NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION I

JERRY D. DEAN and JAMES H. PILKINGTON, individually and as Representatives of a Class of Claimants,

Petitioners,

and

GUS A. FARRAR, JAMES E. LOWELL, PAMLA K. CORNETT, W.E. SPARKS, and GARY A. EATON,

Petitioner/Appellants,

vs.

MULTIPLE INJURY TRUST FUND f/k/a SPECIAL INDEMNITY FUND OF THE STATE OF OKLAHOMA, administered by COMPSOURCE OKLAHOMA f/k/a STATE INSURANCE FUND, and the WORKERS' COMPENSATION COURT,

Respondents.

Case No. 107,754

PROCEEDING TO REVIEW AN ORDER OF
THE WORKERS' COMPENSATION COURT

HONORABLE JOHN M. McCORMICK, TRIAL JUDGE

SUSTAINED

Gus Farrar,
FARRAR & FARRAR, P.C.,
Tulsa, Oklahoma, For Attorneys-Petitioners,

Philip W. Redwine,
Douglas B. Cubberley,
James L. Bintz,
LAW OFFICES OF REDWINE
& CUBBERLEY,
Norman, Oklahoma,
and
Richard Cole,
MULTIPLE INJURY TRUST FUND,
Oklahoma City, Oklahoma, For Respondents.

Opinion by Wm. C. Hetherington, Jr., Presiding Judge:

¶1 This is the fifth review proceeding in this class action litigated in the Workers' Compensation Court since 1993 to collect interest on unpaid compensation awards, the settlement for which was court-approved on April 29, 2008. After receipt of notice of the settlement, Gus A. Farrar, James E. Lowell, Pamla K. Cornett, W.E. Sparks, and Gary A. Eaton (Attorneys) each filed claims for final payment in their own name as qualified claimants. The claims were denied, and Attorneys filed objections and submitted discovery requests from the class representatives. Attorneys now seek review of separate trial court orders denying both their objections and discovery requests. We **SUSTAIN**.

PROCEDURAL HISTORY

Class Action Litigation 1993-2006

¶2 In October 1993, Jerry D. Dean and James H. Pilkington, individually and on behalf of other workers' compensation claimants with material increase awards against the Special Indemnity Fund (SIF) which were not paid, filed a class action in the Workers' Compensation Court (WCC) against SIF after it refused to pay post-judgment interest on their unpaid awards. Over the next fifteen years, the trial court certified the class under 12 O.S. 1991 § 2023(b)(3), approved substitution of SIF with Multiple Injury Trust Fund (MITF, collectively with CompSource, f/k/a the State Insurance Board),[1] and determined WCC's jurisdiction of the class action, MITF's liability for $25,015,457.74 interest on the unpaid awards and the interest rate to be paid.

¶3 During this same period and without court approval, MITF paid some awards of compensation and attorneys fees, both with interest, to the class members' attorney of record in the underlying action against SIF. The trial court later refused to certify Class Representatives' award to the district court. Appeals from several court rulings

[1] When the class action petition was filed, SIF was administered by the State Insurance Board. In 1999, the Legislature replaced SIF with MITF. In 2001, the State Insurance Board became known as CompSource Oklahoma.

resulted in four published opinions between 1998 to 2006.[2]

Class Action Litigation & Settlement 2007-2010

¶4 In early 2007, the trial court granted motions to intervene and approved a sub-class. Later that year, the court referred Class Representatives and MITF to mediation. Pursuant to a mediation agreement negotiated in January 2008, the parties executed a Settlement Agreement on March 18, 2008. Two days later, Class Representatives moved for court approval of the proposed settlement. On March 25, 2008, the trial court filed its Order Acknowledging Settlement, Setting Fairness Hearing And Directing Notice to Class Members.

¶5 Following court instructions, Class Representatives mailed copies of a "Notice Of Class Action Proposed Settlement And Hearing On Settlement" and a "Proof of Eligibility for Payment and Claim Form" to "the claimant's attorney(s) of record in each Class Member's underlying claim as identified in the Settlement Database compiled and provided by MITF as reflected on Exhibit C." The notice and claim

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[2] *Dean v. Special Indemnity Fund*, 1998 OK CIV APP 30, 956 P.2d 945 (*Dean* I) held the January 29, 1997 certification order was not a reviewable decision and dismissed Petitioners' appeal. *Multiple Injury Trust Fund v. Dean*, 2001 OK CIV APP 30, 24 P.3d 861 (*Dean* II), held the WCC had jurisdiction in cases when a claimant is the interested party and there is a statutory basis for an award and affirmed the court's jurisdiction over the class action. *Dean v. Multiple Injury Trust Fund*, 2003 OK CIV APP 34, 67 P.3d 356 (*Dean* III), was vacated by the Supreme Court in *Dean v. Multiple Injury Trust Fund*, 2006 OK 78, 145 P.3d 1097 (*Dean* IV), based on the "gross or manifest injustice" exception to the settled law of the case doctrine. *Dean* IV held "the issue of liability in this case was over the amount of interest due the class on their judgments." *Id.*, 2006 OK 78, ¶¶ 25-26.

form were published in two successive issues in the Oklahoma Bar Journal and for two successive weeks in the Daily Oklahoman, the Tulsa World, and newspapers of general circulation in Oklahoma.[3]

¶6 The Notice of Class Action Proposed Settlement (Notice of Proposed Settlement) was addressed to"[A]ll persons who received awards against the [SIF] during the period from January 1, 1987, until May 9, 1996, whose claims were not timely paid, and who did not opt out of the class, and the surviving spouses and dependent children of such persons." The Notice of Proposed Settlement explained why the class action lawsuit was filed and the lack of an admission by MITF of liability to the class members and summarized the proposed settlement as follows:

> The proceeds total approximately $71.2 million. Of this total, [MITF] has paid Class Members approximately $54.7 million during the pendency of this action.[4] Under the terms of the settlement, [MITF] will pay up to an additional $9.1 million plus attorneys' and administrators' fees and

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[3] The Affidavit of Publication filed April 29, 2008 states the "Notice of Class Action Proposed Settlement and Hearing On Settlement" was published in newspapers of general circulation serving the following cities: Ada, Altus, Ardmore, Bartlesville, Broken Arrow, Clinton, Edmond, Enid, Lawton, McAlester, Midwest City, Moore, Muskogee, Norman, Ponca City, Stillwater, and Woodward.

[4] Because this total is twice the amount of MITF's liability for § 42 interest, we presume it includes payments of compensation awards *and* interest, however the record does not establish whether the same total included payments of attorneys fees and interest. it is undisputed that in May and June of 2000, MITF mailed, without prior approval of the Class Representatives or the court, to several attorneys of record for a significant number of the class members, two separate checks – one for the claimant's award with interest and the other check for the 20% attorney fee award, also with interest.

costs pursuant to the review, approval and supervision of this Court. The attorneys for the class believe this settlement is fair, reasonable, adequate and in the best interests of the class members.

¶7 The terms of the proposed settlement were set out in three enumerated paragraphs of the Notice. Paragraph 1, entitled "Benefit," provided:

> Each class member who is a "QUALIFIED CLAIMANT" may receive a one time FINAL PAYMENT, in an amount up to that which is set out in the following schedule, from the MITF Claims Settlement Fund:
>
> > $1,000 for a QUALIFIED CLAIMANT whose order awarding material increase benefits in the original underlying claim was filed between January 1, 1987, and December 31, 1998;
> >
> > $700 for a QUALIFIED CLAIMANT whose order awarding material increase benefits in the original underlying claim was filed between January 1, 1989, and December 31, 1993; and
> >
> > $500 for a QUALIFIED CLAIMANT whose order awarding material increase benefits in the original underlying claim was filed between January 1, 1994, and May 9, 1996.
>
> A sum equal to 20% of the amount paid to every QUALIFIED CLAIMANT shall be deducted from said amount and paid by the [MITF] in lump sum *to the attorney of record who represent that QUALIFIED CLAIMANT in his underlying case against the [SIF].* (Emphasis added.)

¶8 The second paragraph, entitled "Release," provided a mutual release of all future claims.[5] In the third paragraph, notice was given each class representative would receive an additional $7,500.00, the class counsel would receive $6.4 million (representing 8.95% of the total proceeds) and their reasonable costs, and the Co-Administrators of the MITF Claims Settlement Fund would be paid $500,000.00 for fees and expenses incurred in administering claims under the Settlement.

¶9 The Notice of Proposed Settlement also (1) set April 29, 2008 for a hearing to determine the fairness of the proposed settlement, (2) included instructions for submitting a claim, (3) notified "members of the class" of their right to file an appearance in the case *or* to object to the proposed settlement, (4) explained the requirements for an objection, the deadline for its receipt, and that it must be presented in person at the Fairness hearing, and (5) warned of the consequences for failing to timely file an objection which did not comply with the instructions and for failing to appear at the hearing, in person or by counsel, to present the objection. The

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[5] Under the "Release. Each CLASS MEMBER shall be deemed to have fully, finally, and forever released, relinquished and discharged: (A) all Claims against the [MITF] (including its respective past and present officers, etc.), whether or not such CLASS MEMBERS participates in the settlement by providing a claim form; and (B) the [MITF] from any and all claims arising out of, relating to, or in connection with the defense of this action. Further, [MITF] shall be deemed to have fully, finally and forever released, relinquished and discharged each and all of the CLASS MEMBERS, and their Counsel from any and all claims for abuse of process, malicious prosecution or any other claim arising out of, relating to, or in connection with the initiation and prosecution of the action."

notice required "members of the class who believe they are entitled to share in the class recovery" to complete and submit the "proof of eligibility for payment" and "claim form" provided with the notice to the Co-Administrators postmarked on or before September 1, 2008.

¶10 After the fairness hearing, the trial court entered and filed a ten-page "Order Approving Settlement And Directing Administration Of The Claims" on April 29, 2008, finding, in pertinent part, (1) "Class Representatives have fully complied with the notice requirement of the Court's previous order"; (2) "no objection to the settlement proposed by the parties has been received by the Court Clerk, or Class Counsel, or the Counsel for [MITF];" and (3) "the settlement is fair, adequate and reasonable." The court took judicial notice of "payments made by [MITF] during the pendency of this action totaling approximately $54.7 million" and approved the "MITF Claims Settlement Fund of an additional $9.1 million"[6] to be paid to:

> Each class member who is a QUALIFIED CLAIMANT as defined herein may receive a one time FINAL PAYMENT, in an amount up to that which is set out in the following schedule, from the MITF Claims Settlement Fund:
>
> $1,000 for a QUALIFIED CLAIMANT whose order

[6] Nothing in the record explains whether the "additional $9.1 million" placed in the MITF Claims Settlement Fund and the one time Final Payment is strictly limited to those class members who were not paid any of their compensation award and § 42 interest because they could not be located.

awarding material increase benefits in the original underlying claim was filed between January 1, 1987, and December 31, 1998;

$700 for a QUALIFIED CLAIMANT whose order awarding material increase benefits in the original underlying claim was filed between January 1, 1989, and December 31, 1993; and

$500 for a QUALIFIED CLAIMANT whose order awarding material increase benefits in the original underlying claim was filed between January 1, 1994, and May 9, 1996.

¶11 A "QUALIFIED CLAIMANT" was defined in the Order Approving Settlement, as follows:

> Any person who received award(s) against the [SIF] for the State of Oklahoma (for a material increase in permanent partial disability) during the period from January 1, 1987, until May 9, 1996, who did not opt out of this class action ("Class Member"), and
>
> (1) Who is alive on the date of the filing of this Order; or
>
> (2) The surviving spouse (who is alive on the date of the filing of this Order) of a deceased class member; or
>
> (3) A surviving dependent child (who is alive on the date of the filing of this Order) of a deceased class member as defined in Title 85 O.S. §48.

Any person who does not meet one of the aforementioned criteria is not eligible to receive any payment from the MITF Claims Settlement Fund.

¶12 Under the section "Claims Administration Process" of the April 29, 2008 Order

Approving Settlement, both counsel for Class Representatives were appointed a "Co-Administrators of the MITF Claims Settlement Fund." They were instructed to send a "Notice of Class Action Settlement and Claims Procedure" and a "Proof of Eligibility for Payment and Claim Form" by regular mail to the attorney of record for each class member in that member's underlying claims as identified in MITF's" records. Co-Administrators were further instructed "[t]he notice along with a list of the Class Members represented shall be sent to each attorney of record, respectively. . .and shall require an affirmative response as to the status of the attorney(s) continued representation of the Class Member(s)." In the event of no response, the Co-Administrators were instructed to make follow-up contact with the non-responding attorneys to ascertain their status. If the attorney no longer represented the Class Member, Co-Administrators were required to mail the notice and claim to each "*pro se* Class Member."

¶13 The first paragraph of the "Attorneys' Fees and Expenses" section of the Order Approving Settlement provides:

> The court takes judicial notice that every attorney of record who represented members of this class in their underlying cases against the [SIF] has been paid an attorney fee based on 20% of the payments made by the [SIF] and the [MITF] *during the pendency of this action.* At the time of payment to each VERIFIED QUALIFIED CLAIMANT whose claim is approved, a sum equal to 20% of the amount paid

> under this settlement to such VERIFIED QUALIFIED CLAIMANT shall be deducted from said amount and paid by [MITF] in lump sum to the attorney of record (or his successor in interest) who represented that VERIFIED QUALIFIED CLAIMANT in his or her underlying action. (Emphasis added.)

In the same section, the trial court found the Class Action Attorneys "shall be paid an incremental fee of $6.4 million by [MITF] as a fair, reasonable, and agreed upon fee in satisfaction of their liens and for their efforts in prosecution of this protracted action." At the conclusion of the same section, the trial court set a review hearing on compliance with the order's notice requirements and found "[t]his Court retains jurisdiction in this matter for determination and disposition of any disputed claims."

¶14 The Order Approving Settlement was amended by two separate Orders Nunc Pro Tunc.[7] As approved by the court, Class Representative mailed on May 12, 2008, the "Notice of Class Action Settlement And Claims Procedure" and "Proof of Eligibility for Payment and Claim Form" (collectively, Notice of Settlement) to "each class member's attorney of record in the underlying action against MITF" and "a list of the Class Members" each attorney represented. The Notice of Settlement, which

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[7] The Order *Nunc Pro Tunc* filed May 13, 2008 clarified the court had approved the proposed settlement agreement "as modified by the terms of [April 29, 2008] order." The same *nunc pro tunc* order attached a copy of the "Notice of Class Settlement and Claims Procedure," explaining it had been inadvertently omitted as an exhibit. The Order *Nunc Pro Tunc* filed May 5, 2008, corrected the April 29, 2008 Order to reflect each Class Representative would be paid an additional $7,500.

was published in the same manner used in prior notices, defined the class as:

> All persons who received awards against the [SIF] of the State of Oklahoma (for a material increase in permanent partial disability) during the period of January 1, 1987, until May 9, 1996, whose claims were not timely paid, and who did not opt out of this class action, and the underlying spouses and dependent children of such persons.

The very next part warned "PLEASE READ THIS NOTICE CAREFULLY. THIS IS NOT A NOTICE OF A LAWSUIT AGAINST YOU. YOU MAY BENEFIT FROM READING THIS NOTICE." As required by the Order Approving Settlement, the Notice of Settlement included a summary of the lawsuit and explained the court had issued a final order approving the Settlement Agreement entered into by the parties and thereby disposed of the litigation. In all other respects, the Notice of Settlement was identical to the Order Approving Settlement.

Claims Administration Process

¶15 In addition to filing claims for clients attorneys were able to locate, several of the class members' attorneys of record filed claims for clients who could not be located, which the attorney signed, *and* also claims *in their own name.* Co-Administrators of the MITF Claims Settlement Fund denied the latter claims "because [they] were not made on behalf of a Qualified Claimant" as defined in the Order Approving Settlement, and in their letters doing so, told Attorneys "you have

a right to object to the denial of your claim in the manner set out in the enclosure titled - "Denial of Claims - Procedures."

¶16 Fully complying with the claims procedures, Attorneys filed written objections to the denials in the WCC, asserting, *inter alia*, as "members of the class" and "qualified claimants." Two of the five Attorneys mailed interrogatories and requests for admissions to the Co-Administrators, seeking, *inter alia*, proof the $25 million judgment against MITF included interest on their attorney fee awards.

¶17 MITF moved to quash their discovery requests, asserting Attorneys and Co-Administrators were "not parties to the [class action] lawsuit," Attorneys were not "named claimants" under the December 29, 1999 Order which identified all class members, and the court had no authority to allow a non-party to compel a party to answer discovery requests. In response to Attorneys' objections, MITF argued Attorneys had no standing since they were neither claimants nor class members in the class action and therefore could not be Qualified Claimants under the Settlement Agreement. MITF also argued Attorneys' claims were an impermissible collateral attack on the Order Approving Settlement.

¶18 At the hearing on MITF's motion to quash held December 4, 2008, Attorneys maintained they were parties and argued the Order Approving Settlement was not a final order and would not be until all parties were determined. MITF re-urged its

prior arguments, adding Attorneys' failure to file a reply amounted to a confession of the same.

¶19 Without deciding the discovery requests, the court subsequently held three hearings, two in Tulsa and one in Oklahoma City, for arguments on all of the various objections filed with the WCC. On April 8, 2009, Attorneys presented additional argument to support their objections, *i.e.*, Attorneys are "class members" because they were awarded "benefits" as contemplated by the Legislature,[8] they too were aggrieved by SIF's failure to pay and are the real parties in interest. Co-Administrators gave an oral report of the claims process, and counsel for MITF argued, under the definition of a claimant, "lawyers can't be claimants. . .only representatives of claimants."

¶20 The last hearing was held in Oklahoma City on August 20, 2009. In addition to issues not relevant to this review proceeding, Attorneys re-urged their attorney fees awards were vested. MITF responded, arguing Attorneys got notice of the class

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[8] Attorneys relied solely on the emphasized sentence in § 172(H), which in relevant part, provides:

> H. An attorney for a claimant against the Multiple Injury Trust Fund shall be entitled to a fee equal to twenty percent (20%) of permanent disability benefits awarded. For awards entered after the effective date of this act, the attorney's fee shall be paid in periodic installments by the attorney receiving every fifth check. *All benefits awarded to the attorney shall be vested.*

However, (H) did not become effective until July 1, 2005, and by its own language must be applied prospectively.

settlement through a "myriad of ways," no one appeared and objected to it, the Order Approving Settlement was a final order which no one appealed, and their attempt to undo the settlement a year later was unreasonable.

¶21 On October 26, 2009, the trial court filed its order denying the attorneys' objections after finding (1) "there is no category[9] pursuant to class structure and notice that would allow counsel to come forward without a known, qualified claimant, and assert a claim on behalf of the unfound claimant or assert a claim in counsel's own name based upon a potential fee," and (2) "payment of attorneys' fees in this case is controlled by the [April 29, 2008] Settlement Order." The trial court further found "[t]he objections to attorneys' fees being paid on only qualified claims is a *collateral attack* on the final order in an attempt to avoid, defeat, evade or deny force an (sic) effect of a final order or judgment," citing *Nilsen v. Ports of Call Oil Co.*, 1985 OK 104, 711 P.2d 98. (Emphasis added.)

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[9] In the "Order Denying Claims For Class Members Who Could Not Be Found, Attorneys As Class Members Or Substitution Class Members and Attorney Fees On Denied Claims," the trial court divided the "attorneys' proposals" into the following "three (3) categories":

> 1. Allow counsel in the underlying workers' compensation claims to file a settlement claim on behalf of former clients who cannot be found;
> 2. Allow counsel in the underlying workers' compensation claims to file a settlement claim on behalf of class members who cannot be found and who do not have counsel of record who can be found; and
> 3. Objecting Counsel should be paid a fee for each class claimant, whether or not such claimant was found and/or qualified in accordance with the Court's Settlement Order entered herein on April 29, 2008.

¶22 By separate order filed October 26, 2009, the trial court denied Attorneys' discovery request, finding, in relevant part, discovery regarding claims was controlled by published class notice periods and Attorneys "may not now present a collateral attack on the final order." This review proceeding followed.

STANDARD OF REVIEW

¶23 The general standard of review for class actions – abuse of discretion – applies to administration of settlement agreements and claims processing. *See In re Records and Tapes Antitrust Litigation*, 118 F.R.D. 92 (N.D.Ill., 1987); *Gendron v. Shastina Properties Inc.*, 578 F.2d 1313, 1315 (9th Cir. 1984). A trial court abuses its discretion when it makes an erroneous conclusion of law or there is no rational basis in the evidence for its ruling. *Cactus Petroleum Corp. v. Chesapeake Operating, Inc.*, 2009 OK 67, ¶20, 222 P.3d 12, 20. "A compensation tribunal's *legal rulings*, like those by a district court judge, are on review subject to an appellate court's plenary, independent and non-deferential reexamination." (Emphasis in original.) *Johnson v. City of Woodward*, 2001 OK 85, ¶5, 38 P.3d 218, 222.

ANALYSIS

Preliminary Issues

¶24 MITF filed a motion to dismiss this review proceeding,[10] arguing Attorneys have failed to present appealable orders because (1) the October 26, 2009 orders neither grant or deny an award nor make a final determination of the rights of the parties, and (2) Attorneys did not timely appeal the April 29, 2008 Order Approving Settlement,[11] and their objections basically asked the court to reconsider or vacate the order which it had no authority to do. Similarly, in the "Jurisdictional Statement" section at the beginning of the Answer Brief, MITF now argues "Appellants are *not parties to this case* and hence they have not appealed from decisions that make or deny an award, or which otherwise constitute a final determination of *their rights* upon final hearing."

¶25 MITF correctly points out in the same section that "[r]elief available in this

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[10] After MITF filed its second motion to dismiss this appeal, the Supreme Court, by order filed March 25, 2010, ordered "Petitioners" to respond to MITF's dismissal motion and MITF to file an answer brief, and further ordered "[c]onsideration of [MITF's] motion to dismiss is deferred to the decisional stage." We note for the record MITF's dismissal argument addresses three orders filed October 26, 2009, but we consider herein only the two orders Attorneys addressed in their Brief in Chief.

[11] Approval of a class action settlement is a final decision of the named and unnamed class members' rights or claims sufficient to trigger appeal time. *Devlin v. Scardelletti*, 536 U.S. 1, 9, 122 S.Ct. 2005, 2010 (2002); *see also Gendron v. Shastina Properties Inc.*, 578 F.2d 1313, 1315 (9th Cir. 1984) (judgment approving a settlement in a class action constitutes a final judgment for purposes of appeal).

Court from errors of law in workers' compensation cases is statutorily confined to reviewable decisions." *Dean v. Special Indemnity Fund*, 1998 OK CIV APP 30, ¶5, 956 P.2d 945, 947 (*Dean* I). "An order that is reviewable must be one which either grants or denies an *award of compensation* or otherwise constitutes a final determination of the *rights of the parties*." (Emphasis added.) *Arrow Tool & Gauge v. Mead*, 2000 OK 86, ¶21, 16 P.3d 1120, 1127.

¶26 Acknowledging our jurisdictional limitation, Attorneys deny asking the court to vacate or to reconsider the Order Approving Settlement under which they assert they are Qualified Claimants. They point out they complied with the claims process, the claims were denied, their objections complied with the procedures set for claim denials, and discovery was requested "to prepare for the hearing on their objections." Attorneys contend the Order, which denied their claim for benefits and determined the rights of the parties who claim entitlement to those benefits, is ripe for review, and the error regarding the order denying discovery was included to avoid waiver of all points of error on appeal.

¶27 Relevant to MITF's argument is the settled law of this class action, deciding "[t]he instant case involves the statutory right of *claimants* to *interest* on *unpaid workers' compensation awards*, which right is specifically granted in the Workers' Compensation Act by 85 O.S.Supp. 1995 § 42." (Emphasis added.) *Multiple Injury*

Trust Fund v. Dean, 2001 OK CIV APP 30, ¶11, 24 P.3d 861, 865 (*Dean* II). Section 42 interest is "*incorporated into an award of benefits* by operation of law at the time the award is entered." *Id.*, ¶19.

¶28 The Workers' Compensation Act provides the complete and exclusive method for enforcement of any and all awards made thereunder. *Deanda v. AIU Insurance and AIG*, 2004 OK 54, 98 P.3d 1080. As noted in *Dean* II, the December 29, 1999 Order reserved for future determination the issue of "the means of distribution of the award." Pursuant to Oklahoma's class action statute, 12 O.S.2001 § 2023(E) and *Dean* II, the court later approved the proposed class action settlement agreement. In the Order Approving Settlement, the court expressly provided for the *distribution* of the remaining award and *retained jurisdiction* for "determination and disposition of *any disputed* claims" to that award.

¶29 The first order for review *denies* Attorneys' claim for final payment under the settlement agreement. The second order determines Attorneys have no right to post-settlement discovery for evidentiary support of their alleged entitlement to the final payment. Therefore, we conclude both orders meet the criteria for reviewability of WCC orders set out in *Dean* I and *Arrow Tool.*[12] MITF's dismissal argument based

[12] The Supreme Court determined an order dismissing a risk carrier as a party respondent in the claim is the functional equivalent of a disposition that denies the insurer's liability for an award (continued...)

on a lack of appealable orders is denied.

¶30 We are thus left with the "non-party" basis for dismissal of the appeal. In a workers' compensation case with similar procedural facts, *i.e.*, an attorney filed a petition for review naming the claimant as the sole petitioner and seeking review of an order which affected his attorney fee award, this Court explained in evaluating documents filed with the court "form does not rule over substance" and we "previously [had] deemed *non-named* parties to be included within an appeal." *Hix v. White Swan Food Services*, 1996 OK 132, ¶10, 930 P.2d 208, 210.

¶31 The Court in *Hix* found the attorney, whose fee award *had been reduced* by the court after the claimant's death, had "*standing* to bring the appeal." (Emphasis added.) *Id.*, ¶7. In deciding the standing issue, the Court considered the claimant's award had not been appealed, prior appeals in the same case had involved only attorney fees, both sides were aware of the nature of the appeal in each instance and "the filings [made] it clear the attorney [was] the *aggrieved party* seeking relief." (Emphasis added.) *Id.*, ¶13.

¶32 Standing is a threshold issue which may be raised at any stage of the judicial

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[12] (...continued)
and therefore reviewable. *American Investigative & Security v. Hamilton*, 1998 OK 134, 969 P.2d 975. Similarly, both orders on appeal reject Attorneys' asserted status as Qualified Claimants under the Settlement Agreement as "members of the class." The latter status, if correct, would align Attorneys with the other "unnamed" or "nonnamed" class members who, in class actions, are represented by named class members, a/k/a "Class Representatives."

process by any party or by the court. *Henrick v. Walters*, 1993 OK 162, ¶4, 865 P.2d 1232. A standing argument raises a question of jurisdiction in Oklahoma. *Special Indemnity Fund v. Weber*, 1995 OK 43, ¶5, 895 P.2d 292, 294 (Court found State Insurance Fund, who was not a party in the WCC proceeding, had standing to appeal since it was unquestionably aggrieved by the order *nunc pro tunc* reduced the rate of contribution). "Assessment of standing is not a decision on the cases's merits. Rather it is a determination whether the plaintiff is the *proper party* to seek adjudication of the asserted issue." *Cities Service Co. v. Gulf Oil Corp.* 1999 OK 16, ¶5, 976 P.2d 545, 547 (non-party attorneys lacked standing to appeal an order which imposes a non-monetary sanction against them personally.)

¶33 The required inquiry for standing is whether the party invoking the court's jurisdiction has a legally cognizable interest in the outcome of the tendered controversy. *Weber*, ¶6; *Democratic Party of Oklahoma v. Estep*, 1982 OK 103, 652 P.2d 271, 274. Standing to prosecute an appeal must be predicated on that interest in the trial court's decision "which is direct, immediate and substantial." *Pierson v. Canupp*, 1988 OK 47, ¶14, 754 P.2d 548, 552, fn. 9. "One cannot appeal from a decision, however erroneous, which does not affect one's substantial rights." *Rowe v. Rowe*, 2009 OK 66, ¶10, 218 P.3d 887, 891 (guardian ad litem lacked standing to prosecute an appeal from a permanent custody order because she was *neither a party*

to the divorce proceeding *nor is she aggrieved* by the ruling).[13] "The Supreme Court has long recognized that '[t]he right of an attorney to be paid for his services is a valuable one.'" *Payne v. Archer*, 2001 OK CIV APP 17, ¶8, 19 P.3d 327, 330 (quoting *Conrad v. State Indus. Commission*, 1937 OK 675, ¶ 7, 73 P.2d 858, 860.)

¶34 None of the civil or workers' compensation cases cited above involves an attorney seeking review of a post-settlement order in a class action lawsuit, like at issue here. However, in *Tisdale v. Wheeler Bros. Grain Co., Inc.*, 1979 OK 94, 599 P.2d 1104, three lawyers appealed a judge's order entered in a post-judgment ancillary proceeding that awarded fees for the lawyers' representation of two minors in a wrongful death action substantially less than the total fee recovery fixed by their agreement with the minors' mother. Based on prior judicial decisions, the *Tisdale* Court found "a lawyer who deems himself aggrieved by the trial court's decision determining, *in an ancillary proceeding*, the amount of fee allowable to him from the client's recovery has a right to appeal that is independent of his client's will." *Id.*, ¶4. The Court then concluded the lawyers had *standing to prosecute the appeal* because they "have both a statutory lien claim as well as a contract right" to attorney fees and

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[13] But see *Ogle v. Ogle*, 1973 OK 149, 517 P.2d 797, finding counsel fees are allowed to a party for the benefit of counsel, and therefore an attorney appealing an order which denied fees for his client could not appeal in his own name because he was not a party to the action and did not have an interest in the fee in his own right and independent of his client.

"their claim [was] capable of direct, as distinguished from vicarious, assertion and vindication." *Id.*, ¶5.

¶35 The record in this appeal establishes Attorneys, whether or not formal parties in this WCC class action, will be paid *substantially less fees* under the Settlement Agreement for representing the claimants they are able to locate and assist in obtaining a final payment *than* (1) the original fees granted by the court in the claimants' underlying actions against SIF and, like the claimants' compensation awards, were not timely paid by MITF, *and* (2) the fees MITF paid with interest to Attorneys during the pendency of the class action. As a result, we conclude Attorneys are proper parties in this review proceeding and have standing to appeal the post-settlement orders denying their claims for final payment.[14]

¶36 Last, in the third proposition in Attorneys' Brief in chief, they allege the court's order denying their claims is too indefinite for judicial review. After contending they are not objecting to the Order Approving Settlement and not asking to expand the class of claimants or to create a new class, Attorneys claim they "sought a

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[14] Our conclusion is consistent with the single federal decision revealed by our research which involved an appeal by a nonparty from an order approving a settlement in a class action. The First Circuit Court in *National Association of Chain Drug Stores v. New England Carpenters Health Benefits Fund*, 582 F.3d 30, 41 (1st Cir. 2009), acknowledging *Marino v. Cortez*, 484 U.S. 301, 102 S. Ct. (1988) (per curiam) held nonparties may not appeal a consent decree approving settlement without intervening, applied the exception to nonparty appeals, "if the judgment had purported to alter the legal rights of non-parties," to allow the appeal by non-intervening, nonparty pharmacies who claimed the outcome of the class action settlement affected their interest.

determination from the Court that they were a member of the class entitled to file a claim as a Qualified Claimant" and the Court "failed to address the particular issues propounded by [them]."

¶37 Attorneys' argument here fails to consider the issue they identify as not a factual issue for which the WCC is required to make specific findings, as held in their supporting authority, *Benning v. Pennwell*, 1994 OK 113, 885 P.2d 652. Implicit in the court's reference to "class structure and notice" and its basis for such denial, *i.e.*, Attorneys "may not come forward without a known, qualified claimant . . . and assert a claim in their own name" is the court's interpretation Attorneys are not "Qualified Claimants" under the Settlement Agreement because they fall outside the definition of the class.

Appellate Arguments

¶38 Attorneys raise error in their Brief in Chief[15] as to separate court orders filed October 26, 2009,[16] the first of which denied Attorneys' claims filed *in their own name*. The second order denied their discovery requests for "evidence to support

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[15] The appendix attached to Attorneys' Brief in Chief violates Okla.Sup.Ct.R. 1.11(i)(1), 12 O.S.2001, Ch. 15, App. 1. The appendix is stricken, and the prohibited documents are not considered on appeal unless they are included in the appellate record.

[16] Attorneys' Petition for Review only raised errors with the "Order Denying 'Attorneys as Class Members'" filed October 26, 2009. However, their Brief in chief amends the petition by raising error with the order filed the same date which denies attorneys' motion for post-settlement discovery. *Clayton v. Fleming Companies, Inc.*, 2000 OK 20, n.2, 1 P.3d 981.

their objection to the denial of their claims as Qualified Claimants." Other than Attorneys' appellate claim of prejudice from the latter order, their arguments for reversing both orders are identical.

¶39 Attorneys allege they are "Qualified Claimants" under the terms of the Settlement Agreement, because they "are members of the class who received an award for attorney fees during the time period prescribed and whose claims were not timely paid." They contend "it is impossible to exclude" an attorney fee award from a claimant's award because there can be just one award, relying on *Batt v. Special Indemnity Fund*, 1993 OK 163, 865 P.2d 1244, and *Chamberlin v. American Airlines*, 1987 OK 62, 740 P.2d 717, and contrary to the court's finding, their claims are not based on a *potential* fee, but one "that was awarded and vested and upon which interest accumulated."

¶40 Attorneys argue class membership is not limited to "claimants," asserting the 1995 and 1999 certification orders defined the class as "*persons* who have been awarded benefits against [SIF]" whereas the Notice of Proposed Class Settlement simply defined the class as "*persons* who received awards against [SIF]." Attorneys contend they are entitled to final payment because they are "persons who received *awards* of attorney fees against SIF." As the sole due process violation raised on review, Attorneys contend the Order Approving Settlement subsequently modified

that class definition by adding the parenthetical phrase – (for a material increase in benefits for permanent partial disability). Until that phrase was added, Attorneys claim they reasonably believed they were members of the class and therefore had no reason to object at the fairness hearing.

¶41 For additional support of their asserted class member status, Attorneys contend: (1) the 1995 Order Certifying the Class required MITF to provide Class Representative's counsel a list of persons who filed a claim *and* their counsel; (2) the $25 million judgment against MITF was calculated using interest on the claimant's award *and* the attorney fee awards; (3) during the pendency of the class action, MITF paid some claimants' awards and attorney fees, both with partial interest; and (4) the Settlement Agreement and Order Approving Settlement expressly acknowledge MITF made those payments. In making these arguments, Attorneys claim entitlement to a final payment as a Qualified Claimant of either $1,000, $700, or $500.

¶42 We disagree with Attorneys' asserted status for several reasons. First, we may not ignore the settled-law-of-the-case doctrine, as already applied to this class action by the Court in *Dean v. Multiple Injury Trust Fund*, 2006 OK 78, 145 P.2d 1097 (*Dean* IV). The *Dean* IV Court found "the *nature* of this class action" has been settled by *Multiple Injury Trust Fund v. Dean*, 2001 OK CIV APP 30, ¶13, 24 P.3d 861, 866 (*Dean* II), wherein the Court of Civil Appeals held "the class is comprised

of *claimants* seeking interest which is afforded them in the Workers' Compensation Act." (Emphasis added.) *Dean* IV, ¶23. In workers' compensation proceedings, the term "claimant" has long been used interchangeably with "employee" to refer to a *person* covered by the Workers' Compensation Act who has sustained an accidental "injury or personal injury" and has filed a claim for compensation or benefits under the Act. *Marby Construction Co. v. Mitchell*, 1955 OK 213, 288 P.2d 1108.

¶43 Moreover, "[*Dean* II], which sustained the *make-up of the class* as determined by the workers' compensation court, set the boundaries of the types of actions that would allow exclusion from the class." *Dean* IV, 2006 OK 78, ¶26. The referenced WCC determination is the December 29, 1999 Order, which "*limited* the class to those persons who received *awards of benefits* from [MITF] from January 1, 1987 until May 9, 1996 whose claims have not been paid" and "*excluded* from the class. . . persons who have opted out of the class and those whose claims have been satisfied by payment." (Emphasis added.) *See also Dean* II, n.4. The same Order "noted the parties had exchanged documents listing *the names and case numbers of those in the Class*" and "provided [MITF] was liable for interest on unpaid awards to Class members . . . and ordered [MITF] to pay each class member the amount indicated on Addendum #1 to the order." *Id.*, ¶9. Attorneys have never denied, below or on appeal, MITF's argument they are not included in the list of the specifically identified

class members. Pursuant to the settled law of *Dean* II, the class definition has long been limited to "claimants."

¶44 Second, although Attorneys' original fee awards were undoubtedly derived or deducted from the claimant's award in the underlying actions against SIF, Attorneys do not argue how the origin of such fees automatically mandates their status as class members. They have also failed to consider the consequences of their vested award argument, which, unless argued in the alternative, contradicts their "attorney fees origination" argument. Rights are "vested" when the right of enjoyment, present or prospective, has become the property of some particular person or persons as a present interest. *Baker v. Tulsa Building and Loan Association*, 1936 OK 568, ¶8, 66 P.2d 45, 48. Without deciding whether their fee awards vested when the WCC order became final or after MITF's continued failure to make any periodic payments until all payments of the claimant's compensation and their 20% attorney fee awards were due and unpaid, it is clear that, at whichever point Attorneys' fee awards vested, that award became theirs and only theirs to enjoy and protect. The same must be said for the claimants' compensation awards, which vested right to the award and § 42 interest they chose to protect by bringing the class action lawsuit for enforcement of both.

¶45 Third, *Dean* II was decided less than a year *after* Attorneys' alleged reliance on MITF's payments of some of the class member's compensation awards and

attorney fee awards, both with interest. *Dean* II's express limitation of "claimants" to the composition of the class in conjunction with its affirmance of the WCC order which incorporated the list identifying each class member by name and case number was clear and unambiguous notice to Attorneys they were not considered "members of the class."

¶46 Fourth, *Dean* II was not the only notice from which Attorneys should have realized they were not members of the class. The March 2008 Notice of Proposed Settlement clearly and unambiguously informs the recipients the "Benefit" to be received by "each class member who is a Qualified Claimant" in the form of three separate final payments is entirely different from the payment of fees that will be paid under the attorney fee provision of the Settlement Agreement. As we view it, the Notice of Proposed Settlement was Attorneys' *second* notice they were not considered as class members, but more importantly, Attorneys' first notice their vested legal right to the fees might be affected by the proposed settlement agreement.

¶47 Neither are we persuaded by Attorneys' arguments attempting to distinguish the class definition, as certified, from that used in the Notice of Proposed Settlement, attempting to broaden the class definition to include Attorneys because they too are "persons." "It is the certification order, not the notice, that determines the *res judicata* effect of the judgment that will be entered in [the class action,]." *Carlough*

v. Amchem Products, Inc., 158 F.R.D. 314, 334 (1993). Rule 23(c)(1) "allows alteration or amendment to the certification order only 'before a decision on the merits.'" Rule 23(c)(1) is identical to 12 O.S.2001 § 2023(C)(1).

¶48 Oklahoma's class action statute, 12 O.S.2001 § 2023(E), which was in effect during the instant class action, requires court approval of class action settlements and prior notice to all members of the class in such manner as the court directs, is identical to Rule 23(e) of the Fed Rules of Civil Procedure.[17] "The standard for settlement notices under Rule 23(e) is that it must 'fairly apprise' the class members of the terms of the proposed settlement and of their options." *In re Integra Realty Resources, Inc.*, 262 F.3d 1089, 1111 (10th Cir. 2001).

¶49 Ambiguous class definitions in notices of proposed settlement create a real possibility the targeted audience might conclude they are not members of the class and as a result of failing to make a claim, they will be bound by the judgment. *Cho v. Seagate Technology Holdings, Inc.*, 177 Cal.App.4th 734, 99 Cal.Rptr.3d 436 (2009). Clearly the broader term, "persons," was used in the subject class notices instead of technical terms, "claimants" or "employees," because the latter terms might cause confusion to or be ignored by claimants, or if predeceased, their surviving

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[17] Because Oklahoma's class action provision closely parallels the scheme in the Federal Rules of Civil Procedure, we may look to federal authority for guidance regarding its rationale. *Cactus Petroleum Corp. v. Chesapeake Operating, Inc.*, 2009 OK 67, n. 11, 222 P.3d 12.

dependents, and thereby fail to notify them of the proposed settlement of their claims.

¶50 Nor does deletion of the phrase "of benefits" from the Notice of Proposed Settlement or Order Approving Settlement change the nature or make-up of the class. In workers' compensation proceedings and cases, "benefits" and "compensation" are often used interchangeably, *albeit* the latter term has long been defined under the WCA as "the monetary allowance payable to an employee." The term "benefits" is not specifically defined in the WCA but the phrase "compensation or benefit" or "compensation or benefits" is used in several statutes in the WCA, *e.g.*, 85 O.S.2001 § 3.4, § 45, § 48.

¶51 "Benefits" generally refer to non-monetary services available to an employee, *e.g., Arrow Tool*, 2000 OK 86, ¶21, however, the same term may also mean monetary allowance *and* non-monetary services, *e.g.*, definition of "claimant" in 85 O.S.Supp.2010 § 3(5).[18] The phrase, "award of benefits," as used in the December 29, 1999 Order which *Dean* II sustained, clearly identifies only a claimant's award of compensation, and the deletion of "benefits" from the Notice of Proposed Settlement, at best broadens the number of putative "claimants" class members.

¶52 Nor are we persuaded Attorneys' due process rights were violated simply by

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[18] In 1997, the Legislature defined "claimant" as "a person who claims *benefits* for an injury pursuant to [WCA]."

the alleged modification to the class definition in the Order Approving Settlement by addition of the parenthetical phrase "(for a material increase in permanent partial disability)." Attorneys here were all attorneys of record for the class members in the underlying action against SIF and therefore fully aware from the commencement of the class action of the nature of the claims filed against Fund, as explained in the parenthetical phrase.

¶53 We conclude Attorneys' post-settlement attempts to protect their award of attorney fee in each claimant's underlying action against the SIF does not confer "Qualified Claimant" status. The trial court did not abuse its discretion in denying Attorneys' objections and discovery request. The trial court orders are **SUSTAINED**.[19]

BELL, C.J., concurs, and HANSEN, J., concurs in result.

[19] Because we affirm the court's first basis for denying both orders, we need not address its second basis, *i.e.*, Attorneys' objections were an impermissible collateral attack on a final order.