

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

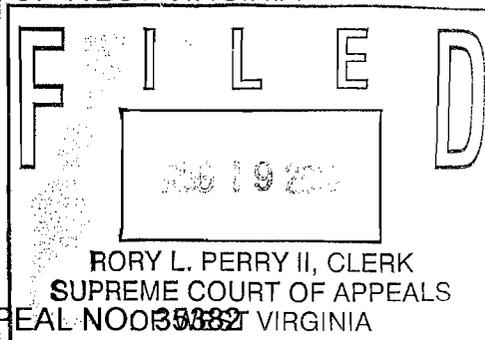
CHARLES L. JOHNSON, dependent son of
LOUIS E. JOHNSON, deceased

Appellant,

vs.

WEST VIRGINIA OFFICE INSURANCE COMMISSION
and FOOTE MINERAL COMPANY

Appellees.



APPELLANT'S SUPPLEMENTAL BRIEF

EDWIN H. PANCAKE
POST OFFICE BOX 3709
CHARLESTON, WEST VIRGINIA 25337

August 19, 2010

SUPPLEMENTAL BRIEF

Pursuant to the July 26, 2010, Order of the Supreme Court of Appeals, the claimant/appellant, Charles L. Johnson, dependent son of Louis E. Johnson, deceased, respectfully supplements his original appeal brief to address the following questions posed by the Court:

Question (1) Whether payments made to appellant were “decisions” made by the insurance carrier, private carrier, or Self-Insured Employer as contemplated by W.Va. Code §23-5-1(e)?

Response: The claimant/appellant, Charles Johnson, believes that the payments made to him were clearly “decisions” or “orders” as contemplated by the statute. As a basis for this position, it should be noted that the initial payment in this claim was made by the Self-Insured Employer after it received a pay order dated October 30, 2002, directing it to pay the amount of \$277,060.06 to Lois J. Dudding, the guardian of her invalid brother, Charles Johnson. (Exhibit A). Thereafter, regular monthly pay orders were issued to the Self-Insured Employer until the self-administration took effect on July 1, 2004. Therefore, between October 30, 2002, and September 1, 2004, the Self-Insured Employer received monthly orders from the former Workers' Compensation Commission directing payment. These orders were never protested nor objected to in any other manner by the Self-Insured Employer or its administrator.

After self-administration was adopted as of July 1, 2004, the Self-Insured Employer continued to make monthly payments until February, 2006, when the administrator gave a 10 day notice to the appellant that his dependent benefits were being terminated since no dependent children were disclosed by Charles Johnson's mother, Anna Johnson, on her application for dependent benefits.

Pursuant to W.Va. Code §23-5-1(e), "the Insurance Commissioner, private carrier or Self-Insured Employer, whichever is applicable may amend, correct or set aside any order or decision on any issue entered by which, at the time of the issuance or any time after that, is discovered to be defective or clearly erroneous or the result of a mistake, clerical error or fraud, or with respect to any order or decision denying benefits, otherwise not supported by the evidence, . . . However, jurisdiction to issue an amended decision pursuant to the subsection continues until the expiration of two years from the date of a decision to which the amendment is made unless the decision is sooner effected by an action of an Administrative Law Judge or other judicial officer of body: provided, that corrective actions in the case of fraud may be taken at any time." In the instant claim, the pay orders were clearly orders as contemplated by this statute. These orders were intended to provide notice to the Self-Insured Employer and, in fact, notice was given monthly until the employer began self-administration of the claim. Thereafter, checks continued to be paid to Lois Dudding for the benefit of Charles Johnson on a monthly basis until they were improperly ceased by the Self-Insured Employer. This action violates the two year limitation for corrective action contained in the above statute since the pay orders had the force and effect of any other decision made by an administrator and gave proper notice to the Self-Insured Employer of the status of the claim.

Question (2). Whether the right to benefits of an "invalid child" as that term is defined in W. Va. Code §23-4-10, can be waived or forfeited by the acts or omissions of another dependent, where the "invalid child" has not been appointed a guardian *ad litem*?

Response: The laws of West Virginia have long recognized the special responsibility that must be taken to protect the rights of minor children, invalids and others who may be under a disability. This concern has been reflected in the numerous

statutes adopted which require the appointment of a guardian *ad litem* to ensure that the rights of those who may be less capable of protecting themselves are, in fact, protected. These include W.Va. Code §44-10-14, which requires a guardian *ad litem* be appointed to represent the interests of the child, even if a potential settlement of a suit has been negotiated by a parent or guardian. Guardians *ad litem* are also required to be appointed by the Court should a defendant in a suit be an infant or insane person. (W.Va. Code §36-2-5)

In the instant claim, the evidence establishes that Charles Johnson was an invalid dependent child and has been since his early youth. Although not specifically stated in West Virginia case law, at least one other jurisdiction considers an "invalid child" to be a child for as long as he remains an invalid. Cato v. Alcoa-Reynolds Metal Company, 152 P.3d 981, 210 Or. App. 721 (Or. App. 2007). In Cato, the Oregon Appellate Court held that "an invalid dependent child is a child, for purposes of benefits, regardless of age, so long as the child was invalid at the time of the accident and thereafter remains an invalid..."

The failure of Charles Johnson's mother to note his status as a dependent child on the workers' compensation claim form should not be construed as a waiver or forfeiture of any benefits to which he may otherwise be entitled. Clearly, this was a technical error on behalf of Charles Johnson's mother, one for which there exists no explanation given the death of Mrs. Johnson. Although Mrs. Johnson indicated no other dependents on her application, this is not a waiver or forfeiture of Charles Johnson's right to benefits given the fact he is a protected person under the law.

Question (3). Whether a person, being paid dependent benefits, is entitled to a hearing before the Office of Judges before the claims administrator can terminate or interrupt the payment of benefits?

Response: The Supreme Court has acknowledged that the receipt of workers' compensation benefits is a substantive right and, as such, must be dealt with using the principals of fundamental fairness embodied in the due process provisions of West Virginia Constitution, Article III, Section 10. State ex rel Blankenship v. Richardson, 196 W.Va. 726, 474 S.E.2d 906, (1996). In the instant claim, by virtue of the fact that the Self-Insured Employer was now also a self-administering employer, Charles Johnson's dependent benefits, (which he had received monthly for 3½ years) were stopped with nothing more than a 10 day notice from the employer. The action by the Self-Insured Employer and its administrator unquestionably violated the appellant's right of due process in its decision to abruptly terminate the claimant's benefits based on the technical flaw in the application.

Prior to self-administration, in order to effect the termination of benefits which a claimant was receiving, the employer was required to file an application for modification in writing with the Workers' Compensation Commission, or other appropriate administrator of the claim. W.Va. Code §23-5-4. This is still the law and no application for modification was ever filed on behalf of the Self-Insured Employer. By ignoring its obligation to file a petition for modification, the Self-Insured Employer has acted outside of law.

It has been held that evidentiary hearings are not required to be held by the Commissioner until an order terminating benefits is entered timely and an objection to the Order has been made. However, procedural due process standards mandate that the Commission give the claimant advance notification of the reasons why his benefits are being considered for termination in a reasonable opportunity to supply relevant information on the issue...Hagy v. SWCC, 163 W.Va. 198 255 S.E.2d 906 (1979).

Under the law, when a claimant is receiving benefits, a heightened procedural review is triggered which requires both a written petition for modification and

a reasonable opportunity to respond to the petition for modification. With the advent of self-administration, the protection of a claimant's due process right is of even greater concern, given the inherent conflict of interest under which a Self-Insured Employer administers its own claims. Under the facts in the case at bar, the Self-Insured Employer has completely ignored Charles Johnson's right to due process and fundamental fair dealing by abruptly terminating his benefits with merely a 10 day notice.

Respectfully submitted,

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304/346-9629

By  _____

WV State Bar ID No: 5767

August 19, 2010

CERTIFICATE OF SERVICE

I, Edwin H. Pancake, counsel for Appellant herein, do hereby certify that I served the foregoing Supplemental Brief 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 19th day of August, 2010.

HAND DELIVERY:

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

David Stuart, Esquire
PO Box 4318
Charleston, WV 25364

VIA UNITED STATES' POSTAL SERVICE:

Karin Weingart, Esquire
Counsel for the Respondent
Spilman Thomas Battle, PLLC
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Charleston, WV 25321



EDWIN H. PANCAKE

Payee's Pay Order Copy

NOV 1 1989

LOIS J. DUDDING
C/O MARONEY THOMAS P LC
WORKERS' COMPENSATION SERVICES
P O BOX 3709
CHARLESTON, WV 25337

**BUREAU OF EMPLOYMENT PROGRAMS
WORKERS' COMPENSATION DIVISION**

STATE OF WEST VIRGINIA
CHARLESTON, WEST VIRGINIA

PAY ORDER NO. 002769621

NOTE: This is NOT a check. Payment will be made to you by the employer.

DATE OF ISSUE			
CODE	MO.	DAY	YR.
FA	10	30	02

DOLLARS CENTS
277060 06

PAY TO: LOIS J. DUDDING
C/O MARONEY THOMAS P LC
WORKERS' COMPENSATION SERVICES
P O BOX 3709
CHARLESTON, WV 25337

PAY \$ 277060.06
THIS IS NOT A CHECK

Robert J. Smith
COMMISSIONER

EMPLOYER: FOOTE MINERAL CO
IN PAYMENT OF BENEFIT AS SET OUT HEREIN THIS
PAYORDER MUST BE HONORED WITHIN 10 DAYS OF
RECEIPT BY THE EMPLOYER OR HIS AGENT

THIS ORDER TO BE RETAINED BY PAYEE

WORKERS' COMPENSATION DIVISION

Control # : 002769621
 Claim # : 840069749
 Claimant Name : LOUIS E. JOHNSON ***
 Claimant SSN : 233-30-3818
 Compensation Type : FATAL
 Payment Type : FIRST PAYMENT
 Pay From : 12/14/1989 Thru: 11/30/2002 Days: 4735
 Daily Pay Rate : \$59.66000
 Date of Injury : 08/29/1983
 Policy Number : 51000034-202 Allocation %:100.00
 Employer : FOOTE MINERAL CO
 Gross Check Amount : \$277060.06 DWF Amount : \$0.00
 Overpay Reduction : \$0.00 CAD Amount : \$0.00
 Net Check Amt : \$277060.06

03/21/2006 09:12 AM

Contact ANN NORTON

