

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NOS. E901941/E911438/E911439

JIMMY THOMPSON CLAIMANT

CITY OF BENTONVILLE RESPONDENT

ARKANSAS MUNICIPAL LEAGUE WC TRUST
INSURANCE CARRIER RESPONDENT NO. 1

WAL-MART, INC. RESPONDENT NO. 2

OPINION FILED SEPTEMBER 8, 2005

Upon review before the FULL COMMISSION in Little Rock, Pulaski County, Arkansas.

Claimant represented by the HONORABLE JAY TOLLEY, Attorney at Law, Fayetteville, Arkansas.

Respondent No. 1 represented by the HONORABLE CHRIS BRADLEY, Attorney at Law, North Little Rock, Arkansas.

Respondent No. 2 represented by the HONORABLE CURTIS NEBBEN, Attorney, Fayetteville, Arkansas.

Decision of the Administrative Law Judge: Affirmed.

OPINION AND ORDER

This matter is before us on an appeal by the Claimant and Respondent No. 1, City of Bentonville (the City). For the reasons set out below, we affirm the decision of the Administrative Law Judge.

This claim has a complex procedural history. The present round of litigation is also complicated because of its unusual nature and the circumstances under which the case was brought to trial. In summary,

the claimant originally filed a claim alleging that he sustained three separate compensable injuries in 1998 and 1999. After a considerable amount of litigation, involving multiple appeals and remands, this Commission finally found in an Opinion dated January 9, 2003, that the claimant had sustained compensable injuries and that he was entitled to certain benefits, primarily medical, from the City.

While this matter was in litigation, the claimant sought medical treatment for his compensable condition. The City would not pay for this treatment because they were, at that time, contesting compensability. Since the claimant's wife was an employee of Respondent No. 2, Wal-Mart, Inc. (Wal-Mart), he was eligible for group health insurance benefits as a dependent spouse. Consequently, some of the medical treatment he received during this period was turned over to Wal-Mart's group health plan for payment. However, as Wal-Mart was aware of the claimant's pending workers' compensation claim, and the possibility that the City would ultimately be found liable for the medical expenses, they had the claimant execute a reimbursement agreement providing that Wal-Mart could be reimbursed

for their payment out of any proceeds from his pending litigation. Subsequent to the Commission's 2003 decision, a Joint Petition settlement was reached between the claimant and the City. While a copy of that proposed Joint Petition settlement was not made part of the record, it appears from our review of the transcript and the appellate briefs, the settlement would have required the City to pay the claimant \$3,500.00 and, if approved by the Commission, would have ended the claimant's entitlement to any further benefits in regard to this claim. At some point, Wal-Mart notified the parties that it was asserting a lien based upon its payment of medical expenses on behalf of the claimant. Once again, the record does not contain any documents setting out exactly when Wal-Mart asserted this lien.

At the request of the claimant and the City, a hearing was set on September 7, 2004 to determine whether the Joint Petition settlement should be approved. Shortly before the date of the hearing, an attorney for Wal-Mart entered an appearance and asked that, prior to the settlement being approved, their lien rights be determined. Apparently, wishing to avoid a delay in the settlement, the Administrative Law Judge

set a hearing on Wal-Mart's lien in the time previously set for the Joint Petition. According to an affidavit prepared by the ALJ's Administrative Assistant, the parties were advised of this change in the nature of the hearing on or about September 3, 2004. Because of the short notice of the hearing, no Prehearing Conference was held or Prehearing Order entered, and no Prehearing Questionnaires were submitted. At the hearing, neither the claimant nor his attorney appeared, even though they were notified of the proceedings. The hearing began with a lengthy discussion between the ALJ and attorneys for the City and Wal-Mart over what issues were to be decided. Eventually, the Judge directed the parties to her letter of May 6, 2004 which indicated that a hearing had been scheduled to determine what medical expenses, if any, Wal-Mart had previously paid for treatment of the claimant's compensable injury. The letter went on to state, "Wal-Mart needs to come forward to establish any liens which they contend that they have for medical expenses extended toward this claimant's compensable injuries."

The only witness that testified at the hearing was Christy Herbaugh, who identified herself as the

reimbursement supervisor for Wal-Mart's group health insurance plan. During her testimony, Ms. Herbaugh explained the method in which the group health plan operated and how they would pay for medical treatment under their plan, even though liability might exist for the benefits from some third party. Ms. Herbaugh explained the limitations and amounts which would be sought and she also set out, through testimony and documents introduced during her testimony, the specific medical treatment for which Wal-Mart had paid and were alleging was the basis of their lien. At the conclusion of her testimony, another lengthy discussion ensued between the counsel and the judge over exactly what relief was being sought at the hearing. The attorneys expressed some doubt as to whether the proposed joint petition had been withdrawn or if it was still existing and, if it had been withdrawn, what was going to be decided as a result of the hearing. In response, the Judge made the following statement:

"Well, it - it has turned into a hearing as to the extent of Wal-Mart's lien and that's - that's the only issue I'm going to be dealing with because I'm not dealing with a joint petition at this particular time."

After more discussion regarding the likelihood of a future joint petition, post-trial briefs, and possible depositions, the hearing was adjourned.

In an Opinion dated November 15, 2004, the Administrative Law Judge held that Wal-Mart had established that they had paid \$2,473.27 for medical treatment of the claimant's job related, compensable injury. The Judge further held that under the terms of Wal-Mart's group insurance plan, they were limited to collecting that amount or 65% of any agreed upon settlement, whichever was less.

In reviewing the parties appellate briefs, it appears that they may have lost sight of the actual issue presented to the Judge for determination. Almost all of the parties briefs are taken up with citations and references to various federal statutes, regulations or cases involving group health insurance benefits and federal preemption, or references to a Arkansas cases relating to a workers' compensation insurance carrier's right to subrogation in third party tort cases. However, that has little, if any, real application to this case.

We find that this case is governed by the provisions of Ark. Code Ann. §11-9-411. That section provides that the respondent in a workers' compensation claim is entitled to an offset against benefits paid by group insurance carriers. The statute also provides that group health insurance carriers may receive reimbursement from the respondents in workers' compensation cases for benefits they have paid out on behalf of workers with compensable injuries. The section of that statute relevant to the present litigation is (c) (2), which provides as follows:

(A) In the event that the claimant is unable to produce releases required by this section, this the commission shall determine the amount of such potential subrogation claims and shall direct the carrier or self-insured employer to hold in reserve only said sums for a period of five (5) years.

(B) If after the expiration of five (5) years, no release or final court order is presented otherwise directing the payment of said sums, then the carrier or self-insured employer shall tender said sums to the Death and Permanent Total Disability Trust Fund.

We find that the Administrative Law Judge made a determination, pursuant to the quoted sections as to

the amount of Wal-Mart's lien. Based upon our de novo review of the record, including the testimony of Ms. Herbaugh and all of the documents made part of the record, we find that the Administrative Law Judge was correct, and that Wal-Mart's group insurance plan has previously paid \$2,473.27 for medical treatment the claimant received as a result of his compensable, job related injuries.

Originally, Wal-Mart had requested that their lien be satisfied out of the proceeds of the settlement between the City and the claimant. However, by the time of the hearing, the settlement had been withdrawn. In this regard, the parties should be cognizant that Ark. Code Ann. §11-9-411(c)(2) provides that once the amount of any subrogation claim by a group insurance carrier is established, the carrier or self-insured employer must hold the amount in reserve until a release or court order is presented directing payment of the sum. As of this time, Wal-Mart has not requested payment from such reserve be made to them.

We also note from reviewing the claimant's appellate brief that he appears to be under the impression that it his responsibility to pay the

subrogation amount. That belief presumably prompted his appeal. However, we do not interpret the Administrative Law Judge's Opinion as ordering the claimant to pay any portion of the lien nor does that result appear to be contemplated by the statute.

As indicated above, Wal-Mart has not taken any steps to try and collect their lien directly from the City. Since no such action is presently before us, we are not making any decision regarding their entitlement to reimbursement from the City. We do note, however, that under the provisions cited above, if no order has been entered regarding disposition of the lien amounts claimed by Wal-Mart, then the City would be required to pay said amounts to the Death and Permanent Total Disability Trust Fund. Likewise, there does not appear to be any pending joint petition settlement before the Commission. In the event such a petition is filed in the future, it will be up to the Administrative Law Judge to whom the joint petition is assigned to determine whether the settlement is in the claimant's best interest, in light of Wal-Mart's subrogation lien.

We therefore find, pursuant to Ark. Code Ann. §11-9-411(c)(2) that Wal-Mart has established their

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right to a subrogation lien in the amount \$2,473.27 and the City is hereby directed to hold that amount in reserve. If no order is entered directing payment of said reserve then, after five (5) years, they shall tender same to the Death and Permanent Total Disability Trust Fund.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

SHELBY W. TURNER, Commissioner

KAREN H. MCKINNEY, Commissioner