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Journal of Consumer Advocacy

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● **CASE FILE**

Cancer Insurance Case Finally Settled

In 1997, Rebecca Ake purchased from Central United Life Insurance Co. a limited-benefit insurance policy which covered specific benefits should Ake or a member of her family be diagnosed with cancer. The company's marketing materials specifically mentioned benefits for immunotherapy and blood platelet and other types of treatment.

Ms. Ake continued to pay her premiums and in 2010, her husband Larry Ake was diagnosed with cancer. He died in 2016. During Mr. Ake's illness, the insurance company paid out several claims but denied benefits for immunotherapy and blood platelet treatments, claiming these were not covered under the policy. The language in the policy was old and made no mention of immunotherapy and other types of treatment. The insurance company used this to deny Mr. Ake the benefits he and Mrs. Ake paid for.

Ms. Ake, a resident of Mangum, OK, hired Frasier, Frasier & Hickman, LLP and a suit was brought in the Western District Federal Court in Oklahoma City, alleging breach of contract.

Recently, on the eve of a scheduled trial, Central United agreed to settle the matter out of court.

"This is a bittersweet situation for Ms. Ake," said Frank Frasier. "The court agreed that she was right, that the insurance policy she had purchased should have covered immunotherapy and blood platelet treatments



"Our firm has seen too many experiences like this one where insurance companies fail to keep their promise, to honor the contract of their insurance policies issued, and a person who needs help does not get it."

for her husband during his illness. But the decision is too late to help her husband.

"Unfortunately, our firm has seen too many experiences like this one where insurance companies fail to keep their promise, to honor the contract of their insurance policies issued, and a person who needs help does not get it."

Frasier added, be vigilant and know what coverages are offered by any insurance policies you have, and demand that insurers honor their promises.

Appeals Court Reverses Workers Compensation Commission on Intoxication

By Kathryn H. Black

It has always been the case in Workers' Compensation that an injury caused by the employee's use of alcohol or drugs is not compensable. With the enactment of the new administrative system in 2014,

however, the Oklahoma Legislature added a twist. Under the new law, if an employee tests positive for an illegal controlled substance, or refuses to undergo testing, there

is a presumption that the injury was caused by the intoxicant. In other words, the law assumes that intoxication caused the injury unless the employee can prove that it did not.

One of our clients recently suffered a grievous injury to his arm when it was crushed in a machine at work. It was not his fault. Nor, even if he had been intoxicated, would that have related to the

cause of the accident – another employee engaged the machine while our client was fixing it.

A Workers' Compensation claim was filed. His employer denied the claim because a blood test performed at the emergency room

revealed the presence of marijuana metabolites. (Marijuana stays in the system for weeks after there is any intoxication.)

At trial, the administrative law judge

determined the presumption was overcome and that the employee was not intoxicated at the time of his injury, despite the presence of metabolites in his system and his admission to smoking marijuana the night before.

That order was appealed by the employer to the recently appointed administrative body, the Workers' Compensation Commission, which

is made up of three political appointees, two of whom are lawyers and none of whom has practiced Workers' Compensation law. The case was appealed and the Court of Civil Appeals reversed the Commission, holding that the Commission overstepped its boundaries as a reviewing body by reweighing the evidence and substituting its judgment for that of the judge.

The Court of Civil Appeals also rejected the Commission's inference that the mere presence of marijuana in an employee's system means that he is intoxicated. Despite the draconian implications of the new law in this regard, the appeals court has shown that despite the presumption of a causal connection between the injury and the use of illegal drugs, the presumption can be overcome by an employee's own undisputed testimony that he was not intoxicated at the time of the injury.



Employee Back to Work After Drug Test

Frank was an employee at the Port of Catoosa and represented by the Operating Engineers. Because he worked with a collective bargaining agreement, he was protected from being terminated without just cause.

The Company also had a drug testing policy in place. However, if the person "fessed up" before taking a drug test, he could go through a rehabilitation program and come back to work – he got one free strike.

Frank availed himself of this benefit and went through rehabilitation. Then, he paid for his own drug test to make sure that it came back clean. (Marijuana, for example, stays in the system for up to six weeks after the last use; other kinds of drugs last several days.)

After Frank tested negative, he returned to work. The first thing the Company did was give him a drug test and it came back positive. The Company terminated him.

The Union, on Frank's behalf, filed a grievance and went to arbitration, assisted by Frasier, Frasier & Hickman, LLP. The only evidence the Company had was the drug test result. The Union also had a drug test result

that was negative. The Union contested the result that the Company had – the results did not indicate at what levels the testing was done (there are minimum levels required by law), nor showed any levels of marijuana in the system, or anything else. The Company also failed to follow appropriate procedures.

The arbitrator held that the Company failed to prove its case by not having test results show the proper testing limits. The arbitrator reinstated Frank to his job with full benefits.

"The employee in this case was lucky because the Company mishandled the drug testing," said Steve Hickman, who represented the Union in the arbitration. "Even under the new marijuana laws, a Company still has the right to terminate an employee who tests positive. But, sometimes, the matter is worth pursuing just because the Company fails to follow protocols or prove its case."



● CONSUMER

Social Security Disability Claims Can Be Difficult to Process

Benefits are available from the Social Security Administration for certain people with serious medical conditions that prevent them from working.

If you are unable to work a full-time job (or a part-time job that pays more than \$860 per month) and you have been unable to work for 12 months or more (or are expected to be unable to work for 12 months or more) then you probably meet the qualifications for either disability insurance benefits (DIB) or supplemental security income (SSI), or in some cases, both, depending upon your past work history.

Many people that apply for disability benefits in Oklahoma are experiencing long delays in the processing

of their claims. Often, a claimant must wait four to six months for a decision, only to be denied.

The steps that must be taken to appeal a denial include requesting a reconsideration of the first decision and then requesting a hearing in front of an administrative judge after the second decision. The reconsideration process often takes six to eight months to complete, and the administrative hearing process often takes eight months to a year or more.

Many times people stop after the first or second denial. This is a mistake – the third level, a hearing



before a judge, results in benefits over half the time.

An experienced attorney can help you with your claim before the judge in order to make sure that the proper information is presented to Social Security.

However, the claimant or the claimant's attorney cannot control the delays that are occurring within Social Security.

The only remedy for those delays is for people to contact their elected officials to push for improvements to Social Security's disability claim process.

● CASE FILE

Case of Complicated Delayed Injuries Settled

Maria Thomas was trying to enter I-44 from U.S. 75 and had to slow to nearly a stop because of heavy traffic. Then she was rear-ended. Her car was a total wreck. The driver of the offending truck admitted his fault, saying he was momentarily blinded by the sun.

An ambulance was called. But Ms. Thomas, who speaks limited English, wanted to wait for her family to come to the scene of the accident – even though she hurt all over. Eventually, she was taken to the emergency room.

Ms. Thomas was later sent home and underwent months of treatment by a chiropractor. When the pain would not subside, she went to a physician who diagnosed a neck injury recommended surgery. But the procedure did not seem to help her pain and numbness in both hands.

Finally, Ms. Thomas saw a lawyer. A lawsuit was filed against the driver of the truck and his employer, to help recover the costs of her medical bills and loss of income.

A settlement was reached recently with Ms. Thomas receiving the help she needed.

"Persons injured in an automobile accident should be thoroughly examined and understand the extent of their injuries before they ever settle a claim."

● FAMILY

Mediation Can Replace Trials

In the past several years John Flippo, family law practitioner with Frasier, Frasier, and Hickman, LLP, has conducted hundreds of mediations. Oklahoma statutes allow for parties in a family law case to resolve their issues with the assistance of a mediator as opposed to having a trial.

Flippo has mediated cases of all aspects of family law including paternity, divorce, guardianship, custody, adoption, visitation, child support, property division, debt division, alimony, and attorney fees and costs.

Approximately 80% of the cases that come before him result in a final or partial mediation agreement. Flippo prepares the agreement itself along with an order for the Court approving the agreement. The attorneys representing the parties see to it that the mediation agreement and order are filed of record with the Court.

Flippo began mediations at the request of many lawyers who practice family law in eastern Oklahoma. Many of the mediation referrals are from local Judges who know that if a case is settled at mediation, then that Judge will not have to sit through a trial.

A successful mediation can last anywhere from two to four hours and each side pays one-half of the mediation fee.

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certiorari, (ser-she-eh-ra-re) noun [Latin, to be informed]; to be informed as a means of gaining appellate review; a common writ. When at least four of the nine U.S. Supreme Court justices vote to hear a case, the court issues a writ of certiorari.

