Workman, J., Dissenting Opinion, Case No.23090 Alton E. Dodrill v. Nationwide Mutual Insurance Company

No. 23090 - Alton E. Dodrill v. Nationwide Mutual Insurance Company

Workman, J., dissenting:

While I do not object to the majority's enunciation of what constitutes multiple violations of West Virginia Code § 33-11-4(9)[(1)] and the need for the fact-finder to conclude that such violative conduct is a "general business practice," the factual evidence presented by this case falls far short of bad faith[(2)] conduct within the meaning of the statute, and I must therefore dissent. In fact, upon reviewing the record in this case, the only honest conclusion to be reached is that, despite little evidence of residual medical problems, the Appellee, Mr. Dodrill, appears to himself have delayed settlement with Nationwide in the hope of increasing his recovery. His own attorney told the Nationwide adjuster that it would be difficult to get Mr. Dodrill to settle.

The facts of this case overwhelmingly fail to demonstrate bad faith[(3)] acts on the part of Nationwide. Within days of the accident, the Nationwide adjuster contacted Mr. Dodrill to discuss the nature of his injuries. Mr. Dodrill said that he had missed some work and was experiencing great pain in his neck and back but had not seen a doctor for the pain as he did not believe that it would do any good. Upon the adjuster's receipt of Mr. Dodrill's wage verification and attending physician's report, he again initiated contact via a phone call to Mr. Dodrill on December 11, 1987. During this conversation, Mr. Dodrill said he was still experiencing pain but that he didn't want to see a doctor. The adjuster advised Mr. Dodrill that if he was still experiencing pain it would be prudent to seek out medical help. During this same conversation, the adjuster offered Mr. Dodrill $1800 to settle the case. The offer was formulated based on the submitted medical bills of $217 and lost wages of $791. At the time the offer was extended, Mr. Dodrill had worked on a regular basis since two days after the accident and the submitted medical information indicated that no permanent injury was expected. Mr. Dodrill rejected the offer and did not make a counteroffer.

The Nationwide adjuster next spoke to Mr. Dodrill on March 1, 1988, at which time Mr. Dodrill indicated that he might need to see a specialist, but that he couldn't find the time to do so. The adjuster tendered a second offer of settlement for the amount of $2000 plus a scheduled release that would set aside money for future medical bills. Mr. Dodrill rejected this offer and indicated that he was going to get an attorney.

While Mr. Dodrill doesn't appear to complain about Nationwide's conduct after he obtained an attorney in May of 1988, the record indicates that Nationwide made an offer to settle the case for $4,000 in January 1990, to which Mr. Dodrill counteroffered $7500. Before trial, Nationwide increased its offer to $5500 and Mr. Dodrill counter offered to settle for $6500.

The only evidence upon which the majority appears to rely to support its conclusion that a general business practice existed sufficient to constitute statutory bad faith practices is Nationwide's practice of not prepaying medical bills and other fixed costs, the failure to reach a settlement between when the accident occurred and the resulting jury verdict, and Nationwide's use of a two-tiered approach with regard to handling pre- and post- litigation claims. Regarding the lapse in time, it is fair to presume that the two-and-a-half-year period between the date of the accident and the trial date is attributable to a variety of factors, including the typical delay experienced in litigation. What the majority totally overlooks is the role Mr. Dodrill himself played in delaying settlement. Mr. Dodrill repeatedly delayed in seeking medical treatment and he failed to make any demand or counteroffers of settlement until he was represented by an attorney.

The majority appears to fault Nationwide for using adjusters to settle minor claims before litigation. This is clearly a business practice that they are entitled to engage in, provided they do so in good faith. Mr. Porter, the Nationwide adjuster, appears to have performed his job in a diligent fashion. The worst that the majority can say of him is that perhaps he didn't suggest that Mr. Dodrill see a doctor during the very first telephone conversation that ensued between Mr. Dodrill and Mr. Porter. But the record indicates that Mr. Porter, during the second or third telephone conversation, actively encouraged Mr. Dodrill to seek medical treatment. Furthermore, he initiated contact with Mr. Dodrill on several occasions seeking to negotiate a settlement. In reality, what the majority appears to dislike is the two-tiered approach of Nationwide to first rely on a non-legal individual such as Mr. Porter to attempt to settle claims and then to shift to a different employee upon the instigation of litigation. I fail to see a bad faith practice arising from this two-tiered approach. Such an approach makes good sense and may even have been calculated to more effectively bring quicker resolution to small claims.

The fact that a settlement was not reached during the period between the accident and the trial cannot be solely attributed to Nationwide. Mr. Dodrill shares a percentage of responsibility with regard to the failure to reach a settlement. Mr. Dodrill testified that at the time Nationwide extended the $2,000 plus future medicals offer, he thought $2,500 plus lost wages might be a fair offer and yet he never communicated this information to Nationwide. Had he done so, the case may have been settled in March of 1988.

While the majority seems to believe the first jury's award of $11,386, an amount twice what Nationwide last offered, is proof of unfair settlement, I cannot reach the same conclusion. Various factors, including Mr. Dodrill's apparent lack of sophistication in business matters, his age, and occupation, are likely to have influenced the jury's award. Thus, to look at the award itself as prima facie evidence of bad faith is fallacious. Furthermore, the nature of the claim was the alleged failure to attempt in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear.

The facts of this case are typical of any situation in which one side is attempting to increase its potential settlement and the other side is trying to keep the settlement to a lower figure in a legitimate manner. Quite simply, Mr. Dodrill does not present one scintilla of evidence sufficient to demonstrate either that Nationwide had a general business practices of bad faith, or that they in any way acted in bad faith under the facts of this case.

1. The specific subsection of West Virginia Code § 33-11-4(9) under which Mr. Dodrill brought suit was subsection (f), which states: "Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear."

2. "Bad faith" herein is in the nature of statutory unfair claim settlement practices, as opposed to the type of bad faith claim for failing to settle within policy limits articulated by this Court in Shamblin v. Nationwide Mutual Insurance Co., 183 W. Va. 585, 396 S.E.2d 766 (1990).

3. No statutory guidance is provided regarding what acts constitute bad faith sufficient to assert a claim under West Virginia Code § 33-11-4-(9)(f). Similarly, no case law

guidance has been provided regarding this statutory concept.