

No. 33337

*Mary H. Wetzel, individually and as executrix of the Estate of Robert H. Wetzel, deceased, v. Employers Service Corporation of West Virginia*

**FILED**

**November 9,**

**2007**

**released at 10:00 a.m.**

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

Starcher, J., dissenting:

I respectfully dissent from the majority's opinion because of its piecemeal and incomplete examination of the record and of the Workers' Compensation Act. The majority's opinion essentially began with the presumption that defendant Employers Service Corporation ("ESC") was immune, and then proceeded to pick and choose parts of the record and the Act that supported that position.

This case really centers on the sixteen physician visits for which ESC refused to pay. The parties are in agreement that these visits were all related to Mr. Wetzel's work-related lung injury – an injury that the Workers' Compensation Commissioner had ruled compensable. The physician submitted the proper forms requesting payment to ESC, along with copies of Mr. Wetzel's medical records indicating the visits were related to his compensable injury.

ESC, however, simply didn't pay the doctor for the visits. The majority opinion repeatedly states that, at that moment, Mr. Wetzel should have exercised his statutory and regulatory right to protest the denial of his benefits. *See* \_\_\_ W.Va. at \_\_\_ n. 5 and \_\_\_ n. 12, \_\_\_ S.E.2d at \_\_\_ n. 5 and \_\_\_ n. 12 (Slip. Op. at 3 n. 5 and 12 n. 12). The problem with the majority opinion's statement is that, in the bureaucratic world of workers'

compensation, *there was nothing to protest*. *W.Va. Code*, 23-5-1(b) [1993]<sup>1</sup> states that decisions regarding benefits must be made “in writing,” and then, within thirty days, the parties have an opportunity to file any objections. In this case, ESC never issued any writing – to Mr. Wetzel or to the doctor – refusing to pay for the doctor visits; instead, bills submitted by the doctor simply weren’t paid. Hence, Mr. Wetzel was never on notice of ESC’s decision, or the basis for its decision, and in the absence of a writing had nothing to which to object.

This Court routinely refuses to hear appeals from parties who are aggrieved by a circuit judge’s unwritten, oral statements. Until the circuit judge formalizes his or her decision in a written, signed final order, this Court holds that there is simply nothing to appeal. *See, e.g., W.Va.R.Civ.Pro.* Rule 58 (“the court shall promptly settle or approve the form of the judgment and sign it as authority for entry by the clerk. The clerk, forthwith upon receipt of the signed judgment, shall enter it in the civil docket. . . . The notation of a judgment in the civil docket . . . constitutes entry of the judgment; and the judgment is not effective before such entry.”). Yet, in this case, the majority opinion faults a party for not appealing when there was nothing to appeal.

When the doctor’s office later inquired by telephone, ESC told the doctor’s employees that the visits weren’t being paid because they had been deemed unrelated to Mr.

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<sup>1</sup>All of the statutory code sections of the Workers’ Compensation Act to which I refer, unless otherwise noted, are those sections in effect at the time the cause of action arose between 1993 and 1995.

Wetzel's occupational injury. Again, ESC didn't orally say *why* they were deemed unrelated, nor did they tell the doctor or Mr. Wetzel in writing *why* the bills were deemed unrelated; they just refused to pay the bills.

At this point, it appears that the doctor's office contacted Mr. Wetzel and informed him that he would have to personally pay the bills because, for unknown reasons, ESC was refusing to pay for the sixteen office visits. Mr. Wetzel contacted his workers' compensation attorney, and the attorney then wrote to ESC inquiring why the bills were not being paid and asking ESC to authorize the office visits. The attorney, in her deposition, stated that she had "represented, literally, thousands of workers' comp claimants over the years," and said "I can't think of a single other time that I've had problems getting payment for office visits."

In hindsight, during the course of the instant lawsuit, ESC finally admitted the reason it didn't pay for the doctor office visits. The text of the paperwork submitted by the doctor to ESC clearly indicated that the office visits were related to Mr. Wetzel's employment injury. However, in the corner of the form, the doctor's office had written the wrong diagnosis billing code number which suggested that the office visits were for illnesses unrelated to Mr. Wetzel's employment injury – and, relying solely upon the code number, ESC refused to pay for the visits.

One of my many reasons for dissenting is this: What I just described above, the majority opinion summarizes in one sentence in a two-sentence footnote; and with the other sentence, the majority opinion summarily concludes that ESC was blameless and the

doctor was entirely at fault for not reading ESC's mind, and resubmitting the bills with the correct code. \_\_\_ W.Va. at \_\_\_ n. 4, \_\_\_ S.E.2d at \_\_\_ n. 4 (Slip. Op. at 2 n. 4). This is, of course, contrary to footnotes 5 and 12, where the majority opinion places the blame squarely upon Mr. Wetzel for not protesting decisions that were never written, never explained, and never conveyed to Mr. Wetzel until shortly before he died.<sup>2</sup>

Another of my reasons is that the immunity from employee lawsuits conferred upon an employer by *W.Va. Code*, 23-2-6 [1991] and -6a [1949] is not, as the majority of this Court wishes, nearly infinite in its reach. That immunity is premised solely upon the occurrence of an accidental injury or death to an employee "in the course of and resulting from" the employment that is compensable under the Act. *W.Va. Code*, 23-2-1 [1989]. Any injury or death caused by an employer to an employee that arises outside of the employer's workplace or outside the furtherance of the employer's business, and which is not compensable under the Act, is not subject to immunity.

Logically, this means that injuries that arise outside of the employer's business are compensable, not through the workers' compensation system, but through a recognized

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<sup>2</sup>The majority opinion does, however, accidentally create an absurd proposition. *W.Va. Code*, 23-5-1 [1993] establishes a clear-cut thirty-day limitation period on the filing of any objections to any *written* decision respecting a workers' compensation award. The statute even specifies that the *written* decision *shall* notify the parties of the thirty-day limitation period. Since ESC's decision to not pay Mr. Wetzel's bills was not in writing and did not notify him in writing of the limitation period, then logically, the thirty-day limitation period has never been triggered and never started to run. Does this mean that, some fourteen years later, counsel for Mr. Wetzel can legally protest ESC's refusal to pay for the office visits?

common law cause of action. Hence, as my colleague Justice Albright notes in his dissent, courts nationwide have recognized that employers, workers' compensation insurers, and workers' compensation claims handlers can be subjected to damages caused by an unreasonable or bad faith refusal to pay benefits. *See* Arthur Larson and Lex K. Larson, *Larson's Workers' Compensation Law*, § 104.05[3] "Intentional Harassment by Delay or Termination of Payment or Treatment"; Michael A. Rosenhouse, "Tort Liability of Worker's Compensation Insurer for Wrongful Delay or Refusal to Make Payments Due," 8 ALR4th 902 (1981).

This interpretation of the Workers' Compensation Act is wholly supported by the Act itself. The Act specifically mandates that if a self-insured employer (like Mr. Wetzel's employer, Chemical Leaman) unreasonably refuses to pay benefits, then the self-insured employer loses any and all immunity conferred by the Act. *Ipsa facto*, if a self-insured employer isn't immune, then any agent of the employer (like ESC) would also be subjected to civil liability.

*W.Va. Code*, 23-2-8 [1991] sets forth the circumstances under which a self-insured employer can lose any immunity conferred by *W.Va. Code*, 23-2-6. The statute states that if an employer elects to be self-insured and "pay individually and directly . . . compensation and expenses to injured employees," but then is "in default in the payment of [the] same" compensation and expenses, then the self-insured employer

shall be liable to their employees . . . for all damages suffered by reason of personal injuries sustained in the course of employment caused by the wrongful act, neglect or default of

the employer or any of the employer's officers, agents or employees while acting within the scope of their employment and in the course of their employment . . . and in any action by any such employee or personal representative thereof, such defendant shall not avail himself of the following common-law defenses: The defense of the fellow-servant rule; the defense of the assumption of risk; or the defense of contributory negligence; and further shall not avail himself of any defense that the negligence in question was that of someone whose duties are prescribed by statute. . . .

In other words, if a self-insured employer unreasonably fails to pay compensation and expenses to its injured employees, then the injured employee can sue the employer for any and all common-law damages, for both their work-related injury and for the injury caused by the refusal to pay the compensation and expenses.

This interpretation is buttressed by reading *W.Va. Code, 23-2-8 in pari materia* with the statute setting out the rights and responsibilities of a self-insured employer, *W.Va. Code, 23-2-9* [1991]. *W.Va. Code, 23-2-8* says that if a self-insured employer has not “otherwise fully complied with the provisions of . . . section nine of this article,” then the self-insured employer is not immune and “shall be liable to their employees . . . for all damages suffered[.]” Section nine of the article, *W.Va. Code, 23-2-9*, required self-insured employers to pay “pecuniary compensation or medical attention . . . of the value at least equal to the compensation provided in this chapter[.]” Again, reading these statutes together, one must conclude that if a self-insured employer (or its agent) refused to pay for “medical attention” for an employee, then the self-insured employer (or its agent) could be subjected to civil liability.

This interpretation is further buttressed by later amendments to *W.Va. Code*, 23-2-9 by the Legislature in 2005 and 2007. Long after Mrs. Wetzel's cause of action against ESC arose, *W.Va. Code*, 23-2-9 was amended to also make it clear that if an employer "ceases to make required payments to the employer's injured employees," or "defaults . . . in any payment required to be made as benefits," then the employer is in default.<sup>3</sup> And, as I just said, an employer in default is subject to liability pursuant to *W.Va. Code*, 23-2-8.<sup>4</sup>

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<sup>3</sup>In 2005, *W.Va. Code*, 23-2-9(f)(1) [2005] was amended to state that "[A]ny self-insured employer who, without good cause, ceases to make required payments to the employer's injured employees . . . as benefits provided for by this chapter . . . is in default." In 2007, the statute was dramatically re-written, but still states that "if a self-insured employer defaults . . . in any payment required to be made as benefits . . . to the employer's injured employees," the Insurance Commissioner and self-insured employer must do certain things to "remov[e] the employer from default status." *W.Va. Code*, 23-2-9(d)(1) [2007].

<sup>4</sup>As Justice Albright suggests in his separate opinion, the 2005 adoption of *W.Va. Code*, 23-2C-21 [2005] creates a host of confusion in this area. *W.Va. Code*, 23-2C-21(a) states that "[n]o cause of action may be brought or maintained by an employee against a . . . third party administrator . . . who violates any provision of this chapter[.]"

First, the Legislature's adoption of this statute in 2005 suggests that the Legislature believed, prior to 2005, that a cause of action could be brought against a third party administrator like ESC. In other words, it means the majority opinion found there was no cause of action under the statute when the drafters of the statute thought there was one.

Second, presuming that *W.Va. Code*, 23-2C-21 is constitutional, reading it together with *W.Va. Code*, 23-2-8 [1991] and *W.Va. Code*, 23-2-9 [2007] leads me to a horrifying conclusion: if, today, a third party administrator like ESC wrongfully failed to pay required benefits on behalf of a self-insured employer, then the self-insured employer would be in default and subject to liability, but the third-party administrator would be immune.

These arguments are entirely speculative, since *W.Va. Code*, 23-2C-21 was not raised by either party in this case.

Mrs. Wetzel should have her day in court to tell a jury how ESC's actions created stress and anguish that potentially shortened the life of her husband. Mr. Wetzel died thinking he was saddling his bride of many years with unpaid debts that arose from his employment. The majority opinion never mentions the facts I discussed above, never mentions these arguments, never mentions these statutes, because to do so would have crippled the majority's pre-formed position. The majority opinion cherry-picked its facts and its law to create immunity for employers and their agents far beyond that ever envisioned by the Legislature. And Mrs. Wetzel, a widow, now suffers as a result.

I therefore respectfully dissent.