
IN THE
COURT OF SPECIAL APPEALS OF MARYLAND

No. 02789
September Term, 2004

PAUL DEL MARR,

Appellant

v.

MONTGOMERY COUNTY, MARYLAND,

Appellee

On Appeal from the Circuit Court for Montgomery County, Maryland
(Hon. Durke Thompson, Judge)

BRIEF OF APPELLEE

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STATEMENT OF THE CASE

Appellee Montgomery County, Maryland¹ accepts Appellant Paul Del Marr's statement of the case as set forth in his brief.

QUESTION PRESENTED

Did the circuit court err in granting summary judgment to the County where the Commission's order providing for a credit for payments of money rather than weeks was contrary to law?

STATUTES, ORDINANCES AND CONSTITUTIONAL PROVISIONS

The full text of all relevant statutes, ordinances and constitutional provisions appears in the appendix to the County's brief.

STATEMENT OF ADDITIONAL FACTS

Paul Del Marr suffered an accidental injury to his back on January 18, 2001. On three occasions, Mr. Del Marr asked the Workers' Compensation Commission ("Commission") to rule on the nature and extent of the permanent disability to his back. On May 2, 2002, the Commission held that Mr. Del Marr sustained a 20% industrial loss of the use of the body as a result of an injury to the back, 10% of which was reasonably related to the accidental injury and 10% of which was pre-existing the accidental injury. The rate of compensation for this injury was \$114.00 per week for 50 weeks.

¹The Montgomery County Board of Education is the employer/self-insurer of Mr. Del Marr. Appellant erroneously named Montgomery County, Maryland as the employer in his pleadings in the circuit court and in this Court. In accordance with this Court's scheduling order, however, Appellee will be referred to as Montgomery County or the County.

On January 9, 2003, the Commission, by stipulation of the parties, ordered an increase in industrial loss to the use of the body as a result of the accidental injury to 24%, 14% related to the accidental injury (a 4% increase) and 10% pre-existing the accident. The rate of compensation for this injury was \$114.00 per week for 70 weeks, for a total of \$7,980.00. The County received a credit for the 50 weeks previously paid.

The Commission issued its third award on the nature and extent of Mr. Del Marr's permanent disability to his back on May 26, 2004, holding that the permanent partial disability to the body due to an injury to the back at that time was 33%, 23% of which was due to the accidental injury (a 9% increase) and 10% due to a pre-existing condition. The rate of compensation for this injury was \$223.00 per week for 115 weeks. The Order provided a credit for payments of money made under the second Order. (E. 36) This appeal arises solely out of the Commission's order regarding the County's credit.

ARGUMENT

The circuit court did not err in granting summary judgment to the County where the Commission's order providing for a credit for payments of money rather than weeks was contrary to law.

While decisions of the Commission are presumed to be *prima facie* correct, a circuit court "must still consider whether the Commission . . . 'misconstrued the law and facts applicable in the case decided.'" *Marshall v. University of Maryland Medical System Corporation*, 161 Md. App. 379, 382, 869 A.2d 391, 393 (2005) (quoting Md. Code Ann., Lab. & Empl. § 9-745(c)). As this Court also noted in *Marshall*, "[s]ummary judgment

is appropriate in a worker compensation appeal to avoid an unnecessary trial if the requirements of Md. Rule 2-501(e) are met.” *Id.*

In reviewing a grant of summary judgment, the proper standard is whether the trial court’s decision was legally correct. *Converge Servs. Group, LLC v. Curran*, 383 Md. 462, 476, 860 A.2d 871, 879 (2004). Under Maryland Rule 2-501(e), summary judgment is appropriate when the motion and response show that there is no genuine dispute as to any material fact and that the moving party is entitled to judgment as a matter of law. *Bradley v. Fisher*, 113 Md. App. 603, 610, 688 A.2d 527, 530 (1997).

In this case, the matter before the circuit court was merely one of law. The County did not challenge the Commission’s award with regard to the percentage of disability granted. The sole issue before the circuit court was the calculation of the County’s payment under the Commission’s Order. The Order provided that Mr. Del Marr was entitled to 115 weeks of compensation, subject to a credit for payments **of money** made under the Order of January 9, 2003. (E. 36) This Order was incorrect because the County should have received a credit for the number of **weeks** paid under the prior two awards rather than for just the amount of **money** paid.² Therefore, the circuit court was faced with the legal issue of whether the County was required to pay the amount of \$223.00 for 45 weeks, the amount of the increase, or whether the County had to pay the second tier

² The distinction of whether the County gets a credit for the number of weeks or for the dollars has significant economic import. If the County gets only a monetary credit, it would owe Mr. Del Marr \$17,665.00 more. Pursuant to the circuit court’s order, the County is required to pay an additional \$10,035.00.

amount of \$223.00 per week for the entire 115 weeks, even though 70 weeks had already been paid at the lower tier of \$114.00 per week.

The circuit court did not err in reversing the Commission's Order and in requiring the County to pay 45 weeks of compensation to Mr. Del Marr at the higher second tier rate of compensation of \$223.00 per week.

***Mr. Del Marr's injury moved from a first tier
to a second tier level of compensation.***

Workers compensation is designed to be a weekly wage replacement. A weekly benefit ensures that an employee's day to day support is maintained. In drafting the Act, the Legislature expressed a commitment to the payment of permanent partial disability in a weekly framework, rather than focusing upon the total monetary value of such an award. *Ametek, Inc. v. O'Connor*, 364 Md. 143, 151-52, 771 A.2d 1072, 1076-77 (2001).

Md. Code Ann., Lab. & Empl. § 9-627 defines the number of weeks of compensation to which a claimant is entitled in all cases. Each part of a claimant's body is worth a certain number of weeks. Mr. Del Marr's injury fell under the "other cases" category of injuries, for which he could receive a maximum of 500 weeks of compensation depending upon the percentage of his disability. Md. Code Ann., Lab. & Empl. § 9-627(k)(3) (2001). Since the Commission awarded Mr. Del Marr 23% under this "Other Cases" category of injuries for the "on the job" portion of his disability, the County was obligated to pay compensation for 115 weeks (.23 x 500).

Under the Workers' Compensation Act ("the Act"), the rate of compensation for an injury is determined by the number of weeks of compensation awarded. There are three tiers of compensation: the first tier of compensation is for injuries less than 75 weeks. The rate of compensation for a first tier injury occurring in 2001 is \$114.00 per week. § 9-628(e). The second tier of compensation is for injuries that are equal to 75 weeks but do not exceed 250 weeks. The compensation rate for a second tier injury occurring in 2001 is \$223.00 per week. § 9-629.³ By increasing the award as it is related to the accidental injury from 14% to 23%, the Commission moved the award from a first tier injury to a second tier injury, which affected the rate of compensation that Mr. Del Marr would receive per week for the injury.⁴

Pursuant to the first two orders of compensation, Mr. Del Marr reached a maximum of 70 weeks. Accordingly, he received the first tier of compensation for his injuries. His

³Section 9-629 provides that the employee is entitled to weekly compensation that equals two-thirds of his average weekly wage not to exceed one-third of the State average weekly wage. Because two-thirds of Mr. Del Marr's weekly wage exceeded one-third of the 2001 State average weekly wage, he was limited to \$223.00.

⁴To calculate the amount of money that an award is worth, the percentage of disability must be multiplied by the number of weeks that the body part is worth. The back is worth 500 weeks. If the Commission awards a claimant 14% disability to the back, then he is entitled to 70 weeks of compensation ($.14 \times 500 = 70$). To determine the amount of money that 70 weeks is worth, the Commission multiplies 70 times the rate of compensation for a first tier injury in the year of the accident. Therefore, the amount of compensation that a claimant receives for a 14% permanent partial disability award to the back is $70 \times \$114.00$ or \$7,980.00.

Here, the percentage of permanency to the back is 23%. Since the back is worth 500 weeks of compensation, the 23% award translates into 115 weeks of compensation ($.23 \times 500 = 115$). The rate of compensation for 115 weeks is \$223.00 per week or \$25,645.00.

monetary benefit was \$7,980.00 (\$114.00 x 70 weeks) paid in weekly installments. With the last award of worsening, Del Marr was at the second tier of compensation. The number of weeks for which Mr. Del Marr was entitled to compensation rose from 70 weeks to 115 weeks. The circuit court correctly determined that only the additional 45 weeks needed to be paid at the second tier level. There was no legal authority to order the County to pay more than the additional 45 weeks awarded at the higher rate of compensation. The circuit court, therefore, correctly entered summary judgment in favor of the County.

Workers' compensation benefits must be in the form of a weekly framework rather than a monetary framework.

The Court of Appeals made clear in *Ametek* that workers' compensation is a weekly benefit and not a monetary benefit. *Ametek* dealt with the issue of when a claimant's workers' compensation award is increased on judicial review, whether the employer and insurer are entitled to a credit for the total amount paid to the claimant pursuant to the award or just a credit for the number of weeks the employer/insurer paid benefits. The Court of Appeals held that the proper credit is for the number of weeks the award was paid even though the decision meant that a claimant would be entitled to less money. Quoting from its earlier decision in *Philip Electronics North American v. White*, 348 Md. 209, 221, 703 A.2d 150, 155 (1997), the Court noted that the Legislature has "expressed a commitment to the payment of permanent partial disability benefits based on a weekly framework, rather than focusing upon the total monetary value of such an award." *Id.* at

152, 771 A.2d at 1077. Although in *Philip Electronics* the award was reduced, that did not alter the Court's holding in *Ametek* that the same analysis must be applied in cases where awards are subsequently increased. *Id.* at 152, 771 A.2d at 1077.

The issue before the circuit court in this case was the exact same issue as was before the *Ametek* court. Here, the Commission gave the County a credit for the monies paid under the prior orders which equals \$7,980.00 (\$114.00 x 70 weeks). Therefore, the County would owe the Claimant an additional \$17,665.00 (\$223.00 x 115 weeks - \$7,980.00). Had the Commission properly applied *Ametek*, it would have awarded a credit for the 70 weeks previously paid rather than award a credit for the \$7,980.00 in money previously paid.

Although the Act is a remedial one to be liberally construed in favor of the claimant, only where an ambiguity is established can the court go beyond the plain meaning of the statute, even if an alternative interpretation would benefit the claimant. *Mayor & City Council of Baltimore v. Cassidy*, 338 Md. 88, 93-94, 656 A.2d 757, 759-60 (1995). In other words, in order that an uncertainty may be liberally construed in favor of the claimant, there first must be an uncertainty. *Cassidy*, 338 Md. at 97, 656 A.2d at 762-63. As found in *Philip Electronics* and *Ametek*, there is no uncertainty as to what the Legislature intended and, therefore, there is no ambiguity under the Act. Sections 9-628 and 9-629 of the Act detail what types of injuries receive first and second tier rates of compensation. These sections clearly and unambiguously require that payments be made within a weekly framework. *Philip Electronics*, 348 Md. at 218, 703 A.2d at 154.

Paying benefits in a weekly framework rather than a lump sum is a hallmark of workers' compensation law, where benefits are meant to compensate employees for loss of earning capacity. Benefits are not in the form of a fixed award of money. Rather, the workers' compensation award replaces a worker's weekly wages. As pointed out by the Court of Appeals in *Ametek*, a claimant suffers no "real" loss from the weekly payment requirement. In this case, Mr. Del Marr continues to receive benefits for another 45 weeks. There is no danger that by granting a weekly credit rather than a monetary credit that Mr. Del Marr will not have the day to day support that he is entitled to as a result of his injury. *Ametek*, 364 Md. at 156, 771 A.2d at 1080. Benefits paid pursuant to the Act compensate only for loss of earning capacity, and do not seek to return a claimant to his or her pre-disability state. *Id.* at 157, 771 A.2d at 1080 (quoting *Philip Electronics*, 348 Md. at 228-29, 703 A.2d at 159). Accordingly, based on the plain meaning of the statute and prevailing case law, the circuit court properly found that the County need only pay the balance of the weeks owed and receive a credit for the number of weeks paid:

This case really calls for an interpretation of what was intended by the legislature as considered by our appellate courts. The Court is satisfied that the AMTEC [sic] case is a guide as to how this matter should come out and the Court determines that it should be decided on a weekly basis.

(E. 61)

Mr. Del Marr claims that workers' compensation benefits can be both a monetary and a weekly benefit depending on the particular circumstances at issue. But the cases that he relies on to support this proposition, *Anne Arundel County v. Tierney*, 132 Md. App.

149, 751 A.2d 35 (2000), and *Norris v. United Cerebral Palsy of Central Maryland*, 86 Md. App. 508, 587 A.2d 557 (1991), pre-date the Court of Appeals decision in *Ametek*. Moreover, *Tierney* relied on this Court's decision in *Ametek* that was reversed on appeal.

The issue in both *Tierney* and *Ametek* is whether after a claimant's workers' compensation award is increased, the employer and insurer are entitled to a credit for the total amount of dollars paid to the claimant pursuant to the award or just a credit for the number of weeks the employer/insurer paid benefits. This Court in *Tierney* held that the Employer/Insurer is entitled to a monetary credit. In making its decision, this Court reasoned that the *Tierney* case was exactly the same as the situation presented to the Court in *Ametek* and adopted its prior decision. *Id.* at 156, 751 A.2d at 38-39. After this Court decided *Tierney* however, the Court of Appeals granted certiorari in *Ametek* and reversed the decision. Accordingly, Mr. Del Marr's reliance on *Tierney* is misplaced.

Moreover, Mr. Del Marr cannot distinguish *Ametek* by arguing that the tiers of compensation should be treated differently. While Mr. Del Marr agrees that an employer/insurer receives a weekly credit for injuries that increase from the second tier to the third tier, he argues that a different type of credit applies for injuries that increase from the first to the second tier. In that situation, the credit is monetary, rather than weekly. But the Court of Appeals in *Ametek* made no distinction between the different tiers of compensation in granting credits.

Ametek clearly states that compensation benefits at any tier are weekly benefits. In coming to this conclusion, *Ametek* analyzed the same statutes that are at issue in this

case. The Court focused on §§ 9-627(k), 9-628, 9-629 and 9-630. All of these statutes detail the calculation of the weeks of compensation and the corresponding payments available. In examining these statutes, the Court held that the language of those sections demonstrated “. . . a clear and unambiguous demonstration of the legislative commitment to the payment of permanent partial disability benefits within a weekly frame work.” *Id.* at 149-150, 771 A.2d at 1075-76.

Although the facts in *Ametek* involved moving from a second to a third tier level of compensation, the Court did not restrict its holding to cases where there is an increase from second to third tiers. Nor did it reason that the weekly framework of workers’ compensation is limited to serious disability cases. Furthermore, nowhere in the *Ametek* opinion does the Court provide that its holding applies only to cases arising out of § 9-630(d). Rather, the Court states that reading all of the sections dealing with the entitlement to workers’ compensation illustrates that workers’ compensation is a weekly rather than a monetary benefit. *Id.* at 149, 771 A.2d at 1075.

To treat an increase in permanent partial disability from the first tier to the second tier differently from an increase in permanent partial disability from the second tier to the third tier would create an unpredictable system unsupported by the clear meaning of the statute. As the Court stated in *Ametek*, predictability and administrative ease are important in establishing rules governing permanent partial disability benefits. *Id.* at 159, 771 A.2d at 1081. Just as “[i]t simply will not do to have different rules, depending upon whether it is the claimant or the employer to whom the result is inequitable,” it simply will not do

to have different rules interpreting the permanent partial disability compensation statutes concerning the different tiers. *Id.*

In creating a false distinction between this case and *Ametek*, Mr. Del Marr urges this Court to ignore the plain meaning of the Act simply because his injury moved from the first tier to the second tier rather than from the second tier to the third tier. Creating a credit for dollar amounts in past weeks where the injury was less severe does not serve the purpose of replacing wages. Rather, it creates a windfall to the employee that is beyond what was anticipated by the Legislature for that week when the injury was less severe. Professor Larson succinctly explains that credits are for weekly benefits rather than monetary ones:

The amount of credit is not the amount of the wages paid, but the amount of compensation due for the particular week. Thus, if the wage paid was \$200, and if the compensation due for the week was \$150, the credit is for \$150 only. In other words, the credit is for the week, not for a number of dollars, and the excess cannot be carried over as a credit against other weeks of liability.

Ametek, 364 Md. at 154 n. 6, 771 A.2d at 1078 n. 6, *quoting* Larson's *Workers' Compensation Law*.

Further, a monetary credit is antithetical to the workings of the Act. Granting a monetary rather than a weekly credit operates from a starting premise that compensation benefits are *fixed awards of money*, i.e. civil judgments, and not compensation payments intended to be paid out over the course of the calculated benefits period. The monetary credit approach does not accurately fit into the Act's weekly benefits structure.

Accordingly, when applied, the monetary credit approach results in benefit amounts that are inconsistent with existing laws and policies. *Philip Electronics North American v. White, supra*. Simply because this case involves an award increase from a first tier level to a second tier level of benefits does not alter the fact that workers' compensation benefits are a weekly rather than a monetary benefit.

CONCLUSION

Inasmuch as workers' compensation is a weekly rather than a monetary benefit, no authority exists under the law to permit the Commission to order the County to pay all 115 weeks at the higher rate of compensation. The circuit court, therefore, did not err in granting summary judgment to the County. This Court should affirm the lower court's decision.

Respectfully submitted,

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This brief was prepared with proportionally spaced type, using Times New Roman font and 13pt type size in accordance with Md. Rule 8-504(a)(8).

APPENDIX

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Md. Code Ann., Lab. & Empl. § 9-629	Apx. 1
Md. Code Ann., Lab. & Empl. § 9-630	Apx. 2

Excerpts from the Maryland Annotated Code (1999):

Lab. & Empl. § 9-627. Duration of compensation.

* * *

(k) *Other cases.* – (1) In all cases of permanent partial disability not listed in subsections (a) through (j) of this section, the Commission shall determine the percentage by which the industrial use of the covered employee's body was impaired as a result of the accidental personal injury or occupational disease.

* * *

(3) The Commission shall award compensation to the covered employee in the proportion that the determined loss bears to 500 weeks.

(4) Compensation shall be paid to the covered employee at the rates listed for the period in §§ 9-628 through 9-630 of this Part IV of this subtitle.

Lab. & Empl. § 9-628. Compensation for less than 75 weeks.

* * *

(e) *On or after January 1, 2000.* — Except as provided in subsections (f) and (g) of this section, if a covered employee is awarded compensation for less than 75 weeks in a claim arising from events occurring on or after January 1, 2000, the employer or its insurer shall pay the covered employee compensation that equals one-third of the average weekly wage of the covered employee but does not exceed \$114.

* * *

Lab. & Empl. § 9-629. Compensation for period equal to or greater than 75 weeks but less than 250 weeks.

If a covered employee is awarded compensation for a period to or greater than 75 weeks but less than 250 weeks, the employer or its insurer shall pay the covered employee weekly compensation that equals two-thirds of the average weekly wage of the covered employee but does not exceed one-third of the State average weekly wage.

Lab. & Empl. § 9-630. Serious disability — Compensation for 250 weeks or more.

(a) *In general.* — (1) Except as provided in paragraph (2) of this subsection, if a covered employee is given an award or a combination of awards resulting from 1 accidental personal injury or occupational disease for 250 weeks or more under § 9-627 of this subtitle:

(I) the Commission shall increase the award or awards by one-third the number of weeks in the award or awards, computed to the nearest whole number; and

(ii) the employer or its insurer shall pay the covered employee weekly compensation that equals two-thirds of the average weekly wage of the covered employee, but does not exceed 75% of the State average weekly wage.

(2) An award for disfigurement or mutilation under § 9-627(I) of this subtitle may not be used to make up the 250 weeks under paragraph (1) of this subsection.

* * *

(d) *Reopening.* — If a covered employee receives additional compensation for a disability on a petition to reopen for serious disability, the additional compensation may not increase the amount of compensation previously awarded and paid.