UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1724

September Term, 2014

MICHAEL A. GREENWELL

v.

MONTGOMERY COUNTY, MD

Wright,
Leahy,
Rodowsky, Lawrence F.
(Retired, Specially Assigned),

JJ.

Opinion by Wright, J.

Filed: June 18, 2015

This appeal arises from a claim before the Workers' Compensation Commission ("Commission"). Appellant, Michael Greenwell, was employed by appellee, Montgomery County, when he suffered a lower back injury on August 28, 2006. On August 10, 2011, Greenwell filed "Issues" with the Commission requesting "approval of surgery as recommended by Dr. Magee and temporary total disability from the date of the surgery and continuing." Following 13 continuances filed by Greenwell, the Commission heard the matter on February 19, 2014. Thereafter, the Commission found that Greenwell "was temporarily totally disabled from January 23, 2014 to present and continuing," and ordered appellee to pay compensation "at the rate of $403.00, payable weekly, beginning January 23, 2014 to present and continuing for as long as [Greenwell] remains temporarily totally disabled as a result of this claim."

On March 4, 2014, appellee filed a petition for judicial review in the Circuit Court for Montgomery County. On August, 2014, the parties filed cross-motions for summary judgment. Following a hearing on September 17, 2014, the circuit court granted appellee's motion, thereby reversing the Commission's award. In its written order entered on September 19, 2014, the court ruled that Greenwell's "claim for temporary total disability benefits is barred by § 9-736 of the Labor and Employment Article."

Greenwell timely appealed, asking us to determine:

> Whether the Circuit Court committed legal error by finding that Mr. Greenwell's claim was barred by limitations and holding that he did not have the requisite basis in fact when issues were filed for disability benefits, despite the fact that his doctor had referred him out for "consideration of surgery"?

For the reasons that follow, we vacate the circuit court's grant of summary judgment in appellee's favor and remand the case to that court for further proceedings not inconsistent with this opinion.

Facts

Greenwell injured his back within the scope of employment on August 28, 2006, and filed a claim with the Commission on October 27, 2006. It is undisputed that appellee issued full salary to Greenwell in lieu of temporary total disability payments from August 30, 2006, to October 19, 2006.

On November 14, 2006, Greenwell began seeing physicians at Magee and Michaels, P.A. Initially, Dr. Stephen Michaels prescribed Naprosyn and Vicodin, and performed epidural injections on Greenwell's back. In 2007, Dr. Michaels did not consider back surgery because he recommended that Greenwell first lose weight by undergoing a gastric bypass surgery.

On March 25, 2011, Dr. Magee noted that Greenwell complained of "persistent pain in his lower back with pain extending into both legs." As a result, Dr. Magee sent Greenwell for an MRI scan of the lumbosacral spine and recommended that he be evaluated by Dr. Alexandros Powers, a neurosurgeon, thereafter.

Dr. Powers examined Greenwell on June 2, 2011, at which time he noted that "even with further diagnostic evaluations it may be determined that the pain generator is not receptive to surgical interventions." Specifically, Dr. Powers stated that "even if a discrete pain generator is identified it would be of benefit to have further weight reduction prior to entertaining any sort of surgical intervention."

On August 5, 2011, Dr. Magee noted that Greenwell's MRI "show[ed] evidence of herniated discs." At that time, Dr. Magee recommended as follows:

> The patient will be referred to Dr. Quigl[e]y at Shady Grove Adventist Hospital for consideration of lumbar decompression with possible fusion. He may continue to work if he is able to do so. I will be happy to see him as needed in the future.

Five days later, Greenwell filed "Issues" with the Commission requesting "approval of surgery as recommended by Dr. Magee and temporary total disability from the date of the surgery and continuing."

On September 22, 2011, the Commission sent Greenwell a notice of hearing scheduled for October 28, 2011. On October 19, 2011, Greenwell requested a continuance, stating that he had "just received [appellee's] IME report and . . . need[ed] to obtain a rebuttal report." Greenwell also stated that he "needs further consultation with Dr. Powers regarding surgery." The Commission granted Greenwell's request on October 21, 2011.

On October 24, 2011, Dr. Zohair Alam, who had joined Dr. Magee's and Dr. Michaels's practice, informed Greenwell's counsel as follows:

> Mr. Greenwell has been under the care of Dr. Magee for an injury sustained on 08/26/06. Dr. Magee is no longer affiliated with our practice. I have reviewed the chart on his behalf. I do not have a note from Dr. Quigley delineating the proposed surgical procedure for Mr. Greenwell but based on reading the notes it appears that the proposed surgery recommended is a lumbar decompression and fusion. Per the chart, since there has been no history of improvement with other modalities of treatment, I do feel surgery is recommended at this time for his lower back and that the surgery is causely [sic] related to the work accident from 08/28/06. Please feel free to contact me if you have any further questions.

Subsequently, Greenwell chose to consult with Dr. Powers instead of Dr. Quigley.

On October 27, 2011, Dr. Powers acknowledged the "recommendation from Dr. Magee indicating that Mr. Greenwell should consider surgical consultation for lumbar decompression and possible fusion." Dr. Powers noted, however, that he would not "be able to comment on whether there is a need for more extensive surgical techniques such as instrumented fusion" until "[a]fter confirmation of the pain generator." By mid-November, 2011, Greenwell "was evaluated for venous thrombosis, which has required anti-coagulation." As a result, Dr. Powers recommended "[c]ompletion of anti-coagulation therapy" and "[i]f a discrete pain generator can be identified . . . and there is failure to show adequate response with conservative modalities, then surgical intervention might need to be considered."

On November 14, 2011, the Commission sent Greenwell a new notice of hearing scheduled for January 17, 2012. On December 27, 2011, Greenwell requested another continuance, stating that he "needs additional diagnostic tests . . . before treating physician will perform surgery . . . . Therefore case is not ready to go forward on the issue of approval of surgery." That request was granted on January 3, 2012.

On January 20, 2012, the Commission sent Greenwell a new notice of hearing scheduled for March 7, 2012. Greenwell requested a third continuance on February 8, 2012, citing the same reasons as his previous request. Greenwell added, however, that he "cannot withdraw issues due to the statute of limitations." The Commission granted Greenwell's request on February 13, 2012.

On February 28, 2012, the Commission sent Greenwell a new notice of hearing scheduled for April 18, 2012. On March 20, 2012, Greenwell filed a fourth request for

continuance, stating that he was "recently cleared to receive the diagnostic blocks which will determine what type of surgery is needed." Greenwell also stated that he needed "additional time to get blocks and follow up with Dr. Powers," and therefore, the case was "not ready to go forward on the issue of approval of surgery and [Greenwell] cannot withdraw issues due to the statute of limitations." The Commission granted Greenwell's request on April 3, 2012.

On April 27, 2012, the Commission sent Greenwell a new notice of hearing scheduled for June 18, 2012. On May 29, 2012, Greenwell requested a fifth continuance, citing the same reasons as the previous request and noting that counsel would be unavailable. That request was granted on May 31, 2012.

By mid-July, 2012, Dr. Powers could not "identify a discrete pain generator let alone discuss whether there is any role for surgical therapy." As a result, Dr. Powers sent Greenwell for "further testing consisting of electrodiagnostic studies." Dr. Powers also explained – and Greenwell understood – that "it is possible that the work-up will ultimately reveal that the condition is not neurosurgical."

On July 13, 2012, the Commission sent Greenwell a new notice of hearing scheduled for September 4, 2012. On August 15, 2012, Greenwell filed a sixth request for continuance, stating that he "needs additional time to undergo EMG test before Dr. Powers can determine what type of surgery is needed. Therefore, case is not ready to go forward on the issue of approval of surgery and [Greenwell] cannot withdraw issues due to the statute of limitations." The Commission granted that request on August 16, 2012.

On October 16, 2012, the Commission sent Greenwell a new notice of hearing scheduled for December 3, 2012. On November 6, 2012, Greenwell requested a seventh continuance, stating that he "has not been able to get approval to complete diagnostic testing needed before proceeding with surgery and the statute of limitations is running." On November 8, 2012, the Commission granted Greenwell's request.

Thereafter, the Commission sent another notice for a hearing set for February 12, 2013. On January 16, 2013, Greenwell filed an eighth request for continuance, citing the same reasons as his previous request. The Commission granted that request on January 18, 2013.

On February 11, 2013, the Commission sent Greenwell another notice for a hearing scheduled for April 1, 2013. On March 27, 2013, Greenwell requested his ninth continuance, citing the same reasons as his preceding two requests. On April 1, 2013, the Commission denied Greenwell's request, but nonetheless postponed the hearing.

On April 29, 2013, the Commission sent Greenwell a new notice of hearing scheduled for June 14, 2013. On May 20, 2013, Greenwell filed a tenth request for continuance, citing his justification or reason as follows:

> Issues are approval of surgery and payment of TTD [temporary total disability]. Claimant is unable to see Dr. Powers, treating physician until July 2013 for final appointment before surgery recommendation is made. Employer/Insurer also needs more time to get IME so case is not ready for hearing.[1] Statut[e] of limitation will run if case not continued.

[1] In its brief, appellee avers that "[t]here is no indication that Appellee requested a continuance of this hearing, and the request indicates that there was no response from Appellee when Appellant attempted contact about this request."

On May 22, 2013, the Commission granted Greenwell's request.

On May 29, 2013, the Commission sent Greenwell a new notice of hearing scheduled for July 17, 2013. On June 13, 2013, Greenwell requested an eleventh continuance, citing the same reasons as his previous request, with the exception of the assertion regarding appellee's need for more time. On July 5, 2013, the Commission granted Greenwell's request.

After evaluating Greenwell on July 19, 2013, Dr. Powers recommended selective nerve root injections instead of surgery. According to Dr. Powers, Greenwell did "wish to proceed with the [proposed] approach" and "understood that he will need to obtain clearance from the compensation carrier prior to obtaining the injection."

Ten days prior, on July 9, 2013, the Commission sent Greenwell a new notice of hearing scheduled for August 27, 2013. On August 14, 2013, Greenwell filed his twelfth request for continuance, stating that he was "still in need of diagnostic testing before surgery can be scheduled," counsel would be unavailable, and that the statute of limitations would run if the case was not continued. On August 16, 2013, the Commission denied that request. At the hearing on August 27, 2013, no one appeared on behalf of Greenwell, and on September 4, 2013, the Commission denied his claim for temporary total disability and request for medical treatment. The Commission also ordered that the case "be reset only on request."

September 11, 2013, Greenwell requested a rehearing, stating that his attorney was at a jury trial on August 27, 2013, and was unaware that the request for continuance had been denied. Greenwell added that the claim was not ready to proceed as of August 23,

2013, because Dr. Powers "recommended additional injections before he definitely recommends surgery is necessary." Greenwell further contended that if the motion for rehearing was not granted, the five-year statute of limitations would run.

On October 15, 2013, the Commission sent Greenwell a new notice of hearing scheduled for November 20, 2013. On November 8, 2013, Dr. Powers evaluated Greenwell and noted that "the selective injection toward the left L5 nerve root provided him with dramatic improvement." At that time, Dr. Powers sought to "obtain a new series of films," and he explained that "if the updated film confirms that there is compromise of the nerve root on the left-hand side, and the diagnostic significance of [Greenwell's] response to the selective injection, it is possible that surgical interventions should be considered and pursued in an effort to address his condition." Resultantly, on November 12, 2013, Greenwell filed his thirteenth request for continuance. On November 14, 2013, the Commission granted his request.

On December 13, 2013, the Commission sent Greenwell a new notice of hearing scheduled for February 19, 2014. On January 14, 2014, after reviewing Greenwell's updated MRI, Dr. Powers recommended that Greenwell "undergo a decompressive laminectomy at L4-L5 for relief of his symptoms, possibly a multilevel decompression." Greenwell underwent surgery on February 5, 2014.

The Commission finally heard the matter on February 19, 2014. The entire transcript of the proceeding, which consisted of only eight pages, reflects that neither party nor the Commissioner discussed any relevant statute or case law. Rather, the Commissioner expressed "shock[]" at the 13 continuances and, in announcing her ruling,

noted that "[t]here's a lot of different reasons, but there are some things here that probably could have been done better." On February 20, 2013, the Commission issued its order finding that Greenwell was "temporarily totally disabled from January 23, 2014 to present and continuing" and directing appellee to pay Greenwell "compensation for temporary total disability at the rate of $403.00, payable weekly, beginning January 23, 2014 to present and continuing for as long as [Greenwell] remains temporarily totally disabled as a result of this claim."

On March 4, 2014, appellee filed its petition for judicial review in circuit court. On August 8, 2014, and August 12, 2014, appellee and Greenwell, respectively, moved for summary judgment. After hearing the matter on September 17, 2014, the circuit court announced its ruling as follows:

> In this case, both parties have filed motions for summary judgment. Both parties agree that there are no disputes of material facts and both motions are supported by documents. The authenticity of which is not disputed even though there may be a dispute as to the weight to be given the report or the letter of Dr. Alam.
>
> Labor and Employment Article Section 9-736, provides that except as provided in Subsection C of this section, the commission may not modify an award unless the modification's applied for within 5 years of the latter of 1) the date of the accident, and 2) the date of disablement, or 3) the last compensation payment. In this case there is actually a dispute because the parties dispute the date of the last compensation payment. The employer contends it was October 19, 2006 and the claimant in their motion indicates it was either October 19, 2006 when he received his last payment from the employer, or on November 16, 2006 and I think that's what they're arguing today, when the County was reimbursed by the self-insurance fund. The Court interprets the statute as to refer to the last compensation payment received by the claimant. Not when the employer may have been reimbursed. Therefore, looking at *Buskirk v. C.J. Langenfeller & Son* (phonetic sp.), which held that in order to toll the statute of limitations set up 9-736 the claimant must file an issues form that identifies the issues to be resolved and

> the claimant also must have a basis in fact for filing these issues. I find that the documents submitted in support of the claimant's cross-motion for summary judgment and opposition to the employer's motion for summary judgment establishes that there was no basis in fact for filing the issues for disability, if you look at the statute of limitations running from October 19th, 2006 as opposed to November 16, 2006. This case is distinguishable from *Dove v. Montgomery County* because there the claimant has undergone treatment when she filed the issues. That is not the situation here when the claimant filed issues and sought approval of surgery as recommended by Dr. [Mag]ee and temporary total disability from the date of the surgery and continuing. The claimant did not allege that he was temporarily totally disabled, only that he wanted surgery which presumably would render him temporarily totally disabled sometime in the future. In this case, within the statute of limitations at most there was a recommendation from Dr. Magee that the claimant see Dr. Quigley for consideration of lumbar decompression with possible fusion. At that time, Dr. [Mag]ee was not recommending surgery, it was simply to see a specialist who may or may not have recommended surgery. The records demonstrate that the specialist who the claimant went to, Dr. Powers, did not recommend surgery within the 5-year statute of limitations and even considering Dr. Alam's recommendation, that was outside the 5-year period.
>
> It wasn't until years later that Dr. Powers actually recommended surgery and the claimant actually had surgery. However, at the time that the issues was [sic] filed there was no basis in fact to claim temporary total disability benefits when he filed the issues. And the many continuances that the claimant obtained did not excuse the reality that there was no basis in fact for temporary total disability benefits when the issues were filed. Therefore, the claim is barred by the statute of limitation. Petitioner's motion for summary judgment is granted. The cross-motion for summary judgment is denied. Thank you.

Standard of Review

Md. Code (1991, 2008 Repl. Vol.), § 9-745 of the Labor & Employment Article ("LE") governs appeals of decisions by the Commission. *Johnson v. Mayor & City Council of Baltimore*, 430 Md. 368, 376 (2013). Pursuant to that statute, "Commission decisions are presumed to be *prima facie* correct." *Marshall v. Univ. Of Maryland Med. Sys. Corp.*, 161 Md. App. 379, 382 (2005) (citing LE § 9-745(b)(1)). In other words, "if the claimant

was the prevailing party before the Commission, and the employer has requested a jury trial *de novo*, the presumption of correctness of the Commission's ruling precludes the circuit court from ruling as a matter of law, upon a motion for summary judgment, that the claimant's evidence of a *prima facie* case will be insufficient." *Kelly v. Baltimore Cnty.*, 161 Md. App. 128, 154 (2005), *aff'd*, 391 Md. 64 (2006). Moreover:

> [T]he party that prevailed before the Commission will be, at the circuit court level, the non-moving party, with no burden of either production or persuasion. That party need do nothing and need produce nothing. That party can ultimately prevail simply by relying on the failure of the opposing party to produce or to persuade. That prevailing party, by definition, cannot have failed to satisfy a burden of production because that party had no burden of production.

Bd. of Educ. for Montgomery Cnty. v. Spradlin, 161 Md. App. 155, 198 (2005). This presumption, however, does not extend to questions of law. *Johnson*, 430 Md. at 376 (citation omitted). Rather, the circuit court "must still consider whether the Commission . . . misconstrued the law and facts applicable in the case decided." *Marshall*, 161 Md. App. at 382 (citing LE § 9-745(c)).

"Summary judgment is appropriate in a worker compensation appeal to avoid an unnecessary trial if the requirements of Md. Rule 2-501(e) are met." *Id.* at 382 (citing *Dawson's Charter Serv. v. Chin*, 68 Md. App. 433, 440 (1986)) (footnote omitted). "Under Maryland Rule 2-501(a), 'any party may file at any time a motion for summary judgment on all or part of an action on the ground that there is no genuine dispute as to any material fact and that the party is entitled to judgment as a matter of law.'" *Wal Mart Stores, Inc. v. Holmes*, 416 Md. 346, 357 (2010) (quoting *Baltimore v. Kelly*, 391 Md. 64, 73 (2006)). The Court of Appeals has stated:

> "[T]he purpose of the summary judgment procedure is not to try the case or to decide the factual disputes, but to decide whether there is an issue of fact, which is sufficiently material to be tried," *Jones v. Mid-Atlantic Funding Co.*, 362 Md. 661, 675, 766 A.2d 617, 624 (2001); *Frederick Road Ltd. Partnership v. Brown & Sturm*, 360 Md. 76, 93, 756 A.2d 963, 972 (2000), and, therefore, it is not a substitute for trial. *Goodwich v. Sinai Hosp. of Baltimore, Inc.*, 343 Md. 185, 205, 680 A.2d 1067, 1077 (1996). Thus, Rule 2-501(e) provides that a trial judge may grant summary judgment "if the motion and response show that there is no genuine dispute as to any material fact and that party in whose favor judgment is entered is entitled to judgment as a matter of law." A material fact is "'a fact the resolution of which will somehow affect the outcome of the case.'" *Jones [ ]*, 362 Md. at 675, 766 A.2d at 624 (quoting *King v. Bankerd*, 303 Md. 98, 111, 492 A.2d 608, 614 (1985)). In making that determination, the evidence, and all inferences therefrom, are viewed in the light most favorable to the nonmoving party. *Natural Design, Inc. v. Rouse Co.*, 302 Md. 47, 62, 485 A.2d 663, 671 (1984). Evidentiary matters, credibility issues, and material facts which are in dispute cannot properly be disposed of by summary judgment. *See Pittman v. Atlantic Realty Co.*, 359 Md. 513, 536, 754 A.2d 1030, 1042 (2000) (recognizing that "Maryland law . . . has not viewed the function of summary judgment to be determining whether an issue is genuine based on credibility.").

Taylor v. NationsBank, N.A., 365 Md. 166, 173-74 (2001).

"When both sides file cross-motions for summary judgment . . . the judge must assess each party's motion on its merits, drawing all reasonable factual inferences against the moving party, but it does not follow that the circuit court must grant one of the motions, for the filing of cross-motions for summary judgment is not dispositive of the absence of a genuine dispute of material fact." *Rupli v. S. Mountain Heritage Soc., Inc.*, 202 Md. App. 673, 683 (2011) (internal citations and quotation marks omitted).

"In turn, our standard of review is governed by LE section 9-750, which states that '[a] party may appeal from a decision of the circuit court to the Court of Special Appeals as provided for other civil cases.'" *Marshall*, 161 Md. App. at 382-83. "When reviewing

a grant of summary judgment, we must make the threshold determination as to whether a genuine dispute of material fact exists, and only where such dispute is absent will we proceed to review determinations of law." *Johnson*, 430 Md. at 376 (citation and internal quotation marks omitted). "We do 'not attempt to decide any issue of fact or credibility, but only whether such issues exist.'" *Rupli*, 202 Md. App. at 682 (quoting *Eng'g Mgmt. Servs. v. Md. State Highway Admin.*, 375 Md. 211, 226 (2003)). Ultimately, "we must determine whether the circuit court's ruling was legally correct." *Marshall*, 161 Md. App. at 383 (citation omitted); *accord Wal Mart Stores, Inc.*, 416 Md. at 358. *See also Johnson*, 430 Md. at 376 ("The standard of review of a trial court's grant of a motion for summary judgment on the law is *de novo*, that is, whether the trial court's legal conclusions were legally correct.") (Citations and internal quotation marks omitted).

Discussion

Greenwell argues that "the circuit court erred in holding that [he] did not have a sufficient basis in fact when he filed issues for disability benefits within the five year statute of limitations." First, Greenwell contends that "the statute of limitations [did] not start until November 16, 2006," when appellee was last reimbursed by the self-insurance fund for its payment to Greenwell. Second, citing *Buskirk v. C.J. Langenfelder & Son, Inc.*, 136 Md. App. 261 (2001), and *Dove v. Montgomery Cnty. Bd. Of Educ.*, 178 Md. App. 702 (2008), Greenwell avers that even if the statute of limitations was triggered as early as October 19, 2006, he "had a basis in fact at the time issues were filed to seek disability benefits." Thus, he urges us to reverse the circuit court's judgment and reinstate the Commission's order.

In response, appellee contends that the circuit court did not err when it found that Greenwell's claim was barred by the statute of limitations. First, appellee argues that the clock began to run on October 19, 2006, when Greenwell received the "last compensation payment," pursuant to LE § 9-736(b)(3). In addition, appellee argues that, contrary to Greenwell's assertions, this Court's rulings in both *Buskirk* and *Dove* support the circuit court's finding that Greenwell did not have a basis in fact to seek disability benefits at the time he filed issues in August, 2010.

Under LE § 9-736(b), "the Commission has continuing powers and jurisdiction over each claim" and "may modify any finding or order as the Commission considers justified." LE § 9-736(b)(1) & (2). Generally, however:

> the Commission may not modify an award unless the modification is applied for within 5 years after the latter of:
>
> (i) the date of the accident;
>
> (ii) the date of disablement; or
>
> (iii) *the last compensation payment*.

LE § 9-736(b)(3) (emphasis added). Previously, the Court of Appeals has held that "the term 'last compensation payment' is based on the date when the last payment by check was received by the claimant, either directly or by the claimant's attorney or the claimant's authorized agent." *Stachowski v. Sysco Food Servs. of Baltimore, Inc.*, 402 Md. 506, 510 (2007). In so ruling, the *Stachowski* Court noted that "'[t]he general rule of liberal construction of the Workers' Compensation Act is not applicable to the limitations

provision of § 9-736.'" *Id.* at 513 (alteration in original) (quoting *Stevens v. Rite-Aid Corp.*, 340 Md. 555, 568 (1995)).

In this case, Greenwell contends that the statute of limitations did not start until November 16, 2006, when appellee was reimbursed from the self-insurance fund for its last payment to Greenwell. According to Greenwell, appellee "was in essence his authorized agent for receipt of the disability benefits since [it] was simply getting reimbursed from the self-insurance fund as [] Greenwell had already been paid his disability leave." This argument has no merit.

"[C]ourts applying Maryland agency law have considered three characteristics as having particular relevance to the determination of the existence of a principal-agent relationship: (1) the agent's power to alter the legal relations of the principal; (2) the agent's duty to act primarily for the benefit of the principal; and (3) the principal's right to control the agent." *Green v. H & R Block, Inc.*, 355 Md. 488, 503 (1999) (citations omitted). There is nothing in the record to indicate that appellee had power to alter Greenwell's legal relations or had a duty to act primarily for Greenwell's benefit. Moreover, it is clear that Greenwell had no right to, nor did he exercise, control over appellee. Therefore, at no point did appellee serve as Greenwell's agent.

Notwithstanding our conclusion regarding the issue of agency, we agree with appellee that *Stachowski* and LE § 9-736(b)(3) consider the "last compensation payment" as "the last payment check to the claimant or someone accepting the check on behalf of the claimant, [and] not the County receiving a reimbursement from another source for expenses already received by the claimant." As stated in LE § 9-610(a)(1), where a governmental

entity "provides a benefit to a 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[.]" Thus, the reimbursement provided by the self-insurer is not relevant and has no effect on "the last compensation payment . . . received by [Greenwell] or his . . . lawful representative." *Stachowski*, 402 Md. at 531.

Having established that the statute of limitations began to run on October 19, 2006, we turn to determine whether the circuit court correctly ruled that Greenwell had "no basis in fact to claim temporary total disability benefits when he filed the issues."

In *Buskirk*, 136 Md. App. at 263-64, this Court held that "when a petition to reopen to modify an award is based on a change in disability status, the petition must be filed within the five-year period and allege a change in disability status, with a basis in fact, as opposed to merely alleging continuing medical treatment." In that case, "the date of the last disability benefit payment was July 31, 1992, and . . . on May 13, 1993, [Buskirk] filed a 'Petition to Reopen for Worsening of Condition,' which was never withdrawn." *Id.* at 266. "On September 15, 1997, [Buskirk] filed '[I]ssues' with the Commission," raising "medical care and treatment and temporary total disability from July 21, 1997." *Id.* at 267. "The Commission held that the 'Request for Reopening' filed on September 15, 1997, was not timely and the 'petition to reopen' filed on May 13, 1993, did not . . . satisfy the timing requirements." *Id.* That decision was subsequently affirmed by the circuit court as well as this Court. *Id.* at 267, 272. With regard to Buskirk's timely 1993 petition, we explained:

> [Buskirk]'s May 13, 1993, petition was filed to seek medical benefits, which were paid. The petition did not allege or request a change in disability status. [Buskirk]'s reasoning is contrary to the General Assembly's intent in enacting section 9-736 and would allow all recipients of workers compensation to file a protective petition for modification and avoid the statute of limitations in the event a change in disability status occurred at a future date. *See McMahan v. Dorchester Fertilizer Co.*, 184 Md. 155, 160, 40 A.2d 313 (1944) ("Accordingly, the Courts should refuse to give statutes of limitations a strained construction to evade their effect.").

Id. at 272.

Seven years after deciding *Buskirk*, we elaborated upon our ruling by reading "the phrase 'basis in fact' to mean that the *claimant must have a reasonable basis for the claim at the time of filing*." *Dove*, 178 Md. App. at 719 (emphasis added) (footnote omitted). We explained:

> The phrase does not mean that a claimant must file, with a request to modify an award, all necessary medical documentation supporting such request, or even sufficient medical documentation to establish a *prima facie* case for a change in the claimant's disability status . . . .
>
> In the case *sub judice*, Dove filed a request to modify a compensation award within the five-year statute of limitations and alleged therein a change in her disability status by requesting additional temporary total disability benefits. Dove was aware, at the time of her [June 3, 2005] filing, of steroid injections that she had received on two separate dates, but she did not have the documentation of those medical procedures at that time. In accordance with *Buskirk*, we conclude that Dove had a factual basis for her change in disability status at the time of her filing a request for modification of the May 31, 2000 award. Indeed, not only did Dove have a factual basis, she proved her claim at the hearing, because the Commission found that she was temporarily totally disabled on the two days of her steroid injections-August 29, 2002, and September 17, 2002.

Id. at 719-20 (footnotes omitted).[2]

In this case, although it is undisputed that Greenwell filed his "Issues" within the five-year period, there is a genuine dispute of material fact as to whether he "allege[d] a change in disability status, *with a basis in fact*, as opposed to merely alleging continuing medical treatment." *Buskirk*, 136 Md. App. at 263-64 (emphasis added). Greenwell points to Dr. Magee's recommendation on August 5, 2011, to argue that "he had a clear recommendation of surgery" at that time. However, on that day, Dr. Magee "referred" Greenwell to a neurosurgeon "for *consideration* of lumbar decompression with possible fusion." (Emphasis added). While Dr. Alam – who only reviewed Greenwell's chart and did not evaluate Greenwell himself – interpreted this to mean that "surgery [wa]s recommended at th[at] time for his lower back," Dr. Powers – the neurosurgeon whom Greenwell chose to consult – expressed that he would not "be able to comment on whether there is a need for more extensive surgical techniques" until further testing and evaluation, despite the "recommendation from Dr. Magee."[3]

We agree with Greenwell that, based upon the record, "Dr. Magee's wording . . . has two possible meanings: 1) Mr. Greenwell needed to see a surgeon to get surgery; [or] 2) Mr. Greenwell needed to see a surgeon to determine if he needed surgery or not." Because the resolution of this question would affect the application of the law and the

[2] Greenwell had not received surgery at the time he filed his claim, as the circuit court noted in its decision. That said, we do not read *Dove* to "requir[e] a claimant to have undergone treatment prior to filing issues," as Greenwell implies that the circuit court did.

[3] Dr. Powers did not actually recommend surgery until January 14, 2014.

outcome of the case, then it is a material fact to be presented to the trier of fact. Moreover, the circuit court was precluded from ruling upon this issue upon appellee's motion for summary judgment. *See Spradlin*, 161 Md. App. at 197 ("A logically ineluctable consequence of the reallocation of the burden of production is that the party which prevailed before the Commission and is, therefore, the non-moving party before the circuit court cannot suffer a summary judgment . . . against it on the ground that it failed to produce a *prima facie* case."). And, as there existed a genuine dispute of material fact at the time that the parties filed cross-motions for summary judgment, we vacate the circuit court's grant of summary judgment in appellee's favor and remand the case so that the court may allow the action to proceed to trial.[4]

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY VACATED. CASE REMANDED FOR PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY MONTGOMERY COUNTY.

[4] It is worth noting that, in his claim, Greenwell was unable to specify the period of time for which temporary total disability was being requested, as required by COMAR 14.09.01.14 at that time. In pertinent part, that section, which was repealed on August 4, 2014, stated:

> A. Request for Hearing.
>
> (1) A party desiring a hearing shall file a Request for Hearing with the Commission. In the request, the party shall state with clarity and in detail the facts or matters of law to be determined, including but not limited to the following issues:
>
> (a) The inclusive dates of any temporary total disability[.]

As we stated in *McLaughlin v. Gill Simpson Elec.*, 206 Md. App. 242, 258-59 (2012), "a request for modification of a previous award by the Commission pursuant to Title 9 must comply with . . . applicable [COMAR] regulation[s]."