

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 384

SEPTEMBER TERM, 2015

JAMES GAINES

v.

MONTGOMERY COUNTY, MARYLAND

Eyler, Deborah S.,
Meredith,
Kehoe,

JJ.

Opinion by Eyler, Deborah S., J.

Filed: March 3, 2016

*This is an unreported opinion and therefore may not be cited either as precedent or as persuasive authority in any paper, brief, motion, or other document filed in this Court or any other Maryland court. Md. Rule 1-104.

James Gaines, the appellant, challenges a decision of the Circuit Court for Montgomery County granting summary judgment in favor of Montgomery County (“the County”), the appellee, and reversing a decision of the Workers’ Compensation Commission (“the Commission”). He presents four questions for review, which we have combined and rephrased:

- I. Did the circuit court err by reversing the decision of the Commission and ruling that Gaines’s application to reopen his case was untimely under Md. Code (1991, 2008 Repl. Vol.), section 9-736 of the Labor and Employment Article (“LE”)?
- II. Was the County’s motion for summary judgment rendered moot when Gaines was paid compensation in April 2014, restarting the limitations period?¹

¹ The questions as posed by Gaines are:

- I. Where the Workers’ Compensation Commission, After a Full Evidentiary Hearing, Made A finding of Fact That Mr. Gaines Had Timely Applied For Worsening, And Had Provided A Good Faith Basis For His Change In Disability Status, Within the Five Year Allowable Period, Was It Error For The Circuit Court To Reverse, As A Matter of Law, The Factual Determination Of The Commission, Especially Where The Court of Appeals Has Explicitly Held In *Kelly v. Baltimore Co.*, That Summary Judgment Against A Claimant Who Prevailed Before The Commission Is Improper?
- II. Where Mr. Gaines Filed His Application For Modification Within The Five Year Period Allowed By § 9-736, And Supported The Application With A Good Faith Basis In Fact Of His Change In Disability Status (e.g. Contemporaneous Medical Records), Was It Error For The Circuit Court To Reverse The Workers’ Compensation Commission’s Decision That His Application Was Timely Filed?
- III. Where The Decision Of The Workers’ Compensation Commission Was Based On Its Interpretation And Application Of Its Own Statute – The Maryland Workers’ Compensation Act – Was It Error For The Circuit Court To Refuse To Give Deference To The Commission’s Findings As Required By *Balto. Gas & Elec. v. Public Serv. Comm?*

(Continued...)

For the following reasons we shall affirm the judgment of the circuit court.

FACTS AND PROCEEDINGS

The facts giving rise to the instant appeal are undisputed. Gaines has been employed by the County as a firefighter for many years. On February 17, 2006, he tore the meniscus² in his left knee while he was working. The injury necessitated arthroscopic knee surgery. Gaines, through counsel, filed a claim with the Commission, which, on April 18, 2006, found that his injury was compensable. A little less than a year later, the Commission held an evidentiary hearing and, by order dated April 26, 2007, found that Gaines had sustained an 18% permanent loss of the use of his left leg. He was awarded permanent partial disability (“PPD”) compensation. He received his last payment of compensation on May 8, 2007.

Pursuant to LE section 9-736(b), the Commission retains “continuing powers and jurisdiction over each claim” and may modify an award *if* the claimant files an application to modify within five years after the latest of the date of the accident, the date of disablement, or the date of the last compensation payment. In the instant case, the

(...continued)

IV. Where It Is Undisputed That Mr. Gaines Was Again Paid Compensation In April 2014, Was It Error For The Circuit Court On March 10, 2015 To Not Find That Montgomery County’s Motion For Summary Judgment Was Now Moot, Given That Under § 9-736 The Five Year Period To Reopen Began Again In April 2014?

² The meniscus is part of the cartilage that cushions the knee joint. *Dorland’s Illustrated Medical Dictionary*, at 1134 (32nd ed. 2012).

latest of these dates is May 8, 2007, the date of the last compensation payment. Thus, Gaines had until May 8, 2012, to apply to modify his award.

On January 27, 2012, within that five-year period, Gaines filed “Issues” with the Commission, using a pre-printed form. The form sets forth a list of “Issues” that can be raised, with check boxes next to each. They include “Medical expenses,” “Temporary total disability” with inclusive dates, “Nature and extent of permanent disability,” and “Authorization for medical treatment.” Gaines selected the box marked “Other” and wrote: “Re-opening. Worsening to the left knee.”

Five days later, on January 17, 2012, Gaines was evaluated by Michael Franchetti, M.D., an orthopedist. Dr. Franchetti’s notes from that visit reflect that Gaines had been experiencing “progressively worsening left knee pain” over the past 6 months. Dr. Franchetti concluded that Gaines required “further evaluation and management.” He administered a cortisone injection, ordered an MRI, and scheduled a follow up appointment for one week after the MRI.

On February 1, 2012, the Commission scheduled an April 5, 2012 hearing date for Gaines’s request to reopen his case. Gaines asked for the hearing to be continued because he was “in medical treatment again” and that the hearing only be reset “upon request.”

In August of 2012, Dr. Franchetti prescribed Synvisc injections for Gaines’s knee.³ On October 10, 2012, Gaines filed “Issues” with the Commission requesting that the County be ordered to authorize the injections and to allow him to obtain a second opinion from another physician. The Commission held a hearing and, on March 26, 2013, ordered the County to authorize the injections and the second opinion.

Almost eight months went by. On November 19, 2013, Gaines underwent surgery on his left knee. As a result, he was unable to work from that date until January 27, 2014.

Meanwhile, on January 15, 2014, Gaines filed “Issues” with the Commission. He checked the box for “Temporary total [disability]” for the period from November 19, 2013, “to present and continuing.” He also checked the box for “Other” and specified the following three issues: 1) “Proceeding on Issue of re-opening and worsening of condition to the left knee (filed on January 7, 2012 and never withdrawn); 2) “Additional temporary total disability” and 3) “In addition to all Issues previously raised.”

On March 27, 2014, Gaines filed a “Request for Modification,” using a form document. He stated that he was seeking a modification of the April 26, 2007 award and checked a box to specify that his permanent disability had increased. He also filed a “Request for Modification Issues” form. He checked the box marked “Nature and extent of permanent disability to the following part or parts of the body” and specified “Re-

³ Synvisc is the trademark name for hylan, a fluid that can be injected into the knee to help lubricate the joint and relieve pain. *Dorland’s, supra*, at 885, 1857.

opening / worsening of condition to the left knee.” He also checked the box marked “Other” and specified “In addition to all Issues previously raised.”

On April 3, 2014, the Commission held a hearing on the issue of temporary total disability. The County argued that Gaines’s request for temporary total disability was time barred because it was not filed within five years of the last compensation payment. The County did not dispute that Gaines’s November 19, 2013 surgery was causally related to his February 17, 2006 injury, noting that it had paid for the surgery. It maintained that Gaines was not eligible for a modification of his disability status at that time. Counsel for Gaines responded that the temporary total disability claim was timely because it arose out of the “worsening” of the condition of his knee, and he had filed a request to reopen based upon that worsening within the five-year limitations period.

Counsel for Gaines made a proffer of Gaines’s testimony with regard to his medical treatment from January 2012 to the day of the hearing and introduced medical records documenting that treatment. The evidence showed that Gaines underwent the MRI that Dr. Franchetti ordered on May 17, 2012, and that it revealed a meniscal tear. Then, as discussed, in August of 2012, Dr. Franchetti ordered Synvisc injections, which ultimately were authorized by the County.⁴ On July 17, 2013, Gaines visited a different orthopedist, Craig Bennett, M.D., for a second opinion. Dr. Bennett recommended a knee brace in the short term and eventual surgery to address the worsening pain. In a follow-

⁴ At the August 2012 appointment, Dr. Franchetti discussed with Gaines the possibility of surgery, but Gaines opted for the Synvisc injections.

up appointment with Dr. Bennett on September 18, 2013, Gaines reported continuing pain and was again advised to use a brace. On October 30, 2013, Gaines saw Dr. Bennett again and decided to undergo an arthroscopic surgical procedure on his knee. As noted, the surgery was performed on November 19, 2013. Dr. Bennett evaluated the knee arthroscopically and debrided certain areas. In a follow-up visit on January 8, 2014, Dr. Bennett cleared Gaines to return to work on January 27, 2014, and advised him to return in two months to discuss whether additional surgery would be needed.

On April 4, 2014, the Commission issued its decision. It ruled that the request to modify was not barred by section 9-736(b), reasoning:

The issues raising worsening of condition were filed on 1/7/12 which was within 5 years of the last payment of medical indemnity. The supporting medical report of Dr. Michael Franchetti was dated 1/17/12 and that report is likewise within the period of Limitations.

The Commission found that “as a result of the accidental injury on February 17, 2006, [Gaines] was temporarily and totally disabled from 11/19/13 to 1/27/14 inclusive.” It ordered the County to pay Gaines \$797 per week for the period of temporary total disability and that the claim be held subject to further consideration of permanent partial disability.

On April 30, 2014, the County filed a petition for judicial review in the circuit court. The County filed a motion for summary judgment on November 25, 2014. It argued that on the undisputed material facts the Commission had erred as a matter of law by ruling that the issue of Gaines’s temporary total disability was not time barred. It also argued that Gaines’s January 7, 2012 “Issues” did not comply with the COMAR

regulations that govern requests for modification of disability status, and, even if he substantially complied, the January 7, 2012 “Issues” did not and could not allege a change in disability status with any basis in fact. As a result, the filing of the January 7, 2012 “Issues” did not toll the five-year limitations period and Gaines’s subsequent change in disability status, which resulted from his November 19, 2013 surgery, was not compensable. The County attached to its motion thirteen exhibits that, with the exception of the Commission’s decision, all had been in evidence before the Commission.

On December 30, 2014, Gaines filed an opposition to the County’s motion and a cross-motion for summary judgment. He asserted that the Commission’s decision was subject to a presumption of correctness, precluding the grant of summary judgment in favor of the County. He argued, moreover, that the Commission’s interpretation of the regulations it administers is entitled to deference. With respect to limitations, he maintained that he had complied with the regulations and that his request to reopen his claim was timely filed. Gaines attached eleven exhibits, all of which were in evidence before the Commission.

On January 16, 2015, Gaines filed an affidavit by Dr. Franchetti as a supplement to his cross-motion for summary judgment. In the affidavit, Dr. Franchetti attested that he began treating Gaines on January 17, 2012, and continued to treat him for the remainder of 2012. He opined that “in January 2012 when I treated him, as well as throughout 2012 and as of today, the condition of [Gaines]’s left knee had, in fact, worsened.” He further opined that in January of 2012 “[Gaines] required additional

medical treatment due to his worsening before he could reach maximum medical improvement.”

On February 23, 2015, the circuit court heard argument on the cross-motions for summary judgment. On March 10, 2015, the court reconvened and announced its ruling from the bench. It found that the facts were “largely undisputed.” It noted that on his January 7, 2012 “Issues” form Gaines did not mark either the box for temporary total disability or the box for permanent disability; instead, he chose the box marked “Other.” The court explained that there was no dispute that the “change in disability status,” *i.e.*, the period of temporary total disability from November 19, 2013, through January 27, 2014, “occurred after the limitations period was over.” The court concluded that, because the change in disability status happened after the limitations period had run, the modification request was time barred.

On March 17, 2015, Gaines moved for reconsideration and/or for the court to remand the matter to the Commission to decide whether any failure to comply with the COMAR regulations could be excused in the interests of justice, pursuant to COMAR 14.09.01.06.⁵ He also argued, in the alternative, that the County’s payment of temporary total disability benefits on April 9, 2014, pursuant to the Commission’s April 4, 2014 order, restarted the limitations clock, rendering the County’s motion for summary judgment moot.

⁵ That regulation states that “[w]hen justice so requires, the Commission may waive strict compliance with these regulations.”

By order entered on April 16, 2015, the circuit court granted the County’s motion for summary judgment and denied Gaines’s cross-motion for summary judgment and his motion for reconsideration and/or remand. The court ordered the matter remanded to the Commission for it to enter an order stating that LE section 9-736(b) barred “further indemnity payments in this action.”

This timely appeal followed.

DISCUSSION

I.

Gaines contends the circuit court erred in granting summary judgment in favor of the County, for two reasons. First, the Commission’s factual finding that he had a “good faith basis” to apply to reopen his case on January 7, 2012, was *prima facie* correct and was not susceptible of a contrary finding on summary judgment. Second, and alternatively, the circuit court was legally incorrect in concluding that a motion to reopen that is filed within the limitations period and is premised on a worsening of condition is insufficient to toll the limitations period, when the subsequent indemnity award is for a period of temporary total disability that occurs after limitations has run.

The County responds that the circuit court correctly determined that there were no genuine disputes of material fact and that the five-year limitations period in LE section 9-736(b) barred Gaines’s claim as a matter of law. It argued that, under the controlling case law, Gaines was obligated to petition to reopen his case and to modify his disability status with a basis in fact within the five-year limitations period. Although Gaines had a basis

in fact to support additional medical benefits when he filed his Issues on January 7, 2012, he did not have a basis in fact to support a change in disability status at that time.

We begin with Gaines’s argument that the procedural posture of this case precluded the circuit court from granting summary judgment in favor of the County. Gaines relies primarily on *Baltimore County v. Kelly*, 391 Md. 64 (2006). In that case, the Court explained the unique procedures in place for “appeals” to the circuit court from decisions of the Commission. *Id.* at 74. Either party may appeal an adverse decision of the Commission in one of two ways: an on-the-record appeal, akin to judicial review of a final agency decision, or an “‘essentially’ *de novo* trial” with regard to any question of fact. *Id.* In either type of appeal the “‘decision of the Commission is presumed to be prima facie correct . . . and the party challenging the decision has the burden of proof.’” *Id.* (quoting LE § 9-745(b)). When an employer “chooses to appeal the Commission’s decision in favor of the claimant through an essentially *de novo* trial,” the Commission’s decision is treated as “‘*ipso facto* correct” and the claimant has “‘no burden of production.’” *Id.* at 75–76 (quoting *Gen. Motors Corp v. Bark*, 79 Md. App. 68, 80 (1989)). Thus, if “‘the decision of the Commission involves the consideration of conflicting evidence as to essential facts, or the deduction of permissible but diverse inferences therefrom, its solution of such conflict is presumed to be correct and the burden of proof is upon the party attacking it to show that it was erroneous.’” *Id.* at 76–77 (quoting *Moore v. Clarke*, 171 Md. 39, 45 (1936)).

In the case at bar, there was no “conflicting evidence as to essential facts or the deduction of permissible diverse inferences” so as to preclude the grant of summary judgment. *Id.* The Commission found that Gaines filed “Issues” on January 7, 2012, “raising worsening of condition” and that, at the April 4, 2014 hearing, he presented a “supporting medical report [*i.e.*, Dr. Franchetti’s January 17, 2012 report] . . . [that was] likewise within the period of Limitations.” The Commission did not make a finding that the January 7, 2012 “Issues” were a request for a change in disability status or resolve conflicting evidence as to when Gaines’s change in disability status arose. Rather, it found as a matter of law that when a claimant has a basis in fact to allege that his medical condition has worsened within the limitations period, LE section 9-736 is satisfied. On the same undisputed material facts, the circuit court ruled that Gaines’s claim was time barred under LE section 9-736, as a matter of law. This *de novo* assessment of an issue of law was permissible under *Kelly*. Our review of the legal issue likewise is *de novo*. See *McLaughlin v. Gill Simpson Elec.*, 206 Md. App. 242, 257 (2012) (construction of LE section 9-736(b) is a matter of statutory interpretation which we review *de novo*).

LE section 9-736(b) states:

(b)(1) The Commission has continuing powers and jurisdiction over each claim under this title.

(2) Subject to paragraph (3) of this subsection, the Commission may modify any finding or order as the Commission considers justified.

(3) [With an exception that does not apply], 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.) The five-year limitations period LE section 9-736(b) establishes applies to the payment of indemnity benefits, *i.e.*, wage compensation, for temporary total, temporary partial, permanent total, and permanent partial disability. *See Wal-Mart Stores, Inc. v. Holmes*, 416 Md. 346, 353–54 n.2, (2010) (describing the four categories of indemnity benefits awardable under the Workers’ Compensation Act). It does not apply to medical benefits for causally related medical treatment. *See* LE § 9-660 (describing the medical benefits a covered employee may receive for an accidental injury and stating that an award of medical benefits “may not be construed to . . . reopen any case[] or . . . allow any previous award to be changed”); *Luby Chevrolet Inc. v. Gerst*, 112 Md. App. 177, 185 (1996) (medical benefits are payable so long as treatment is required regardless of whether wage compensation has terminated).

Buskirk v. C.J. Langenfelder & Son, Inc., 136 Md. App. 261 (2001), controls the outcome of the case at bar. In that case, Buskirk was awarded compensation for a work-related injury to his back. The last compensation payment was made on March 28, 1990. A little over three years later, in May of 1993, he was treated by a doctor and filed a “Petition to Reopen for Worsening of Condition” with the Commission. *Id.* at 264. He attached a letter asking the Commission not to schedule a hearing until one was requested. More than three years later, in September of 1996, Buskirk returned to that same doctor and the doctor ordered an MRI of his lumbar spine.

On September 15, 1997, more than seven years after the last compensation payment, Buskirk filed “Issues” and a “Request for Reopening, Reconsideration, or Rehearing” with the Commission. *Id.* at 265. In his “Issues,” he specified that he was seeking medical care and treatment and temporary total disability benefits from July 21, 1997, to the present and continuing. Buskirk’s employer filed “Issues” raising the five-year limitation period under LE section 9-736(b). The Commission held a hearing and issued an order declaring that the petition was time barred. On judicial review, the circuit court affirmed the decision of the Commission.

This Court affirmed. In his May 1993 petition to reopen, which was filed within five years of the last date of compensation, Buskirk only alleged a “worsening of condition.” *Id.* at 268. He did not “raise an issue as to disability status.” *Id.* “All of the information contained in [Buskirk’s] ‘issues’ raised within the five-year period related to his medical condition and not to his disability status.” *Id.* The first time Buskirk applied for a modification of his disability status was on September 15, 1997, after the five-year limitations period had expired.

We pointed out that, unlike other provisions of the Workers’ Compensation Act, which are to be “construed liberally in favor of injured employees in order to effectuate the legislation’s remedial purpose,” the limitations provision in section 9-736(b) is to be construed strictly. *Id.* at 270–71 (quoting *Marsheck v. Bd. of Trs. of the Fire & Police Emps. Ret. Sys.*, 358 Md. 393, 403 (2000)). We held that Buskirk’s May 13, 1993 petition to reopen, which only alleged a “worsening of condition” and did not allege a

change in disability status, was insufficient to toll the five-year limitations period. To hold otherwise would open the door to claimants “fil[ing] a protective petition for modification and avoid[ing] the statute of limitations *in the event a change in disability status occurred at a future date.*” *Id.* at 272 (emphasis added).

In the case at bar, Gaines filed “Issues” on January 12, 2012, within the five-year limitations period. Like in *Buskirk*, he did not allege any change in his disability status. Rather, he generally alleged a worsening of the condition of his left knee. Also like in *Buskirk*, at his request, a hearing on the “Issues” was held in abeyance. Thus, for the same reasons articulated in *Buskirk*, Gaines’s January 7, 2012 “Issues” only raised a change in his “medical condition” and did not raise a change in his “disability status.” 136 Md. at 268. The first time that Gaines sought a change in disability status was on January 15, 2014, after the five-year limitations period had expired, when he filed new “Issues” and specified that he was seeking additional temporary total disability payments for the period November 19, 2013 and continuing.” (Indeed, he did not file a request for modification of his disability status until March 27, 2014.) This case cannot be meaningfully distinguished from *Buskirk*.

The parties also discuss *Dove v. Montgomery County Board of Education*, 178 Md. App. 702 (2008), in which this Court again was called upon to construe LE section 9-736(b). Dove injured her right leg and back at work and applied to the Commission for benefits. On May 31, 2000, the Commission awarded her compensation for permanent partial disability. On June 10, 2000, she received her last payment of compensation on

that award. On June 3, 2005, seven days before the expiration of the five-year limitations period, she filed with the Commission a request for reconsideration or modification, seeking temporary total disability benefits from November 29, 2001, to the present and continuing. She also filed “Issues,” requesting temporary total disability benefits. She attached to her filings a November 29, 2001 medical report from a doctor.

On February 2, 2006, the Commission held a hearing on Dove’s petition. At the outset, she reduced her request for temporary total disability benefits to two days—August 29, 2002, and September 17, 2002. She introduced two medical reports showing that on those dates she had received epidural steroid injections. She testified that she had missed work as a result.

Dove’s employer argued that her petition was barred by the five-year limitations period in LE section 9-736(b) because Dove had ““filed issues without a basis in fact.”” *Id.* Specifically, the employer argued that Dove was obligated to provide documentation, *i.e.*, medical reports, of any period of temporary total disability before she could file her petition to reopen. The Commission held that Dove’s claim was not barred and awarded her compensation.

Dove’s employer petitioned for judicial review in the circuit court and moved for summary judgment. The circuit court granted the motion, ruling that under *Buskirk*, Dove’s June 3, 2005 motion for modification was filed without a “basis in fact” because it contained only a “bald allegation of temporary total disability from 11/29/01 to present and continuing.” The court concluded that, given that before the Commission Dove only

claimed entitlement to temporary total disability for two days within that period, she had not had a basis in fact to support her petition to modify when she filed it.

Dove appealed and this Court reversed the circuit court’s grant of summary judgment to the employer. We explained that neither LE section 9-736(b) nor the COMAR regulations governing procedures before the Commission require a claimant to support a motion to modify with medical documentation at the time the motion to modify is filed. We rejected the employer’s argument that the requirement, as explained in *Buskirk*, that a claimant’s motion to reopen have a “basis in fact” means that a claimant must have all of the “necessary medical documents supporting the claim before the expiration of the limitations period and cannot supplement such documentation after that time.” *Id.* at 719. Rather, a “basis in fact” means that a claimant “must have a reasonable basis for the claim at the time of filing.” *Id.* (footnote omitted). So long as “the medical proof ultimately adduced at a hearing on the request to modify [is] sufficient to establish that the change in the claimant’s disability status occurred prior to the expiration of the statute of limitations,” the “basis in fact” requirement is satisfied. *Id.* (emphasis added).

The case at bar is not like *Dove*. Dove had a basis in fact to request a modification of her disability status when she filed her motion to modify because she already had lost wages due to epidural steroid injections that caused her to miss work, and she filed her motion to modify her disability status within the five-year limitations period. Gaines did not have basis in fact to claim lost wages when he filed his January 7, 2012 “Issues.” Almost two years passed after he filed his Issues before he had the surgery that resulted

in temporary total disability for a period of more than two months. Thus, unlike in *Dove*, when the Commission held a hearing Gaines could not present any “medical proof . . . sufficient to establish that the change in [his] disability status occurred prior to the expiration of the statute of limitations.” *Id.* And of course, his request to modify his disability status was not made in the five-year period; it first was made almost a year and a half after that period had expired.

II.

Gaines contends the limitations issue we just addressed was rendered moot when, on April 9, 2014, the County paid him temporary total disability compensation, as directed by the Commission in its April 4, 2014 order. According to Gaines, as of April 9, 2014, the limitations clock was restarted, under LE section 9-736(b)(3), and there no longer could be any question that the Commission had the authority to award further indemnity compensation.

The County responds that because LE section 9-741 provides that a petition for judicial review from a decision of the Commission does not operate to stay a compensation order, it was obligated to pay the temporary total disability compensation awarded by the Commission. It maintains that the purpose of the anti-stay provision is to ensure that workers are paid their benefits in a timely fashion. It asserts that, in light of the anti-stay provision, payment of a compensation award is not a waiver of a limitations defense and does not create a new tolling period that moots that defense. We agree.

Gaines has cited no legal authority supporting his view that the payment of compensation as ordered—and that cannot be stayed—will moot an appeal in which the Commission’s award of that compensation is being challenged as an error of law. If Gaines were correct, an employer never could challenge an erroneous limitations ruling by the Commission, an absurd result given that LE section 9-736 is to be strictly construed. Moreover, as Gaines himself points out, a claimant who is awarded compensation by the Commission, but whose compensation award is reversed on appeal, is not required to repay the monies already received. *See, e.g., Gleneagles Inc. v. Hanks*, 385 Md. 492, 500–501 (2005). Thus, the benevolent purposes of the Act are served and the claimant already is protected during the pendency of an appeal challenging an award of compensation. Accordingly, we conclude that the payment of the April 4, 2014 compensation order did not render this appeal moot.

**JUDGMENT AFFIRMED. COSTS
TO BE PAID BY THE APPELLANT.**