UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0895

September Term, 2014

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CLEAR SPRING AMBULANCE CLUB,

ET AL.

v.

ROGER J. REED

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Eyler, Deborah S.,
Wright,
Kenney, James A., III
(Retired, Specially Assigned),

JJ.

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Opinion by Kenney, J.

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Filed: February 26, 2016

Clear Spring Ambulance Club ("appellant" or "Clear Spring"), appeals the Circuit Court for Montgomery County's grant of an oral motion for judgment in favor of appellee Montgomery County ("the County"), which made Clear Spring the responsible employer for appellee Roger J. Reed's ("Mr. Reed's") workers' compensation claim. Clear Spring presents a single contention for our review, which we have re-formulated as follows:

> Did the circuit court err when it granted the County's motion for Judgment?[1]

For the reasons that follow, we affirm the judgment of the circuit court.

## FACTUAL AND PROCEDURAL BACKGROUND

Mr. Reed was employed by the County as a firefighter from 1962 until his retirement on January 1, 1994. Beginning in February 1997, until November 1998, Mr. Reed was an emergency medical technician and ambulance driver for Clear Spring. In that role, he responded to approximately twenty-five incident calls a month that included automobile accidents, fires, hazardous material spills, and fuel spills. When responding to a fire, he typically was outside the ambulance within 150 feet of the incident and could "smell the fire, smell the incident as it evolved" at the site "watching what was going on."

[1] In its brief appellant presents the issue as follows: "Did the circuit court err by granting judgement in favor of appellee Montgomery County despite the Worker's Compensation Commission Order's presumption in favor of the appellants Clear Spring?"

In addition, he could smell diesel fumes in the sleeping and recreational quarters,[2] which was above the garage where the ambulances were housed.

Diagnosed with prostate cancer, Mr. Reed underwent a procedure for that condition on February 13, 2006. He filed a claim with the Workers' Compensation Commission ("the Commission"), asserting that he "developed prostate cancer due to [his] many years of exposure to toxic chemicals as a fire-fighter . . . ." After hearings on August 7, 2012 and August 14, 2012, the Commission issued an order on September 12, 2012:

> [Mr. Reed] sustained an occupational disease (prostate cancer) arising out of and in the course of employment, that the first date of disablement was February 13, 2006, that the disability of [Mr. Reed was] the result of the occupation disease, and that as a result thereof, [he] was temporarily totally disabled from February 13, 2006 to April 1, 2006, inclusive. The Commission further [found] that the last injurious exposure occurred while [Mr. Reed was] employed by Montgomery County, Maryland.

The County filed a request for rehearing asserting that the "undisputed evidence is that the last [injurious exposure occurred during Mr. Reed's tenure with] Clear Spring" when, as "an active duty firefighter/EMT at Clear Spring," he "was exposed" to "fire and other chemicals." The Commission granted the request, and a second hearing was held on April 4, 2013. At that hearing, Mr. Reed stated that at Clear Spring he "respond[ed] to all

[2] At the April 4, 2013 Workers' Compensation Commission hearing, Mr. Reed stated that the Clear Spring Ambulance Company facility was "a two-story building with a garage base for the ambulance to respond out of on the first floor . . . and a watch office to the left of the ambulance bay, and the sleeping and, recreation facilities on the second floor." When asked whether "the sleeping and recreation facilities [are] right above the garage" he responded affirmatively.

dispatched calls as an EMT and driver" and was exposed to "whatever was on the scene" in addition to the smell of diesel fumes in the sleeping and recreational quarters above the ambulance bay. Apart from the previously submitted April 10, 2012, independent medical evaluation report by Dr. Jeffrey Gaber, no medical information was introduced at that hearing.[3]

On April 12, 2013, the Commission issued an order finding that Mr. Reed sustained a compensable occupation disease; that he was temporarily totally disabled from February 13, 2006, to April 1, 2006, inclusive; and that the last injurious exposure occurred while he was employed as a firefighter by the County. On May 7, 2013, the County filed an appeal of that decision and requested a jury trial.

On May 13, 2014, the *de bene esse* deposition of Dr. Gaber was conducted. In that deposition, Dr. Gaber discussed the April 14, 2014 supplement to his earlier medical evaluation. That supplement resulted from the January 17, 2014 affidavit of Mr. Reed, in which Mr. Reed indicated his role with Clear Spring. Dr. Gaber explained that prior to receiving Mr. Reed's affidavit, he was "not aware" of Mr. Reed's service as an emergency medical technician at Clear Spring. Based on that information, Dr. Gaber concluded that Mr. Reed's prostate cancer was related to his exposure to various carcinogens and diesel fumes during a "long career as both a firefighter and emergency medical technician."

[3] Dr. Gaber's report stated that Mr. Reed's prostate cancer is "related to the toxic exposures which he encountered during his long career as a firefighter."

A jury trial commenced on May 20, 2014. At the beginning of trial, the County made a motion in limine to "prevent [Clear Spring] from referring or arguing that the decision of the commission is presumed correct." That motion was denied because, in the court's view, "there was evidence before the commission that allows the presumption of correctness to apply in this case."

The County, contending that the Commission's decision was incorrect and that Clear Spring was the employer of last injurious exposure, introduced the *de bene esse* deposition of Dr. Gaber and pointed out that Clear Spring had failed to introduce any medical evidence to support its assertion that any exposure Mr. Reed encountered while at Clear Spring was not "injurious exposure."

At the close of the County's case, Clear Spring moved for judgment on two separate grounds: (1) that "there was no evidence submitted by [the County] that there was actually any exposure to smoke or fumes or any hazardous exposure, any injurious exposure while [Mr. Reed] was volunteering for Clear Spring in 1996,[4] 1997, or 1998[;]" and (2) that "[workers' compensation] law require[d] that the . . . [County] submit into evidence a copy of the commission order . . . [or] something in the case in chief . . . which enters into evidence the substance of the commission's decision . . . ," which the County had failed to do. The first ground was rejected by the trial court because the employer denying liability has the burden of production and persuasion and there was

[4] Nothing in the record indicates that Mr. Reed was volunteering for Clear Spring in 1996.

evidence indicating that Mr. Reed "would've been exposed [to toxins at the scene of a call] from 150 feet." The second ground was rejected because nothing in the language of the statute[5] or in the case law required the party appealing a Commission decision to introduce the order or other similar information.

Clear Spring introduced the April 12, 2013 Commission order, excerpts from the hearings before the Commission, and testimony from Ricki Lynn Hemphill, assistant treasurer of the Washington County Volunteer Fire Rescue Association,[6] to support its

[5] Clear Spring's argument referred to Md. Code (1991, 2008 Repl. Vol.), § 9-745 of the Labor and Employment Article ("L.E. § 9-745") which states:

> (a) The proceedings in an appeal shall:
>
> (1) be informal and summary; and
>
> (2) provide each party a full opportunity to be heard.
>
> (b) In each court proceeding under this title:
>
> (1) the decision of the Commission is presumed to be prima facie correct; and
>
> (2) the party challenging the decision has the burden of proof.
>
> (c) The court shall determine whether the Commission:
>
> (1) justly considered all of the facts about the accidental personal injury, occupational disease, or compensable hernia;
>
> (2) exceeded the powers granted to it under this title; or
>
> (3) misconstrued the law and facts applicable in the case decided.
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> (d) On a motion of any party filed with the clerk of the court in accordance with the practice in civil cases, the court shall submit to a jury any question of fact involved in the case.
>
> (e) (1) If the court determines that the Commission acted within its powers and correctly construed the law and facts, the court shall confirm the decision of the Commission.
>
> (2) If the court determines that the Commission did not act within its powers or did not correctly construe the law and facts, the court shall reverse or modify the decision or remand the case to the Commission for further proceedings

[6] Mr. Hemphill had access to the membership lists of Clear Spring Ambulance Club for the 1996, 1997, and 1998, but he was not a member of Clear Spring (continued…)

position that the Commission order was correct and that Mr. Reed did not suffer any injurious exposure during his tenure with Clear Spring.

After the close of Clear Spring's case, Mr. Reed's testimony from the August 14, 2012 Commission hearing was read into the record by his counsel,[7] which included Mr. Reed's statements that it was "a normal and customary exposure of the job, to be exposed to smoke when [he] was [on the scene of a call] as a paramedic" and that he could "smell" diesel fumes when he was in the sleeping and recreational quarters.

The County moved for judgment arguing that, to rebut the presumption in favor of Mr. Reed that the occupational disease was incurred at the last place he worked, Clear Spring was required to present "more evidence than just general allegations" that any exposure at Clear Spring was not injurious. It also argued that "the commission's decision [did] not enjoy a presumption of correctness" because the occupational disease presumption applies to the employer of last "injurious exposure" and that "at the commission [Clear Spring] didn't have medical evidence" to support the Commission decision. According to the County, Clear Spring had "both the burden of production and the burden of persuasion," to overcome the occupational disease presumption, which "constitutes affirmative evidence at all time[s]."

Clear Spring responded that it was "not clear that any exposures occurred at Clear Spring" and that the Commission's "factual determination" that the County was the

Ambulance Club. Therefore, he had no personal knowledge of the number of fires that Mr. Reed responded to as a member of Clear Spring.

[7] Mr. Reed was not present at trial because he was living in Texas.

employer where the last injurious exposure occurred should be presumed correct. Therefore, Clear Spring was "entitled to get to the jury verdict on [the] factual issue" of whether the last injurious exposure was at Clear Spring.

After hearing arguments from all parties, the court granted the County's motion for judgment and explained:

> [T]he medical evidence was uncontroverted that [Mr. Reed] was exposed to hazardous or injurious -- there was injurious exposure to the hazards of the occupation. Namely smoke, diesel fumes, you know, all those sorts of toxic chemicals.
>
> And there's no dispute that the last in time was Clear Spring, and I agree that the bulk of the exposures . . . is due to the time and the fact that [Mr. Reed] was a firefighter. . . [But f]or better or for worse, the law says that it's the last injurious exposure that controls.
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> So there's no disputed fact on that. The last injurious exposure occurred during the employment at Clear Spring. There's no evidence to controvert that. There's no evidence from any medical source that no, that's not true . . . The evidence was there was an exposure at Clear Spring. It might not have been as definitive as would be, you know, helpful. But again, it certainly could just be the fact that well, this occurred a long time ago[.]
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> But I think in context, he was -- his testimony was that I was exposed to toxic chemicals or, you know, whatever it was, but it was at least in part caused by the exposure to the hazards of being a firefighter and an EMT.
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> So I just don't think there's anything to go to the jury. And if there's nothing to go to the jury, it's not really fair to the [C]ounty [to] have the jury decide something that there is no factual dispute over. And the law is pretty definitive. And I guess it's a policy decision that we're going to hold liable employers for people who work in highly hazardous occupations, and that's it.

The order granting the motion and remanding the case to the Workers' Compensation Commission for entry of an order consistent with the decision was entered on July 2, 2014.

*Standard of Review*

In reviewing the grant or denial of a motion for judgment, we conduct "the same analysis as the trial judge." *Thomas v. Panco Mgmt. of Md., LLC*, 423 Md. 387, 394 (2011). All evidence, including all reasonable and logical inferences drawn therefrom, is construed in the light most favorable to the non-moving party. *Address v. Millstone*, 208 Md. App. 62, 80 (2012). But, if "we conclude that there was insufficient evidence to create a jury question[,]" we will affirm the trial court's grant of a motion for judgment. *Spengler v. Sears, Roebuck & Co.*, 163 Md. App. 220, 235 (2005) (quoting *Wilbur v. Suter*, 126 Md. App. 518, 528 (1999)).

Ordinarily, a "decision of the Commission is presumed to be prima facie correct; and . . . the party challenging the decision has the burden of proof." Md. Code (1991, 2008 Repl. Vol.), § 9-745(b) of the Labor and Employment Article ("L.E. § 9-745(b)"). The court, however, determines whether the Commission "(1) justly considered all of the facts about the . . . occupational disease[;] (2) exceeded the powers granted to it under [Title 9]; or (3) misconstrued the law and facts applicable in the case decided." L.E. § 9-745(c). In other words, Commission decisions involving issues of law, are not entitled to the "presumption of correctness" under L.E. § 9-745. *Simmons v. Comfort Suites Hotel*, 185 Md. App. 203, 211 (2011). Reviewing courts have "broad authority and may reverse [a] Commission[] decision [that] is based on an erroneous conception of the law." *Globe Screen Printing Corp. v. Young*, 138 Md. App. 122, 128 (2001) (citation omitted) (internal quotation marks omitted); *see also Md. Bureau of Mines v. Powers*,

258 Md. 379, 383 (1970) ("[A] finding of the Commission may be reversed when it is based on an erroneous conception of the applicable law."). On appeal of a Commission decision, "the court shall submit to a jury any question of fact involved in the case." L.E. § 9-745(d).

The presumptions created by L.E. § 9-503,[8] ("the occupational disease presumption"), and L.E. § 9-745,[9] ("the Commission correctness presumption"), are rebuttable factual presumptions. *See City of Frederick v. Shankle*, 136. Md. App. 339, 352-53 (2001). Whether Clear Spring had and, if so, met its burden of production to overcome the occupational disease presumption are questions of law that we review de novo. *Terumo Med. Corp. v. Greenway*, 171 Md. App. 617, 623 (2006).

*Discussion*

Clear Spring contends that "the circuit court erred by granting judgment in favor of [the County] because the court erroneously resolved a factual dispute as to whether any alleged exposure at Clear Spring was 'injurious exposure,' as contemplated by the Workers' Compensation Act." According to Clear Spring,

[8] "(c) A paid firefighter, paid fire fighting instructor, paid rescue squad member, paid advanced life support unit member, . . . or a volunteer firefighter, volunteer fire fighting instructor, volunteer rescue squad member, or volunteer advanced life support unit member . . . is presumed to be suffering from an occupational disease that was suffered in the line of duty and is compensable under this title if the individual: (1) has . . . prostate . . . cancer that is caused by contact with a toxic substance that the individual has encountered in the line of duty;"

[9] "(b) In each court proceeding under this title: (1) the decision of the Commission is presumed to be prima facie correct; and (2) the party challenging the decision has the burden of proof."

> there [was] a genuine dispute of material fact as to whether any "exposure" at Clear Spring Ambulance Club was "injurious" to [Mr. Reed], to the point that it caused or contributed to the development of the prostate cancer occupational disease . . . , [and this factual dispute] arises from the type, amount and frequency of exposure and whether any exposure that may have occurred was significant enough to cause prostate cancer.

It further argues that the Commission order is entitled to the presumption of correctness because the Commission "made a factual finding based upon sufficient evidence," and "the burden of production and burden of persuasion [were on the County] as the petitioner at the trial court."

The County counters that the circuit court correctly granted its motion for judgment, stating "[t]here is no genuine issue of material fact" because Mr. Reed's "prostate cancer is presumed to be caused by working as either a firefighter or a rescue squad worker" and "under the law, only [Clear Spring, as] the employer of last exposure," is responsible. The County further argues that the Commission's order was "contrary to the law and undisputed facts," in that "no evidence needs to be introduced to show a toxic exposure at either job," and the "undisputed evidence [was] that during his work as an [emergency medical technician] for [Clear Spring], Mr. Reed came in contact with toxic substances in the line of duty." According to the County, the "undisputed facts" as recounted in its summary judgement motion, Mr. Reed's testimony at the Commission hearing, and Dr. Gaber's *de bene esse* deposition, establish that there "was a toxic exposure" related to the occupational disease while at Clear Spring and that Clear

Spring presented nothing "to controvert the application of the [L.E. § 9-503 occupational disease] presumption to [Clear Spring]."[10]

Under workers' compensation law, employers are required to provide compensation to covered employees who suffer job related injuries and subsequently become disabled. L.E. § 9-501. "'[D]isablement' means the event of a covered employee becoming partially or totally incapacitated: (1) because of an occupational disease; and (2) from performing the work of the covered employee in the last occupation in which the covered employee was injuriously exposed to the hazards of the occupational disease." L.E. § 9-502(a). Thus, "[w]hen the issue is who must pay compensation, . . . the date of last injurious exposure to the hazard of the disease . . . governs." *James v. Gen. Motors Corp.*, 74 Md. App. 479, 486 (1988).

The law entitles individuals who have worked in certain public safety occupations and suffer from particular occupational diseases to the rebuttable presumption that their conditions are compensable. L.E. § 9-503. Notably, a

> volunteer rescue squad member . . . who is a covered employee under § 9-234[11] of this title is presumed to be suffering from an occupational

[10] In addition to the arguments presented by the County, Mr. Reed argued that the circuit court properly granted the County's motion for judgment because *Baltimore v. Kelly*, 391 Md. 64 (2006), a case on which Clear Spring relies, is distinguishable from the instant appeal. We agree. The Kelly decision is inapposite to our discussion because the occupational disease presumption did not apply in that case.

[11] Section 9-234 provides:

> (w) Washington County – (1) Unless an election is made under paragraph (2) of this subsection, a member of a volunteer company in Washington County is not a covered employee. (2)The Board of County Commissioners for Washington County may provide by resolution for members of a

(continued…)

> disease that was suffered in the line of duty and is compensable under this title if the individual: (1) has leukemia or pancreatic, prostate, rectal, or throat cancer that is caused by contact with a toxic substance that the individual has encountered in the line of duty.[12]

L.E. § 9-503. That presumption, "impose[s] a formidable burden upon employers of those given preferential treatment under the statute" and "to overcome the presumption the employer/insurer must produce evidence of some non-job related cause for the disease." *Shankle*, 136 Md. App. at 361, 365.

The Court of Appeals discussed the origins of this presumption and its evidentiary weight in *Montgomery Cnty. Fire Bd. v. Fisher*, 298 Md. 245, 256-58 (1983):

> [T]he Maryland legislature created the presumption in light of the general public knowledge that [the employees listed in the statute] in the course of their daily activities are exposed to inhalation of smoke or noxious fumes and are subjected to unusual stresses and strains; that for purposes of applying the presumption of § 64A(a) [what is now L.E. § 9-503] it does not matter how the [individual] contracted the disabling [condition] or how it first became evident since it is presumptively compensable as an occupational disease in any event; and that once the presumption of compensability has been applied, the Commission "must then consider whether it has been rebutted by other evidence in the case showing that non-job related factors either caused or contributed, in whole or in part, to [the individual's condition] and, if so, apportion the

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volunteer company in the county to be covered employees while on duty. Washington County resolution number RS-08-06 provides:

> 1. Upon election by a volunteer fire or rescue company in Washington County as defined by Md. Code, Labor & Employments Article, §9-234(a)(3) that its members be considered covered employees while on duty as defined by Md. Code, Labor & Employments Article, §9-234(a)(2) for purposes of workers' compensation coverage provided by the county government.

Mr. Reed's status as a covered employee is not at issue on appeal.

[12] The individuals are also required to meet several other conditions, none of which are at issue in this case.

> contribution of each factor accordingly." [*Lovellette v. City of Baltimore*, 297 Md. 271, 285 (1983)].
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> * * * *
>
> We think the legislature intended that the Morgan type presumption [which requires the opponent to carry the burden of production and persuasion] be applied in adjudicating cases arising under [the statute]. . . . [The presumption] is reflective of a social policy affording preferential treatment to [individuals listed in the statute]. Although the presumption of compensability is a rebuttable one of fact, the legislature manifestly intended that the statute impose a formidable burden on the party against whom it operates. Accordingly, both the burden of production and the burden of persuasion remain fixed on the employer; neither ever shifts to the claimant and the presumption constitutes affirmative evidence on the [claimant's] behalf throughout the case, notwithstanding the production of contrary evidence by the other side.

Neither Clear Spring nor the County challenge the Commission's finding that Mr. Reed sustained an occupational disease (prostate cancer) as a result of his career. Nor do they challenge his resulting disablement. In Clear Spring's view, however, "any evidence of exposure" does not necessarily impose liability on the "last-in-time employer," and it contends that Mr. Reed's "line of duty" exposure as an emergency medical technician was not extensive enough to be considered the last "injurious exposure."

There is evidence in the record of Mr. Reed's "line of duty" contact with toxic substances during his tenure at Clear Spring. He testified at the Commission hearings that he was situated within 150 feet of the fire incidents to which he responded, from which he could "smell the fire," and that he was exposed to diesel fumes in the quarters where he slept while on duty. Mr. Reed's affidavit, which Dr. Gaber relied on in his supplemental medical evaluation, states that he "was exposed to fire and chemicals on the

job [at Clear Spring].” The evidence also established the causal connection between the exposures and Mr. Reed’s prostate cancer. Dr. Gaber’s supplemental medical evaluation, which had not been submitted before the Commission, stated that Mr. Reed’s “impairment due to prostate cancer . . . is related to his long career as both a firefighter and emergency medical technician.” Therefore, the L.E. § 9-503 occupational disease presumption imposed on Clear Spring, as the last employer, the burden to produce prima facie evidence of some non-job related cause for Mr. Reed’s prostate cancer. *Shankle*, 136 Md. App. at 361.

Perhaps relying on Dr. Gaber’s initial medical evaluation that did not reflect Mr. Reed’s service with Clear Spring, Clear Spring produced no evidence of a non-job related cause before the Commission, even though Mr. Reed’s actual service at Clear Spring was not disputed. Nor, on appeal to the circuit court, did it do so. It relied instead on the Commission correctness presumption of L.E. § 9-745, the correctness of which had been undermined in the County’s case-in-chief by Dr. Gaber’s supplemental medical opinion that was not before the Commission. The burdens of production and persuasion were on Clear Spring to establish a non-job related cause for the occupational disease. Had it met its production burden at the Commission, the Commission correctness presumption may have been “an evidentiary fact” to be weighed on its burden of persuasion. *S.B. Thomas, Inc. v. Thompson*, 114 Md. App. 357, 366 (1997).

Dr. Gaber, the only medical expert to testify, related Mr. Reed’s cancer to exposures both as a firefighter with the County and as an emergency medical technician

at Clear Spring. In the absence of some prima facie evidence of non-job related causation, there was no factual issue for the jury to decide. *See S.B. Thomas, Inc.*, 114 Md. App. at 383-84 (stating that expert medical testimony is generally required to establish a prima facie case of non-causation).

We recognize, as did the circuit court, that "a bulk of the exposures . . . was due to the time and the fact that [Mr. Reed] was a firefighter" working for the County. But, the length of service and the actual extent of exposure are not the measures of injurious exposure under the statute. Although the legislative policy of "assigning liability to the last employer that could have caused the disease may seem unfair under the facts of a specific case," it recognizes the problem of pinpointing the inception of an occupational disease and the exposure that ultimately triggered it, and represents a conscious decision by the legislature that is to be applied uniformly. *CES Card Establishment Servs., Inc. v. Doub*, 104 Md. App. 301, 312 (1995). In this case, for example, the disease was not diagnosed until approximately six years after some thirty-four years of exposure.

As the Court of Appeals explained in *Lowery v. McCormick Asbestos Co.*, 300 Md. 28, 39, 47-48 (1983):

> The last injurious exposure rule of proof more typically applies where one employment caused the disease, but more than one could have. By arbitrarily assigning liability to the last employment which could have caused the disease, the rule satisfies claimant's burden of proof of actual causation. The reason for the rules lies not in their achievement of individualized justice, but rather in their utility in spreading liability fairly among employers by the law of averages and in reducing litigation. [(Quoting *In re Compensation of Bracke*, 646 P.2d 1330, 1336 (1982)).]
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> * * * *

We believe that the legislative purpose in the passage of the initial Occupational Disease Act (ch. 465, Acts of 1939) was to bring within the purview of the Workmen's Compensation Act disability caused by specified occupational diseases produced by the workplace environment without change in the basic social aspects of the law and we attribute to the 1939 Legislature the same high ideals and the same high social aims that motivated the Legislature of 1914.

It is plain that the Legislature was aware of the inherent difference between disability produced by accidental injury—with a fixed date of occurrence—and that produced by the more insidious occupational disease—the inception of which most frequently is clouded and the disabling effect of which may occur years after its commencement. The Legislature made specific provision for that inherent difference: (1) by fixing the date of disablement as the accrual date of a worker's right to benefits (ch. 465, Acts of 1939, § 32B; now Article 101 § 22(a)) [recodified at L.E. § 9–502], and (2) by assigning liability for benefits to that employer in whose employment the disabled worker was last injuriously exposed to the hazards of the disease (ch. 465, Acts of 1939, § 32C, now Article 101 § 23(b)) [recodified at L.E. § 9–502(b)].

In sum, we affirm the circuit court's grant of summary judgment.

**JUDGMENT AFFIRMED. COSTS TO BE PAID BY APPELLANT.**