Reversing the Supreme Court of Maryland? Yes, It Can Be Done!

A Legal Drama In 3 Acts

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Introduction

Sometimes, the "last word" is not really the "last word." In *Spevak v. Montgomery County*, 480 Md. 562, 281 A.3d 171 (2022), the Supreme Court of Maryland (formerly the "Court of Appeals") held, in a 6-1 decision, that a covered government employee's workers' compensation benefits arising from an anatomically unrelated, subsequent disease (work-related hearing loss) which was completely unrelated to an earlier injury that led to his disability retirement (a prior back injury) should nevertheless be offset. It ruled that Md. Code Ann., Lab. & Empl. ("LE") § 9-610's ("Offset against other benefits") term "similar benefits" encompassed situations even where the employee's work-related condition (hearing loss) arose years after his retirement and had nothing at all to do with his disability retirement (back). The decision seemed to contradict almost 50 years of appellate law, including from the high court itself, which had previously stated, on several occasions, that it was the Legislature's intent in adopting the phrase "similar benefits" to mean that the two systems (retirement and workers' compensation) provide "only a single recovery for a **single injury**." (emphasis supplied) *see e.g. Frank v. Baltimore Cty.*, 284 Md. 655, 659; 399 A.2d 250, 253 (1979); *Newman v. Subsequent Inj. Fund*, 311 Md. 721, 537 A.2d 274 (1988). The final word? Not so fast. Read on.

Given that Fire Fighter Spevak's workers' compensation hearing loss had nothing to do with his earlier disability retirement, and considering the high Court's prior pronouncements, we entirely disagreed with the Court's "new" interpretation[1] of what the Legislature's intent was in enacting § 9-610's offset. The undersigned did not believe that the Legislature's intent when it enacted § 9-610 in 1971, formerly Art. 101 § 33, somehow changed between 1988 when Newman was decided and 2022 when *Spevak* was argued. *Newman* specifically stated:

> Our cases have made it abundantly clear, as the Court of Special Appeals discovered, that the legislature "**intended to preclude double-dipping into the same pot of comparable benefits**." Oros, 56 Md.App. at 694, 468 A.2d 693 (emphasis added). The corollary is, that **when the benefits are dissimilar, the setoff provisions of § 33(c) [now LE Sec. 9-610] do not apply. We have not heretofore specifically said this, but we say it today**.

311 Md. 721, 728; 537 A.2d 274, 277 (1988).

The Professional Fire Fighters of Maryland and myself also questioned the logic of how someone's workers' compensation benefits for a condition that he had no knowledge of at the time of his retirement, and which had not yet occurred, could be offset by a prior unrelated condition. We decided to get the answer from the proverbial horse's mouth, and sought redress with the General Assembly, requesting that it clarify its meaning of the words "similar benefits" set out in LE § 9-610.

In a "this is what we meant" measure, the Legislature explicitly "abrogated" the high court's Spevak decision, perceiving the inequity in the Court's decision, as well as the departure from past judicial pronouncements regarding a section of a benevolent statute that was enacted over a century ago to compensate injured workers and their families for injuries or diseases caused by their employment. It amended LE § 9-610 to reinstate the pre-*Spevak* interpretation of the term "similar benefits" by specifically declaring that the same body part had to be involved. This was in line with what most practitioners believed to be the law prior to *Spevak*. Senate Bill 377, approved by Governor Wes Moore on May 3, 2023, modified the statute's language to reinstate its original aim of only offsetting combinations of benefits made payable for injuries *involving the same body part*.

Act I - Factual Background

Patrick Spevak had commendably served as a fire fighter for the Montgomery County Department of Fire and Rescue from 1979 to 2010. Throughout his long career, he was, as all fire fighters routinely are, exposed to numerous known causes of hearing loss (extremely loud noises caused by sirens, noisy machinery, engines, claxons, etc.). In 2007, Fire Fighter Spevak had sustained a back injury years earlier, and filed a workers' compensation claim, which was found compensable. This orthopedic injury eventually led to his service-connected disability retirement for which he received disability retirement benefits.

Five years later, in 2012, Fire Fighter Spevak started to experience symptoms of hearing loss and correspondingly filed a separate, new claim with the Maryland Workers' Compensation Commission (the "Commission") for said hearing loss. Although

Montgomery County (the "County") contested the claim, the Commission found his hearing loss to have indeed arisen out of and in the course of his employment as a fire fighter and deemed it compensable. At a later hearing before the Commission regarding the nature and extent of his hearing loss (permanency), the Commission found that he sustained a 6% permanent partial disability as a result of the hearing loss.[2] Although they ordered benefits for the permanency, they directed that these benefits were to be offset because of his disability retirement benefits for his earlier back condition under LE § 9-610 in light of the, at that time, recently decided case of *Zakwieia v. Baltimore Cty., Bd. of Educ.*, 231 Md. App. 644, 153 A.3d 888 (2017), issued by the Appellate Court of Maryland (formerly "Court of Special Appeals") prior to *Reger, supra* footnote 1.

Fire Fighter Spevak filed a Petition for Judicial Review of the Commission's decision, but just three days later the Supreme Court of Maryland issued its decision in *Reger*, and Fire Fighter Spevak moved to remand the case back to the Commission.[3] In light of the high court in *Reger* finding a Sec. 9-610 offset applicable in a non-service connected disability retirement case because the claimant had been granted two sets of benefits for the *same* back *injury*, Mr. Spevak requested that the Commission reconsider its offsetting his benefits awarded for his hearing loss due to a prior unrelated back injury. The Commission claimed it did not have jurisdiction to review the offset issue, and the case was reinstated in the Circuit Court for Montgomery County. On cross dispositive motions, the circuit court affirmed the Commission's pre-*Reger* application of LE § 9-610's offset by granting the County's motion for summary judgment. The County and the Circuit Court focused on the total amount Fire Fighter Spevak would be receiving from the two sets of benefits, notwithstanding they were due to completely different injuries and conditions involving separate body parts. This decision seemed to be contrary to what the high court had just recently held in Reger, which for all intents and purposes, overruled the intermediate Court's *Zakwieia* holding.

Act II (A) - The Appellate Process

The Appellate Court of Maryland affirmed the Circuit Court's decision, holding that "because Mr. Spevak's service-connected total disability retirement compensates *for any and all work-related injuries he sustained in his employment with Montgomery County*, he may not receive his permanent partial workers' compensation" benefits for an occupational disease, even though his occupational disease of hearing loss had absolutely nothing to do with his earlier service-connected disability predicated on his back.[4] The Appellate Court spent much of its opinion focusing on the total amount of money Fire Fighter Spevak would receive in benefits from the two separate systems, rather than simply addressing the actual legal issue of whether the two sets of benefits were "similar" in accordance with the unvarnished wording of LE § 9-610, despite disclaiming that it was not viewing the matter as a "wage loss" issue, which Maryland does not adhere to.[5]

Act II (B) - The Supreme Court's Decision: Not The Final Curtain

Believing that the issue to be decided was plainly a matter of statutory interpretation and not the amounts received, we filed a petition for writ of certiorari with the Supreme Court of Maryland asking: "...whether the Court of Special Appeals erred in affirming the Circuit Court and the Commission regarding the applicability of the offset provision in LE § 9-610."[6] Put simply, did § 9-610's term "similar benefits" apply to a case where the new compensation benefits were for a condition unrelated to the injury/condition that resulted in the service-connected disability retirement?

Petitioner Spevak argued that the Appellate Court of Maryland failed to properly apply the "same injury" test first interpreted in *Blevins, infra*, and seemingly settled in Newman.[7] Under the "same injury" test, the General Assembly's intent in including the words "similar benefits" in Sec. 9-610's set off provision was to provide only a single recovery for a single injury for employees covered by both a pension plan and workers' compensation and prevent employees from receiving a double recovery for the *same injury*. This test was previously enunciated by the Supreme Court itself in *Newman* in 1988, in *Fikar v. Montgomery Cty.* in 1994, in *Blevins* in 1999, and again in *Reger* in 2022.[8]

Montgomery County argued that service-connected disability retirement benefits compensate for *all* disabilities that occur during employment, even for ones that arise *after* the individual is no longer working and the injury that led to the disability retirement is not linked to the injury/disease giving rise to the workers' compensation claim. The County again emphasized that if the offset was not utilized, "Mr. Spevak would collect more than the maximum compensation available in a workers' compensation case if he received permanent total disability benefits and more than his weekly wage at the time of his retirement."[9] We argued that if the County's concern was that Mr. Spevak's disability retirement benefits were too high, that the matter ought to be addressed by collective bargaining or revision of the retirement system—leaving aside that this case had nothing to do with permanent total disability (Spevak had a 6% hearing loss). The County's perceived concern for the amount of Mr. Spevak's retirement benefits did not change the meaning of the words in Sec. 9-610 or give the Court license to tinker with the economic consequences of the Act.

The Supreme Court began its decision by articulating a brief history of workers' compensation law and explained the situations in which offsets apply.[10] Following this synopsis, the prominent determination to be made, according to the Court, was whether Fire Fighter Spevak's back injury (pre-retirement) and his hearing loss (post-retirement) were "similar" or the "same injury", so as to limit his recovery by offsetting the benefits payable. So far, so good. They had seemingly properly framed the issue.

The Supreme Court then, as it had done numerous times before, professed that the "same injury" test was indeed the practice that governs offset analyses. Despite this declaration, however, the high court then suddenly reversed its stated position

in *Reger, Newman, Blevins, et. al.*, about preventing double recovery for "the same injury." It held that in drafting LE § 9-610, the General Assembly somehow intended to preclude employees from receiving workers' compensation benefits and service-connected retirement disability, regardless of whether they arose from separate occurrences or to different body parts. Otherwise, the Court suggested, the worker would receive too much. LE § 9-610, at the time *Spevak* was decided, read as follows:

> 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...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.

Despite the apparent plain meaning of the term "similar benefits", and its prior declarations about one injury/one recovery, the high court held that service-connected disability benefits compensate for **any type** of injury or disease that arises from the employment even for workers' compensation injuries that did not exist at the time of the disability retirement. Put differently, the Supreme Court was now saying that previously granted service-connected retirement disability benefits resulting from a back injury were "similar" to permanent partial workers' compensation benefits for occupational hearing loss.

Justice Watts, in a dissenting opinion, correctly noted that the "same injury" test had been historically used in Maryland, that it was the proper test, and that there was little basis to deviate from the Court's own interpretation over the last four plus decades regarding the Legislature's intent in choosing the words "similar benefits." She opined that under our case law and the plain meaning of the statute's words, "the workers' compensation benefits at issue need not be offset...because the case involves benefits for **two different injuries – namely, a back injury and hearing loss and tinnitus – rather than two types of benefits for the same injury**."[11] The Supreme Court had deprived Fire Fighter Spevak of compensation to which he was statutorily and precedentially entitled under our Workers' Compensation Act. "Such an outcome is inequitable, at odds with our case law, and inconsistent with the clear intent of the General Assembly for offsets...[which are required] only where an employee is awarded two types of benefits for the same injury."[12]

Act III - The Epilogue

Rather than wallow in rejection or dismay (or my inability to convince an appellate panel of what seemed incredibly obvious and logical to me), we employed a tactic using civics lessons from junior high school social studies that was often overlooked. We "petitioned" our other branch of government, the one whose intent the Court was now (re)interpreting. We asked the Legislature to weigh in on what they had really meant by the term "similar benefits" when it enacted § 9-610. We did so by drafting a bill which would reinstate the interpretation of LE § 9-610 under which most practitioners and the Commission had operated (no offset unless the benefits from the retirement and the workers 'compensation claim were due to the *same injury* or *body part*). In essence, we invited the General Assembly itself to tell us whether they agreed with the Supreme Court's new interpretation of LE § 9-610's phrase "similar benefits."

The General Assembly immediately recognized the illogic of the decision as well as the detrimental effects the *Spevak* opinion would create. After a House vote of 131-1 and a Senate vote of 47-0, the bill was passed by the Legislature and became effective on October 1, 2023. Moreover, the bill explicitly abrogated the decision of *Spevak*. Section 2 of the enacted bill states: "AND BE IT FURTHER ENACTED, That it is the intent of the General Assembly **that this Act abrogate the holding by the Supreme Court of Maryland in Spevak v. Montgomery County**, 480 Md. 562 (2022)."[13]

LE § 9-610, as amended to enforce what it initially meant and had meant for 50 years prior to Spevak, now expressly states:

> ...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 only if the payment of the benefit by the employer and the payment for benefits under this title are based, in whole or in part, on the same body part**.

As it now reads, LE § 9-610 squashes any argument that workers' compensation benefits for injuries which do not stem from the same body part as the service-connected disability retirement are to be offset. This solution, along with *Reger*, which dealt with non-service-connected disability retirement, and *Newman* which dealt with length of service ("regular") retirement, is now statutorily solidified and protected from attacks based on municipal economics, rather than the purpose of the law. In a workers' compensation system so historically rooted in addressing and compensating employees for their dedication and devotion to their professions, the outcome emerged in a way that provides Fire Fighter Spevak, and all municipal claimants, with the remedy that their occupational efforts justly warrant.

Postscript

Notwithstanding the arduous endeavor above resulting in the Legislature reminding the high court of the "benevolent purpose" and "social legislation" of the Maryland Workers' Compensation Act, some municipalities, incredibly, have continued to challenge the Legislature's explicit actions in abrogating *Spevak*. At recent hearings, a few municipalities have erroneously argued that Senate Bill 377 does not apply retroactively, even with the Act expressly saying it "abrogates the Spevak decision". This argument misses the mark. SB-377 demonstrates that the Legislature believed that the *Spevak* holding ran contrary to the legislative intent of Sec. 9-610. Mr. Spevak did not, as the County imagined, ask to *change* past law through retroactive application of a subsequent statute,

but merely to have the Legislature reiterate what the vast majority of practitioners believed the law to be in effect on Claimant's date of disablement, (e.g. what the Legislature had initially meant it to be).[14] To determine a claimant's benefits, the Commission applies the law in effect on the date of disablement.[15] These quasi *ex post facto* arguments entirely fail to comprehend that the *Spevak* decision demonstrated, according to the Legislature, a temporary period (between August 15, 2022, when *Spevak* was rendered and October 1, 2023 when the new amendment took effect) where the actual law was misinterpreted and misapplied. Other than perhaps for disablements arising during that 13-month period, such post facto attacks are devoid of any merit to be considered. We are now, happily, back to where we were - a fair and reasonable interplay and coordination between two different benefit systems.

Biography

Ken Berman is a founding partner of Berman | Sobin | Gross LLP. From Maryland Workers' Compensation cases small and large, to multi-million dollar Personal Injury trials, Ken advocates and consistently achieves winning results for his clients. Ken has been instrumental in the passage of many pieces of legislation that have expanded the rights of fire fighters as well as other injured workers. He testifies regularly before the state legislature in Annapolis on pending Workers' Compensation laws. He served on the Maryland Governor's Study Commission on Workers' Compensation Legislation and was Chairman of the Workers' Compensation section of the Maryland Association of Justice.

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[1] Even in the most recent Supreme Court case concerning offsets prior to Spevak, the Court, in Reger v. Washington County Board of Education, 455 Md. 68, 117, 166 A.3d 142, 170 (2017), noted that the Legislature's intent in drafting LE § 9-610 was to offset workers' compensation benefits "accruing by reason of the same injury." Spevak presented a departure in holding two separate injuries to separate body parts also triggered the offset.

[2] To have compensable hearing loss (occupational deafness) in Maryland, a claimant must meet a statutory threshold which is charted in LE § 9-650. Mr. Spevak first met the threshold to file a compensable claim in 2012.

[3] The Supreme Court in Reger refused to give deference to Zakwieia because the appellate court there relied on Reynolds v. Bd. of Educ. of Prince George's Cnty., 127 Md. App. 648, 736 A.2d 391 (1999), a case that the Reger court expressly disagreed with throughout its opinion. Moreover, Reger, in rendering its approval of and adherence to the general rule of a single recovery for a single injury, essentially overturned the Zakwieia holding.

[4] Spevak v. Montgomery Cnty., 251 Md. App. 674, 707, 256 A.3d 329, 348 (2021).

[5] Justice Beachley stated:
Under Mr. Spevak's theory, an employee who sustains two different injuries resulting in permanent total disability could be entitled to both the service-connected total disability retirement (in this case, 70% of final salary) and the permanent total disability payments under workers' compensation law (generally two-thirds of salary). In our view, that result would likewise constitute a windfall not intended by the Legislature.
Spevak, 251 Md. App. 674, 707; 256 A.3d 329, 348 (2021). Leaving aside the opinion's misguided focus on the total amount a claimant would recover (e.g. the results) rather than interpreting the language of the statute - Fire Fighter Spevak had merely a six percent (6%) hearing loss and never came close to arguing that he was permanently totally disabled.

[6] Spevak, 480 Md. 562, 566; 281 A.3d 171, 173 (2022).

[7] Newman, 311 Md. 721; 537 A.2d 274 (1988).

[8] Newman v. Subsequent Inj. Fund, 311 Md. 721, 537 A.2d 274 (1988); Blevins v. Baltimore Cty., 352 Md. 260, 724 A.2d 22 (1999); Fikar v. Montgomery Cty., 333 Md. 430, 625 A.2d 977 (1994); and Reger v. Washington County Board of Education, 455 Md. 68, 166 A.3d 142 (2017).

[9] Spevak, 480 Md. 562, 571; 281 A.3d 171, 176 (2022).

[10] Id. at 570; 281 A.3d at 175.

[11] Spevak, 480 Md. 562, 581; 281 A.3d 171, 182 (2022) (Watts, J., dissenting) (emphasis added).

[12] Id. at 587, 281 A.3d at 186 (Watts, J., dissenting).

[13] SB-377, Gen. Assemb., 2023 Sess. (Md. 2023).

[14] Tangentially, perhaps the question of SB-377's retroactivity would be relevant if Fire Fighter Spevak's, or any similar claimant's, date of disablement was between the Spevak decision (August 15, 2022) and SB-377's effective date (October 1, 2023). However, those scenarios, although posing an interesting question, will be few and far between for workers' compensation claimants.

[15] Sanchez v. Potomac Abatement, Inc., 417 Md. 76, 82-86, 8 A.3d 737, 740-43 (2010).