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ARKANSAS COURT OF APPEALS

DIVISION II
No. CA12-626

RODGER BRIGMAN APPELLANT V. CITY OF WEST MEMPHIS and MUNICIPAL LEAGUE WORKERS' COMPENSATION TRUST APPELLEES	**Opinion Delivered** February 6, 2013 APPEAL FROM THE ARKANSAS WORKERS' COMPENSATION COMMISSION [NO. G101863] AFFIRMED

ROBIN F. WYNNE, Judge

Rodger Brigman appeals from an order of the Arkansas Workers' Compensation Commission granting an offset against his workers' compensation disability benefits to appellees, the City of West Memphis and the Municipal League Workers' Compensation Trust. He argues that the Commission erred in its interpretation of Arkansas Code Annotated section 11-9-411(a)(2). We disagree and affirm the decision of the Commission.

Mr. Brigman began working for the West Memphis Police Department as a patrol officer in 2002. In July 2009, he began contributing a portion of his wages to the Arkansas Local Police and Fire Retirement System (LOPFI). Prior to that time, the contributions to LOPFI were made entirely by the city. The city continued to make contributions after July

2009.[1] On December 31, 2010, Mr. Brigman sustained a compensable injury to his back while chasing a suspect. He was restricted to light-duty work and ceased working for appellees in February 2011 when light duty was no longer available. Mr. Brigman filed for and received disability-retirement benefits through LOPFI. He was assigned a ten-percent impairment rating, and appellees paid permanent-partial disability benefits.

Mr. Brigman requested a hearing before the Commission to litigate his entitlement to wage-loss disability benefits, the employer's entitlement to an offset, and other issues. In an opinion filed on January 12, 2012, an administrative law judge determined that appellant was entitled to wage-loss disability benefits in the amount of thirty percent and that appellees were not entitled to an offset for the disability-retirement benefits paid to Mr. Brigman. Appellees appealed to the Commission solely on the issue of their entitlement to an offset. The Commission determined that appellees were entitled to an offset of Mr. Brigman's retirement-disability benefits based on their contributions to LOPFI. The Commission further determined that appellees were not entitled to an offset for the portion of the retirement-disability policy paid for by Mr. Brigman. This appeal followed.

This appeal involves the interpretation of a statute. The question of the correct interpretation and application of an Arkansas statute is a question of law, which we decide de novo. *St. Edward Mercy Med. Ctr. v. Howard*, 2012 Ark. App. 673, 424 S.W.3d 881. It is for this court to decide what a statute means. *Id.* In deciding what a statute means, the

[1]Our calculations show that for the period from July 2009 through April 2011, Mr. Brigman's contributions totaled 12.5% of the LOPFI premiums paid during that period, with the city's contribution comprising the remaining 87.5%.

interpretation of a statute by the agency charged with its execution is highly persuasive, and, while not binding on this court, will not be overturned unless it is clearly wrong. *Id.* When we construe the workers' compensation statutes, we must strictly construe them. *Id.* Strict construction is narrow construction and requires that nothing be taken as intended that is not clearly expressed. *Id.* The doctrine of strict construction requires this court to use the plain meaning of the language employed. *Id.*

Arkansas Code Annotated section 11-9-411(a)(1) (Repl. 2012) states that

> [a]ny 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.

Section 11-9-411(a)(2), which was added via a 2009 amendment, states that "the reduction specified in subdivision (a)(1) of this section does not apply to any benefit received from a group policy for disability if the injured worker has paid for the policy."

This is the first opportunity that we have had to interpret section 11-9-411(a)(2). As noted above, the Commission determined that the application of section 11-9-411(a)(2) meant that appellees were entitled to an offset for the portion of the retirement-disability policy for which they paid and that they were not entitled to an offset for that portion paid for by Mr. Brigman. This court's task is to determine whether the Commission's interpretation of the statute is clearly wrong.

In *Henson v. General Electric*, 99 Ark. App. 129, 257 S.W.3d 908 (2007), this court held

that disability-retirement benefits, such as the ones at issue here, were subject to a dollar-for-dollar offset. In so holding, we stated that the overriding purpose of section 11-9-411 is to prevent a double recovery by a claimant. *Id.* at 137, 257 S.W.3d at 914. We recently held that, in calculating the offset, any amount proven to have been paid purely on account of retirement is not to be considered. *Mills v. Ark. State Hwy. & Trans. Dep't*, 2012 Ark. App. 395. There is no indication from the record before us that any portion of the benefits Mr. Brigman is receiving through LOPFI is for retirement.

The statutory phrase "if the injured worker has paid for the policy" is ambiguous because it is not clear from the language employed whether the legislature meant for section 11-9-411(a)(2) to apply only in cases where the employee has paid all of the policy premiums or whether it was intended to apply in cases such as this one, where both the employer and the employee have contributed to the policy premiums. When the meaning of a statutory term is ambiguous, we look to the language of the statute, the subject matter, the object to be accomplished, the purpose to be served, the remedy provided, the legislative history, and other appropriate means that shed light on the subject. *Collins v. Excel Specialty Prods.*, 347 Ark. 811, 69 S.W.3d 14 (2002).

We hold that the Commission's interpretation of subsection (a)(2) gives effect to the purpose of the 2009 amendment. Prior to the amendment, an employer could claim a full dollar-for-dollar offset for benefits received by an injured worker from a group policy for disability regardless of the source of the premium payments. The amendment was clearly meant to prevent this from happening. Allowing an employer a full dollar-for-dollar offset

in a situation such as this would produce the result that the legislature expressly wished to avoid. Conversely, to adopt appellant's position and completely deny an offset to the employer, especially in a situation such as this where the employer paid the majority of the disability-policy premiums, would result in an unintended windfall to the injured worker and could potentially deter employers from making contributions to group disability policies. Essentially, under the Commission's interpretation, each party receives the benefit of the disability-policy payments that it made, which was the intent of the legislature in passing the 2009 amendment to section 11-9-411. The Commission's interpretation of section 11-9-411(a)(2) is not clearly wrong and is affirmed.

Affirmed.

GRUBER, J., agrees.

HARRISON, J., concurs.

BRANDON J. HARRISON, Judge, concurring. I agree that we should affirm the Commission's decision to grant a proportional offset to the City of West Memphis and the Municipal League Workers' Compensation Trust. I also agree that we should determine the offset amount in light of the relative premium contributions the city and Brigman paid. I write separately to ask our supreme court to reexamine when we must apply the de novo and clearly wrong standards of review in the same case.

My colleagues rightly state that "[t]his appeal involves the interpretation of a statute. The question of the correct interpretation and application of an Arkansas statute is a question of law, which we decide de novo." But then we employ what I believe to be an unnecessary

standard of review: "In deciding what a statute means, the interpretation of a statute by the agency charged with its execution is highly persuasive, and, while not binding on this court, will not be overturned unless it is clearly wrong." Our holding in this case expressly integrates the highly deferential standard: "The Commission's interpretation of section 11-9-411(a)(2) is not clearly wrong and is affirmed." I would prefer to restrict our review to the de novo standard and simply state that the statute at issue permits a proportional offset and therefore the Commission did not commit a reversible legal error when it applied a proportional offset. But our supreme court requires otherwise.

We all agree that the crucial question in this case is what does the phrase "if the injured worker has paid for the policy" mean? Ark. Code Ann. § 11-9-411(a)(2)(Repl. 2012). We also agree that the question is solely an issue of law—and "[s]traight-up issues of law deserve and receive de novo review no matter what kind of case they arise in. . . . [F]indings of fact deserve deference." *Hicks v. Cook*, 103 Ark. App. 207, 218, 288 S.W.3d 244, 252 (2008) (Marshall, J., concurring). But to say that we are making a de novo review and then also state that we will not reverse unless the Commission's decision was clearly wrong is, to me, like saying "we review the judgment for green redness." *Id.* at 215, 288 S.W.3d at 250. A leading treatise on statutory construction puts the matter this way: "[n]o deference is owed to an agency's interpretation of a statute where the issue is one of first impression." 3B *Sutherland Statutory Construction* § 75:3 (7th ed. 2009).

Applying, as a matter of course, the de novo standard and the clearly wrong standard in "agency" cases should be reexamined. This is especially so in a case like this one—where

the application of a statute does not turn on the Commission's findings of particular material facts. Nor do we have a developed regulatory history in point that arguably caused the Commission and the parties to have a reasonable expectation on how an appellate court might likely decide the statutory interpretation issue presented. Finally, no party has identified and argued that the Commission possesses a particular type of expertise that places it in a superior position to determine what section 11-9-411(a)(2) means. There will be cases where the Commission will deserve the high amount of deference attached to the clearly wrong standard of review. This case should not be one of them.

Perhaps our supreme court will, in due course, clarify why we should apply the de novo and clearly wrong standards at one time—in a case of first impression that turns solely on how to read and apply a statute, does not involve a settled history of agency action, and in which no party has identified a particular Commission expertise that bears on the legal question before the reviewing court.

Brazil, Adlong & Mickel, PLC, by: *Thomas W. Mickel*, for appellant.

J. Chris Bradley, for appellees.