Circuit Court for Baltimore County
Case No. C-14-5580

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 237

September Term, 2016

SOUTHLAND CORPORATION, et al.

v.

CARL CURRO

Graeff,
Friedman,
Thieme, Raymond G., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Thieme, J.

Filed: September 19, 2017

Carl Curro, appellee, suffered a workplace accident on September 13, 2005, for which the Maryland Workers' Compensation Commission ("the Commission") awarded him temporary total disability benefits and permanent partial disability benefits. Relative to this appeal, Curro petitioned to re-open the case, and a hearing was held on April 21, 2014. The Commission ordered Southland Corporation ("Southland") and Ace American Insurance Company ("Ace"), collectively "appellants," to pay temporary total disability benefits from September 14, 2013, to February 4, 2014, and February 5, 2014, "to present and continuing."

Appellants petitioned for judicial review in the Circuit Court for Baltimore County. The court posited one question to the jury: Was the Commission's award of temporary total disability benefits incorrect? The jury concluded that the Commission's award was correct. Appellants then noted an appeal to this Court and seek our review of one issue, which we have rephrased:[1] Did the court err in denying appellants' motion for judgment notwithstanding the verdict ("JNOV")? For the reasons stated below, we answer that question in the negative and affirm.

[1] Appellants' question presented, verbatim from their brief, reads:

> Did the circuit court err by denying appellant employer and insurer's motion for judgment notwithstanding the verdict, and err by allowing the jury to consider and award temporary total disability benefits unto the claimant subsequent to the August 18, 2014 date of "maximum medical improvement"?

BACKGROUND

In September 2005, Curro was training to be a field supervisor for Southland, the corporation that trains employees for 7-11 stores in the State of Maryland.[2] On September 13th, Curro was assisting in the reception of a delivery, and when he set a case of drinks down, he "felt a pain shoot up my back[.]" Curro's primary physician, Dr. Kevin O'Keefe, referred him to an orthopedic surgeon, Dr. Brian Sullivan. An initial course of physical therapy did not alleviate Curro's pain, and Dr. Sullivan recommended surgery. On August 17, 2010, Curro underwent a decompression laminectomy. The surgery, however, did not relieve Curro of his back pain.

Curro testified that he attempted to manage the pain for a period of time, but he went to see Dr. O'Keefe again in 2013.[3] Dr. O'Keefe again referred Curro to Dr. Sullivan, who recommended another surgery. Refusing to undergo another surgical procedure, Curro went to see Dr. Richard Genato in January 2014. Dr. Genato recommended sacroiliac joint injections, wherein medication is injected into the patient's sacroiliac joint in an attempt to alleviate pain. Dr. Genato injected Curro on May 20, 2014, but, at a follow-up visit on June 13th, Curro reported that the injection did not lessen his back pain. Curro underwent a second injection on July 29th, but, again, he stated that the injection was not successful in alleviating his pain. Dr. Genato also prescribed transdermal FLECTOR patches, which

[2] At the trial proceeding, Curro testified that all of the 7-11 stores in the state are run by franchisees, except for two stores that Southland operates in order to train employees.

[3] Curro left 7-11 due to the injury and began working for the Intercontinental Cigar Company in 2006 as a territory manager. He retired on December 1, 2013, after missing excessive periods of work due to his back pain and treatment.

contain pain medication on a patch that the patient places against the affected area. Curro stated that the patches provided sufficient relief for him to fall asleep, but nothing more. Curro last saw Dr. Genato on August 18, 2014.

Proceedings at the Commission

Immediately following the accident, Curro filed a claim against appellants with the Commission. Following a December 6, 2006 hearing, the Commission ordered appellants to pay temporary total disability benefits from September 13-21, 2005, and from September 23, 2005, to May 6, 2006, as well as permanent partial disability for a period of 75 weeks beginning on May 7, 2006. On May 18, 2010, the Commission re-opened the case and ordered appellants to pay temporary total disability benefits from February 2 to March 30, 2010, and authorized surgery, as recommended by Dr. Sullivan. Following the surgery, on October 24, 2011, the Commission ordered appellants to pay temporary total disability benefits from August 17 to November 9, 2010, as well as permanent partial disability beginning on November 10, 2010, for a period of 150 weeks. On December 11, 2013, the Commission ordered appellants to pay temporary total disability benefits beginning on September 4, 2013, "and continuing as long as the claimant [Curro] remains temporarily totally disabled[.]"

Relative to the present appeal, the Commission conducted a hearing on April 21, 2014, to analyze Curro's request for temporary total disability benefits from February 5, 2014, and Dr. Genato's recommended treatment. The Commission subsequently ordered appellants to pay temporary total disability benefits from September 14, 2013, to February 4, 2014, and from February 5, 2014, "to present and continuing." Additionally,

the Commission ordered appellants to authorize the sacroiliac injections and patches and pay the associated medical expenses.

Appeal to the Circuit Court

Appellants thereafter petitioned for judicial review in the circuit court before a jury. In the interim, appellants notified Curro of the termination of benefits as of March 10, 2015, indicating that he had reached maximum medical improvement.[4] At trial on February 3-4, 2016, appellants introduced the *de bene esse* video depositions of Drs. Richard Draper and Edward Cohen, who had reviewed Curro's medical records at the request of appellants.[5] Dr. Draper testified that Curro's MRI – taken shortly after the accident – indicated several problems, including degenerative disc disease and arthritis, as well as bone spurs and spinal stenosis. Dr. Draper opined that Curro had reached maximum medical improvement on July 14, 2011, following the 2010 surgery, and no other course of treatment would be medically beneficial to alleviate the pain associated with the 2005 injury. Furthermore, Dr. Draper testified that Dr. Genato's recommended course of treatment would be ineffective, and the Commission should have determined that Curro had reached maximum medical improvement by at least January 2014.[6]

Dr. Cohen evaluated Curro on February 24, 2015, and reviewed his medical records at the request of appellants. Like Dr. Draper, Dr. Cohen opined that Curro's MRI indicated

[4] Curro did not seek a review of this termination.

[5] Dr. Draper's deposition was taken on August 3, 2015, and Dr. Cohen's on January 12, 2016.

[6] Dr. Draper stated that the last time he evaluated Curro was on January 29, 2014.

degenerative disc disease which was aggravated by the 2005 incident. Dr. Cohen testified that Dr. Genato's recommended course of treatment constituted palliative care that was not medically necessary and would not improve Curro's medical condition. Accordingly, Dr. Cohen stated that Curro had reached maximum medical improvement by January 2014.

The jury then viewed the video deposition of Dr. Genato. Dr. Genato initially examined Curro on January 16, 2014, and diagnosed him with sacroiliac joint pain associated with the 2005 injury. Accordingly, he recommended the aforementioned injections and patches. Following their reported ineffectiveness, Dr. Genato recommended physical therapy.

Curro testified that he has not seen a physician for his back pain since August 2014. He stated that his back pain is still "[t]errible," and he takes Tylenol to help with his pain.

At the conclusion of the presentation of evidence, appellants moved for judgment, contending that Curro's condition was stable, that Dr. Genato's recommended course of treatment was not medically necessary, and that Curro was, effectively, at maximum medical improvement, which he had reached in January 2014. The circuit court denied appellants' motion. The parties had previously agreed, however, that the decision of the Commission relative to the authorization of the injections and patches, was appropriate, and appellants would not contest this issue. Accordingly, the only question submitted to the jury was whether the Commission's award of temporary total disability benefits was incorrect. The jury answered this question in the negative.

Appellants subsequently moved for a judgment notwithstanding the verdict ("JNOV"). Appellants argued that Curro had not sought medical treatment since August

2014, and he had, accordingly, reached maximum medical improvement. The court denied appellants' motion, ruling that there were still treatment options available, but Curro had simply declined to avail himself of those treatments. Appellants then noted this appeal.

STANDARD OF REVIEW

In reviewing an appeal from a decision of the Commission, we review the Commission's action, not the circuit court decision. *See McLaughlin v. Gill Simpson Elec.*, 206 Md. App. 242, 251 (2012). "'We must respect the expertise of the agency and accord deference to its interpretation of a statute that it administers . . .; however, we may always determine whether the administrative agency made an error of law.'" *Id.* (quoting *Watkins v. Sec'y, Dep't of Pub. Safety & Corr. Servs.*, 377 Md. 34, 46 (2003)). Pursuant to Maryland Code (1991, 2008 Repl. Vol.), Labor & Employment Article ("L&E"), § 9-745(b)(1), "the decision of the Commission is presumed to be *prima facie* correct[.]" *See also Smith v. Howard Cnty.*, 177 Md. App. 327, 337 (2007) (describing appeal from decision of the Commission as an "'essential trial *de novo*'" (quoting *Balt. Cnty. v. Kelly*, 391 Md. 64, 75 n.4 (2006)).

As to our review of appellants' motion for judgment notwithstanding the verdict, we note that such a motion "'tests the legal sufficiency of the evidence.'" *Willis v. Ford*, 211 Md. App. 708, 715 (2013) (quoting *Impala Platinum Ltd. v. Impala Sales (U.S.A.), Inc.*, 283 Md. 296, 326 (1978)). Accordingly, we "'must determine whether the record contains legally relevant and competent evidence, however slight, from which a jury rationally could have found in [the non-moving party's] favor.'" *Id.* (quoting *S. Mgmt. Corp. v. Taha*, 137 Md. App. 697, 714 (2001), *vacated on other grounds*, 367 Md. 564

(2002)). This Court has remarked that "'[a] party is entitled to a judgment notwithstanding the verdict . . . when the evidence at the close of the case, taken in the light most favorable to the nonmoving party, does not legally support the nonmoving party's claim or defense.'" *Giant Food, Inc. v. Booker*, 152 Md. App. 166, 177 (2003) (quoting *Jacobs v. Flynn*, 131 Md. App. 342, 353 (2000)).

DISCUSSION

Appellants contend that the court should have limited Curro's recovery for temporary total disability benefits to August 18, 2014, because that was the last day he sought treatment for his back pain. Appellants note that there is no dispute as to this date, nor does Curro argue that he has sought medical treatment beyond this date. Appellants rely primarily on *Ngo v. CVS, Inc.*, 214 Md. App. 406 (2013), for the proposition that, by law, temporary disability benefits cannot be awarded for a time period in which claimants do not seek medical care. Stated succinctly, appellants claim that Curro had reached maximum medical improvement by August 2014.

Preliminarily, Curro contends that appellants' appeal was untimely, and we do not have jurisdiction in this matter. If appellants timely noted their appeal, then Curro maintains that the issue as presented to the Commission – and subsequently to the jury – was whether Curro should be awarded temporary total disability benefits as of the time the Commission made its decision – April 21, 2014. Furthermore, Curro contends that appellants' "must be seeing a doctor rule" so as to avoid being classified as having achieved maximum medical improvement is "problematic" because it would lead to absurd results.

Additionally, Curro asserts that he had not reached maximum medical improvement by that time; rather, he had opted for physical therapy over another surgery.

Concerning Curro's motion to dismiss, Rule 8-202(a) provides that, with exceptions inapplicable to this case, "the notice of appeal shall be filed within 30 days after entry of the judgment or order from which the appeal is taken." This Court has noted that this timing requirement is jurisdictional, and we will dismiss untimely appeals. *See Carter v. State*, 193 Md. App. 193, 206 (2010). In this case, the docket entries indicate that the circuit court's judgment was entered on February 29, 2016, and the notice of appeal was not docketed until April 13, 2016, more than thirty days later.[7] However, appellants' notice of appeal was filed on March 29, 2016, rendering the appeal timely. *See Lovero v. Da Silva*, 200 Md. App. 433, 451 (2011) (remarking that a notice of appeal is "filed" when it is accepted by the clerk and complies with Rule 1-323). *See also In re Blessen H.*, 392 Md. 684, 713-14 (2006) (noting difference between when a document is filed and when it is docketed). Appellants' appeal was, therefore, timely filed, and we deny Curro's motion to dismiss.

At oral argument in this Court, Curro's counsel argued that the February 29th order was a non-substantive remand order, and the order that started appellants' 30-day appeal clock was the court's February 4th order denying the JNOV. The order denying the JNOV, however, does not qualify as an appealable order. It was not a final order because it was not entered on a separate document. *See* Rule 2-601(a) ("Each judgment shall be set forth

[7] *See* Rule 2-601(d) (providing that "the date of the judgment is the date that the clerk enters the judgment on the electronic case management system docket").

on a separate document."); *URS Corp. v. Fort Myer Constr. Corp.*, 452 Md. 48, 65-66 (2017) (discussing separate document requirement for appealable final judgment). The denial of the JNOV is also not an appealable interlocutory order. *See* Maryland Code (1973, 2014 Repl. Vol.), Courts & Judicial Proceedings Article ("CJP"), § 12-303. Accordingly, the court's February 29th order was the first one that constituted a final appealable order. As such, appellants' appeal was timely.

Turning to the merits of the case, we agree with appellee's conceptualization of the case: the issue before us is whether the jury correctly determined that the Commission's decision, as of April 21, 2014, was correct. In *Smith*, *supra*, this Court observed that when a claimant prevails before the Commission,

> "the burden of proof, which was borne by the claimant before the Commission, switches to the employer before the circuit court. 'In such a case, the decision of the Commission is, *ipso facto*, the claimant's *prima facie* case . . . . Indeed, the successful claimant, as the non-moving party on appeal, has no burden of production.'" The claimant cannot, therefore, "suffer a summary judgment (or, perhaps, a directed verdict at the end of the [employer's] case) against it on the ground that it failed to produce a *prima facie* case."

177 Md. App. at 338 (internal citations omitted). Accordingly, the court correctly denied appellants' JNOV because there was evidence, namely the decision of the Commission, from which the jury could have found for appellee, the non-moving party.

At oral argument before this Court, counsel for appellee contended that appellants' counsel, in arguing about maximum medical improvement, was anticipating future litigation. Both parties noted that in making the April 21, 2014 decision, the Commission could not predict the future and foretell what Curro would or would not do concerning his

medical treatment or how he would react to medical treatment. Indeed, the Commission never determined the date of maximum medical improvement – nor were they asked to. This Court has held that before a circuit court may engage in fact-finding upon review of a decision of the Commission, there is a "threshold requirement" that "[a]ny factual question that is to be the subject of *de novo* relitigation must first have been a factual issue that was actually decided by the Commission." *Bd. of Educ. for Montgomery Cnty. v. Spradlin*, 161 Md. App. 155, 177 (2005). Because the Commission did not determine the date of maximum medical improvement – if it had been reached – in this case, the issue was not properly before the jury, and any dispute as to that date and benefits stemming from that issue, must await further developments.

APPELLEE'S MOTION TO DISMISS DENIED.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANTS.