

No. 33337 – *Mary H. Wetzel, individually and as executrix of the Estate of Robert H. Wetzel, deceased v. Employers Service Corporation of West Virginia*

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OF WEST VIRGINIA

Maynard, J., concurring:

I agree with the majority opinion but write separately to briefly address some of the issues raised by my colleagues in their dissenting opinions.

The facts and the law of this case are simple. The facts concern a disagreement between an employee, Mr. Wetzel, and ESC, the workers' compensation administrator of self-insured employer Chemical Leaman, over the denial of payments for certain medical treatments based on ESC's determination that the treatments did not involve a compensable injury. The law of this case is likewise simple. It is indisputable that under the workers' compensation system created by the Legislature, self-insured employers and their agents enjoy immunity from suit with a few exceptions. This Court has recognized that the immunity provided by the workers' compensation system "is not easily forfeited." *State ex rel. Abraham Linc. Corp. v. Bedell*, 216 W.Va. 99, 104, 602 S.E.2d 542, 547 (2004).

Under the Act, an employer who is otherwise entitled to immunity under § 23-2-6 may lose immunity in only one of two ways: (1) by defaulting in payments required by the Act or otherwise failing to comply with the provisions of the Act, or (2) by deliberately intending to produce injury or death to the employee.

Abraham Linc., id., quoting *Smith v. Monsanto Co.*, 822 F.Supp. 327, 330 (S.D.W.Va. 1992).

Because the instant dispute arose from a work-related injury and payment for costs associated with the injury are governed by the workers' compensation act, it is logical that the majority would begin with the presumption that ESC is immune and then proceed to determine whether any of the exceptions to immunity apply.

My dissenting colleagues would have us believe that ESC lost its immunity pursuant to W.Va. Code § 23-2-8 by defaulting on payments of compensation and expenses to injured employees. In other words, they say that denying several of Mr. Wetzel's requests for payments constituted a default of required payments. This is incorrect. There is absolutely nothing in our statutory or case law that provides that when a self-insured employer or its agent denies a request for payment based on its determination that the medical care was not necessary to treat a compensable injury, the employer or its agent automatically loses its immunity. Such a proposition is wholly untenable. If such were the case, self-insured employers or their agents would be required to pay all requests regardless of their validity for fear of losing statutory immunity and being forced to defend a bad faith suit. In fact, employers and their agents are required to pay only *valid* workers' compensation related payment requests. Whether or not a specific payment request is valid is often a matter of dispute that must be settled after the claimant administratively protests the payment denial, a remedy of which Mr. Wetzel did not avail himself.

My dissenting colleagues also argue that several courts across the nation have

held that employers, workers' compensation insurers, and workers' compensation claims handlers are not immune from actions that seek damages caused by alleged bad faith refusal to pay benefits. However, this Court has never recognized such a bad faith claim nor is the existence of such a claim apparent in our workers' compensation act. Also, with regard to the decisions of other courts, "in actions seeking to impose tort liability on an insurer for wrongful delay or refusal to make benefit payments, the courts frequently have held that the action was barred by the compensation statute as a whole, or, more particularly, by the statute's exclusive remedy provision or its penalty provision." Michael A. Rosenhouse, "Tort Liability of Worker's Compensation Insurer for Wrongful Delay or Refusal to Make Payments Due, 8 ALR4th 902 (1981) (footnotes omitted). Clearly, the majority opinion is consistent with the law of this Court, statutory law, and the decisions of many other courts.

In sum, despite the views of my dissenting colleagues, I believe the majority opinion is well reasoned and conforms to both the spirit and letter of the law as expressed in our workers' compensation act. Accordingly, I concur.