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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Albright, Justice, dissenting:

I respectfully dissent from the majority opinion and would hold that the trial court erred in granting summary judgment to Employers Service Corporation (hereinafter "ESC"). In my view, ESC is not immune from liability to Mrs. Wetzel in this case, and ESC is subject to liability under the Unfair Trade Practices Act. *See* W.Va. Code § 33-11-1, et seq. ESC is a third-party administrator of a self-insured employer, Chemical Leaman. The relationship between Chemical Leaman and ESC was established subsequent to the *election* of Chemical Leaman to operate as a self-insured employer under West Virginia Workers' Compensation law. In its capacity as a third-party administrator, ESC seeks to be sheltered from liability for its actions in this case, based upon both its perception of its role as an entity not engaged in the business of insurance and its belief that it is shielded from liability by statutory immunities. It has prevailed in its endeavor to convince a majority of this Court that its arguments are correct. Therefore, rules the majority opinion, ESC has been protected from liability.

This Court held in *Taylor v. Nationwide Mutual Insurance Co.*, 214 W.Va. 324, 589 S.E.2d 55 (2003), that an insurance adjuster could be held liable for its actions

under the Unfair Trade Practices Act. 214 W.Va. at 326, 589 S.E.2d at 57. As a practical matter, the functions performed by ESC as a third-party administrator are essentially those of an insurance adjuster. The majority in this case apparently accepts neither the concept of self-insured employers' workers' compensation as the business of insurance nor the concept of ESC serving the role of an adjuster. Yet, in the most fundamental sense, an employer electing to be self-insured provides the insurance,[1] and the entity hired to administer the self-insured employer's workers' compensation cases provides the role of an adjuster. The

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[1]Workers' compensation has been treated as a type of insurance in opinions of this Court. In *State ex rel. Abraham Linc. Corp. v. Bedell*, 216 W.Va. 99, 602 S.E.2d 542 (2004), for instance, this Court quoted, with approval, from an explanation of the philosophy behind the formation of the workers' compensation system, as follows:

> "That philosophy has commonly been described as a *quid pro quo* on both sides: in return for the purchase of *insurance against job-related injuries*, the employer receives tort immunity; in return for giving up the right to sue the employer, the employee receives swift and sure benefits." *Dominion Caisson Corp. v. Clark*, 614 A.2d 529, 532-33 (D.C.1992) *quoting Meiggs v. Associated Builders, Inc.*, 545 A.2d 631, 634 (D.C.1988), *cert. denied*, 490 U.S. 1116, 109 S.Ct. 3178, 104 L.Ed.2d 1040 (1989).

216 W.Va. at 103 n.7, 602 S.E.2d at 546 n.7 (emphasis supplied). Moreover, the statutory scheme of this state envisions Insurance Commissioner review of self-insurers. West Virginia Code § 23-2-9(a)(3) currently provides: "An annual review of each self-insurer's continuing ability to meet its obligations and the requirements of this section shall be made by the Insurance Commissioner." The third-party administrator is also controlled by the Insurance Commissioner, to the extent stated in West Virginia Code § 23-2-9(i): "An employer may not hire any person or group to self-administer claims under this chapter as a third-party administrator unless the person or group has been determined to be qualified to be a third-party administrator by the Insurance Commissioner pursuant to rules adopted by the board of managers or Industrial Council."

majority deprives Mrs. Wetzel of a remedy based upon the labyrinth of relationships among the business entities and based upon the manner in which the employer, Chemical Leaman, elected to establish its workers' compensation coverage.

The potential tort liability of a workers' compensation insurer for willful or reckless disregard of the obligation to pay benefits is not a novel concept. It has been recognized by several jurisdictions for many years. In *Catron v. Tokio Marine Management, Inc.*, 978 P.2d 845 (Haw. 1999), for instance, the court found that a bad faith claim against an employer's workers' compensation insurer is not barred by the exclusive remedy provisions. The fact that an employer is self-insured does not affect the underlying resolution; common law tort liability still exists. In *McIlravy v. North River Insurance Co.*, 653 N.W.2d 323 (Iowa 2002), the Iowa court held that a "self-insured employer or employer's workers' compensation carrier may be penalized for a delay in payment of benefits . . . by a private cause of action for first-party bad faith." 653 N.W.2d at 328-29. The *McIlrvay* court explained that "[b]ad faith claims are applicable to workers' compensation insurers because they hold the discretionary power to affect the statutory rights of workers, which clearly reflects their obligation to act in good faith in the exercise of this authority." 653 N.W.2d at 329.

In *Sizemore v. Continental Casualty Co.*, 142 P.3d 47 (Okla. 2006), the court found that where an insurer fails to act with good faith and fair dealing in paying an award, the claimant has a common law action for bad faith, and such action can be brought against the workers' compensation insurer or a self-insured employer. It is axiomatic that an insurer has an implied duty of good faith and fair dealing in its relationship with the insured. As the court in *Sizemore* observed, "[w]orkers . . . enjoy both a contractual and a statutory status as third party beneficiaries of a workers' compensation insurance agreement." 142 P.3d at 51. "Thus, the right to enforce the insurance agreement, and the attendant duty of good faith and fair dealing implied in that contract, belongs to the injured worker. This is true whether the insurer is an insurance company or a self-insured employer who voluntarily assumes insurer status." *Id.* (footnote omitted).

In accord with these well-reasoned cases, I believe that Mrs. Wetzel should be entitled to maintain a bad faith action against ESC under the circumstances of this claim which occurred prior to the 2005 enactment of West Virginia Code § 23-2C-21(a) (2005), providing as follows: "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 [§§ 33-1-1et seq.] of this code."

In addition to my belief that Mrs. Wetzel has a claim against ESC under the Unfair Trade Practices Act, I join the dissent of Justice Starcher on the issue of the absence of statutory immunity. The immunity conferred upon an employer is premised upon the occurrence of an accidental personal injury arising out of and in the course of employment.[2] An insurer's bad faith failure to pay an award is not an injury arising in such manner and is consequently not covered by the statutory immunity. "A bad faith claim is separate and apart from the work relationship, and it arises against an insurer only after there has been an award against the employer." *Goodwin v. Old Republic Ins. Co.*, 828 P.2d 431, 434 (Okla. 1992).

In *Brodeur v. American Home Assurance Co.*, 2007 WL 2917129 (Colo. 2007), the Colorado court observed that the legislature had not intended to abrogate common law bad faith tort remedies when it enacted additional legislation providing remedies for claimants in the workers' compensation arena. "Thus, we have consistently held that bad faith tort claims are distinct and separate actions available to workers' compensation claimants in addition to remedies under the Workers' Compensation Act, and that the resolution of bad faith tort claims is independent from the resolution of workers' compensation claims." 2007 WL 2917129 at *5. The court reasoned: "The injury

[2]As this Court recognized decades ago, "[t]he Workmen's Compensation Act was designed to remove *negligently* caused industrial accidents from the common law tort system." *Mandolidis v. Elkins Indus., Inc*., 161 W.Va. 695, 700, 246 S.E.2d 907, 911 (1978), *superseded by statute as stated in Handley v. Union Carbide Corp*., 804 F.2d 265, 269 (4th Cir.1986). It was not designed to remove bad faith actions based upon improper handling of claims from the common law tort system.

underlying Petitioner's bad faith tort claims was the fact that Brodeur did not receive medical treatment in a timely manner. This injury occurred regardless of the ultimate outcome in the workers' compensation proceeding." *Id*. at *6.

The act upon which Mrs. Wetzel has attempted to premise her cause of action occurred outside the scope of the exclusive remedy provisions of the workers' compensation statutory scheme. It is completely improper for this Court to expand those immunity provisions beyond that which the legislature intended.

Based upon the foregoing, I respectfully dissent from the majority opinion in this case.