

Circuit Court for Montgomery County  
Case No. 430553-V

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2231

September Term, 2017

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JESSE KELLEHER

v.

MONTGOMERY COUNTY, MARYLAND

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Fader, C.J.,  
Shaw Geter,  
Sharer, J. Frederick,  
(Senior Judge, Specifically Assigned)

JJ.

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Opinion by Shaw Geter, J.

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Filed: August 15, 2019

\*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.

This appeal arises from a judicial review by the Circuit Court for Montgomery County of the Workers' Compensation Commission's modification of Appellant's permanent partial disability award. While performing duties related to his employment with Montgomery County, Maryland, Appellant was injured on February 6, 2007. On December 12, 2008, the Commission found Appellant had sustained a thirty percent impairment of his left knee and directed Montgomery County to compensate him. Appellant later filed a Request for Modification of that award in July 2011, which was granted. Appellant received the last payment of compensation pursuant to this award on November 10, 2011. Appellant then filed a Request for Modification alleging a worsening of his condition on June 9, 2016 and September 22, 2016, respectively. Following a hearing, the Commission found Appellant's partial permanent disability had worsened by five percent and directed Montgomery County to compensate him accordingly. Montgomery County noted an "on the record" appeal to the Circuit Court for Montgomery County alleging the statute of limitations had run and, thus, relief was unavailable. Appellant requested a jury trial on the question of whether his Request for Modification was sufficient to toll the applicable statute of limitations. The circuit court struck the jury trial prayer, finding the question to be purely legal in nature. The circuit court then held the statute of limitations had run and therefore the Commission lacked the power to modify Appellant's award. Appellant brings this timely appeal and presents the following questions for our review:

1. Did the circuit court err in denying Appellant's request for a jury trial?

2. Did the circuit court err in finding Appellant’s workers’ compensation claim was barred by the statute of limitations?
3. Is Appellee’s limitations argument moot because Appellee paid Appellant in February 2017?

### STATEMENT OF FACTS

Appellant, Jesse Kelleher, was a firefighter employed by self-insured employer, Montgomery County, Maryland. On February 6, 2007, while fighting a fire, Kelleher slipped and fell on ice, seriously injuring his left knee. Kelleher filed for temporary total disability and permanent partial disability with the Worker’s Compensation Commission (the “Commission”). On December 12, 2008, after a hearing, the Commission found, *inter alia*, that Kelleher sustained a thirty percent permanent impairment of his left knee and awarded him compensation.

In July 2011, Kelleher filed a Request for Modification of his award due to a worsening of his condition. Following a hearing, in an order dated October 28, 2011 (the “October 2011 Order”), the Commission found Kelleher’s permanent partial disability had worsened to thirty-five percent in his left knee and ordered the County to pay Kelleher \$283.00 per week. Kelleher received the last payment of compensation pursuant to the October 2011 Order on November 10, 2011.

Kelleher began to experience increased pain in his left knee in April 2016. He sought treatment from Dr. David Kowalk, his treating orthopedic surgeon, on April 14, 2016. Dr. Kowalk’s report stated that Kelleher had “noted some catching and locking sensation” in his left knee during the six months prior to the appointment. The report also stated that “X-rays of [Kelleher’s] left knee from [April 13, 2016] show significant

degenerative changes involving the medial compartment with joint space narrowing and osteophytes.” During Kelleher’s appointment with Dr. Kowalk, he was prescribed an unloading knee brace and injection therapy. In addition, Dr. Kowalk stated that Kelleher “may” require a total knee replacement.

On June 9, 2016, Kelleher filed a Request for Modification Issues form (“Request for Modification”) with the Commission pursuant to Maryland Code Annotated, Labor & Employment (“L.E.”), § 9-736(b), asserting that the permanent condition of his left knee had worsened and requesting a modification of the October 2011 Order. The Request for Modification stated, “Reopening due to worsening of condition: LEFT KNEE IN ADDITION TO ALL OTHER ISSUES.” Kelleher filed another Request for Modification with the Commission on September 22, 2016, requesting a “[r]eopening due to worsening of condition: LEFT KNEE.” At the time Kelleher filed the respective Requests for Modification, Kelleher had not obtained a written evaluation of permanent impairment from a health care provider.

On December 8, 2016, Kelleher submitted to a medical evaluation by the County’s independent medical evaluator, Dr. Stuart Gordon. In a report addressing the findings of his evaluation, Dr. Gordon opined that the permanent impairment of Kelleher’s knee increased by five percent. Dr. Kevin McGovern, Kelleher’s original treating physician, evaluated Kelleher’s anatomical impairment on December 20, 2016. In his report, Dr. McGovern opined that the permanent impairment to Kelleher’s left knee increased by thirty-four percent since Kelleher’s 2011 evaluation.

The Commission held an evidentiary hearing on January 4, 2017. At the hearing, the Commission reviewed the increased impairment ratings submitted by Kelleher and the County, Dr. Kowalk's medical report, and Kelleher's uncontradicted testimony.<sup>1</sup>

The County did not file an Issues form pursuant to Code of Maryland Regulation ("COMAR") 14.09.03.02 prior to or at the hearing. The County also did not object to Kelleher's Request for Modification at the hearing. However, after the hearing, on January 5, 2017, the County submitted a letter to the Commission alleging Kelleher's Request for Modification was outside the applicable five-year statute of limitations under L.E. § 9-736(b), and thus the Commission could not modify his award. The County argued Kelleher filed each of his Requests for Modification without first obtaining a written evaluation of impairment as required by COMAR 14.09.03.13(D) and 14.09.09.02(B). Kelleher's counsel, on January 13, 2017, wrote a letter to the Commission in response to the County's argument. In the letter, he argued that applicable case law only required Kelleher present medical evidence of the worsening at the time of the hearing, rather than at the time the Request for Modification was filed.

In an order dated January 31, 2017, the Commission found Kelleher's permanent partial disability of his left knee had increased to forty percent, demonstrating a five percent worsening. The Commission directed the County to pay Kelleher \$283.00 every week for

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<sup>1</sup> During direct examination, Kelleher testified:

- Q: Okay. And since 2011 has your knee condition or the symptoms in your knee stayed the same, have they gotten better, or have they gotten worse?
- A. It's gotten worse.

fifteen weeks. The Commission “considered the arguments raised regarding the statute of limitations” and found “that the [Request for Modification] [was] not barred by the statute.”

The County then filed an “on the record” appeal to the Circuit Court for Montgomery County on March 1, 2017. Kelleher filed with the circuit court a request for a jury trial. Kelleher intended to submit two questions to the jury: (1) whether the Request for Modification was filed, with “a basis in fact,” within the five-year statute of limitations period pursuant to L.E. § 9-736(b) and (2) the nature and extent of the worsening of the condition of Kelleher’s left knee. On May 9, 17, and 22, 2017, the circuit court heard oral argument from both parties and decided to allow the factual question regarding the nature and extent of the worsening of Kelleher’s left knee to be submitted to a jury. However, the court found the question regarding the statute of limitations to be a “purely legal question,” and struck Kelleher’s request that it be placed before a jury. On October 31, 2017, the circuit court reversed the Commission, finding that Kelleher had not filed his Request for Modification with a written evaluation of permanent impairment as required by COMAR 14.09.09.02.

Kelleher filed a Motion for Reconsideration, or in the alternative, Remand, arguing, *inter alia*, (1) he did not have an opportunity to address the limitations issue since it was never raised prior to the hearing, (2) the Commission waived “strict compliance” with the applicable regulations, and (3) the circuit court imposed a new standard as to what was required to demonstrate that his condition worsened by November 10, 2016—the end of the limitations period. On December 11, 2017, the circuit court denied Kelleher’s Motion for Reconsideration/Remand.

## DISCUSSION

### I. Whether the circuit court erred in denying Kelleher’s request for a jury trial.

Kelleher contends he was improperly denied his right to a jury trial on the issue of whether his Request for Modification was filed within the five-year statute of limitations because it was a factual issue. Conversely, the County claims the circuit court’s denial of Kelleher’s request for a jury trial was proper because the appeal was “on the record,” and the circuit court was required to accept the facts as found by the Commission.

At the outset, we note that an “appeal from the Workers’ Compensation Commission may follow two alternative modalities.” *Simmons v. Comfort Suites Hotel*, 185 Md. App. 203, 224 (2009). The first is an appeal “on the record of the Commission” pursuant to LE § 9-745(c) and (e). *Id.* In an “on the record appeal,” “no new evidence is taken nor is any fresh fact-finding engaged in.” *Board of Educ. for Montgomery Co. v. Spradlin*, 161 Md. App. 155, 170 (2005). Rather, “[t]he determination of whether the decision of the Commission was free from error will entail only an examination of the record of the proceedings before the Commission.” *Id.* The court’s review of the Commission’s decision is limited to whether the Commission (1) justly considered all of the facts, (2) exceeded its powers, or (3) misconstrued the law and facts applicable in the case decided. L.E. § 9-745(c). We have clarified that “[m]isconstruing the facts” references “the issue of whether the Commission’s fact-finding was, as a matter of law, clearly erroneous because it was not supported by legally sufficient evidence.” *Spradlin*, 161 Md. App. at 169.

The second modality of appeal is known as an “essential trial *de novo*,” pursuant to LE § 9-745A(d), which provides, “[o]n a motion of any party filed with the clerk of the court in accordance with the practice in civil cases, the court shall submit to a jury any question of fact involved in the case.” *Spradlin*, 161 Md. App. at 171. A trial *de novo* is “diametrically different” from an “on the record appeal.” *Id.* at 172. While a court in an on the record appeal reviews the Commission’s decision for legal error, the essential trial *de novo* is “concerned only with findings of fact.” *Id.* at 173. “The entitlement to fresh, *de novo* fact-finding is plenary and is not . . . dependent in any way on the notion that the Commission’s original fact-finding was in error.” *Id.* “At the *de novo* trial, the propriety of the Commission’s original fact-finding is a matter of no consequence.” *Id.* Additionally, “[e]ither party on the appeal to the circuit court may invoke the right to have a factual finding by the Commission determined *de novo* at the circuit court level.” *Id.* at 176 (“Even though a party does not appeal, he can raise issues contesting the findings and decision of the Commission in an appeal taken by the other party.”). Thus, when appealing the Commission’s decision to a circuit court, whether a factual question may be properly submitted to the jury does not depend on the Commission’s original decision, the party who noted the appeal, nor the type of appeal.

We must next determine whether the limitations question is one of fact or purely law. “Generally, the question of when a cause of action accrues is one that is properly decided by the court.” *Lombardi v. Montgomery County*, 108 Md. App. 695, 711 (1996). However, there are “aspects to limitations defenses, most notably when the defense hinges upon a question of fact, which are not properly decided by the court and are better suited

for a jury.” *Id.* Thus, “[w]hether a cause of action is barred by the statute of limitations is ordinarily a mixed question of law and fact that may be taken from the jury only when the court determines as a matter of law that the suit was not instituted within the proper time.” *Dove v. Montgomery County Bd. of Educ.*, 178 Md. App. 702, 712 (2008).

As we see it, whether Kelleher’s Request for Modification was legally sufficient to toll the statute of limitations was not a question of fact for the jury to decide. The parties did not disagree as to when Kelleher filed his Requests for Modification, that he did so without first obtaining a written evaluation of permanent impairment, or when he obtained his final permanency ratings. Indeed, even Kelleher, in his brief, admits there “had been no objection by the County to any of the evidence” he produced at the hearing.

Instead, the limitations question was purely legal and appropriate for the court to decide. The County argued Kelleher’s Request for Modification was not legally sufficient to toll the five-year statute of limitations under LE § 9-736(b). The County contended, as it does now, that Kelleher’s Request for Modification did not allege a change in disability with a “basis in fact,” as he had not first obtained a written evaluation of permanent impairment as required by COMAR 14.09.09.02(B). Conversely, Kelleher argued his Request for Modification tolled the statute of limitations despite the lack of a written evaluation of permanent impairment. He alleged that the evidence he produced at the Commission hearing established a “basis in fact,” meeting the requirements set forth in *Dove, supra*.

Kelleher, relying on *Dove, supra*, argues the limitations question in this case was a “mixed question of fact and law,” which entitled him to have the matter submitted to a jury

under L.E. § 9-745(d). However, Kelleher’s reliance is misplaced. In *Dove*, we merely held that a claimant need not produce all necessary medical documentation with his or her request for modification. 178 Md. App. at 714. In that case, the reviewing circuit court was tasked with deciding the purely legal question of whether the claimant’s Request for Modification of temporary total disability benefits, which was filed without medical evidence, was barred by the statute of limitations. *Id.* at 713. The question was not submitted to a jury because, like here, there was no dispute as to any material fact.

Kelleher further claims that his right to a jury trial in this case is mandated by the Maryland Constitution, which provides, “The right of trial by Jury of all issues of fact in civil proceedings in the several Courts of Law in this State, where the amount in controversy exceeds the sum of \$15,000, shall be inviolably preserved.” Md. Const. art. 23. However, as we have stated, the limitations question involved no question of fact. Thus, Kelleher had no constitutional right to a jury trial on the issue.

**II. Whether the court erred in finding Kelleher’s workers’ compensation claim was barred by the statute of limitations.**

Kelleher argues the filing of his Request for Modification was legally sufficient to toll the statute of limitations, and, if it was not, the Commission waived the issue when it found the Request for Modification was not barred. Conversely, the County claims the Commission was without power to modify Kelleher’s award because the statute of limitations had run on his claim as he had no “basis in fact” to support a change in his disability status when he filed his Request for Modification.

When reviewing an administrative agency’s decision, “we reevaluate the decision of the agency, not the decision of the lower court.” *Jordan Towing, Inc. v. Hebbville Auto Repair, Inc.*, 369 Md. 439, 450 (2002). “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.” *Hranicka v. Chesapeake Surgical, Ltd.*, 443 Md. 289, 297 (2015) (quoting *Watkins v. Sec’y, Dept’ of Pub. Safety and Corr. Servs.*, 377 Md. 34, 46 (2003) (brackets in original)). However, this presumption “does not extend to questions of law, which we review independently.” *Id.* (quoting *Johnson v. Mayor and City Council of Balt.*, 430 Md. 368, 376 (2013)).

The purpose of the Maryland Workers’ Compensation Act is “to protect 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 County*, \_\_ Md. \_\_, (filed June 24, 2019) (slip op. at 8) (quoting *Roberts v. Montgomery County*, 436 Md. 591, 603 (2014)). “The Act is remedial in nature and ‘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.” *Id.* at 8–9 (quoting *Stachowski v. Sysco Food Services of Baltimore, Inc.*, 402 Md. 506, 513 (2007)).

The statute at issue in this case is L.E. § 9-736, which sets forth a statute of limitations for modifications of claimants’ disabilities. “The period of limitations applicable to petitions to reopen, currently embodied in L.E. [§] 9-736, has in one form or

another . . . been a part of the Workers' Compensation Act since its inception in 1914.”

*Buskirk v. C.J. Langenfelder & Son, Inc.*, 136 Md. App. 261, 269 (2001). L.E. § 9-736

provides, in relevant part:

(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) 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.

“Ordinarily, a time limitation is deemed a condition precedent if it is fixed in the statute that creates the cause of action[.]” *Griggs v. C & H Mechanical Corp.*, 169 Md. App. 556, 571 (2006). Thus, a claimant must establish that he or she sufficiently applied for worsening of a disability within the statute of limitations before the Commission is empowered to modify the claimant’s award. Accordingly, if Kelleher failed to sufficiently apply for a modification of his award within the five-year statute of limitations, the Commission did not have the authority to modify the award.

Pursuant to L.E. § 9-736, a claimant must apply for a modification of their award within the applicable time-frame with a “basis in fact” to believe that such a modification is warranted by their injury. *Dove v. Montgomery County Bd. of Educ.*, 178 Md. App. 702, 719 (2008). There is no requirement 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.” *Id.* Rather, a “basis in fact” merely means “that the claimant must have a reasonable basis for the claim at the time of filing.” *Id.* (holding claimant had a “basis in fact” sufficient to support her request for additional temporary total disability benefits because, at the time she filed, she was aware of steroid injections she received on two separate dates within the statute of limitations period although she did not have the documentation of the injections).

In the case *sub judice*, Kelleher applied for a modification within the statute of limitations set forth in L.E. § 9-736(b)(3) when he filed his Request for Modification on June 9, 2016 with a “basis in fact.” On April 14, 2016, almost seven months before the statute of limitations ended on November 10, 2016, Kelleher, due to experiencing a “catching and locking” sensation as well as knee pain, sought treatment from Dr. Kowalk. Dr. Kowalk, after examining Kelleher, reported that “X-rays of [Kelleher’s] left knee from [April 13, 2016] show significant degenerative changes involving the medial compartment with joint space narrowing and osteophytes.” Dr. Kowalk then told Kelleher that he may require a total knee replacement. Thus, Kelleher had a “basis in fact” to believe that the condition of his knee had, in fact, worsened at the time he filed his Request for Modification with the Commission on June 9, 2016, which was four months the limitations period expired on November 10, 2016. Applying for the modification by filing his Request for Modification with a “basis in fact” was all L.E. § 9-736(b)(3) required of Kelleher to toll the statute of limitations.

The County next argues that Kelleher failed to sufficiently toll the statute of limitations because, when he filed his Request for Modification, he had not obtained a

written evaluation of permanent impairment as required by the applicable COMAR regulations. Indeed, the General Assembly empowered the Commission to adopt “regulations to govern the procedures of the Commission” and “determine the nature and the form of an application for benefits or compensation.” L.E. § 9-701(2). Pursuant to this authority, the Commission adopted COMAR 14.09.03.13, which mandates that “a party seek[ing] an increase in a prior award for permanent partial disability . . . shall comply with . . . COMAR 14.09.09.” COMAR 14.09.09.02 provides, “[p]rior to filing an Issues form raising permanent disability, the party filing the issue shall have obtained a written evaluation of permanent impairment prepared by a physician, psychologist, or psychiatrist in accordance with [the American Medical Association’s ‘Guides to the Evaluation of Permanent Impairment].” *See also id.* at 14.09.09.03.

Relying on *McLaughlin v. Gill Simpson Elec.*, 206 Md. App. 242 (2012) and *Hranicka v. Chesapeake Surgical, Ltd.*, 443 Md. 289 (2015), the County contends that the Commission was given wide discretion in promulgating regulations “to determine the nature and form of an application for benefits,” so that Kelleher’s failure to strictly adhere to the Commission’s procedure must result in a denial of the relief sought. However, here, the regulations did not require Kelleher have a written evaluation of permanent impairment in order to *apply* for a modification as required by L.E. § 9-736(b)(3).

We find the Court of Appeals’ opinion in *Gang v. Montgomery County* instructive on this issue. There, Gang, nearly four years after obtaining an award of compensation from the Commission, filed a “Request for Document Correction” with the Commission seeking an adjustment of his prior award. *Gang v. Montgomery County*, \_\_ Md. \_\_, No.

67, Sept. Term, 2018 (filed Jun. 24, 2019) (slip op. at 3). The Commission modified Gang’s award of compensation pursuant to his request. *Id.* at 5. On appeal, Gang’s former employer, the County, citing *McLaughlin*, argued that the Commission lacked the power to modify the award because Gang failed to file with the Commission a “Motion for Modification” in addition to filing his “Issue” form, as was required by COMAR 14.09.03.13B, within the limitations period set forth in L.E. § 9-736(b)(3). The Court of Appeals found the County’s argument unpersuasive, and instead concluded Gang’s claim was not barred by the statute of limitations because he “filed his Request for Document Correction within five years of the last payment of compensation in accordance with” L.E. § 9-736(b)(3). *Id.* at 24.

We conclude that Kelleher sufficiently tolled the statute of limitations despite his failure to obtain a written evaluation of permanent impairment before filing his Request for Modification of his award. L.E. § 9-736(b)(3) required Kelleher to apply for a modification of his award on or before November 10, 2016. And, as we have stated, Kelleher filed his first Request for Modification on June 9, 2016—four months before the limitations period expired. Applying for a modification by filing the Request for Modification within the limitations period was all that was required by L.E. § 9-736(b)(3).

Moreover, COMAR 14.09.01.06 provides, “When justice so requires, the Commission may waive strict compliance with [the Commission’s] regulations.” Thus, while the Commission had the authority to withhold from Kelleher an award of benefits due to his failure to obtain a written evaluation of permanent impairment, the Commission

also had the discretion to waive Kelleher’s compliance with the applicable regulation, which it did in this case.

The County contends the waiver provision is located within the general provisions in the administrative chapter and that, again citing *Hranicka*, “the general provisions in the administrative chapter of the Commission Regulations do not apply to the claims filing procedures and/or more specific regulations.” However, in *Hranicka*, a general provision in the administrative chapter provided that documents may be filed with the Commission “[e]lectronically through the [Commission’s electronic filing system].” *Id.* at 300. In addition, another of the Commission’s regulations specifically stated that an electronic filing did *not* constitute a “filing” of a claim with the Commission. *Id.* While we do note that “the statute of limitations in L.E. § 9-736(b) is to be strictly construed[.]” *McLaughlin v. Gill Simpson Elec.*, 206 Md. App. 242, 254 (2012), the COMAR regulations applicable in this case do not specifically state that Kelleher was required to have obtained a written evaluation of permanent impairment to “apply” for a modification and, thereby, satisfy L.E. § 9-736(b)(3).

Accordingly, for the foregoing reasons, we hold the circuit court erred in concluding the Commission lacked the authority to hear Kelleher’s workers’ compensation claim and award him permanent disability benefits.

**III. Whether the County’s limitations argument is moot because the County paid Kelleher in February 2017.**

Kelleher contends the limitations issue which we have addressed was rendered moot when, on February 2, 2017, the County paid him permanent partial disability compensation

as directed by the Commission in its January 31, 2017 order. According to Kelleher, as of February 2, 2017, the limitations clock was restarted under L.E. § 9-736, and thus the Commission had the authority to modify his award.

The County argues that because L.E. § 9-736 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 partial permanent disability compensation award regardless of appeal. It maintains the purpose of the anti-stay provision is to ensure that workers are paid their benefits in a timely fashion and, 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 which moots that defense. We agree.

A “court may not grant a stay” or an injunction of a workers’ compensation award pending appeal. *Gleneagles, Inc. v. Hanks*, 385 Md. 492, 497 (2005). This is so because the Workers’ Compensation Act’s “humanitarian policy would be seriously hampered if weekly payments of compensation awarded by the [C]ommission could be suspended because of an appeal.” *Id.* at 500 (citing *Branch v. Indemnity Ins. Co.*, 156 Md. 482, 489 (1929)). Additionally, 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 Id.* at 502. Thus, the benevolent purposes of the Act are served and the claimant remains protected during the pendency of an appeal challenging an award of compensation. Kelleher has cited no legal authority supporting his contention that the payment of permanent partial disability compensation as ordered will moot an appeal in which the Commission’s award of that compensation is being challenged as an error of

law. If we were to hold such, we would effectively eviscerate the ability of an employer or insurer to challenge an erroneous limitations ruling by the Commission. Accordingly, we hold the compensation Kelleher received pursuant to the January 31, 2017 order did not render this appeal moot.

**JUDGMENT OF THE CIRCUIT  
COURT FOR MONTGOMERY  
COUNTY REVERSED; COSTS  
TO BE PAID BY APPELLEE.**