

RENDERED: FEBRUARY 19, 2010; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-001682-WC

WAL-MART STORES, INC.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-06-97979

DONALD GREG WELLS;
HON. DOUGLAS W. GOTT,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: COMBS, CHIEF JUDGE; CLAYTON AND STUMBO, JUDGES.

STUMBO, JUDGE: Wal-Mart Stores, Inc., appeals the award of workers'

compensation benefits to Donald Wells. Wal-Mart argues that Wells was not

entitled to workers' compensation benefits because he pursued a civil suit against

two third-party tortfeasors who were responsible for his injury. Wal-Mart claims

that the \$900,000 settlement reached in the civil suit precludes Wells from also being awarded workers' compensation benefits. Wells argues that the Administrative Law Judge (hereinafter ALJ) and Workers' Compensation Board (hereinafter Board) correctly awarded him benefits. We agree with Wells and affirm.

On December 10, 2005, Wells suffered injuries from exposure to carbon monoxide while working in a freezer for the Wal-Mart Distribution Center. At the time Wells was exposed to the carbon monoxide, Wal-Mart had hired contractors Atlas and Unarco to perform renovations to the freezer. These two contractors were using generators in the non-ventilated freezer. They also were using welding machinery. It was from these machines that Wells believed he was exposed to the carbon monoxide.

Wells simultaneously pursued a workers' compensation claim against Wal-Mart and civil actions against Atlas and Unarco. The civil actions were resolved first, with Atlas settling for \$500,000 and Unarco settling for \$400,000. As for the workers' compensation claim, the ALJ awarded Wells a total of \$440,659.21 in income benefits and past and future medical benefits.

Wal-Mart now claims that Wells should only be allowed to collect from either the civil suits or the workers' compensation claim, but not both. Wal-Mart cites to KRS 342.700(1) which states:

Whenever an injury for which compensation is payable under this chapter has been sustained under circumstances creating in some other person than the

employer a legal liability to pay damages, the injured employee may either claim compensation or proceed at law by civil action against the other person to recover damages, or proceed both against the employer for compensation and the other person to recover damages, but he shall not collect from both. If the injured employee elects to proceed at law by civil action against the other person to recover damages, he shall give due and timely notice to the employer and the special fund of the filing of the action. If compensation is awarded under this chapter, the employer, his insurance carrier, the special fund, and the uninsured employer's fund, or any of them, having paid the compensation or having become liable therefor, may recover in his or its own name or that of the injured employee from the other person in whom legal liability for damages exists, not to exceed the indemnity paid and payable to the injured employee, less the employee's legal fees and expense. The notice of civil action shall conform in all respects to the requirements of KRS 411.188(2).

Wal-Mart argues the “but he shall not collect from both” language means Wells can either collect from a civil suit or a workers’ compensation claim, not both as he is trying to do.

The ALJ, Board, and Wells all disagree. We find there is plenty of caselaw dispositive of this issue. *Cincinnati Ins. Co. v. Samples*, 192 S.W.3d 311 (Ky. 2006); *AIK Selective Self Ins. Fund v. Bush*, 74 S.W.3d 251 (Ky. 2002); and *Hillman v. American Mut. Liability Ins. Co.*, 631 S.W.2d 848 (Ky. 1982); among others, all interpret the above statute to mean that one cannot collect workers’ compensation benefits from a workers’ compensation claim and a civil action. In other words, if you collect on a workers’ compensation claim, you cannot collect the awards in the civil action that mirror workers’ compensation benefits; i.e.,

money for past and future medical expenses, lost wages, and the impairment of power to earn money. If an employee does pursue both claims, then the employer has a right to subrogation against the proceeds recovered in the civil action that duplicate the workers' compensation benefits. This prevents the employee from receiving a double recovery.

The ALJ examined Wells' \$900,000 civil recovery to determine which duplicated workers' compensation benefits. The ALJ allotted \$38,939.79 for past medical expenses, \$265,200.00 for future medical expenses, \$17,284.57 for lost wages, \$175,000.00 for the impairment of power to earn money, and \$403,575.64 for past and future pain and suffering. The ALJ then found that \$444,080.36 duplicated workers' compensation benefits and were amenable to a claim of subrogation for Wal-Mart.

However, KRS 342.700(1) "requires that the employee's entire legal expense . . . be deducted from the employer's or insurer's portion of any recovery." *Bush* at 257. Wells' attorney's fees and expenses for the claim against Atlas were \$203,367.76. His fees and expenses for the claim against Unarco were \$113,901.00. In total, Wells' fees and expenses equaled \$317,268.76. As the ALJ and Board found, this would give Wal-Mart a subrogation credit of \$126,811.60 (\$444,080.36 minus \$317,268.76).

We find that the reasoning of the ALJ, Board, and Wells comports with statutory and caselaw and therefore affirm the amount of subrogation credit owed to Wal-Mart.

Wal-Mart also argues that as part of his tort settlement with Atlas, Wells waived his right to bring a workers' compensation claim. Wal-Mart brings our attention to language contained in the settlement agreement which states that Wells unconditionally released Atlas from any claims, agreed to satisfy all medical and workers' compensation liens and subrogation claims, and agreed to release Atlas from all such liens and claims.

We find this issue to be without merit. Nothing in the settlement agreement, especially the sections Wal-Mart brings to our attention, waives Wells' right to pursue a workers' compensation claim. In fact, the settlement sets out exactly the requirements of KRS 342.700(1), that Wal-Mart has a subrogation claim and that Wells must satisfy it. The ALJ and Board took this into consideration when Wal-Mart received the subrogation credit of \$126,811.60. This means that Wal-Mart will not have to pay Wells \$126,811.60 worth of workers' compensation benefits.

Based on the foregoing, we affirm the opinions of the ALJ and Board in awarding Wells workers' compensation benefits and giving Wal-Mart a \$126,811.60 subrogation credit.

ALL CONCUR.

PETITION FOR REVIEW
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