

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

No.33337

MARY H. WETZEL, individually
and as Executrix of the
Estate of Robert H. Wetzel,
deceased,

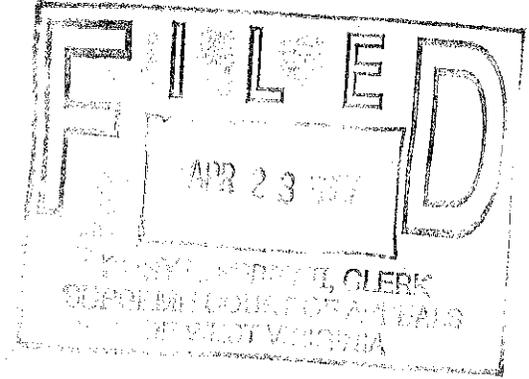
Plaintiff/Appellant,

vs.

EMPLOYERS SERVICE
CORPORATION OF WEST
VIRGINIA,

Defendant/Appellee.

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CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA
CIVIL ACTION NO. 96-C-172K

BRIEF OF APPELLANT

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I.

KIND OF PROCEEDING AND NATURE OF RULING BELOW

The question presented is whether a company hired to administer a self-insured workers compensation plan can escape liability for bad faith conduct which causes or accelerates a claimant's death.

Employers Service Corporation of West Virginia (ESC) is in the business of administering workers compensation plans for self-insured employers in four states. Robert Harry Wetzel suffered a life threatening lung disease as a result of the toxic exposure in the course of his employment. ESC processed Wetzel's claim, delaying or denying outright requests for medically necessary treatment that were obviously related to his compensable injury.

Harry Wetzel died and his widow, Mary, sued ESC alleging that its bad faith conduct accelerated Wetzel's pain, suffering and eventual death. Two experts testified that ESC's handling of Wetzel's claim did not comply with industry standards. Two additional experts testified that ESC's improper claims handling did, in fact, contribute to his death. Nevertheless, the trial court granted summary judgment in favor of ESC, concluding that it was protected by workers compensation immunity under W.Va. Code 23-2-6a and that Mrs. Wetzel was without a legal remedy. The trial court also held that ESC was not in the business of insurance and, thus, could not be found liable under the Unfair Trade Practices Act, W.Va. Code 33-11-1 et seq.

For the reasons set forth herein, the summary judgment order should be REVERSED so that Mrs. Wetzel's claims can be presented to a jury.

II.

STATEMENT OF FACTS

Robert Harry Wetzel was employed as a truck driver for Chemical Leaman Tank Lines from September 19, 1983 until his death on September 5, 1995. In the course of his employment with Chemical Leaman, Harry Wetzel was required to load, transport and unload Toluene Disocyanate (TDI). TDI is a toxic chemical, famous for its use as a chemical weapon in World War I. Exposure to TDI can cause severe, permanent lung damage. On several occasions, Wetzel was exposed to unsafe levels of TDI, and, as a result, he contracted TDI-induced asthma and pulmonary fibrosis. These diseases are progressive in nature and are life-threatening without the benefit of timely and appropriate medical care.

At all relevant times, Chemical Leaman was a self-insured employer under West Virginia's workers compensation law. Chemical Leaman contracted with the Defendant, Employers Service Corporation ("ESC"), to serve as the administrator of its self-insured workers compensation plan. ESC is a multi-state corporation with offices in West Virginia, 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 compensation programs.

ESC provides similar administering services for both workers compensation and unemployment compensation plans. Basically, for a fixed fee, ESC assumes all claims handling responsibility including processing, reviewing and approving claims and requests for medical services, expenses, etc., made by individual employees. As a matter of law, EEC is required to apply the same standards for compensability and payment of benefits as the workers compensation commissioner.

Following his last exposure on November 16, 1992, Wetzel applied for workers compensation benefits. On January 12, 1993, the commissioner entered an order determining Wetzel's claim to be compensable. Thereafter, he saw his family physician, Dr. Emch, who

treated his pulmonary condition with medications including Rhenatrex, Prozac and Prednisone. These office visits were medically necessary and reasonably related to Wetzel's occupational injury. Dr. Emch and other healthcare providers requested reimbursement for their medical services from Chemical Leaman's self insured plan. In some instances, ESC denied payment for reasons which lacked a basis in law or fact. In other instances, ESC improperly delayed payment.

ESC's conduct in denying and delaying payment for treatment that was obviously related to Wetzel's TDI exposure was, in a word, egregious. Sue Howard, one of the most experienced workers compensation attorneys in the Northern Panhandle and likely all of West Virginia, testified as follows:

Q Just generally, and then I'll get into the specifics, what opinions do you have, if any, regarding Employers Service Corporation handling of Mr. Wetzel's 1992 claim?

A My opinion is that they did not properly pay for routine office visits with his treating physician.

When I acquired the information from the doctor to try to find out why these visits weren't being paid, the contact that Employer Services had with Dr. Emch's office seemed to be that the need for the office visit was unrelated to the occupational injury. Whereas, the office notes that Dr. Emch had sent in in conjunction with the request for payment clearly indicated that Harry was being treated for his lung condition. That was, in my opinion, an inappropriate denial.

HOWARD DEPOSITION, AT 7-8.

Attorney Howard further explained that the denials of Wetzel's claims for routine office visits were virtually unheard of in workers compensation cases.

I believe that that was in 1994, which would have been about a year before Harry died. I had written a letter that I have never written in another claim before or since, that said, "Please authorize these office visits, they're not being paid for."

ID., AT 8.

Howard described ESC's role in paying routine office visits as mere "process[ing]" and repeated, again, that she could not remember another single occasion that the administrator of a self insured plan had denied a request for payment involving a routine office visit:

Q. When you have a self-insured entity, who has the ultimate decision-making power, if you will, of deciding whether treatment, a certain treatment, is authorized?

A. Well, in general, workers' compensation makes decisions on authorization for treatment, but when it's a routine-type of treatment, such as an office visit, workers' compensation doesn't issue authorizations for routine office visits with authorized treating physicians. They'll authorize Dr. Emch to treat, for example, but not send an order out that specifies that the claimant's entitled to ten office visits, for example. That's something that the self-insured or the third-party administrator is to just process. It's been that way in every claim I can ever think of.

I've represented, literally, thousands of workers' comp claimants over the years, and I can't think of a single other time that I've had problems with getting payment for office visits. It's always medication, or it's always a denial for an MRI. I just can't remember this ever coming up in any other claim, it's something that's just always paid. If the bill is to be sent to workers' compensation, they just paid for that office visit. They -- I can't recall them denying an office visit for an authorized treating physician on a routine office visit. Consultations, yes. The doctor might want to refer a claimant to a specialist, for example. There might be an issue of whether that might be needed, and I've seen that happen. But I can't recall it happening to treating physicians.

ID., AT 11-14.

Howard also testified that ESC's failure to pay for Wetzel's treatment contributed to his level of anxiety and stress over having his medical treatment paid for, and, in the end, contributed to his death:

Q Do you have an opinion as to whether ESC's handling of Mr. Wetzel's claim contributed to his death?

A I think in terms of a professional opinion, that's probably outside of my degree, my expert legal opinion. If you were to ask me as a

layperson, I'd have to answer you yes, simply because Harry was a very responsible person. I never ever recall him telling me that he was afraid to die. He was always afraid of what would happen to his wife. He couldn't stand to be dunned, he couldn't stand to take charity, and he couldn't stand to not have things paid for on his behalf. I mean, he had a very strong idea of right and wrong, and he didn't want to incur any obligations that he couldn't pay for.

His claim, I believe, closed for indemnity benefits sometime in 1993, then for a few months, he received vocational rehabilitation benefits. So, he had no resources, and I know Mary went to work in a nursing home making minimum wage and, on that, managed to pay for his medication. It was hard on him to think about incurring bills and because that chilling effect, if you will, was in place, I think that that did contribute to his death.

I can tell you he is in a vast, vast minority of my clients who ever had to contact me to get treatment covered this way. I can't think of a single other client, and I really think that this includes my other clients who had TDI, but I can't think right now of any other client who ever had a routine office visit with an authorized treating physician denied coverage for that office visit. That's a big problem.

ID., AT 23-24.

Howard's opinion was confirmed by two medical professionals including Dr. Michael Blatt, a board certified pulmonologist. Dr Blatt identified two ways that stress played a role in Wetzel's death. First, he testified that the stress of ESC's failure to pay Wetzel's medical bills operated "mechanical[ly]" on Wetzel's body leading to a myocardial infarction. BLATT DEPOSITION, AT 21. Second, this same stress caused a significant--and harmful--dropoff in Harry Wetzel's visits to Dr. Emch despite a worsening of his lung condition. Thus, he was deprived of necessary treatment. ID., AT 22.

Furthermore, Dr. Blatt testified that ESC's failure to approve a referral of Harry Wetzel to a pulmonary specialist prevented him from receiving appropriate, lifesaving treatment, shortening his life by as much as ten years:

Q. Did the fact that Dr. Emch was not getting paid for some of these office visits, do you believe that had an adverse effect on Mr. Wetzel's health?

A. Yes.

Q. Could you elaborate on those adverse effects?

A. It's my opinion that Dr. Emch did not get to see sufficiently enough of Mr. Wetzel to refer him earlier to a respiratory disease specialist where treatment could have been--more effective treatment could have been enacted.

Q. Can you quantify how much his life could have been extended?

A. I believe that Mr. Wetzel's life would have extended perhaps another ten years as a result of this. He clearly had stage of end stage lung disease, options could have been used that were not used, and he needed certainly more specialty care at that point.

Q. Can you state that his life would have been extended by ten years to a reasonable degree of medical probability?

A. Yes, ma'am, I can.

BLATT DEPOSITION, AT 15-17.

Dr. Emch, who treated Harry Wetzel throughout his illness, testified that he personally observed Wetzel's "deteriorat[ing]" mood and demeanor caused by the stress of ESC's failure to pay for treatment. This, he opined, contributed to Wetzel's untimely death:

Q. Do you believe that the stress that you've discussed or you've described that Mr. Wetzel felt for the fact that these payments weren't being made and he was concerned over that--

A. Yeah.

Q. Do you believe that stress contributed to his death?

A. Seeing how he had deteriorated with it, I think it probably played--stress played a role in his death based on the autopsy report.

Q. Can you state to a reasonable degree of medical probability that the fact that these office visits that I just listed in the previous questions were denied was a cause of his death or the payments for those office visits were denied were a cause of his death?

A. If we attribute some stress to the death, yes.

Q. Do you believe stress was a cause of his death to a reasonable degree of medical probability?

A. Partly, part of its cause. I mean, you can't measure stress in an autopsy, but personally, with regard to personal

information, watching his condition over the years, watching his demeanor and his mood over the years.

EMCH DEPOSITION, AT 24-25.

While Harry Wetzel died from TDI exposure, ESC caused him endless anguish and grief by denying payment of routine bills. At the same time, his wife had to take a job, instead of being by her husband's side, for fear that the expense would ruin the family after Harry's death. A more clear cut case of the tort of outrage could not be stated. Mary Wetzel's own testimony further shows the humiliation to which Harry Wetzel, a hard-working, honest man was put by the improper, wrongful and unheard of denials of approval for routine medical visits or medications.

Q. When your husband would receive a letter from Employers Service Corporation or from Workers' Compensation saying that a certain treatment or certain medication had been denied, how would he react to that? Did it upset him?

A. Yeah.

Q. Did he have --

A. It upset him. In fact, one time they told him -- he said he didn't have any money to buy the medicine with that he needed, the doctor prescribed for him, and they even told him -- they said, "Well, can't you go to your church? Won't they give you money to help pay your expenses?" and he was very humiliated.

MARY WETZEL DEPOSITION, AT 13-14.

On September 5, 1995, Wetzel died at the age of 49 as a result of the progression of his TDI related condition. ESC's refusal to authorize medically necessary services and to pay for those services deprived Wetzel of the opportunity to reduce his pulmonary symptoms, decrease his pain and suffering, and extend his life expectancy. Furthermore, Harry Wetzel was haunted throughout his last days with the fear that his widow, Plaintiff Mary Wetzel, would be left with a raft of unpaid medical bills following his death. Mr. Wetzel became severely depressed and was placed on Prozac as a result of ESC's tortious conduct. ID., AT 14-17. Those who were close to Mr. Wetzel throughout his last days know

of the extreme emotional anguish Mr. Wetzel suffered as ESC repeatedly, but inexplicably delayed and denied his valid claims for benefits due.

Following her husband's death, Mary Wetzel brought a complaint against ESC alleging theories of intentional infliction of emotional distress, bad faith and negligence. The case proceeded through discovery. Eventually, the trial court granted summary judgment in ESC's favor citing two basic grounds. First, the trial court held that ESC was an "agent" of the employer for purposes of W.Va. Code 23-2-6a and, thus, was protected by the employer's immunity. Mrs. Wetzel's proof, no matter how compelling, could not overcome this immunity. 8/15/06 ORDER, at 4-5. Second, the trial court held that ESC was not an "insurer" subject to the Unfair Trade Practices Act, W.Va. Code 33-11-1 et seq. The trial court's ruling effectively held that the acceleration of Mr. Wetzel's death is a wrong without a remedy since it is not compensable through workers compensation and ESC is also protected by immunity. Mrs. Wetzel appeals, asking this court to REVERSE the trial court's summary judgment order.

III.

ASSIGNMENTS OF ERROR

Assignment of Error No. 1: The court erred in refusing to apply the test set forth in Deller v. Naymick, 176 W.Va. 108, 342 S.E.2d 73 (1985) when determining whether the defendant, ESC, was an "agent" of Chemical Leaman for purposes of immunity under W.Va. Code 23-2-6a.

Assignment of Error No. 2: The court erred in concluding that the defendant, ESC, as a third party administrator of a self insured workers compensation plan, was immune under W.Va. Code 23-2-6 and -6a for improperly denying and/or delaying payments for medically necessary treatment where the evidence demonstrated that its conduct caused or accelerated

the employee's death.

Assignment of Error No. 3: The court erred in concluding that the defendant, ESC, as a third party administrator of a self insured workers compensation plan, was not in the business of insurance for purposes of the Unfair Trade Practices Act, W.Va. Code 33-11-1 et seq.

IV.

STANDARD OF REVIEW

“A circuit court's entry of summary judgment is reviewed de novo.” Syllabus Point 1, Painter v. Peavy, 192 W.Va. 189, 451 S.E.2d 755 (1994).

Furthermore, the issues involved herein are issues of statutory construction which, likewise, are reviewable under a de novo standard. Crystal R. M. v. Charley A. L., 194 W.Va. 138, 459 S.E.2d 415 (1995).

V.

ARGUMENT

A.

ESC IS NOT AN “AGENT” OF CHEMICAL LEAMAN FOR PURPOSES OF THE WORKERS COMPENSATION IMMUNITY PROVISIONS CONTAINED IN W.VA. CODE §23-2-6a

W.Va. Code 23-2-6a provides, in part, that an employer's immunity under the workers compensation laws also extends “to every officer, manager, agent, representative or employee” thereof while acting in furtherance of the employer's business. ESC argues that it is an “agent” within the meaning of this code section.

In the proceedings below, ESC cited Deller v. Naymick, 176 W.Va. 108, 342 S.E.2d 73 (1985) as support of its argument that it is an “agent” of Chemical Leaman and, thus, entitled to immunity. Deller, however, actually militates against immunity. The Plaintiff in Deller received an occupational injury to his knee while working as a Weirton Steel employee. For this injury, he was treated by Dr. Naymick at the company’s infirmary. Dr. Naymick was employed by Weirton Steel on a fulltime basis, working “as a salaried employee, 8 hours a day, Monday through Friday.” Id. at 109, 342 S.E.2d at 74. The plaintiff sued Dr. Naymick alleging malpractice in the treatment he rendered. Critically, Deller established the following test for determining when an individual providing professional services is entitled to immunity (the latter part of which was codified in syllabus point 1):

Ordinarily, a member of a profession is not considered to be an “employee,” within the meaning of workers’ compensation laws, because he usually provides his services for a limited purpose and only for particular transactions. Id., 76 W.Va. at 704, 182 S.E. at 827-28. On the other hand, 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 service [his or her] employer[.]” Id., 116 W.Va. at 704, 183 SE. at 828.

Id., at 113, 342 S.E.2d at 76.

Clearly, ESC cannot meet this test. In effect, Deller creates a presumption that someone providing professional services to an employer is not protected by the employer’s immunity. It is only when a professional provides his services on an exclusive basis and, at all times, holds himself “in readiness...to serve his employer” that an agency relationship will be found to exist.

In Deller, Dr. Naymick was a fulltime Weirton Steel employee whose private practice

was thereby "limited." In this case, ESC is hardly in Dr. Naymick's position. ESC is a large, multistate corporation providing claims administration, consulting, risk management and related services to hundreds of area businesses. Its ability to provide those same services to other business is unaffected by its contractual obligations to Chemical Leaman.

Inexplicably, the court below did not cite Deller or its test. Instead, at ESC's urging, the court attempted to draw a distinction between an "employee" and an "agent." Deller, it held, was attempting to define who is an "employee" under W.Va. Code 23-2-6a. But ESC was acting as an agent, not as an employee. Therefore, Deller is inapposite--or so the argument goes. Instead, the trial court looked to general agency law, concluding that an agent is "anyone authorized by another person to act for [or] in place of him" or anyone "entrusted with another's business." 8/15/06 ORDER, at 4.

In reaching this conclusion, the court plainly erred. First, the court's resort to a common law definition of who is, and is not, an agent for purposes of W.Va. Code 23-2-6a is plainly and fundamentally wrong. The common law plays no part whatsoever in establishing the workers compensation system or defining liabilities or immunities. Accordingly, common law definitions are meaningless in this context:

The rights granted and liability imposed under the [workers compensation] acts are not common law rights and liabilities, for the reason that the acts are in derogation of, or a departure from, the common law, and are not amendatory, cumulative, or supplemental thereto, or declaratory thereof, but wholly substitutional in character. Accordingly, the liability of the employer to pay compensation arises from the compensation law itself, and not from the common law.

99 C.J.S., Workers Compensation §23; see also Jones v. Laird Foundation, Inc., 156 W.Va. 479, 489, 195 S.E.2d 821 (1973)("[t]he very purpose of the workmen's compensation laws is

to release both the employer and employee from the often burdensome common-law rules of liability and damages”).

Furthermore, this state’s workers compensation laws must be liberally construed in favor of compensation--not immunity: “Compensation acts, being highly remedial in character, though in derogation of the common law, should be liberally and broadly construed to effect their beneficent purpose.” Plummer v. Workers Compensation Division, 209 W.Va. 710, 714, 551 S.E.2d 46 (2001). Obviously, the trial court chose to define the word “agent” in a manner that practically guarantees immunity. In fact, its definition is so broad that any professional or, indeed, anyone performing services on a contract basis would be covered and entitled to assert immunity.

Thankfully, this question is answered by Deller. Citing W.Va. Code 23-2-6a, Deller explained that the reason behind extending immunity to employees, agents, etc., is the fact that they, too, are a part of the “compromise” underlying the workers compensation system. In other words, one of the things a worker expects in return for giving up the right to sue is that he himself will be free from suit by any coworkers. 176 W.Va. at 111, 342 S.E.2d at _____. Accordingly, immunity is only available in situations where the tortfeasor would be entitled to benefits “in the same or similar circumstances.” Helmic v. Paine, 369 Mich. 114, 119 N.W.2d 574, 577 (1963); Meade v. Ries, 642 N.W.2d 237 (Iowa 2002)(citing cases); see generally, Larson & Larson, Workers Compensation Law: Cases, Material and Text 26.03. Certainly, ESC has never been so brazen as to suggest that if any of its employees were injured they would be covered under Chemical Leaman’s workers compensation plan! Nor, of course, did the court below make any such finding.

In essence, ESC is asking the court to give it “freeloader” status. ESC paid no workers

compensation premiums, and, in fact, gave up nothing of value whatsoever in exchange for its claimed immunity. For his part, Wetzel certainly received nothing of value in return. Nevertheless, ESC seeks the benefit of workers compensation immunity. Taken to its logical extreme, anyone performing any type of services for Chemical Leaman including its accountant, its computer repairman, and even its attorney, would be “agents.” Accepting the trial court’s view, if Chemical Leaman’s computer repairman dropped a monitor down the stairwell injuring Harry Wetzel or one of his coworkers, the repairman could claim status as an agent and enjoy full immunity for his negligent acts! Clearly, this kind of absurd result was not intended. The test for determining agency status is clearly set forth in Deller. Under the Deller test, ESC is not an agent. It is providing professional services on a contract basis, and, for this reason, it is not entitled to invoke the immunity provisions contained in W.Va. Code 23-2-6a.

B.

EVEN IF ESC IS AN “AGENT,” IT IS NEVERTHELESS LIABLE FOR ITS INTENTIONAL REFUSAL TO PAY REASONABLE AND NECESSARY MEDICAL EXPENSES RESULTING IN DEATH

Even if ESC is an “agent” protected by Chemical Leaman’s immunity, its conduct in this case is sufficient under West Virginia law to overcome that immunity.

The workers compensation system is fundamentally a “compromise” whereby the employee surrenders his right to sue for damages in exchange for relatively prompt, no-fault benefits. It does not shield the employer from liability for intentional acts causing injury. W.Va. Code 23-4-2(b) (excluding from immunity those injuries resulting from the employer’s “deliberate intention”). Moreover, it does not shield the employer from liability for intentional

acts impairing or defeating an employee's right to obtain benefits. After all, the employee's free access to benefits is the basis for the "compromise."

In Persinger v. Peabody Coal Co., 196 W.Va. 707, 474 S.E.2d 887 (1996), the plaintiff suffered a back injury in a work related accident. The plaintiff's employer fraudulently denied that an injury occurred when, in fact, there was no basis for the denial. The plaintiff sued, in tort, seeking damages for the employer's fraudulent conduct. The court held that the immunity provided under W.Va. Code 23-2-6 "only contemplates an exemption...from liability for damages at common law or by statute for the injury or death of any employee arising out of a negligently-inflicted injury of an employee." ID., at 717, 474 S.E.2d at 897 (interior quotes and footnote omitted). Given the fact that the employer made false statements "with the intention of depriving [the plaintiff] of benefits rightfully due him," the plaintiff was entitled to sue for tort damages. ID.

The trial court interpreted Persinger as establishing a sweeping and incredibly harsh rule requiring proof of fraud before an employee can recover for any kind of misconduct involving claims handling: "Worker's compensation immunity extends to the handling of the claim for benefits by the employer or the employ[er]'s agent or representative unless plaintiff can establish that the claim was handled fraudulently." 8/15/06 ORDER, AT 5. This is clearly a misreading of Persinger—which by its clear language applies only to the employer. Of course, since Mrs. Wetzel is not suing Chemical Leaman, she is not subject to the rigorous "fraud" test set forth in Persinger. That test applies only to employers who have workers compensation immunity.

The logic behind Persinger, however, does apply in this case. Persinger underscores the fact that workers compensation immunity applies only to negligently inflicted injury or death arising out of the employment. At the heart of the workers compensation system lies a

quid pro quo: the employer “is relieved from common law tort liability for negligently inflicted injuries” and, in return, the employee “is assured prompt payment of benefits.” Meadows v. Lewis, 172 W.Va. 457, 469, 307 S.E.2d 625 (1983); see also Messer v. Huntington Anesthesia Group, Inc., 218 W.Va. 4, 9, 620 S.E.2d 144 (2005)(“in return for giving up the right to sue the employer, the employee receives swift and sure benefits”). Obviously, then, where an injury is not covered by the workers compensation law and subject to compensation thereunder, no immunity exists. See, e.g., Marlin v. Bill Rich Construction, 198 W.Va. 635, 482 S.E.2d 620 (1997).

Improprieties in the handling of a worker’s compensation claim clearly fall outside of the scope of immunity. In fact, one of the cases cited with approval in Persinger dealt specifically with claims handling. Birkenbuel v. Montana State Compensation Ins. Fund, 212 Mon. 139, 687 P.2d 700 (1984). The plaintiff in Birkenbuel negotiated a lump sum settlement with the state’s compensation fund. The plaintiff wrote a letter accepting the state’s settlement offer, but criticizing its negotiating tactics. When the plaintiff went to pick up the settlement check, the fund refused to honor the terms of its prior offer due, in large part, to the tenor of the plaintiff’s letter. The plaintiff sued for damages alleging, inter alia, intentional infliction of emotional distress and a failure to negotiate in good faith. The court upheld “the right of a worker to assert a separate claim for tortious conduct occurring outside the employment relationship and during the processing and settlement of a workers compensation claim.” (emphasis added). ID., at 146, 687 P.2d at 703.

There are, in fact, numerous cases recognizing an employee’s right to sue for tort damages where the employer acting alone, or through another, refuses to honor and timely pay workers compensation benefits. E.g., Weber v. State, 635 So.2d 188 (La. 1994); Johnson v. Federal Reserve Bank of Chicago, 199 Ill.App.3d 427, 557 N.E.2d 328, 145 Ill.Dec. 558,

Ill.App. (1990); Falline v. GNLV Corp., 107 Nev. 1004, 823 P.2d 888 (Nev.1991); Izaguirre v. Texas Employers' Ins. Ass'n, 749 S.W.2d 550 (Tex.App 1988); Matter of Certification of a Question of Law, 399 N.W.2d 320 (S.D. 1987); Leathers v. Aetna Cas. & Sur. Co., 500 So.2d 451 (Miss. 1986); Soto v. Royal Globe Ins. Corp., 184 Cal.App.3d 420, 229 Cal.Rptr. 192 (Cal.App. 1986); Hough v. Pacific Ins. Co., Ltd., 83 Haw. 457, 927 P.2d 858 (Haw. 1996); Annot., Tort Liability of Workers Compensation Insurer for Wrongful Delay or Refusal to Make Payments Due, 8 A.L.R.4th 902.

Factually, this case is most similar to Weber. The plaintiff in Weber, a state employee, contracted an occupational disease which was found to be compensable. The plaintiff's condition worsened over time. The plaintiff's physician, believing his condition to be terminal, recommended that the plaintiff undergo a heart transplant. The state refused to authorize the medical workup for the transplant. The plaintiff died before the state's refusal could be formally protested. Thereafter, the plaintiff's survivors sued the state for tort damages.

Like ESC, the state argued that it was entitled to immunity and that its refusal to pay medical expenses, if improper, was subject to administrative penalties. Eventually, the Alabama Supreme Court soundly rejected the state's argument. Recognizing an employee's right to sue in tort under these circumstances, the court noted that a contrary holding would have the effect of rewarding an employer for acting arbitrarily and, in effect, hastening an employee's illness or death:

An employer faced with the claim that Weber presented in this case could arbitrarily refuse the claim and thereby relieve itself of the obligation of paying for a heart transplant while never being exposed to penalties and attorney's fees. Indeed, such an employer could relieve itself of its compensation obligation entirely. The Legislature certainly could not have intended such consequences. We therefore conclude that the Legislature did not intend that the exclusive remedy of penalties and

attorney's fees for an employer's intentional and arbitrary refusal to provide medical treatment to a compensation victim would encompass the situation where the employer knew to a substantial certainty that the refusal would cause death, that would not otherwise have occurred.

ID., at 193.

Clearly, then, an employer or its agent is subject to tort liability where its refusal to authorize necessary medical treatment, and to pay expenses in connection therewith, causes an aggravation of a plaintiff's medical condition resulting in his death. This is so for two reasons. First, intentional acts are specifically excluded from the workers compensation law. Mary Wetzel alleges that EEC acted intentionally and, thus, it cannot avail itself of the immunity provisions contained in W.Va. Code 23-2-6a. Second, and more fundamentally, Mrs. Wetzel's claims are not for injuries arising out of and in the course of his employment. Persinger stated clearly and unequivocally that workers compensation immunity extends only to "damages...arising out of a negligently-inflicted injury of an employee." 196 W.Va. at 717, 474 S.F.2d at 897. As the cases cited earlier clearly establish, claims handling activities are not related to employment and cannot be the subject of immunity. And again, Persinger only protects employers, not third party administrators.

Here, of course, Mrs. Wetzel seeks damages for acts committed by ESC in its handling of her husband's requests for medical treatment. This is an "additional injury. . .over and above the injury that he suffered as a result of the incident of contracting the occupational disease on the job, [which] did not occur during the course of his employment and only indirectly arose from his employment." Weber, 635 So.2d at 192. The trial court's contrary conclusion is wrong as a matter of law. For this reason, its summary judgment order should be REVERSED.

C.

ESC IS ENGAGED IN THE BUSINESS OF INSURANCE FOR PURPOSES OF W.VA. CODE 33-11-4(9) AND THE RULES AND REGULATIONS THEREUNDER

Finally, the court held that ESC is not an “insurer” and is not “in the business of insurance,” as those terms are used and defined in the Unfair Trade Practices Act, W.Va. Code 33-11-4(9) (hereafter “UTPA”)

Nearly 20 years ago, this court recognized that the UTPA expresses a “strong policy...against unfair insurance practices.” Jenkins v. J.C. Penney Casualty Co., 167 W.Va. 597, 280 S.E.2d 252, 257 (1981). It is a remedial statute intended to regulate practices within the trade and, specifically, to prohibit practices which are unfair or deceptive. Consequently, the statute must be construed “liberally so as to furnish and accomplish all the purposes intended.” State ex rel. McGraw v. Scott Runyan Pontiac Buick, Inc., 194 W.Va. 770, 777, 461 S.E.2d 516, 523 (1995).

The provisions of the UTPA regulate most aspects of the claims handling process including the investigation, evaluation and negotiation of claims. W.Va. Code 33-11-4(9) specifically provides that it is a violation of the UTPA for an person to misrepresent pertinent facts relating to coverages and benefits; to refuse to pay benefits without conducting a reasonable investigation; to refuse to engage in good faith settlement negotiations; to compel claimants to institute litigation for purposes of recovering benefits legally due to them; and to deny claims without providing a reasonable explanation therefor. The word “person” is broadly defined to include not only insurance companies but “any individual, . . . corporation, or other legal entity, including agents and brokers.” W.Va. Code 33-11-2.

In this case, of course, Chemical Leaman operated a self-insured workers compensation fund. ESC was retained for the purpose of processing all claims made under that fund. Initially, ESC was responsible for making a determination of compensability. If the claim was determined to be compensable, then ESC was responsible for reviewing all requests for payment of medical services provided. It was within ESC's power to approve to disapprove each request being made.

The trial court cited Hawkins v. Ford Motor Company, 566 S.E.2d 624 (2002), concluding that the UTPA "is applicable only to those entities that are insurers or in the business of insurance." 8/15/06 ORDER, AT 5. Without any real explanation, the court then noted simply that "'ESC is not an insurer in that it does not issue any insurance policies and is not in the business of insurance.'" ID., AT 6.

The trial court's finding fails in two fundamental respects. First, Hawkins is inapposite. In Hawkins, as the case caption would indicate, the Defendant was Ford itself, and of course, "Ford's principal business is the manufacture and sale of automobiles." ID., at 629. But Mary Wetzel has not sued Ford, or Chemical Leaman – rather, she has sued ESC, a company whose principal business is neither automaking nor chemical manufacturing, but rather claims adjusting and handling. As such ESC is plainly subject to the UTPA.

Second, the trial court fixated on the wrong question. True, ESC is not an insurer. It does not issue insurance policies. But, then, neither do agents, brokers, or others who are unquestionably subject to the UTPA. The proper question is not whether ESC is an insurer, but whether it is engaged in the business of insurance. Clearly, the claims handling activities which ESC performs on a daily basis constitute the business of insurance. This court has defined the business of insurance in broad terms to include "solicitation and inducement,

preliminary negotiations, effected a contract of insurance and transaction of matters subsequent to effecting the contract and arising out of it." (emphasis added). Rose v. St. Paul Fire & Marine Ins. Co., 215 W.Va. 250, 257, 599 S.E.2d 673 (2004). There is no doubt, then, that transacting insurance includes claims processing, and that the UTPA is intended to regulate the conduct of all persons participating in the investigation, evaluation and settlement of claims. See, e.g., Taylor v. Nationwide Mut. Ins. Co., 214 W.Va. 324, 589 S.E.2d 55 (2003)(concluding generally that a claims adjustor is in the business of insurance and, thus, subject to the UTPA).

Courts in other jurisdictions have held that insurers and administrators who are responsible for processing workers compensation claims are treated as insurance companies. See e.g., Falline v. GNLV Corp., 107 Nev. 1004, 823 P.2d 888 (1991) (recognizing a cause of action in favor of the claimant for negligent or bad faith delay in the payment of benefits); Hough v. Pacific Ins. Co., 83 Haw., 927 P.2d 853 (1996) (recognizing that an insurer handling a workers compensation claim owed a duty of good faith and fair dealing); Racine v. American International Adjustment Co., 980 F.Supp. 745 (D.Ve. 1997).

Fundamentally, there is no language within the UTPA limiting its scope. If anything, the broadly worded definition of "persons" evidences a legislative intent to make the UTPA applicable in all situations, and in all fields of insurance, unless there is limiting language contained within the UTPA itself. Of course, there is nothing in the UTPA excluding workers compensation or those who are involved in administering workers compensation claims. Therefore, consistent with its remedial purposes, the UTPA should be given an interpretation which will reach all of those engaged in claims handling including, as in this case, the administrator of a self insured plan.

D.

SUGGESTED SYLLABUS POINTS

1. The issue of whether a professional person or entity is an "agent" entitled to immunity under W.Va. Code 23-2-6a is determined by the test set forth in syllabus point 1 of Deller v. Naymick, 176 W.Va. 108, 342 S.E.2d 73 (1985).

2. A third party administrator of a self insured workers compensation plan may be held liable notwithstanding the general immunity provided under 23-2-6 and -6a upon proof that (1) it improperly denied or delayed payment of workers compensation benefits to an employee for medically necessary treatment, and (2) its conduct caused or accelerated the employee's death.

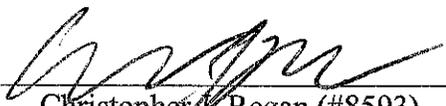
3. A third party administrator of a self insured workers compensation plan is in the business of insurance for purposes of the Unfair Trade Practices Act, W.Va. Code 33-11-1 et seq.

VI.

CONCLUSION

For all of the reasons set forth herein, the plaintiff asks this court to REVERSE the August 15, 2006 summary judgment order and REMAND this case for further proceedings including a jury trial.

MARY H. WETZEL, individually and as
Executrix of the Estate of Robert
H. Wetzel, deceased, Plaintiff

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CERTIFICATE OF SERVICE

Service of the foregoing BRIEF OF APPELLANT was had upon the defendant herein by mailing a true copy thereof, by regular United States Mail, postage prepaid, on this 20th day of April, 2007, as follows:

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