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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2018-2019

2170873

City of Gadsden

v.

Lillie Billingsley

Appeal from Etowah Circuit Court
(CV-10-900283.80)

PITTMAN, Judge.

This is the second appeal to reach this court from an action brought under the Alabama Workers' Compensation Act ("the Act"), Ala. Code 1975, § 25-5-1 et seq., that was commenced in June 2010 by Lillie Billingsley ("the employee")

2170873

in the Etowah Circuit Court against the City of Gadsden ("the employer") and that arose from a work-related August 2008 automobile collision. See Billingsley v. City of Gadsden, 189 So. 3d 738 (Ala. Civ. App. 2015).

In our opinion in the first appeal, we noted that the employee's complaint had sought benefits under the Act based upon averments that she "had suffered 'injuries to her [r]ibs, back, legs, headaches [sic], [and] shoulder,' as well as suffering a 'closed head injury' and from 'post traumatic stress syndrome,'" but that the Etowah Circuit Court's judgment from which the employee was then appealing, which had been entered after an ore tenus proceeding, had determined "'that the left shoulder claim only arises out of [the employee's] employment'" and had awarded benefits based upon a 25% impairment rating to that shoulder. 189 So. 3d at 739-40, 743. The employee raised as issues in the first appeal whether the Etowah Circuit Court had erred (1) "in having sustained her claim as to only her left shoulder" and (2) "in awarding permanent-partial-disability benefits based solely upon its 25% physical-impairment rating as to her shoulder." 189 So. 3d at 740.

2170873

In the first appeal, this court affirmed the Etowah Circuit Court's judgment as to the first issue raised by the employee, noting that the record in that appeal "contain[ed] substantial evidence to the effect that the employee's claimed injuries to parts of the body other than her left shoulder and her mental disorders alleged to have stemmed from the automobile collision were not, in fact, caused by the collision" and concluding that, "as to the [Etowah Circuit Court]'s determination that only the employee's left-shoulder injury stems from the employment and is compensable as a permanent partial disability under the Act, we [were] constrained by the applicable standard of review to affirm the judgment." 189 So. 3d at 744, 745. We reversed the Etowah Circuit Court's judgment, however, as to the second issue raised by the employee, observing that, because the employee's left-shoulder injury was not an injury to a scheduled member under the Act (and the record did not indicate that the employee had returned to work at a wage level equaling or exceeding her preinjury wage), any award of compensation to the employee could only properly be based on the employee's loss of ability to earn and not her physical-impairment

2170873

rating. See 189 So. 3d at 745-46. The narrow breadth of our holding was underscored in our mandate:

"... [W]e reverse the [Etowah Circuit Court]'s judgment insofar as it awards the employee permanent-partial-disability benefits under the Act, and we remand the cause for [that] court to determine the extent, if any, to which the employee's left-shoulder injury has affected her ability to earn income and to award the employee benefits in accordance with that determination. In all other respects, the judgment is affirmed."

189 So. 3d at 746. Neither party sought rehearing of this court's decision pursuant to Rule 40, Ala. R. App. P., nor did either party seek further review of this court's decision by petitioning our supreme court for a writ of certiorari pursuant to Rule 39, Ala. R. App. P.

The record in this appeal reflects that, on remand from this court, the Etowah Circuit Court conducted a "scheduling conference," after which that court entered an order on October 20, 2015, directing the parties "to submit proposed orders within thirty (30) days." It appears from the electronic case-action-summary sheet that a proposed order or judgment was timely submitted by counsel for the employer but that counsel for the employee did not submit any proposed order or judgment within the period specified by the Etowah

2170873

Circuit Court; the record does not indicate that the Etowah Circuit Court took any action on the employer's filing.

On May 1, 2018, the Etowah Circuit Court entered an order again directing counsel for each party to prepare and to file electronically a proposed order or judgment and specifying that those proposals be submitted within 10 days. The record indicates that proposed judgments were submitted by both counsel for the employer and counsel for the employee in response to that order. The proposed "amended findings of fact, conclusions of law and final judgment" submitted by counsel for the employer contained a provision reiterating the Etowah Circuit Court's previous determination, affirmed by this court in the first appeal, that "the left shoulder claim only arises out of [the employee's] employment," but specifying, in response to the instructions of this court on remand, that the employee's left-shoulder injury had caused a permanent partial disability that, "[c]onsidering such factors as [her] age, educational background, work experience, medical situation, pain complaints, and hiring bias," had caused a 25% loss in her ability to earn income. In contrast, the proposed judgment submitted by counsel for the employee contained

2170873

suggested determinations to the effect that the employee, because of injuries to "her left shoulder, neck, [and] lower back" and her "psychological problems caused by the August 11, 2008," collision, "lost 100% of her ability to earn a living." On May 17, 2018, the Etowah Circuit Court entered a judgment in substantial conformity with the proposed judgment submitted by counsel for the employee.

The employer appeals from the Etowah Circuit Court's May 17, 2018, judgment. We find dispositive the first of the two issues raised by the employer: whether the judgment entered by the Etowah Circuit Court on remand from this court's judgment in the previous appeal conforms to the mandate of this court. We agree with the employer's contention that the May 17, 2018, judgment of the Etowah Circuit Court does not so conform.

In Dodson v. Atrax Division of Wallace-Murray Corp., 437 So. 2d 1294 (Ala. Civ. App. 1983) ("Dodson I"), this court reviewed the correctness of a trial court's judgment denying an award of workers' compensation benefits to a claimant who had contracted bronchitis during her employment. We concluded in Dodson I "that there [was] no reasonable view of the evidence that support[ed] the conclusion of law expressed by

2170873

the learned trial judge that the 'disease' did not result from conditions to which [the claimant had been] exposed at work," and this court remanded the cause "for proceedings not inconsistent with" that holding. 437 So. 2d at 1296, 1298. However, on remand from this court's decision in Dodson I, the pertinent defendant's insurer refused to pay the claimant any benefits, and the trial court ordered that a new trial would take place; the claimant then petitioned for a writ of mandamus directing the trial court, on the authority of Dodson I, to enter a judgment in her favor and award her benefits based upon her impaired earning capacity. Ex parte Dodson, 459 So. 2d 884, 884-85 (Ala. Civ. App. 1984) ("Dodson II"). This court granted the claimant's petition in Dodson II, rejecting the defendant's position that it was entitled "to reopen the record in an attempt to present new and additional evidence on its behalf," and we opined that the trial court was "limited to disposing of the case in accordance with the directions given to it by this court." 459 So. 2d at 885.

We applied our holding in Dodson II in a case cited by the employer in its appellate brief, City of Gadsden v. Johnson, 891 So. 2d 903 (Ala. Civ. App. 2004), in which the

2170873

Etowah Circuit Court had initially entered a judgment determining that a workers' compensation claimant had sustained a 90% loss of earning capacity and a 90% vocational impairment as a result of an alleged February 1993 work-related accident, but this court had reversed that judgment because, among other things, the record did not support a connection between the February 1993 accident and the claimant's subsequent surgeries. 891 So. 2d at 904. On remand, the Etowah Circuit Court, over the objection of the claimant's employer, conducted a new trial and entered a new judgment determining that an October 1993 accident had aggravated the claimant's injury that had been sustained in the February 1993 accident and that the claimant's "injuries" had resulted in a 55% loss of earning capacity and a 55% vocational impairment. 891 So. 2d at 905. After discussing the holdings of Dodson II and other cases regarding the scope of trial-court proceedings after remand from a judgment of an appellate court, this court in Johnson concluded that the Etowah Circuit Court "was not free to conduct a new trial that addressed, at least in part, the [February 1993] injury" and that the Etowah Circuit Court's new judgment had improperly

2170873

determined the claimant "to have suffered a 55% disability based on" two injuries. 891 So. 2d at 906. We directed the Etowah Circuit Court in Johnson to "determine, based on the evidence presented to it at the original trial, the level, if any, of [the claimant's] disability as a result of the [February 1993] ... accident." 891 So. 2d at 906-07.

Still more recently, in Honda Manufacturing of Alabama, LLC v. Alford, 47 So. 3d 1283 (Ala. Civ. App. 2010) ("Alford II"), which also involved a dispute between an employee and an employer regarding benefits payable under the Act, this court addressed whether a judgment entered by the Etowah Circuit Court after this court's reversal, in part, of that court's previous judgment in Honda Manufacturing of Alabama, LLC v. Alford, 6 So. 3d 22 (Ala. Civ. App. 2007) ("Alford I"), was in conformity with Alford I. The Etowah Circuit Court's previous judgment had awarded the employee permanent-total-disability benefits based upon its determinations that, among other things, "the employee's work-related knee injury had resulted in a subsequent ... ruptured lumbar disk[]" and that "the knee and back injuries together had inhibited the employee's ability to perform certain job functions and placed additional

2170873

physical restrictions and limitations on his activities." Alford II, 47 So. 3d at 1284. In Alford I, we reversed that aspect of the judgment, concluding that the employee's injury fell within the schedule of members under the Act and that the Etowah Circuit Court was therefore, on remand, required to calculate the employee's scheduled disability benefits without consideration of any evidence of vocational disability. Alford II, 47 So. 3d at 1284-85. However, on remand, the Etowah Circuit Court, believing its previous judgment to be in conformity with an intervening decision of our supreme court, entered a new judgment "confirm[ing]" the previous judgment. Alford II, 47 So. 3d at 1285.

The employer again appealed, contending that the Etowah Circuit Court had been bound to conform to the mandate of this court in Alford I. We agreed, and reversed the Etowah Circuit Court's new judgment, reasoning:

"When a case is remanded to a trial court after a decision on appeal, "issues decided by the appellate court become law of the case and the trial court's duty is to comply with the appellate mandate...." Erbe v. Eady, 447 So. 2d 778, 779 (Ala. Civ. App. 1984) (quoting Walker v. Carolina Mills Lumber Co., 441 So. 2d 980, 982 (Ala. Civ. App. 1983)). We further noted in Erbe that "[t]he trial court is not free to reconsider issues finally decided in the mandate." Id. (emphasis added). The decisions of

the Alabama Supreme Court are in accord with Erbe. See Gray v. Reynolds, 553 So. 2d 79, 81 (Ala. 1989); Auerbach v. Parker, 558 So. 2d 900, 902 (Ala. 1989) (noting principles set forth in Erbe and further noting authorities for the proposition that when a cause is remanded with directions as to the judgment to be entered, that judgment should be entered without a new trial).

"In Alford I, we directed the [Etowah Circuit Court] to proceed in a manner 'consistent with [our] opinion' -- an opinion in which we determined that the [Etowah Circuit Court]'s earlier conclusion that the employee's knee injury had affected his back so as to render the schedule in the Act inapplicable was not 'supported by substantial evidence' (6 So. 3d at 29) -- and we specifically instructed the [Etowah Circuit Court] to calculate scheduled disability benefits without consideration of any evidence of vocational disability that might be pertinent to [an] injury outside the schedule. It is well settled that '[t]he issues decided by an appellate court become the law of the case on remand to the trial court, and the trial court is not free to reconsider those issues'; further, '"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.'" Ex parte S.T.S., 806 So. 2d 336, 341 (Ala. 2001) (emphasis added; quoting Blumberg v. Touche Ross & Co., 514 So. 2d 922, 924 (Ala. [1987])). The [Etowah Circuit Court's] judgment entered on remand from this court in Alford I, after a reexamination of the facts previously presented, by no means fulfills the [Etowah Circuit Court]'s duty '"to comply strictly with [our] mandate ... according to its true intent and meaning.'" Ex parte Alabama Power Co., 431 So. 2d 151, 155 (Ala. 1983) (emphasis added; quoting 5 Am. Jur. 2d Appeal & Error § 991 (1962))."

2170873

Alford II, 47 So. 3d at 1285-86.

In this case, our previous decision expressly affirmed, as supported by "substantial evidence," the Etowah Circuit Court's determination that "only the employee's left-shoulder injury stems from the employment and is compensable as a permanent partial disability under the Act." 189 So. 3d at 745. Although that court's award of compensation in the judgment reviewed by this court in the first appeal as to that specific left-shoulder injury was held to have been in error because it had been based solely upon the 25% physical-impairment rating with respect to that shoulder, rather than having been based upon findings of any loss on the part of the employee of her ability to earn following her having reached maximum medical improvement, our reversal left for the Etowah Circuit Court to undertake only a determination of "the extent, if any, to which the employee's left-shoulder injury has affected her ability to earn income" and afforded the Etowah Circuit Court discretion solely "to award the employee benefits in accordance with that determination." 189 So. 3d at 746. Although counsel for the employee is certainly entitled to his belief, expressed in the employee's brief in

2170873

this appeal, that the Etowah Circuit Court's previous judgment "found erroneously ... that the back injury and the mental diagnoses that [the employee] experienced after the accident were pre-existing," that determination of the Etowah Circuit Court has been affirmed by this court and is now conclusive of the issue, and neither this court's mandate nor the doctrine of law of the case empowered the Etowah Circuit Court to recede from that determination by entering its May 17, 2018, judgment on remand adopting the provisions supplied by counsel for the employee.

Based upon the foregoing facts and authorities, the May 17, 2018, judgment of the Etowah Circuit Court is reversed. The cause is remanded for that court to reinstate its previous judgment in its entirety except insofar as that judgment awarded compensation to the employee for her left-shoulder injury based solely upon the 25% physical-impairment rating. As to that issue alone, the trial court, based upon the existing record in the case, is to make findings of fact and state conclusions of law, in conformity with Ala. Code 1975, § 25-5-88, and our mandate in the first appeal, regarding the

2170873

employee's loss of ability to earn, if any, that has resulted solely from her left-shoulder injury.

REVERSED AND REMANDED WITH INSTRUCTIONS.

Thompson, P.J., and Thomas, Moore, and Donaldson, JJ.,
concur.