

STATE OF MICHIGAN
WORKER'S COMPENSATION APPELLATE COMMISSION

RICKY L. JONES,
PLAINTIFF,

V

DOCKET # 00-0440

WAL-MART STORES, INCORPORATED AND
INSURANCE COMPANY OF THE
STATE OF PENNSYLVANIA,
DEFENDANTS.

APPEAL FROM MAGISTRATE HEDSTROM.

THOMAS G. MOHER FOR PLAINTIFF,
JOHN M. ROELS FOR DEFENDANTS.

OPINION

WITTE, COMMISSIONER

This cause came before the Appellate Commission on defendant Wal-Mart Stores' appeal from Magistrate Richard L. Hedstrom's decision, mailed October 4, 2000, ordering defendant to pay plaintiff's attorney 30 percent fee, equaling \$18,669.75, in accordance with MCL 418.821(2), from a disposed 1999 worker's compensation case.¹

Section 821(2) and (3) read:

(2) . . . When a group disability or hospitalization insurance company; health maintenance organization . . . or a medical care and hospital service corporation . . . enforces an assignment given to it as provided in this section, it shall pay, pursuant to rules established by the director, a portion of the attorney fees of the attorney who secured the worker's compensation recovery.

¹ This case has been ready for review since March 1, 2001. While Insurance Company of the State of Pennsylvania is listed on all captions, Wal-Mart represents in its appellate brief that it is an "excess carrier" whose "coverage was not triggered in this case so it is not involved in this appeal." Defendant's brief, 2, footnote 1. At trial, a separate brief was submitted by Wal-Mart and National Union Fire Insurance Company, the latter being the worker's compensation carrier.

(3) As used in this section, “insurance company” includes a self-insurer. If an insurance company insures both worker’s compensation and group disability or group hospitalization, it shall be permitted the adjustment provided in this section.

Defendant presents its legal issue as follows:

Is defendant Wal-Mart required to pay plaintiff’s attorney a fee on the full amount of the workers’ compensation awarded against Wal-Mart where Wal-Mart subsequently reduced its workers’ compensation liability to plaintiff by the amount of Health Plan benefits previously paid by Wal-Mart for the plaintiff as provided by MCL 418.354?

The heart of defendant’s argument is as follows:

As part of Wal-Mart’s decision to coordinate under § 354, Wal-Mart elected not to enforce its Health Plan right to reimbursement. . . . As a consequence of Wal-Mart’s action, the Wal-Mart Health Plan obviously has never realized reimbursement, and there has been no “enforcement of an assignment” which would justify awarding plaintiff’s counsel an attorney fee. *Gilroy [v General Motors Co (After Remand)*, 438 Mich 330 (1991)], 341-343.²

Section 354, upon which defendant states this matter should be resolved, reads in pertinent part:

Sec. 354. (1) This section is applicable when either weekly or lump sum payments are made to an employee . . . with respect to the same time period for which . . . payments under a self-insurance plan . . . are also received . . . by the employee. . . . If such self-insurance plans . . . are entitled to repayment in the event of a worker’s compensation benefit recovery, the carrier shall satisfy such repayment out of the funds the carrier has received through the coordination of benefits provided for under this section. Notwithstanding the provisions of this subsection, attorney fees shall be paid pursuant to section 821 to the attorney who secured the worker’s compensation recovery.

In this case, the parties take opposing positions on recovery of medical expenses in a case where the employer is self insured for both a group medical insurance plan and a worker’s compensation insurance plan. The facts are generally stipulated; there were no witnesses at trial. The employer, through its group medical plan, paid \$62,232.49 in medical expenses for what was eventually determined, through award and affirmance on appeal, a work-related injury.

During the course of litigation, the employer’s group medical plan (which did not retain its own counsel) sent plaintiff’s attorney a series of seven letters, admitted at trial, repeatedly alerting

² Defendant’s brief, 2, 9 - 10.

him that the group medical plan would assert its right of reimbursement/subrogation, should the attorney be successful in getting plaintiff's disability determined work related. We note this typical language:

The Plan requires 100% reimbursement of its' [sic] subrogation interest when payments are made on behalf of participants. . . . Please let this serve as notification of the Plan's assertion of its' [sic] subrogation and reimbursement rights. . . . [Y]ou must contact our Subrogation Department . . . prior to any settlement to verify the total amount of the Plan's reimbursement and/or subrogation interest. To insure your protection, please include [the Plan] as a payee on the settlement check.³

The attorney dutifully notified the plan of the worker's compensation award and, as he had numerous times, supplied exhibits supporting the substantial medical costs. The magistrate noted that, by the time of trial, all outstanding medical expenses had been paid by the group medical plan.

The parties stipulated to the following relevant facts: "e. [The group medical plan] relied on plaintiff's counsel complying with demand, which counsel did;⁴ f. [The group medical plan] benefitted from the work performed by plaintiff's counsel;"⁵

They also stipulated that even though Wal-Mart was insured by Insurance Company of the State of Pennsylvania as an excess carrier and by National Union Fire Insurance Company for its worker's compensation coverage (see this opinion's footnote 1), that, as the magistrate noted, "counsel has agreed that both are self-insured"⁶ At the close of the July 28, 2000 trial, the magistrate requested briefing on the issue of attorney fees.

Interestingly, a new piece of evidence appeared attached to defendant's post-trial brief. A letter, dated August 10, 2000, authored by Wal-Mart's senior corporate counsel, had been written, indicating that, with the court's permission, defendant would instead "coordinate or take a credit for the Plan's previous payment" on plaintiff's behalf.

Upon consideration, the magistrate found pursuant to section 821(2) and the case of *Gilroy v General Motors Co (After Remand)*, 438 Mich 330 (1991), that the plaintiff's attorney had obtained

³ This particular language is taken from the first of the seven letters, dated December 4, 1997.

⁴ On appeal defendant takes issue with this stipulation. It argues that plaintiff's attorney was not directed by defendant to pursue reimbursement; the letters "simply informed counsel that if he collected from third parties, then Wal-mart (the Health Plan) was entitled to reimbursement for payments already made on behalf of Mr. Jones under the Health Plan." Obviously, it is too late to take this position.

⁵ Plaintiff's trial memorandum, 6.

⁶ Trial transcript, 16.

the work-related award and that defendant had enforced its assignment. As such, plaintiff's counsel should be paid by defendant in accordance with 821(2).

Regarding the lately-drafted letter choosing coordination, he wrote, "It was very interesting to note that there is the letter from Wal-Mart in regard to subrogation under the plan[; t]he letter providing basically that they demand the self-insured group portion of the Defendant have full rights to coordinate and take credit for the sum of \$62,232.49. Then the letter provides that if the credit is allowed, then the self-insured plan will not 'enforce its previously asserted reimbursement and/or subrogation interest on Mr. Jones' recovery.'" ⁷

The magistrate phrased his central holding in "if-then" language. Noting *Gilroy* and *Watkins v Chrysler Corp*, 167 Mich App 122 (1988), he said:

It has to be noted that in those two cases the Court ruled that *if there is an attempt* by the insurer, in other words the Defendant in these proceedings, *to enforce an assignment* to obtain reimbursement of sickness and accident benefits, then in that event *there must be payment of attorney fees* in accordance with the statute and the rule. ⁸

After finding *Watkins* inapplicable, the magistrate distinguished the holding in *Gilroy*, in which defendant was not ordered to pay attorney fees, from the instant facts:

Of course, in *Gilroy*, (supra), there was an order of attorney fees even though there had been no attempt whatsoever for reimbursement by the group carrier. The facts in this case are to the contrary. The proofs show and it was agreed that there were numerous "notice of subrogation interest" letters demanding reimbursement. It shows that there were acts taken on behalf of the Wal-Mart self-insured group plan directing the Plaintiff's counsel to seek reimbursement from the self-insured workers' compensation to [the] self-insured [medical benefits] group. Therefore this would appear to be conduct such that it takes it out of the general case law and allows, and this Magistrate would have to order, per the Act[,] attorney fees. ⁹

On appeal, defendant seeks to demonstrate that, while it had a right to reimbursement, it never exercised it. Defendant takes the position that a mere attempt to seek reimbursement/ subrogation

⁷ Magistrate's decision 3 - 4.

⁸ Magistrate's decision, 4. (Emphasis ours.)

⁹ Id.

should not take it out of the *Gilroy* rule. Instead, it coordinated the medical expenses, thus circumventing the plaintiff's attorney's right to any fees.¹⁰

Defendant likens itself to the defendants in *Gilroy*, where attorney fees were not awarded against the defendants because “[n]either of [the defendants] enforced an assignment or received any reimbursement.” As for benefit to the defendant, the *Gilroy* Court wrote, “Contrary to the [Court of Appeals’] view that GM reaped a ‘substantial benefit’ by coordinating the ‘disability benefits paid to plaintiff’ . . . it is apparent that the only benefit received by GM was the right not to pay twice for the same disability.” Therefore, defendant concludes, because it neither enforced its assignment or reaped a benefit, it should not be liable for plaintiff’s attorney fees.

We are unpersuaded by defendant’s argument that since it has elected to coordinate the medical expenses, the magistrate’s decision should be reversed. Section 354 is not applicable to this case since it concerns the coordination of weekly benefits or a lump sum (i.e., redemption), and not the coordination of medical expenses. The *Gilroy* case involved the coordination of weekly benefits, not medical expenses, and is therefore inapplicable. Defendant also relies on § 821. However, defendant stipulated at the hearing that it *did* benefit from plaintiff’s attorney’s efforts. Therefore, both defendant’s challenges are unpersuasive and the magistrate’s decision is affirmed.

Chairperson Skoppek and Commissioner Przybylo concur.

Joy L. Witte	Commissioner
Jürgen O. Skoppek	Chairperson
Gregory A. Przybylo	Commissioner

¹⁰ Plaintiff points out that, at trial, the defense position was solely that the employer’s disability plan was subject to ERISA which “trumped” the state-based Worker’s Disability Compensation Act. Defense counsel stated on the record that “their position is still that they think under ERISA the plan is not subject to State law. They feel this is the wrong for[u]m, and that is their position. And other than that, I have no other case law or anything else to support that position.” Trial transcript, 13. The magistrate rejected that argument and the defendant does not renew that argument with us.

Plaintiff now asserts that the defendant cannot abandon its ERISA argument and adopt a new approach on appeal. We note specifically plaintiff’s argument that defendant never brought up the issue of coordination pursuant to section 354 at trial. While there is merit to plaintiff’s argument, we choose to consider the matter. Since the overall issue is the same – does defendant owe plaintiff’s attorney’s fees? – the defendant is free to make what supportive legal arguments it may, honing them as it goes through the appellate process.

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IT IS ORDERED that the magistrate's decision is affirmed.

Joy L. Witte Commissioner

Jürgen O. Skoppek Chairperson

Gregory A. Przybylo Commissioner