

IN THE COURT OF APPEALS OF MARYLAND

No. 83

September Term, 1997

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MAYOR AND CITY COUNCIL
OF BALTIMORE

v.

JOSEPH CHARLES SCHWING, JR.

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Bell, C.J.
Eldridge
Rodowsky
Chasanow
Raker
Wilner
Cathell,

JJ.

—

Concurring opinion by Raker, J.,
in which Rodowsky, J. joins

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Filed: September 16, 1998

I concur in the judgment of the Court. I would affirm the judgment of the Court of Special Appeals and remand for further proceedings consistent with the reasons stated in Section C of the majority opinion. Maj. op. at 34-36. I would not overrule *Waskiewicz*, however, and for that reason, I write separately.

The majority recognizes that “[t]here are, indeed, some distinctions that can be drawn between this case and *Waskiewicz*,” maj. op. at 23, but rather than distinguish *Waskiewicz*, the majority chooses to overrule it. Based primarily on the doctrine of *stare decisis*, I disagree.

I would hold that the Commission erred in summarily dismissing Claim B on limitations grounds, not, as the Court of Special Appeals concluded, because a permanent partial disability is, in a generic sense, separately compensable from an earlier temporary total disability, but because the Commission’s conclusion in this case was not based on sufficient evidence. I would have the Commission determine, from evidence, whether Mr. Schwing suffered a disablement from an occupational disease in 1993-94. In making that determination, it should decide whether he suffered a disablement at all and if so, whether that disablement in fact occurred in 1982-83 from the same occupational disease upon which Claim B is based. From that, it should then have to determine whether his 1993-94 condition amounted merely to an aggravation or worsening of an earlier disablement or constituted an initial disablement.

The majority suggests, in Section C, that Mr. Schwing’s coronary artery disease in

1994 may constitute a new disablement arising from his employment within the period of limitations set forth in § 9-711 not because he suffered an additional injurious exposure to hazards aggravating an existing disability but because there are “many different forms that cardiovascular disease, or even heart disease, can take, and that a second disabling event may not necessarily be related to, or arise from the same disease as, the first.” Maj. op. at 36. The majority points out that “the Commissioner, based on his layman’s knowledge of cardiovascular disease and without the benefit of any factual or expert evidence, concluded that Schwing’s coronary artery disease in 1994 was a worsening of the cardiovascular disease that led to the 1982 myocardial infarction, and, therefore, could not constitute a new claim.” Maj. op. at 34-35. The question of whether the 1982 infarction constituted a compensable disablement “is a legitimate question” and the causal relationship required by § 9-502 must rest on more than a Commissioner’s lay understanding of complex medical questions. On this basis, this Court should affirm *Schwing* and avoid revisiting *Waskiewicz*.

This Court should adhere to the doctrine of *stare decisis* and should not overrule *Waskiewicz*. *Stare decisis* promotes a predictable and consistent development of legal principles. The Supreme Court said of *stare decisis*:

[I]t is indisputable that *stare decisis* is a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon “an arbitrary discretion.” The Federalist, No. 78, p. 490 (H. Lodge ed. 1888)(A. Hamilton). See also *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986)(*stare decisis* ensures that “the law will not merely change erratically” and “permits society to presume that bedrock principles are founded in the law rather than in the

proclivities of individuals”).

Patterson v. McLean Credit Union, 491 U.S. 164, 172, 109 S.Ct. 2363, 2370, 105 L.Ed.2d 132 (1989). Although *stare decisis* is not an inexorable command, the doctrine “is of fundamental importance to the rule of law. For this reason, ‘any departure from the doctrine . . . demands special justification.’” *Welch v. Texas Highways & Public Transp. Dept.*, 483 U.S. 468, 494-95, 107 S.Ct. 2941, 2957, 97 L.Ed.2d 389 (1987)(quoting *Arizona v. Rumsey*, 467 U.S. 203, 212, 104 S.Ct. 2305, 2311, 81 L.Ed.2d 164 (1984)). The Supreme Court has noted that in the area of statutory construction, the party urging the abandonment of established precedent has a greater burden than in the context of constitutional construction, because “the legislative power is implicated, and Congress remains free to alter what we have done.” *Patterson*, 491 U.S. at 172-73, 109 S. Ct. at 2370, 105 L.Ed.2d at 148.

This Court has repeatedly stressed the importance of *stare decisis*, for “consistency and stability in this Court’s ruling . . . are necessary for our citizens to know their respective rights and obligations.” *Herring v. Christensen*, 252 Md. 240, 242, 249 A.2d 718, 719 (1969). This is particularly true in the area of workers’ compensation, as “one of the key virtues of a *statutory* workers’ compensation system is its predictability.” *Waskiewicz v. General Motors Corp.*, 342 Md. 699, 714, 679 A.2d 1094, 1101 (1996). The majority has offered insufficient reasons to warrant this Court to undertake the extraordinary step of overruling *Waskiewicz*.

The Court decided *Waskiewicz* just two years ago. Neither law nor facts supporting *Waskiewicz* have changed since we decided that case. Indeed, the only justification asserted

by the majority to overrule a case of such recent vintage is that the result is unfair, and the decision is wrongly decided. The majority has not demonstrated that “the rule [laid out in *Waskiewicz*] has become unsound in the circumstances of modern life.” *White v. King*, 244 Md. 348, 354, 223 A.2d 763, 767 (1966). The majority does not suggest that there are any changes or developments in the few years since *Waskiewicz* was decided to justify overruling the case. The only difference today is the composition of the Court, with the additions of Judge Wilner and Judge Cathell following the retirements of Chief Judge Murphy and Judge Karwacki. Even the majority would concede that this is an unsound basis to overrule a case. Unlike the legislature, this Court cannot in good conscience overrule cases on the basis of different personnel.

The court decided *Waskiewicz* on July 29, 1996. *Waskiewicz v. General Motors Corp.*, 342 Md. 699, 679 A.2d 1094 (1996). As the majority notes, this Court held in a 4-3 decision that “under § 9-502, an employee who has already claimed benefits for a disability caused by an occupational disease cannot base a new claim for benefits upon additional injurious exposures which cause a worsening of his or her condition but not a new disability.” *Id.* at 700, 679 A.2d at 1095. The arguments on both sides of this issue were explicated fully in the opinion for the Court, written by Judge Karwacki, and in the dissenting opinion, written by Judge Chasanow.

In the majority opinion, we noted that “[t]he essence of Mr. Waskiewicz’s argument is that his additional and injurious exposure to the hazards of carpal tunnel syndrome, caused by his *return* to the assembly line *after* having been removed from the assembly line, was

more analogous to a new accidental personal injury than an aggravation of an existing disability.” *Id.* at 711, 679 A.2d at 1100. We questioned the underlying assumptions in his analogy and found it “quite clear that if Mr. Waskiewicz had suffered the disability in the 1970s and stayed on the assembly line without interruption, and his carpal tunnel syndrome continued to worsen over that time, his only opportunity for increased benefits would be under the reopening provision.” *Id.* We concluded that Mr. Waskiewicz’s argument was “founded on the notion that the employer’s actions in removing him from and then reassigning him to the repetitive motion work were the significant events triggering a new claim.” *Id.* We reviewed the plain language of the statute and the legislative history, and rejected this argument, concluding that “[t]he General Assembly has determined that both a disablement resulting from an occupational disease and an accidental personal injury on the job constitute compensable events under the statutory scheme; it has not determined, at least as of the date of this opinion, that an employer’s knowing reassignment of an already disabled worker to hazardous duty, without more, is a compensable event.” *Id.* at 714, 679 A.2d at 1102.

Although we noted the unfairness to Mr. Waskiewicz, we refused to write new legislation. We determined that “[t]his Court cannot and will not usurp the General Assembly’s authority to expand the scope of the Act in this manner.” *Id.* at 715, 679 A.2d at 1102. We should not do so today.

Today, the majority overrules *Waskiewicz*, reasoning that “the position taken in *Waskiewicz* is not only unsupported by any out-of-State case law that we could find but is,

in fact, contrary to the position taken in a number of other States.” Maj. op. at 24. The majority also argues that considerations of policy and fairness favor a position contrary to *Waskiewicz*.

The majority states that the position taken in *Waskiewicz* is contrary to the position taken in other states. Cases from other jurisdictions generally are unpersuasive because “Maryland’s Workers’ Compensation statute differs from that in most states.” *Beverage Capital v. Martin*, 119 Md. App. 662, 671 n.6, 705 A. 2d 1175, 1180 n.6 (1998); *See Federated Stores v. Le*, 324 Md. 71, 82-83, 595 A.2d 1067, 1072-73 (1991) (distinguishing the workers’ compensation case at issue from out-of-state cases on the basis that the statutory language contained in the Maryland Workers’ Compensation Act differed from that of the other states); *Anderson v. Bimblich*, 67 Md. App. 612, 613 n.1, 508 A. 2d 1014, 1014 n.1 (1986)(deeming cases from other jurisdictions unpersuasive because of the difference in the applicable workers’ compensation laws).

While at first glance the majority appears to make a strong showing that many states have adopted positions contrary to *Waskiewicz*, the cases relied upon by the majority are all distinguishable, particularly because workers’ compensation statutes vary from state to state. Upon closer examination, it becomes apparent that most of the out-of-state cases did not address the principal issue raised in *Waskiewicz*, *i.e.* whether an employee who has claimed benefits for a disability caused by an occupational disease can base a new claim for benefits upon additional injurious exposures which cause a worsening of his or her condition but not a new disability. *Waskiewicz v. General Motors Corp.*, 342 Md. 699, 700, 679 A.2d 1094,

1095 (1996).

The cases relied upon by the majority are factually and legally distinct from the situation which faced the court in *Waskiewicz*. Perhaps that is why, although all of these cases had been decided at the time of *Waskiewicz*, none were cited in either the *Waskiewicz* majority or dissent. The dissent in *Waskiewicz* acknowledged that it found only one appellate decision, *Mikitka v. Johns-Manville Products Corp.*, 352 A.2d 591 (N.J. Super. Ct. App. Div. 1976), “clearly on point.” *Waskiewicz*, 342 Md. at 722, 679 A.2d at 1106 (Chasanow, J., dissenting). Thus, with the exception of *Mikitka* (an opinion quoted extensively by the *Waskiewicz* dissent and apparently unpersuasive to the *Waskiewicz* majority), the cases mentioned by the majority today lend little support to the decision to overrule *Waskiewicz*.

For example, in *Muldoon v. Homestead Insulation Co.*, 650 A.2d 1240 (Conn. 1994), an employee suffering from pulmonary asbestosis filed for workers’ compensation for pulmonary asbestosis caused by exposure to asbestos from 1947 to 1974. In 1977, the employee entered into a settlement agreement with numerous defendants as to that claim.¹

¹ “The parties agreed that payments were ‘in full accord and satisfaction of a disputed claim’ and ‘shall be made and accepted as a full and final settlement for all compensation for said injury and for all results upon [Muldoon], past, present and future, and for all claims for past, present, and future medical, surgical, hospital and incidental expenses and all compensation which may be due to anyone in case of the death of [Muldoon], to the end that the payment of such sum shall constitute a complete satisfaction of all claims due or to become due at any time in favor of anybody on account of the claimed injury, or on account of any condition in any way resulting out of the said injury, or on account of the death of [Muldoon] on account of said condition.’” Muldoon further agreed that he understood the settlement agreement to be a “full and final settlement and that it is intended to deal with any and all conditions, known or unknown, which exist as of the date thereof, or any changes
(continued...)

Id. at 1241. The employee continued working in asbestos related employment until 1984.

Id. In 1987, the employee filed a claim for workers' compensation for an increase in his pulmonary disability caused by exposure to asbestos after the time covered by the settlement agreement. *Id.* at 1241-42.

Unlike Mr. Waskiewicz, Mr. Muldoon did not pursue his first claim for workers' compensation, did not receive a determination that he was suffering from a disability as to his first claim, and did not recover benefits under this first claim. Instead, he settled his claim with various defendants. While the court characterized the damage caused by the second exposure as a 'new injury,' it did so only in the context of deciding whether the workers' compensation claim was barred by the specific language of the settlement agreement. *Id.* at 1244. Finally, the *Muldoon* court did not have occasion to engage in statutory construction, nor did the court construe language similar to Maryland's statutory provisions governing occupational disease.

The court in *Mancini's Bakery v. W.C.A.B. (Leone)*, 625 A.2d 1308 (Pa. Commw. Ct. 1993), addressed whether the statute of limitations barred a worker's initial claim for degenerative osteoarthritic disease. Although the worker was diagnosed with the disease in 1983, he did not attempt to file a claim until November of 1988. *Id.* at 1310. Pennsylvania law required that an employee file a claim within three years of an injury. *Id.* at 1311. The

¹(...continued)
of conditions which may arise in the future on account of said alleged occupational disease occurring between 1947 and 1974." *Muldoon v. Homestead Insulation Co.*, 650 A. 2d 1240, 1241 (Conn. 1994).

court concluded that the employee's petition was timely. *Id.*

Mancini was not an occupational disease case. Under the Pennsylvania Workmens' Compensation Act, it involved "personal injury." The *Mancini* court emphasized that the timing rules applicable in personal injury cases differed from those applicable in occupational disease cases. The court concluded:

The medical evidence presented by both parties clearly established, and the referee found, that Claimant was suffering from a preexisting condition aggravated by the requirements of his job. Each day that Claimant worked constituted a "new" injury in that it further aggravated his condition.^[2]

Id. at 1311. Whereas *Waskiewicz* asked whether an employee who had previously received benefits could assert a new claim for worsening of an occupational disease based on new exposure, *Mancini* asked only whether the aggravation of a pre-existing injury constituted a "new injury" for the purpose of filing an initial claim within the statute of limitations.

The majority maintains that *Waskiewicz* "is at odds with public policy." Maj. op. at 32. The thrust of the majority's argument is that *Waskiewicz's* interpretation is unfair to

² This result is an illustration of an "untenable outcome" which the Court predicted in *Waskiewicz*:

Mr. Waskiewicz's theory of exposure to the hazards of an occupational disease as a compensable event in itself, if put into practice, would lead to untenable outcomes. For example, if his theory prevailed, one might successfully argue that each day of work following the first claim of disability contributed, however slightly, to a worsening of the disability, thereby entitling the claimant to a new claim each day.

Waskiewicz v. General Motors Corp., 342 Md. 699, 708, 679 A.2d 1094, 1099 (1996).

employees. We noted this element of unfairness in *Waskiewicz*. We also noted that a claim of unfairness is directed more properly to the General Assembly. This Court has repeatedly recognized that “the legislature is the appropriate forum to balance the equity or fairness of a particular statutory provision in a workers compensation scheme.” *Philip Electronics v. Wright*, 348 Md. 209, 229, 703 A.2d 150, 159 (1997).

Two legislative sessions have passed since we filed *Waskiewicz*. Presumably, if the General Assembly disagreed with our interpretation of the statute, it would have said so. See *Williams v. State*, 292 Md. 201, 210, 438 A.2d 1301, 1305 (1981). In the 1997 legislative session, the Legislature made many changes to other sections of Title 9, the Workers’ Compensation Act, but left the provisions interpreted by *Waskiewicz* unchanged. See, e.g., 1997 Maryland Laws ch. 70 at 1400 (codified at Maryland Code (1991, 1997 Supp.) Labor and Employment Article § 9-309 (e), § 9-316 (a), § 9-401 (b), § 9-402 (a), § 9-1006 (d)); 1997 Maryland Laws ch. 350 at 2455 (codified as amended at Maryland Code (1991, 1997 Supp.) Labor and Employment Article § 9-602, § 9-630, § 9-637); 1997 Maryland Laws ch. 591 at 3258 (codified as amended at Maryland Code (1991, 1997 Supp.) Labor and Employment Article § 9-104); 1997 Maryland Laws ch. 641 at 3633 (codified at Maryland Code (1991, 1997 Supp.) Labor and Employment Article § 9-742). The fact that it has taken no action to alter our interpretation evidences the Legislature’s acquiescence in our construction of the statute expressed in *Waskiewicz*. Along these same lines, Judge Eldridge, writing for the Court in *Williams v. State*, 292 Md. at 210, 438 A.2d at 1305, observed:

The General Assembly is presumed to be aware of this Court's interpretation of its enactments and, if such interpretation is not legislatively overturned, to have acquiesced in that interpretation. This presumption is particularly strong whenever, after statutory language has been interpreted by this Court, the Legislature re-enacts the statute without changing in substance the language at issue. Under these circumstances, it is particularly inappropriate to depart from the principle of stare decisis and overrule our prior interpretation of the statute.

See also Baltimore City Police v. Andrew, 318 Md. 3, 18-19, 566 A.2d 755, 762 (1989);

Frank v. Storer, 308 Md. 194, 203-204, 517 A.2d 1098, 1102-03 (1986).

Judge Rodowsky has authorized me to state that he joins in the views expressed herein.