Tulsa Law Review

Volume 30 | Number 3

Spring 1995

Bad Faith in the Workers' Compensation Context: A Cause in Search of an Action

Edward John Main

BAD FAITH IN THE WORKERS' COMPENSATION CONTEXT: A CAUSE IN SEARCH OF AN ACTION

Edward John Main*

I. INTRODUCTION

This article will address the application of bad faith principles to a claim for benefits under a workers' compensation insurance policy. Thorough analysis reveals that established principles of workers' compensation law[1] severely limit the possibility of a separate claim actionable in the District Court (as distinct from the Workers' Compensation Court), but nevertheless suggests the potential for two distinct forms of action. The first, a claim for intentional infliction of emotional distress, may arise during the processing of a claim when the insurer steps outside of its role as a workers' compensation carrier to establish a "special relation" with the plaintiff. The second would be a bad faith claim arising only after the Workers' Compensation Court has entered an order awarding benefits. Although the Oklahoma Supreme Court has, to date, not fully recognized either of these causes of action, it has discussed the possibility of such claims.

II. DISCUSSION: *GOODWIN V. OLD REPUBLIC INSURANCE CO.*

The Oklahoma Supreme Court first addressed the possibility of a bad faith cause of action relating to workers' compensation insurance claims in *Goodwin v. Old Republic Insurance Co.*[2] The matter before the Court in *Goodwin* was a claim for bad faith from an alleged failure

* Associate, Secrest, Hill & Folluo, Tulsa, Oklahoma. B.A., 1969, J.D., 1986, University of Tulsa; M.A., 1974, Ph.D., 1982, Southern Illinois University at Carbondale.

1. Oklahoma Workers' Compensation Act, OKLA. STAT. ANN. tit. 85, § 1-211 (West 1992 & Supp. 1995).

2. 828 P.2d 431 (Okla. 1992).

to make payments pursuant to an award of the Workers' Compensation Court.[3] Although the *Goodwin* opinion fell short of recognizing or endorsing this bad faith cause of action, it made at least a tacit acknowledgment of the claim.

The plurality opinion based its analysis on the *assumption* that a bad faith cause of action is viable in the workers' compensation context.[4] It then *held* that "the facts of this case do not support an action for bad faith."[5] This analysis simultaneously makes a clear holding that the plaintiff did not have a valid claim and an unclear assumption as to what law the Court applied.

The plurality apparently used the terms "assume" and "hold" very carefully and deliberately. Clearly, the plurality did not intend to hold that this bad faith cause of action exists in Oklahoma law or will exist by virtue of a subsequent holding. Several Oklahoma Supreme Court decisions demonstrate that what the Court assumes in one opinion may be rejected in another. For example, in a discussion of the principles of "dram shop" liability, the Court stated:

> For the purpose of disposing of these cases *we assume, but do not hold*, that the abrogation in *Brigance* [v. Velvet Dove Restaurant, Inc., 725 P.2d 300 (Okla. 1986)] of the common-law's causation barrier operates to benefit not only a third person injured by an intoxicated consumer but also the inebriated vendee himself.[6]

Despite this "assum[ption]" in one case, the Court "held" the opposite in a subsequent opinion:

---

3. *Id.* at 432. The claim was based upon an "award [which] became due and payable on June 3, 1983." *Id.* The insurer paid the claim 18 days after the award became due and payable. *Id.* The plaintiff alleged "that the appeal of the [Workers' Compensation Court] orders, without a likelihood of success, and the delay in payment of the awards once mandate was spread of record, constituted bad faith." *Id.* The opinion does not discuss how or why the award "became due and payable on June 3, 1983." *Id.* That date may reflect when mandate issued on the appeal. For example, the Court cited OKLA. STAT. ANN. tit. 36, § 619(a)(6) (West 1990), which refers to "an insurer's obligation 'to pay any final judgment rendered against it in Oklahoma within thirty (30) days after the judgment became final.'" *Id.* at 432 n.2. This cite suggests that mandate on the appeal issued 30 days prior to June 3, 1983, and that the award "became due and payable" on the expiration of that period. *Id.* Justice Doolin, concurring specially, observed that "[t]he alleged cause of action did not arise until after Goodwin had made his claim and had received all the remedies provided by the [Workers' Compensation] Act." *Id.* at 436 (Doolin, J., concurring specially).

4. *Id.* at 431-32. "We *assume* that a workers' compensation insurance company may be subjected to liability in tort for a wilful, malicious and bad faith refusal to pay an employee's workers' compensation award...." *Id.* (emphasis added) (citation omitted). The first clause of this passage is also the title for part one of the plurality opinion. *Id.* at 432.

5. *Id.* (emphasis added) (citation omitted). This language is repeated as the final sentence of the plurality opinion. *Id.* at 436.

6. McClelland v. Post No. 1201, VFW, 770 P.2d 569, 573 n.16 (Okla. 1986) (emphasis added).

> The public policy of protecting the innocent from the intoxicated would not be furthered by such an extension of *Brigance*.[7]

The distinction between "assume" and "hold" is explicit in the language of *McClelland* and *Ohio Casualty*, and the same distinction is implicit in the careful use of those terms in *Goodwin*.

The distinction becomes explicit in the special concurrence by Justice Summers.[8] Justice Summers emphasized that he would go further than the plurality because he considered its "assumption unassailable."[9] That is, the plurality (which he called the "majority") merely assumed the bad faith cause of action to exist whereas Justice Summers would formally recognize such a cause of action.[10]

The existence of an ordinary bad faith cause of action within the workers' compensation context is problematic because of the special circumstances surrounding workers' compensation law. Workers' compensation is essentially a compromise which "has the net effect of imposing a form of strict liability upon the employer to pay for industrial accidents."[11] When an employee experiences such a job related injury, the employer is obligated to make payments pursuant to the Act.[12] When there is liability under the Act, that liability is exclusive.[13] Exclusive jurisdiction for claims arising under the Act is conferred upon the Workers' Compensation Court, and the jurisdiction of other Courts is abrogated.[14]

The plurality in *Goodwin* "noted that the exclusivity provisions of the Statute relates to the liability of the employer—not that of the insurer."[15] Nevertheless, "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."[16] By custom and practice, an employer's workers' compensation insurance carrier is joined as a party

---

7. Ohio Casualty Insurance Co. v. Todd, 813 P.2d 508, 512 (Okla. 1991) (holding that an intoxicated plaintiff could not sue the vendor for the plaintiff's own injuries).

8. *Goodwin*, 828 P.2d at 437 (Summers, J., concurring specially).

9. *Id.* at 438.

10. *Id.* (stating that prior holdings must be disturbed or the workers' compensation statutes altered to formally recognize a bad faith cause of action in the workers' compensation context).

11. Weber v. Armco, Inc., 663 P.2d 1221, 1224 (Okla. 1983).

12. OKLA. STAT. ANN. tit. 85, § 11 (West Supp. 1995).

13. OKLA. STAT. ANN. tit. 85, § 12 (West 1992).

14. OKLA. STAT. ANN. tit. 85, § 122 (West 1992).

15. Goodwin v. Old Republic Ins. Co., 828 P.2d 431, 432 (Okla. 1992) (emphasis omitted) (discussing OKLA. STAT. ANN. tit. 85, § 12 (West 1992)).

16. United States Fidelity & Guar. Co. v. Theus, 493 P.2d 433, 435 (Okla. 1972).

to an action before the Workers' Compensation Court.[17] In addition, the Oklahoma Supreme Court has held that

> [e]xcept when the Workmen's Compensation laws of this state authorize, or provide for, the determination of particular matters arising under those laws, by some other court or courts, the [Workers' Compensation Court] has the exclusive, original jurisdiction to determine . . . the liability of . . . insurance carriers under those laws, and any rights asserted under those laws[18]

Thus, according to well-established principles of Oklahoma law, the exclusive jurisdiction of the Workers' Compensation Court extends to a claim an employee may have against an employer's carrier for benefits. "The Workers' Compensation Court is vested with *exclusive* jurisdiction to determine and enforce a compensation risk carrier's liability to a claimant."[19] Therefore, the liability of a workers' compensation carrier to an injured employee is a function of Oklahoma workers' compensation law.

Under Oklahoma law, a third-party beneficiary has standing to maintain a bad faith action against an insurer.[20] The plurality also noted that "the Legislature specifically provided . . . that workers are third-party beneficiaries of the employer's liability policy with the insurer."[21] However, the statute which grants a worker third-party beneficiary status is a part of the Oklahoma Workers' Compensation Act, which also contains provisions limiting jurisdiction for claims and available remedies.[22] Apart from the special "trade off" effected by

17. The forms provided by the Workers' Compensation Court identify the employer's carrier as a party to the action. Workers' Compensation Court Rule 13 states that when an employee has commenced a proceeding "a copy of that notice of claim form bearing the assigned case number and the filing date shall be mailed by the Court to the employer or the insurance carrier." OKLA. STAT. ANN. tit. 85, Ch.4, App. (West 1992).

18. State *ex rel.* Ammons v. Breckenridge, 442 P.2d 506, 509 (Okla. 1968).

19. State Ins. Fund v. Brooks, 755 P.2d 653, 656 (Okla. 1988) (citation omitted).

20. OKLA. STAT. ANN. tit. 15, § 29 (West 1992). The statute states that "a contract made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescind it." *Id.* The *Goodwin* Court noted that the named beneficiary under a life insurance policy, pursuant to this statute, could maintain a bad faith action. Goodwin v. Old Republic Ins. Co., 828 P.2d 431, 434 (Okla. 1992). *See* Roach v. Atlas Life Ins. Co., 769 P.2d 158 (Okla. 1989).

21. Goodwin v. Old Republic Ins. Co., 828 P.2d 431, 432 (Okla. 1992) (citing OKLA. STAT. ANN. tit. 85, § 65.3 (West 1992)).

22. Third party beneficiary status is conferred by OKLA. STAT. ANN. tit. 85, § 65.3 (West 1992) while exclusivity of jurisdiction for claims and remedies is established pursuant to OKLA. STAT. ANN. tit. 85, §§ 11, 12, 44, 122 (West 1992 & Supp. 1995).

the workers' compensation law, a worker with a claim against an employer would be merely a third-party claimant to any liability insurance maintained by that employer.[23] However, an ordinary third-party claimant does not have standing to maintain a bad faith action.[24] Therefore, any status a worker may have to maintain an action against a workers' compensation insurance carrier is a status created by the Act and is limited by the Act. In other words, the legal effect of the statute making a worker a third-party beneficiary is to give that worker standing to maintain an action against the carrier in the Workers' Compensation Court. It would not have the effect of giving a worker standing to assert a claim against a carrier based upon principles of tort liability which are separate and apart from the limited remedies available under the Workers' Compensation Act.

Under the Act, "[t]he Workers' Compensation Court is vested with *exclusive* jurisdiction to determine and enforce a compensation risk carrier's liability to a claimant."[25] Accordingly, a claimant has standing to enforce the policy between an employer and the employer's workers' compensation carrier, but any such claim must be brought in the Workers' Compensation Court. Since a bad faith action would be maintained to impose liability upon a compensation risk carrier of a claimant, such an action would fall within the exclusive jurisdiction of the Workers' Compensation Court. Therefore, because such an action may not be maintained in the Workers' Compensation Court, it may not be maintained by a worker at all.

The plurality in *Goodwin* relied upon the earlier case of *Christian v. American Home Assurance Co.*[26] In *Christian*, the Oklahoma Supreme Court applied the following principle: "It is an elementary rule that a cause of action cannot be split or divided and made the subject of several suits, but that [the] plaintiff must include in one action all the various items of damage he has suffered from defendant's wrong."[27] However, the Court concluded that the rule against splitting a cause of action would not bar the plaintiff's claim in that case because of "the unique and nonrecurring circumstances presented here . . . ."[28] Thus, the Oklahoma Supreme Court recognized that, in the typical case, the rule against splitting a cause of action would be a

23. *See* Weber v. Armco, Inc., 663 P.2d 1221, 1225 (Okla. 1983).
24. Allstate Ins. Co. v. Amick, 680 P.2d 362, 364-65 (Okla. 1984).
25. State Ins. Fund v. Brooks, 755 P.2d 653, 650 (Okla. 1988) (footnote omitted).
26. 577 P.2d 899 (Okla. 1977).
27. *Id.* at 905 (citation omitted).
28. *Id.*

bar to maintaining separate actions for claims under a policy in one Court while maintaining a claim for bad faith in another Court. The exception would be the presence of extreme, unusual, unique, and nonrecurring circumstances.

When the rule against splitting a cause of action is applied in the context of a claim for workers' compensation benefits, a bad faith clause of action should not be available, at least not prior to the entry of an Order of the Workers' Compensation Court awarding benefits. Any claim for benefits under the policy would fall within the exclusive jurisdiction of the Workers' Compensation Court.[29] Therefore, any action a claimant would maintain would be limited by the remedies available under the Workers' Compensation Act.

The Oklahoma Supreme Court has held that the Workers' Compensation Court has exclusive jurisdiction over any actions an employee may maintain against an employer's insurance carrier.[30] In addition, the Court has held that the carrier is entitled to invoke the same defenses available to the employer (including the exclusivity of jurisdiction) stating that "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*."[31]

In *Goodwin*, the Court addressed an alleged bad faith failure to make payments after the Workers' Compensation Court had entered an award and the award had become due and payable.[32] Justice Doolin in his special concurrence specifically noted that "[t]he alleged cause of action should not arise until after Goodwin had made his claim and had received all the remedies provided by the Act."[33] The basic principles of workers' compensation law suggest that there is no possibility of a bad faith claim prior to the entry of an award by the Workers' Compensation Court, at least not without severely altering or abrogating well-established law.[34]

---

29. OKLA. STAT. ANN. tit. 85, § 12 (West 1992).

30. United States Fidelity & Guar. Co. v. Theus, 493 P.2d 433 (Okla. 1972). In *Theus*, the Court issued a Writ of Prohibition to bar maintenance of an ordinary tort action in District Court. *Id. Theus* continues to be the law in Oklahoma. *See* State Ins. Fund v. Brooks, 755 P.2d 653, 658 (Okla. 1988). There is no indication that the *Goodwin* plurality intended to alter or abrogate well-settled principles of Oklahoma Workers' Compensation Law, notwithstanding the plurality's comment that the statutes refer to the liability of the employer, not the insurer. Goodwin v. Old Republic Ins. Co., 828 P.2d 431, 432 (Okla. 1992).

31. *Theus*, 493 P.2d at 435 (emphasis added).

32. *Goodwin*, 828 P.2d at 432.

33. *Id.* at 436 (Doolin, J., concurring specially).

34. *Id.*

Even after an award by the Workers' Compensation Court, a subsequent bad faith action in another court would be severely limited. The Workers' Compensation Act contains specific procedures for rendering an award of the Workers' Compensation Court enforceable in another Court.[35] In these procedures, it is arguable that a bad faith claim may not be maintained, and in fact will not even accrue, until after an order of the Workers' Compensation Court has been entered and certified to another Court for enforcement.[36] The Workers' Compensation Court would continue to have jurisdiction over even an intentional failure by a carrier to make timely payments pursuant to an award. As stated by the Oklahoma Supreme Court, "[p]ositive requirements of § 122 of the [Workmen's Compensation] Act deprived the district courts of any jurisdiction over matters properly within [the] scope of [the] Workmen's Compensation Act."[37] However, it is possible that an employee faced with such circumstances may either elect to continue to pursue the remedies available under the Workers' Compensation Act for failure to pay an award, or maintain a separate

35. The procedures are as follows:

A. If payment of compensation or an installment payment of compensation due under the terms of an award, except in case of appeals from 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 the district court. Any compensation awarded and all payments thereof 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. Upon the filing of the certified copy of the Court's award a writ of execution shall issue and process shall be executed and the cost thereof taxed, as in the case of writs of execution, on judgments of courts of record, as provided by Title 12 of the Oklahoma Statutes. Provided, however, the provisions of this section relating to execution and process for the enforcement of awards shall be and are cumulative to other provisions now existing or which may hereafter be adopted relating to liens or enforcement of awards or claims for compensation.

B. If any insurance carrier intentionally, knowingly, or willfully violates any of the provisions of the Workers' Compensation Act or any published rules or regulations promulgated thereunder, 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 this state.

OKLA. STAT. ANN. tit. 85, § 42 (West 1992). This statute establishes the Workers' Compensation Court's continuing jurisdiction over claims where an award of that Court has not been paid. The Court retains that jurisdiction until the award is certified to another court. Due to the exclusive jurisdiction of the Workers' Compensation Court, no other Court would have jurisdiction over an award that has not been paid prior to certification.

36. *Id.*

37. Crowder v. Continental Materials Co., 590 P.2d 201, 204 (Okla. 1979).

bad faith action in District Court.[38] Moreover, the previously discussed principles regarding "splitting a cause of action" also suggest that a claimant must first certify the order for enforcement through another Court before maintaining a bad faith action.[39]

Prior to such certification, a claimant would not have a claim for benefits pursuant to the award. Such an action would have to be brought exclusively before the Workers' Compensation Court. The claimant would then have two separate causes of action, one for the benefits ordered by the Court (maintainable only in the Workers' Compensation Court) and one for bad faith (maintainable only in the District Court). Nevertheless, both actions would relate to the same underlying "transactions", i.e., the circumstances of the carrier's failure to make payments as ordered. Oklahoma adheres to a "transactional" analysis pursuant to which a single course of conduct, or a single set of "wrongful acts" gives rise to only one cause of action.[40] Therefore, the same course of conduct should give rise to but one claim actionable in but one Court. If the conduct is the subject of proceedings before the Workers' Compensation Court, that Court would have exclusive jurisdiction until and unless the statutory steps are taken for making such an order enforceable in some other Court.

---

38. *See, e.g.*, Pryse Monument Co. v. District Ct. of Kay County, 595 P.2d 435 (Okla. 1979). In *Pryse*, the employer was subject to workers' compensation law, but did not maintain the required insurance. *Id.* at 436. The Court concluded that the claimant could proceed in either the Workers' Compensation Court or the District Court. *Id.* However, once the employee had selected a forum, he would be barred from pursuing a claim in the other forum. *Id.* at 437. More specifically, the Court held that the employee's election to pursue a claim before the Workers' Compensation Court barred a claim in District Court even though the employee's claim before the Workers' Compensation Court was barred by the statute of limitations. *Id.* The elements of the employee's waiver were stated as follows:

> Three essential elements, all present here, must coincide to make preclusion through waiver by prior election of remedies available: (a) two or more remedies must be in existence (b) the available remedies must be inconsistent (c) choice of one remedy and its pursuit to conclusion must be made with knowledge of alternatives that are available.

Id. These principles would also apply to a failure to make payments pursuant to a workers' compensation award. A claimant would have one remedy through the Workers' Compensation Court system and perhaps a second remedy for bad faith through the District Court. Allowing a claimant to maintain two separate actions for the same remedy in different Courts would be inconsistent, as was the case in *Pryse*, and the claimant (at least through his attorney) would presumably have notice of the possibility of maintaining either of the two actions.

39. *See supra* note 30 and accompanying text.

40. *See* Fleet v. Sanguine Ltd., 854 P.2d 892, 901 (Okla. 1993). *See also* Hadnot v. Shaw, 826 P.2d 978, 987 (Okla. 1992); Eason Oil Co. v. Howard Eng'g, Inc., 755 P.2d 669, 672 n.13 (Okla. 1988); Chandler v. Denton, 741 P.2d 855, 863 n.20 (Okla. 1987); Reams v. Tulsa Cable Television, Inc., 604 P.2d 373, 375 (Okla. 1979); Retherford v. Halliburton Co., 572 P.2d 966, 969 (Okla. 1978).

The jurisdiction of the Workers' Compensation Court continues even after an order awarding benefits has been entered:

> In case of disobedience of any person to comply with the order of the Commission, . . . the judge of the district court of the county in which the person resides, or of the county in which such hearing is being conducted, *on application of any member of the board, or any inspector or examiner appointed by it*, shall compel obedience by attachment proceedings as for contempt, as in the case of disobedience of requirements of subpoena issued from such court on a refusal to testify therein.[41]

Only a member of the workers' compensation board, or an individual acting under its authority, can maintain an action to compel payments in a court other than the Workers' Compensation Court. The Act provides that

> [t]he power and jurisdiction of the [Workers' Compensation] Court over each case shall be continuing and it may, from time to time, make such modifications or changes with respect to former findings or orders relating thereto if, in its opinion, it may be justified, ...[42]

The jurisdiction of the Workers' Compensation Court also continues over an employee's claim for benefits under an insurance policy.[43] After following specific procedures, an independent action may be brought.[44] Furthermore, the "[p]ositive requirements of section 122 of the [Workers' Compensation] Act deprive the district courts of any jurisdiction over matters within the scope of the Workmen's Compensation Act."[45]

These authorities clearly state that the Workers' Compensation Court continues to have exclusive jurisdiction over an employee's claim for benefits under an insurance policy, even after an award has been entered. Therefore, the principle that only intentional acts fall outside the exclusive jurisdiction of the Workers' Compensation Court would also apply to actions taken in the process of evaluating a

41. OKLA. STAT. ANN. tit. 85, § 80 (West 1992) (emphasis added).
42. OKLA. STAT. ANN. tit. 85, § 84 (West 1992).
43. OKLA. STAT. ANN. tit. 85, § 42(A) (West 1992).
44. *Id.* The statute states:

> If payment of compensation or an installment payment of compensation due under the terms of an award, except in a case of appeals from an award, is not made within ten (10) days after the same is due by the employer or insurance carrier liable therefore, 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 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 the district court.

Id.

45. Crowder v. Continental Materials Co., 590 P.2d 201, 204 (Okla. 1979).

claim and making payments. Only intentional acts during that process fall outside the exclusivity of jurisdiction of the Oklahoma Workers' Compensation Court.[46]

This principle is stated clearly in *Unruh v. Truck Insurance Exchange*,[47] a case cited with approval in *Goodwin*.[48] The *Unruh* Court held that a workers' compensation carrier has "not stepped out of its proper role as an insurer in the compensation scheme" even though it acts negligently in the processing of a claim.[49] It also noted that "the *nature* of the insurer's role is not changed merely because its usual functions may have been performed negligently."[50] Although the Court acknowledged that "a negligent investigation of an employee's claim may well be an aberration in the carrier's normal activities," it went on to conclude that it could "find no justification in either statutory or policy considerations for treating the negligent carrier as no longer acting as a carrier but rather as a third party" so as to incur liability apart from the workers' compensation framework.[51] Instead, only when the "insurer intentionally embarks upon a deceitful course of conduct in its investigations which causes injury to the subject of the investigation" may liability apart from the workers' compensation framework exist.[52]

The reasoning of the Court in *Unruh*, endorsed in *Goodwin*, demonstrates that only intentional actions may be independently actionable apart from the workers' compensation framework. This principle has been applied in numerous jurisdictions with consistent results. For example, in *Ricard v. Pacific Indemnity Co.*,[53] the California Appellate Court affirmed the dismissal of a workers' compensation claimant's amended complaint.[54] The plaintiff had alleged a bad faith claim against a workers' compensation insurer, and also a claim for intentional infliction of emotional distress.[55] The Court held that the allegations of bad faith were insufficient to overcome workers'

46. Goodwin v. Old Republic Ins. Co., 828 P.2d 431, 434 (Okla. 1992).
47. 498 P.2d 1063 (Cal. 1972).
48. *Goodwin*, 828 P.2d at 436 n.21.
49. *Unruh*, 498 P.2d at 1070.
50. *Id.* at 1071.
51. *Id.* at 1073.
52. *Id.*
53. 183 Cal. Rptr. 502 (Cal. Ct. App. 1982).
54. *Id.* at 507.
55. *Id.* at 504.

compensation exclusivity, and that the conduct alleged was not sufficiently outrageous to state a claim for intentional infliction of emotional distress.[56] The Appellate Court cited *Unruh*, noting that there the carrier "in the course of a deceitful investigation, through an agent who established an ostensibly romantic relationship with the applicant, engaged in affirmative conduct which was independently tortious."[57] The establishment of a direct relationship, in *Unruh* a romantic relationship, took the insurer outside its contemplated role within the workers' compensation scheme.

The *Ricard* Court distinguished its facts from the *Unruh* scenario, stating:

> Here, by contrast, no relationship is alleged between plaintiff and defendant other than that of claimant and insurer. The insurance carrier committed no affirmative conduct which took it outside its role as an insurer so as to invest itself with a "dual personality" subject to liability at law.[58]

The Court noted "a distinction between negligent and intentional misconduct" and stated that "we are not so naive as to believe that insurance carriers do not on occasion frustrate the objectives of the workers' compensation statute by intentionally dragging their feet."[59] Nevertheless, barring the extreme circumstances of the *Unruh* example, no independent bad faith claim could be asserted.

Similarly, in *Everfield v. State Compensation Insurance Fund*[60] a carrier's alleged inconsistent delays in payments and arbitrary reduction in amounts was held not actionable, notwithstanding allegations that the conduct was intentional, deceitful, fraudulent and in bad faith.[61] The Court held that the conduct of the insurer constituted "no more than . . . a nonperformance of a statutory duty to provide temporary disability benefits under the Labor Code."[62] The Court further held that "ordinary nonperformance of a statutory duty owed by respondent to appellant is insufficient" to state a claim when the allegations do not rise to the tortious level of outrageous conduct.[63]

---

56. *Id.* at 507.
57. *Id.* at 506.
58. *Id.* (citations omitted).
59. *Id.* at 507.
60. 171 Cal. Rptr. 164 (Cal. Ct. App. 1981).
61. *Id.* at 165.
62. *Id.* at 166.
63. *Id.*

The plaintiff in *Soto v. Royal Globe Insurance Co.*[64] faced a similar situation. Although he alleged "a willful delay in payment of benefits" by a workers' compensation insurer, the Court held that he was not entitled to tort recovery.[65] The Court also held that because the plaintiff had failed to state a claim for intentional infliction of emotional distress, "a fortiori he has likewise failed to succeed in placing himself *beyond WCAB jurisdiction* on the theory of negligent infliction of emotional distress and on the theory of a grievance based on any breach of the implied covenant of good faith and fair dealing, or any supposed violation of [the Workers' Compensation Statutes]."[66]

Following this same rationale, the Court in *Cervantes v. Great American Insurance Co.*[67] held that an initial refusal even to investigate a claim, and a refusal to make any payment until after the claim had been filed and processed to a successful conclusion before the Workers' Compensation Court, was not independently actionable as bad faith.[68] The Washington Court of Appeals reached a similar result in *Deeter v. Safeway Stores, Inc.*[69] The *Deeter* Court noted that workers' compensation "immunity is lost when either the employer or the claims adjuster embarks upon a deceitful course of conduct constituting the tort of outrage."[70] Citing *Unruh*, the Court concluded that "conduct, although arguably vexatious and irresponsible, did not rise to the level of 'outrageous conduct' exhibited by the carrier in *Unruh*."[71] Additionally, the Court noted that the claimant had failed to "exhaust administrative remedies" prior to commencing the action.[72]

The Illinois Court of Appeals encountered particularly egregious conduct in *Echelbarger v. Dixon Publishing Co.*[73] where it held that withholding workers' compensation payments was not actionable outside the Workers' Compensation Act, even where the plaintiff alleged that payments were withheld "repeatedly and as a pattern of conduct."[74] The *Echelbarger* Court relied upon a decision of the Illinois Supreme Court, *Robertson v. Travelers Insurance Co.*,[75] holding

64. 229 Cal. Rptr. 192 (Cal. Ct. App. 1986).
65. *Id.* at 197.
66. *Id.*
67. 189 Cal. Rptr. 761 (Cal. Ct. App. 1983).
68. *Id.* at 768.
69. 747 P.2d 1103 (Wash. Ct. App. 1987).
70. *Id.* at 1108.
71. *Id.* at 1109.
72. *Id.*
73. 582 N.E.2d 295 (Ill. App. Ct. 1991).
74. *Id.* at 296.
75. 448 N.E.2d 866 (Ill. 1983).

that recovery under the Workers' Compensation Act "is the exclusive remedy for a plaintiff whose damages arise solely from unreasonable or vexatious delay in payment."[76]

In *Hastings v. Firemen's Fund Insurance Companies*,[77] the Court held that a workers' compensation insurer's termination of benefits was not actionable.[78] In *Farley v. CNA Insurance Co.*,[79] "an unsympathetic attitude" on the part of the workers' compensation carrier's agent did not constitute actionable conduct.[80] The *Farley* Court even acknowledged that the evidence did suggest that the carrier gave claimant "the run-a-round" by not paying bills on time and not authorizing medical treatment.[81] Nevertheless, the Court concluded that "there is clearly a threshold beyond which an insurance company's recalcitrance must go before it crosses into outrageous conduct."[82] The Court found that threshold not to have been reached in *Farley*.[83]

As these decisions from other jurisdictions indicate, a bad faith claim against a workers' compensation carrier requires more than negligence in the processing and handling of a claim. So long as a carrier is performing its function within the workers' compensation framework, even if it does so negligently, the carrier remains entitled to the protection afforded by workers' compensation exclusivity.

The *Goodwin* plurality applied this principle to Oklahoma law, discussing the parameters of a bad faith cause of action as first recognized in *Christian v. American Home Assurance Co.*[84] However, the plurality also cited provisions of the Oklahoma Unfair Claims Settlement Practices Act.[85] That Act, however, does not give rise to a private right of action.[86] Thus, the discussion by the plurality of principles governing an insurer's decision to pay a claim does not inevitably lead to the conclusion that a cause of action is necessarily created.

A curious circumstance of the *Goodwin* opinion is that the plurality, which appeared to be outlining the parameters of a bad faith

76. *Echelbarger*, 582 N.E.2d at 296.
77. 404 N.W.2d 374 (Minn. Ct. App. 1987)
78. *Id.*
79. 576 So. 2d 158, 160 (Ala. 1991).
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. 577 P.2d 899 (Okla. 1977).
85. OKLA. STAT. ANN. tit. 36, §§ 1221-28 (West 1992).
86. Walker v. Chouteau Lime Co., 849 P.2d 1085, 1087 (Okla. 1993) ("[W]e hold the [Unfair Claims Settlement Practices] Act does not provide a private remedy under the Act").

claim, relied upon authorities from other jurisdictions which *reject* an independent cause of action for a bad faith failure to make payments pursuant to a workers' compensation award. These authorities do, however, recognize a separate cause of action for intentional infliction of emotional distress as outside the jurisdiction of workers' compensation where the carrier steps outside its role within the workers' compensation framework and creates a separate and distinct relationship to the plaintiff.[87]

In *Farley*, the first case cited by the Oklahoma Supreme Court,[88] the court affirmed summary judgment in favor of the defendant on the grounds that there was no actionable bad faith claim and affirmed a directed verdict in favor of the defendant on the grounds that plaintiff's evidence failed to show sufficiently outrageous conduct.[89] As to the first holding, the *Farley* Court cited previous authorities in which it "held that a bad faith claim against a workmen's compensation insurance carrier is barred by the exclusivity provisions of the Alabama Workmen's Compensation Act."[90] However, the court also noted that it had "previously recognized that the tort of outrageous conduct can exist in a workmen's compensation setting."[91]

The second case cited by the Oklahoma Supreme Court, while acknowledging that a claim for intentional infliction of emotional distress would be available, similarly declined to recognize a bad faith action.[92] The Washington Supreme Court observed that

> [s]everal Courts and other jurisdictions have addressed the issue of whether a civil cause of action lies for wrongful delay or termination of workers' compensation benefits . . . [and] "[i]n the *great majority* of these cases, for one reason or another, a cause of action was held *not* to lie."[93]

As did the Oklahoma Supreme Court in *Goodwin*, the Washington Supreme Court acknowledged that "when the employer injures the employee with the deliberate intention of doing so" an action would not be barred by exclusivity provisions of the workers' compensation

87. Goodwin v. Old Republic Ins. Co., 828 P.2d 431, 436 n.1 (Okla. 1992).
88. Farley v. CNA Ins. Co., 576 So. 2d 158 (Ala. 1991).
89. *Id.* at 159.
90. *Id.* (citations omitted).
91. *Id.* (citations omitted).
92. Wolf v. Scott Wetzel Servs., Inc., 782 P.2d 203, 205 (Wash. 1989). The Court held that "[t]he Industrial Insurance Act expressly provides a remedy within the workers' compensation system for wrongful delay or termination of workers' compensation benefits; and that is the exclusive remedy for any such wrongful delay or termination." *Id.*
93. *Id.* (quoting ARTHUR LARSON, WORKMEN'S COMPENSATION, § 68.34(e), at 13-1272 to 13-1280 (1988)).

statutes.[94] The *Wolf* Court went on to note specifically that the statutory immunity would be lost "when the employer's conduct, or the conduct of a company hired by the employer to administer workers' compensation claims, constitutes the tort of outrage."[95]

The *Goodwin* Court also cited *Unruh v. Truck Insurance Exchange* where the California Supreme Court held that

> an insurer is still acting within its proper role in the compensation scheme, and may not be sued at law as a "person other than the employer" under Section 3852, when it provides negligent medical treatment for a compensable injury or when it negligently inspects the employer's premises. . . .
>
> . . . .
>
> . . .[t]he *nature* of the insurer's role is not changed merely because its usual functions may not have been performed negligently . . . . We can find no justification either in statutory or policy considerations for treating the negligent carrier as no longer acting as a carrier but rather as a third party.[96]

Under this rationale, so long as a workers' compensation insurance carrier is acting pursuant to its role within the general workers' compensation scheme, it is still protected by workers' compensation exclusivity. This is entirely consistent with Oklahoma law which grants the Workers' Compensation Court continuing jurisdiction with respect to its own orders and awards,[97] and which treats an employer and its insurance carrier as one for the purposes of the Workers' Compensation Act.[98] Nevertheless, as was the case in Alabama and Washington, the California Supreme Court held that an insurer could be held liable for an independent tort when "such insurer intentionally embark[ed] upon a deceitful course of conduct in its investigations which cause[d] injury to the subject of the investigation."[99] Specifically, in *Unruh*, the

---

94. *Id.* at 209. *Cf.* Goodwin v. Old Republic Ins. Co., 828 P.2d 431, 434 (Okla. 1992) (noting that "by definition intentional, wilful acts are not within the purview of the Workers' Compensation Act").

95. *Wolf*, 782 P.2d at 209. The "tort of outrage" is an alternative name for a claim for "intentional infliction of emotional distress." Eddy v. Brown, 715 P.2d 74, 76 (Okla. 1986).

96. Unruh v. Truck Ins. Exch., 498 P.2d 1063, 1071-72 (Cal. 1972).

97. *See* OKLA. STAT. ANN. tit. 85, § 84 (West 1992).

98. United States Fidelity and Guar. Co. v. Theus, 493 P.2d 433, 435 (Okla. 1972). *See* State *ex rel.* Ammons v. Breckenridge, 442 P.2d 506 (Okla. 1968). The Court in *Ammons* held that

> [e]xcept when the workers' compensation laws of this state authorize, or provide for, the determination of particular matters arising under those laws, by some other Court or Courts, the [Workers' Compensation Court] has the exclusive, original jurisdiction to determine . . . the liability of . . . insurance carriers under those laws, and any rights asserted under those laws.

Id. at 509.

99. *Unruh*, 498 P.2d at 1073.

insurer's agent embarked upon a deceitful romance with the claimant in order to trick her into performing activities which would be filmed by an additional, hidden agent.[100] Again, the point is that intentional acts specifically intended to harm a claimant are separately actionable apart from the workers' compensation scheme.

The penultimate case cited with approval by the Oklahoma Supreme Court was a Florida Court of Appeals decision which dismissed bad faith or negligence claims against a workers' compensation insurer and allowed a claim for intentional infliction of emotional distress.[101] The *Bowen* Court noted that

> [a] growing number of courts permit workers to penetrate the exclusive remedy shield in employment related injuries where the basis of the action against the employer's insurer is an intentional malicious tort.[102]

Applying this standard, the *Bowen* Court allowed the claim for intentional infliction of emotional distress to proceed, holding that "a common law tort claim is permitted only where the nonpayment involves outrageous conduct which causes emotional distress."[103]

A decision of the Minnesota Court of Appeals was the final authority cited with approval by the Oklahoma Supreme Court.[104] The Minnesota Court, citing *Unruh*, held as follows:

> Other states which have this exclusive remedy provision in their workers' compensation act, have established a juridically created exception to this rule. These Courts have consistently refused to allow common law claims unless the employer's insurance carrier intentionally engages in outrageous and extreme conduct which cannot be justified by the needs of normal investigation or defensive claims.[105]

The Court also emphasized that no action would lie for "less extreme conduct, such as wrongful refusal to pay claims."[106]

The Oklahoma Supreme Court cited and relied upon the above authorities in reaching its conclusion in *Goodwin*. Consideration of these authorities reveals the true significance of the *Goodwin* decision: any independent action against a workers' compensation insurer must be one which satisfies the very stringent requirements of a claim

100. *Id.*
101. Bowen v. Aetna Life & Casualty Co., 512 So. 2d 248 (Fla. Dist. Ct. App. 1987).
102. *Id.* at 249 (citations omitted).
103. *Id.* at 250 (citations omitted).
104. Dennison v. Milwaukee Mut. Ins. Co., 360 N.W.2d 448 (Minn. Ct. App. 1985).
105. *Id.* at 450 (citing Unruh v. Truck Ins. Exch., 498 P.2d 1063 (Cal. Ct. App. 1972)).
106. *Id.*

for intentional infliction of emotional distress.[107] The plaintiff in *Goodwin* asserted only a bad faith claim, but the Court speculated as to a claim of "outrage."[108] The Court noted that the law in plaintiff's situation would defeat either action.[109] Oklahoma adheres to a "transactional" approach to identifying causes of action, and the same factual situation, gives rise to but one cause of action.[110] Therefore, the only permissible claim is one where the facts are sufficient to constitute the tort of outrage. Accordingly, for purposes of rendering an opinion in *Goodwin*, the Oklahoma Supreme Court only "assumed" a bad faith action would be available. However, the only true cause of action is one for intentional infliction of emotional distress.

III. CONCLUSION

The Oklahoma Supreme Court has yet to grant its final seal of approval on a bad faith cause of action in the workers' compensation context. The plurality in *Goodwin* merely outlined principles of bad faith law which may be applicable in the workers' compensation context, but nevertheless fell short of recognizing such a claim. Established principles of workers' compensation law suggest the following limitations: first of all, no action can be maintained prior to the entry of an award of the Workers' Compensation Court awarding benefits; prior to that time, any claim would be indistinguishable to one for benefits pursuant to the Workers' Compensation Act. Second, after an order of the Workers' Compensation Court has been entered awarding benefits, the better approach would require a claimant to certify the order for enforcement through the District Court, and a claim for bad faith would be limited to actions taken by the insurer after such certification. Third, in no event would a carrier be liable for merely negligent processing of a claim, or a merely negligent failure to

107. Timmons v. Royal Globe Ins. Co., 653 P.2d 907 (Okla. 1982). In *Timmons*, the Oklahoma Supreme Court held that a claim for emotional distress in a bad faith action did not have to rise to the level necessary to maintain an independent claim for intentional infliction of emotional distress. *Id.* at 916. In that case, the Court made a standard distinction between "mental suffering" as an independent cause of action and as an element of damages which may be recovered in a claim based upon "an otherwise actionable transgression." *Id.* The existence of such an "otherwise actionable transgression" is necessary to recover "emotional suffering" in a cause of action. *Id.* Because no bad faith claim is even possible until after the Workers' Compensation Court has entered an order awarding benefits, there is no "otherwise actionable transgression" to support a claim for emotional distress. *Id.* Therefore, the emotional distress would have to be independently actionable, as was the case in *Unruh*.

108. Goodwin v. Old Republic Ins. Co., 828 P.2d 431, 432 n.1 (Okla. 1992).

109. *Id.*

110. Chandler v. Denton, 741 P.2d 855, 863 (Okla. 1987); Retherford v. Halliburton Co., 512 P.2d 966, 969 (Okla. 1978).

pay an award, because such a carrier would still be fulfilling its function within the general scheme of workers' compensation law, albeit poorly. Finally, a claim for intentional infliction of emotional distress would remain a distinct and separate possible cause of action, but only when the insurer steps outside its role within the workers' compensation framework and establishes a direct relationship with the claimant.