Circuit Court for Calvert County
Case No. 04-C-15-001130

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2855

September Term, 2018

BOGNET CONSTRUCTION ASSOCIATION, INC., *et al.*

v.

STEVE BRUCE

Shaw Geter,
Wells,
Wright, Alexander, Jr.
(Senior Judge, Specially Assigned),
JJ.

Opinion by Shaw Geter, J.

Filed: March 18, 2020

*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.

This appeal derives from an Order issued by the Circuit Court for Calvert County on October 29, 2018, granting appellee's motion for Judgment Notwithstanding the Verdict (J.N.O.V) and motion to remand. At the end of a three-day workers' compensation *de novo* trial, the jury found that appellee did not sustain an occupational disease during his employment with appellant. Following a post-trial hearing, the court remanded the case to the Workers' Compensation Commission to conduct a hearing on all issues. Appellants, Bognet Construction Association, Inc (Bognet) and Erie Insurance Company, timely appealed.

Appellant presents the following question for our review:

1. Whether the Circuit Court committed reversible error when it granted Appellee's motion for J.N.O.V. absent expert medical testimony that his lung disease was due to hazards within the nature of his employment with the employer, and that such disease was inherent in the nature of the industry, and an anticipated consequence of the occupation?

For reasons to follow, we dismiss this appeal.

BACKGROUND

Bognet employed appellee, Steve Bruce, beginning in 2005 as a construction field supervisor. Appellee had extensive experience in drywall construction, having worked in the field for over 30 years. He also owned and worked in his construction company, Bruce's Drywall, which specialized in installing drywall in new construction. Appellee ceased his employment with Bognet on March 3, 2015 because of a breathing disorder that made him unable to work.

On April 22, 2015, appellee filed a Workers' Compensation claim. He alleged he developed an occupational disease, a breathing disorder, as a result of his employment with

Bognet because the job caused him to inhale various irritants. He further stated that his date of disablement was March 3, 2015, his last day with Bognet.

During an initial hearing before the Commission on August 10, 2015, appellee testified as to his occupational exposure. A letter from Dr. Peter Wisniewski, appellee's treating pulmonologist, was admitted into evidence, that stated appellee

> suffers from interstitial lung disease/pulmonary fibrosis most likely secondary to occupational exposures. In particular, this patient has been exposed to significant quantities of drywall dust and other construction related to us. This has resulted in significant damage to his lungs to the point that he is unable to work in any type of job that requires any exertion manual labor.

Appellants did not submit medical evidence at the hearing, but they later supplemented the record with a report from an independent medical examination conducted by Dr. Ghazala Kazi. Dr. Kazi found:

> . . . within a reasonable degree of medical certainty, his interstitial lung disease is due to construction dust that he was exposed to for almost 30 years. The exposure around l2/23/2014 may have exacerbated his condition, but has not caused it. Therefore, within a reasonable degree of medical certainty, his interstitial lung disease was exacerbated by the injury of 12/23/2014.

After reviewing the evidence, the Commission denied appellee's claim and found:

> on the issues presented that the claimant did not sustain an occupational disease of interstitial and chronic airway disease of the lungs/pulmonary fibrosis arising out and in the course of employment as alleged to have occurred on March 3, 2015 (amended); and that the causal relationship opinion is insufficient.

On September 1, 2015, a request for reconsideration was filed with the Commission, which was denied on September 15, 2015. The next day appellee noted an appeal to the Circuit Court for Calvert County. In November 2015, while the case was pending appeal,

appellee received a double lung transplant. Portions of his removed lungs were analyzed and "showed pathology consistent with construction dust."

On February 15, 2017, appellee filed a Motion to Remand, stating, "the Commission's decision was not based upon 'sufficient evidence' and as a matter of [l]aw [the] decision was incorrect." The motion was subsequently withdrawn without prejudice to allow the parties additional discovery time and to reschedule the trial. On August 20, 2018, the motion was renewed. The court, however, reserved on its decision and commenced a jury trial.

Dr. Aldo T. Iacono, appellee's treating physician, testified that appellee's employment with appellant "in part influenced the progression of [his] disease" and he "could conclusively state that [he] believe[ed] that dust particles either made [appellee's] lung disease worse or more probably caused lung fibrosis and with each exposure [appellee's] lung got worse and his airways got worse." Dr. Ross Myerson, appellant's expert, testified that he did not believe appellee had "an occupational disease and therefore his treatment, his surgery and subsequent treatments are not work related." Following deliberations, the jury found appellee did not suffer an occupational disease.

Appellee timely filed post-trial motions for a new trial and to alter the judgment – J.N.O.V. Following a hearing on October 29, 2018, the trial judge remanded the case to the Commission. The court's order was issued on November 9, 2018 and stated:

> The [c]ourt having been shocked by the jury verdict in conjunction with [appellee's] arguments on the Motion to Remand, It is the 9th day of November 2018 hereby ORDERED, and [appellee's] motion for J.N.O.V and Motion to Remand are GRANTED.

> Therefore, this [c]ourt vacates both the August 28, 2015 Workers' Compensation Order and the August 23, 2018 Jury verdict and remand this case to the Workers' Compensation Commission with instructions to conduct a new hearing on all issues, to include all new medical evidence and all defenses raised.

STANDARD OF REVIEW

"An appeal from the Workers' Compensation Commission may follow two alternative modalities." *Simmons v. Comfort Suites Hotel*, 185 Md. App. 203, 224 (2009) (internal citation omitted). One is an "unadorned administrative appeal" and the second is an "administrative appeal plus." Both are authorized by Labor and Employment Article, § 9-745. *Bd. of Educ. for Montgomery Cty. v. Spradlin*, 161 Md. App. 155, 161–71 (2005). In an unadorned administrative appeal "we would look through the circuit court judgment to review the decision of the Commission;" but in an administrative appeal plus "we review the decision of the circuit court." *Stine v. Montgomery Cty.*, 237 Md. App. 374, 381–82 (2018). Generally, when reviewing trial court's decisions' on judgments notwithstanding the verdict, we determine "whether on the evidence presented a reasonable fact-finder could find the elements of the cause of action by a preponderance of the evidence." *Univ. of Maryland Med. Sys. Corp. v. Gholston*, 203 Md. App. 321, 329 (2012).

DISCUSSION

Bognet claims the court committed reversible error by striking the jury's verdict and granting appellee's motions. Appellee contends that the court did not err and further that there was no final judgment, thus this matter is not yet appealable.

A "party may appeal from a final judgment entered in a civil or criminal case by a circuit court." Md. Code Ann., Cts. & Jud. Proc. § 12-301. Section 10-222 of the Maryland State Government Code states that in administrative proceedings "a party who is aggrieved by the final decision in a contested case is entitled to judicial review of the decision as provided in this section." A final decision or judgment has the following three characteristics:

> (1) it must be intended by the court as an unqualified, final disposition of the matter in controversy, (2) unless the court properly acts pursuant to Md. Rule 2-602(b), it must adjudicate or complete the adjudication of all claims against all parties, and (3) the clerk must make a proper record of it in accordance with Md. Rule 2-601.

Rohrbeck v. Rohrbeck, 318 Md. 28, 41 (1989). An order is final where "the trial court's determination either decided and concluded the rights of the parties involved or denied a party the means to prosecute or defend rights and interests in the subject matter of the proceeding." *Nnoli v. Nnoli*, 389 Md. 315, 324, 1219–20 (2005).

Section 10-223(b)(1) of the Maryland State Government Code provides a "party who is aggrieved by a final judgment of a circuit court under this subtitle may appeal to the Court of Special Appeals in the manner that law provides for appeal of civil cases." A circuit court's remand to the Workers' Compensation Commission to "decide an issue within its purview, but not decided by it, without completing appellate review, is an entirely appropriate procedure." *M & G Convoy, Inc. v. Mauk*, 85 Md. App. 394, 406 (1991).

In *Metro Maint. Systems South, Inc.*, the Court of Appeals held that the trial court's order remanding to the agency "to reconsider its decision—issued prior to any judicial

review of the agency's decision, at the request of the Board and with consent of the party that sought judicial review—is not a final, appealable judgment." *Metro Maint. Sys. S., Inc. v. Milburn*, 442 Md. 289, 311 (2015).[1] The Court analyzed several cases which had been remanded to administrative agencies and noted "a remand after a circuit court has conducted judicial review that precludes the parties from further contesting or defending the validity of the agency's decision in that court—and leaves nothing further for the court to do—is a final judgment." *Id.* at 302–04. In determining instances where a circuit court's remand to an agency is not a final judgment the Court looked to *Anne Arundel Cty. v. Rode*, 214 Md. App. 702 (2013).

In *Rode*, the Board filed a motion to reconsider its decision after the claimant appealed to the circuit court and the circuit court granted its request. *Id.* at 705–07. We concluded that the remand was "made prior to any consideration of the merits by the circuit court and in response to a request by the [the Board] itself, represented nothing more than a brief delay in the ongoing review . . . and the case was not over." *Id.* at 715. In *Rode*, we examined *Hickory Hills Ltd. P'ship v. Sec'y of State of Md.*, where we held

> . . . a remand for additional evidence is permitted under subsection (e) prior to a final decision by the reviewing court. Conversely, subsection (g) does not expressly provide, as an appropriate purpose, the gathering of additional evidence. Thus, in a particular case a reviewing court must first determine which subsection the trial judge is applying. If he is applying subsection (e) and makes the appropriate findings, as he explicitly did in the case at bar, such a remand is proper and is not normally a final appealable order.

[1] In *Metro Maint. Systems South, Inc.*, appellee filed a petition for judicial review of the Department of Labor, Licensing, and Regulation Board of Appeals' (Board) decision to a circuit court. *Metro Maint. Sys. S., Inc. v. Milburn*, 442 Md. 295. After appellant and appellee filed their memorandums the Board filed a motion to remand, which was granted. *Id.* at 295–96 .

Hickory Hills Ltd. P'ship v. Sec'y of State of Md., 84 Md. App. 677, 686 (1990). We also stated any order given under § 10-222(f) allows the circuit court to have "continuing jurisdiction over the subject matter" because § 10-222(f)(1)(i)

> requires that such motion be made *prior to the hearing date in court,* and second, [§ 10-222(f)(3)] requires that the agency file with the *reviewing court,* as part of the record, the additional evidence and any modifications of the findings or decision. Those two provisions of [§ 10-222(f)] make clear that the circuit court retains jurisdiction over the appeal.

Id. at 680–81 (emphasis in original).[2]

In the case at bar, the circuit court granted the motion for judgment notwithstanding the verdict and remanded the case to the agency. A grant of a judgment notwithstanding the verdict replaces an original jury verdict. *Mona v. Mona Elec. Grp., Inc.*, 176 Md. App. 672, 729 (2007). Under Maryland Rule 2-532, when a court grants a judgment notwithstanding the verdict, the previous judgment is removed, and the case starts anew with a trial. As a result, here, there was no decision on the merits and thus, no final disposition or adjudication of the parties' claims. We, therefore, dismiss this appeal as premature.

APPEAL DISMISSED; COSTS TO BE PAID BY APPELLANTS.

[2] Since *Hickory Hills Ltd. P'ship v. Sec'y of State of Md.*, Section 10-215 of the Maryland State Government Code has been recodified as § 10-222.