage are satisfied, the action must be barred by the exclusiveness clause no matter what its name or technical form may be." *Id.* at § 68.34(a). He reaches the following conclusion:

> If the essence of the tort, in law, is non-physical, and if the injuries are of the usual non-physical sort, with physical injury being at most added to the list of injuries as a make-weight, the suit should not be barred. But if the essence of the action is recovery for physical injury or death, the action should be barred even if it can be cast in the form of a normally non-physical tort.

Id.

20. Unruh v. Truck Ins. Exch., 7 Cal. 3d 616, 498 P.2d 1063, 102 Cal. Rptr. 815 (1972).

21. LARSON, *supra* note 9, at § 68.34(b).

22. *Unruh*, 7 Cal. 3d 616, 498 P.2d 1063, 102 Cal. Rptr. 815 (1972).

realm of workers' compensation. Unruh's breakdown, then, did not arise "out of and in the course of the employment,"[23] and was neither covered nor barred by the exclusive remedies of the compensation act. Using a "but-for" approach, the second injury is related to the compensable job-related injury, but this approach cannot justify placement of the second injury within the workers' compensation act. To view the second injury in this way would set a precedent which could lead to unjustifiable results.[24]

C. *Application of the Larson Approach*

Applying Larson's second injury theory, the Wisconsin Supreme Court allowed an injured worker a cause of action for bad faith. In *Coleman v. American Universal Insurance Co.*,[25] the insurer cut off the plaintiff's benefits three times while it was in possession of uncontradicted medical reports showing that the plaintiff was unable to work. The court held that under these circumstances the acts by the insurer constituted a separate tort independent of the workers' compensation act, and therefore was not barred by the exclusive remedy provisions.[26] Using Larson's analysis, the court held that the exclusive remedy provision applied only if an injury fell within the coverage of the act.[27] As Coleman's injury was a second injury not arising from his employment, it was not covered by the act. Therefore, the cause of action was allowed. With this promising beginning, the stage was set for decisions of the courts in the 1980s.

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23. California's statute uses language identical to that of OKLA. STAT. tit. 85, § 3(7) (1981 & Supp. 1986), which requires that a compensable injury must arise out of and in the course of employment.

24. This reasoning could indeed lead to untenable results in Larson's estimation:

> To say that the second injury was only an aggravation or extension of the first, because the investigation was related to the first injury, one would have to accept a kind of but-for theory that could lead to preposterous results. It is true that but for the original injury the investigation would never have been undertaken and the second injury would not have occurred. But must we go on to say that the carrier acquires complete tort immunity ever after for anything its agents do to carry out their investigation? . . . Is the compensation act the exclusive remedy, merely because the activity involved, which was the collecting of evidence, was in the mainstream of the agent's duties?

LARSON, *supra* note 9, at § 68.34(b). Larson feels that these questions demand a negative answer.

25. 86 Wis. 2d 615, 273 N.W.2d 220 (1979).

26. The plaintiff alleged "[t]hat these tactics of harrassment [sic] and delay were meant to cause the plaintiff to give up on his claims, to minimize the amount of the defendants' liability or to cause the [plaintiff] to starve." *Id.* at __, 273 N.W.2d at 221. The court held that "where a worker's compensation insurer acts in bad faith in the settlement or payment of compensation benefits, a separate tort is committed that is not within the purview of the exclusivity provisions of the workers' compensation law . . . ." *Id.*

27. *Id.* at __, 273 N.W.2d at 222.

beg for loans from relatives and friends, or for the goods he had to sell at less than a fair price for much-needed cash.[9] Justice demands that some remedy be available to the injured worker treated so outrageously by the insurance company. Tort actions for bad faith and intentional infliction of emotional distress are becoming increasingly numerous as more abused claimants seek to gain remedies for such conduct through the district courts.

II. THE EARLY CASES

State and federal district courts have reached different conclusions regarding the availability of a common law remedy for the injured worker in cases of bad faith or intentional infliction of emotional distress. Although most courts have focused on the language of the state's workers' compensation statutes, the injury caused by the failure to pay benefits is not the injury intended to be covered by the compensation act, but is a *second* injury to the employee. This second injury is generally nonphysical, distinguishing it from the initial, job-related injury. As a second injury, it falls outside the workers' compensation laws because it did not arise out of and in the course of the employment. Although the various workers' compensation acts do not address these injuries, the majority of courts have traditionally looked to the compensation acts.

A. *Judicial Attempts to Create a Remedy*

A cause of action for an employer's intentional infliction of emotional distress upon an injured worker was first recognized by the Massachusetts federal district court. In *Cohen v. Lion Products Co.*,[10] the estate of a deceased worker claimed that the employer had tormented the worker with threats of a lay off. The claimant was laid off and died two weeks later from a massive heart attack due to emotional distress.[11] The court reasoned that this tort was not the kind of personal injury covered by the workers' compensation act,[12] because the act was intended to

9. "Embarrassment, humiliation, and deprivation of personal liberty . . . were not the sort of 'personal injuries' contemplated by the Act." 2A A. LARSON, WORKMEN'S COMPENSATION LAW § 68.31 (1987) [hereinafter LARSON].

10. 177 F. Supp. 486 (D. Mass. 1959).

11. *Id.* at 488.

12. The court reasoned as follows:

> Presumably the reason why those torts [libel, false arrest] are excluded, is because the policy, history, administrative mechanism, and scale of the Workmen's Compensation Act show that it covers bodily injury, apprehension of bodily injury, and perhaps even mental

cover only injuries arising out of an in the course of employment. Because no remedy was afforded by the compensation act, the court in *Cohen* allowed the estate a cause of action at common law. It held the tort to be a "mental" one regardless of the obviously physical result of the stress. Despite its findings, the court granted summary judgment for the defendants, holding that the stated claims did not survive the worker's death. Thus, *Cohen* offers no guidance because the portion of the opinion dealing with the common law tort is dicta.

The California Supreme Court was next to deal with the issue of common law damages in the workers' compensation context. In *Unruh v. Truck Insurance Exchange*,[13] two investigators employed by the workers' compensation insurance carrier were assigned to Unruh, an injured worker who had undergone four back operations. One of the investigators befriended her, inviting her to behave in ways that exceeded her physical capacities. While she was involved in these activities, the other investigator filmed her. At a later hearing in her workers' compensation case, the films were shown, and Unruh realized for the first time the true nature of her relationship with the investigator. After suffering a physical and mental breakdown, she brought suit, alleging intentional infliction of emotional distress.

Based on the dual capacity doctrine,[14] the California court decided to allow a common law cause of action in order to further the objectives of the compensation act, and to encourage the insurer to carry out its proper duties in the legislative scheme.[15] Therefore, the plaintiff had a viable cause of action for intentional infliction of emotional distress.

B. *Larson's Approach*

Professor Larson, a recognized authority in the area of workers' compensation, analyzes insurer misconduct by distinguishing between injuries subsequent to and somehow caused by the insurer's misconduct,

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impairment, but not injury to feelings or emotions apart from fright of physical consequences. . . . [T]here is not a "personal injury" compensable under the . . . Workmen's Compensation Act.

Id. at 489.

13. 7 Cal. 3d 616, 498 P.2d 1063, 102 Cal. Rptr. 815 (1972).

14. The employer or insurer otherwise immune to suit by the injured employee may lose this immunity if the injury occurred while it was involved with the employee in some other capacity. For example, the employer may lose his immunity to suit if he was acting in the capacity of landowner at the time of the injury to the employee. The insurer is more likely to lose its immunity that is the employer under this doctrine. The doctrine has now largely fallen into disfavor with the courts. *See generally* LARSON, *supra* note 9, at §§ 72.81, 72.92.

15. *Unruh*, 7 Cal. 3d at __, 498 P.2d at 1073, 102 Cal. Rptr. at __.

and those in which the insurer's misconduct occurs after the injury, producing a second injury or loss.[16] Larson's theory recognizes that the initial on-the-job injuries and the subsequent mental injuries inflicted by insurer misconduct are separate causes of action and should be treated as such. Where the conduct precedes the injury, any injuries are assumed to merge together and thus bar a separate cause of action for the conduct.[17] However, where the conduct is post-accident, a second separate injury results. Particularly when the second injury is non-physical, the majority of decisions have allowed the claimant a cause of action in district court, as well as recovery through workers' compensation.[18] In cases where there is also a physical component to the second injury, recovery may be allowed if the physical component is only an element of damages. The main thrust of the action must be for a non-physical injury with any physical injury being a by-product.[19] Whether an action is barred by the exclusive remedy provisions of workers' compensation act, then, depends both upon the legal ingredients, which differ in each jurisdiction, and the results of the tortious act.

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27. *Id.* at __, 273 N.W.2d at 222.

B. *Intentional Infliction of Emotional Distress*

Another avenue of potential recovery for the worker in cases of insurer misconduct is the claim for intentional infliction of emotional distress.[39] While the conduct necessary to constitute a cause of action may vary from state to state, generally three elements must be present: (1) an intentional act, (2) which was unreasonable, and (3) which the actor realized was likely to cause an injury.[40] Proof of these elements may allow the injured worker a cause of action for intentional infliction of emotional distress.

In *Robertson v. Travelers Insurance Co.*,[41] the Illinois Supreme Court decided that even where an insurer failed to inform a claimant of his right to file a workers' compensation claim, no claim for outrageous conduct could succeed. The carrier paid for plaintiff's medical care for his on-the-job accident until the statute of limitations for filing of a compensation claim had expired. It then informed plaintiff that it was terminating all benefits, forcing the plaintiff to borrow money from friends and seek public aid. Plaintiff then filed a compensation claim which was met with a statute of limitations defense by the insurer. The Industrial Commission determined that the insurer's conduct estopped it from raising the statute of limitations defense and awarded compensation.

Robertson filed suit in district court, alleging that the financial strain and borrowing humiliated him and affected him both mentally and emotionally.[42] He won at the trial court level, but the Illinois Supreme Court overturned the verdict, holding that the action was barred by the exclusive remedy provision.[43] This decision was based on the court's reading of the statutory language of the Illinois compensation act.[44] The

39. The claim in Vantine v. Elkhart Brass Mfg. Co., 762 F.2d 511 (7th Cir. 1985) was a hybrid which alleged that the insurance company also behaved outrageously.

40. *See, e.g.*, Bennett v. City Nat'l Bank & Trust Co., 549 P.2d 393, 397 (Okla. Ct. App. 1976).

41. 95 Ill. 2d 441, 448 N.E.2d 866 (1983).

42. *Id.* at __, 448 N.E.2d at 869.

43. *Id.* at __, 448 N.E.2d at 870. The court adopted the majority view and defined the rationale behind those cases as follows:

> The rationale of these cases [denying a common law action] has typically been that the legislature, anticipating that bad faith in delaying payment of benefits would occur on occasion, provided a "quick, simple and readily accessible method" of resolving disputes over such payments without "the proof and defenses incident [to a common law action], the intolerable delay in resolution of a lawsuit, economic waste to all and expense to the worker" or the spectre of "multiple jurisdictions being engaged in the resolution of the same basic questions with the possibility of conflicting results."

Id. at __, 448 N.E.2d at 870. (citations omitted).

44. *Id.* at __, 448 N.E.2d at 870. Unlike the Oklahoma exclusive remedy provision, the Illinois statute prohibited tort actions even in cases of intentional misconduct by the employer/insurer.

court decided that the exclusive remedy provision meant that the benefits provided to the claimant were to be his only remedy against the compensation insurance carrier.[45] Implicitly, the court's decision to bar the claim rested on the degree of outrage claimed and the fact that the statute of limitations had not been allowed to bar the claim.

In the past two years, Kentucky has also attempted to establish a policy dealing with insurer misconduct. In *Zurich Insurance Co. v. Mitchell*,[46] the Kentucky Supreme Court held that there was no cause of action for bad faith or outrage based on failure to timely pay benefits. The plaintiff was a worker adjudged to be one hundred percent permanently disabled. While the order of the compensation court provided that medical treatment was to continue, the carrier stopped payment, forcing plaintiff to return to the court in order to obtain payment for his medical treatment. The plaintiff sued for bad faith and outrage.

The court reasoned that the torts of outrage and bad faith simply did not apply in this case because the worker's compensation act provided several remedies for bad faith conduct by the insurer.[47] However, the court then implicitly contradicted itself, distinguishing bad faith from the tort of outrage. In the case of outrage, the court felt that if the employer/insurer's conduct were "conspicuously contemptible," a cause of action would be allowed.[48] The circumstances in this case were simply not extreme enough to justify a cause of action under the tort of outrage.[49] Citing the underlying purpose of the exclusive remedies provision, the court held that the workers' compensation remedies were

45. *Id.* at __, 448 N.E.2d at 871.

46. 712 S.W.2d 340 (Ky. 1986).

47. *Id.* at 341. "[The Act] provides several safeguards to insure that alleged misconduct or delay in payment by an employer or its insurance carrier can be presented quickly and appropriate relief granted . . . by the [Workers' Compensation] Board . . . ." *Id.*

48. The court made the following statement:

> The typical case in which courts have permitted a former employee to maintain a tort action against the employer involved circumstances in which the employer or the insurance company's conduct was "conspicuously contemptible." . . . A claimant cannot elevate a simple delay in payments into an actionable tort merely by using the terms fraudulent, deceitful and intentional. The exclusive remedy provided by the statute is not voided by the employer's violations because . . . [it] provides a remedy for untimely or delayed payments and the legislature has specified that the only exception to the exclusive remedy is for the willful and unprovoked physical aggression.

Id. at 342.

49. The court also made note of the following:

> The Mitchell complaint alleges only the untimely payment of some medical expenses under a compensation award. Neither the insurance companies nor the employer caused his regular disability payments to be terminated. No one harassed, threatened or even contacted him. There were no timely steps taken to petition the Board or circuit court for the enforcement of the costs, interest and other remedies provided for by this act.

Id. at 344.

intended to be exclusive.[50] Recent Kentucky case law has not clarified this position.[51]

C. *Decisions Allowing a Cause of Action*

Other courts, however, have been presented with circumstances of misconduct which have justified a common law remedy. In a case from South Dakota before the Eighth Circuit, the court found that plaintiffs established a cause of action for bad faith.[52] The injured worker began suffering side effects from exposure at work to the chemical toluene.[53] After filing a compensation claim, she was awarded benefits by the workers' compensation court. Without legal basis, the insurer appealed the plaintiff's claim twice, despite instructions from the home office to pay her. Plaintiff sued, alleging intentional, malicious, and fraudulent acts on the part of the insurer. Focusing on the fact that the injury complained of occurred after the work-related injury, the court held that the worker's compensation statute did not cover torts which arose independent of the compensable injury.[54]

In 1985, the federal district court of Delaware adopted the reasoning of the Eighth Circuit. In *Correa v. Pennsylvania Manufacturers Association Insurance Co.*,[55] two injured workers and one spouse brought an action for intentional infliction of emotional distress and bad faith. Even though the initial injuries were admittedly work-related,[56] the insurance carrier routinely refused to pay or delayed in making payment on medical bills, causing the plaintiffs to be sued by the medical creditors, and ruining their credit rating. Plaintiffs filed suit, claiming bad faith and intentional infliction of emotional distress.

The Delaware court held that the emotional distress caused by the

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50. *Id.* at 341.

51. *See, e.g.*, Coker v. Daniel Constr. Co., 664 F. Supp. 1079 (W.D. Ky. 1987) (false affidavits filed by defendant insurance company combined with failure to pay benefits as ordered are not enough to state a tort cause of action).

52. Hollman v. Liberty Mut. Ins. Co., 712 F.2d 1259 (8th Cir. 1983).

53. Toluene is clear, colorless, noncorrosive liquid which may be either inhaled as a vapor or absorbed through the skin. It may cause irritations to the eyes, respiratory tract, and skin. Extended contact can result in dermatitis. If an individual is acutely exposed to toluene, central nervous system depression results, with symptoms of headache, dizziness, lack of coordination, skin paresthesias, collapse, and coma. U.S. DEP'T OF HEALTH, EDUCATION, AND WELFARE, OCCUPATIONAL DISEASES: A GUIDE TO THEIR RECOGNITION at 242-44 (rev. ed. 1977).

54. *Hollman*, 712 F.2d at 1261. The court also relied on the analysis of Professor Larson, *supra* notes 16-24 and accompanying text.

55. 618 F. Supp. 915 (D. Del. 1985).

56. *Id.* at 917.

creditor's suit was a separate injury which did not arise out of employment or include physical injuries which were the subject of the workers' compensation claims.[57] Thus, the exclusive remedy provision of the compensation act did not apply to bar the plaintiff's claims.[58] The court also extended the remedies afforded the injured worker for intentional infliction of emotional distress to the spouse.[59] Several other states have since followed suit.[60]

D. *Summary*

In all cases, both where a cause of action was allowed and where one was denied, courts have looked at the specific language of the particular workers' compensation act in question to determine whether the language would support an independent tort claim. In addition, courts have looked to case law to determine what constitutes a tort cause of action within that state. Therefore, in order to determine whether such claims should be allowed in Oklahoma, a thorough analysis of Oklahoma statutory and case law is required.[61]

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57. *Id.* at 923.

58. *Id.* at 924-25. Later in its opinion dealing with the issue of bad faith, the court states as follows:

> The theoretical foundation upon which these cases rest is the premise that worker's compensation carriers owe a duty of good faith and fair dealing to the employees insured by their policies and that where an insurance carrier breaches that duty by delaying or terminating worker's compensation benefits owed to an employee, the employee suffers an injury which does not arise out of the course of his or her employment. Thus, the injury is not one to which the exclusivity doctrine is applicable.

Id. at 924.

59. *Id.* at 929. This is a reasonable approach as an insurer must anticipate that the injured worker may have a family and the spouse is, therefore, a foreseeable victim of the insurer's acts.

60. *See, e.g.*, Synder v. Congoleum/Kinder, Inc., 664 F. Supp. 975 (E.D. Pa. 1987) (claim for bad faith dismissed against employer but allowed as to insurance carrier); Carpentino v. Transport Ins. Co., 609 F. Supp. 556 (D. Conn. 1985) (plaintiff seeking relief for bad faith conduct on part of insurer has stated a tort separate and apart from any wrong covered by the compensation act and cause of action will be allowed); Brazier v. Travelers Ins. Co., 602 F. Supp. 541 (N.D. Ga. 1984) (cause of action allowed against an insurer for fraud, misrepresentation, deceit, abuse of process, and intentional infliction of emotional distress, holding that such injuries were outside the scope of the compensation act).

61. The only Tenth Circuit case which deals with this issue is Chavez v. Kennecott Copper Corp., 547 F.2d 541 (10th Cir. 1977). In this claim for bad faith against the employer, the court held that no cause of action would stand in view of the workers' compensation settlement made, which specifically released all claims against the employer. Based on this release, the court held that no cause of action remained. While this case interpreted the New Mexico workers' compensation act, the provision of that act are analogous to those of the Oklahoma Act, *see* OKLA. STAT. tit. 85, § 84 (1981); *see also supra* note 7 and accompanying text. Therefore, the Tenth Circuit has implicitly ruled that an employee may not settle his claim by joint petition and then maintain a common law action.

IV. OKLAHOMA'S POSITION

A. *Bad Faith*

Oklahoma has long recognized the common law tort of bad faith. In *National Mutual Casualty Co. v. Britt*,[62] the Oklahoma Supreme Court held that the insurer owed a duty of the "utmost good faith" in its dealings with the insured.[63] From this decision, a line of cases descended in which Oklahoma courts recognized the duty of the insurer to the insured and the damages which may be recovered in the event the duty is breached.

Another Oklahoma landmark case which further explained the duty of the insurer is *Christian v. American Home Assurance Co.*[64] The primary question in *Christian* was whether there was liability in tort for an insurance company's malicious, willful, and bad faith refusal to pay a valid insurance claim.[65] The plaintiff had paid premiums on a disability insurance policy. When plaintiff did in fact become totally disabled, the insurance company refused to pay the claim. Plaintiff brought an action in district court, after which he collected the benefits due along with interest. During the course of this trial, it became obvious to the plaintiff that the insurance company never had defense to his claim. The action for bad faith followed.

The Oklahoma Supreme Court, in a unanimous decision, held that a tort cause of action did exist. The court determined that when a policy of insurance is made, it imposes a legal duty upon the insurer to act in

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62. 203 Okla. 175, 200 P.2d 407 (1948).

63. 203 Okla. at 178-79, 200 P.2d at 411. The court quoted the Vermont case of Johnson v. Hardware Mut. Casualty Co., 109 Vt. 481, __, 1 A.2d 817, 820 (1938), with approval:

> When the company accepted the premium charged for the policy, it impliedly undertook to use this control and management for the mutual benefit of the parties to the contract. Their relations became mutually fiduciary; and each owed the other the duty of the utmost good faith in their dealings together, and in exercising the privileges and discharging the duties specified in and incident to the policy contract. The plaintiff engaged to cooperate with the company if a loss threatened. He was bound to do so honestly and with all good fidelity. . . . [The company] had a right to look after its own interests, but it was bound to have due regard for the plaintiff's interests, as well. If in what it did and refused to do, it acted honestly and according to its best judgment, this suit must fail. If on the contrary, it used its authority over the case . . . to save itself from as much of the loss as possible, in disregard of the plaintiff's rights, consciously risking loss to the plaintiff to save loss to itself, the suit must succeed; for that would be bad faith, while its relation to the plaintiff demanded good faith. . . . [B]ad faith on the part of the defendant would be the intentional disregard of the financial interests of the plaintiff in the hope of escaping the full responsibility imposed upon it by its policy.

Britt, 203 Okla, at 178-79, 200 P.2d at 411-12.

64. 577 P.2d 899 (Okla. 1977).

65. *Id.* at 900.

good faith.[66] The *Christian* court imposed a duty on the insurer not only to pay in accord with the policy, but also to pay promptly.[67] The court further stated that when that duty is breached, the injured party may bring a tort action and possibly recover punitive damages.[68] *Christian* therefore clarified the duties of the insurer to the insured.[69]

In 1982, the Oklahoma court extended the boundaries of bad faith actions. In *Timmons v. Royal Globe Insurance Co.*,[70] the insured brought suit after a tort action against him resulted in an award which exceeded his policy limits. He alleged that the insurance company had in bad faith raised defenses to claims against him and had therefore refused to settle the suit for a reasonable amount within policy limits.[71] Finding a failure "to deal fairly and in good faith,"[72] the court held that the plaintiff had indeed stated a cause of action.

The *Timmons*[73] court also delineated the parties who may be joined in a bad faith suit. Timmons sought damages against an adjustor, a third party who was a stranger to the insurance contract. While the third party was an agent of the insurance company, the court held that a judgment against him as an individual could not be allowed. He had no independent duty to deal in good faith with the insured and therefore his misconduct was attributed to the insurance company.[74]

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66. *Id.* at 901.

67. *Id.* at 904. However, the court noted that

> [r]esort to a judicial forum is not per se bad faith or unfair dealing on the part of the insurer regardless of the outcome of the suit. Rather, tort liability may be imposed only where there is a clear showing that the insurer unreasonably, and in bad faith, withholds payment of the claim of its insured.

Id. at 905. This rule that the plaintiff must prove that the insurer behaved unreasonably and in bad faith is illustrated by Manis v. Hartford Fire Ins. Co., 681 P.2d 760 (Okla. 1984). In *Manis*, the court held that where the insurer could reasonably have drawn the inference that for some reason the claim put forth was not valid, the fact that the insurer lost the case did not subject him to punitive damages. This case involved a fire which the fire marshall stated had started from some flammable material, leading the insurance company to reasonably suspect arson.

68. *Christian*, 577 P.2d at 901. The court went further, stating that "notwithstanding that it [breach of good faith] also constitutes a breach of contract," the plaintiff may be allowed to recover punitive damages in certain instances. This is in contrast to the law of contracts, which does not impose punitive damages. *Id.*

69. *Id.* at 902.

70. 653 P.2d 907 (Okla. 1982).

71. Royal Globe cited a failure to guard the aircraft involved in the action after one of its agents told Timmons not to worry about protecting it as it had crashed in too remote a location to be disturbed. The avionics, however, were stolen at which time the insurance company claimed this defense to the claim. *Id.* at 910. The company also claimed that Timmons had failed to cooperate by sending requested documents, when it was established that copies of the documents had been forwarded by the company to its investigator. *Id.* at 911.

72. *Id.* at 914.

73. *Id.*

74. *Id.* at 913.

In 1984, *Allstate Insurance Co. v. Amick*[75] extended the holding in *Christian*. The Amicks, plaintiffs in a suit against an insured of Allstate's, brought suit against Allstate for failure to negotiate a settlement with them. Although they were not Allstate's insureds,[76] the plaintiffs attempted to extend the *Christian* reasoning to include themselves. They alleged that the insurer had dealt in bad faith with them. The court, however, rejected this position, stating that *Christian* applied only to situations between the insurer and insured and did not extend the duty of good faith to third parties.[77] Thus, *Amick* effectively limits any possible action against an insurer to parties who are in privity with the insurer.

In the holdings of these four cases, the parameters of a bad faith suit have been established by the Oklahoma court. The claim for bad faith actions may be made by the insured whenever there is an insurance policy because the policy imposes a duty on the insurer to act in good faith.[78] This duty requires that the insurer pay a valid claim promptly and further conduct itself with good faith.[79] Third parties to the contractual obligations of the insurer may not be sued,[80] nor may they bring suit against the insurer.[81]

B. *Intentional Infliction of Emotional Distress*

According to Oklahoma case law, an action for mental anguish does not have to result from a physical injury as long as the act was willful and violated plaintiff's legal rights.[82] In attempts to justify this conclusion, courts have held that the suffering of emotional distress causes a change in the nervous system and that this is in itself enough to constitute a physical injury for purposes of recovery.[83] In Oklahoma, the elements which must be present to constitute intentional infliction of emotional distress are (1) an intentional act, (2) which was unreasonable,

75. 680 P.2d 362 (Okla. 1984).

76. *Id.*

77. *Id.* at 364-65.

78. Christian v. American Home Assurance Co., 577 P.2d 899 (Okla. 1977).

79. *Id.* at 904.

80. Timmons v. Royal Globe Ins. Co., 653 P.2d 907, 912 (Okla. 1982).

81. *Allstate*, 680 P.2d 362, 364..

82. Eddy v. Brown, 715 P.2d 74 (Okla. 1986) (cause of action for outrage would be allowed in the employment context); Mashunkashey v. Mashunkashey, 189 Okla. 60, 113 P.2d 190 (1941); Floyd v. Dodson, 692 P.2d 77 (Okla. Ct. App. 1984); Bennett v. City Nat'l Bank & Trust Co., 549 P.2d 393 (Okla. Ct. App. 1975).

83. *Bennett*, 549 P.2d at 396. The court stated that "[c]ourts have recognized that the interest in freedom from severe emotional distress is regarded as of sufficient importance to require others to refraining from conduct intended to evoke it." *Id.* at 397.

and (3) which the actor realized was likely to cause an injury.[84] Later case law has changed the second requirement to require more than unreasonable conduct; the act must be "extreme and outrageous."[85] This change arose from a belief that more restrictive requirements were necessary to prevent suits alleging minor insult or inconsiderate conduct.[86]

C. *Application of the Oklahoma Workers' Compensation Statutes*

Courts have discussed several reasons for allowing or disallowing tort actions against the insurer for bad faith or intentional infliction of emotional distress. These factors include the language of specific statutory provisions dealing with accidental versus intentional injuries, penalty provisions, and statutory duties imposed upon the defendants. Courts have also relied on case law to determine the relationships of the parties: the contractual relationship, if any, of the employee and the insurance carrier, and the "agency" between the employer and the insurer. Oklahoma law leans in support of a cause of action for either bad faith or intentional infliction of emotional distress.

1. Employees as Insureds

Section 65.3 of Title 85 of the Oklahoma Statutes[87] provides that the

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84. *Id.*

85. *Floyd*, 692 P.2d at 80.

86. In Munley v. ISC Fin. House, Inc., 584 P.2d 1336, 1338 (Okla. 1978), the court modified its views:

> The torts of intentional infliction of mental distress and invasion of privacy are part of a modern development in the law to afford some redress to plaintiffs who have suffered from certain previously non-actionable forms of anti-social behavior. Inherent in the development of these new forms of action is an attempt to strike a medium between some of the merely unpleasant aspects of human interpersonal relationships on the one hand and clearly unacceptable conduct on the other. There is simply no room in the framework of our society for permitting one party to sue on the event of every intrusion into the psychic tranquility of an individual. If recovery for damage done is to be afforded at all, there must be some test by which to weed out those suits premised on mere discord between individuals while preserving those where the conduct of individuals has clearly exceeded tolerable bounds of social deportment. . . . [For the] defendant's conduct to be actionable as an intentional infliction of mental distress it must be of such a character as would reasonably be regarded as "extreme and outrageous."

Id.

87. OKLA. STAT. tit. 85, § 65.3 (1981) provides in pertinent part:

> Every contract of insurance issued by an insurance carrier for the purpose of insuring an employer against liability under the Workers' Compensation Act shall be conclusively presumed to be a contract for the benefit of each and every person upon whom insurance premiums are paid, collected, or whose employment is considered or used in determination of the amount of the premium collected upon such policy for the payment of benefits as provided by the Workers' Compensation Act regardless of the type of business in which the employer of such person is engaged or the type of work being performed by the employee at the time of any injury received by such employee arising out of and in the course of his employment, which contract may be enforced by such employee as the beneficiary thereof.

employee is the beneficiary of the contract of insurance between the employer and insurance carrier. By declaring the injured employee to be the beneficiary of the contract, the legislature has effectively provided that the insurer shall act with good faith in its dealing with the injured employee. Section 65.3 places a legal duty upon the insurer, then, to conduct itself in good faith.[88] More significantly, the statute provides that the insurance contract may be "enforced" by the employee. Use of the word "enforced" generally means that one given this power has the option of using the courts to claim whatever right is given him.[89] This phrasing of Section 65.3 should allow the employee a tort action.

2. Penalties

Statutory imposition of penalties upon an insurer for failure to timely pay extends the exclusive remedy of the Workers' Compensation Acts to matters of misconduct. Many courts have viewed penalties as a remedy for the injured worker.[90] Therefore, the courts of many states have relied on the exclusive remedy provision to bar all claims for bad faith based on statutory penalty provisions.[91] Other state courts have held that these penalties do not exclude claims for additional damages under bad faith provisions.[92] The Oklahoma Act also includes provisions to ensure payment of compensation benefits, and a closer examination of those laws will help determine how the Oklahoma courts will rule in cases of compensation insurer misconduct.

The Oklahoma legislature enacted Section 22(5)[93] which provides "penalties" for non-payment of temporary total disability before the

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Id.

88. Christian v. American Home Assurance Co., 577 P.2d 899 (Okla. 1977).

89. "Enforce" is defined as follows: "to make affective as to enforce a particular law" BLACK'S LAW DICTIONARY 474 (5th ed. 1979).

90. LARSON, *supra* note 9, at § 69.30.

91. *See, e.g.*, Robertson v. Travelers Ins. Co., 95 Ill. 2d 441, __, 448 N.E.2d 866, 869, 871 (1983) (Illinois legislature has provided penalties in the amount of 50% of compensation payable plus $100 per day until paid) Zurich Ins. Co. v. Mitchell, 712 S.W.2d 340, 341 (Ky. 1986) (Kentucky law provides for 12 percent interest penalty on delayed payments, imposition of fines and imprisonment, and all costs against party unreasonable refusing to pay benefits).

92. *See, e.g.*, Carpentino v. Transp. Ins. Co., 609 F. Supp. 556, 559 (D.C. Conn. 1985) (provisions made for a penalty of reasonable attorney fees and 6% per annum on unpaid portion); Brazier v. Travelers Ins. Co., 602 F. Supp. 541, 547-48 (N.D. Ga. 1984) (legislature provided penalties in the amount of 15% of compensation due unless excused, attorneys fees and costs).

93. OKLA. STAT. tit. 85, § 22(5) (1981 & Supp. 1987). The text of the statute is set out below:

> If any compensation payments owed without an award are not paid within ten (10) days after becoming due there shall be added to such owed payments an amount equal to ten percent (10%) of the amount due which shall be paid at the same time in addition to the owed payments unless such nonpayment is excused by the Court after a showing by the

claimant prevails in Workers' Compensation Court. These monies may be assessed if the compensation has not been paid ten days after it is due. The court may, at its discretion, however, excuse the nonpayment upon a showing by the employer that he faces circumstances beyond his control or denies coverage. The Oklahoma Act does not contain provisions regarding wrongful termination of benefits ordered paid,[94] nor does it cover bad faith denials of coverage. The employer may escape anything resembling a penalty under the statute simply by timely denial of the claim. In any event that coverage is timely denied, the employee is left without a remedy, collecting only the monies initially due even if the employer is later found to have unreasonably denied the claim. Additionally, Section 22(5) has been interpreted to apply only when a court order issues regarding the past due payments.[95] Therefore, this provision is too narrow to constitute an effective remedy for wrongful denial or termination of temporary total disability benefits.

Sections 41 and 42 deal with enforcement of permanent disability awards, attempting to provide assurance of proper payment by the insurer.[96] Again, these provisions do not apply to all situations which may

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employer that conditions exist over which the employer had no control in that either payments were not made within the prescribed time or the employer denies coverage within the time specified for the employer to respond.

Id.

94. Section 22 provides only for compensation due "without an award." Although the Attorney General states that an employer is subject to Section 22(5) with or without an award, 79 Op. Att'y Gen. 285 (1979), the statutory language is specific. Had the legislature intended this section to be applied to awards, deletion of the phrase "without an award" would have served the purpose. Insertion of the phrase has the effect of limiting the provision and implies that it was added with that purpose.

95. 79 Op. Att'y Gen. 285 (1979). This interpretation precludes penalties unless the evidence of late payments is brought before the court. This would require much more proof on the part of the claimant and he may consider it not worth the effort. He would have to produce a witness or the insurance file to document the check dates and the actual dates due. Additionally, for this type of proof, he would almost certainly have to hire an attorney. Therefore a large amount of misconduct will never be remedied, at least by Section 22(5).

96. OKLA. STAT. tit. 85, §§ 41-42 (1981 & Supp. 1987). Section 41(C) provides as follows:

> All payments shall be made on any award in the manner and form prescribed by the Court not to exceed the weekly rate of compensation specified in Section 22 of this title. . . . Failure for ten (10) days to pay any final award or any portion thereof, as ordered shall immediately entitle the beneficiary to an order finding the respondent and/or insurance carrier to be in default and all unpaid portions, including future periodic installments unpaid, shall immediately become due and may be immediately enforced as provided by Section 42 of this title.

Section 42 contains the following provisions:

> If payment of compensation or an installment payment of compensation due under the terms of an award . . . is not made within ten (10) days after the same is due by the employer or insurance carrier liable therefor, the Court may order a certified copy of the award to be filed in the office of the court clerk and the county clerk of any county, which award whether accumulative or lump sum shall be entered on the judgment docket of the district court, and shall have the same force and be subject to the same law as judgments of

be encountered during the course of a claim. If, for example, the insurer continually delays payments for nine days, no remedy would be provided, nor would there be a payment of interest if the insurer paid prior to certification by the district court. The language of Section 42 is ambiguous as to whether this interest applies if the award is paid prior to certification. Reading Section 42 in conjunction with Section 41 indicates that as a practical matter, interest would not be assessed. The date on which the award became due would be too uncertain and any attempt by the claimant to collect interest on a small amount of compensation would be more than outweighed by the time and effort expended. Therefore, unless the award is fully certified, this remedy is not practical because additional litigation would be required to collect the interest.

While Sections 41 and 42 ensure that insurers pay benefits in a timely manner, they do not provide a remedy for the injured worker. The ten percent added to overdue temporary disability awards will not, under current Oklahoma law, be paid to the claimant. Section 101 of the Act provides that all penalties are to be paid to the court administrator.[97] Although it could be argued that this provision should have been repealed and has just been carelessly left on the books, it does remain in effect.[98] Thus, Sections 41 and 42 do not afford the claimant a remedy, they merely reimburse the Workers' Compensation Court for its time.

Sections 41 and 42 do not contain any penalty provisions. The insurer must merely pay interest on the award. While the interest is assessed at a relatively high rate,[99] it cannot be construed as a remedy. The payment of interest compensates the worker only for the use of his money; it does not provide him a remedy for the bad faith denial of his claims. The workers' compensation system's failure to provide a remedy

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the district court. Any compensation awarded and all payments directed to be made by order of the Court shall bear interest at the rate of eighteen percent (18%) per year from the date ordered paid by the Court until the date of satisfaction. . . . If any insurance carrier intentionally, knowingly, or willfully violates any of the provisions of the Workers' Compensation Act, the Insurance Commissioner, on the request of a Judge of the Court or the Administrator, shall suspend or revoke the license or authority of such insurance carrier to do a compensation business in the state.

97. OKLA. STAT. tit. 85, § 101 (1981) provides that "[a]ll penalties imposed by the Workers' Compensation Act, shall be applicable to the expenses of the Administrator. When collected such penalties shall be paid into the State Treasury and be thereafter appropriated by the Legislature for the purpose prescribed in this section."

98. This argument would be supported by reference to the 1915 version of Section 42, which provided a 50% penalty on failure to pay permanent partial disability awards, all of which went to the administrator. This portion of the provision has since been amended.

99. The statute currently provides interest at 18% per annum, the rate charged by many banks on credit card balances.

is a good reason to allow a common law cause of action.[100]

3. The Exclusive Remedy Provision

The exclusive remedy provision of the Oklahoma Workers' Compensation Act[101] provides the greatest support for a common law cause of action for bad faith or intentional infliction of emotional distress. As previously discussed, either of these causes of actions would be allowed under Larson's second injury theory.[102] Even if the Oklahoma courts reject this theory, however, injured workers should still be able to recover.

Oklahoma's exclusive remedy provision has been interpreted to cover only those on-the-job injuries which are accidental.[103] In contrast, both the torts of bad faith and intentional infliction of emotional distress require intent on the part of the insurer or employer. Therefore, these intentional torts are already arguably within the reach of the Oklahoma plaintiff.

Despite this statutory support, the Larson approach still provides the strongest argument for allowing a common law cause of action. The Oklahoma Act provides that injuries covered by the Act must arise "out of and in the course of employment." The injuries suffered by a claimant

100. Even if these statutory provisions are construed to be penalties, a tort cause of action should still be allowed. *See* Coleman v. American Universal Ins. Co., 86 Wis. 2d 615, __, 273 N.W.2d 220, 224 (1979) ("[a] penalty for delayed worker's compensation payments does not preclude a cause of action for the intentional tort of bad faith for failure to honor or pay the claim").

101. OKLA. STAT. tit. 85, § 12 (1981 & Supp. 1984). The text of the statute reads as follows:

> The liability prescribed in Section 11 of this title shall be exclusive and in place of all other liability of the employer and any of his employees, any architect, professional engineer, or land surveyor retained to perform professional services on a construction project, at common law or otherwise, for such injury, loss of services, or death, to the employee, or the spouse, personal representative, parents, or dependents of the employee, or any other person.

The reference Section 11 provides that the employer shall pay compensation benefits for "disability or death of his employee resulting from an accidental personal injury." *Id.* at § 11.

102. *See supra* notes 9, 16-19 and accompanying text.

103. Adams v. Iten Biscuit Co., 63 Okla. 52, 162 P. 938 (1917) addressed the scope of the compensation act and the exclusive remedy provision:

> Considering the various provisions of the act together, there does not seem to be any ambiguity as to its meaning. It embraces all kinds of accidental injuries not resulting in death, whether occurring from the negligence of the employer or not arising out of and in the course of employment, but does not include willful or intentional injuries inflicted by the employer, nor injuries resulting from an intent upon the part of the employee to injure himself. . . . A willful or intentional injury, whether inflicted by the employer or employee, could not be considered as accidental, and therefore is not covered by the act.

Id. at 60, 162 P. at 945. *See also* Roberts v. Barclay, 369 P.2d 808 (Okla. 1962) (order sustaining demurrer to plaintiff's petition affirmed due to lack of proof of intent on part of defendant employer to cause the injury); Thompson v. Madison Mach. Co., 684 P.2d 565 (Okla. Ct. App. 1984) (cause of action in tort allowed for employee who was injured in a fight with his employer).

because of an insurer's bad faith failure to pay or intentional infliction of emotional distress are clearly not injuries that are covered under the Act. The second injury caused by the misconduct cannot be covered by the Act and must therefore be addressed in the district courts.

4. Relationship of the Insurer and Employer

Under Oklahoma case law, the employer and the insurance carrier are equally immune from suit by the injured worker.[104] A majority of states with compensation acts routinely make the insurer and employer immune from suit.[105] When allowing recovery, courts have avoided the exclusive remedy provision and held that the misbehaving insurer has severed itself from the employer and becomes a "third party" who can be sued.[106] This legal fiction is an extension of the dual capacity doctrine and has been disapproved in most jurisdictions.[107] Therefore, jurisdictions following the majority rule afford the protection of the exclusive remedy statute to the insurer as well as the employer. Oklahoma has followed suit.

V. CONCLUSION

The Oklahoma courts must allow injured workers to pursue tort remedies whenever the insurer has acted in bad faith or has intentionally inflicted emotional distress. Oklahoma recognizes these torts, and Oklahoma's case law and statutes suggest that such a remedy should be afforded. While none of the cases decided by Oklahoma courts have dealt with these torts in the workers' compensation context, the language of the applicable statutes, and their interpretation by the courts, strongly suggests that given the opportunity the state courts would allow causes of action for an insurer's bad faith or intentional infliction of emotional distress.

104. United States Fidelity & Guar. Co. v. Theus, 493 P.2d 433, 435 (Okla. 1972) stated that "it appears the intent of the Workmen's Compensation Law is to make the insurance carrier one and the same as the employer as to liability and immunity."

105. *See, e.g.*, Brazier v. Travelers Ins. Co., 602 F. Supp. 541, 544 (N.D. Ga. 1984) (statutory provision making insurance company and employer one entity as to liability to the worker).

106. The Pennsylvania court put it as follows:

> [T]his conduct is alleged to have occurred outside the workplace, and subsequent to the initial injury. The insurer was performing "a separate and distinct function . . . which . . . [was] not a part of the employer's business operation."

Thus the court found the insurer was separated from the employer by these acts and subject to liability. Snyder v. Congoleum/Kinder, Inc., 664 F. Supp. 975, 978 (E.D. Pa. 1987) (citation omitted).

107. *See generally supra* note 14 and accompanying text.