

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

FILED
November 7, 2013
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

LINDA L. COX,
Claimant Below, Petitioner

vs.) No. 12-0215 (BOR Appeal No. 2046146)
(Claim No. 2010112785)

WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER
Commissioner Below, Respondent

and

THE ESTATE OF THELMA SCHMIDT,
Employer Below, Respondent

MEMORANDUM DECISION

Petitioner Linda L. Cox, by George Zivkovich, her attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. The estate of Thelma Schmidt, by Robert L. Stultz, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated January 23, 2012, in which the Board affirmed a July 6, 2011, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's March 9, 2009, decision rejecting Ms. Cox's application for benefits because Ms. Schmidt, her employer, was not required to maintain workers' compensation insurance. The Court has carefully reviewed the records, written arguments, and appendices contained in the briefs, and the case is mature for consideration.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Rules of Appellate Procedure.

Ms. Cox worked as a home care giver for Ms. Schmidt from August of 2005 to September of 2008. Ms. Schmidt was physically incapacitated due to arthritis and was incapable of moving around her home or taking care of herself. Ms. Cox provided assistive care for Ms. Schmidt. She worked on Monday, Tuesday, Friday, Saturday, and Sunday during the week. Her duties included bathing, clothing, feeding, and administering medication to Ms. Schmidt. Although Ms. Schmidt was physically incapacitated, she was mentally capable of directing and supervising Ms. Cox's work. During that period, Ms. Cox's W-2 Statements and individual tax returns indicate that she was employed on an hourly basis and her taxes were deducted as if she was Ms. Schmidt's employee. On September 22, 2008, Ms. Cox was helping Ms. Schmidt to her wheelchair, when Ms. Schmidt stumbled and knocked Ms. Cox into a wall, injuring Ms. Cox's back and shoulder. Ms. Cox filed an application for workers' compensation benefits with the Office of Insurance Commissioner in its capacity as Administrator of the Uninsured Employers Fund because Ms. Schmidt did not have coverage for Ms. Cox. The claims administrator rejected Ms. Cox's application on March 9, 2009, asserting that Ms. Schmidt was not required to maintain workers' compensation insurance because she was an employer of a domestic service employee. The Office of Judges affirmed the claims administrator's decision on July 6, 2011. The Board of Review affirmed the Order of the Office of Judges on January 23, 2012, leading Ms. Cox to appeal.

The Office of Judges concluded that Ms. Schmidt was an employer, but that under West Virginia Code § 23-2-1(b)(1) (2005) Ms. Schmidt was not required to carry workers' compensation insurance because she was employing Ms. Cox in a domestic service capacity. The Office of Judges found it undisputed that Ms. Cox had suffered an injury while assisting Ms. Schmidt to her wheelchair. But the Office of Judges determined that Ms. Cox's job duties placed her in a category of domestic service employees and that Ms. Schmidt, therefore, was not required to maintain coverage for her. The Office of Judges found that the claims administrator had properly rejected Ms. Cox's application for benefits. The Board of Review adopted the findings of the Office of Judges and affirmed its Order.

We agree with the conclusions of the Board of Review and the findings of the Office of Judges. West Virginia Code § 23-2-1(b)(1) provides that "employers of employees in domestic service" are not required to maintain workers' compensation insurance. West Virginia Code of State Rules § 85-8-3.3 (2008) defines domestic service as service of a household nature and specifically includes care givers, cooks, and medical providers as domestic service employees when the work is performed in the "private home of the person by whom he or she is employed." Ms. Cox's job duties fit within this definition of domestic service. Ms. Schmidt was not required to maintain workers' compensation insurance on her behalf and did not elect to do so. The claims administrator was correct to reject Ms. Cox's application for benefits.

For the foregoing reasons, we find that the decision of the Board of Review is not in clear violation of any constitutional or statutory provision, nor is it clearly the result of erroneous conclusions of law, nor is it based upon a material misstatement or mischaracterization of the evidentiary record. Therefore, the decision of the Board of Review is affirmed.

Affirmed.

ISSUED: November 7, 2013

CONCURRED IN BY:

Chief Justice Brent D. Benjamin

Justice Robin J. Davis

Justice Margaret L. Workman

Justice Menis E. Ketchum

Justice Allen H. Loughry II