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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2007-2008

2060267

Millry Mill Company

v.

Jimmy L. Manuel

Appeal from Washington Circuit Court
(CV-01-161)

BRYAN, Judge.

Millry Mill Company appeals from a judgment of the trial court awarding Jimmy L. Manuel permanent-total-disability benefits pursuant to the Alabama Workers' Compensation Act, §

25-5-1 et seq., Ala. Code 1975. We affirm in part, reverse in part, and remand.

In November 1998, Manuel began working for Millry Mill as a trimmer operator in a lumber mill. As a trimmer operator, Manuel inspected boards and used a saw to trim defects from the boards. Manuel's job required him to lift and turn boards, and it involved repetitive motions of the hands, wrists, and arms. The owner of Millry Mill testified that a trimmer operator like Manuel processes between 5,000 and 6,000 boards per day, with each board measuring 10 board feet.[1] Manuel's supervisor testified that Manuel was required to lift and turn about half of the boards that he processed, i.e., about 2,500 to 3,000 boards daily. Manuel testified at trial that he began experiencing pain in his hands, shoulders, and neck in April 2000.

On November 14, 2001, Manuel sued Millry Mill for workers' compensation benefits, alleging that he had contracted carpal tunnel syndrome as a result of his employment with Millry Mill. Manuel's complaint alleged that

[1]A "board foot" is "a unit of quantity for lumber equal to the volume of a board 12 X 12 X 1 inches." Merriam-Webster's Collegiate Dictionary 137 (11th ed. 2003).

he had sustained work-related injuries to his hands, wrists, elbows, and shoulders. The complaint also stated a retaliatory-discharge claim; that claim is not an issue on appeal. Manuel subsequently amended his complaint to allege that he had sustained a work-related neck injury. Millry Mill moved for a partial summary judgment on April 21, 2004, and again on May 13, 2005, asserting, among other things, that Manuel's work with Millry Mill had not caused his injuries; the trial court denied both motions.

The trial court held a trial on April 25, 2006. On November 17, 2006, the trial court entered a judgment awarding permanent and total disability benefits to Manuel. In its judgment, the trial court stated, in pertinent part:

> "Manuel now suffers from both carpal tunnel syndrome and from a neck injury, both of which conditions have totally disabled him, and either of which conditions, standing alone and independently, would have caused him to become totally disabled.
>
> "... [T]he duties performed by Jimmy L. Manuel in the course of his employment, in particular, the repetitive lifting of lumber and the twisting and turning necessary to the performance of his duties, are the cause of both Mr. Manuel's carpal tunnel syndrome condition and his neck injury.
>
> "... [T]here was a direct cause-and-effect relationship between the heavy repetitious work that Mr. Manuel was required to perform at the Millry

> Mill sawmill and the rupture and tear of the anulus and the rupture of disc material against the spinal cord, which resulted in Mr. Manuel's neck injury.
>
> "....
>
> "... [F]ollowing the aforesaid injuries, Mr. Manuel became totally disabled, and continues to be fully disabled, from working at any employment for which he is qualified, or could become qualified."

On appeal, Millry Mill argues that the trial court erred (1) by finding that Manuel's work with Millry Mill caused his injuries; (2) by not treating Manuel's carpal tunnel syndrome as an injury to a scheduled member; (3) by denying its motions for a partial summary judgment; (4) by denying its motions to strike certain deposition testimony; and (5) by awarding certain costs to Manuel. We present these arguments in the order we will address them, not in the order Millry Mill presents them on appeal.

Section 25-5-81(e), Ala. Code 1975, provides the standard of review in a workers' compensation case:

> "(1) In reviewing the standard of proof set forth herein and other legal issues, review by the Court of Civil Appeals shall be without a presumption of correctness.
>
> "(2) In reviewing pure findings of fact, the finding of the circuit court shall not be reversed if that finding is supported by substantial evidence."

Substantial evidence is "evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved." West v. Founders Life Assurance Co. of Florida, 547 So. 2d 870, 871 (Ala. 1989).

Millry Mill argues that Manuel failed to present clear and convincing evidence that his neck injury and carpal tunnel syndrome arose out of and in the course of his employment, i.e., that those injuries were "work related." Injuries resulting from gradual deterioration or cumulative physical stress, as in this case, are "compensable only upon a finding of clear and convincing proof that those injuries arose out of and in the course of the employee's employment." § 25-5-81(c), Ala. Code 1975.[2] "Clear and convincing" evidence is

> "'evidence that, when weighted against evidence in opposition, will produce in the mind of the trier of fact a firm conviction as to each essential element of the claim and a high probability as to the

[2]Carpal tunnel syndrome may also be caused by a one-time acute trauma or accident. In such a case, the proper burden of proof is the preponderance of the evidence. Ex parte USX Corp., 881 So. 2d 437, 441-43 (Ala. 2003). In this case, we understand the trial court's judgment as finding that both Manuel's carpal tunnel syndrome and his neck injury were caused by gradual deterioration or cumulative physical stress.

> correctness of the conclusion. Proof by clear and convincing evidence requires a level of proof greater than a preponderance of the evidence or the substantial weight of the evidence, but less than beyond a reasonable doubt.'
>
> "To establish that a cumulative-physical-stress injury is compensable under the Workers' Compensation Act, the employee must establish both legal and medical causation by clear and convincing evidence. Valtex, Inc. v. Brown, 897 So. 2d 332, 334 (Ala. Civ. App. 2004); Safeco Ins. Co. v. Blackmon, 851 So. 2d 532 (Ala. Civ. App. 2002); and § 25-5-81(c), Ala. Code 1975. To establish legal causation, the employee must prove that 'the performance of his or her duties as an employee exposed him or her to a danger or risk materially in excess of that to which people are normally exposed in their everyday lives.' Ex parte Trinity Indus., Inc., 680 So. 2d 262, 267 (Ala. 1996). To establish medical causation, the employee must prove that the danger or risk to which the employee was exposed '"was in fact [a] contributing cause of the injury"' for which benefits are sought. Id. at 269 (quoting City of Tuscaloosa v. Howard, 55 Ala. App. 701, 318 So. 2d 729, 732 (Civ. 1975))."

Madix, Inc. v. Champion, 927 So. 2d 833, 837 (Ala. Civ. App. 2005).

The record on appeal contained evidence indicating that Manuel, while working for Millry Mill, lifted and turned approximately 2,500 to 3,000 boards daily and used a saw to trim defects from the boards. The trial court had before it sufficient evidence to find that Manuel presented clear and

convincing evidence that his employment exposed him to dangers materially in excess of the dangers that we all face in merely living, i.e., that Manuel established legal causation. See id.

Manuel also was required to establish, by clear and convincing evidence, medical causation, i.e., that the risks to which he was exposed while working for Millry Mill were a contributing cause of his injuries. Id. In considering whether Manuel had established medical causation, the trial court had before it the deposition testimony of several doctors who treated or examined Manuel: Dr. Arthur E. Wood, who treated Manuel twice in 2000; Dr. Steven Donald, who treated Manuel once in 2000; Dr John L. Hinton, a neurologist who treated Manuel several times in 2000-2001 and twice in 2004; Dr. Troy H. Middleton III, who performed a diskectomy on Manuel's neck in July 2000; Dr. William Fleet, a neurologist who treated Manuel three times in 2004 and once in 2005; and Dr. Joseph Ray, an orthopedic surgeon who examined Manuel once in 2004 and once in 2006.

Dr. Wood testified that he would "assume" that Manuel's repetitive work activities caused his carpal tunnel syndrome

if Manuel did indeed have that condition. Dr. Hinton testified that he did not know if Manuel's work activities with Millry Mill contributed to his carpal tunnel syndrome. Both Dr. Middleton and Dr. Donald testified that Manuel's work activities with Millry Mill could have caused his carpal tunnel syndrome. Dr. Donald also testified that, "in the absence of any other disease process," Manuel's work likely caused his carpal tunnel syndrome.

Dr. Fleet and Dr. Ray each testified that Manuel's work activities at Millry Mill caused or contributed to his carpal tunnel syndrome. Dr. Fleet testified:

> "Q. ... [D]o you have an opinion to a reasonable degree of medical certainty as to whether or not the carpal tunnel syndrome which you have diagnosed was caused or contributed to by [Manuel's] job at Millry Mill?
>
> "....
>
> "A. Yes, sir.
>
> "Q. And what is your opinion?
>
> "A. It was."

Dr. Ray testified:

> "Q. ... [D]o you have an opinion to a reasonable degree of medical certainty as to whether or not [Manuel's] carpal tunnel syndrome was caused

> by the work he was performing at [Millry Mill's] sawmill ...?
>
> "....
>
> "A. Yes.
>
> "....
>
> "Q. And what is that opinion?
>
> "A. I believe that it was related to his work at the mill."

Millry Mill contends that the difference in opinion among the physicians testifying in this case indicates that Manuel has failed to establish clear and convincing evidence of medical causation. However, in International Paper Co. v. Melton, 866 So. 2d 1158 (Ala. Civ. App. 2003), this court stated that it was not required

> "to conclude, as a matter of law, ... in each and every case where the trial court's record includes conflicting medical evidence on the issue of whether an employee's carpal tunnel syndrome is work related, including some medical evidence that the employee's carpal tunnel syndrome was not work related, that the employee has failed to present clear and convincing evidence that the injury was work related. To do so would be to improperly intrude on the trial court's role as fact-finder. Not only might the trial court choose, in an appropriate case, to give greater weight to contrary medical evidence (e.g., the testimony of one or more physicians who opine that the employee's injury did arise out of his work), it also might, in an appropriate case, give weight to the lay testimony

> presented, including that of the employee himself. ...
>
> "We note that '§ 25-5-81(c) does not require proof to an absolute certainty, but rather requires only clear and convincing proof.' Wal-Mart Stores, Inc. v. Kennedy, 799 So. 2d 188, 197 (Ala. Civ. App. 2001)."

866 So. 2d at 1167-68.[3]

In this case, the testimony of Dr. Wood, Dr. Hinton, Dr. Donald, and Dr. Middleton, taken together, tends to indicate the possibility that Manuel's employment with Millry Mill caused or contributed to his carpal tunnel syndrome. However, Dr. Fleet and Dr. Ray unequivocally testified that Manuel's work activities at Millry Mill caused his carpal tunnel syndrome. Based on the evidence presented in this case, the trial court had before it sufficient evidence to find that Manuel presented clear and convincing evidence that his employment was a contributing cause of his carpal tunnel syndrome, i.e., that Manuel established medical causation. See id.

[3]Millry Mill does not cite Melton in its principal brief. Although Manuel relies on Melton in his brief, Millry Mill does not address that case in its reply brief, much less ask us to reconsider our holding in that case.

Millry Mill also argues that the trial court should have treated Manuel's carpal tunnel syndrome as a permanent partial disability under the schedule provided in § 25-5-57(a)(3), Ala. Code 1975. However, Millry Mill never presented this argument to the trial court. "[An appellate court] cannot consider arguments advanced for the purpose of reversing the judgment of a trial court when those arguments were never presented to the trial court for consideration or were raised for the first time on appeal." State Farm Mut. Auto. Ins. Co. v. Motley, 909 So. 2d 806, 821 (Ala. 2005). We note also that the trial court found that, regardless of Manuel's carpal tunnel syndrome, Manuel was permanently and totally disabled as a result of the injury to his neck, a body part not listed in the schedule.

In its judgment, the trial court found that both Manuel's carpal tunnel syndrome and his neck injury "have totally disabled him, and either ... condition[], standing alone and independently, would have caused him to become totally disabled." Other than its argument that Manuel's carpal tunnel syndrome should be treated as a scheduled injury, Millry Mill does not challenge the trial court's finding that

that condition acting alone rendered Manuel permanently and totally disabled.[4] Therefore, because we conclude that the trial court did not err in finding that Manuel's work with Millry Mill caused his carpal tunnel syndrome, rendering him permanently and totally disabled, we do not address whether Manuel's work also caused his neck injury.

Millry Mill also argues that the trial court erred in denying its motions for a partial summary judgment.

> "'[W]e do not review a trial court's denial of a summary-judgment motion following a trial on the merits. See Grayson v. Hanson, 843 So. 2d 146 (Ala. 2002); Superskate, Inc. v. Nolen, 641 So. 2d 231, 233 (Ala. 1994); see also Lind v. United Parcel Service, Inc., 254 F.3d 1281, 1283-84 (11th Cir. 2001).'"

Beiersdoerfer v. Hilb, Rogal & Hamilton Co., 953 So. 2d 1196, 1205 (Ala. 2006) (quoting Mitchell v. Folmar & Assocs., LLP, 854 So. 2d 1115, 1116 (Ala. 2003)).

Citing Superskate, Inc. v. Nolen, 641 So. 2d 231 (Ala. 1994), Millry Mill argues that this case presents an exception to the general rule that an appellate court does not review

[4]As we have noted, we do not consider whether the carpal tunnel syndrome should have been treated as a scheduled injury.

the denial of a summary-judgment motion after a trial on the merits. In Superskate, our supreme court stated:

> "Ordinarily, any issue as to the denial of the summary judgment motion would be moot, because the sufficiency of the evidence at trial would be the significant question on appeal. However, a movant who conclusively establishes that a summary judgment is appropriate, with no pertinent opposition from the nonmovant, is 'entitled to a judgment as a matter of law,' and '[t]he judgment sought shall be rendered forthwith,' Rule 56(c)(3), Ala. R. Civ. P. The denial of a summary judgment is not appealable, and if the trial court refuses to issue the statement provided for by Rule 5(a), Ala. R. App. P. (relating to appeals by permission), the movant has no opportunity for review other than an appeal after an adverse judgment. Therefore, it is at least arguable that the later appeal could challenge the correctness of the denial of a summary judgment.
>
> "Furthermore, in this case, the plaintiffs' evidence in opposition to the summary judgment motions was somewhat different from their evidence at trial, so the question of sufficiency differs at the two stages. To say that a judgment should have been entered against the plaintiff for failure at an early stage to produce sufficient probative evidence may be an exaltation of form over substance where the plaintiff has produced sufficient evidence at trial. On the other hand, if it appears that the plaintiff has changed testimony or other evidence based on experience gained during the proceedings on the motion for summary judgment, the defendant may have a legitimate argument that the case should never have gone to trial."

641 So. 2d at 233-34 (footnote omitted).

Millry Mill contends that Manuel changed his testimony between the filing of the motions for a partial summary judgment and the trial. In moving for a partial summary judgment, Millry Mill submitted Manuel's 2002 deposition testimony, in which he testified that he did not remember experiencing pain in his neck while working for Millry Mill. At trial in 2006, Manuel testified that he began to experience pain in his neck while "flipping boards" at work. However, Manuel's changed testimony is not a material change that would indicate an error by the trial court in allowing the case to be tried. Regardless of Manuel's changed testimony regarding his neck injury, the trial court found that Manuel's carpal tunnel syndrome alone was sufficient to render him permanently and totally disabled. Our supreme court has stated: "We caution that it would be a rare case where this Court would reverse the denial of a summary judgment when the nonmovant has produced sufficient evidence at trial to survive a [motion for a judgment as a matter of law]." Superskate, 641 So. 2d at 234. We conclude that this is not the rare case contemplated by Superskate in which we would reverse the

denial of a summary-judgment motion after a trial on the merits.

Millry Mill also argues that the trial court erred in admitting Dr. Fleet's and Dr. Ray's deposition testimony. In separate motions, Millry Mill moved the trial court to strike Dr. Fleet's and Dr. Ray's testimony with respect to "the cause of [Manuel's] neck injury."[5] We read those motions as seeking to strike Dr. Fleet's and Dr. Ray's testimony insofar as it addressed the cause of Manuel's neck injury. Millry Mill did not move the trial court to strike Dr. Fleet's and Dr. Ray's testimony insofar as that testimony addressed Manuel's carpal tunnel syndrome. In its judgment, the trial court found that either Manuel's carpal tunnel syndrome or his neck injury "standing alone and independently, would have caused him to become totally disabled." Other than its argument that Manuel's carpal tunnel syndrome is a scheduled injury, Millry

[5]The trial court, in its judgment, stated that "all of the medical witnesses whose deposition testimony has been entered into the Record ... are qualified to testify as expert witnesses on the matters to which they testified," and it stated that the challenge to Dr. Ray's testimony "has been rejected." Therefore, the record indicates that the trial court explicitly denied the motion to strike Dr. Ray's testimony and implicitly denied the motion to strike Dr. Fleet's testimony.

Mill does not challenge the trial court's finding that, regardless of his neck injury, Manuel's carpal tunnel syndrome rendered him permanently and totally disabled. As we have noted, the trial court did not err in concluding that Manuel's work with Millry Mill caused his carpal tunnel syndrome. Because Millry Mill did not move to strike Dr. Fleet's and Dr. Ray's testimony with respect to the cause of Manuel's carpal tunnel syndrome, any error by the trial court in failing to strike those doctors' testimony insofar as it addressed the causes of Manuel's neck injury would be harmless error. See Rule 45, Ala. R. App. P. Accordingly, we pretermit further discussion of this issue.

Finally, Millry Mill argues that the trial court erred in awarding Manuel costs, with the exception of costs awarded in the amount of the filing fee. Section 25-5-89, Ala. Code 1975, provides, in part, that "[c]osts may be awarded by [the trial] court in its discretion, and, when so awarded, the same costs shall be allowed, taxed and collected as for like services and proceedings in civil cases." "'[W]here a cost is not substantiated by an "invoice or other evidence," this court has held that a trial court abused its discretion in

awarding the prevailing employee payment of that cost.'" Reeves Rubber, Inc. v. Wallace, 912 So. 2d 274, 281-82 (Ala. Civ. App. 2005) (quoting Bostrom Seating, Inc. v. Adderhold, 852 So. 2d 784, 799 (Ala. Civ. App. 2002), citing in turn Hooker Constr., Inc. v. Walker, 825 So. 2d 838, 845 (Ala. Civ. App. 2001)). The record contains no invoices or other evidence to substantiate Manuel's costs. Accordingly, we conclude that the trial court's judgment is due to be reversed insofar as it awards Manuel costs in the amount of $11,751.65; however, we except from our conclusion in this regard the filing fee in the amount of $210 because a trial court may take judicial notice of that cost. See Bostrom Seating, Inc. v. Adderhold, 852 So. 2d at 799.

Manuel contends that Millry Mill is precluded from challenging the award of costs because, he contends, Millry Mill conceded that it owed the costs. Manuel argues that Millry Mill implicitly made this concession by moving the trial court to set a supersedeas bond in an amount that accounted for the amount of costs awarded in the judgment. We do not read Millry Mill's motion for a supersedeas bond as a concession precluding it from arguing on appeal that the trial

court erred in awarding certain costs. Manuel also argues that Millry Mill stipulated that it owed the awarded costs in a letter from Millry Mill's attorney to Manuel's attorney. However, because the record does not contain a copy of that letter, we may not consider the letter's purported contents. See Grider v. Grider, 578 So. 2d 1363, 1364 (Ala. Civ. App. 1991) ("An appellate record cannot be factually enlarged or altered by factual allegations found in a party's brief."). The record does not indicate that Millry Mill conceded that it owed the full amount of the costs awarded by the trial court.

In conclusion, we reverse the judgment of the trial court insofar as it awarded Manuel costs in excess of the filing fee in the amount of $210, and we remand the case. In all other respects, we affirm the judgment.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED WITH INSTRUCTIONS.

Pittman, J., concurs specially.

Thompson, P.J., and Thomas, J., concur in the result, without writing.

Moore, J., recuses himself.

PITTMAN, Judge, concurring specially.

I concur in the main opinion. Although I dissented in International Paper Co. v. Melton, 866 So. 2d 1158 (Ala. Civ. App. 2003), my dissent in that case was predicated upon the speculative nature of the medical evidence supporting the trial court's finding of causation. In this case, however, two medical professionals unequivocally tied Manuel's carpal tunnel syndrome to his work, and the trial court could properly have found that evidence "clear and convincing" so as to meet the standard set forth in § 25-5-81(c), Ala. Code 1975.