Circuit Court for Baltimore City
Case No. 24-C-19-03384

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 136

September Term, 2020

CHASE MONTGOMERY

v.

MAYOR AND CITY COUNCIL OF BALTIMORE

Nazarian,
**Gould,
Wright, Alexander, Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Nazarian, J.

Filed: September 15, 2021

** Steven B. Gould, now serving on the Court of Appeals, participated in the hearing and conference of this case while an active member of this Court; he participated in the adoption of this opinion as a specially assigned member of this Court.

Chase Montgomery, a Baltimore City police officer, filed a claim with the Workers' Compensation Commission seeking compensation for an injury he sustained when he stepped out of his patrol vehicle, lost his balance, and hit his head on the vehicle. In its response to the claim, the City did not contest that Officer Montgomery's injury had arisen out of and in the course of his employment. The Commission issued an order finding that Officer Montgomery's injury was connected causally to his employment.

About seven weeks later, the City filed issues contesting Officer Montgomery's claim. The Commission held a hearing on May 13, 2019, at which the City asserted for the first time that Officer Montgomery's injury arose from vertigo, a condition from which Officer Montgomery allegedly suffered before the accident, and not in the course of his employment. The Commission issued an order construing the City's issues as a request to reopen under § 9-736(b) of the Labor & Employment Article and, in the same order, denied that request.

The City filed a petition for judicial review in the Circuit Court for Baltimore City and moved to remand the matter to the Commission. The circuit court granted the City's motion to remand and ordered the Commission to hold a hearing on the City's issues. After the circuit court denied his motion for reconsideration, Officer Montgomery appealed. We hold that the Commission's decision denying the City's request to reopen the case was not subject to judicial review by the circuit court. We vacate the judgment and remand to the circuit court with instructions to dismiss the petition for judicial review.

I. BACKGROUND

Officer Montgomery filed his claim on December 13, 2018, and on December 18, 2018, the City's adjuster responded using a standard form. The adjuster checked the box next to "no compensable lost time" but did not check any other boxes, including the one under the heading "Contested Issues," next to the question "Did the employee sustain an accidental personal injury or occupational disease arising out of and in the course of employment?" Having received no objection from the City, the Commission issued an order on January 15, 2019 finding that Officer Montgomery's injury arose out of his employment. The order also deferred the determination of the nature and extent of Officer Montgomery's disability.

About seven weeks later, on March 7, 2019, the City filed issues contesting Officer Montgomery's claim. On May 13, 2019, the Commission held a hearing at which the City asserted for the first time that vertigo, an idiopathic condition from which he had suffered before, caused Officer Montgomery's injury.[1] The City represented that although its adjuster had Officer Montgomery's medical records in January, City attorneys did not have them in their possession until March, and they filed the issues immediately upon receiving them. The City did not explain to the Commission, the circuit court, or this Court the reason for the delay in transmitting the records. But the City argued that the medical records were

[1] An "idiopathic condition" is one that is "personal to the claimant" and does not itself "arise out of employment, unless the employment contributes to the risk or aggravates the injury." *Youngblud v. Fallston Supply Co., Inc.*, 180 Md. App. 389, 403–04 (2008) (*quoting CAM Constr. Co., Inc. v. Beccio*, 92 Md. App. 452, 455 n.2 (1992)).

"in the nature of newly discovered evidence" and that the City was entitled to raise the defense of idiopathic condition. Without citing to the specific statute, the City referenced a provision of the Labor and Employment Article that allows a request for rehearing on the basis of newly discovered evidence during the fifteen-day period after the Commission's decision; we assume this is Maryland Code (1991, 2016 Repl. Vol.) § 9-726 of the Labor and Employment Article ("LE"). Section 9-726(a) provides that a party may file with the Commission a motion for rehearing "[w]ithin 15 days after the date of a decision by the Commission." *See generally Frederick Cnty. Bd. of Comm'rs. v. Sautter*, 123 Md. App. 440, 447–48 (1998) (observing that motions for rehearing under LE § 9-726 must be grounded on either an error of law or newly discovered evidence). But although it appeared to reference LE § 9-726, the City did not argue that it had filed a request for rehearing—or even that it filed its issues—within that fifteen-day period.

Officer Montgomery's counsel disputed the characterization of the evidence as "new" and argued that "it would be wrong to allow" the City "to go forward on contesting issues well after automatic award was passed and no appeal has been filed." He argued that "there was no rehearing request filed, there was no [] appeal filed, and now the City is, at this point, saying they want to contest the claim." He contended that "if that were to be allowed, then there's no validity to this automatic award, there's no reason to have an appeal, no reason to ever file a rehearing; we could just file for another hearing whenever we see fit." In response, the Commission stated that it "agree[d]." Several times during the hearing, the commissioner stated that the City's attempt to contest causality was too late:

- on page 36: "But if you're contending that the fall, itself, was caused by an idiopathic condition, they're out of luck. They filed too late."
- on page 43: "But, you know, if the Mayor and City Council is simply saying this is idiopathic condition that caused the accident, it's too late, I'm afraid."
- on page 45: "Procedurally, the Claimant's correct, that the time to contest this case and the way it was contested is not proper."

But ultimately, the commissioner concluded the hearing by stating that it would take the matter under consideration and make a decision later:

> All right. So I'm going to take a look and decide how I'm going to handle it, as far as that's concerned one way or another – whether it's just going to be a continuance is, probably, the way that I can see it, that there's no, no issues ripe for, for a decision at this point. Okay?

On May 31, 2019, the Commission issued a written order construing the City's March 7 issues as a request for reopening under LE § 9-736(b) and stating that it "refuse[d] to reopen this matter":

> Hearing was held in the above claim at Baltimore, Maryland on May 13, 2019 on the employer and insurer's Petition to Reopen filed on March 7, 2019. The Mayor &City [sic] Council of Baltimore, having not requested a rehearing on or filed an appeal concerning the Commission's Award dated January 15, 2019, the Issues filed on March 7, 2019 must be considered a request for modification or reopening under Labor & Employment Article, Section 9-736(b). The Commission refuses to reopen this matter and will deny the employer and insurer's Petition to Reopen.

On June 18, 2019, the City filed a petition for judicial review in the circuit court. On December 16, 2019, the City filed a motion for remand, asking the circuit court to remand the matter to the Commission with directions to consider the City's evidence that

Officer Montgomery's alleged vertigo caused his injury. Officer Montgomery opposed the motion, and on February 3, 2020, the circuit court held a hearing. The City argued that the Commission should have considered the merits of the City's issues, specifically that Officer Montgomery's vertigo was an idiopathic condition that could serve as a defense to his compensation claim. The City argued that the circuit court had the "equitable" authority to remand the matter to the Commission. Officer Montgomery countered that the case should not be remanded because the City missed the deadlines to challenge the Commission's January 15 decision by way of a request for rehearing or filing a petition for judicial review.

The circuit court ruled from the bench. It recognized that the City "had within [its] power [and] resources to have learned of [the vertigo]" and that the City "argues through Counsel today that it simply did not know until the date it did." Even so, the court remanded the matter to the Commission based on its equitable powers, reasoning that the City "should have been given the opportunity to make a factual defense," even if it would not have succeeded:

> What the Mayor and City Council of Baltimore is therefore doing today is seeking relief from this Court of an equitable nature, ordering a remand, and frankly requiring the Commission to merely allow the petitioner the opportunity, meaning the insurer, to present evidence to be considered by the Commission.
>
> And I don't believe that's inappropriate, notwithstanding the tardy discovery of the symptomology and the diagnosis. I don't believe it's inappropriate for the Commission to, frankly, have the information that it should have had long ago, had it [] permitted the petitioner herein to present the evidence that it wanted to present.

> This Court does believe, notwithstanding the time based arguments of the claimant respondent herein, Officer Montgomery, that Mayor and City Council of Baltimore should have been given the opportunity to make a factual defense []. Not – and I'm not suggesting that it would have succeeded, but to at least have had an opportunity to have made an effort on the issue of causation. And the Commission needs to make ultimately a factual finding determining that, given the parties['] dispute.

Officer Montgomery moved to reconsider the remand decision and the circuit court denied the motion. Officer Montgomery filed a timely notice of appeal. We supply additional facts as necessary below.

II. DISCUSSION

The parties identify a single question presented that we rephrase: Did the circuit court err in granting the City's motion for a remand instructing the Commission to hold a hearing on the City's challenge to Officer Montgomery's claim based on his alleged vertigo?[2] We don't reach the merits of that question, though, because we hold that the

[2] Officer Montgomery states the question as follows:

> Whether the Circuit Court erred when it held that the Appellee, as an equitable remedy, was entitled to a hearing on the "Issues" it filed when the Appellee missed mandatory filing deadlines before the Maryland Workers Compensation Commission?"

The City states the question as follows:

> Whether the circuit court properly exercised its inherent authority to order the Workers' Compensation Commission to consider the City's motion to modify an award on the basis of newly discovered evidence of an idiopathic condition undermining the claimant's entitlement to compensation, where a statute expressly grants the Commission authority to modify its orders but the presiding commissioner refused to

Commission's May 31 order declining to reopen the case under LE § 9-736(b) was not a reviewable order. We vacate the judgment of the circuit court and remand with instructions to dismiss the petition for judicial review.[3]

The right to judicial review of a Commission decision is provided by LE § 9-737, which allows a petition for review to be filed within thirty days after the Commission mails its decision:

> An employer, covered employee, . . . or any other interested person aggrieved by a decision of the Commission . . . may appeal from the decision of the Commission provided the appeal is filed within 30 days after the date of the mailing of the Commission's order . . . .

"[T]he 'decision' of the Commission which is subject to judicial review under the statutory language is the *final* decision or order in a case." *Montgomery Cnty. v. Ward*, 331 Md. 521, 526 (1993) (emphasis in original) (citations omitted). And the "final" decision is generally understood to be the decision in which the Commission substantively disposes of the workers compensation claim, *i.e.*, the order must "'determin[e] the issues of law and of fact necessary for a resolution of the problem presented in that particular proceeding *and* which grants or denies some benefit under the [Workers' Compensation] Act.'" *Willis v. Montgomery Cnty.*, 415 Md. 523, 544 (2010) (alteration in original) (*quoting Paolino v.*

> reopen the matter after stating that it was "out of [his] hands" and he "[didn't] know that [he] [could] do anything."

[3] Officer Montgomery did not move for dismissal of the City's petition for judicial review in the circuit court and did not argue on appeal that the petition should be dismissed. Nevertheless, the threshold reviewability of the City's petition is in the nature of a jurisdictional question and appropriate for this Court to raise *sua sponte*. *Ward*, 331 Md. at 526 n.6.

McCormick & Co., 314 Md. 575, 583 (1989)).

In this case, the order at issue is the Commission's January 15, 2019 order declining to reopen the case. The request that prompted that order was the issue that the City filed on March 7, 2019, and the City acknowledges that its issue was in effect a request to modify or reopen the Commission's January 15 decision under LE § 9-736(b). Section 9-736(b) gives the Commission the authority to reopen and reconsider a previously-decided claim if that relief is requested within five years of the decision:

> (b)(1) The Commission has continuing powers and jurisdiction over each claim under this title.
>
> (2) Subject to paragraph (3) of this subsection, the Commission may modify any finding or order as the Commission considers justified.
>
> (3) Except as provided in subsection (c) of this section, the Commission may not modify an award unless the modification is applied for within 5 years after the latter of:
>
> (i) the date of the accident;
>
> (ii) the date of disablement; or
>
> (iii) the last compensation payment.

The Commission has broad authority to revisit an earlier decision under LE § 9-736(b). *Gang v. Montgomery Cnty.*, 464 Md. 270, 280–90 (2019) (discussing line of cases supporting "wide breadth" of Commission's authority under LE § 9-736(b) to modify earlier decision). Indeed, the Commission's authority to modify an earlier order under LE § 9-736(b) does not depend upon an error of law or newly discovered evidence. *Id.* at 286–87; *accord Sautter*, 123 Md. App. at 448–49 (1998); *see also Robin Express, Inc. v. Cuccaro*, 247 Md. 262, 263 (1967) (applying Md. Code (1957), Art. 101, § 40(c), the

predecessor to LE § 9-736(b)); *Stevenson v. Hill*, 170 Md. 676 (1936) (applying Md. Code (1924, as amended by ch. 236, Acts of 1935), Art. 101, § 54, predecessor to Art. 101, § 40(c)); *but see Ratcliffe v. Clarke's Red Barn*, 64 Md. App. 293, 301 (1985) (the Commission did not have the power to grant a motion to reopen under LE § 9-736(b) where "the sole reason for reopening" was to confer the right of a party to file a petition for judicial review). Subsection (b) stands in contrast to the Commission's authority to adjust the rate of compensation under subsection (a), which *does* expressly require "aggravation, diminution, or termination of disability" to apply. *See Sautter*, 123 Md. App. at 448–49 (discussing differences between LE §§ 9-736(a) and (b)); *see also Gang*, 464 Md. at 287–289 (discussing legislative histories of LE §§ 9-736(a) and (b)).

Although the Commission's authority to revisit an earlier decision under LE § 9-736(b) is broad, the City has not cited, and we have not found, any law or authority that *requires* the Commission to do so when asked. Indeed, the language of the statute itself does not require it, and courts have recognized the Commission's discretion to decline to revisit an earlier decision. *See Robin Express*, 247 Md. at 265 (observing that "[i]f a court or administrative body reopens a case its second decision, be it the same or different from its previous decision, is a new holding; if it refuses to reopen, it decides only not to interfere with its previous decision which stands unimpeached as of its original date"); *see also Blevins v. Baltimore Cnty.*, 352 Md. 620, 633 (1999); *Gold Dust Corp. v. Zabawa*, 159 Md. 664, 666 (1930). And a Commission decision declining to reopen a claim is not subject to judicial review. *Board of Educ. of Harford Cnty. v. Sanders*, 250 Md. App. 85, 96 (2021)

(*quoting Gold Dust*, 159 Md. at 666) ("'[A] decision declining to interfere with a previous decision is not one intended to be included under a general statutory allowance of appeal from any decision.'"), *cert. granted*, No. 20, Sept. Term 2021 (July 9, 2021). Put another way, a decision declining to reopen is not a "final" decision, and therefore is not reviewable under LE § 9-737. But if the Commission grants a request to reopen under LE § 9-736(b) and proceeds to reconsider its earlier decision and issue a new decision, the new decision is a new holding on the merits and *is* reviewable. *Blevins*, 352 Md. at 633.

On the surface, this principle seems straightforward enough: when the Commission declines to revisit an earlier decision, its refusal is not reviewable. In practice, "ambiguity" may arise, as the Court of Appeals recognized in *Blevins*, in the way the Commission articulates its decision. *Id.* at 633. There is no such ambiguity, though, in cases in which the Commission *summarily* denies a request to reopen—where the Commission does not discuss or address the "merits or propriety" of the earlier order, "it is evident that the earlier order has not been reconsidered and no new holding has been made." *Id.*; *see, e.g.*, *Sanders*, 250 Md. App. at 101 (holding that the Commission's summary denial of claimant's request to reopen, without holding a hearing or taking new evidence, was not a decision subject to judicial review).

But ambiguity may arise in cases in which "the Commission considers an application to reopen and, without making clear its intent, enters an order declining to revise the earlier order." *Blevins*, 352 Md. at 633. *Blevins* provides an example of such an ambiguous situation. The Commission awarded benefits to the claimant in that case for a

work-related accidental injury. *Id.* at 628. The county-insurer petitioned for judicial review, and the circuit court affirmed the Commission's award. *Id.* Later, the county-insurer filed an issue with the Commission raising the question of set-off, which it had not raised in the initial proceeding. *Id.* The Commission held a hearing, but ultimately denied relief. *Id.* at 629.

The Court of Appeals observed that on the one hand, the Commission's remarks from the bench at the hearing suggested that it was denying the request to reopen because the county-insurer raised its set-off argument too late—the applicable statute required that any request for set-off had to be made at the time of the initial award. *Id.* at 634. If that were the case, then the decision denying the motion to reopen would not have been based on the merits of the arguments and therefore would not have been subject to judicial review. *Id.* On the other hand, the parties had presented substantive arguments concerning the set-off to the Commission, the Commission "seemed to accept, at least tacitly," the merits of the set-off argument, and the Commission's written order did not indicate that it was denying the request to reopen based on timing grounds (and indeed did not set forth any reasoning at all). *Id.* at 634–35.

The Commission's decision in *Blevins* was "ambiguous" and "reasonable minds could differ" on the Commission's true intent with respect to the application. *Id.* at 634, 635. But although the Court of Appeals declined to decide the issue, it offered guidance to the Commission on framing Commission decisions on applications to reopen to avoid the possibility of confusion. *Id.* at 635. Specifically, the Court urged the Commission "when

considering applications to revise an earlier final decision, to make clear whether it is denying the application or granting it and entering a new order." *Id.*

In this case, the record is not at all ambiguous. The Commission's May 31 order indicates that the Commission recognized that the City's issues "must be considered a request for modification or reopening under Labor & Employment Article, Section 9-736(b)"—the Commission expressly recognized its power to "modif[y]" or "reopen," then went on to say in so many words that it "refuse[d] to reopen this matter." That resolves the issue: the May 31 order was an order in which the Commission recognized its authority to reopen the case and then declined to do so, and is therefore not subject to judicial review. *Blevins*, 352 Md. at 633; *Gold Dust*, 159 Md. at 666; *Sanders*, 250 Md. App at 101

The City acknowledges, as it must, that the Commission's decision not to reopen the case is not reviewable. To overcome this procedural hurdle, it argues that the circuit court nevertheless had the authority under its mandamus power to review and remand the Commission's decision for further consideration. "The plaintiff seeking a writ of mandamus must demonstrate that a public official has a plain duty to perform certain acts, that the plaintiff has a plain right to have those acts performed, and that no other adequate remedy exists by which plaintiff's rights can be vindicated." *Prince George's Cnty. v. Carusillo*, 52 Md. App. 44, 50 (1982) (citations omitted); *accord Board of Public Works v. K. Hovnanian's Four Seasons at Kent Island, LLC*, 443 Md. 199, 223 (2015). The City argues that the Commission denied the City's request to reopen based on the presiding commissioner's mistaken belief that he lacked any authority to reopen the case. The City

bases its assertion regarding the commissioner's belief on comments he made during the hearing—the City argues on page 15 of its brief that:

> throughout the hearing on the City's motion, the presiding commissioner remarked that the issue of whether Montgomery's injury arose out of an idiopathic condition was "out of [his] hands," it was "too late," the commissioner's "hands [were] tied," and the commissioner "[didn't] really know what. . . it is that [he] [could] do, other than affirm the Commission order.

(Alterations in original.) From there, the City assumes that the commissioner thought that the Commission lacked the discretion to modify the January 15, 2019 order, and the City argues that the Commission erred insofar as it failed to recognize its "wide discretion" to modify the order.

As we explained above, we agree with the City that the Commission does have broad discretion to modify its orders: LE § 9-736(b) provides the Commission with the authority to reopen and reconsider an earlier decision as long as the request is brought within five years. *Gang*, 464 Md. at 280–90; *accord Sautter*, 123 Md. App. at 448–49 (1998); *see also Robin Express*, 247 Md. at 263; *Stevenson*, 170 Md. at 554. But the City's arguments conflate the Commission's authority to decide to *reopen* a claim in the first place with its power to modify an earlier decision once it has already decided to reopen the claim. Again, the City doesn't identify, and we haven't found, any law or authority that *requires* the Commission to reopen a decision when it's asked to do so. Indeed, the Commission has the discretion to deny a request to reopen under LE § 9-736(b) summarily, without a hearing or any explanation at all. *Sanders*, 250 Md. App. at 100.

Although the City doesn't argue that the presiding commissioner's comments at the hearing rendered its ruling on the motion to reopen "ambiguous," as in *Blevins*, the City does argue that we should read the transcript to mean that the commissioner was declining to reopen the case because he lacked the authority to do so. We don't read it that way. As Officer Montgomery argues, all the commissioner seemed to be saying was that the City did not file its issues on time, and the City does not dispute that its filing was late. The commissioner seemed concerned that the City shouldn't be allowed to raise issues that it should have raised within the applicable time frames. He did not seem to be saying that the City's tardiness precluded the Commission from reopening the case at all. To the contrary, the commissioner seemed to recognize that he *did* have the authority to reopen, but that if he did so, that would give the City "another bite" at challenging the causation question, even though the City filed its issues late and without explanation:

> The only thing that I could do is read these [treatment records] and see if there's a causal relationship. Again, I think that that prejudiced the Claimant. I think the only thing to do at this point is, simply, to continue it until there is an actual dispute. I don't think it's going to change the outcome.
>
> As far as I'm concerned, accidental injury is found. But you're not asking me to, to rule on anything at this point, so I don't know that there's anything I have to make a finding of. And I'm not going to just affirm a, a prior award and give the Mayor and City Council, you know, get another bite, so I really think my hands are tied. Procedurally, the Claimant's correct, that the time to contest this case and the way it was contested is not proper. All right?

And if the commissioner did decline to reopen based on timeliness grounds, then, according to *Blevins*, that would not be a decision on the merits and would not be subject to judicial

review. 352 Md. at 634.

Ultimately, the factual dispute over what the commissioner meant or didn't mean at the hearing isn't relevant because the Commission's written order stating that it "refuses to reopen this matter" indicates unambiguously that the Commission recognized its authority to reopen and decided not to do so. In other words, the Commission followed the Court of Appeals's guidance in *Blevins* "to make clear whether it is denying the application or granting it and entering a new order." *Id.* at 635.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY VACATED AND CASE REMANDED TO THAT COURT WITH INSTRUCTIONS TO DISMISS THE PETITION FOR JUDICIAL REVIEW. MAYOR AND CITY COUNCIL OF BALITMORE TO PAY COSTS.