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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2008-2009

2061070

Norandal U.S.A., Inc.

v.

Welton Graben

Appeal from Jackson Circuit Court
(CV-99-361)

MOORE, Judge.

Norandal U.S.A., Inc. ("the employer"), appeals from a judgment awarding Welton "Sonny" Graben ("the employee") permanent-total-disability benefits under the Alabama Workers'

Compensation Act, Ala. Code 1975, § 25-5-1 et seq., on account of a right-knee injury arising out of and in the course of his employment. We affirm the trial court's judgment.

Procedural History

On November 2, 1999, the employee filed a complaint against the employer seeking workers' compensation benefits. In that complaint, the employee alleged that he had twisted his right knee and had injured his "right leg and knee" on July 10, 1997, due to an accident arising out of and in the course of his employment with the employer. On November 12, 1999, the employer filed an answer generally denying liability for the injury.

The employee filed an amended complaint on January 29, 2002. In the amended complaint, the employee reasserted his earlier claims, added a second defendant, and alleged further that he had developed dermatitis and "other dermatological inflammations or disorders" from repeated exposure to formaldehyde and other chemicals or allergens in the course of his employment up to August 2001.[1] The employer filed an

[1]The record shows that on February 15, 1999, Scottsboro Aluminum, L.L.C., took over ownership of the plant formerly owned by the employer. In his amended complaint, the employee claimed that he developed dermatitis while employed by

answer to the amended complaint on February 4, 2002, again denying liability.

After an ore tenus hearing on May 29, 2007, the trial court entered a judgment on July 12, 2007, awarding the employee permanent-total-disability benefits for his right-knee injury. The employer timely appealed.[2]

Facts

The facts pertinent to this appeal show that on July 10, 1997, the employee twisted his knee while pushing a drum of paint at work. The initial treating physician diagnosed a medial-meniscus tear and the aggravation of an arthritic condition in the employee's right knee. The employee eventually underwent three surgeries for those injuries,

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Scottsboro in 2001. Although Scottsboro never answered the amended complaint, Scottsboro did file a suggestion of bankruptcy on February 5, 2002, and notified the trial court that all actions against it had been stayed by order of the bankruptcy court. The trial court never adjudicated the dermatitis claim against Scottsboro. That claim is not before the court on this appeal. Therefore, the facts relating to that claim will not be discussed further.

[2]The appeal was from a nonfinal judgment because of the pending claim against Scottsboro. See note 1, supra. However, this court reinvested the trial court with jurisdiction to enter a Rule 54(b), Ala. R. Civ. P., order certifying the judgment as final, which the trial court did on August 25, 2007.

including an arthroscopic surgery on November 10, 1997, a partial knee replacement on October 24, 2001, and a "debridement and synovectomy of medial compartment, suprapatellar pouch and medial gutter" and "chondroplasty of the patellafemoral joint" on March 10, 2004. According to the employee and some of the medical records introduced into evidence, those surgeries did not eliminate the constant pain in the employee's right knee or the instability in the joint that sometimes caused his right knee to buckle.

The employee testified that on April 3, 2004, three weeks after his last surgery, his right knee gave way causing him to fall to the ground while on a personal errand. The employee testified that he initially fell on his right hand, injuring his right shoulder. He then fell on his left hip, causing severe pain in that area, as well as pain in his lower back. The employee was eventually diagnosed with a rotator-cuff tear, a contused left hip, and lumbar radiculopathy with associated left-foot drop. The left-hip problem resolved quickly, but the shoulder and lower-back problems persisted to the point that the employee underwent fusion surgery on his lumbar spine on March 30, 2005, and shoulder surgery on March

2, 2006. The employee did not inform the employer of the April 3, 2004, fall or ever file a claim on account of that accident.

The employee's attorney referred the employee to Dr. Shelinder Aggarwal, an unauthorized physician, for a medical examination on July 17, 2006. The employee related that he used a cane to ambulate, and Dr. Aggarwal observed that the employee had an antalgic gait. Dr. Aggarwal testified that the way the employee walked indicated that the employee had pain in his right leg. According to Dr. Aggarwal, that pain would likely cause the employee pain in the low-back and hip area and would also preclude the employee from running, crawling, bending at the knee, squatting, and stooping.

At trial, the employee testified that his right knee continues to buckle and that he has poor balance. The employee stated that he cannot stoop or bend very much. He also testified that he cannot stand or walk very long without pain and that he has been using a cane, crutch, or walking stick since 2005. The employee testified that when he puts his right knee down, he feels severe pain from his foot to his lower back. His pain also extends from his right knee into

his low back and hip. The employee rated his right-knee pain as 7 out of 10, with 10 being the worst. He also testified that the only time he gets relief from his right-knee pain is when he lays down and rests, as he does for two to three hours every day. Any active use of the right knee worsens his pain.

Issue on Appeal

The sole issue on appeal is whether the trial court erred in awarding the employee nonscheduled permanent-total-disability benefits for his right-knee injury. The employer first contends that the trial court erred as a matter of law in awarding the employee nonscheduled benefits on account of his lower-back and right-shoulder injuries sustained in the April 3, 2004, fall. The employer secondly argues that the trial court erred in awarding nonscheduled benefits on account of what the trial court described in its judgment as "severe, throbbing, chronic, and sometimes sharp" pain in the employee's right knee that persists "even though [the employee] does not work and refrains from using the right leg to the extent he reasonably can do so...." See Masterbrand Cabinets, Inc. v. Johnson, 984 So. 2d 1136, 1144-45 (Ala. Civ. App. 2005), affirmed, Ex parte Masterbrand Cabinets, Inc., 984

So. 2d 1146 (Ala. 2007). On the other hand, the employee maintains that, even if the trial court erred in awarding nonscheduled benefits for the reasons set out in its judgment, this court may affirm its judgment on other valid grounds.

Standard of Review

"In reviewing pure findings of fact, the finding of the circuit court shall not be reversed if that finding is supported by substantial evidence." Ala. Code 1975, § 25-5-81(e)(2). "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.'" Ex parte Trinity Indus., Inc., 680 So. 2d 262, 268 (Ala. 1996) (quoting West v. Founders Life Assurance Co. of Florida, 547 So. 2d 870, 871 (Ala. 1989)). See also Ala. Code 1975, § 12-21-12(d).

Conclusions of law are reviewed without a presumption of correctness. Ala. Code 1975, § 25-5-81(e)(1). So long as due process is satisfied, see Liberty Nat'l Life Ins. Co. v. University of Alabama Health Servs. Found., P.C., 881 So. 2d 1013, 1020 (Ala. 2003), this court may affirm a correct judgment for any reason, even if the trial court did not rely

on that reason in reaching its judgment. Chadwick Timber Co. v. Philon, [Ms. 2050697, March 16, 2007] ___ So. 2d ___, ___ (Ala. Civ. App. 2007).

Legal Analysis

For purposes of workers' compensation, a knee injury is treated as an injury to the leg. See, e.g., Wolfe v. Dunlop Tire Corp., 660 So. 2d 1345 (Ala. Civ. App. 1995). Injuries to the leg are ordinarily compensated under § 25-5-57(a)(3), Ala. Code 1975. Id. Pursuant to the schedule contained therein, an employee is entitled to 200 weeks of compensation for the total loss of use of a leg, §§ 25-5-57(a)(3)a.16. & 25-5-57(a)(3)d., Ala. Code 1975, but the number of weeks of compensation is reduced proportionately for a partial loss of use of the leg. See § 25-5-57(a)(3)d., Ala. Code 1975.

The compensation for the loss of use of a leg established in the schedule is intended by statute to be "in lieu of all other compensation." § 25-5-57(a)(3)d., Ala. Code 1975. However, by caselaw, an injury to the knee may be compensated outside the schedule "'if the effects of the loss of the member extend to other parts of the [employee's] body and interfere with their efficiency.'" Ex parte Drummond Co., 837

So. 2d 831, 834 (Ala. 2002) (quoting 4 Lex K. Larson, Larson's Workers' Compensation Law § 87.02 (2001)).

> "Based on the holding in Ex parte Jackson, [[Ms. 1061180, Nov. 16, 2007] ___ So. 2d ___ (Ala. 2007)], in order to prove that the effects of the injury to the scheduled member 'extend to other parts of the body and interfere with their efficiency,' the employee does not have to prove that the effects actually cause a permanent physical injury to nonscheduled parts of the body. Rather, the employee must prove that the injury to the scheduled member causes pain or other symptoms that render the nonscheduled parts of the body less efficient."

Boise Cascade Corp. v. Jackson, [Ms. 2051041, May 2, 2008] ___ So. 2d ___, ___ (Ala. Civ. App. 2008). In order to prove that the loss of a member "interferes with the efficiency" of other parts of his or her body, an employee must prove that the normal effective functioning of another part of his or her body has been hindered or impeded due to the loss of the member. Id.

The trial court found that the injury to the employee's right knee caused by the July 10, 1997, work-related accident weakened that knee. As a result of that weakness, on April 3, 2004, the employee's right leg buckled and he fell, injuring his lower back and right shoulder. Under Alabama law, injuries received from a fall due to a leg weakened by a work-

related injury are considered a direct and natural consequence of the original, compensable injury and are themselves injuries covered by the workers' compensation laws. See, e.g., Erwin v. Harris, 474 So. 2d 1125, 1127 (Ala. Civ. App. 1985). However, an employee may only recover compensation for such injuries by complying with the notice statute and the statute of limitations. See Gulf States Steel, Inc. v. White, 742 So. 2d 1264, 1267-68 (Ala. Civ. App. 1999); and Fort James Operating Co. v. Crump, 947 So. 2d 1053, 1067-68 (Ala. Civ. App. 2005).

In this case, the trial court concluded that the injuries the employee received in the April 3, 2004, fall were a direct and natural consequence of the original, compensable right-knee injury but that the employee could not recover compensation for those injuries. In his brief, and again at oral argument, the employee conceded the correctness of that legal conclusion. Based on that concession and the fact that the employee did not file a cross-appeal as to that issue, the trial court's conclusion is now the law of the case. See G.E.A. v. D.B.A., 920 So. 2d 1110, 1115 (Ala. Civ. App. 2005) (quoting Bagley ex rel. Bagley v. Creekside Motors, Inc., 913

So. 2d 441, 445 (Ala. 2005), quoting in turn Southern United Fire Ins. Co. v. Purma, 792 So. 2d 1092, 1094 (Ala. 2001), quoting in turn Blumberg v. Touche Ross & Co., 514 So. 2d 922, 924 (Ala. 1987)) ("'"'Under the doctrine of the "law of the case," whatever is once established between the same parties in the same case continues to be the law of that case, whether or not correct on general principles, so long as the facts on which the decision was predicated continue to be the facts of the case.'"'").

Despite its conclusion that the employee could not recover additional compensation on account of the injuries he received in the April 3, 2004, fall, the trial court awarded the employee additional compensation outside the schedule on the theory that the injury to the right knee extended to and interfered with the efficiency of the employee's lower back and right shoulder as a result of the April 3, 2004, fall. The award of additional, nonscheduled benefits on account of the lower-back and right-shoulder injuries received in the April 3, 2004, violates the law of the case.

In Ex parte Fort James Operating Co., 905 So. 2d 836 (Ala. Civ. App. 2004), the worker injured his knees due to

several work-related accidents. The worker subsequently fell outside the course of his employment and injured his lower back and shoulder. The worker filed a workers' compensation claim for the knee injuries and for his lower-back injury; he later withdrew the claim for the lower-back injury. The employer filed a motion for a summary judgment arguing that the only injuries claimed by the worker were the injuries to his knees and that the worker had received all the compensation that was due him under the schedule for those injuries. The week before trial, the worker moved to continue the case and moved to amend his complaint to reinstate his lower-back-injury claim and, for the first time, to assert a claim for his shoulder injury. After the circuit court granted both motions, the employer filed a petition for a writ of mandamus, which this court granted. 905 So. 2d at 837-41. This court held that the worker had no good cause to amend his complaint, which pursuant to Rule 15, Ala. R. Civ. P., is required when an amendment is filed within 42 days of trial. 905 So. 2d at 843. This court ordered the circuit court to vacate its order allowing the worker to amend his complaint. 905 So. 2d at 845.

After this court issued the writ, the circuit court vacated its order. The employer then re-filed its motion for a summary judgment. In opposition to the summary-judgment motion, the worker argued that even though he could not recover any compensation for the injuries to his lower back on the basis of a separate claim, he could still present evidence of those injuries in order to prove that the effect of his knee injuries extended to other parts of his body for the purpose of taking the knee injuries outside the schedule. After the circuit court denied the employer's motion for a summary judgment, the employer again petitioned this court for a writ of mandamus, arguing that the circuit court was not following the law of the case by allowing the worker to prove injuries for which he had no viable claim. This court granted the petition for a writ of mandamus and directed the circuit court to enter a summary judgment for the employer because the court could not consider the injuries received in the fall for which the employee had no viable claim. Ex parte Fort James Operating Co., (No. 2050166), 981 So. 2d 1183 (Ala. Civ. App. 2006) (table).

In accordance with Ex parte Fort James, we conclude that the trial court erred in considering the injuries the employee received in the April 3, 2004, fall in determining whether the right-knee injury extended to and interfered with the efficiency of other parts of the employee's body.

During oral argument, the employee asserted that, even if he could not recover nonscheduled benefits on account of the injuries caused by the April 3, 2004, fall, the judgment of the trial court should be affirmed because the evidence shows that his right-knee injury has altered his gait and caused impairment to his lower back and hip independent of the April 3, 2004, fall. See Boise Cascade Corp. v. Jackson, ___ So. 2d at ___, and Fort James Operating Co. v. Irby, 895 So. 2d 282 (Ala. Civ. App. 2004), rev'd on other grounds, Ex parte Fort James Operating Co., 895 So. 2d 294 (Ala. 2004), on remand, 895 So. 2d 298 (Ala. Civ. App. 2004), appeal after remand, 911 So. 2d 727 (Ala. Civ. App. 2005). Because the parties clearly litigated the exclusivity of the schedule throughout the trial-court proceedings, we may affirm the judgment on the ground asserted by the employee if the evidence in the record

affirmatively supports that legal theory. Chadwick Timber Co. v. Philon, ___ So. 2d at ___.

The trial court specifically found that the employee had developed "an extremely altered gait due to the weakness and buckling of his right leg." Substantial evidence supports that finding. The employee testified that, since his July 10, 1997, accident, he has experienced weakness and buckling in his right knee. The medical records show that the employee complained of that problem before his last knee surgery in March 2004. According to the employee, that surgery did not alleviate the buckling problem, and that problem had continued up to the time of trial. The employee testified that in 2005 he started using a walking stick or a crutch to help him walk and that he had begun using a cane several months before trial. In the report of his examination of the employee on July 17, 2006, Dr. Aggarwal documented that the employee walked very slowly and had "an antalgic gait with decreased stance phase time on the right lower extremity." In his deposition, Dr. Aggarwal explained that because the employee experiences increased pain in his right knee when walking, he

spends less time on the right-lower extremity, resulting in an abnormal gait.

The employee testified that the pain from his right knee extends into his low back and hip. The employee stated that prolonged walking increases the pain in his right knee, low back, and hip. Dr. Aggarwal testified that the employee's antalgic gait would likely cause the employee to have pain in his low back and hip because the unusual gait puts more strain on the joints in those areas of the body. That evidence, which is not refuted, indicates that the injury to the right knee extends to the low back and hip and causes pain in those nonscheduled parts of the body. See Ex parte Drummond Co., 837 So. 2d at 834.

The employee testified that, after prolonged standing or walking, the pain increases in his right knee, lower back, and hip so that he has to rest, first in a seated position, then in a reclining position, and then back into a standing position. The employee made similar complaints to his treating physicians, which are documented in their most recent records. The record does not contain any evidence disputing the employee's testimony. Consequently, the record

affirmatively discloses that the effects of the employee's right-knee injury impede or hinder the normal functioning of his lower back and hip. Boise Cascade Corp. v. Jackson, ___ So. 2d at ___.

Based on the undisputed evidence in the record, we find that the judgment of the trial court is due to be affirmed on the basis that the injury to the employee's right knee has extended to and interfered with the efficiency of his lower back and hip. Because we are affirming the judgment on the ground that the Drummond exception applies, we do not address the employer's contentions regarding the so-called pain exception to the schedule.

AFFIRMED.

Thompson, P.J., and Pittman, Bryan, and Thomas,[3] JJ., concur.

[3]Although Judge Thomas did not sit for oral argument of this case, she has viewed the video recording of that oral argument.