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ARKANSAS COURT OF APPEALS

DIVISION I
No. CA11-380

BRADLEY CLEVENGER APPELLANT V. CITY OF JONESBORO and ARKANSAS MUNICIPAL LEAGUE APPELLEES	**Opinion Delivered** October 5, 2011 APPEAL FROM THE ARKANSAS WORKERS' COMPENSATION COMMISSION [No. F603467] AFFIRMED

LARRY D. VAUGHT, Chief Judge

Appellant Bradley Clevenger appeals from a Workers' Compensation Commission finding that appellee City of Jonesboro was entitled to an offset against Clevenger's retirement disability benefits under Arkansas Code Annotated section 11-9-411(a). This appeal involves questions of first impression concerning the construction and interpretation of a workers' compensation statute. Specifically, we must resolve whether a 2009 amendment to section 11-9-411 is procedural in nature and therefore applicable retroactively, or substantive in nature and therefore applicable only prospectively.

The facts of this case are not in issue. Clevenger sustained a compensable back injury while working for the City of Jonesboro ("the City") as a firefighter and was given a fourteen-percent impairment rating that was accepted and paid by the City in weekly disability benefits. He reached the end of his healing period in March 2006 and was unable to return to his job. The record shows that he began receiving monthly retirement disability

benefits from the Arkansas Local Police and Firefighter Retirement System ("Retirement System") in the amount of $2,311.80 (sixty-five percent of his salary), in addition to income from a part-time job with the Arkansas Game and Fish Commission at which he reported making about $2000 per month. On August 6, 2010, a hearing was held before an administrative law judge (ALJ) to determine Clevenger's entitlement to additional workers' compensation benefits. Clevenger argued that he was entitled to wage-loss disability benefits and that the City was not entitled to an offset against his Retirement System disability benefits. In an opinion filed on September 30, 2010, the ALJ held that the City was not entitled to any offset pursuant to Ark. Code Ann. § 11-9-411(a)(2), because Clevenger paid for a portion of his Retirement System benefits. The Commission reversed the ALJ, finding that the 2009 amendment gave the City a vested right to a reduction, was therefore substantive in nature, and in turn could not be applied retroactively. Accordingly, the Commission ruled that the City was entitled to an offset under the statute.

When Clevenger sustained his compensable injury in 2006, Arkansas Code Annotated section 11-9-411(a) provided:

> Any benefits payable to an injured worker under this chapter shall be reduced in an amount equal to, dollar-for-dollar, the amount of benefits the injured worker has previously received for the same medical services or period of disability, whether those benefits were paid under a group health care service plan of whatever form or nature, a group disability policy, a group loss of income policy, a group accident, health, or accident and health policy, a self-insured employee health or welfare benefit plan, or a group hospital or medical service contract.

In 2009, the General Assembly amended § 11-9-411(a) by adding that the reduction "does not apply to any benefit received from a group policy for disability if the injured worker has paid for the policy." Ark. Code Ann. § 11-9-411(a)(2).

On appeal, Clevenger argues that the Commission erred in ruling that the statute is substantive in nature and may not be applied retrospectively. Our supreme court has consistently set forth the law regarding retroactive application of statutes, *McMickle v. Griffin*, 369 Ark. 318, 254 S.W.3d 729 (2007):

> Retroactivity is a matter of legislative intent. Unless it expressly states otherwise, we presume the legislature intends for its laws to apply only prospectively. However, this rule does not ordinarily apply to procedural or remedial legislation. The strict rule of construction does not apply to remedial statutes which do not disturb vested rights, or create new obligations, but only support a new or more appropriate remedy to enforce an existing right or obligation. Procedural legislation is more often given retroactive application. The cardinal principle for construing remedial legislation is for the courts to give appropriate regard to the spirit which promoted its enactment, the mischief sought to be abolished, and the remedy proposed.

McMickle, 369 Ark. at 338–39, 254 S.W.3d at 746. Further, it is presumed that the General Assembly intended prospective application unless the language of the Act clearly admits no other construction. *City of Dover v. Barton*, 337 Ark. 186, 987 S.W.2d 705 (1999). Any doubt on the matter is resolved against retroactive application. *Id.* at 189, 987 S.W.2d at 707. Additionally, the general rules also apply to amendatory Acts. *Gannett River States Publ'g Co. v. Ark. Ind. Dev. Comm'n*, 303 Ark. 684, 799 S.W.2d 543 (1990). Our supreme court has further clarified that,

> Although the distinction between remedial procedures and impairment of vested rights is often difficult to draw, it has become firmly established that there is no vested right in any particular mode of procedure or remedy. Statutes which do not

> create, enlarge, diminish, or destroy contractual or vested rights, but relate only to remedies or modes of procedures, are not within the general rule against retroactive operation. In other words, statutes effecting changes in civil procedure or remedy may have valid retroactive application, and remedial legislation may, without violating constitutional guarantees, be construed . . . to apply to suits on causes of action which arose prior to the effective date of the statute . . .. A statute which merely provides a new remedy, enlarges an existing remedy, or substitutes a remedy is not unconstitutionally retrospective.

Archer v. Sisters of Mercy Health Sys., 375 Ark. 523, 528, 294 S.W.3d 414, 417 (2009).

Clevenger concedes that section 11-9-411(a)(2) contains no language to suggest retroactivity; however, he relies on the holding of *Archer* and attempts to draw a parallel that, like in *Archer*, and retroactive application is appropriate because the amendment alters only the City's available recovery remedies, not its vested rights. Indeed, in *Archer*, our supreme court concluded that the direct-action statute—the subject of its review—did not create a new cause of action, because the negligence cause of action was firmly grounded in our state's common law and was regulated by statute. *Id.* at 529, 294 S.W.3d at 418. The court went on to note that merely the remedy for recovery had changed, not the underlying right to recover. *Id.* at 529, 294 S.W.3d at 418. Thus, there is a notable distinction between the case presently at bar and the *Archer* precedent—the underlying "cause of action" remained constant in *Archer*, the only thing that changed was the potential tortfeasors.

Here, prior to 2009, the employer had a vested right to a setoff, yet after the amendment that right was obliterated. Our case law directs that any changes in statutes relating to vested rights are characterized as substantive and require application of the law as it existed at the time the claimant sustained a compensable injury. *Ark. State Police v. Welch*, 28 Ark. App. 234, 772 S.W.2d 620 (1989). A vested right exists when the law declares that

one has a claim, or that one may resist enforcement of a claim. *Forrest City Mach. Works v. Aderhold*, 273 Ark. 33, 616 S.W.2d 720 (1981).

In *Welch*, we considered a workers' compensation statute limiting the amount of permanent partial disability benefits and concluded that the statute did not apply retroactively, agreeing with the Commission's finding that it was substantive in nature because it dealt "not with the procedure for enforcing a remedy provided under the Workers' Compensation Act but rather with the substance of the remedy itself, *i.e.*, entitlement to an award of wage loss benefits." *Welch*, 28 Ark. App. at 237–38, 772 S.W.2d at 622. We are satisfied that because the amendment altered a vested right it cannot be said to be merely procedural or remedial, and therefore, our case law directs us to prospectively apply the statute.

The statutory amendment at issue in this case deals not with the procedure for enforcing a remedy provided under the Workers' Compensation Act, but rather with the substance of the remedy itself, *i.e.*, entitlement to retirement disability benefits. Before section (a)(2) was enacted, a claimant had no vested right to retirement disability benefits that had already been paid by other parties, and the employer had a vested right to a full setoff for those amounts. When section (a)(2) was enacted, it created a new vested right for injured workers and altered that of employers. Accordingly, because the statute is substantive and therefore cannot be applied retroactively to cover Clevenger's injury, the decision of the Commission is supported by substantial evidence, and we affirm.

Affirmed.

HOOFMAN and BROWN, JJ., agree.