

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2007 Term

**FILED
November 8,
2007**

No. 33337

released at 3:00 p.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

**MARY H. WETZEL, INDIVIDUALLY AND AS EXECUTRIX
OF THE ESTATE OF ROBERT H. WETZEL, DECEASED,
APPELLANT,**

V.

**EMPLOYERS SERVICE CORPORATION OF WEST VIRGINIA,
APPELLEE.**

**Appeal from the Circuit Court of Marshall County
Honorable Mark A. Karl, Judge
Civil Action No. 96-C-172**

AFFIRMED

**Submitted: October 10, 2007
Filed: November 8, 2007**

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The Opinion of the Court was delivered PER CURIAM.

JUSTICES STARCHER and ALBRIGHT dissent and reserve the right to file dissenting opinions.

JUSTICE MAYNARD concurs and reserves the right to file a concurring opinion.

SYLLABUS BY THE COURT

1. “W. Va. Code, 23-2-6a [1949] extends the employer’s immunity from liability set forth in W. Va. Code, 23-2-6 [2003] to the employer’s officer, manager, agent, representative or employee when he is acting in furtherance of the employer’s business and does not inflict an injury with deliberate intention.” Syllabus point 4, *Henderson v. Meredith Lumber Co., Inc.*, 190 W. Va. 292, 438 S.E.2d 324 (1993).

2. “Generally the words of a statute are to be given their ordinary and familiar significance and meaning, and regard is to be had for their general and proper use.” Syllabus point 4, *State v. General Daniel Morgan Post No. 548, Veterans of Foreign Wars of the United States*, 144 W. Va. 137, 107 S.E.2d 353 (1959).

3. “An agent in the restricted and proper sense is a representative of his principal in business or contractual relations with third persons[.]” Syllabus point 3, in part, *State ex rel. Key v. Bond*, 94 W. Va. 255, 118 S.E. 276 (1923).

4. “The statute creating a legislative standard for loss of employer immunity from civil liability for work-related injury to employees found in W. Va. Code Sec. 23-4-2 [2005] essentially sets forth two separate and distinct methods of proving ‘deliberate intention.’” Syllabus point 1, *Mayles v. Shoney's, Inc.*, 185 W. Va. 88, 405 S.E.2d 15 (1990).

5. “To properly plead a prima facie case under W. Va. Code § 23-4-2(c)(2)(I) [2005], the statute requires an employee set out *deliberate intention* allegations. Under the statute, *deliberate intention* allegations may only be satisfied where it is alleged an employer acted with a consciously, subjectively and deliberately formed intention to produce the specific result of injury.” Syllabus point 9, *Tolliver v. Kroger Co.*, 201 W. Va. 509, 498 S.E.2d 702 (1997).

6. “To establish ‘deliberate intention’ in an action under W. Va. Code § 23-4-2(c)(2)(ii) [2005], a plaintiff or cross-claimant must offer evidence to prove each of the five specific statutory requirements.” Syllabus point 2, *Helmick v. Potomac Edison Co.*, 185 W. Va. 269, 406 S.E.2d 700 (1991).

7. “The Unfair Trade Practices Act, W. Va. Code §§ 33-11-1 to 10, and the tort of bad faith apply only to those persons or entities and their agents who are engaged in the business of insurance.” Syllabus point 2, *Hawkins v. Ford Motor Co.*, 211 W. Va. 487, 566 S.E.2d 624 (2002).

Per Curiam:

Mary H. Wetzel (hereinafter “Mrs. Wetzel”), appellant/plaintiff below, individually and as executrix of the estate of her deceased husband Robert H. Wetzel, appeals

from an order of the Circuit Court of Marshall County granting summary judgment in favor of Employers Service Corporation of West Virginia, appellee/defendant below (hereinafter “ESC”). In this proceeding, Mrs. Wetzel contends that the circuit court committed error in finding that (1) the workers’ compensation statutes granted ESC immunity from liability, and (2) ESC was not in the business of insurance for purposes of her statutory bad faith claim. After a thorough review of the briefs and record, and having heard the arguments of the parties, we affirm the circuit court.

I.

FACTUAL AND PROCEDURAL HISTORY

The decedent, Mr. Wetzel, was employed as a truck driver for Chemical Leaman Tank Lines (hereinafter “Chemical Leaman”) from 1983 until his death in 1995. During the course of his employment, Mr. Wetzel was exposed to a chemical called Toluene Diisocyanate (hereinafter “TDI”). As a result of the exposure to TDI, Mr. Wetzel developed pulmonary complications and filed a workers’ compensation claim in 1992. The Workers’ Compensation Commissioner issued an order finding the claim compensable and awarded Mr. Wetzel temporary total disability benefits.

At the time that Mr. Wetzel’s pulmonary complications were ruled compensable, Chemical Leaman was a self-insured employer for purposes of workers’ compensation. Chemical Leaman had a contractual agreement with ESC, dating back to

1987, whereby ESC was made the administrator for Chemical Leaman's workers' compensation program. Under the agreement, ESC was responsible for, among other things, processing and paying all valid workers' compensation related payment requests.

During the course of Mr. Wetzel's treatment for his pulmonary complications, ESC received a total of 139 requests for payment on his claim.¹ ESC paid out a total of \$12,083.41 on the claim.² However, ESC objected to payment of 26 of the 139 payment requests.³ Out of the 26 payment denials, 16 denials were made for physician office visits that did not involve the compensable injury.⁴ Four of the 26 payment denials involved medications that were not authorized for the compensable injury. The remaining six payment denials involved duplicative charges. The actual amount of the 26 payment denials totaled \$662.94. Although Mr. Wetzel had a right to file an administrative protest to each of the payment denials, he failed to make an administrative protest to any of the payment denials.⁵

¹The circuit court's summary judgment order listed only 79 payment requests.

²The circuit court's summary judgment order found that ESC paid out a total of \$11,281.00 on the claim.

³The circuit court's summary judgment order listed only 19 payment requests as being denied.

⁴The physician who submitted the 16 requests for payment testified that, through an error in his office, some of the requests were submitted with the wrong billing code. Even so, none of the office visit payment requests were resubmitted for payment.

⁵The applicable regulation provides that a self-insured employer may deny payment "for those services or items that have [no] direct relationship to the work related injury or disease[.]" 85 C.S.R. § 85-20-9.9.1. The statutory procedures for protesting benefit denials

On September 5, 1995, Mr. Wetzel died.⁶ A year later, on September 9, 1996, Mrs. Wetzel filed the instant action against ESC. The complaint alleged that ESC's denial of the 26 payment requests contributed to Mr. Wetzel's death. The legal theories relied upon were negligence, intentional infliction of emotional distress and statutory bad faith settlement of claims. After a period of extensive discovery, ESC filed a motion for summary judgment. By order entered on August 14, 2006, the circuit court granted ESC's motion for summary judgment. In doing so, the circuit court found that (1) ESC was an agent of Chemical Leaman and, as such, enjoyed immunity from common law tort theories, and (2) ESC was not subject to a statutory bad faith claim. It is from these rulings that Mrs. Wetzel appeals to this Court.

II.

STANDARD OF REVIEW

We have held that “[a] circuit court’s entry of summary judgment is reviewed *de novo*.” Syl. pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994). In conducting a *de novo* review, this Court applies the same standard for granting summary

are set out in W. Va. Code § 23-5-1, *et seq.*

⁶The record does not disclose the exact cause of death. However, it appears that this Court awarded Mrs. Wetzel workers’ compensation widow’s benefits during an administrative proceeding. Consequently, it would appear that TDI was a contributing factor to Mr. Wetzel’s death.

judgment that a circuit court must apply. *United Bank, Inc. v. Blosser*, 218 W. Va. 378, 383, 624 S.E.2d 815, 820 (2005). Pursuant to that standard, “[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.” Syl. pt. 3, *Aetna Cas. & Sur. Co. v. Federal Ins. Co. of New York*, 148 W. Va. 160, 133 S.E.2d 770 (1963). Finally, we note that “[t]he circuit court’s function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial.” Syl. pt. 3, *Painter*, 192 W. V.a 189, 451 S.E.2d 755. Mindful of these principles, we address the issues raised on appeal.

III.

DISCUSSION

Mrs. Wetzel contends that ESC does not have immunity under the workers’ compensation statutes because it is not an agent of Chemical Leaman. In the alternative, Mrs. Wetzel argues that, if ESC is an agent of Chemical Leaman, she may still proceed against ESC under her intentional tort theory. Finally, Mrs. Wetzel contends that, for purposes of her bad faith claim, ESC is in the business of insurance and therefore her bad faith claim may proceed. We will address each issue separately.

A. ESC is an Agent of Chemical Leaman

All parties agree that under our workers’ compensation statutes, an agent of an

employer is granted immunity from suit for non-deliberate intent conduct that injures or causes the death of an employee. Specifically, the immunity to employers is set out in W. Va. Code § 23-2-6 (2003) (Repl. Vol. 2005) in part, as follows:

Any employer subject to this chapter who subscribes and pays into the workers' compensation fund the premiums provided by this chapter or who elects to make direct payments of compensation as provided in this section is not liable to respond in damages at common law or by statute for the injury or death of any employee, however occurring, after so subscribing or electing, and during any period in which the employer is not in default in the payment of the premiums or direct payments and has complied fully with all other provisions of this chapter.

The extension of employer immunity to agents and others is set out in W. Va. Code § 23-2-6a (1949), (Repl. Vol. 2005) as follows:

The immunity from liability set out in the preceding section shall extend to every officer, manager, agent, representative or employee of such employer when he is acting in furtherance of the employer's business and does not inflict an injury with deliberate intention.

In Syllabus point 4 of *Henderson v. Meredith Lumber Co., Inc.*, 190 W. Va. 292, 438 S.E.2d 324 (1993), this Court summarized the above statutes as follows:

W. Va. Code, 23-2-6a [1949] extends the employer's immunity from liability set forth in W. Va. Code, 23-2-6 [2003] to the employer's officer, manager, agent, representative or employee when he is acting in furtherance of the employer's business and does not inflict an injury with deliberate intention.

Mrs. Wetzel contends that under our decision in *Deller v. Naymick*, 176 W. Va. 108, 342 S.E.2d 73 (1985), ESC is not an agent of Chemical Leaman. On the other hand,

ESC argues that *Deller* does not address the issue of who may be an agent for workers' compensation purposes. We agree with the position advocated by ESC.

In *Deller*, the plaintiff sued a doctor who worked out of a facility provided by the employer. The trial court certified questions to this Court asking that we determine whether the doctor was an employee of the employer, and therefore immune from suit. This Court found that the doctor was an employee and, in doing so, formulated the following test for determining whether a professional person is an employee of an employer:

A professional person is an “employee” for workers’ compensation purposes when he or she provides his or her services “to an employer largely to the exclusion of otherwise special employment, for a certain fixed and determined period, at a regular salary, and hold[s] [himself or herself] in readiness at all times to serve [his or her] employer[.]”

Syl. pt. 1, *Deller*, 176 W. Va. 108, 342 S.E.2d 73, (quoting *West Virginia Coal & Coke Corp. v. State Comp. Comm’r*, 116 W. Va. 701, 704, 182 S.E. 826, 828 (1935)). Clearly, *Deller’s* test for determining whether a professional person is an employee of an employer has no relevancy to determining whether ESC is an agent of Chemical Leaman.

The definition of an agent is not provided by W. Va. Code § 23-2-6a. In Syllabus point 4 of *State v. General Daniel Morgan Post No. 548, Veterans of Foreign Wars of the United States*, 144 W. Va. 137, 107 S.E.2d 353 (1959), we held that “[g]enerally the words of a statute are to be given their ordinary and familiar significance and meaning, and

regard is to be had for their general and proper use.” See Syl. pt. 1, *Thomas v. Firestone Tire & Rubber Co.*, 164 W.Va. 763, 266 S.E.2d 905 (1980) (“In the absence of any specific indication to the contrary, words used in a statute will be given their common, ordinary and accepted meanings.”). Prior decisions of this Court have addressed the meaning of “agent.” In Syllabus point 3 of *State ex rel. Key v. Bond*, 94 W. Va. 255, 118 S.E. 276 (1923), we stated, in part, that “[a]n agent in the restricted and proper sense is a representative of his principal in business or contractual relations with third persons[.]” Accord Syl. pt. 3, *Thomson v. McGinnis*, 195 W. Va. 465, 465 S.E.2d 922 (1995). We have also said that

[a]n agent is one who represents another, called the principal, in dealings with third persons. He is one who undertakes some business or to manage some affair for another by authority of or on account of the latter and to render an account of it.

State ex rel. Clark v. Blue Cross Blue Shield of West Virginia, Inc., 203 W. Va. 690, 714, 510 S.E.2d 764, 788 (1998) (quoting 1A Michie’s Jurisprudence Agency § 2, at 666 (1993)). See *Warden v. Bank of Mingo*, 176 W. Va. 60, 64, 341 S.E.2d 679, 683 (1985) (“The common law definition of an agent [is] a person authorized by another to act for him[.]”).

Under the precedents of this Court defining the meaning of “agent”, we have no hesitancy in finding that ESC was an agent of Chemical Leaman for workers’ compensation purposes. The record is clear. As a self-insured employer, Chemical Leaman had a statutory duty to provide for processing and making payments on workers’ compensation claims that were found compensable. In 1987, Chemical Leaman entered into

an agreement with ESC that gave ESC the responsibility of carrying out Chemical Leaman's statutory duty to process and make payments for workers' compensation claims. Consequently, the circuit court correctly found that "ESC acted in place of or conducted business on behalf of Chemical Leaman and was, therefore an agent or representative of Chemical Leaman." (Internal quotation marks omitted).

B. Mrs. Wetzel's Intentional Tort Theory Is Not a Recognized Cause of Action under the Workers' Compensation Statutes

Mrs. Wetzel has asserted that even if ESC is an agent of Chemical Leaman, she may still maintain a cause of action against ESC for intentionally refusing to pay a total of \$662.94 in claims.⁷ We disagree.

⁷We must point out that this issue, as argued in Mrs. Wetzel's brief, is not the intentional tort theory alleged in her complaint, *i.e.*, intentional infliction of emotional distress. In Syllabus point 6 of *Harless v. First National Bank In Fairmont*, 169 W. Va. 673, 289 S.E.2d 692 (1982), we set out the elements of an intentional infliction of emotional distress claim as "[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm." Mrs. Wetzel's brief failed to even mention the elements of this cause of action. Even so, given the fact that ESC has addressed Mrs. Wetzel's unnamed novel intentional tort theory in its brief, we will address the matter on its merits. See Syl. pt. 3, *State v. Salmons*, 203 W. Va. 561, 509 S.E.2d 842 (1998) ("When a [party] assigns an error . . . for the first time on direct appeal, the [opposing party] does not object to the assignment of error and actually briefs the matter, and the record is adequately developed on the issue, this Court may, in its discretion, review the merits of the assignment of error.").

Mrs. Wetzel does not contend that her negligence cause of action is still viable upon finding that ESC is an agent of Chemical Leaman.

The Legislature has specifically provided in W. Va. Code § 23-4-2(d)(2) (2005) (Repl. Vol. 2005) the type of intentional tort action that may be brought to defeat the immunity afforded to employers and their agents. The statutory intentional tort is called “deliberate intention.” We held in Syllabus point 1 of *Mayles v. Shoney’s, Inc.*, 185 W. Va. 88, 405 S.E.2d 15 (1990), that “[t]he statute creating a legislative standard for loss of employer immunity from civil liability for work-related injury to employees found in W. Va. Code Sec. 23-4-2 [2005] essentially sets forth two separate and distinct methods of proving ‘deliberate intention.’” The two deliberate intent causes of action have been summarized by this Court as follows:

To properly plead a prima facie case under W. Va. Code § 23-4-2(c)(2)(I) (1994)⁸, the statute requires an employee set out *deliberate intention* allegations. Under the statute, *deliberate intention* allegations may only be satisfied where it is alleged an employer acted with a consciously, subjectively and deliberately formed intention to produce the specific result of injury.

Syl. pt. 9, *Tolliver v. Kroger Co.*, 201 W. Va. 509, 498 S.E.2d 702 (1997) (footnote added) (finding assault and battery not recognized as cause of action against employer by employee).⁹

⁸Following our decision of this case, the Legislature recodified this section. The relevant text is now set for at W. Va. Code § 23-4-2(d)(2)(i) (2005) (Repl. Vol. 2005).

⁹The deliberate intent cause of action under W. Va. Code § 23-4-2(d)(2)(I) is as follows:

It is proved that the employer or person against whom liability is asserted acted with a consciously, subjectively and deliberately formed intention to produce the specific result of

To establish “deliberate intention” in an action under W. Va. Code § 23-4-2(c)(2)(ii) (1983)¹⁰, a plaintiff or cross-claimant must offer evidence to prove each of the five specific statutory requirements.

Syl. pt. 2, *Helmick v. Potomac Edison Co.*, 185 W. Va. 269, 406 S.E.2d 700 (1991) (footnote added).¹¹

injury or death to an employee. This standard requires a showing of an actual, specific intent and may not be satisfied by allegation or proof of: (A) Conduct which produces a result that was not specifically intended; (B) conduct which constitutes negligence, no matter how gross or aggravated; or (C) willful, wanton or reckless misconduct.

¹⁰This section also has been recodified and is now located at W. Va. Code § 23-4-2(d)(2)(ii) (2005) (Repl. Vol. 2005).

¹¹The deliberate intent cause of action under W. Va. Code § 23-4-2(c)(2)(ii) is as follows:

The trier of fact determines, either through specific findings of fact made by the court in a trial without a jury, or through special interrogatories to the jury in a jury trial, that all of the following facts are proven:

(A) That a specific unsafe working condition existed in the workplace which presented a high degree of risk and a strong probability of serious injury or death;

(B) That the employer, prior to the injury, had actual knowledge of the existence of the specific unsafe working condition and of the high degree of risk and the strong probability of serious injury or death presented by the specific unsafe working condition;

(C) That the specific unsafe working condition was a violation of a state or federal safety statute, rule or regulation, whether cited or not, or of a commonly accepted and well-known safety standard within the industry or business of the employer, as demonstrated by competent evidence of written standards or guidelines which reflect a consensus safety standard in the industry or business, which statute, rule, regulation or standard was

Mrs. Wetzel failed to plead in her complaint or argue before this Court a deliberate intention cause of action against ESC as provided by W. Va. Code § 23-4-2(d)(2). Instead, in this appeal Mrs. Wetzel contends that this Court should recognize a cause of action against ESC for intentionally refusing “to honor and timely pay workers’ compensation benefits.” To support this alleged cause of action, Mrs. Wetzel cites to our decision in *Persinger v. Peabody Coal Co.*, 196 W. Va. 707, 474 S.E.2d 887 (1996), wherein this Court created a cause of action against an employer for engaging in fraud to deny an employee workers’ compensation benefits. Insofar as Mrs. Wetzel did not allege fraud against ESC in her complaint nor in her brief on appeal, we do not find *Persinger* applicable. Further, *Persinger* actually supports ESC’s position that a cause of action for nonfraudulently contesting a claim is not actionable. We made this point quite clear in *Persinger* when we indicated that, “[i]n recognizing the existence of this type of [fraud] action, we do not wish to open a Pandora’s box of litigation, *nor do we wish to infringe upon an employer’s right*

specifically applicable to the particular work and working condition involved, as contrasted with a statute, rule, regulation or standard generally requiring safe workplaces, equipment or working conditions;

(D) That notwithstanding the existence of the facts set forth in subparagraphs (A) through (C), inclusive, of this paragraph, the employer nevertheless intentionally thereafter exposed an employee to the specific unsafe working condition; and

(E) That the employee exposed suffered serious compensable injury or compensable death as defined in section one, article four, chapter twenty-three whether a claim for benefits under this chapter is filed or not as a direct and proximate result of the specific unsafe working condition.

to contest an employee's claim." *Persinger*, 196 W. Va. at 717, 474 S.E.2d at 897 (emphasis added).

Consequently, we decline to recognize the cause of action urged by Mrs. Wetzel.¹² See *Bias v. Eastern Associated Coal Corp.*, 220 W. Va. 540, 640 S.E.2d 540 (2006) (declining to recognize a cause of action against an employer for a mental-mental claim); *State ex rel. Darling v. McGraw*, 220 W. Va. 322, 647 S.E.2d 758 (2007) (same); *State ex rel. City of Martinsburg v. Sanders*, 219 W. Va. 228, 632 S.E.2d 914 (2006) (immunity from liability afforded to employers protects against awards of medical monitoring damages based on common law tort theories). In sum, the circuit court properly found that Mrs. Wetzel's tort theories of liability against ESC were precluded by the immunity granted under W. Va. Code § 23-2-6a.¹³

¹²As we pointed out earlier, there is an administrative remedy available for an employee to challenge the denial of a medical benefit.

¹³Ms. Wetzel also cited to a number of cases from other jurisdictions to support her position. Those cases are not persuasive because of statutory and factual distinctions. See *Hough v. Pacific Ins. Co.*, 927 P.2d 858 (Haw. 1996) (statutory and factual distinctions); *Johnson v. Federal Reserve Bank of Chicago*, 557 N.E.2d 328 (Ill. App. Ct. 1990) (case did not involve claim for workers' compensation); *Weber v. State*, 635 So. 2d 188 (La. 1994) (statutory and factual distinctions); *Leathers v. Aetna Cas. & Sur. Co.*, 500 So. 2d 451 (Miss. 1986) (statutory and factual distinctions); *Falline v. GNLV Corp.*, 823 P.2d 888 (Nev. 1991) (statutory distinctions); *Matter of Certification of a Question of Law from the United States Dist. Court, Dist. of South Dakota, Western Div.*, 399 N.W.2d 320 (S.D. 1987) (factual distinctions). Mrs. Wetzel also cited to the decision in *Soto v. Royal Globe Insurance Corp.*, 229 Cal. Rptr. 192 (1986). However, that case is actually consistent with this Court's decision, even though the opinion discusses exceptions that permit an action based upon the uniqueness of California's workers' compensation statutes.

***C. ESC is not Engaged in the Business of Insurance for
Purposes of the West Virginia Unfair Trade Practices Act***

The final issue presented by Mrs. Wetzel is her contention that the circuit court committed error in finding that she could not maintain a cause of action against ESC under the West Virginia Unfair Trade Practices Act (hereinafter “the Act”).¹⁴ Mrs. Wetzel takes the position that ESC is in the “business of insurance.” Therefore, the Act can be enforced against it for bad faith refusal to pay claims in the amount of \$662.94. ESC argues that it is not an insurance company nor is it in the business of insurance. We agree with ESC’s argument.¹⁵

To begin, we observe that “[t]he primary object in construing a statute is to ascertain and give effect to the intent of the Legislature.” Syl. pt. 1, *Smith v. State Workmen’s Comp. Com’r*, 159 W. Va. 108, 219 S.E.2d 361 (1975). “Once the legislative intent underlying a particular statute has been ascertained, we proceed to consider the precise language thereof.” *State ex rel. McGraw v. Combs Srvs.*, 206 W. Va. 512, 518, 526 S.E.2d

¹⁴*See* W. Va. Code § 33-11-1, *et seq.*

¹⁵Although Mrs. Wetzel argues that ESC is in the business of insurance, her brief describes ESC’s business as follows:

ESC is a multi-state corporation with offices in West Virginia, Pennsylvania and Kentucky. It offers a wide range of professional services to businesses including nursing and medical consulting, loss control management, as well as administering self-insured programs.

34, 40 (1999). Further, “[a] statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect.” Syl. pt. 2, *State v. Epperly*, 135 W. Va. 877, 65 S.E.2d 488 (1951).

The purpose of the Act, as set out in W. Va. Code § 33-11-1 (1974) (Repl. Vol. 2006), “is to regulate trade practices in the business of insurance . . . by defining, or providing for the determination of, all such practices in this State which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined.” The Act sets out and defines unfair methods of competition and unfair or deceptive acts or practices in detail in W. Va. Code § 33-11-4 (2002) (Repl. Vol. 2006). The Act does not provide a specific definition for “insurer.” However, other provisions of the Insurance Code do address the matter. W. Va. Code § 33-1-2 (2005) (Repl. Vol. 2006) states that an “[i]nsurer is every person engaged in the business of making contracts of insurance.” Further, W. Va. Code § 33-1-1 (1957) (Repl. Vol. 2006) defines insurance as “a contract whereby one undertakes to indemnify another or to pay a specified amount upon determinable contingencies.”

In this proceeding, Mrs. Wetzel does not contend that ESC is an insurer. In fact, Mrs. Wetzel has conceded that “ESC is not an insurer.” Even so, Mrs. Wetzel argues that she can maintain her action against ESC under the Act because ESC “is engaged in the business of insurance.” To support this argument Mrs. Wetzel asserts that “the claims

handling activities which ESC performs on a daily basis constitute the business of insurance.”

ESC argues that if merely processing workers’ compensation payment claims constitutes the business of insurance, then every self-insured employer that processes its own claims, as opposed to relying on a third party administrator, would be in the business of insurance and subject to liability under the Act. ESC cites to the decision in *Hawkins v. Ford Motor Co.*, 211 W. Va. 487, 566 S.E.2d 624 (2002), for the proposition that self-insured employers that process their own claims are not subject to a cause of action under the Act.

The decision in *Hawkins* involved an attempt by the plaintiffs to amend their complaint to add a bad faith claim against the defendant, Ford Motor Company. The plaintiffs in *Hawkins* contended that the defendant acted in bad faith in refusing to settle a claim involving a defective automobile that was destroyed by fire. At the time of the incident, the defendant was self-insured for general liability up to a certain amount. The trial court found that the Act did not apply to a self-insured entity and therefore denied the motion to amend the complaint. On appeal, this Court agreed with the trial court that a bad faith claim could not be maintained against the defendant. Specifically this Court held that “[a] self-insured entity is not in the business of insurance.” *Hawkins*, 211 W. Va. at 492, 566 S.E.2d at 629. We went on to formulate the following syllabus point:

The Unfair Trade Practices Act, W. Va. Code §§ 33-11-1

to 10, and the tort of bad faith apply only to those persons or entities and their agents who are engaged in the business of insurance.

Syl. pt. 2, *Hawkins*, 211 W. Va. 487, 566 S.E.2d 624.

Although we agree with Mrs. Wetzel that *Hawkins* is factually distinguishable from the instant case, we agree with ESC that the outcome must be the same. To hold otherwise would lead to an absurd result. For example, if this Court followed the logic of Mrs. Wetzel, we would have a rule of law which holds that an employer that is self-insured and processes its own claims, for both general liability and workers' compensation liability, cannot be sued as an insurer under the Act for bad faith settlement of general liability claims because of *Hawkins*, but may be sued as an insurer under the Act for bad faith settlement of workers' compensation claims. There is simply no tenable legal justification for such a different outcome. *See Stafford EMS, Inc. v. J.B. Hunt Transp., Inc.*, 270 F. Supp. 2d 773, 778 -79 (S.D. W. Va. 2003) ("Inasmuch as West Virginia law is clear that a self-insured entity, such as J.B. Hunt, is not liable for bad faith, either statutory or common law, [plaintiff] can receive no relief from J.B. Hunt on those grounds. Moreover, inasmuch as the court has determined that independent adjusters retained by a self-insured entity have no greater liability for bad faith claims than that of the self-insured entity, [plaintiff] is not entitled to relief from Custard or Robertson."). Nor do we believe the Legislature intended the Act to apply to entities like ESC that simply process claims for self-insured workers'

compensation employers.¹⁶ Therefore, we affirm the trial court's dismissal of Mrs. Wetzel's bad faith claim.

IV.

CONCLUSION

In view of the foregoing, we affirm the trial court's order granting summary judgment in favor of ESC.

Affirmed.

¹⁶Under a new provision of the current workers' compensation statutes, the Legislature has expressly stated that a violation of the Insurance Code, of which the Act is a part, by entities like ESC cannot be the basis of a civil action by an employee. *See* W. Va. Code § 23-2C-21(a) (2005) ("No cause of action may be brought or maintained by an employee against a private carrier or a third-party administrator, or any employee or agent of a private carrier or third-party administrator, who violates any provision of this chapter or chapter thirty-three [§§ 33-1-1 *et seq.*] of this code."). This statute is not applicable to the instant case because it was enacted after the litigation began.