

Circuit Court for Baltimore County
Case No. 03-C-15-000049
WCC No. B756630

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 0337

September Term, 2016

KEAVY KINNA

v.

BOARD OF EDUCATION
BALTIMORE COUNTY

Leahy,
Reed,
Rodowsky, Lawrence F.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Rodowsky, J.

Filed: September 15, 2017

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Appellant, Keavy Kinna, received an ordinary disability pension as a former teacher employed by the Board of Education of Baltimore County (the Board). She was also awarded workers' compensation benefits by the Workers' Compensation Commission (the Commission) for a disability incurred in that former employment. She submits that, under the circumstances of her case, she is entitled to retain her workers' compensation award in full, without offset for retirement benefits or coordination of benefits. The Commission agreed. The Circuit Court for Baltimore County did not agree with Kinna's contention. We shall reverse for the reasons hereinafter set forth, not the least of which is that the Court of Appeals has spoken, again.

Facts and Procedural History

On July 15, 2014, the Board of Trustees of the Maryland State Retirement and Pension System (SRPS) awarded appellant ordinary disability retirement benefits "due to Fibromyalgia." Her claim for accidental disability retirement benefits was denied.

On May 24, 2011, Kinna had been physically assaulted by a student. By order of the Commission dated December 17, 2014, she was awarded temporary total disability benefits and permanent partial disability benefits. The Commission found that appellant suffered, under "Other Cases," a ten percent loss of use "reasonably attributable to the accidental injury [of May 24, 2011] (body (post traumatic stress disorder))."

The Commission then addressed the offset provided for in Maryland Code (1991, 2016 Repl. Vol.), § 9-610 of the Labor and Employment Article (LE). It reads in relevant part:

"(a)(1) Except for benefits subject to an offset under § 29-118 of the State Personnel and Pensions Article, if a statute, charter, ordinance, resolution, regulation, or policy, regardless of whether part of a pension system, provides a benefit to a covered employee of a governmental unit or a quasi-public corporation that is subject to this title under § 9-201(2) of this title or, in case of death, to the dependents of the covered employee, payment of the benefit by the employer satisfies, to the extent of the payment, the liability of the employer and the Subsequent Injury Fund for payment of similar benefits under this title."

Maryland Code (1994, 2015 Repl. Vol.), § 29-118 of the State Personnel and Pensions Article (SPP), referred to in LE § 9-610, provides in relevant part:

"(b)(1) The Board of Trustees shall reduce an accidental or special disability retirement benefit by any related workers' compensation benefits paid or payable after the effective date of retirement if the workers' compensation benefits:

"(i) are paid or payable while a pension is paid or payable; and
"(ii) are for an accidental personal injury arising out of and in the course of the retiree's employment by a participating employer."

The Commission concluded that LE § 9-610 did not apply and did not offset the workers' compensation award by the amount of ordinary disability benefits. That agency reasoned that "the offset does not apply because the claimant's ordinary disability retirement award is based upon the claimant's fibromyalgia only." The parties agree that the fibromyalgia is unrelated to the post-traumatic stress disorder (PTSD).

Kinna sought judicial review, apparently aggrieved by the Commission's conclusion not to award a greater amount of compensation. The employer sought summary judgment, contending that any amount of workers' compensation would be subject to the LE § 9-610

set off.¹ Kinna filed a motion for partial summary judgment in support of the position taken by the Commission on the offset issue. The circuit court granted the Board's motion.

The parties then filed a Joint Motion for Final Order. They pointed out that the circuit court's ruling had mooted the case in that court. Kinna had never alleged that she suffered permanent total disability. Her maximum compensation rate for permanent partial disability is \$705, but, if LE § 9-610 applies, the offset is \$718.57. We agree that under these facts the grant of the Board's motion for summary judgment is a final judgment in the action.

Kinna's appeal timely followed.

Questions Presented

"I. In Light of *State Retirement And Pension Sys. v. Thompson* Which Determined State Personnel and Pension § 29-118 Applies And Not Labor Employment § 9-610 As The Appellant Is A Member Of The Maryland Teachers Pension System, Was It Error For The Circuit Court To Grant The Board Of Education Of Baltimore County's Summary Judgment, Finding Workers' Compensation Benefits Were To Be Reduced/Offset By The Receipt Of Ordinary Disability Retirement Benefits Pursuant To § 9-610?

"II. Assuming *Arguendo* LE § 9-610 Is Applicable Where The Claimant Is A Member Of The Maryland Teachers Pension System, Was It Error For The Circuit Court To Overturn The Commission's Decision That The Claimant's Workers' Compensation Benefits Will Not Be Offset By Her Receipt Of An Ordinary Disability Retirement, Where The Basis For Claimant's Retirement Was Due To Injuries Unrelated To Her Work Injury And § 9-610 Only Offsets Similar Benefits?"

¹The parties, in connection with obtaining a Final Order in this case, advised the circuit court that cross appeals had been filed. We do not find in the record a Petition for Judicial Review by the Board. Nevertheless, we do not believe that such a petition was necessary. The circuit court proceeding is de novo and Kinna's petition seeking additional workers' compensation brought up the asserted offset defense.

I

The case was decided on summary judgment in the circuit court. The submissions of the parties did not even suggest that SPP § 29-118 was the governing statute.

When the Commission inquired about issues at the commencement of its proceeding, counsel for the claimant, after stating that her issue was "[n]ature and extent," added "the employer insurers have their own issue of a possible offset under [§] 9-610." When asked by the Commission to respond, counsel for the Board said, "We're also raising apportionment along with offset."²

Thus, the SPP § 29-118 issue was not tried and decided by the Commission or by the circuit court. It is not preserved. *See Motor Vehicle Admin. v. Shea*, 415 Md. 1, 15 (2010); Maryland Rule 8-131.

In any event, even if the issue were before us, our holding would be the same as that expressed in considered dicta in *Zakwieia v. Baltimore County, Bd. of Educ.*, 231 Md. App. 644 (2017), *cert. denied*, Pet. Docket No. 39, Sept. Term 2017, 2017 WL 3314606 (Md. 2017). There, the claimant was a member of the Teachers' Pension System who retired on an ordinary disability pension and who was also awarded workers' compensation. *Id.* at 646-48. The Commission applied LE § 9-610 and offset the workers' compensation award by the ordinary disability retirement benefits. *Id.* at 647. On judicial review, the circuit

²The Commission had found a fifteen percent industrial loss of use of the body and had apportioned five percentage points to a pre-existing condition of depression and anxiety.

court affirmed. *Id.* Then, on appeal to this Court, the claimant for the first time asserted that SPP § 29-118 controlled. *Id.* at 648-49.

The argument in *Zakwieia*, as here, in part relies on *State Retirement & Pension Sys. of Md. v. Thompson*, 368 Md. 53 (2002).³ There, Judge Wilner, writing for the Court, recognized that "Maryland law precludes a government employee from collecting duplicative benefits for the same work-related disability under both the workers' compensation law and the employer's retirement system." *Id.* at 55. Benefits paid under SRPS are offset by workers' compensation, per then SPP § 29-118, and where retirement benefits are paid under other public employment plans, workers' compensation is offset by the retirement benefits, per LE § 9-610. *Id.* at 55-56.

After *Thompson* was decided, the General Assembly amended SPP § 29-118. It had provided in subsection (b)(1) that "[t]he Board of Trustees shall reduce a disability retirement benefit by any related workers' compensation benefits." By ch. 193 of the Acts of 2004, the statute was changed to: "reduce an accidental or special disability retirement benefit." Kinna contends that, per the symmetry described in *Thompson*, SPP § 29-118 applies to members of the Teachers' Retirement System, but, by virtue of the amendment, that section provides for offset only of accidental or special disability retirement benefits, not ordinary disability benefits. The result, says Kinna, is no offset at all. *Zakwieia* opined that the effect of the amendment was to limit SPP § 29-118 to accidental and special

³The same law firm representing *Zakwieia* represents claimant Kinna in the instant matter.

retirements so that LE § 9-610 controls ordinary disability and the workers' compensation award is offset by the ordinary disability payments. *Zakwieia*, 231 Md. App. at 650 n.2.

For reasons that are not clear to us, neither party to the case before us has referred in their briefs to SPP § 29-118(a), the substance of which was added by ch. 279 of the Acts of 1997. Subsection (a) in relevant part now reads:

"(a)(1) Except as otherwise provided in this subsection, this section applies to a retiree

"(2)(i) This section does not apply to:

"1. a retiree of a participating governmental unit ... or

"2. a retiree of the Employees' Pension System or the Employees' Retirement System who receives a disability retirement benefit as a former employee of a county board of education

"(ii) A retiree described in subparagraph (i) of this paragraph ... is subject to § 9-610 of the Labor and Employment Article."

Because SPP § 29-118(b)(1) specifically addresses accidental or special disability retirement benefits, it would seem that the "disability retirement benefit" referenced in (a)(2)(i)2 applies to ordinary disability retirement benefits. Thus, we are directed by SPP § 29-118(a)(2)(ii) to LE § 9-610 for the operative offset.

Confirming this conclusion is *Reger v. Washington County Bd. of Educ.*, No. 68, Sept. Term 2016, 2017 WL 3317892 (Md. 2017). There, after a thorough review of the cases and statutes, the Court held that, "under the statutory scheme created by [ch. 279 of the Acts of 1997] which remains in effect today, a retiree who was employed by a county board of education who receives a disability benefit through that employer remains subject to the offset provision in LE § 9-610, and not the offset in [SPP] § 29-118." *Id.* at *21 (footnote omitted).

II

The second issue alternatively raised by Kinna is the meaning of "similar benefits" in LE § 9-610(a)(1). She contends that, to apply the offset, "Maryland Courts have made clear that the underlying basis for both benefits must be the result of the same injury and must be 'similar.'" Here, that standard is not met. The retirement disability benefit is based on fibromyalgia and the workers' compensation benefit is based on PTSD. The Board, however, contends that the required similarity is in benefits, not injuries, and submits that ordinary disability retirement payments and workers' compensation payments are both wage loss benefits.

To be eligible for an ordinary disability retirement, a member must have at least five years of eligible service and be incapable of further performing the duties of the member's position by an incapacity that is likely to be permanent. SPP § 29-105. The cause of the ordinary disability may, but need not, arise out of the performance of a duty of the member's position. Thus, if the similarity requirement under LE § 9-610 is satisfied by wage continuation coupled with any disability, then the offset applies. If, however, the similarity requirement is concerned only with the disability that underlies the workers' compensation award, then the offset would not apply. It is a question of legislative intent.

Looking to the language of the statute, appellee emphasizes that "similar" modifies "benefits." Focusing on "benefits," and not looking at the cause of the disabilities, one can say that appellant's awards for PTSD and for fibromyalgia are both wage continuation benefits, and therefore "similar." The Board argues that, if the offset was intended to apply

only where the injury underlying both benefits was similar, the Legislature would have said so.

The concept of similarity based on wage continuation came into the Maryland cases from Professor Larson's work. *See Newman v. Subsequent Injury Fund*, 311 Md. 721 (1988). There, the Court said:

"Several of our cases ... concerned with § 33(c),⁴ and the Court of Special Appeals in this case, look to 4 A. Larson, *The Law of Workmen's Compensation* § 97.10, at 18-9 (1979):

"Wage-loss legislation is designed to restore to the worker a portion, such as one-half to two-thirds, of wages lost due to the three major causes of wage-loss: physical disability, economic unemployment, and old age. The crucial operative fact is that of wage loss; the cause of the wage loss merely dictates the category of legislation applicable. Now if a workman undergoes a period of wage loss due to all three conditions, it does not follow that he should receive three sets of benefits simultaneously and thereby recover more than his actual wage. He is experiencing only one wage loss and, in any logical system, should receive only one wage-loss benefit. (Footnote omitted)."

Id. at 726-27 (footnote omitted).

The Court of Appeals, however, rejected Larson's policy analysis as inapplicable to the Maryland statute, saying:

"Our cases, however, were all decided in the context of dual benefits accruing by reason of the same injury, that is, two benefits being paid stemming from the same cause. Moreover, Larson's endeavor to coordinate workmen's compensation and all 'other wage-loss benefits' was not made in the light of our statute, nor does he refer to a comparable statute. *Our statute focuses*

⁴Prior to Code Revision, LE § 9-610 was Maryland Code (1957, 1985 Repl. Vol.), Art. 101, § 33(c). There was no substantive change. *See Blevins & Wills v. Baltimore County*, 352 Md. 620, 631 (1999).

only on dual recoveries for a single on-the-job injury. Section 33(c) does not encompass setoffs for every type of wage-loss benefit available as Larson attempts to do. It is our statute which governs, not Larson's generalizations."

Id. at 727 (emphasis added).

Newman had elected to take a length of service retirement about two months after a workers' compensation reward. *Id.* at 722-23. The Court held that there was no offset between the two benefits. *Id.* at 728.

In *Blevins & Wills v. Baltimore County*, 352 Md. 620 (1999), the claim of Wills, a clerical employee, *id.* at 627, was governed by LE § 9-610 as it had been enacted in Code Revision without the word "similar" that had described "benefits" in former Art. 101, § 33(c). *Id.* at 630-31. Baltimore County contended the result was that an offset was required between Wills's length of service benefits and her workers' compensation benefits. *Id.* at 628. The Court held, as a matter of statutory construction, that the Legislature intended that the benefits be "similar" for the offset to apply. *Id.* at 644. Looking to what the Legislature must have known when, in the legislatively accepted Revisor's Note, it stated that no substantive change was intended, the Court construed "similar," implied in LE § 9-610, as having the same meaning that *Newman* had placed on the statute. *Id.* at 642-43. It means "that the *only* benefits that a county was entitled to set off against a workers' compensation award were those that were similar to the compensation benefits -- those which, if not set off, would permit a double recovery for the *same injury*." *Id.* at 642 (emphasis added). Thus, an offset was not authorized. *Id.* at 644.

Appellee acknowledges that "[t]here is no case explicitly and directly addressing the applicability of the offset provided in § 9-610 where the employee is receiving ordinary disability retirement benefits and workers' compensation benefits arising out of the same employment, but from distinct medical diagnoses." But, there is now further guidance. After briefing and argument in the case *sub judice*, the Court of Appeals decided *Reger v. Washington County Bd. of Educ.*

Reger, an employee of the Washington County Board of Education, injured his back and neck in 2007 in a work-related accident. *Id.* at *1. In 2008, he was awarded temporary total disability benefits by the Commission. *Id.* at *2. In 2009, he applied for accidental disability retirement to SRPS, but accepted ordinary disability benefits after the medical board concluded that Reger's neck and back permanent disabilities were due to cervical spondylosis and stenosis lumbar spondylosis and were not due to the accident. *Id.* at *3-4. After the claimant underwent surgery and had prevailed in two actions for judicial review, the Commission ordered that Reger's workers' compensation benefits were subject to offset under LE § 9-610 by the ordinary disability retirement payments. *Id.* at *4-7. On judicial review of that order, the employer prevailed on summary judgment which the Court of Special Appeals affirmed in an unreported opinion. *Id.* at *7-9.

The Court in *Reger* distilled three principles from its thorough review of the statutes and cases. They are:

"First, the overall legislative intent behind the offset provision now contained in LE § 9-610 was 'that the General Assembly wished to provide only a single recovery for a single injury for government employees covered by both a pension plan and [workers'] compensation,' and to thereby prevent

employees from receiving a double recovery for the same injury. *Fikar* [*v. Montgomery County*], 333 Md. [430,] 435 [(1994)] (quoting *Frank* [*v. Baltimore County*], 284 Md. [655,] 659 [(1979)]).

"Second, as clarified in *Newman*, the specific language in the statute that 'payment of the benefit by the employer satisfies, to the extent of the payment, the liability of the employer ... for payment of *similar benefits* under this title' reflects a legislative intent that the offset apply only to 'comparable' benefits, which are '*benefits accruing by reason of the same injury.*' 311 Md. at 727 ... (emphasis added). See also *Fikar*, 333 Md. at 439 ... (holding that the statutory offset applied because cash payments the petitioner was paid as part of her vocational rehabilitation benefits were awarded 'because of the same injuries sustained in the same accident which occurred in the course of her employment' that was also the basis for her disability pension benefits); *Polomski* [*v. Mayor & City Council of Baltimore*,] 344 Md. [70,] 81 ... [(1996)] (holding that 'similar benefits for the same injury trigger the offset provision of Art. 101, § 33(d) [later recodified at LE § 9-610]' whereas '[d]issimilar benefits [] render the offset provision inapplicable'); *Blevins*, 352 Md. at 642. ... (noting that pursuant to our holding in *Newman*, 'the only benefits that a county was entitled to set off against a workers' compensation award were those that were similar to the compensation benefits -- those which, if not set off, would permit a double recovery for the same injury'). When benefits are not traceable to the same injury, they are dissimilar, and the statutory offset does not apply. *Newman*, 311 Md. at 728

"Third, although early cases discussing the statutory offset provision suggested it should apply to offset workers' compensation benefits against any other benefit that compensates the employee for wage loss, this Court explicitly rejected that rationale in *Newman*, emphasizing that 'our statute focuses only on dual recoveries for a single on-the-job injury' and 'does not encompass setoffs for every type of wage-loss benefit available.' *Id.* at 727"

Id. at *22 (emphasis retained).

In the case before us, there are two distinctly different disabilities. The LE § 9-610 offset does not apply.

**JUDGMENT OF THE CIRCUIT
COURT FOR BALTIMORE COUNTY
VACATED AND CASE REMANDED
TO THAT COURT FOR ENTRY OF A
JUDGMENT AFFIRMING THE
ORDER OF THE WORKERS'
COMPENSATION COMMISSION.**

**COSTS TO BE PAID BY THE
APPELLEE.**