

Circuit Court for Montgomery County  
Case No. 424002-V

UNREPORTED  
IN THE COURT OF SPECIAL APPEALS  
OF MARYLAND

No. 2391

September Term, 2017

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BOARD OF EDUCATION OF  
MONTGOMERY COUNTY, MARYLAND

v.

KEVIN MIDDLETON

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Graeff  
Kehoe,  
Berger,

JJ.

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Opinion by Kehoe, J.

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Filed: November 6, 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. *See* Md. Rule 1-104.

The issue in this judicial review proceeding is whether the Workers' Compensation Commission erred when it entered an order awarding Kevin Middleton temporary total disability benefits for his period of convalescence after surgery to alleviate the effects of a work-related injury. Mr. Middleton's employer, the Board of Education of Montgomery County, filed a petition for judicial review. The Circuit Court for Montgomery County, the Honorable John W. Debelius, III, presiding, affirmed the Commission's decision. The County has appealed and presents one issue, which we have reworded:

Was Mr. Middleton's claim for temporary disability benefits barred by Md. Code Lab. & Empl. § 7-736(b)?<sup>[1]</sup>

We will affirm the judgment of the circuit court.

### **Background**

At all relevant times, Middleton was employed as a teacher in the Montgomery County public school system. During the course of his employment, he injured his back in what initially appeared to be two separate work-related incidents. The controversy in this case revolves around the ways that Middleton presented his claims for compensation arising out of these separate incidents.

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<sup>1</sup> In its brief, the County articulates the issue as:

Did the Commission and the trial court err in awarding the Appellee temporary total disability benefits following surgery to his back?

On April 3, 2009, Middleton injured his back when he broke up an altercation between two students. (E. 20). He filed for compensation, which was docketed by the Commission as Claim No. W012759. He received physical therapy, but ultimately had surgery on August 3, 2009. (E. 21). The Commission awarded Middleton temporary total disability benefits for the period of his recuperation from the surgery. The last payment under this award was on September 6, 2009. About two years later, Middleton received a series of injections to address recurring symptoms related to his back injury and underwent another course of physical therapy in December 2011.

On August 26, 2014, that is, within five years of the date of his last disability payment pursuant to the Commission’s award for his 2009 injury, Middleton filed an Issue seeking permanent partial disability benefits arising out of his 2009 injury. In March 2015, Middleton obtained a written permanent impairment rating for his 2009 injury from Joel D. Fechter, M. D. That physician opined that Middleton was entitled to “a 49% impairment of the whole person” with “41% attributable to work *injuries* of 4-3-09 and 5-2-12.” (Emphasis added.) Dr. Fechter further opined that Middleton’s 2013 surgery “was causally related, in part, to the work injury of 4-3-09 and, in part, to the injury of 5-2-12.”

On May 2, 2012, Middleton apparently re-injured the same part of his back while at work. (As we will explain, his treating neurosurgeon eventually concluded that what Middleton and the County had been viewing as a separate injury was actually a sequela of the 2009 injury.) He filed a separate claim for compensation which was docketed as Claim No. W037904. The Commission ordered the County to pay his medical expenses and

awarded him temporary total disability benefits. In January 2013, Middleton had back surgery to address the effects of his 2012 injury. Treatments continued through 2014. The medical treatments and the corresponding temporary total disability benefits were approved by the Commission. Despite these treatments, Middleton continued to experience back problems and, in 2015, his physician recommended that he undergo another surgery. Middleton filed an Issue with the Commission asking it to authorize the procedure and to order the County to pay his associated medical expenses. He did not ask for temporary total disability benefits in this filing. The County took the position that further surgery was unnecessary. All of this was done in Case No. W037904.

To summarize, Middleton's claim for permanent partial disability benefits for his 2009 injury and his request for approval of further surgery for his 2012 injury were timely made in their respective cases and worked their way through the Commission on separate tracks in separate proceedings. Until the events that we are about to describe, both Middleton and the County appear to have proceeded on the assumption that the 2009 and 2012 injuries were separate, with the only common denominators being that both occurred to Middleton in the course of his employment with the County, and both affected the same part of his back. The pending issues were scheduled for a joint hearing before the Commission on March 29, 2016.

In preparing for this hearing, Middleton's counsel requested his treating neurosurgeon, Alexandros D. Powers, M.D., to provide his opinions regarding causation and possible treatments for her client's back problems. In a letter dated April 19, 2015, Dr. Powers

opined that Middleton’s “initial injury . . . took place around 04/03/2009, and the events of 05/02/2012 caused an exacerbation.” On December 14, 2015, Dr. Powers provided an updated analysis, in which he concluded that Middleton’s “ongoing symptoms are a continuum from the [2009] work-related injury.”

This brings us to the 2016 Commission hearing. At the hearing the following occurred:

First, acknowledging that there was a “statute of limitations issue under the 2009 case,” Middleton’s counsel asked the Commission to consolidate the two cases. The County objected and pointed out that the Commission had denied an earlier request by Middleton to consolidate the cases. The Commission denied the request.

Second, Middleton’s request for an award of permanent partial disability benefits was deemed to have been withdrawn by the Commission.<sup>2</sup>

Third, based on Dr. Powers’ December 2015 opinion that Middleton’s symptoms were a “continuum” from the 2009 injury, his counsel requested approval of the surgery under the 2009 case. In response, the County’s counsel took the position that no additional surgery was necessary based upon an evaluation by its expert. The parties presented evidence in the form of the various medical revaluations and testimony from Middleton.

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<sup>2</sup> Middleton did not expressly withdraw his request for permanent partial disability benefits during the hearing. However, as he concedes in his brief, withdrawal of the request for permanent partial disability benefits was necessarily implied when he requested approval for the surgery and temporary total disability benefits.

On April 14, 2016, the Commission issued an order in Case No. W012759, that is, the 2009 case, which read in pertinent part:

The Commission finds that as a result of the accidental injury sustained on April 3, 2116 [sic], the claimant was paid temporary total disability from May 5 2009 to September 6, 2009 inclusive. The Commission finds on the issues presented that authorization for medical treatment (back surgery as recommended by neurosurgeon Dr. Powers) is approved. The issue of nature and extent of the back is withdrawn. Average weekly wage: \$1682.90.

It is, therefore, this 14th day of April 2016, by the Worker's Compensation Commission ORDERED that the [County] authorize back surgery as recommended by neurologist, Dr. Powers. It is further ordered that the above entitled claim be reset only upon request.

On April 18, Middleton's counsel filed a request for a rehearing. The request pointed out that the Commission's order "did not address the issue of temporary total disability benefits from the date of the surgery[.]"

In response, the County's counsel wrote the Commission and stated that Middleton had never filed an Issue requesting post-surgery temporary total disability benefits and that no such request was made at the hearing. The County continued:

Had such a request been made, the County would have objected in that limitations has now run on Mr. Middleton's claim for indemnity benefits. Mr. Middleton was last paid indemnity benefits under this claim on September 6, 2009.

Moreover, continued the County, Middleton's Issue filed on August 26, 2014, failed as a matter of law because it did not comply with the requirements set out in two of the Commission's regulations, COMAR 14.09.01.16 and COMAR 14.09.01.12. (We will

discuss the relevant regulations later in this opinion.) There followed a series of letters from both counsel to the Commission further elaborating on their respective positions.

On July 1, 2016, the Commission issued an order granting Middleton's request for post-surgery temporary total disability benefits. The order stated in relevant part (emphasis in original):

Under date of April 18, 2016 a Request for Rehearing was filed with this Commission in the above-entitled claim by Counsel for the Claimant. After due consideration, the Commission will rescind its Order dated April 14, 2016 and will pass in lieu thereof the following Order:

Bold font indicates revised language[.]

Hearing was held in the above claim . . . on March 29, 2016 on the following issues:

1. Nature and Extent
2. Medical Treatment
- 3. Additional temporary total disability[.]**

The Commission finds that as a result of the accidental injury sustained on April 3, 2116 [sic], the claimant was paid temporary total disability from May 5, 2009 to September 6, 2009 inclusive. The Commission finds on the issues presented an authorization for medical treatment (back surgery as recommended by neurosurgeon, Dr. Powers) is approved. **The Commission further finds that the claim for individual temporary total disability from the date of surgery to the date the claimant returns to work is approved.** The issue of nature and extent of back is withdrawn.

. . .

It is further ORDERED that the above-entitled claim and title claim is held be held subject to further consideration by this Commission as to permanent disability, if any . . . .

The County filed a request for a rehearing, which the Commission denied. The County then filed a petition for judicial review. The parties filed cross-motions for summary judgment and the court affirmed the Commission's decision.

### **The standard of review**

Lab. & Empl. § 9-745 permits two modes of judicial relief for a party aggrieved by a decision of the Workers' Compensation Commission. *Board of Education Montgomery County v. Spradlin*, 161 Md. App. 155, 166 (2005). Subsection (c) of the statute authorizes what is essentially a judicial review of the Commission's decision in which the circuit court "reviews the record of the proceeding before the Commission and decides, purely as a matter of law, whether the Commission acted properly." *Id.* at 169 (cleaned up). Additionally, Lab. & Empl. § 9-745(d) permits what we have termed "an essential *de novo* trial," in which the Commission's decision is presumed to be correct but the court (or the jury as the case may be) makes its own fact-finding. *Id.* at 188–90.

The parties chose the first modality. Therefore, the role of the reviewing court is to decide if the Commission "acted within its powers and correctly construed the law and facts." Lab. & Empl. 9-745(e)(1). If the court answers this question in the affirmative, then it will "confirm the decision of the Commission." *Id.* If the judicial response is no, then it will "reverse or modify the decision or remand the case to the Commission for further proceedings." Lab. & Empl. 9-745(e)(2).

In the present case, the facts are not in dispute and the issues are those of law. We exercise *de novo* review over the Commission's legal conclusions, although with appropriate deference to "its interpretations of the Workers' Compensation Act." *Hranicka v. Chesapeake Surgical, Ltd.*, 443 Md. 289, 297 (2015) (cleaned up). Additionally, we review the decision of the Commission, as opposed to that of the circuit court. *Id.*; *see also*



*People’s Counsel for Baltimore County v. Surina*, 400 Md. 662, 681 (2007) (In a judicial review proceeding, an appellate court “looks through” the circuit court’s decision to make its own evaluation of the agency’s decision.).

### **Implicit decision-making**

As a general rule, a reviewing court will affirm a decision by an agency in a quasi-judicial proceeding only upon the grounds articulated by the agency. *See, e. g., McDonell v. Harford County Housing Agency*, 462 Md. 586, 620 (2019); *McClure v. Montgomery County. Planning Board*, 220 Md. App. 369, 385 (2014). Application of this principle in judicial review of decisions by the Commission can be problematic because its orders sometimes reveal little or nothing about the Commission’s reasoning in reaching a decision. For this reason, Maryland courts have long recognized reviewing courts may review issues that were “implicitly decided” by the Commission. *Trojan Board Co. v. Bolton*, 11 Md. App. 665, 671 (1971) (citing, among other cases, *Cabell Concrete Block Co. v. Yarborough*, 192 Md. 360, 369 (1949) and *Butler Brothers v. Mabin*, 171 Md. 126, 127 (1936)). As this Court explained in *Trojan Boat*, “[A]n implicit decision by the Commission is one that, in the logical process of disposing of the proceeding, the Commission encountered and solved, although without explicit mention of it in the record. By their very nature, they are elusive.” 11 Md. App. at 671.

### **The parties’ contentions**

The parties agree that the controlling statute in this case is Lab. & Empl. § 9-736, which states in pertinent part (emphasis added):

(a) If aggravation, diminution, or termination of disability takes place or is discovered after the rate of compensation is set or compensation is terminated, the Commission, on the application of any party in interest or on its own motion, may:

- (1) readjust for future application the rate of compensation; or
- (2) if appropriate, terminate the payments.

(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,<sup>[3]</sup> 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*.

By its plain language, Lab. & Empl. § 9-736(b) sets out a five-year statute of limitations on requests to modify awards. Most of the provisions of the Workers' Compensation Act are "liberally construed in favor of injured employees." *McLaughlin v. Gill Simpson Electric*, 206 Md. App. 242, 261 (2012). However, the general rule of liberal construction does not apply to limitations provisions, including § 9-736. *Id.* (citing *Stevens v. Rite-Aid Corp.*, 340 Md. 555, 569 (1995)).

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<sup>3</sup> Lab. & Empl. § 9-736(c) authorizes the Commission to consider an untimely request to modify an award when the failure to file the request on a timely basis was the result of "fraud or facts and circumstances amounting to estoppel[.]" Neither party asserts that subsection (c) pertains to the questions raised in this appeal.

The parties also agree that the starting point for a § 9-736(b) analysis in this case is the date of the County's last payment of compensation to Middleton pursuant to the Commission's award in the 2009 case. The date of that payment was September 6, 2009, which means that Middleton's right to seek a modification of that award expired on September 7, 2014.<sup>4</sup> Middleton filed his request for *permanent* partial disability benefits stemming from his 2009 injury on August 26, 2014. The Commission's award in this case was for *temporary total disability* benefits. The Commission's decision did not explain how or why it concluded that it should treat a request for permanent partial disability benefits as a request for temporary total disability benefits. Therefore, a reviewing court must review the record to ferret out one or more "implicit decisions" by the Commission that led to its ultimate result. *Trojan Boat*, 11 Md. App. at 671.

To this Court, the County argues that the Commission erred when it granted Middleton's request for temporary total disability benefits. The County concedes that Middleton's August 26, 2014 Issue in the 2009 case was within the five-year limitations period. However, the County points out that, in that Issue, he sought permanent partial disability benefits and not the temporary total disability benefits eventually awarded by the Commission. Moreover, says the County, Middleton's 2014 filing was irredeemably flawed because at the time of filing, Middleton did not have a written evaluation of

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<sup>4</sup> The parties are in agreement that there is no statute of limitations regarding an injured worker's right to request that the employer pay for additional medical treatment.

permanent impairment. Although it uses different terminology in its brief, in effect, the County asserts that such an evaluation is a condition precedent to filing a claim for permanent partial disability benefits. To support this contention, the County relies on COMAR 14.09.00.02(B).<sup>5</sup> The County also argues that:

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<sup>5</sup> COMAR 14.09.09.02. states in pertinent part:

A. A claimant alleging permanent disability shall file with the Commission an Issues Form that:

(1) Explicitly claims permanent partial or permanent total disability;

• • •

B. Prior 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 Regulation .03 of this chapter.

COMAR 14.09.09.03 states:

A. Written Evaluation Required. As evidence of permanent impairment, a party shall submit:

(1) A written evaluation of permanent impairment prepared by a physician;

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B. When preparing an evaluation of permanent impairment, a physician, psychologist or psychiatrist shall:

(1) Generally conform the evaluation with the format set forth in §2.2 (“Reports”) of the American Medical Association's “Guides to the Evaluation of Permanent Impairment”;

(2) Use the numerical ratings for the impairment set forth in the American Medical Association's “Guides to the Evaluation of Permanent Impairment”, provided that a physician, psychologist or psychiatrist is not required to use the inclinometer evaluation technique specified in §3.3, but instead may use the goniometer technique specified in the “Addendum to Chapter 3”;

(3) Include the items listed under the heading “Comparison of the results of analysis with the impairment criteria . . .” in §2.2 (“Reports”) of the American Medical Association's “Guides to the Evaluation of Permanent Impairment”; and

at the March 29, 2016 hearing, [Middleton] requested surgery for the back rather than proceeding with the issues of permanency. [Middleton] withdrew these Issues for nature and extent to the back and instead asked the Commission to go forward on authorization for surgery, for which Issues had never been filed.

Finally, the County argues that the only way that the Commission could have woven what the County claims was a skein of procedural irregularities and failings into a basis for granting temporary total disability benefits was to have exercised its authority under COMAR 14.09.01.06 to waive strict compliance with its regulations “[w]hen justice so requires.” The County asserts that COMAR 14.09.01.06 does not give the Commission the authority to disregard its mandatory regulations. For this proposition, the County relies primarily on *Hranicka v. Chesapeake Surgical, Ltd.*, 443 Md. 289, 301 (2015) (“Nothing in the Workers' Compensation Act or COMAR permits the Commission to “relate back” the date of a claim to its electronic submission date. The Commission erred in utilizing the date that Hranicka electronically submitted his claim form “for limitation purposes” instead of the date that the Commission date-stamped the paper claim form; the Commission's determination was plainly erroneous and inconsistent with COMAR 14.09.02.02A.”).

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- (4) Include information on the items required by Labor and Employment Article, §9-721, Annotated Code of Maryland:
    - (a) Loss of function, endurance, and range of motion; and
    - (b) Pain, weakness, and atrophy.
  - C. Numerical Ratings

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Middleton takes issue with each argument presented by the County. We will address Middleton's arguments as relevant in our analysis.

### **Analysis**

We do not find the County's contentions to be persuasive. In our view, addressing the merits of the appeal requires us to answer two questions. The first is whether the Commission erred when it implicitly decided that Middleton's 2014 request for permanent partial disability benefits was legally effective to toll the running of the statute of limitations on modification of the 2009 claim. We conclude that the Commission did not err. The second is whether the Commission erred when it awarded temporary total disability benefits in the 2009 case. We agree with Middleton that the Commission's choice to do so was a fair and common-sense way of efficiently resolving the questions before it.

In order to reach these conclusions, we must identify the "implicit decisions" that must have been part of the Commission's decision-making process. *See Trojan Boat*, 11 Md. App. at, 671.

#### 1.

The County's primary argument is that Middleton's 2014 request for permanent partial disability benefits was fatally defective because, the County asserts, Middleton failed to obtain a physician's written evaluation of permanent impairment prior to filing his request

for permanent partial disability benefits in 2014.<sup>6</sup> The County relies upon COMAR 14.09.09.02.02.B which states:

Prior 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 Regulation .03 of this chapter.

The difficulty with this argument is that it ignores this Court’s analysis and holding in *Dove v. Montgomery County Board of Education*, 178 Md. App. 702, 717 (2008). In that case, just as in this one, the County argued that § 9-731(b)’s five-year limitations period was not tolled by the filing of a request for modification unless the employee had already obtained all of the documentary medical evidence necessary to prove her case on the merits. *Id.* at 713. We did not agree. The Court explained:

The question presented by the instant appeal requires us to determine whether Section 9–736(b)<sup>[7]</sup> includes a requirement that a request for modification of an existing award must be accompanied, at the time of filing, by all necessary medical documentation supporting the claim.

• • •

The plain language of Section 9–736(b) does not specify any requirement of filing supporting documentation with a request for the modification of an award of compensation. Indeed, we find only two express requirements

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<sup>6</sup> As we have explained, Middleton obtained such an evaluation from Dr. Fetcher before the Commission hearing.

<sup>7</sup> Section 9-736(b) statute reads in pertinent part:

- (b)(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.

under Section 9–736(b): (1) that the modification must be applied for within five years after the latter of the date of the accident, the date of the disablement, or the last compensation payment; and, (2) that the Commission have justification for its ordered modification.

*Id.* at 714–15.

The Court further concluded that a claimant seeking benefits must have a “basis in fact, [that is] a reasonable basis for the claim at the time of filing.” *Id.* at 719. Middleton certainly had a basis in fact for his claim of permanent partial disability when he filed his request—the medical evidence makes it clear that he never fully recovered from the 2009 injury and, from what he knew at the time he filed his request in 2014, he had reached maximum medical improvement.

In order to get around our holding in *Dove*, the County asserts that COMAR 14.09.09.02.02.B<sup>8</sup> imposes a condition precedent upon an injured employee’s right *to file* a request for permanent partial disability benefits. Whatever the regulation might mean in other contexts, adopting the County’s interpretation in the present case would not be

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<sup>8</sup> COMAR 14.09.09.B. states

Prior 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 Regulation .03 of this chapter.



consistent with the plain language of § 7-736(b), which requires only that a claimant *file* a request for a modification within the statutory period.<sup>9</sup>

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<sup>9</sup> The County’s extremely expansive reading of COMAR 14.09.09.B. raises another issue. The Commission’s rule-making authority is set out in Lab. & Empl. § 9-701, which states in pertinent part (emphasis added):

Subject to this title, the Commission shall:

(1) adopt reasonable and proper regulations to govern the procedures of the Commission, which shall be as simple and brief as reasonably possible;

(2) determine the *nature and the form of an application* for benefits or compensation;

• • •

(4) regulate and provide for the nature and extent of evidence and proof and for the method of taking and providing evidence and proof to establish a right to compensation[.]

• • •

Section 9-701 authorizes the Commission’s to regulate the “nature and form” of an application for benefits. But there is nothing in § 9-701 that authorizes the Commission to modify the substantive provisions of the Workers’ Compensation Act itself. For this reason, the Board’s reliance on *Hranicka* is unavailing.

At issue in that case was a prior version of COMAR 14.09.02.02 which, in effect, (1) permitted a would-be claimant to file a claim form electronically as long as the claimant also filed a signed paper version of the form but (2) provided that a claim was not considered filed the Commission actually received the paper version of the claim form even if the claim had also been filed electronically. 443 Md. at 299. (The regulation has since been amended.)

Hranicka timely filed his claim form electronically but the paper version arrived at the Commission shortly after the deadline for filing his claim had expired. *Id.* at 294–95. The employer moved to dismiss the claim because it was not timely filed, and the Commission denied the request on the ground that the date of filing of the paper version of the form would relate back to the date that the electronic form had been filed. *Id.* at 294–95.

The Court of Appeals concluded that the Commission had erred. It held that there was nothing in the Commission’s regulations that permitted an untimely-filed paper version of a claim to relate back to the date that the electronic version of the claim had been filed. *Id.* at 301–02. *Hranicka* certainly stands for the proposition that the Commission cannot disregard its own regulations. But the County has pointed to no regulation other than

In order to award Middleton post-surgery temporary total disability benefits, the Commission must have implicitly decided that his 2014 request for permanent partial disability benefits was legally sufficient. The County has not convinced us that the Commission was in error in this regard.

2.

We turn to the second issue, which is whether the Commission erred when it awarded temporary total disability benefits in the 2009 case. We have previously discussed the County's contentions on this issue. Middleton sees the case in very different terms.

The first part of Middleton's argument focuses on notice and possible prejudice to the County. He asserts that, well in advance of the hearing before the Commission, he had filed an Issue in the 2012 case for surgery and temporary total disability benefits. Therefore, he reasons, at the time of the hearing, the County was on notice that it was subject to an award for permanent partial disability benefits (via the Issue filed in the 2009 case) or temporary total disability benefits (via the Issue filed in the 2012 case). The record fully supports these assertions and we do not understand the County to disagree with any of them.

Middleton argues that the County "was fully prepared to defend on both issues" at the hearing and that "the County's prepared argument against allowing the surgery and temporary total disability benefits under the 2012 claim would be exactly the same as it

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COMAR 14.09.09.B that would affect the outcome of this case. And, as we have explained, we do not agree with the County's construction of that regulation.

was once the Commission moved these issues to the 2009 claim.” We believe that these are valid points as regards factual matters.<sup>10</sup>

From these premises, Middleton argues that he:

could have proceeded on the issues of permanent partial disability under the 2009 claim and simply withdrawn his request for surgery and corresponding temporary total benefits under the 2012 claim. [Had he done so, he] would have received a permanency award in the 2009 claim, and then, subsequently, could have filed issues for surgery and temporary total disability benefits, producing the same outcome that was reached by amending the issues at the hearing. However, approaching the issues in this manner would have been a waste of the Commission’s resources and against judicial [sic] economy.

We do not agree with Middleton that, had he elected to withdraw his request for surgery and corresponding temporary total disability benefits, he would have inevitably prevailed on his claim for permanent partial disability benefits.<sup>11</sup> With that said, however, Middleton

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<sup>10</sup> In response to Middleton’s request for a rehearing, the County argued that his failure to raise the temporary total disability benefit issue at the hearing prevented it from arguing that limitations had run on his claim for temporary total disability benefits in the 2009 case. But this a legal and not a factual argument. The legal issues were fully discussed in the parties’ post-hearing letters to the Commission. We do not see how the County was prejudiced by the Commission’s decision to decide a legal question on the written legal arguments presented by the parties.

<sup>11</sup> In its reply brief, the County asserts that Middleton would have been “precluded” from proceeding with a permanent partial disability claim before the Commission because such a claim was contradicted by “the evidence [he] had in his own possession.” The evidence in question was Dr. Powers’ December 14, 2005 letter, in which he recommended additional surgery. We do not believe that Dr. Powers’ letter would have precluded, that is, barred as a matter of law, a hypothetical claim for permanent partial disability benefits. But it certainly would have made it more difficult to Middleton to prevail on such a claim.

has exposed a fatal weakness in the County's arguments, namely that all of the County contentions focus on what occurred, and did not occur, in the 2009 case and, for all practical purposes, ignore what happened in the 2012 case. The County does not explain why the Commission was required to cabin one proceeding from the other, especially after Middleton withdrew his request for permanent partial disability benefits.

Although an explanation of the Commission's reasoning would have been helpful, we are reasonably certain that it went something like this:

The parties and the Commission had proceeded for years under the assumption that the two injuries were distinct. Until December 2015, no medical professional had suggested that the 2012 injury was a manifestation of the lingering effects of the 2009 injury. until his December 2015 letter. Dr. Fechter concluded otherwise in his evaluation of Middleton in March 2015, as did Dr. Powers in his April 2015 evaluation. Certainly, Dr. Powers' belated conclusion created problems. But, at least as regards to Middleton's request for surgery and temporary total disability benefits, the problems were administrative and not substantive.

As Middleton points out in his brief, the Commission could have approved the surgery and the temporary total disability benefits to which he was unquestionably entitled in the 2012 case. This certainly would have delayed Middleton's receipt of the benefits and added to the Commission's case load. How such an approach would have benefitted the County is unclear.

Of course, the Commission docketed its order in the 2009 case and it did so at Middleton's request. The Commission could have reasoned that it was fair and just to treat the 2009 and 2012 cases as different sides of the same coin and that doing so would not prejudice the County because it was fully on notice, albeit in different cases, of Middleton's medical problems and his need for further treatment. Once the surgery was approved, Middleton had the right to temporary total disability benefits. To the extent that the Commission needed a legal principle to support its decision, the principle would be relation back.

Although the County sees the matter differently, we conclude that the Commission's decision in this case reflected its balancing of the unusual facts of the two cases with common sense and fairness. The Commission's decision is presumed to be correct. The County has not come close to identifying a legal error on the Commission's part because the County's arguments are based on the incorrect premise that what happened in the 2012 case was legally irrelevant to the Commission's decision.

We affirm the judgment of the circuit court and, in doing so, the decision of the Commission.

**THE JUDGMENT OF THE CIRCUIT  
COURT FOR MONTGOMERY COUNTY  
IS AFFIRMED. APPELLANT TO PAY  
COSTS.**