

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

LOUIS E. JOHNSON (deceased)
LOIS DUDDING for CHARLES L. JOHNSON,

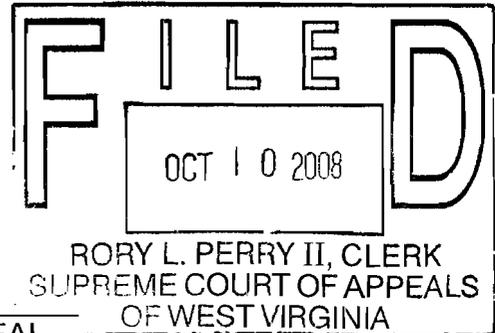
Petitioner,

vs.

APPEAL NO: 2040452
CLAIM NO. 84-69749

FOOTE MINERAL COMPANY

Respondent.



PETITION FOR APPEAL
from an order of the
WORKERS' COMPENSATION BOARD OF REVIEW
certified on September 17, 2008

EDWIN H. PANCAKE
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CHARLESTON, WEST VIRGINIA 25337

October 10, 2008

PETITION FOR REVIEW

TYPE OF APPEAL

The claimant/petitioner, Charles L. Johnson, invalid son of the decedent, Louis E. Johnson seeks review of the September 17, 2008, Board of Review order which affirmed the February 8, 2008, decision of the Administrative Law Judge thereby affirming the Administrator's order of March 14, 2006, which ceased payment of dependent benefits to the claimant, Charles Johnson, on the grounds that he was not a dependent of the deceased. The claimant asserts on appeal that he was a dependent and is entitled to a reinstatement of his benefits.

BACKGROUND OF THE CASE

Louis Johnson, deceased, was employed as a steelworker for the employer for over 30 years as a furnace operator. During his work, Louis Johnson was exposed to the hazards of airborne contaminants which ultimately resulted in him developing lung cancer. The lung cancer then resulted in Louis Johnson's death on or about December 13, 1989.

Because Louis Johnson died of an occupational disease, his widow, Anna Johnson, petitioned for dependent benefits by application dated July 6, 1990. In her application, it was marked "none" with regard to the question as to whether there were any surviving dependent children.

By order dated May 15, 1991, Mrs. Johnson's claim for dependent benefits was denied by the Commission. She then protested this decision which was ultimately reversed by the former Workers' Compensation Appeal Board by decision dated June 18, 2002. The decision granting dependent benefits was then affirmed by the Supreme Court.

Anna Johnson, Louis' widow, died on April 14, 2000, during the pendency of the litigation. However, notwithstanding the assertion that there were no dependent surviving children which was contained on the application for dependent benefits, Louis

and Anna Johnson did, in fact, leave a dependent invalid adult son, Charles Johnson. Charles Johnson has been an invalid and a dependent child throughout his life.

After being advised that Mrs. Johnson had deceased, the Administrator was notified by letter dated July 22, 2002, that Charles L. Johnson was a surviving dependent child. After that, the Administrator issued pay orders to the Self-Insured Employer which directed payments be made on behalf of Charles Johnson as a dependent to Louis Johnson and these benefits were paid without any objection from the employer until March 14, 2006, when benefits were terminated by the now Self Administered Self-Insured Employer. The claimant protested this order.

In support of his protest, the claimant tendered depositions of Charles Johnson and Lois Dudding, his guardian, which were taken August 8, 2006. It is clear from the transcripts that Charles Johnson is an invalid and relies upon his sister, Lois Dudding, for care and support. Ms. Dudding provided this support with the assistance of the dependent benefits which were paid for nearly six years prior to being terminated by the employer.

Additionally, the claimant tendered psychiatric records, Court documents, Social Security records and other medical documents all proving that Charles Johnson was, in fact, a dependent at the time of his father's death.

In support of its action, the Self-Insured Employer tendered the documents upon which it relied in terminating Charles' benefits.

The claim was subsequently submitted for a decision. By order dated September 17, 2008, the Board of Review affirmed the February 8, 2008, Administrative Law Judge's ruling thereby affirming the Commission's order of March 14, 2006, ceasing payment of dependent's benefits on the grounds that Charles L. Johnson was not a dependent of the deceased.

ASSIGNMENT OF ERROR

Did the Board of Review clearly err as a matter of law and affirming the Self-Insured Employer's order terminating dependent benefits?

ARGUMENT AND POINTS OF AUTHORITY

The Board of Review and Administrative Law Judge clearly erred as a matter of law and fact in affirming the action of the Self-Insured Employer which terminated the dependent benefits payable to Charles Johnson, dependent son of Louis Johnson. This is a clear error in light of the fact that the record unequivocally shows that Charles Johnson was a dependent upon Louis Johnson at the time of this death and, therefore, notwithstanding a technical defect in the application, he is entitled to dependent benefits.

In support of his protest, the claimant has tendered numerous documents and transcripts proving beyond doubt, that Charles Johnson was an invalid and a dependent under the law at the time of Louis Johnson's death due to occupational lung cancer. In fact, it is undisputed that Charles Johnson satisfied the statutory requirements for dependency at the time of his father's death. In terminating the dependent benefits, the Self-Insured Employer relies upon the application for dependent benefits signed by Anna Johnson on July 6, 1990. In her application, there is no explanation for this omission other than a mistake on the part of Anna Johnson. However, this statement is clearly incorrect and is a technical fault in the application. In cases such as this, the policy of the Workers' Compensation Chapter is "to prohibit the denial of just claims of injured or deceased workers or their dependents on technicalities." W.Va. Code §23-5-13.

The Administrator also states that "all proofs of dependency in fatal cases must be filed with the Commission within six months from and after the dated of death." However, the Administrator fails to cite any rule or statute in support of this statement. The claimant has, however, submitted substantial evidence of Charles Johnson's

dependency at the time his father's death, and had no reason to submit additional evidence in the claim until the termination of benefits was made by the Self-Insured Employer.

Pursuant to W. Va. Code §23-5-4, the Self-Insured Employer is required to submit an application for modification in writing pursuant to W. Va. Code §23-5-4 in order to seek to modify a claim. Although the claim is now self administered, this does not relieve the employer of its lawful obligation to file an application for modification of the award. In fact, the Administrator wrote only a letter dated February 17, 2006, entitled "Notification of Termination of Dependent Benefits" and allowed the claimant only 10 days to respond to the notice. Neither the claimant nor the claimant's counsel ever received any petition or application for modification as required by law.

Besides failing to reopen this issue properly, the Self-Insured Employer also lacked any jurisdiction to amend, correct or set aside the prior decision paying dependent benefits to Charles Johnson. W. Va. Code §23-4-51(d), limits the time limit for correcting any order or decision on any issue to two years from the date of entry of an order or the decision. In this case, the Self-Insured Employer received a pay order in November, 2002, and made monthly payments pursuant to subsequent pay orders until February, 2006. While no order specifically granting Charles Johnson dependent benefits was ever issued by any Administrator, the Self-Insured Employer clearly had notice of Charles Johnson's claim for dependent benefits because of the pay orders it regularly honored. Because of this the two years it had to challenge Charles Johnson's receipt of dependent benefits lapsed many years ago. Since there has been no fraud involved, the Self-Insured Employer has committed an improper action which must not be affirmed.

The Administrative Law Judge and Board of Review have also lost sight of the fact that the dependent in this matter is under a severe psychiatric disability and unable to act on his own. While there is no known explanation as to why Anna Johnson

indicated on the application for dependent benefits that there were no surviving dependent children, what is known is that there was, in fact, a surviving dependent invalid adult son. What is also known is that it is undisputed that Charles Johnson was, in fact, a dependent child at the time of Louis Johnson's death. Therefore, the Board of Review and Administrative Law Judge have erred in terminating these dependent benefits and must be reversed.

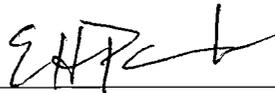
CONCLUSION

Wherefore, the claimant/petitioner, Charles Johnson, (dependent invalid son of Louis E. Johnson, deceased), respectfully requests that this Court reverse the decision of the Office of Judges and the Self-Insured Employer, thereby reinstating his dependent benefits which were properly paid until March, 2006, when the Self-Insured Employer terminated these benefits.

Respectfully yours,

Maroney, Williams, Weaver, & Pancake, PLLC
Post Office Box 3709
Charleston, WV 25337
304/346-9629

By _____



WV State Bar ID No: 5767

October 10, 2008

CERTIFICATE OF SERVICE

I, Edwin H. Pancake, counsel for Petitioner herein, do hereby certify that I served the foregoing Petition upon the following by hand delivery and/or by mailing a true and accurate copy of the same via the United States Mail, postage prepaid, on this the 10th day of October, 2008.

HAND DELIVERY:

Rory Perry, Clerk
State of West Virginia
Supreme Court of Appeals
State Capitol Building
Charleston, WV 25305

VIA UNITED STATES' POSTAL SERVICE:

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