ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY

Vande Krol v. Superstition/Benchmark,
CV-23-0211-PR

PARTIES:

Petitioner: Benchmark Insurance and Benchmark Administrators (the "**Carrier**")

Respondent: Robert Vande Krol ("**Vande Krol**")

FACTS:

Vande Krol was a firefighter and engineer for Superstition Fire and Medical for eighteen years. He was diagnosed with oligodendroglioma, a rare form of brain cancer, and in October 2020, he had surgery that successfully removed the tumor. Thereafter, he suffered "headaches, memory problems, loss of some peripheral vision, and vertigo." *Krol v. Indus. Comm'n*, 255 Ariz. 495, 498 ¶ 5 (App. 2023).

In January 2021, Vande Krol submitted a claim for workers' compensation with an injury date of October 28, 2020. The Carrier denied the claim. Vande Krol requested a hearing which was set to commence on August 3, 2021. Vande Krol requested a continuance which was granted and the hearing was postponed until October 5, 2021.

A key question at the hearing was whether the 2017 version of A.R.S. § 23-901.01 or the 2021 version of A.R.S. § 23-901.09 applied to Vande Krol's workers' compensation claim; the relevant language from these statutes is printed below.[1] A critical difference between the statutes was that under the 2017 version, to have a viable claim Vande Krol had to prove that he had been "exposed to a known carcinogen" that was "reasonably related to the cancer" that he developed; under the 2021 version, Vande Krol could have a viable claim without making such a showing. *Compare* A.R.S. § 23-901.01(C)(3) (2017), *with* A.R.S. § 23-909.09(B) (2021). The 2021 statute also changed the standard for a carrier or employer to overcome the presumption that a worker's injury was "deemed to arise out of employment" from a preponderance of the evidence to clear and convincing evidence. *Compare* A.R.S. § 23-901.01(E), with A.R.S. § 23-901.09(E). The 2021 statute became effective on September 29, 2021.

The parties agreed that Vande Krol's injury met the requirements of the 2021 statute, but disagreed on whether it met the requirements of the 2017 statute. They also disagreed as to which statute should apply to Vande Krol's workers' compensation claim.

An administrative law judge (the "**ALJ**") held an evidentiary hearing over three days in October 2021 on Vande Krol's claim. The ALJ noted that under A.R.S. § 1-244 the default rule is that "No statute is retroactive unless expressly declared therein." The ALJ determined that the 2021 statute did not state that it was to be applied retroactively and thus it could "only apply to claims that arise after the statute was enacted." Because Vande Krol had an injury date that

[1] In 2021, the relevant portions of § 23-901.01(C) relating to firefighters were moved to § 23-901.09(B).

occurred "before the enactment of the updated statute," the ALJ concluded that the "correct law to be used is the 2017 statute." The ALJ determined that Vande Krol could not establish that any of the carcinogens to which he had been exposed during his firefighting career had caused his oligodendroglioma. Thus, under the 2017 version of the statute, the ALJ ruled that Vande Krol had not established a viable workers' compensation claim. Vande Krol timely appealed.

The court of appeals noted that the "default rule is that [a] statute, once effective, applies only prospectively," but indicated that there are "at least three" exceptions "where the presumption against retroactivity does not" apply. *Vande Krol*, 255 Ariz. at 499–500 ¶¶ 13, 14. Those three exceptions are: when the legislature expressly directs that a statute applies retroactively; when a procedural statute becomes effective "during ongoing proceedings;" and "judge-made exceptions" such as applying "[p]rocedural enactments" that "do not alter or affect earlier established substantive rights." *Id.* at 500–01 ¶¶ 19, 21.

According to the appellate court, subsection (C)(2) of the 2021 statute established "when it applies (and by implication when it does not)" and "application does not hinge on the date of injury." *Id.* at 501 ¶ 22. The court stated that subsection (C)(2), "application of the 2021 statute turns on: (1) the firefighter's age at the time of diagnosis and (2) a maximum length of separation from employment at the time of diagnosis." The court of appeals held that under its plain terms, "the 2021 statute should have been applied to Vande Krol's proceedings." *Id.* at 502 ¶ 28.

The court held that applying the 2021 version of the statute to Vande Krol's claim did not violate retroactivity principles because "the 2021 statute became effective before the start of Vande Krol's hearings." *Id.* at 503 ¶ 29. Because those hearings started on October 5, 2021, the court ruled that Vande Krol's proceedings were "'an action already pending'" for retroactivity purposes. *Id.* ¶ 30 (alterations omitted) (quoting *State Comp. Fund of Ariz. v. Fink*, 224 Ariz. 611, 613 ¶ 9 (App. 2010)).

The court also held that applying the 2021 version of the statute to Vande Krol's claim did not violate retroactivity principles because "the statute is procedural in nature and 'does not alter or affect earlier established substantive rights.'" *Id.* ¶ 33 (alterations omitted) (quoting *Aranda v. Indus. Comm'n of Ariz.*, 198 Ariz. 467, 470 ¶ 11 (2000)). In determining whether the 2021 statute was procedural or substantive, the court of appeals applied "guidance" from the Fifth Circuit. *Id.* at 504 ¶ 37. The court of appeals stated that

> a presumption is substantive when it is "conclusive," which "may be described as one which is final and irrebuttable, an inference which must be drawn from proof of given facts which no evidence, however strong, can overcome." On the flip side, "a procedural presumption is one which is rebuttable, it operates to require the production of credible evidence to refute the presumption, after which the presumption disappears."

Id. (citation omitted) (quoting *Maryland Cas. Co. v. Williams*, 377 F.2d 389, 394 (5th Cir. 1967)). Applying that framework here, the court of appeals held that the "2021 statute contains a *procedural* presumption—the presumption is rebuttable and disappears with clear and convincing evidence of 'a specific cause of the cancer other than an occupational exposure to a carcinogen.'" *Id.* ¶ 38 (quoting A.R.S. § 23-901.09(E)).

The court of appeals also held that, even if the 2021 version of the statute were to be deemed substantive rather than procedural, that version would still apply to Vande Krol's claim

because the statutory changes "did not impact a right that vested before the 2021 statute's effective date." *Id.* at 505 ¶ 41. The court held that workers' compensation "payments vest once the Industrial Commission's Findings and Award become final." *Id.* ¶ 42 (alteration omitted) (quoting *Aranda*, 198 Ariz. at 473 ¶ 27). The court held that the Carrier's right to defend itself "had not vested vis-à-vis Vande Krol's claim because his formal hearing had not begun, let alone had any award of non-compensation become final, when the 2021 statute became effective." *Id.* The court held that, prior to the first hearing in this case, "any right to successfully defend against Vande Krol's claim was subject to several events and conditions which may not have happened, making any such right contingent." *Id.*

Because the ALJ had applied the 2017 version of the statute to Vande Krol's claim, the court of appeals set aside the ALJ's award. The court of appeals then remanded to allow the ALJ to determine whether the Carrier "presented clear and convincing evidence to rebut the presumption" under A.R.S. § 23-951(B). *Id.* ¶ 43. The Carrier petitioned this Court for review.

ISSUE:

As rephrased by this Court: "Whether the Court of Appeals erred in finding that amendments to A.R.S. § 23-901.01 applied retroactively to the claim for benefits in this case."

DEFINITION & STATUTES:

Black's Law Dictionary defines "Retroactivity" as: "The quality, state, or condition of having relation or reference to, or effect in, a prior time; specif., (of a statute, regulation, ruling, etc.) the quality of becoming effective at some time before the enactment, promulgation, imposition, or the like, and of having application to acts that occurred earlier."

The 2017 version of A.R.S. § 23-901.01 provided, in relevant part:

> B. Notwithstanding subsection A of this section and § 23-1043.01:
>
> 1. Any disease, infirmity or impairment of a firefighter's . . . health that is caused by brain . . . cancer . . . that results in disability or death is presumed to be an occupational disease as defined in § 23-901, paragraph 13, subdivision (c) and is deemed to arise out of employment.
>
> . . . .
>
> (C) The presumptions provided in subsection B of this section are granted if all of the following apply:
>
> 1. The firefighter or peace officer passed a physical examination before employment and the examination did not indicate evidence of cancer.
>
> 2. The firefighter or peace officer was assigned to hazardous duty for at least five years.
>
> 3. The firefighter or peace officer was exposed to a known carcinogen as defined by the international agency for research on cancer and informed the department of this exposure, and the carcinogen is reasonably related to the cancer.

A.R.S. § 23-901.01 (2017).

The 2021 version of A.R.S. § 23-909.09 provided, in relevant part:

> A. Notwithstanding § 23-901.01, subsection A and § 23-1043.01:
>
> 1. Any disease, infirmity or impairment of a firefighter's or fire investigator's health that is caused by brain . . . cancer . . . that results in disability or death is presumed to be an occupational disease as defined in § 23-901, paragraph 13, subdivision (c) and is deemed to arise out of employment.
>
> . . . .
>
> B. The presumptions provided in subsection A of this section are granted if all of the following apply:
>
> 1. The firefighter or fire investigator passed a physical examination before employment and the examination did not indicate evidence of cancer.
>
> 2. The firefighter or fire investigator was assigned to hazardous duty for at least five years.
>
> 3. For the presumption provided in subsection A, paragraph 2 of this section and for firefighters only, the firefighter received a physical examination that is reasonably aligned with the national fire protection association standard on comprehensive occupational medical program for fire departments (NFPA 1582).
>
> C. Subsection A of this section applies to both of the following:
>
> 1. Firefighters or fire investigators currently in service.
>
> 2. Former firefighters or fire investigators who are sixty-five years of age or younger and who are diagnosed with a cancer that is listed in subsection A of this section not more than fifteen years after the firefighter's or fire investigator's last date of employment as a firefighter or fire investigator.

A.R.S. § 23-909.09 (2021).