

Circuit Court for Montgomery County
Case No. 419262V

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2161

September Term, 2018

MONTGOMERY COUNTY, MARYLAND

v.

JOHN D. GILKEY

Beachley,
Wells,
Adkins, Sally D.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Beachley, J.

Filed: January 9, 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.

In November 2009, the Workers' Compensation Commission (the "Commission") awarded appellee John Gilkey workers' compensation benefits from his employer, appellant Montgomery County, Maryland. On December 14, 2015, Gilkey moved to modify the 2009 award and, after a hearing, the Commission ruled that the request was not barred by the applicable five-year statute of limitations and ordered Montgomery County to pay post-surgery temporary total disability benefits, and increased Gilkey's permanent partial disability. The Circuit Court for Montgomery County affirmed the decision.

Montgomery County presents the following question on appeal:

Did the trial court err in finding that [Gilkey's] workers' compensation claim for additional benefits was not barred by the statute of limitations?

We conclude that Gilkey's claim for increased permanent partial disability was barred by limitations, but that the Commission properly awarded post-surgery temporary total disability benefits pursuant to its continuing jurisdiction over Gilkey's compensation claim.

FACTUAL AND PROCEDURAL BACKGROUND

Gilkey is employed as a firefighter by Montgomery County, Maryland. While training his search dog, he injured his left knee. On October 30, 2009, the Commission awarded Gilkey temporary total disability and permanent partial disability benefits. He received the last payment on that award on November 11, 2009.

On February 7, 2014, Gilkey filed a request for modification of the October 30, 2009 award. In his request for modification, he sought an increase in permanent disability and requested authorization for surgery and temporary total disability benefits following

surgery. On May 5, 2014, the Commission issued an order authorizing Gilkey to have surgery and awarded Gilkey temporary total disability benefits beginning on the date of that future surgery. The Commission also awarded temporary partial disability benefits from a prior period—July 6, 2008, to September 8, 2008—“at fifty per centum of the difference between the claimant’s average weekly wage and his wage earning capacity in the same employment or otherwise if less than before the accident[.]” Based on that calculation, Montgomery County determined that it owed no money to Gilkey for temporary partial disability; consequently, Montgomery County made no payment to him as a result of that award.

Gilkey filed another request for modification on October 27, 2014. He again sought an increase in permanent disability and challenged Montgomery County’s determination that it owed Gilkey nothing pursuant to the temporary partial disability award contained in the May 5, 2014 order. In the Commission’s order dated May 8, 2015, resolving Gilkey’s October 27, 2014 modification request, the Commission ordered that “the issue for worsening of the left knee be withdrawn” and found that the issue regarding the disability payments was “raised but not litigated.”

On June 15, 2015, slightly more than a year after the Commission had authorized surgery, Gilkey had surgery on his left knee. He filed a request for modification on December 14, 2015, seeking an increase in permanent disability. He also challenged Montgomery County’s “failure to comply” with the May 5, 2014 order. On March 11, 2016, the Commission held a hearing on Gilkey’s December 14, 2015 request for modification. At that hearing, Gilkey expressly abandoned his claim that Montgomery

County failed to comply with the May 5, 2014 order. Instead, Gilkey presented evidence to support his permanent disability claim based on worsening of condition and requested temporary total disability benefits for the post-surgery period—June 15, 2015, through August 24, 2015. In the Commission’s order dated March 15, 2016, it found that “the claim for permanent partial disability benefits and temporary total disability benefits awarded on 5/5/14, is not barred by limitations.” Accordingly, the Commission granted an increase in Gilkey’s permanent partial disability and awarded him temporary total benefits “beginning 6/15/15 – 8/24/15 inclusive.”

Montgomery County appealed “on the record” to the Circuit Court for Montgomery County, alleging that Gilkey’s December 14, 2015 filing was outside the five-year limitations period prescribed by Maryland Code (1957, 2016 Repl. Vol.), § 9-736(b)(3) of the Labor and Employment Article (“LE”). On July 12, 2018, the circuit court affirmed the Commission’s order, and Montgomery County timely appealed.

STANDARD OF REVIEW

We recently stated the appropriate standard of review for “on the record” appeals from the Commission:

When reviewing workers’ compensation awards in cases where the claimant sought review on the record (rather than a de novo review involving a new evidentiary hearing), we look through the decision of the circuit court and evaluate the Commission’s decision directly. *W.R. Grace & Co. v. Swedo*, 439 Md. 441, 452–53 (2014). Our task is “to determine whether the Commission: (1) justly considered all of the facts about the . . . occupational disease . . . ; (2) exceeded the powers granted to it under [the Act]; or (3) misconstrued the law and facts applicable in the case decided.” LE § 9-745(c). “The court must confirm the decision unless it determines that the Commission exceeded its authority or misconstrued the law or facts.”

Richard Beavers Constr., Inc. v. Wagstaff, 236 Md. App. 1, 13 (2018) (citing *Uninsured Empl'rs' Fund v. Pennel*, 133 Md. App. 279, 288–89 (2000)).

Montgomery Cty. v. Cochran, 243 Md. App. 102, 112 (2019) (alterations in original).

A determination that a claim is barred by the statute of limitations “is ordinarily a mixed question of law and fact.” *Dove v. Montgomery Cty. Bd. of Educ.*, 178 Md. App. 702, 712 (2008) (quoting *James v. Weisheit*, 279 Md. 41, 46 (1977)). Because the relevant facts here are not in dispute, the limitations issue is purely a question of law. “In an appeal of a workers’ compensation case, when the issue presented is an issue of law, ‘we review the decision *de novo*, without deference to the decisions of either the Commission or the circuit court.’” *Zakwieia v. Balt. Cty. Bd. of Educ.*, 231 Md. App. 644, 648 (2017) (quoting *Long v. Injured Workers’ Ins. Fund*, 225 Md. App. 48, 57 (2015)), *cert. denied*, 454 Md. 676 (2017).

DISCUSSION

The Maryland Workers’ Compensation Act (the “Act”) was enacted in 1914 with the purpose of “protect[ing] workers and their families from hardships inflicted by work-related injuries by providing workers with compensation for loss of earning capacity resulting from accidental injury arising out of and in the course of employment.” *Gang v. Montgomery Cty.*, 464 Md. 270, 278 (2019) (quoting *Roberts v. Montgomery Cty.*, 436 Md. 591, 603 (2014)). The Act created the Workers’ Compensation Commission to administer the law. *Id.* at 279 (quoting *Egeberg v. Md. Steel Products Co.*, 190 Md. 374, 379 (1948)); LE § 9-301. The General Assembly provided the Commission “‘with the power to carry out the intent of the Act[,]’ such that its ‘jurisdiction includes the authority to approve

claims, reopen cases, make determinations on employment relationships, determine liability of employers, award lump sum payments, approve settlements, award fees for legal services, funeral expenses, and medical services.” *Gang*, 464 Md. at 279 (alteration in original) (quoting *Temporary Staffing, Inc. v. J.J. Haines & Co., Inc.*, 362 Md. 388, 400 (2001)); LE § 9-309, 9-701.

As always when analyzing a statute, we determine the intent of the legislature by first looking to the plain meaning of the words of the statute. *McLaughlin v. Gill Simpson Elec.*, 206 Md. App. 242, 253–54 (2012). When there is ambiguity, the Workers’ Compensation Act “should be construed as liberally in favor of injured employees as its provisions will permit in order to effectuate its benevolent purposes. Any uncertainty in the law should be resolved in favor of the claimant.” *Gang*, 464 Md. at 279 (quoting *Stachowski v. Sysco Food Servs. of Balt., Inc.*, 402 Md. 506, 513 (2007)). However, the statute of limitations provision is to be strictly construed. *McLaughlin*, 206 Md. App. at 254.

The controlling statute in this case is LE § 9-736(b)(3), which establishes the limitations period for seeking modification of a workers’ compensation award:

(3) Except as provided in subsection (c) of this section, 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.**

(Emphasis added).

In this case, the parties do not dispute that the last compensation payment was made on November 11, 2009. Accordingly, unless the statute of limitations was tolled or extended by events after November 11, 2009, limitations would expire on November 11, 2014. We therefore shall examine each of Gilkey's post-2009 filings and corresponding compensation orders to inform our limitations analysis.

The February 2014 Claim and the May 5, 2014 Order

Gilkey's February 7, 2014 claim was heard by the Commission on May 5, 2014. Because Gilkey filed this claim within five years from the last payment of November 11, 2009, it was undoubtedly timely.

That filing resulted in the May 5, 2014 order authorizing surgery and awarding temporary total disability benefits in the future for the period of recovery after surgery. We initially note that surgery itself has no effect on the statute of limitations. *Holy Cross Hospital of Silver Spring, Inc. v. Nichols*, 290 Md. 149, 163 (1981). On the other hand, the payment of temporary total disability benefits related to surgery would extend the limitations period for another five years to the extent that any such payments were made and received by the claimant. LE § 9-736(b)(3); *Stachowski*, 402 Md. at 531 (holding that the date of the last compensation payment is when the payment is received); *Vest v. Giant Food Stores, Inc.*, 329 Md. 461, 476 (1993) (“[T]he term ‘compensation’ by definition encompasses payments for both temporary and permanent disability.”). However, because Gilkey did not have surgery until June 15, 2015, no disability payments were made as a result of the May 5, 2014 order. The May 5, 2014 order also awarded temporary partial disability payments for a two-month period many years earlier in 2008, but no payments

were made as a result of this award because Gilkey apparently received his full salary during that period.¹ Importantly, because no payments were made as a result of the May 5, 2014 order, limitations was not extended pursuant to LE § 9-736(b).

We note that the February 7, 2014 filing also alleged an increase in permanent disability. However, this claim was not raised during the hearing and the May 5, 2014 order made no findings as to permanent disability. In response to the Commissioner's inquiry concerning the issues to be heard, Gilkey's attorney identified only the authorization for surgery and temporary total disability benefits after the surgery. Whether Gilkey withdrew his permanent disability claim or simply did not pursue it is irrelevant to our analysis. For limitations purposes, the important aspect of the May 5, 2014 order is that no payments were made pursuant to that order.

The October 2014 Claim and the May 8, 2015 Order

On October 27, 2014, Gilkey filed a request for modification in which he raised the following issues: an increase in permanent disability due to "worsening of condition to the left-knee"; "[p]ast temporary total and temporary partial disability"; and "[a]dditional temporary total and temporary partial disability." We note that this claim was also timely as it was filed within five years of the last payment on November 11, 2009.

Gilkey's October 27, 2014 claim was heard by the Commission on May 1, 2015. After the hearing, the Commission issued an order on May 8, 2015, which we reprint in its

¹ Gilkey made no claim either below or on appeal that the award of 2008 benefits as provided in the May 5, 2014 order re-started limitations. Accordingly, we shall not address that potential issue. Rule 8-131(a).

entirety:

Hearing was held in the above claim at Beltsville, Maryland on May 1, 2015; and as a result thereof, it is this 8th day of May, 2015, by the Worker's Compensation Commission ORDERED that the issue for worsening of the left knee be withdrawn. The Commission finds that the issue of temporary total disability and temporary partial disability payments was raised but not litigated.²

Again, the importance of the May 8, 2015 order for our limitations analysis is that it did not require the employer to make any compensation payments, and therefore no payments were made. Thus, the May 8, 2015 order had no effect on limitations.

The December 2015 Claim and the March 15, 2016 Order

This brings us to Gilkey's December 14, 2015 filing and the Commission's March 15, 2016 order which is the subject of this appeal. In his December 14, 2015 request for modification, Gilkey alleged a "worsening of condition to the left knee," i.e., an increase in permanent partial disability.³ At the March 11, 2016 hearing before the Commission, Montgomery County asserted that Gilkey's claim was barred by limitations. As it did below, Montgomery County argues on appeal that, because the last compensation payment on Gilkey's claim was made on November 11, 2009, the statute of limitations expired on

² Gilkey directs us to a letter to the Commission dated May 7, 2015, which indicated that issues were withdrawn because Montgomery County had advised that "additional temporary partial disability payments had been made" pursuant to the May 5, 2014 order. Gilkey apparently took no further action to alter or amend the May 8, 2015 order.

³ In his request for modification, Gilkey also raised "failure to comply with Order of 5/05/14." This issue presumably related to the temporary total disability benefits awarded by the May 5, 2014 order for the period from July 6, 2008, to September 8, 2008. Gilkey expressly abandoned that claim at the March 11, 2016 hearing.

November 11, 2014, more than a year before Gilkey filed his December 14, 2015 claim. Gilkey counters that, because the May 5, 2014 order authorized surgery and awarded him temporary partial disability commencing with the date of the future surgery, he had “a clear case of change in disability status.” In Gilkey’s view, a “change in disability status” constitutes an event that re-starts the five-year period of limitations prescribed in LE § 9-736(b). Thus, Gilkey asserts that his December 14, 2015 claim was timely because it was filed within five years of the May 5, 2014 order.

We agree with Montgomery County that Gilkey’s permanent partial disability claim is barred by limitations. The parties do not dispute that the last compensation payment in this case was made on November 11, 2009. At oral argument, the parties conceded that the only intervening events during the five-year period after November 11, 2009, were the May 5, 2014 and May 8, 2015 orders. As we have previously explained, Montgomery County made no disability compensation payments pursuant to either the May 5, 2014 order or the May 8, 2015 order. Accordingly, for limitations purposes, the date of the “last compensation payment” as set forth in LE § 9-736(b)(3) remained November 11, 2009. As such, Gilkey’s December 14, 2015 claim for worsening of condition—filed more than six years after the last compensation payment of November 11, 2009—was barred by limitations. In so holding, we expressly reject Gilkey’s contention that a “change in disability status” is sufficient to re-start limitations. As noted, LE § 9-736(b)(3) provides that a modification must be applied for within five years of the latter of three specific events: 1) the date of accident, 2) the date of disablement, or 3) the last compensation payment. Were we to accept Gilkey’s argument, “change of disability status” would be a

fourth event from which to calculate limitations. We decline Gilkey’s invitation to add language to a statute that is clear and unambiguous (and which would presumably be contrary to the General Assembly’s intent).⁴ See *Stachowski*, 402 Md. at 516 (“[A] court may neither add nor delete language so as to reflect an intent not evidenced by the plain and unambiguous language of the statute.” (quoting *Kushell v. DNR*, 385 Md. 563, 576–77 (2005))).

Although we conclude that Gilkey’s permanent disability claim for worsening was barred by limitations, we view his claim for post-surgery temporary total disability benefits differently. The May 5, 2014 order not only authorized Gilkey’s surgery, but also determined that he would be entitled to temporary total disability benefits commencing with the date of surgery. Montgomery County did not appeal that determination. We conclude that the Commission retained continuing jurisdiction pursuant to LE § 9-736(b)(1) to grant a specific term of temporary total disability benefits as expressly contemplated by its May 5, 2014 order. LE § 9-736(b)(1) (“The Commission has continuing powers and jurisdiction over each claim under this title.”). In *Potomac Abatement, Inc. v. Sanchez*, 424 Md. 701 (2012), the Court of Appeals interpreted LE § 9-736(b) broadly, holding that “the Commission retains jurisdiction pending an appeal over

⁴ In their briefs, both parties seem to assert that a change in disability status that occurs within limitations is sufficient to re-start limitations. However, *Buskirk v. C.J. Langenfelder & Son, Inc.* clearly holds 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[.]” 136 Md. App. 261, 263 (2001) (emphasis added).

issues on which no evidence was taken or decision made at the previously appealed hearings.” *Id.* at 727. Implicit in the *Sanchez* holding is that the Commission maintains continuing jurisdiction over issues “reserved for later consideration.” *Id.* at 717. In this case, the Commission had already determined that Gilkey would be entitled to post-surgery temporary total disability benefits and implicitly “reserved for later consideration” the discrete post-surgery temporary total disability benefits to which Gilkey was entitled. We perceive no error in the Commission’s determination at the March 11, 2016 hearing that Gilkey was entitled to temporary total disability benefits from June 15, 2015 (date of surgery) to August 24, 2015. In our view, establishing the specific dates of temporary total disability fell within the Commission’s continuing jurisdiction over the May 5, 2014 order pursuant to LE § 9-736(b)(1).

We therefore hold that, as to the Commission’s March 15, 2016 order, the circuit court erred in affirming the award of increased permanent partial disability, but did not err in affirming the award of temporary total disability benefits from June 15, 2015, to August 24, 2015, inclusive.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AS TO THE COMMISSION’S AWARD OF PERMANENT PARTIAL DISABILITY BENEFITS IS REVERSED; JUDGMENT AS TO THE COMMISSION’S AWARD OF TEMPORARY TOTAL DISABILITY BENEFITS FROM JUNE 15, 2015, TO AUGUST 24, 2015, IS AFFIRMED. COSTS TO BE DIVIDED EQUALLY BY THE PARTIES.