Circuit Court for Baltimore County
Case No. 03-C-16-009592

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2419

September Term, 2017

BALTIMORE COUNTY, MARYLAND

v.

PHILIP R. KEARNEY

Meredith,
Graeff,
Beachley,

JJ.

Opinion by Graeff, J.

Filed: February 11, 2019

On April 21, 2016, Philip R. Kearney, appellant, filed a claim with the Workers' Compensation Commission (the "Commission"), alleging an occupational disease of non-Hodgkin's lymphoma relating to his employment as a firefighter for Baltimore County, Maryland, appellee (the "County"). In an order dated August 26, 2016, the Commission found that Maryland Code (2016 Repl. Vol.) § 9-503(c) of the Labor and Employment Article ("LE") entitled Mr. Kearney to a presumption that the non-Hodgkin's lymphoma with which he was diagnosed in 2008 was the result of his duties as a firefighter. The Commission reserved findings on all other issues related to the claim.

The County filed a petition for judicial review and a motion for summary judgment in the Circuit Court for Baltimore County. It argued that Mr. Kearney was not entitled to the presumption because non-Hodgkin's lymphoma was not added to the statute providing for a presumption until 2013. The circuit court denied the motion, and the parties filed a joint motion asking the court to convert its order into a final judgment under Maryland Rule 2-602(b). On January 31, 2017, the circuit court granted the joint motion.

On appeal, the County raises three questions for this Court's review, which we have rephrased slightly, as follows:

> 1. Did the circuit court err in denying the County's motion for summary judgment?
>
> 2. Does LE § 9-503 (granting a presumption of compensability to specific cancers) apply to a claim for non-Hodgkin's Lymphoma when, on the date of disablement alleged, it was not a covered cancer under the statute?
>
> 3. Does language in the enrolled bill amending LE § 9-503 suggest that LE § 9-503(c)(1) applies retroactively to claims that accrued but were not pending at the time the amendment went into effect, and essentially nullify the statute of limitations for filing such claims?

For the reasons set forth below, we shall not reach the merits of these questions because the petition for judicial review was filed prematurely, and it should have been dismissed by the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

Mr. Kearney is a retired firefighter for Baltimore County. He began working as a full-time firefighter in 1964, retired in 1992, and continued to work on a volunteer basis.[1] In 2007, Mr. Kearney began to feel fatigued, and after consulting his family doctor and being diagnosed with anemia, he went to Dr. Gary Cohen, a hematologist, who diagnosed Mr. Kearney on April 10, 2008, with non-Hodgkin's lymphoma.

On April 21, 2016, Mr. Kearney filed a claim with the Workers' Compensation Commission, asserting that he developed non-Hodgkin's lymphoma after "various exposures" at work. At a hearing before the Commission on August 24, 2016, Mr. Kearney testified that, during his career, he was on "active fire grounds on a regular basis," and he was routinely exposed to the "byproducts of combustion." He stated that he decided to file the compensation claim after he visited a former coworker who had been diagnosed with lung cancer. Prior to that visit, he did not suspect that his firefighting activities led to his cancer.

Following Mr. Kearney's testimony, counsel for Baltimore County and Mr. Kearney discussed whether, under LE § 9-503(c), Mr. Kearney was entitled to a presumption that

[1] The record does not reflect when, if ever, Mr. Kearney stopped working as a volunteer at the Baltimore County Fire Department.

his lymphoma was an occupational disease arising out of his employment.[2] Counsel for the County argued that non-Hodgkin's lymphoma was added to the statute in 2013, and therefore, the presumption did not apply to Mr. Kearney, who was diagnosed with the disease in 2008. Counsel for Mr. Kearney argued that the presumption did apply because the amendment to LE § 9-503(c) applied to claims filed after the effective date of the legislation, and Mr. Kearney filed his claim after that date.

On August 26, 2016, the Commissioner issued a Compensation Order, in which it made the following findings:

> The Commission finds on the issues presented that LE [§] 9-503 does apply and will reserve findings as to whether the claimant sustained an occupational disease of (non-[H]odgkin's lymphoma) arising out of and in the course of employment and whether . . . the disability of the claimant is the result of the occupational disease, subject to Dr. Gitter's review of Dr. Meyerson's causation opinion and Dr. Gitter's response. Temporary total disability was raised but not litigated. Average weekly wage - $1,269.63.
>
> It is, therefore, this 26th day of August, 2016, by the Workers' Compensation Commission, ORDERED that the case will be held for further

[2] Maryland Code (2016 Repl. Vol.) § 9-503(c) of the Labor and Employment Article provides, in pertinent part, as follows:

> A paid firefighter . . . who is a covered employee under § 9-234 of this title 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 leukemia or prostate, rectal, throat, multiple myeloma, non-Hodgkin's lymphoma, brain, testicular, or breast cancer that is caused by contact with a toxic substance that the individual has encountered in the line of duty[.]

> consideration by this Commission as to whether the claimant sustained an occupational disease of (non-[H]odgkin's lymphoma) arising out of and in the course of employment and whether . . . the disability of the claimant is the result of the occupational disease, subject to Dr. Gitter's review of Dr. Meyerson's causation opinion and Dr. Gitter's response and whether the claimant has sustained permanent partial disability, if any; the case will be reset only on request.

On September 15, 2016, the County filed a Petition for Judicial Review with the Circuit Court for Baltimore County, seeking *de novo* review of Mr. Kearney's claim. Mr. Kearney subsequently filed a Cross Petition for Judicial Review and Response to Petition for Judicial Review to "preserve [his] right to raise any and all issues on appeal."

On August 18, 2017, the County moved for summary judgment, arguing that LE § 9-503 "did not apply to [Mr. Kearney's] non-Hodgkin[']s Lymphoma," and therefore, the Commission's decision finding that the statute applied was erroneous as a matter of law and should be reversed. As indicated, the circuit court found that Mr. Kearney was entitled to the presumption under LE § 9-503(c), and it denied the County's motion for summary judgment on that issue.

On January 31, 2018, the parties filed a Joint Motion for Entry of Final Judgment under Maryland Rule 2-602(b)(1), asking the court to

> direct in its order that the order denying County's motion for summary judgment is a final judgment as to the issue of whether LE § 9-503 applies, because there is no just reason for delay; so that piecemeal appeals are prevented; unnecessary confusion, delay, and expense are avoided; this Court's judicial resources are conserved; and an issue of statutory construction which will often arise can be resolved.

On February 2, 2018, the circuit court, finding that there was "no just reason for delay," granted the Joint Motion for Entry of Final Judgment. This appeal followed.

DISCUSSION

We begin by addressing the threshold question whether the petition for judicial review was filed prematurely. Although neither party challenged the finality of the Commission's decision in their briefs, we will address the issue "sua sponte even though not raised by any party." *Montgomery Cty. v. Ward*, 331 Md. 521, 526 n.6 (1993) (quoting *Bd. of Ed. for Dorchester Co. v. Hubbard*, 305 Md. 774, 787 (1986)). *Accord Priester v. Balt. Cty, Md.*, 232 Md. App. 178, 190, *cert. denied*, 454 Md. 670 (2017). *See also Tamara v. Montgomery Cty. Dept. of Health Human Servs.*, 407 Md. 180, 189 (2009) (appellate courts have been "strict" in disallowing "immediate judicial review of interlocutory administrative orders").

The Court of Appeals has made clear "that the 'decision' of the Commission which is subject to judicial review under [LE § 9-737] is the *final* decision or order in a case." *Ward*, 331 Md. at 526. *Accord Willis v. Montgomery Cty.*, 415 Md. 523, 534 (2010) ("'As a general rule, an action for judicial review of an administrative order will lie only if the administrative order is final.'") (quoting *Holiday Spas v. Montgomery Cty. Human Relations Comm'n*, 315 Md. 390, 395 (1989)). The purpose of this requirement is to "avoid piecemeal actions in the circuit court seeking fragmented advisory opinions with respect to partial or intermediate agency decisions." *Bd. of Pub. Works v. K. Hovnanian's Four Seasons at Kent Island, LLC*, 443 Md. 199, 222 (2015).

For an administrative order to be "final," it must "dispose of the case by deciding all question[s] of law and fact and leave nothing further for the administrative body to

decide." *Willis*, 415 Md. at 535. In the context of a Workers' Compensation matter, "the action must grant or deny a benefit," i.e., grant or deny an award. *Id.* at 535, 548.

Here, the Commission's ruling did not grant or deny Mr. Kearney a benefit. Rather, it merely found that the presumption in LE § 9-503 applied. It stated that it would

> reserve findings as to whether the claimant sustained an occupational disease of (non-[H]odgkin's lymphoma) arising out of and in the course of employment and whether . . . the disability of the claimant is the result of the occupational disease, subject to Dr. Gitter's review of Dr. Meyerson's causation opinion and Dr. Gitter's response.

Under these circumstances, the Commission's August 26, 2016, order was not a final order, and therefore, the circuit court was required to dismiss the petition for judicial review of the interlocutory ruling without reaching the merits of the issue the County raised in its petition.

Prior to any oral argument in this case, we issued an order for the County to show cause why the interlocutory order of the Commission was immediately subject to judicial review. In response, the County argued that the Commission's decision put it in a difficult position, but it did not dispute that the decision was not a final decision that granted or denied a benefit. And at oral argument, counsel for both the County and Mr. Kearney agreed that the petition for judicial review was premature.

The appropriate course of action at this point was explained in *Ward*, 331 Md. at 529: "As the Commission's order was not final, the judgments of the courts below must be vacated and the case remanded to the circuit court with instructions to dismiss the action."

Accord Renaissance Centro Columbia, LLC v. Broida, 421 Md. 474, 491–92 (2011); *Priester*, 232 Md. App. at 218.[3]

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY VACATED. CASE REMANDED TO THE CIRCUIT COURT WITH INSTRUCTIONS TO DISMISS THE ACTION. COSTS TO BE PAID BY APPELLANT.

[3] The dismissal does not, as the County suggested in its response to the show cause order, operate "as confirmation of the Commissioner's decision." The merits of the decision regarding the applicability of the presumption can be considered on judicial review from the Commission's final decision.