No. 11-1059 – *Jeffrey Jenkins and M. Jean McNabb v. City of Elkins, Stephen P. Stanton, Westfield Insurance Company, National Union Fire Insurance Company, and Bombardier Aerospace Corporation*

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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

BENJAMIN, Justice, concurring in part and dissenting in part:

I concur to the majority opinion except for its finding that the circuit court committed error in determining that the plaintiffs were not entitled to auto medical payments benefits under Mr. Jenkins' employer's insurance policy. I believe that the majority opinion's finding has no basis in the precedent of this Court.

The majority opinion holds that an employee injured by a third party in the course of his employment can receive both auto medical payment benefits from his employer's insurance policy and workers' compensation benefits. To support this holding, the majority opinion incorrectly relies on this Court's opinion in *Henry v. Benyo*, 203 W. Va. 172, 506 S.E.2d 615 (1998). *Benyo* concerned underinsured motorist benefits; the instant case concerns medical payments benefits. These two types of insurance coverage serve different purposes. Medical payments coverage "permits the insured to gain speedy reimbursement for medical expenses incurred as a result of a collision without regard to the insured's fault." *Ferrell v. Nationwide Mut. Ins. Co.*, 217 W. Va. 243, 249, 617 S.E.2d 790, 796 (2005). In contrast, uninsured coverage is intended to supplement an insured's recovery from another driver in order to make the

insured whole. In the instant case, Mr. Jenkins does not need a speedy reimbursement for medical expenses because workers' compensation paid his medical bills.

To support its holding, the majority opinion includes a quotation from *Benyo,* but modifies the statement in a way which I believe changes its meaning. The statement as quoted by the majority opinion is as follows:

> [E]quity, fairness, and justice require that an employee, who is involved in a motor vehicle accident with a third-party during the course and scope of the employee's employment, be permitted to recover . . . [auto medical] benefits under his/her employer's motor vehicle insurance policy to compensate him/her for those losses [caused] by workers' compensation [subrogation].

Jenkins, slip op. at 40, *citing Benyo*, 203 W. Va. at 179, 506 S.E.2d at 622 (footnote omitted). The actual statement from *Benyo* is as follows:

> equity, fairness, and justice require that an employee, who is involved in a motor vehicle accident with a third-party during the course and scope of the employee's employment, be permitted to recover, in addition to workers' compensation benefits, underinsured motorist benefits under his/her employer's motor vehicle insurance policy to compensate him/her for those losses that are not covered by workers' compensation (*e.g.*, pain and suffering, loss of enjoyment of life, loss of consortium, etc.).

Benyo, 203 W. Va. at 179, 506 S.E.2d at 622.

The clear point of this Court's *actual* statement in *Benyo* is that an injured employee should be permitted to recover underinsurance benefits from his or her employer's motor vehicle policy in addition to workers' compensation benefits to

compensate for those losses that are *not* covered by workers' compensation. This policy makes sense because it serves to make the plaintiff whole.

In contrast, the statement as modified in the majority opinion makes no sense. Significantly, there are no losses to the plaintiff caused by workers' compensation subrogation. Such subrogation simply means that a party other than the workers' compensation provider, and of course the plaintiff, is responsible for paying the plaintiff's medical bills. If there is no other party to pay the bills, the workers' compensation provider will not have a right of subrogation. Thus, under statutory subrogation, workers' compensation may be reimbursed for payment of the plaintiff's medical bills, but regardless, the plaintiff will have his or her bills paid.

The actual effect of the law created in the majority opinion is that the plaintiff will receive a windfall by virtue of having his or her medical bills paid more than once. For example, in the instant case, Mr. Jenkins has had his medical bills paid by the workers' compensation provider. Also, he will be able to collect uninsured benefits from his employer's auto policy which sum will include medical costs. Pursuant to W. Va. Code § 23-2A-1(e) (2009), the workers' compensation provider's statutory subrogation right does not apply to the uninsured coverage so that Mr. Jenkins will receive his uninsured benefits free and clear. Finally, as a result of the majority opinion, Mr. Jenkins will receive auto medical payment benefits from his employer's policy despite the fact that his medical bills have already been paid by the workers' compensation provider. It is

unclear under W. Va. Code § 23-2A-1(e), whether the workers' compensation provider will have subrogation rights against these auto medical payment benefits. Therefore, Mr. Jenkins potentially will have his medical bills paid three times over. Such a result is inexplicable to me and has no basis in reason or in law.

Accordingly, I am compelled to dissent to the majority opinion's holding that the plaintiffs are entitled to auto medical payments benefits under Mr. Jenkins' employer's insurance policy. Accordingly, I concur, in part, and dissent, in part.