

# Limit on Benefits for Aggravation of Pre-Existing Conditions Faces Constitutional Scrutiny

By Sherri Okamoto.....[www.workcompcentral.com](http://www.workcompcentral.com)

Oklahoma City claimants' attorney Bob Burke is adding another case to his catalog of constitutional challenges to the state's 2013 comp reforms.

As of last week, Burke had 24 appeals pending before the courts and/or the Workers' Compensation Commission. He says he'll be filing one more Monday, to contest the Legislature's decision to change the requirements for a worker to receive benefits for the aggravation of a pre-existing condition.

According to Larson's Workers' Compensation treatise, most states will award a worker benefits if he aggravates a pre-existing condition while at work. For more than 100 years, that was the case in Oklahoma, Burke said Thursday. Then lawmakers decided to impose a "strange limitation" via 85A O.S. Section 2(9)(b)(6).

The statute requires that a treating physician confirm that a worker suffered an "identifiable and significant" work-related aggravation of the pre-existing condition; otherwise the aggravation isn't compensable.

In *McPeak v. Express Services*, Burke and attorney Jim Devinney are arguing that "such restrictive, limiting language" is "a substantial departure from a century of workers' compensation law in Oklahoma" and "unconstitutional on a number of grounds."

Speaking with WorkCompCentral on Thursday, Devinney said it seems that in any case where there's a worker with "a prior injury, or a prior claim," the employer contests it on the basis of Section 2(9)(b)(6).

That was the problem for Jessie McPeak, who injured his shoulder in April 2015 while working for a temporary staffing company.

Devinney said McPeak's medical records had documented an injury to the neck and right shoulder from an

automobile accident in 2013. McPeak had also gone to the doctor, complaining about shoulder pain, about a month before he hurt himself at work.

After he filed a comp claim, Administrative Law Judge Patricia Sommer appointed Dr. David Nonweiler to perform an independent medical examination. The doctor opined that McPeak's work activities had aggravated a pre-existing condition, but he said he didn't think the aggravation was "significant."

Accordingly, Sommer found McPeak had not carried his burden of proof under Section 2(9)(b)(6), and his injury was not compensable.

Burke and Devinney are now requesting review of this ruling by the en banc Workers' Compensation Commission.

Devinney said Thursday that the Administrative Workers' Compensation Act didn't establish a definition of "significant," so "nobody knows what it means." He said it seems to be "subjective," and "that's why its such a hard standard to go to court and prove."

But beyond that, he said, it also operates as a limitation on a worker's ability to get benefits for a condition that's been aggravated by his work.

"The Oklahoma Constitution requires that injured workers have a remedy," Devinney said, but under Section 2(9)(b)(6), "if a guy has an aggravation but it's not significant, he falls through the cracks."

He and Burke are also arguing that the statute deprives a worker of due process, under the reasoning employed by the Oklahoma Supreme Court earlier this year in *Torres v. Seaboard Foods*.

In that case, the Supreme Court noted that whenever the Legislature "decreases workers' compensation liability (and costs) for the class of employers by barring an injured employee from filing a claim, such legislation also increases potential economic liability to employees and increased economic risk allocation by a diminished duty owed to the employees."

The court went on to find that "the creation of an arbitrarily designed employer immunity by shifting economic loss to

an innocent injured employee" does not comport with due process.

Burke and Devinney contend that Section 2(9)(b)(6)'s limitation on compensability similarly "constitutes an arbitrarily designed employer immunity that shifts the economic loss to an innocent injured employee."

They further contend that the statute subjects workers to disparate treatment, as a worker with a pre-existing condition can be denied benefits if he doesn't have a substantial aggravation of his condition, but a fellow worker with no pre-existing condition suffers the same injury, that worker receives benefits.

Additionally, Burke and Devinney are arguing that it should be up to an ALJ to act as the fact-finder in a case, and Section 2(9)(b)(6) impermissibly requires that a "treating physician to predetermine a fact that is a requirement for the finding of compensability."

Lewis A. Berkowitz, an Oklahoma City-based defense attorney, on Thursday said that he, too, saw Section 2(9)(b)(6) as a "drastic departure" from what the law had been prior to 2013.

He said he was inclined to think that the Legislature's intent in adding the substantiality requirement was to limit liability for cumulative trauma-type claims, so if he were called upon to formulate a defense to the McPeak case, that's what he would focus his initial research efforts on.