

**IMPORTANT NOTICE**  
**NOT TO BE PUBLISHED OPINION**

**THIS OPINION IS DESIGNATED “NOT TO BE PUBLISHED.” PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.**

# Supreme Court of Kentucky

2010-SC-000306-WC

DONALD GREG WELLS

APPELLANT

V. ON APPEAL FROM COURT OF APPEALS  
CASE NO. 2009-CA-001682-WC  
WORKERS' COMPENSATION BOARD NO. 06-97979

WAL-MART STORES, INC.

APPELLEE

## **MEMORANDUM OPINION OF THE COURT**

### **AFFIRMING**

An Administrative Law Judge (ALJ) awarded the employer a subrogation credit for damages recovered in the claimant's third-party tort action that duplicated his workers' compensation benefits. The award prohibited the employer from taking the credit until it paid income and medical benefits that equaled the claimant's attorney's fee in the tort action. The Workers' Compensation Board affirmed and the Court of Appeals affirmed the Board. The claimant appeals the Court of Appeals' order denying his petition for rehearing. The petition requested the court to modify its opinion to make clear that the employer is not entitled to a subrogation lien until it has paid benefits equal to his attorney's fee in the tort action.

We affirm. The Court of Appeals did not err by addressing only the amount of the subrogation credit. The employer argued on appeal that KRS 342.700(1) barred any workers' compensation award due to the claimant's tort recovery. The argument did not include a question concerning the point at which the subrogation lien would become effective.

The claimant sustained injuries from being exposed to carbon monoxide while working in a freezer on December 10, 2005. He thought that the injuries occurred because Atlas and Unarco, the contractors the employer hired to perform renovations, used a welder and generators in the freezer without providing ventilation. He filed a workers' compensation claim against his employer and simultaneous tort claims against Atlas and Unarco.

The claimant settled the tort claims first for a total of \$900,000.00. After considering the workers' compensation claim, an ALJ awarded a total of \$440,659.21 in past and future income and medical benefits. The ALJ then calculated the employer's subrogation credit under KRS 342.700(1) as follows:

Tort recovery	\$900,000.00
LESS: Items not duplicating workers' compensation benefits <sup>1</sup>	-\$455,919.64
LESS: Attorney's fees/costs in tort case <sup>2</sup>	<u>-\$317,268.76</u>
Subrogation credit	\$126,811.60

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<sup>1</sup> These items included \$403,575.64 for pain and suffering; \$7,020.00 for lost wages awarded in excess of temporary total disability benefits; and \$45,324.00 for permanent impairment of the ability to earn money awarded in excess of permanent partial disability benefits.

<sup>2</sup> See *AIK Selective Self-Insurance Fund v. Bush*, 74 S.W.3d 251, 257 (Ky. 2002).

The ALJ also determined that the employer was not entitled to apply the subrogation credit until it had paid benefits equal to \$317,268.76, *i.e.*, equal to the attorney's fee and costs in the tort case.

The employer appealed, maintaining that KRS 342.700(1) prohibited the claimant from being awarded any workers' compensation benefits due to his tort recovery. The appeal did not dispute the allocation of damages or the point at which the employer's subrogation credit arose under the award.

The Board rejected the employer's arguments, noting that KRS 342.700(1) does not prohibit simultaneous tort and workers' compensation awards. It precludes a duplication of benefits by granting employers a limited right of subrogation against the proceeds of a third-party settlement. Noting that the employer had paid no income or medical benefits due under Chapter 342, the Board stated as follows:

What Wal-Mart fails or pretends not to grasp is that in accordance with the ALJ's decision there will be no double recovery by Wells, and no enforceable subrogation lien until Wal-Mart pays medical and income benefits, *excluding interest*, that equal the amount of the attorney fees and costs borne by Wells in the third party tort action. In addition, damages recovered from Atlas and Unarco that are not duplicative of Wells' workers' compensation award are, as a matter of law, not subject to subrogation under KRS 342.700(1). (emphasis original).

The employer appealed the decision, citing to KRS 342.700(1), which states in pertinent part as follows:

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). (emphasis added).

The employer argued that the "but he shall not collect from both" language limited the claimant to collecting from either a tort action or a workers' compensation and precluded his present attempt to collect from both.

The Court of Appeals rejected the employer's argument and affirmed the Board. Nevertheless, the claimant filed a petition for rehearing in which he asked the court to modify its opinion to clarify that the employer is not entitled to a subrogation lien until it has paid \$317,268.76 in benefits as stated by the ALJ and the Board. The court denied the petition summarily and this appeal by the claimant followed. He argues that the Court of Appeals should have modified its opinion as requested on rehearing. We disagree.

The Court of Appeals' decision addressed only the amount and calculation of the subrogation credit because the employer argued that KRS 342.700(1) barred any workers' compensation award due to the claimant's tort

recovery. The court did not err by refusing to "clarify" its opinion as requested in the claimant's petition for rehearing because the issues on appeal did not include a question concerning the point at which the subrogation lien would become effective.

The decision of the Court of Appeals is affirmed.

All sitting. All concur.

COUNSEL FOR APPELLANT,  
DONALD GREG WELLS:

James Douglas Holliday  
P.O. Box 29  
Hazard, KY 41702-0029

COUNSEL FOR APPELLEE,  
WAL-MART STORES, INC.:

William Bryan Hubbard  
Ward, Hocker & Thornton, PLLC  
333 West Vine Street  
Suite 1100  
Lexington, KY 40507