

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,

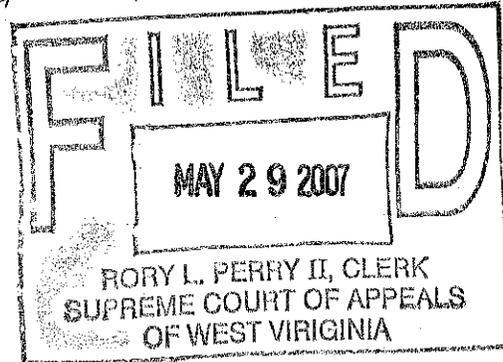
Plaintiff/Appellant,

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

APPELLANT'S REPLY BRIEF

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The plaintiff, Mary Wetzel, files the following reply brief pursuant to Rule 10(c) of the Rules of Appellate Procedure.

The legal issues raised herein appear to have been fully briefed by the parties. However, ESC makes a number of factual statements that are simply untrue and require a response.

First and foremost, it should be noted that Mrs. Wetzel is appealing from a summary judgment order. Accordingly, the law is well settled that all factual conflicts must be resolved in Mrs. Wetzel's favor. Furthermore, she is entitled to all favorable inferences arising from the undisputed facts. See, e.g., State ex rel. Payne vs. Mitchell, 152 W.Va. 448, 454, 164 S.E.2d 201 (1958) ("summary judgment should be denied if there is involved conflicting testimony or varying inferences which may reasonably be drawn from evidence which is uncontradicted"). Unfortunately, the trial court overstepped its proper role by resolving conflicting facts and now the defendant, ESC, is asking this court to do the same thing. Indeed, many of the so-called "uncontested" facts appearing on pages 2 and 3 of ESC's response brief were, and still are, contested by Mrs. Wetzel--in some instances by as many as two or three witnesses!

ESC's denial of payment for office visits is a case in point. According to ESC, Dr. Emch testified that the office visits "were not related to Mr. Wetzel's compensable claim." BRIEF OF APPELLEE, AT 3. This is a serious mischaracterization. To be clear, Dr. Emch testified that each and every office visit for which ESC denied payment was related to Harry Wetzel's compensable lung condition:

- Q. When was his first chemical pneumonitis?
A. That would be when I picked him up. There could have been others previously, because he had chronic scarring, but when I picked him up was 1 or 2 or '86, the day I saw him for the other doctor. That's the first time I knew it.
Q. Can you determine from your records if the bronchitis or pneumonitis episodes he had in late '93 and '94 and

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A. also, I think, earlier in '93 were viral versus chemical?
Let me see. '93. Okay. We're halfway through '93.

(Brief pause.)

A. In '93 and '94 in my own notes, there's nothing about just plain bronchitis and pneumonitis. They're all--it's all TDI.

Q. That's kind of what I thought.

A. I think I was--I mentioned it was probably billed wrong, because in my entire '93, '94, there was nothing called bronchitis, pneumonitis.

Q. So there's no question that what he was treating for at that time was not a viral bronchitis that any person might have, but--

A. Right.

Q. --rather, the chemical pneumonitis he had been having on and off--

A. According to my notes, yes, but not the billing.

EMCH DEPOSITION, AT 28, 29.

In other words, all of the office visits were clearly TDI-related and should have been paid. Nevertheless, ESC denied payment due to a simple billing error. It was this kind of gamesmanship that the plaintiff's workers compensation experts addressed in their depositions. Interestingly, even though ESC quotes literally pages from these depositions, it quotes nothing addressing the opinions of these two experts on this critical issue.

Attorney Sue Howard testified that Dr. Emch's office notes were sent to ESC with the requests for payment and, thus, were available for ESC's review. These notes "clearly indicated that Harry was being treated for his [compensable] lung condition" during these office visits. ESC, as the third party administrator, was responsible for reviewing the notes and was charged with knowledge of their contents. Thus, ESC's denial of payment under the circumstances was improper:

A. Well, I hope that you read the medical records, you know. If you're a claim manager, I think you have the

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responsibility to know what's in that claim file, and then, if the guy checked in within a day or two of his occupational injury with a diagnosis of pneumonitis and that ends up in Dr. Emch's billing codes, then I think, clearly, that that's something that ought to be covered under the claim. There's got to be some responsibility here to identify what this means condition-wise.

HOWARD DEPOSITION, AT 31.

Attorney Marty Mazeska agreed. Attorney Mazeska made it clear that a third party administrator cannot simply deny treatment. At a bare minimum, there is a "duty to advise as to the basis of the refusal to pay." MAZESKA DEPOSITION, AT 19. Accordingly, ESC's blanket denial of Dr. Emch's request for payment was improper. More than that, ESC's attempt to justify the denial by using ICD9 codes was, likewise, improper. ICD9 was an appropriate tool for determining whether, or not, to preauthorize a new treatment. However, it was inappropriate "to deny medical treatment based on [ICD9] because...they don't have authority to deny medical treatment." ID., at 27. Regardless, then, of whether Dr. Emch's office submitted the wrong diagnostic codes for billing purposes, ESC was wrong in using the codes as a basis for denying payment.

ESC's misconduct does not end there. Not only did ESC act wrongly in denying payment, it compounded its misconduct by refusing to notify workers compensation of its denial. This created a sort of "no man's land" where no procedural vehicle existed for reviewing ESC's illegitimate denials.

Attorney Howard explained that "workers compensation doesn't issue authorizations for routine visits with authorized treating physicians." The role of a third party administrator, like ESC, is simply to "process" requests for payment that are submitted by the treating physician. HOWARD DEPOSITION, AT 11. By refusing to notify workers compensation, ESC left Harry Wetzel with no order upon which he could file a protest and obtain a review of

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ESC's denial. ID., at 35. Attorney Mazeska agreed that ESC was under a "duty...to advise the workers compensation division [of the denial] so that that can be put in a form of a protestable order so that the claimant has a right to protest it." MAZESKA DEPOSITION, AT 9, 10. ESC's refusal to comply with this duty effectively left Harry Wetzel without a remedy for ESC's illegitimate denials of necessary, related and compensable medical treatment.

ESC also suggests that "no expert in this case has testified that any act or omission on the part of ESC caused, contributed or hastened Mr. Wetzel's unfortunate death." BRIEF OF APPELLEE, AT 3. This is another mischaracterization. True, there is no single, cross disciplinary expert who can provide all of the links in the causation chain. This is often so in complex cases.¹ Mrs. Wetzel identified two workers compensation experts and two medical experts. Their opinions, taken together, establish that ESC's improper denials caused or contributed to Harry Wetzel's death.

As noted previously, Attorneys Howard and Mazeska both testified that ESC acted wrongfully in denying payments. Mrs. Wetzel's medical experts provide the rest of the causation chain. ESC tries to minimize Dr. Emch's testimony, indicating that he "testified that the denials did not affect his treatment of Mr. Wetzel." BRIEF OF APPELLEE, AT 3. This, however, miss the point. Dr. Emch's treatment may not have been affected, but he clearly testified that Harry Wetzel suffered anxiety, stress and a deteriorating physical

¹ See, e.g., Estate of Iser vs. Hahn, No. 33189 (W.Va. 5/21/07) where, in a medical case, the court discussed the linkage between the opinions expressed by two of the plaintiff's experts:

Thus, Dr. McLaughlin's testimony, along with Dr. Dickie's testimony that Dr. Rhee violated the standard of care surrounding Maranda's sonogram, are necessarily connected. When read together they constitute evidence that the Eisers can present to a jury demonstrating that Dr. Rhee violated the standard of care and that such violation was a cause of the Eiser's injury."

ISER, SLIP OP AT 11.

condition as a result of ESC's failure to pay. These, in turn, contributed to Mr. Wetzel's death to a reasonable degree of medical probability:

- 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.

Dr. Blatt, a board certified pulmonologist, also provided causation testimony. Like Dr. Emch, he testified that Harry Wetzel's stress over ESC's failure to pay bills in a timely and appropriate manner contributed to his death. Specifically, he identified two ways it did so: first, it contributed to Mr. Wetzel's myocardial infarction and, second, it prevented Mr. Wetzel from obtaining adequate follow up care:

- Q. What about, um--there's been some testimony that he was also the stress factor, the worrying about the bills. Do you believe that had an adverse effect on his health and outcome?

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A. Yes, I do.

Q. In what way?

A. Two ways. Clearly, the mechanical stress of the body could have contributed to a myocardial infarction, and I think those are adequate explanations as to why he had a myocardial infarction, but clearly the other issue is that the stress would prohibit him from engaging in a more aggressive form of medical care because he wasn't sure how he was going to get this more aggressive medical care paid for.

BLATT DEPOSITION, AT 20, 21.

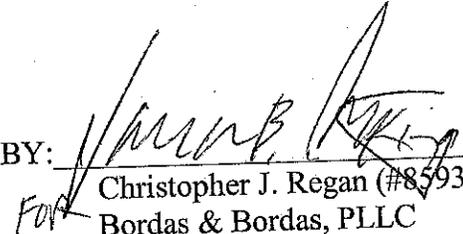
Contrary, then, to the trial court's findings and the arguments set forth in ESC's brief; there are clearly triable issues of fact which preclude summary judgment. ESC may well have contrary evidence to present. Its expert will testify that ESC acted appropriately in all respects. Of course, this is irrelevant for summary judgment purposes. The important point is that genuine fact issues exist. Under settled law, these fact issues cannot be resolved by the court through summary judgment proceedings. Rather, they must be resolved by the collective judgment of a Marshall County jury.

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For all of the reasons set forth in the initial brief of the plaintiff, Mary Wetzel, and herein, the summary judgment order should be REVERSED and the case should be REMANDED for a jury trial.

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Executrix of the Estate of Robert
H. Wetzel, deceased, Plaintiff

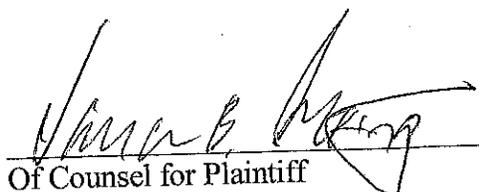
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CERTIFICATE OF SERVICE

Service of the foregoing APPELLANT'S REPLY BRIEF was had upon the defendant herein by mailing a true copy thereof, by regular United States Mail, postage prepaid, on this 25 day of May, 2007, as follows:

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