

IN THE COURT OF APPEALS OF MARYLAND

No. 105

September Term, 1995

ROBERT WASKIEWICZ

v.

GENERAL MOTORS CORPORATION

Murphy, C.J.
Eldridge
Rodowsky
Chasanow
Karwacki
Bell
Raker

JJ.

Dissenting Opinion by Chasanow, J.,
in which Eldridge and Bell, JJ.,
join

Filed: July 29, 1996

The majority holds that the Workers' Compensation Act (the Act), Maryland Code (1991 Repl. Vol., 1995 Supp.), Labor and Employment Article, § 9-101 *et. seq.*,¹ bars a disabled worker from maintaining a claim for a permanent total disability from an occupational disease that occurred in 1992, simply because the worker received an award for a 15 percent disability from the same occupational disease 16 years earlier. In reaching this result, the majority recognizes that its holding has "some seeming unfairness," ___ Md. at ___, ___ A.2d at ___ (Majority. op. at 16), and "appears particularly unfair," ___ Md. at ___, ___ A.2d at ___ (Majority op. at 19).

The facts in the instant case are undisputed. Waskiewicz developed carpal tunnel syndrome in 1973, and in 1976 he received workers' compensation benefits for a permanent partial disability of 15 percent. During the 1980s, Waskiewicz continued to receive further treatment for carpal tunnel syndrome and was placed on light duty that involved no use of power tools and no heavy lifting. In 1991, Waskiewicz's physician specifically directed General Motors to assign Waskiewicz only to jobs with "no lifting, no repetitive motion and no use of air guns." Despite this warning, General Motors again placed Waskiewicz in a job where he was required to use hand tools in a repetitive manner. As a result of this new workplace exposure, Waskiewicz's carpal tunnel syndrome

¹All statutory references are to Maryland Code (1991 Repl. Vol., 1995 Supp.), Labor and Employment Article.

worsened, and the parties have agreed that he is now totally disabled and unable to engage in any gainful employment.

In ruling against Waskiewicz, the majority asserts that he "does not support his analysis of the intention of the Legislature with any legislative history of § 9-736 or other authority, nor could we locate any." ___ Md. at ___, ___ A.2d at ___ (Majority op. at 16). I disagree. The legislature has mandated in § 9-102 that the Act is to be construed liberally in favor of workers like Waskiewicz. That mandate can be considered a part of the Act's legislative history. Moreover, the fundamental rule that the Act should be construed liberally in favor of workers has been recognized by this Court in numerous cases. See *Para v. Richards Group*, 339 Md. 241, 251, 661 A.2d 737, 742 (1995) (noting that the Act "`should be construed as liberally in favor of injured employees as its provisions will permit in order to effectuate its benevolent purposes'") (citations omitted); *Vest v. Giant Food Stores, Inc.*, 329 Md. 461, 467, 620 A.2d 340, 342 (1993); *Howard Co. Ass'n., Retard. Cit. v. Walls*, 288 Md. 526, 530, 418 A.2d 1210, 1213 (1980).

Instead of construing the Act liberally in favor of the disabled employee, the majority seems to construe all ambiguous provisions against the worker and holds that Waskiewicz cannot recover compensation for his increased disability either through a reopening of his 1976 claim or by filing a new claim based solely

on his 1992 increase in disability. According to the majority, once a worker is deemed "disabled" from an occupational disease, that worker cannot recover for any increase in disability, even though it was caused by a new exposure to workplace hazards, unless the worker files for a reopening of his or her original award within five years of the last payment on the original claim. Because Waskiewicz did not file for a reopening of his original 15 percent disability claim within five years, the majority holds that he is barred under § 9-736 from recovering for his increased disability.

Of course, the reason Waskiewicz could not apply for an increase in his compensation within five years of the 1976 award was because the second injurious exposure that caused his increased disability *did not even occur* until 1992, more than 15 years later. In essence, the majority holds that the statute of limitations on Waskiewicz's claim for total disability expired ten years before the total disability had even occurred. Surely the legislature did not intend that the five-year limitation on reopening an award would bar recovery for an increase in disability caused, not by the natural progression of the disease, but by a *subsequent injurious exposure* to workplace hazards. See *Uninsured Employers' v. Lutter*, 342 Md. 334, 346, 676 A.2d 51, 57 (1996) (noting that courts should avoid absurd or unreasonable results when construing statutes).

The majority's holding should result in a great increase in

trivial motions to modify permanent partial disability awards. A worker who receives an award based on a permanent partial disability from an occupational disease will have to file for a modification for any increase in disability every four or five years or risk losing the right to additional compensation should his or her occupational disease worsen substantially due to continued exposure to employment hazards.

The majority apparently concedes that if Waskiewicz's increase in disability had resulted from a *new accidental injury* he suffered more than five years after his 1976 disability award ended, he would be entitled to additional compensation under § 9-501 for the increase in his disability. ___ Md. at ___, ___ A.2d at ___ (Majority op. at 15). But because Waskiewicz's increase in disability resulted from *additional exposure* to the hazards of an occupational disease, the majority holds that he is not entitled to additional compensation. There is no reason to treat employees whose disabilities are exacerbated because of an additional accidental injury on the job differently from employees whose occupational disease is exacerbated because of an additional injurious exposure on the job. Nothing in § 9-501 or § 9-502, or any other provision in the Act, requires such unfair and disparate treatment of employees with occupational diseases. In fact, this Court has previously recognized that the Act reflects the legislature's intent to treat disability "from occupational disease

... much like an injury caused by accident." *Shifflett v. Powhattan Mining Co.*, 293 Md. 198, 202, 442 A.2d 980, 983 (1982).

Contrary to the majority's construction, I believe the legislature intended to allow workers who have suffered partial disability as a result of an occupational disease to recover for any increased disability resulting not from a natural progression of the disease but from a *new exposure* to employment hazards. If the increase in disability occurs within five years of the last compensation payment, the legislature has provided that the employee may file to reopen the claim under § 9-736. If, on the other hand, there is an additional work-induced increase in the disability that occurs more than five years after the last payment, the worker should be allowed to file a new claim for benefits for the additional disability under § 9-656 or § 9-802.² Section 9-656 provides:

"(a) *Determination by Commission.* -- If

²Section 9-656 applies in cases where the combined effects of a preexisting infirmity and a subsequent occupational disease result in a permanent disability that does not exceed 50 percent of the body as a whole. See § 9-655. In cases where the combined effects result in a disability that does exceed 50 percent of the body as a whole, § 9-802 applies. Under § 9-802(a), the employer is liable only for the disability caused by the subsequent occupational disease. The employee is also entitled to additional compensation from the state Subsequent Injury Fund if the combined effects of the preexisting condition and the subsequent occupational disease cause a "substantially greater" disability than would have been the case from the subsequent occupational disease alone. § 9-802(b).

it appears that a permanent disability of a covered employee following an accidental personal injury or occupational disease is due partly to the accidental personal injury or occupational disease and partly to a preexisting disease or infirmity, the Commission shall determine:

(1) the proportion of the disability that is reasonably attributable to the accidental personal injury or occupational disease; and

(2) the proportion of the disability that is reasonably attributable to the preexisting disease or infirmity.

(b) *Payment of compensation.* -- The covered employee:

(1) *is entitled to compensation for the portion of the disability of the covered employee that is reasonably attributable solely to the accidental personal injury or occupational disease; and*

(2) *is not entitled to compensation for the portion of the disability that is reasonably attributable to the preexisting disease or infirmity.*" (Emphasis added).

Section 9-802 provides in pertinent part:

"(a) *Limitation on liability of employer and insurer.* -- If a covered employee has a *permanent impairment* and suffers a *subsequent accidental personal injury, occupational disease, or compensable hernia* resulting in permanent partial or permanent total disability that is substantially greater due to the combined effects of the previous impairment and the subsequent compensable event than it would have been from the subsequent compensable event alone, the *employer or its insurer is liable only for the compensation payable under this title for the subsequent accidental personal injury, occupational disease, or compensable hernia.*" (Emphasis added).

There is nothing in the language of § 9-656 or § 9-802 to preclude Waskiewicz's original 15 percent disability from carpal tunnel syndrome from being considered a "preexisting disease" or a "permanent impairment." If his original disability is a preexisting impairment under § 9-656 or § 9-802, it seems clear that Waskiewicz should be entitled to compensation for the portion of his current disability reasonably attributable to his new exposure.

The majority dismisses this construction of § 9-656 and § 9-802 summarily in a footnote by simply pronouncing that Waskiewicz did not "suffer a subsequent occupational disease." ___ Md. at ___ n.9, ___ A.2d at ___ n.9 (Majority op. at 19 n.9). Apparently, the majority concludes that Waskiewicz cannot maintain a new claim for additional compensation under § 9-656 or § 9-802 because Waskiewicz's preexisting infirmity as well as his subsequent occupational disease were both carpal tunnel syndrome. In other words, the majority engrafts onto § 9-656 and § 9-802 a requirement that the worker suffering from a preexisting infirmity suffer a *subsequent and different* occupational disease in order to qualify for compensation. The majority cites no authority or legislative history to support its view that this admittedly unfair result is what the legislature intended.

Neither § 9-656 nor § 9-802 contains any requirement that an employee suffer a *subsequent and different* occupational disease in

order to qualify for compensation. These provisions merely require that an employee be permanently disabled due partly to a preexisting disease and partly to a subsequent occupational disease. That is exactly what is alleged to have occurred in the instant case. There is no dispute that Waskiewicz suffered from carpal tunnel syndrome when General Motors assigned him in 1991 to work with hand tools in a repetitive manner. It is also stipulated that this repetitive work in 1991 and 1992 resulted in a subsequent worsening of the carpal tunnel syndrome to the point that Waskiewicz became unable to work. Sections 9-656 and 9-802 do not require that a worker's preexisting disease be of a different type than the subsequent occupational disease. We should not read such a requirement into the statute, especially when the result is to unfairly deny Waskiewicz workers' compensation benefits for a disability he received as a result of his employment.

The right to workers' compensation for a disability caused by an occupational disease is conferred by § 9-502(c), which provides:

"(c) *Liability of employer and insurer.* -- Subject to subsection (d) of this section and except as otherwise provided, an employer and insurer to whom this subsection applies shall provide compensation in accordance with this title to:

(1) a covered employee of the employer for disability of the covered employee resulting from an occupational disease; or

(2) the dependents of the covered employee for death of the covered employee resulting from an occupational disease."

It seems to me that the majority is adopting a strained interpretation of § 9-502 in order to deny Waskiewicz compensation for his disability. The majority construes § 9-502 as only permitting a *single claim* for a single type of occupational disease, although that claim may be reopened within the five-year statutory period.³ The majority's construction completely ignores subsection (e) of the statute that clearly envisions more than one

³This Court on at least one occasion has tacitly approved the filing of two separate claims for disablement from the same occupational disease. In *Montgomery County v. McDonald*, 317 Md. 466, 564 A.2d 797 (1989), the employee suffered two heart attacks, one in 1977 and another in 1984. In 1984, he filed two separate occupational disease claims, one dating from the 1977 heart attack and the other dating from the 1984 heart attack. It was conceded that both attacks involved the same occupational disease. The Workers' Compensation Commission (the Commission) found the claim for the 1977 attack was barred by the statute of limitations. The Commission also found that the claim for the 1984 heart attack was barred by the statute of limitations because it was casually related to the 1977 heart attack. On appeal to the circuit court, the two claims were filed together under one case number. The circuit court held that the claim for the 1977 heart attack was not barred by the statute of limitations. The circuit court, however, did not make a specific ruling on the claim for the 1984 heart attack. The employer appealed the ruling on the claim for the 1977 heart attack, but there was no certification of the circuit court's order for immediate appeal under Maryland Rule 2-602(b). This Court reversed the circuit court and held that the claim for the 1977 heart attack was barred by the statute of limitations. In so doing, however, we indicated that the claim for the 1984 heart attack was not dependant on the 1977 claim and was still pending, even though it was for increased disability caused by the same occupational disease as the 1977 claim. *McDonald*, 317 Md. at 469 n.2, 564 A.2d at 799 n.2. This was at least a tacit acknowledgement that the 1984 occupational disease claim was a separate action and separately maintainable even though it was for the same disease and causally related to the 1977 claim, which was foreclosed by the statute of limitations.

claim for the same occupational disease and that would have been totally superfluous if the legislature intended to limit a worker to one claim for each type of occupational disease. Section 9-502(e) provides:

"(e) False representation -- Compensation prohibited. -- A covered employee or a dependent of the covered employee is not entitled to compensation for a disability or death that results from an occupational disease if, when the covered employee began employment with the employer, the covered employee falsely represented in writing that the covered employee had not been disabled, laid off, or compensated in damages or otherwise, due to the occupational disease for which the covered employee or dependent is seeking compensation." (Emphasis added).

Under this subsection, an employee is denied a second claim for compensation for an occupational disease if the employee has falsely represented in writing that the employee had not been previously disabled or compensated for the same occupational disease for which the employee is now seeking compensation. If a second claim for compensation for the same occupational disease were always barred, there would have been no reason for the legislature to specifically bar a second claim when the employee has lied about the prior disability or prior compensation.

The majority cites no cases from any jurisdiction to support its holding. The only appellate decision I have been able to locate that is clearly on point decides the issue contrary to the majority's holding. In *Mikitka v. Johns-Manville Products Corp.*,

352 A.2d 591 (N.J. Super. Ct. App. Div. 1976), the court faced a set of circumstances similar to that presented in the instant case. Mikitka, a worker who suffered from work-related asbestosis, received an award for a seven and one-half percent permanent disability. Despite her disability, Mikitka continued to work for her employer for several more years before retiring. After her retirement, Mikitka filed a new workers' compensation claim seeking additional compensation for an increase in her disability that resulted from continued exposure to employment hazards occurring after the initial award for a seven and one-half percent disability but before her retirement. The new claim, however, was filed after the New Jersey statute's two-year statute of limitations for re-opening a disability claim had expired. Nonetheless, the court held that Mikitka could maintain her claim for increased disability:

"In the present case, ... petitioner has filed a new claim petition; she is not seeking modification of the [original] award. Rather, she contends that because of exposure to alleged deleterious conditions of employment occurring after entry of the 1967 award, she has suffered additional disability. This is a new claim, not an attempted modification of a prior award. [The] two-year time limitation [has] no application to this new claim.

* * *

[W]here an employee has once recovered compensation for an occupational disease and thereafter suffers additional disability from additional exposure to the conditions of employment after rendition of the original award, such an employee can file a claim

petition for the disability so caused within a year (or now two years) after the employee knew or ought to have known of the increased disability stemming from the continued employment despite knowledge as to the type of disability acquired in connection with the original award. This rule, to be applied in these limited circumstances, will avoid the absurd result of possibly barring claims before they even existed." (Citation omitted).

Mikitka, 352 A.2d at 593-94.

I believe a similar rationale should be applied in the instant case. Waskiewicz should be allowed to maintain a new claim for compensation for the increased disability he has suffered as a result of additional exposure to the employment hazards that caused his carpal tunnel syndrome to worsen. Accordingly, I dissent.

Judge Eldridge and Judge Bell have authorized me to state that they join in the views expressed in this dissenting opinion.