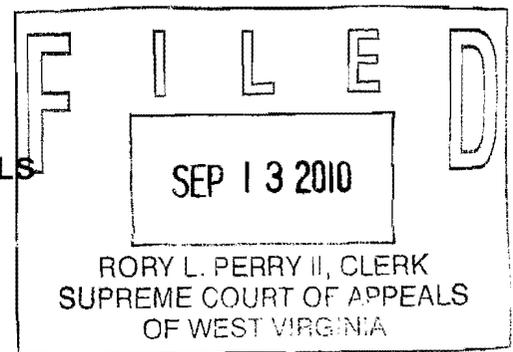


**ARGUMENT
DOCKET**
IN THE
SUPREME COURT OF APPEALS
OF
WEST VIRGINIA

At Charleston



CHARLES L. JOHNSON,

Appellant,

v.

**SC DOCKET NO. 35382
JCN/CLAIM NO. 840069749**

FOOTE MINERAL COMPANY,

Appellee.

FROM THE WEST VIRGINIA WORKERS' COMPENSATION BOARD OF REVIEW

**TO THE HONORABLE JUDGES OF THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

**SUPPLEMENTAL BRIEF ON BEHALF OF SELF-INSURED
EMPLOYER-APPELLEE FOOTE MINERAL COMPANY**

FOOTE MINERAL COMPANY
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MEMORANDUM OF PARTIES

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NATURE OF THE PROCEEDINGS

This claim is before this Honorable Court pursuant to the Petition for Review filed by Charles L. Johnson (“Claimant” or “Appellant”), which Petition this Court has accepted. Appellant and Foote Mineral Company (“Employer” or “Appellee”) have filed their respective briefs, and this Court has set this matter for oral argument and ordered the parties to file supplemental briefs responding to three specific questions. The employer submits this brief in response to this Court’s request.

ISSUES FOR ADDITIONAL BRIEFING

1. **WHETHER PAYMENTS MADE TO THE APPELLANT WERE “DECISIONS” MADE BY THE INSURANCE CARRIER, PRIVATE CARRIER, OR SELF-INSURED EMPLOYER AS CONTEMPLATED BY W. VA. CODE § 23-5-1(e)?**

W. Va. Code § 23-5-1(e) provides:

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 it** which, at the time of issuance or any time after that, is discovered to be defective or clearly erroneous or the result of a mistake, clerical error or fraud Jurisdiction to issue an amended decision pursuant to this 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 affected by an action of an administrative law judge or other judicial officer or body (Emphasis added.)

This specific code provision identified by this Court is a subpart of the section of the code related to review. The initial process of litigation begins with an active decision by either the Insurance Commissioner, self-insured employer or private carrier. Prior to privatization, this code provision also related to decisions made by the Workers' Compensation Division of the Bureau of Employment Programs. W. Va. Code § 23-5-1(a) indicates that these entities may determine all questions within their jurisdiction, and subpart (b) provides that such decisions must be made in writing and must allow the affected party the opportunity to protest. This is the first opportunity for review of a decision which then puts the claim in litigation before the Office of Judges. This "decision" implies a determination on the part of the entity issuing the decision after an assessment of the factual representations and documents put before it.

The Workers' Compensation Division made the initial decision on May 15, 1991 denying Anna Johnson's application for dependents benefits. Litigation ensued, and the Office of Judges affirmed the rejection on April 9, 2001. On appeal before the Board of Review (then the Workers' Compensation Appeal Board), the rejection was reversed and Anna Johnson was granted dependents benefits. As a result of the reversal, the Workers' Compensation Division, not the self-insured employer, issued an acknowledgement of the

Appeal Board's order on July 17, 2002, noting that dependents benefits were thereby granted. Subsequently, the Workers' Compensation Division, not the self-insured employer, issued a Pay Order based on this reversal and directing the employer to make payments pursuant to the Appeal Board's determinations. Subsequent payments made by the self-insured employer pursuant to this Pay Order do not equate to a decision as contemplated in § 23-5-1 which the self-insured employer could thereafter set aside. The issue as to whether or not the employer owed dependents benefits had been litigated and lost. It was determined that the employer owed dependents benefits to Anna Johnson as the dependent of Louis Johnson. The Pay Order was an administrative procedure employed by the Workers' Compensation Division to prompt the employer to pay where an issue had already been protested and litigated to a final decision. It is clear from the face of the Pay Order that this is not protestable and the employer had to comply with the Order. To suggest that the self-insured employer had any decision-making privileges as to whether or not to comply with the Pay Order would lead to the potential of perpetual litigation over issues which had reached finality.

In his supplemental brief, claimant suggests that the Pay Order directed the employer to pay the amount to Lois J. Dudding, the guardian of her invalid brother, Charles Johnson. In fact, the Pay Order directs the employer to pay the sum to Lois J. Dudding in care of Maroney Thomas PLC. There is nothing in the Pay Order to suggest that it is being paid on behalf of Charles Johnson. The self-insured employer's payment of \$277,000.00 was simply an

act of the employer complying with its obligation to pay on a claim which had been litigated and in which the employer received an unfavorable decision on appeal. The employer was obligated to pay and had no discretion to make a determination not to pay when it received the Workers' Compensation Division's Pay Order.

The employer will agree there are times when payments could be construed as decisions. Where a self-insured employer is self-administering a claim, for example, and receives an application for benefits and begins making temporary total disability payments based on its assessment that the application supports a valid claim for benefits. The employer may begin making those payments without calling them "conditional benefits" and without issuing an order ruling the claim compensable or accepting liability. In circumstances such as those, an employer's payment could be deemed a decision. In the circumstances before this Court, however, the employer's payment was simply compliance with a Pay Order at the end of the litigation of a contested issue.

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 APPOINTED A GUARDIAN AD LITEM?

According to W. Va. Code § 23-4-10 (1989) in case an occupational pneumoconiosis causes death, the benefits shall be paid to dependents for as long as their dependency continues in the same amount that was paid or would have been paid to the deceased employee for total disability had he or she lived, and "dependents" include the dependent widow or widower until the death or

remarriage of the widow or widower and an invalid child, to continue as long as the child remains an invalid. Additionally, all dependents are jointly entitled to the amount of benefits payable as the result of the employee's death. Finally, W. Va. Code § 23-4-15 (1989) states that the application for dependents benefits must be filed within two years of the employee's death, and **all** proofs of dependency must be filed within two years of the employee's death. Although acknowledging that an invalid adult child may be a dependent, there is no requirement contained within the workers' compensation statute that the application for dependents benefits be made by a guardian ad litem. In addition, there is no provision in the workers' compensation code that excepts invalid dependents from meeting the two year limitation for filing proofs of dependency.

In his supplemental brief, claimant notes that there are several specific code provisions which require the appointment of a guardian ad litem for the protection of an invalid child under very defined circumstances. The code provisions related to West Virginia workers' compensation do not contain such a mandate. W. Va. Code § 56-4-9, however, does provide that any minor entitled to sue may do so by his next friend or guardian. When the action or suit is brought by his next friend, the court may, for good cause, substitute the guardian in lieu of the next friend, or any other person as the next friend.

Anna Johnson, Charles Johnson's mother, acted as Charles Johnson's next friend in administrative actions related to the death of Louis Johnson, Charles Johnson's father. According to the testimony of Charles Johnson's sister, Lois Dudding, Anna planned very carefully, with the advice and

guidance of counsel, for the care of Charles Johnson. Four days after Louis Johnson's death, by application dated December 18, 1989, Anna Johnson submitted documentation to the Social Security Administration seeking additional benefits for Charles Johnson as the result of Louis Johnson's death. (Employer's Appendix 1.) By letter dated February 1, 1990, the Social Security Administration acknowledged her application and indicated that Charles Johnson's benefits would be increased. (Employer's Appendix 2.) The Administration also recommended on December 18, 1989, at the time of Anna Johnson's application on behalf of Charles, that Anna Johnson was interested in the welfare of Charles Johnson and would use the money for the best interests of Charles. (Employer's Appendix 3.) It was found that there was no reason to question Anna Johnson's reputation and reliability and that she was in a position to know about and to report suspension and termination events regarding Charles Johnson's benefits.

This Court has also recognized in the past that a parent is his or her child's natural guardian and presumed to act in his or her child's best interests. See *State v. Kirk N.*, 214 W. Va. 730, 737, 591 S.E.2d 288, 295 (2003), citing *State Ex Rel Kiger v. Hancock*, 153 W. Va. 404, 168 S.E.2d 798 (1969). These cases exemplify a legal preference that the natural parents serve as guardians in legal proceedings involving their children. In fact, the Social Security Administration determined that Anna Johnson would act in the best interests of her son, Charles Johnson, when she filed for increased benefits after Louis Johnson's death. At the time that Anna Johnson was acting on behalf of Charles Johnson in seeking additional Social Security benefits, she had the

advice of counsel and acted quickly to secure Charles Johnson's additional Social Security benefits. At the time, it may have been determined that because of Social Security maximum benefits and off-sets for State benefits as found in 42 U.S.C 403, it would be better for the family's income for Anna Johnson to be the sole recipient of dependents benefits in the State workers' compensation claim in order to maximum Charles Johnson's benefits under Social Security. There is nothing to suggest that at the time Anna Johnson was not acting in the best interests of Charles Johnson by maximizing benefits. Just because a different person acting as next friend or guardian ad litem may have made a different choice with regard to benefits does not mean that Charles Johnson did not have complete and appropriate protection of his interests.

Whether Anna Johnson effectively waived or forfeited dependents benefits for Charles Johnson does not affect the fact that an application for benefits on behalf of Charles was not filed. The award of dependents benefits that was granted in this claim was awarded upon a finding that Anna Johnson alone was a dependent of Louis Johnson and that she was entitled to such dependents benefits. There has been no such finding with regard to dependency and entitlement for Charles Johnson. At this point, according to West Virginia workers' compensation law, no further award may be made in fatal cases except within two years after the date of death of the employee. W. Va. Code § 23-4-16(a)(3). This is a jurisdictional issue which cannot be waived and an agency cannot confer more jurisdiction upon itself than a statute allows. W. Va. Code § 23-4-16 is the statute granting jurisdiction for modification of claims and its

authority over workers' compensation claims is exclusive. This claim is barred for further actions for dependents benefits. When the State Compensation Commissioner enters a final order, he no longer retains jurisdiction over the case unless the parties seeking to reopen the case brings himself within the terms of the statute providing for modification of the order. *Dismond v. State Compensation Commissioner*, 132 S.E.2d 743 (1963). With regard to dependents of Louis Johnson entitled to benefits under § 23-4-10, the Workers' Compensation Division issued its final decision as to dependents with the non-medical order of October 30, 1990 which found Anna Johnson to be the sole dependent of Louis Johnson. The non-medical order was not protested or appealed.

Notwithstanding the foregoing, the evidence of record in this claim would indicate that Anna Johnson, with the advice and guidance of legal counsel, acted with deliberation with regard to obtaining benefits on behalf of her son, Charles. As discussed in the employer's appellee brief, the documentation along with Lois Dudding's testimony, show careful and thorough planning for the care of Charles Johnson at the time that Louis Johnson's cancer recurred through the time of his death.

3. WHETHER A PERSON, BEING PAID DEPENDENTS BENEFITS, IS ENTITLED TO A HEARING BEFORE THE OFFICE OF JUDGES BEFORE A CLAIM ADMINISTRATOR CAN TERMINATE OR INTERRUPT THE PAYMENT OF BENEFITS?

Under W. Va. Code § 23-4-10(c), "Compensation under this subdivision and subdivision (b) of this section shall, except as may be specifically

provided to the contrary in those subdivisions, cease upon the death of the dependent, and the right to the compensation shall not vest in his or her estate.” In this claim, Anna Johnson was lawfully granted dependents benefits by order of the Workers’ Compensation Appeal Board dated June 18, 2002. Anna Johnson was the only dependent granted the benefits, and her death extinguished the employer’s obligation to pay those benefits. In the case of the death of the dependent who had been granted such benefits, a hearing before the Office of Judges would not be necessary to terminate said benefits.

In any case where a claimant was properly awarded dependents benefits, and the basis for such award is later extinguished, W. Va. Code § 23-5-4 might be implicated. This code provision states:

In any case in which an employer makes application in writing for modification of any award previously made to an employee of the employer, the commission, the successor to the commission, other private insurance carriers and self-insured employers, whichever is applicable, shall make a decision upon the application. If the application discloses cause for further a adjustment, the commission, the successor to the commission, other private insurance carriers and self-insured employers, whichever is applicable, shall, after due notice to the employee, make the modifications or changes with respect to former findings or orders that are justified. Any party dissatisfied with any modification or change made or by the denial of an application for modification is, upon proper and timely objection, entitled to a hearing as provided in section 9 of this article.

The claimant, Charles Johnson, was never awarded dependents benefits. Therefore, § 23-5-4 was not implicated in his particular case. The self-insured employer’s obligation to pay dependents benefits to Anna Johnson extinguished upon her death. Claimant does not dispute the fact that Anna Johnson died in 2000 and the compensation payable under the award to Anna Johnson ceased upon her death pursuant to the provisions of § 23-4-10(c).

Despite the fact that Charles Johnson was receiving payments on an award granted to Anna Johnson alone, and despite claimant's allegations in his supplemental brief, the employer actually did file notice that it was seeking a modification and termination of the dependents benefits that were being paid. By letter dated February 17, 2006, Acordia Employers Service, on behalf of the employer, sent a notice to Charles Johnson in care of his sister and to Charles Johnson's attorney indicating that it was seeking a modification of benefits. (Employer's Appendix 4.) Although the letter is titled Notification of Termination of Dependents Benefits, it is clearly a notice of application for modification by the terms of the letter itself. Specifically, the first paragraph states, "On behalf of the self-insured employer, Cyprus Foote Mineral Company, we are hereby issuing notice that we will be pursuing a modification of benefits for the following reasons"

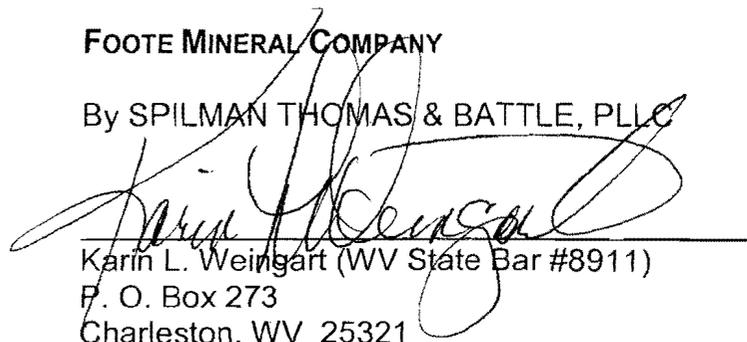
In addition, the notice provided ten days for a response. This was not the only opportunity claimant had to respond and, claimant actually had almost a month before the decision terminating dependents benefits was issued on March 14, 2006. This was a protestable decision which, consistent with W. Va. Code § 23-5-4, activated claimant's right to protest and obtain a hearing in front of the Office of Judges. This claim was, in fact, litigated before the Office of Judges as the first step to the appeal process which now brings us before this Court. Finally, neither the Code nor case law requires that an evidentiary hearing be held before the order terminating benefits is issued. Evidentiary hearings are not required to be held by the Workmen's Compensation Commissioner until an

order terminating benefits is entered and timely objection has been made; however, procedural due process standards mandate that the Commissioner give claimant advance notification of the reasons why his benefits are being considered for termination and a reasonable opportunity to supply relevant information on the issue. *Mitchell v. State Workmen's Compensation Commissioner*, 256 S.E.2d 1 (1979).

Respectfully submitted,

FOOTE MINERAL COMPANY

By SPILMAN THOMAS & BATTLE, PLLC

A large, stylized handwritten signature in black ink, appearing to read 'Karin L. Weingart', is written over a horizontal line.

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