Workers' Compensation Case Law Update

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Court of Civil Appeals of Alabama
Workers' Compensation Cases

1. Brewton Area YMCA v. Lanier, 2017 Ala. Civ. App. LEXIS 61 (Civ. App. March 17, 2017)

Trial Court Details:
Venue: Escambia County
Judge: Rice
Employee's Counsel: Gordon Godwin, Timothy Godwin, Charles Godwin
Employer's Counsel: Ian Rosenthal

Holding:
The Alabama Court of Civil Appeals determined that: 1) substantial evidence existed at the trial court level regarding the employee's testimony used to prove legal causation; 2) that actual knowledge of a work-related injury existed when the employer-CEO contacted its workers compensation carrier about the work place injury, and the workers compensation carrier subsequently investigated the claim; 3) that injuries to an employee's hip should be treated as a nonscheduled member injury; 4) that the employer was barred from arguing that its retirement plan contributions should not be calculated in the employee's average weekly wage simply because the employer failed to raise such argument at the trial court level; and 5) the employee conceded she was not due TTD and TPD benefits when she was being paid her full salary while recuperating and when she returned to work full time after her accident.

Summary:

Georgia Lanier ("employee") worked at the Young Men's Christian Association ("employer"). The employee was preparing to leave work on December 19, 2012, when she got up from the chair at her desk, pushed the chair back, reached over the credenza located behind her desk, picked up a box of items to take home with her, tripped over the "spokes" of her chair, and fell to the ground. The employee fractured her hip in two places. The employee testified that she hit her head when she fell, and that she lost consciousness. Due to losing consciousness, the employee could not remember anything after the fall, until the emergency medical personnel arrived.

The emergency room records did not indicate that the employee characterized her injury as work-related, however the medical notes stated that employee "fell at the Y," which was where she worked. Dr. Engerson performed surgery on the employee and implanted two rods

in her hip area. The employee continued to experience significant pain, and in June 2013, the employee experienced pain in her groin, buttock, and lateral thigh. Dr. Engerson noted that the employee's pain could be related to both the hip surgery and an irritation of a previous lumbar fusion surgery. Dr. Engerson later testified there was no way to tell if the employee's fractures resulted from her impact with the floor or whether they occurred because of an abnormal position of her leg as she fell. Dr. Engerson also testified that employee's injury could have aggravated her back condition.

The employee then treated with Dr. Metzger, who performed her prior back surgery. Dr. Metzger noted that most of the employee's pain was related to her hip injury and also diagnosed her with chronic pain syndrome, noting that she has had sever back pain for years. Dr. Metzger then performed another surgery on the employee's hip by replacing one of the rods in the employee's hip with a smaller rod. The employee was then released to return to work on August 19, 2013. The employee testified that once she returned to work, certain duties were added to her job requirements, she no longer felt welcome, and she was often asked when she planned to retire. In January 2014, the employee notified her employer that she would retire effective May 4, 2014.

The employee explained that, at first, she did not think her injury was work-related, and that she thought workers compensation was for an injury such as climbing a ladder and falling off or reaching for something and it falling on top of you. The employee also explained that while she was in the rehabilitation facility, she received a phone call from someone who claimed to be from the employer's workers compensation carrier. The employee stated that the person who called the employee told her that the employer's CEO, Mr. Dickey, had contacted the workers compensation carrier to report the employee's incident.

The employee also explained that when she went to her supervisor, Cathy Green, to collect her paycheck one day, Ms. Green informed the employee that her injury was not work-related and that the employee should not file a workers compensation claim because it would cause the employer's "premium" to increase. The employee stated that Ms. Green said the company would "take care of her." Therefore, the employee testified that she had told the workers compensation carrier, in a second phone call, that the accident was not work related. The employer did not pay for temporary workers compensation benefits and did not pay for any medical care. Ms. Green denied having instructed the employee to tell the workers compensation carrier that employee's injury was not work related. Ms. Green also testified that the day of the employee's injury, Ms. Green was present after the employee fell, and that the employee told Ms. Green her leg was injured and that Green should call for an ambulance.

Additionally, Daniel McNamara testified that he was present when the employee fell. McNamara stated that the employee was not walking when she fell, that the employee fell when she attempted to pick up a box, and that the employee did not hit her head when she fell.

The trial court found the employee's injury to be compensable, determined the employee to be totally and permanently disabled, calculated employee's average weekly wage, ordered

the employer to pay medical benefits, and awarded the employee temporary and permanent workers compensation benefits. The employer appealed on multiple grounds.

First, the employer challenged the trial court's conclusion that employee proved legal causation (that the accident arose out of and in the court of employment). The employer pointed to disputed facts: 1) that the employee stated she tripped on her chair, but Mr. McNamara stated that employee did not trip over her chair; 2) the employee stated she hit her head, lost consciousness, and could not remember anything until the paramedics arrived, but Mr. McNamara stated he did not see employee hit her head, the medical records do not indicate that the employee sustained a head injury, and Ms. Green stated that the employee spoke to Ms. Green after her fall, telling Ms. Green that her leg hurt and that Ms. Green should call an ambulance. The employer argued that these discrepancies in the employee's testimony served to undermine other events surrounding the fall.

The Court of Appeals explained that it must affirm the trial court's ruling if it is based on substantial evidence, which the court defined as "evidence of sufficient weight and quality to allow persons to reasonably infer the existence of the fact sought to be proven." The Court of Appeals mentioned how it is precluded from weighing evidence presented at the trial court level, and that the trial court is in the best position to resolve conflicts of evidence. Therefore, even though there were discrepancies in the employee's testimony, the Court of Appeals concluded that the trial court chose to believe the employee's testimony about the fall when it found legal causation existed. Thus, the evidence supporting the trial court's finding that the employee tripped over the chair was substantial. Accordingly, the Court of Appeals rejected the employer's argument as to a lack of legal causation.

Second, the employer contended that the trial court erred in concluding that the employer received proper notice under the Alabama Workers Compensation Act. It was conceded that the employee did not provide written notice, however the Court of Appeals pointed out that in the absence of written notice, actual notice will suffice. The employer contended that even though it knew the employee fell at work, it had no notice that the employee was claiming that the injury suffered was work-related. To this end, the Court of Appeals pointed out that the employer-CEO notified its workers compensation carrier of the accident via a First Report of Injury, and the employer "acted in a manner consistent with having received notice of the injury." Additionally, the workers compensation carrier conducted an investigation and contacted the employee at least twice about the incident. Thus, the Court of Appeals rejected the employer's contention of insufficient notice.

Third, the employer argued that the trial court erred when it concluded that the employee's injury was a nonscheduled member injury. However, the Court of Appeals quickly pointed that hip injuries are a nonscheduled part of the body. Thus, the Court of Appeals rejected the employer's argument as to a nonscheduled member injury.

Fourth, the employer argued that its retirement plan contributions should not have been included in the computation of the employee's average weekly wages at the trial court level.

However, the Court of Appeals pointed out the fact that the employer did not raise this argument at the trial court level, and therefore the employer is barred from asserting such argument at the appeals level. Thus, the Court of Appeals did not entertain the employer's argument as to retirement plan contributions.

Fifth, and finally, the employer contended that the trial court erred in awarding TTD and TPD benefits during the times when the employee was either working full time or was being paid her full salary while she was recuperating. The employee conceded that she was not due benefits during those times. Thus, the Court of Appeals reversed and remanded this issue (of determining benefits due to the employee) to the trial court for further consideration.

Decision: Affirmed in part; Reversed in part; and Remanded with instructions.

2. Ex parte Hibbett Sporting Goods, Inc., No. 2160069, 2017 Ala. Civ. App. LEXIS 31 (Civ. App. Jan. 27, 2017)

Trial court Details:
Venue: Lamar County
Judge: Junkin
Employee's Counsel: Burke Spree and Steven Ford
Employer's Counsel: Lonnie Wainwright and Daniel Flickinger

Holding:
Venue is proper under §6-3-7(a)(2) in the county where a business has its principal office in the State of Alabama, and §6-3-7(a)(3), stating that venue is proper where a Plaintiff resides, applies if the corporation does business by an agent in the county of Plaintiff's residence.

Summary:
Hibbett Sporting Goods, Inc. ("Hibbett sporting Goods") petitions the Court of Appeals for a writ of mandamus directing the Lamar County Circuit Court to vacate its order denying Hibbett Sporting Goods' motion for a change of venue and to enter an order transferring the underlying workers compensation action to Jefferson County.

Keith Cantrell ("Cantrell") filed a complaint against Hibbett Sporting Goods for benefits under the Alabama Workers Compensation Act ("the Act"). Cantrell claimed to have injured himself while working for Hibbett Sporting Goods in Indiana. Hibbett Sporting Goods filed a motion to transfer venue to Jefferson County, supported with evidence that Hibbett Sporting Goods' principal place of business was located in Birmingham, Alabama, Hibbett Sporting Goods has never done, and does not currently do, any business in Lamar County, has no offices or stores in Lamar County, and has no assets in Lamar County. In reply, Cantrell provided evidence that he was, at all relevant

times, a resident of Lamar County, and that for the purposes of establishing venue, Hibbett Team Sales, Inc. ("Hibbett Team Sales"), a separate corporation, acted as an agent for Hibbett Sporting Goods in Lamar County. Cantrell also attached an annual report filed by Hibbett Sports, Inc. ("Hibbett Sports").

Evidence showed that Hibbett Team Sales visited Lamar County to sell athletic equipment to local schools. Hibbett Sporting Goods contended that no agency relationship existed between it and Hibbett Team Sales, that Cantrell was never an employee of Hibbett Team Sales, and that Hibbett Sports is a holding company for publicly traded stock.

The Court of Appeals outlined how in Ex parte Adams, 11 So. 3d 246 (Ala. Civ. App. 2008), it previously held that §6-3-2 did not apply to workers compensation actions, and instead, under the Act, venue is defined as "[t]he circuit court that would have jurisdiction in an ordinary civil action involving a claim for the injuries or death in question." Ala. Code §6-3-2 (1975). Essentially, this means that venue is proper in the court that would otherwise have proper jurisdiction for a hypothetical tort action between the same parties. Thus, pursuant to the Act, §6-3-7 governs the determination of venue for the case at bar. Alabama Code §6-3-7(a)(2) states that venue is proper in the county of the corporation's principal office in the State of Alabama. Therefore, venue is proper in Jefferson County.

The Court of Appeals also addressed how the "catch all" provision of §6-3-79(a)(4) applies only if no other county would be a proper forum under the other corporate-venue provisions. Additionally, the Appeals Court noted how §6-3-7(a)(3), which establishes venue in the county in which the Plaintiff resides only applies if the corporation does business by an agent in the county of Plaintiff's residence. Accordingly, the evidence established a prima facie showing that Hibbett Team Sales was not an agent for Hibbett Sporting Goods, despite the fact the Hibbett Sporting Goods and Hibbett Team Sales were subsidiaries of Hibbett Sport. Therefore, the burden of proving agency shifted to Cantrell, who was not able to overcome such burden. Thus, Hibbett Sporting Goods demonstrated a clear legal right to a writ of mandamus.

Decision: Petition Granted. Writ Issued.

3. Ex parte Tenax Corp., No. 1151122, 2017 Ala. LEXIS 6 (Jan. 27, 2017)

Trial Court Details:
Venue: Conecuh County
Judge: Weaver
Employee's Counsel: Evan Allen
Employer's Counsel: Carroll Sullivan, Griffin Knight, John Naramore, and George Zoghby (for Tenax Corp.); Carroll Sullivan and George Zoghby (for Tenax

manufacturing Alabama); William Sisson, Robert Sherer, and Ernest Smith (for Onin Staffing, LLC); Griffin Knight (for Tenax Spa)

Summary:

Holding:

Factors such as control, direction, payment of fees for workers compensation insurance premiums, duration of work, and acquiescence of the risks of employment where physically working are factors that support a contract of hire. When such contract for hire exists, in addition to other enumerated factors, the employer becomes a special employer, as defined by the Alabama Workers Compensation Act, and is thereby relieved of tort liability under the exclusive-remedy provisions of the Alabama Workers Compensation Act.

Tenax Corporation ("Tenax") and Tenax Manufacturing ("Tenax Alabama") petition the Alabama Supreme Court for a writ of mandamus directing the Conecuh Circuit Court to enter summary judgment in their favor in John Dees' ("Dees") tort action against them due to the exclusive-remedy provisions of the Alabama Workers Compensation Act ("the Act").

Dees worked for Tenax at multiple different points in time. Dee's latest stint with Tenax was in July of 2014 when a Tenax general manager directed Dees to apply to Tenax through Onin Staffing, LLC ("Onin"). Dees did so, and on January 14, 2015, Dees suffered significant injuries to his left arm. Dees sued Tenax, alleging a defective condition on the machine that Dees injured himself on. Dees also sought workers compensation benefits from Onin. In their answer, Tenax and Tenax Alabama asserted the immunity defense under the Act and moved for summary judgment.

As for Tenax Alabama, Dees eventually conceded that Tenax Alabama was not a legal entity at the time Dees was injured, and therefore, summary judgment was due to be granted to Tenax Alabama.

As for Tenax, Tenax asserted that although Onin was Dees' "general employer" under the Act, Tenax was Dees' "special employer," and therefore the exclusive-remedy provisions of the Act extended to Tenax. The Alabama Supreme Court outlined how the exclusive remedy provision extends to "special employers," and how the Court had adopted a three-pronged test for determining when an employee of a general employer can become the employee of a special employer for workers compensation purposes.

The Court stated: "[w]hen a general employer lends an employee to a special employer, the special employer becomes liable for workmen's compensation [and thus immune from liability for tort actions brought by the special employee] only if (a) the employee has made a contract of hire, express or implied, with the special employer; (b)

the work being done is essentially that of the special employer; and (c) the special employer has the right to control the details of the work. When all three of the above conditions are satisfied in relation to both employers, both employers are liable for women's compensation." Gaut v. Medrano, 630 So. 2d 362, 364 (Ala. 1993).

The Court noted that factor (a) is the only issue for the Court to decide. That is, whether Dees had an implied contract of hire with Tenax. The Court found that Dees intended to enter into a contract of hire with Tenax. Even though Dees applied through Onin, he did so at the direction of a Tenax general manager, indicating that Dees necessarily agreed to a contract of hire with Tenax. Additionally, Dees clearly submitted to Tenax's control and supervision, and he testified that it was his understanding that he was employed by Tenax. Furthermore, Tenax provided workers' compensation insurance, and Tenax paid Onin a rate above the rate paid to Dees, in part, to pay for workers' compensation insurance premiums. "If the special employer doctrine does not apply in such a situation, the employee is effectively suing the entity that provided his workers' compensation insurance, which is contrary to the reasons for and provisions of the workers' compensation statute." G.UB.MK Constructors v. Garner, 44 So. 3d 479, 489 (Ala. 2010).

The Court continued to reason that Dees' activities were subject to Tenax's direction and control, and that the evidence proves that Dees worked solely for Tenax from when he was hired by Onin until his injury. Moreover, given Dees' duration of work, he could be reasonably presumed to have evaluated and acquiesced in the risks of his employment with Tenax. It was not shown that this was a temporary borrowing of an employee, but rather, it was a long term employment in which Dees had an implied contract of hire with Tenax.

Thus, the Court found that Tenax made a prima facie showing that it was Dees' special employer, and Dees could not overcome this fact. Therefore, the Court found that the exclusive-remedy provision of the Act applied to Tenax.

Decision: Petition Granted. Writ Issued.

4. Ex parte Thompson Tractor Co., No. 2160086, 2017 Ala. Civ. App. LEXIS 14 (Civ. App. Jan. 13, 2017)

Trial court Details:
Venue: Calhoun County
Judge: Page
Employee's Counsel: Thomas Knight, Morris Steven, and James Sanders
Employer's Counsel: James Shaw and Jeffrey Canon (for Thompson Tractors); James Sanders, Robin Elliott, Gwendolyn Jett, Michael Fish, and Karen Cleveland (for Gold Kist Holdings, Inc.)

Holding:

When an employee / plaintiff to a workers compensation claim dies before the adjudication of the workers compensation claim, the action abates upon the employee's death, and thereby strips the trial court of subject-matter jurisdiction, forcing the case to be dismissed. A widow to the deceased employee may not be substituted as a plaintiff in such instance because the widow has no claim under the Alabama Workers Compensation Act.

Summary:

On May 11, 2011, Ray Franklin ("employee") and Donna Franklin ("widow") filed a complaint against Thompson Tractor, Inc. ("employer") asserting, among other things, a claim for workers compensation benefits under the Alabama Workers Compensation Act ("the Act") for the employee contracting asbestosis during his work with employer. The claim for benefits under the Act was severed from the rest of the complaint, and the parties continued to identify the widow as a plaintiff in the workers compensation action, however the widow did not make any claim in the workers compensation action.

In a procedural determination of who is a party, the labels assigned by a court do not control because the substance of the action, not its form, controls. See generally, Morgungenko v. Dwayne's Body Shop, 23 So. 3d 671, 674 (Ala. Civ. App. 2009). Therefore, since the widow did not make a substantive claim in the workers compensation action, she was not a plaintiff in that action, and the employee was the sole plaintiff in the workers compensation action.

On October 23, 2011, before adjudication of the workers compensation action, the employee died, and the widow subsequently filed a motion to be substituted as the plaintiff. The employer filed a motion to dismiss, arguing that the trial court had lost subject-matter jurisdiction when the employee died.

The Court of Appeals agreed with the employer, stating that under long-standing law in Alabama, an employee's rights to benefits under the Act terminate at his or her death. Ex parte Woodward Iron Co., 167 So. 2d 702, 703 (Ala. 1964). Furthermore, a claim under the Act is not an action that survives the death of an employee so as to be continued by his estate or personal representative. See Owens v. Ward, 271 So. 2d 251, 254 (Ala. Civ. App. 1972). If an employee dies before the adjudication of his workers compensation claim, the action abates upon death. See Ginson v. Staffco, L.L.C., 63 So. 3d 1272, 1274 (Ala. Civ. App. 2010). A court lacks jurisdiction to act on a case that has been abated by death of one of the parties. See Ex parte Thomas, 54 So. 3d 356 (Ala. 2010).

Therefore, the employee's claim under the Act was extinguished by death, and the widow could not be substituted as a Plaintiff under Rule 25 of the Alabama Rules of Civil Procedure. Accordingly, the trial court lacked subject matter jurisdiction over the workers compensation claim.

Decision:

Petition Granted. Writ Issued.

5. Hand Constr., LLC v. Stringer, No. 2150730, 2017 Ala. Civ. App. LEXIS 19 (Civ. App. Jan. 13, 2017)

Trial Court Details:

Venue: Mobile County
Judge: Stewart
Employee's Counsel: Sidney Jackson and Robert Perloff
Employer's Counsel: William Pipkin, Jr.

Holding:

Trial court lacked jurisdiction to award benefits under Alabama Code §25-5-35(d)(2) due to the fact that the employee (Stringer) could not satisfy the two-pronged test under §25-5-35(d)(2) and thereby show that no other state besides Alabama would have jurisdiction over workers compensation claim for benefits in connection with his injuries.

Summary:

Hand Construction, LLC ("Hand") appeals from a judgment by the Mobile Circuit Court finding that injuries to Mitchell Stringer ("Stringer") were compensable under the Alabama Workers Compensation Act ("the Act").

Stringer lives in Mobile, Alabama, and Hand has its principal place of business in Shreveport, Louisiana and is registered in the State of Alabama as a foreign entity able to do business in Alabama.

The Court of appeals found that Stringer was called by a Hand employee and offered a job at Hand. Stringer then flew down to Shreveport to complete his employment application and submit to a drug test. Stringer then traveled to Hand's construction job site in North Dakota to work on a construction project. Stringer would work in North Dakota for ten days and would then return to his home in Mobile for about four or five days before returning to North Dakota for another ten days.

On October 6, 2015, Stringer testified that he met with a manager of Hand in Shreveport, where Stringer was notified that the job in North Dakota was finished, and Hand did not have sufficient work to keep Stringer as an employee. However, Hand wanted Stringer to return to North Dakota one last time to retrieve Stringer's personal equipment and Hand's construction equipment. Once Stringer returned from North Dakota, he was to ship the items from Mobile to Shreveport. Stringer's notice of termination was dated October 5, 2015.

Hand paid for Stringer to fly from Mobile to North Dakota. On October 10, 2015, while en route to Mobile, Stringer was involved in a motor vehicle accident in Arkansas.

The trial court found that, at the time of the accident, Stringer' employment with Hand for the work in North Dakota had ended, and that Stringer and Hand entered into a subsequent contract for hire when Hand requested Stringer to return to North Dakota and retrieve the equipment. Therefore, the trial court found jurisdiction under Alabama Code §25-5-35(d)(2), which allows an employee to recover benefits under the Act while working outside the State of Alabama. The trial court awarded Stringer benefits under the Act.

Alabama Code §25-5-35(d)(2) has a two pronged test for determine if an out of state injury is compensable. First, the contract of employment must have been made in Alabama. Second, the worker's employment must not have been principally localized in any one state.

The Court of Appeals found that, due to the facts that Stringer worked 10 day period in North Dakota for six months, Stringer's physical presence at the job site in North Dakota was necessary for work to be done, Stringer lived in housing provided by Hand in North Dakota, Stringer's state income taxes were withheld in North Dakota, Stringer was listed as a Hand employee in North Dakota, and any work Stringer did in mobile was merely incidental to his job in North Dakota, Stringer regularly worked and spent a substantial part of his working time North Dakota. On these facts, the Court of Appeals concluded that the trial court erred in finding that Stringer was not principally localized in any state. Thus, the trial court incorrectly awarded Stringer benefits under the Act.

Additionally, the Court of Appeals found that the trial court's determination that Stringer entered into a second contract for employment in Alabama was not supported by the facts. Specifically, even assuming there was a second contract formed in relation to Stringer going to North Dakota one last time to retrieve equipment, that conversation and agreement, if a contract at all, occurred at Hand's office in Shreveport, not in Alabama. Therefore, the Court of Appeals did not find substantial evidence to conclude that no other State besides Alabama would have jurisdiction over Stringer's claim, as required by Alabama Code §25-5-35(d)(2). Stringer had the burden of proof and he failed to prove the Act is applicable to his case.

Decision: Judgment Reversed and Remanded.

6. Ex parte Associated Gen. Contrs. Workers' Comp. Self-Insured Fund, No. 2160120, 2017 Ala. Civ. App. LEXIS 9 (Civ. App. Jan. 6, 2017)

Trial Court Details:
Venue: Cullman County
Judge: Williams
Employee's Counsel: David Tidmore
Employer's Counsel: Jonathan Berryhill, Candace Deer, and Devona Segrest (for AGC); Joshua Thompson and Carter Dukes (for Good Hope)

Holding:
The Alabama Court of Civil Appeals granted AGC's and Good Hope's writ of mandamus directing the Cullman trial court to vacate its order transferring the action to Jefferson County, to reinstate the action in Cullman County, and to enter an order denying Harding's motion to dismiss or, alternatively, to transfer on the basis of improper venue due to AGC's and Good Hope's showing that §6-3-7 controls venue in this instance because Good Hope's principal place of business was in Cullman County.

Summary:
The Associated General Contractors Workers' Compensation Self-Insured Fund, Alabama Branch ("AGC") and Good Hope Contracting, Inc. ("Good Hope") filed a complaint with the Cullman County Circuit Court against Lynn Harding ("Harding") seeking a declaratory judgment that Harding was not entitled to benefits under the Alabama Workers Compensation act ("the Act"). Good Hope was named as Harding's employer. Harding then filed a motion for change of venue and after arguments and after briefs were filed from all parties, the trial court granted Harding's motion and transferred the case to Jefferson County. The AGC and Good Hope now petition the Alabama Court of Appeals for a writ of mandamus directing the Cullman trial court to vacate its order transferring the action to Jefferson County, to reinstate the action in Cullman County, and to enter an order denying Harding's motion to dismiss or, alternatively, to transfer on the basis of improper venue.

In support of Harding's motion to change venue, Harding relied upon Alabama Code §6-3-2, which generally governs venue in actions against individuals. Harding argued that since Jefferson County was his place of residency, venue is proper in Jefferson County. In support of their motion, AGC and Good Hope presented evidence that Good Hope was a domestic Alabama corporation with its principle place of business in Cullman County.

The Court of Appeals outlined how in Ex parte Adams, 11 So. 3d 246 (Ala. Civ. App 2008), it previously held that §6-3-2 did not apply to workers compensation actions, and instead, under the Act, venue is defined as "[t]he circuit court that would have jurisdiction in an ordinary civil action involving a claim for the injuries or death in question." Ala. Code §6-3-2 (1975).

Essentially, this means that venue is proper in the court that would otherwise have proper jurisdiction for a hypothetical tort action between the same parties. Thus, pursuant to the Act, §6-3-7 governs the determination of venue for the case at bar. Alabama Code §6-3-7(a)(2) states that venue is proper in the county of the corporation's principal office in the State of Alabama. Worth noting, Harding also filed a retaliatory discharge claim against Good Hope, and since Good Hope is a corporation, §6-3-7 also governs the determination of venue for the retaliatory discharge claim.

Harding had the burden of proof for showing how venue was improper, pursuant to §6-3-7, and she failed to meet that burden. Specifically, Harding failed to present any evidence to controvert the assertion that Good Hope's principal place of business is in Cullman County.
Decision: Petition Granted. Writ Issued.

7. RGIS Inventory Specialists v. Huey et al., 2016 Ala. Civ. App. LEXIS 302 (Ala. Civ. App. Dec. 16, 2016)

Holding:
(1) Since the trial court had not yet dismissed the case when it denied the employer's and the carrier's motion to intervene, the employer and carrier appealed from a valid order. (2) Since the employer and the carrier did not cite any relevant Alabama legal authority to support their argument for their right to intervene for subrogation recovery, they waived their argument that the trial court erred in denying their motion to intervene.

Trial Court Details:
Venue: Sumter County
Judge: Hon. Eddie Hardaway
Employee's Counsel: Jerald Crawford
Employer's Counsel: Jeremy England (for RGIS Inventory Specialists); Earl Bloom, Christopher Albright, Nathan Watkins, Jr., Lara Keahey, Cooper Thurber, and Joseph Minus (for Connor Kenneth & Barber Milk, LLC); Earl Bloom, Nathan Watkins, Jr., Lara Keahey, Cooper Thurber, Joseph Minus, and John Peake (for Dean Foods); Henry Penick (for Crawley Edwin); Zackery Burr (for Amanda Ellis)

Summary:

George Allen Huey (the "employee") was employed by RGIS Inventory Specialists (the "employer"). The employer had a workers compensation carrier, Fidelity and Guaranty Insurance Co. (the "carrier"). On January 19, 2009, the employee was driving from Mississippi to Tennessee to perform his job duties for his employer when he was injured in a motor vehicle accident in Alabama. Employee then filed a claim in Mississippi for workers compensation benefits, but the Mississippi Compensation Committee denied his claim.

On November 12, 2010, employee filed a third party action in the Sumter Circuit Court of Alabama against Kenneth Connor, Barber Milk, LLC, and Dean Foods. On April 28, 2016, the employer and the carrier filed a motion to intervene in the trial court, seeking a declaratory judgment of their subrogation rights to any recovery from the third party. On May 24, 2016, the trial court denied the motion to intervene.

On June 9, 2016, employee and the third parties reached a settlement and subsequently filed a joint stipulation of dismissal. On June 17, 2016, the trial court entered an order granting such dismissal. Also on June 17, 2016, the employer and the carrier appealed the denial of their motion to intervene (denied by the trial court) to the Alabama Court of Civil Appeals.

Employee argued that the joint stipulation of dismissal rendered the appeal moot. Employee relied on Gallagher Bassett Services, Inc. v. Phillips, 991 So. 2d 697, 700-01 (Ala. 2008), wherein the Alabama Supreme Court held that the stipulation of dismissal had effectively ended the jurisdiction of the trial court to act on the motion to intervene, rendering the trial court's *subsequent* order denying the motion to intervene as void and not appealable.

However, in this case, when the trial court denied the employer's and the carrier's right to intervene, the employee and the third parties had *not yet* filed their joint stipulation of dismissal. Therefore, the trial court had jurisdiction over the third party action when it denied the motion to intervene. Since the trial court had jurisdiction to deny the motion, the employer and the carrier had appealed from a valid order.

Nevertheless, the employer and the carrier failed to cite any relevant Alabama legal authority providing them with a right to intervene in the third party action. Additionally, they failed to cite any Alabama legal authority that the trial court allegedly violated when it denied their motion to intervene. Instead, they relied solely on Mississippi statutes and Mississippi case law.

The Alabama Court of Civil Appeals concluded that since the employer and the carrier failed to provide the Court with any argument containing relevant legal authorities, the employer and the carrier waived their argument that the trial court wrongfully denied their motion to intervene.

Decision: AFFIRMED the trial court's judgment.

8. Ex parte Tidra Corp, 2016 Ala. Civ. App. LEXIS 252 (Ala. Civ. App. Oct. 07, 2016)

Holding: (1) Because no party made a required motion, petitioner employer was entitled to a writ of mandamus vacating an order that respondent employee undergo a mental examination. (2) Error in summary judgment requiring the employer to provide the employee physical therapy because no evidentiary hearing required under Ala. Code § 25-5-77(a) and Ala. Code § 25-5-88 was held, only a properly supported motion for judgment on the pleadings or summary judgment could be granted pretrial, and there was a genuine dispute in regards to whether the employee is entitled to physical therapy as a result of his work-related injury.
Petition Granted; Writ Issued.

Trial Court Details:
Venue: Lee County
Judge: Jacob A. Walker III
Employee's Counsel: Pro se
Employer's Counsel: Robert Cleston Thomas Jr. (for Tidra Corp); Simeon Penton and Roy Dumas (for ITP Global Service); George Ray, Harold Mooty, and John Searcy (for Meister Logistics); and William Waller (for Mando)

Summary:

In September 2012, the employee filed a complaint seeking workers' compensation benefits and medical treatment for his alleged work-related injury. A question arose regarding which of several entities employed the employee at the time of the alleged injury, and the trial court determined in May 2015 that he had been employed by Tidra (hereinafter "employer"). Acting pro se, the employee sought a hearing on whether the employer should be required to provide, as medical treatment, eight sessions of physical therapy recommended by Dr. Martin Jones. The employer responded with an objection to what it characterized as a motion to compel medical treatment, and requested clarification of Dr. Jones's recommendation that the employee undergo physical therapy. In response, Dr. Jones indicated that the physical therapy he had recommended was not related to the employee's 2012 injury. The employee filed a second motion specifically characterized as a motion to compel medical treatment. The trial court heard oral arguments on July 13, 2016, but no testimony was taken. The court noted that the case was set for trial in the near future, and that issues regarding medical treatment and compensability would be decided at trial. Additionally, the trial court stated on the record that it intended to deny the employee's motions.

On July 15, 2016, the trial court entered an order granting the motion to compel physical therapy and based its decision "upon a review of [the employee's] medical records." The court further ordered the employee to submit to a mental evaluation pursuant to Rule 35 of the

Alabama Rules of Civil Procedure. The employer filed a motion to reconsider, and when the motion was not ruled upon, it filed a petition for a writ of mandamus.

The employer first argued that the trial court erred by ordering the employee to undergo a mental examination when neither party had requested such relief and that the record did not demonstrate good cause for such an order. The Court noted that Rule 35(a) states that a trial court may order a mental examination of a party "only on motion," and that no such motion was pending in the trial court. The Court thus held that the trial court acted outside its authority in entering sua sponte an order requiring the mental examination, and that the employer is entitled to the relief it seeks regarding that portion of the trial court's order requiring the employee to undergo a mental examination.

The employer next argued that the trial court erred by failing to hold a trial on the issue of compensability before requiring that the employer provide physical therapy to the employee, relying on the opinion in *Ex parte Publix Super Markets*, 963 So. 2d 654, 659 (Ala. Civ. App. 2007). The Court noted in *Ex parte Publix Super Markets* that a trial court may not compel an employer to pay for medical treatment for an employee without first holding an evidentiary hearing on the issue of compensability or utilizing either Rule 12(c), Ala. R. Civ. P. (authorizing a judgment on the pleadings) or Rule 56, Ala. R. Civ. P. (authorizing a summary judgment) to determine the issue of compensability without a trial. *Id.* at 659. In this case, there was no evidential hearing on the issue of compensability because no witnesses were sworn in, no testimony was taken, and the matter was not submitted to the court.

Next, the employee's motions could only be treated as motions seeking a partial summary judgment because he included materials outside the pleadings as attachments to their respective filings. The Court illustrated that a motion for summary judgment must meet certain procedural requirements, including the requirement that the motion should contain a "narrative summary of what the movant contends to be the undisputed material facts." Rule 56(c)(1). In this analysis, the Court stated that neither of the employee's motions contains a narrative summary because neither motion discusses the factual underpinnings of the action, explains the mode of injury, nor describes the accident giving rise to the claims. Nevertheless, the Court stated that even if it were to "generously construe [the employee's] motions as motions for a partial summary judgment on the issue of the reasonable necessity of his request for physical therapy, we conclude that [the employer] is entitled to the writ of mandamus it seeks" because the materials before the Court demonstrate that a dispute exists between the employer and the employee relating to whether he is currently entitled to physical therapy as a result of the June 2012 injury.

In sum, the employer was entitled to the writ of mandamus because neither party filed a motion seeking a mental examination and the trial court lacked the authority to order a mental examination sua sponte. Additionally, the employee's motions seeking to compel the employer to provide physical therapy should not have been granted.

Decision: Petition Granted; Writ Issued.

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9. Augmentation, Inc. v. Debra Harris., 2016 Ala. Civ. App. LEXIS 247 (Ala. Civ. App. Sept. 23, 2016)

Holding: The Court affirmed the trial court's judgment and held the employer in contempt for failure to pay for the employee's medical treatment because the employer failed to prove that it had a valid reason to believe that the treatment prescribed was not reasonable and necessary, the employer did not seek judicial review of the dispute, and the employer did not seek expert opinions to support its challenge to the reasonable necessity of the prescribed medical treatment. In response to the employer's contentions otherwise, the Court noted that the trial court did conduct a trial on the merits of the dispute, and that the employer failed to offer authority to support its contention that the trial court failed to allow "meaningful discovery."

Affirmed

Trial Court Details:
Venue: Tuscaloosa County
Judge: Allen W. May
Employee's Counsel: Burke McKee Spree and Steven Wayne Ford
Employer's Counsel: Michael Ian Fish and Charley Michael Drummond

Summary:

On April 3, 2011, while performing the duties of her employment, the employee injured her neck, left shoulder, and back. The employee sought workers' compensation benefits against the employer in April 2013. The trial court entered a judgment in April 2014 incorporating the parties' settlement of the workers' compensation claim and stating that "future medical benefits shall remain open." In March 2015, the employee filed a motion to hold the employer in contempt for its failure to authorize, approve, and pay for medical treatment prescribed by her authorized treating physician. The employee complained that the employer failed to approve an epidural steroid injection and medications prescribed to treat her lumbar back injury. The employee further alleged that the employer and its workers' compensation carrier had failed to reimburse her for mileage costs for her travel to and from appointments on two different occasions. The employer filed a response and requested to take the depositions of two other physicians employed by the employer to review the employee's medical records to determine whether the treating physician's continued treatment was related to her April 2011 accident. The trial court entered a judgment on December 4, 2015 determining that the employer was in contempt of the April 2014 judgment, and ordered the employer to immediately provide and pay for the medical treatment ordered by the treating physician. The judgment awarded the employee a total of $10,975, which included $300 in reimbursement for medical expenses, $10,425 in attorney fees, and $250 in deposition costs. The employer appealed.

The employer argued that the trial court erred by concluding that it violated the April 2014 judgment, and that it erred by finding it liable for the employee's ongoing and future medical treatment. The employer also complained that the trial court failed to allow meaningful discovery and failed to conduct a trial on the merits to determine whether the employer is

required to pay for the employee's ongoing and future medical treatment required by the April 2014 judgment.

In analyzing the "meaningful discovery" issue, the Court noted that the trial court held four hearings, two of which were evidentiary hearings. Moreover, the trial court specially set a hearing to accommodate the employer's witness who had suffered a migraine headache on the prior hearing and could not attend. Despite the accommodation, the witness did not attend the new hearing, and the employer did not present a witness at either evidentiary hearing. Thus, the Court held that it could not agree that the trial court failed to conduct a trial on the merits of the dispute. Further, the employer failed to provide proper authority supporting their argument that the trial court prevented it from conducting meaningful discovery.

Regarding the employer's contention that the trial court erred in determining that it violated the April 2014 judgment, the employer argued that the trial court improperly construed the judgment to mean that "[the employer] accepted liability for [the employee's] alleged injuries and agreed to authorize and pay for [the employee's] medical treatment." The employer stressed that the settlement agreement incorporated in to the April 2014 judgment indicated that the employee's claim was contested by the employer and contemplated that the issue of the employer's responsibility for future medical treatment would remain open "subject to all medical necessity, causation, and pre-authorization requirements as provided in the Workers' Compensation Act." The employer therefore argued that the trial court could not have concluded that the employer had "accepted liability" for the future medical treatment. The Court stated that the trial court's judgment specifically states that the April 2014 judgment "required [the employer] to provide reasonable and necessary medical treatment related to [the employee's] compensable injury," and that the statement does not indicate the conclusion that the employer had accepted liability without limitation. Thus, the Court held that the trial court did not err in construing the April 2014 judgment.

The Court next analyzed the employer's argument that the trial court erred by declaring that the employer was required to pay for any and all future treatment prescribed by the treating physician. However, the Court disagreed that the trial court's judgment made such a blanket determination. The trial court's judgment instead indicates that the trial court understood that the issue regarding the employer's responsibility for the employee's future medical treatment was to remain open under the April 2014 judgment and that the employer could seek to challenge the reasonable necessity of any treatment prescribed for the employee. The Court thus held that it could not hold the trial court in error for determining that the employer was required to pay for any and all of the employee's medical treatment when the judgment does not so provide.

Lastly, the Court analyzed the employer's argument that the trial court erred by concluding that its decision to refuse to pay for the employee's prescribed medical treatment was willful and contumacious. In basing its determination that the employer's refusal was willful and contumacious, the trial court noted the following: the employer failed to prove that it had a valid reason to believe that the treatment prescribed was not reasonable and necessary at the time it chose to refuse to pay for that treatment; the employer failed to resort to a utilization-review process or to seek judicial review of the dispute before refusing to pay for the employee's treatment; the employer had not properly investigated or challenged its obligation to pay for the prescribed treatment before it declined to pay; and the employer had no evidence that the ordered medical treatment was not reasonable and necessary. The Court illustrated that

"sanctions for contempt 'should not be imposed if the employer has a valid reason to question its liability for the medical expense in dispute.'" *Travelers Indem. Co. of Illinois v. Griner*, 809 So. 2d 808, 814 (Ala. 2001). In reviewing the record, the Court found no evidence supporting the employer's contention that it made "numerous" attempts to contact the treating physician regarding the necessity of the injection, and the employer never questioned the necessity of the muscle relaxer or the anti-inflammatory patches. Additionally, the Court reiterated the trial court's note that the employer did not participate in utilization review or seek judicial review of its duty to pay for the employee's medical treatment. Finally, the Court pointed to the employer's failure to seek expert opinions to support its challenge to the reasonable necessity of the prescribed medical treatment until well after the denial of that treatment and after the employee had filed her contempt motion. Therefore, the Court affirmed the trial court's judgment holding the employer in contempt.

Decision: Affirmed

10. Tracy Page v. Southern Care, Inc., 2016 Ala. Civ. App. LEXIS 234 (Ala. Civ. App. Sept. 16, 2016)

Holding: The Court affirmed the trial court's holding that the employee, whose third-party employment requires her to travel out of state, was limited to the mileage expenses that were for reasonably necessary travel only, and held that the employer was responsible only for the mileage costs for the travel between the employee's home and her providers.
Affirmed

Trial Court Details:
Venue: Etowah County
Judge: William B. Ogletree
Employee's Counsel: Charles Yerby Boyd and Wallace Whitney Seals
Employer's Counsel: Tom Oliver, Bricker Daughtry, and Michael Guarino

Summary:

Employee and employer entered into a settlement agreement on December 10, 2008 that memorialized that the employee claimed injuries to her neck and lower back resulting from work-related accidents occurring on February 14, 2005 and June 14, 2005. The employer agreed to pay the employee $75,566.67 to settle her claim for workers' compensation benefits. The settlement agreement further provided: "Employer will remain liable for all future medical benefits as required by the Workers' Compensation Act of Alabama which was in effect at the time of the said accident." On December 11, 2015, the employee filed a motion to compel payment of mileage and claimed that the employer refused to pay her mileage expenses for travel to and from her physician's and pharmacist's offices in 2014 and 2015.

During the relevant time period, the employee's authorized treating physician was located in Hoover, Alabama, and the employee's pharmacy was located in Hokes Bluff, Alabama. Although the employee's home address was in Gadsden, Alabama, she was working

as a nurse (employed by a third-party) in West Palm Beach, Florida, and Valdosta, Georgia. Between September 4, 2014 and August 18, 2015, the employee traveled a total of 13,912 miles between her work locations in West Palm Beach, FL and Valdosta, GA, and her treating physician in Hoover, AL and pharmacy in Hokes Bluff, AL. Her total mileage for 2014 was 5,208 miles and her total mileage for 2015 was 8,704 miles. After a hearing, the trial court entered an order finding that mileage costs from her residence in Gadsden to and from her medical providers was reasonable and necessary, but that mileage costs to and from Florida and Georgia were not. The court awarded the employee $560.51 of the $7,921.80 she claimed for mileage reimbursement. The employed filed a "second motion to compel payment of mileage," and the trial court denied the motion. The employee appealed.

The employee first argued that the trial court erred in construing Ala. Code § 25-5-77, which provides, "the employer shall pay mileage costs to and from medical and rehabilitation providers at the same rate as provided by law for official state travel." The employee argued that the statute does not expressly define mileage costs as those incurred in traveling to and from the home of an employee to her medical and rehabilitation providers, and also noted that the legislature did not include the words "reasonable" and "necessary" to modify the term "mileage costs." Because the statute omits any reference as to where travel "to" a provider commences or where travel "from" a provider ends, the Court relied on legislative intent as the method of statutory construction.

The Court noted that the legislature specifically expressed that employers should be responsible for only the "reasonable and fair cost" of medical services. *Ex parte Southeast Alabama Med. Ctr.*, 835 So. 2d 1042, 1050 n.9 (Ala. Civ. App. 2002). Thus, the Court concluded that only "reasonable and fair" mileage costs should be recoverable, which would include a requirement that the travel be "reasonably necessary," as is the case for all other reimbursable medical expenses. The employee then argued that the trial court erred in determining that her travel to and from Valdosta, GA and West Palm Beach, FL was not reasonably necessary. In this case, the parties waived their right to an evidentiary hearing, and the trial court decided the case based solely on arguments of counsel, motions, briefs, and exhibits, which revealed no dispute as to the material facts. Thus, the Court reviewed the trial court order without a presumption of correctness.

A review of the record shows undisputed evidence that the employer initially selected providers a reasonable distance from the Gadsden home of the employee. The employee subsequently undertook employment that required her to travel to and from Valdosta, GA and West Palm Beach, FL. However, the employee did not request a change in her providers to accommodate her new work locations. In addition, the employee traveled to and from Gadsden regularly as part of her business travel for her new employer, regardless of whether she had an appointment with her authorized treating physician or needed a prescription filled. While the Court agreed with the employee that she has a right to continue to use her authorized providers that have provided her satisfactory care, the Court also agreed with the trial court that the law limits the employee to mileage expenses only for reasonably necessary travel. The Court noted that the employee could have scheduled her physician and pharmacy visits to take place while she was in Gadsden. The Court held that in this case, it is unreasonable to require the employer to incur the costs of the employee's work-related travel, and that the travel is not reasonably necessary for the employee to obtain her authorized medical care. Thus, the

employer should be responsible only for the mileage costs to and from the employee's Gadsden home because no other travel can be considered reasonably necessary.

Decision: Affirmed

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11. Kennamer Brothers, Inc. v. Ronney Stewart, 2016 Ala. Civ. App. LEXIS 231 (Ala. Civ. App. Sept. 9, 2016)

Holding: (1) The trial court's determination of medical causation as to the employee's shoulder injury was affirmed because the employer offered no other traumatic event that could have caused the injury and it offered no other potential causal explanation for the onset of his symptoms. (2) The Court could not conclude that the employee did not show a causal link between his injury and his diminished earning capacity during the specified period, due to his long-term work history and the absence of evidence that he could have secured alternative suitable employment during his recovery period but for the circumstances of his injury. (3) The Court reversed the award of increased TTD benefits to the extent that it violated Ala. Code § 25-5-68(e), which holds that the maximum benefits that are in effect on the date of the accident shall be applicable for the full compensation period.

Affirmed in part; reversed in part

Trial Court Details:
Venue: Marshall County
Judge: Tim Jolley
Employee's Counsel: Jacob Maples and James Richardson
Employer's Counsel: Howard Warren and Jeffrey Lawrence Smith Jr

Summary:

In December 2013, the employee brought a civil action against his employer alleging that on October 25, 2012, while the employee was in the line and scope of his employment as a truck driver, the vehicle he was operating overturned and crashed on an interstate highway in Tennessee, causing him to receive injuries to his head, neck, back, left arm, legs, and body as a whole. In June 2015, the employee amended his complaint to add allegations of an injury to his right arm and right shoulder. The employer denied that the employee's injuries were compensable under the Act. After an ore tenus proceeding, the trial court entered a judgment that determined the employee's right shoulder condition (a rotator-cuff tear) was a compensable injury that had been caused by the work-related incident; that the employee was entitled to maximum TTD benefits from when the employer had stopped paying TTD benefits to when the employee acquired another job; and that those benefits amounted to $771 per week from 12/21/12 to 07/01/13, and $788 per week from 07/01/13 to 01/28/14. The employer appealed.

The employer's first argument was whether the trial court erred in determining that the employee's rotator-cuff tear was, as a medical matter, caused by his truck crash. The Court noted that in cases involving alleged accidents involving a sudden and traumatic event, "an employee must produce substantial evidence tending to show that the alleged accident occurred and must also establish medical causation by showing that the accident caused or was a contributing cause of the injury." *Pair v. Jack's Family Rests., Inc.*, 765 So. 2d 678, 681 (Ala. Civ. App. 2000). The Court further noted, "whether the employment caused an injury is a question of fact to be resolved by the trial court." *Tenax Mfg. Alabama, LLC v. Hold*, 979 So. 2d 105, 112 (Ala. Civ. App. 2007).

According to the record, the employee was 52 years old at the time of trial and had worked almost exclusively as a truck driver for the past 30 years. He was transported from the scene of the crash via helicopter, and was diagnosed with a concussion and a scalp laceration requiring staples and the removal of foreign bodies. He was discharged from the hospital with instructions to take oxycodone, a prescription pain medication, and he underwent plastic surgeries on his head would for two months, with prescriptions for antibiotic medicines and hydrocodone for pain. The employee testified at trial that he had noticed issues with his right shoulder as he came off the pain medication. On March 26, 2013, after he completed initial treatment for the head wound, the employee returned to the neurologist reporting back and neck pain, and "whole arm pain." Although the neurologist assessed the employee's condition as being "[d]iffuse upper and lower extremity symptoms with a significant numbness and tingling component," the neurologist determined the employee was at maximum medical improvement with no impairment after performing an MRI. The employee then requested a panel of four physicians pursuant to Ala. Code 1975, § 25-5-77(a). After returning to an orthopedist complaining of pain to his back, neck, and both arms, the employee was diagnosed with cubital tunnel syndrome and underwent a release surgery on his left arm. However, the physician records noted the employee's continued issue with his right shoulder. Dr. Janssen, another orthopedic, ordered an MRI of his right arm and discovered a full-thickness tear in his right shoulder rotator cuff; Dr. Janssen opined that the rotator cuff required arthroscopic repair, and that the crash caused or contributed to the symptoms.

In response to the employer's contention that the right shoulder condition was not caused by the truck crash because the employee did not report such symptoms for approximately a year after the crash, the Court stated, "as we noted in *Fab Arc Steel Supply, Inc. v. Dodd,* symptoms that first appear a few hours, days or even months after a traumatic event may nonetheless properly be deemed caused by that trauma if no intervening event has occurred and no alternative medical explanation is provided for the appearance of the symptoms." 168 So. 3d 1244, 1256 (Ala. Civ. App. 2015). The employer pointed to no other traumatic event that could have caused the symptoms and offered no other potential causal explanation for the onset of the symptoms. Thus, the Court held that it could not conclude that the trial court's determination of medical causation was not supported by substantial evidence.

The employer's second issue was whether the trial court properly determined that the employee's TTD stemming from the truck crash extended from 12/21/12 to 01/28/14. The general rule is that TTD benefits are not payable if, before MMI is reached, the injured employee is able to work and earn his preinjury wages, but he is prevented from working for reasons unrelated to his workplace injury. *Fab Arc*., 168 So. 3d at 1259. The employee was terminated on February 4, 2013, when he reported to work but was informed that the employer was not

able to secure insurance coverage because of his involvement in automobile crashes. Nonetheless, the Court stated that the trial court could properly have determined that the reason for terminating the employee is not unrelated to the injury because had the employee not been involved in the crash, in can be inferred that he would not have been deemed an impossibly high insurance risk and would have continued performing his previous driving duties for the employer. The Court further noted that the employee was unable to find a replacement driving position after February 4, 2013, but before January 28, 2014 because he had been unable to obtain medical releases necessary to secure a medical certificate required pursuant to federal motor-carrier regulations. Moreover, the employee had been restricted from lifting heavy loads incidental to his driving duties in August 2013. The Court therefore held that given the employee's long-term work history as a truck driver and the absence of evidence that he could have secured alternative suitable employment during his recovery period but for the circumstances of his injury, they could not conclude that the employee did not show "a causal link between his injury and his diminished earning capacity" during the period specified by the trial court." *Team Am. of Tennessee v. Stewart*, 998 So. 2d 483, 487 (Ala. Civ. App. 2008).

Lastly, the employer contested the TTD award and whether it violated Ala. Code 1975, § 25-5-68, which specifies in subsection (a) that the maximum compensation payable under the Act is "100 percent of the average weekly wage" of the state as administratively determined by the director of the Alabama Dept. of Labor as of July 1 of each year, but subsection (e) states that the "maximum benefits that are in effect on the date of the accident which results in injury or death shall be applicable for the full period during which compensation is payable." The trial court awarded the employee $771 per week from December 21, 2012 to July 1, 2013, which was the average weekly wage in effect at the time of the accident, but $788 per week from July 1, 2013 to January 28, 2014, based upon the director's determination of the average weekly wage of the state as of July 1, 2013. Because the increase in the TTD benefits was contrary to § 25-5-68(e), the Court reversed that portion of the trial court's judgment.

Decision: Affirmed in part; reversed in part

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12. Ex parte Lincare Inc., 2016 Ala. LEXIS 94 (Ala. Aug. 19, 2016)

Holding: 1) Writ of mandamus granted to employer regarding the trial court's denial of its motion to dismiss a former employee's assault and battery and tort-of-outrage claims since they were barred by the exclusivity provisions of the Workers' Compensation Act because the incident in which she was injured arose out of her employment since the incident was precipitated by her resignation, it occurred while she was on the employer's premises, and involved the employer's documents. 2) In regards to the employee's claims against her supervisor, the trial court properly denied the supervisor's motion to strike the jury demand because the employee's waiver of the right to a jury trial was part of her employment agreement, to which the supervisor was neither a party nor an intended third-party beneficiary.
Petition Granted in Part and Denied in Part

Trial Court Details:
Venue: Jefferson County
Judge: Elisabeth French
Employee's Counsel: Lee Winston
Employer's Counsel: Gregory Ritchey

Summary:

Employee alleges that after submitting a letter of resignation to her supervisor, an altercation occurred wherein the supervisor choked, assaulted, and physically attacked the employee. The complaint alleges the supervisor fractured the employee's two fingers on her left hand and damaged her right thumb and elbow. According to the employee, she was resigning because the supervisor had created a difficult work environment, and the employer had failed to address the issue after they were made aware. On April 9, 2015, the employee filed an action against the employer and supervisor, alleging a claim for workers' compensation benefits against the employer, a claim of assault and battery against the employer and supervisor, and a tort-of-outrage claim against the employer and supervisor. She further demanded a jury trial "on all issues triable by jury."

The employer and supervisor filed a joint "Motion to Dismiss or Sever Claims and to Strike Jury Demand," arguing that the workers' compensation claim should be severed from the tort claims. In addition, they contended that the tort claims against the employer were subject to dismissal based on Ala. Code § 25-5-52 (1975), an exclusivity provision of the Workers' Compensation Act. They further argued that the employee failed to state a claim for which relief could be granted with regard to her assertion that the employer ratified the alleged assault and battery and with regard to the tort-of-outrage claim. Lastly, they argued that a jury waiver the employee signed as a condition of her employment dictated that the tort claims be heard in a bench trial rather than before a jury, including the claims against the supervisor because such claims were related to her employment. After a hearing, the trial court entered an order severing the workers' compensation claim from the tort claims "for trial purposes." The trial court denied the motion to dismiss with respect to the tort claims against the supervisor, and denied the motion "at this time" as to the tort claims against the employer. Further, the trial court allowed the jury demand to remain for the tort claims. The employer and supervisor filed a petition for a writ of mandamus.

The employer argued that the employee's tort claims against the employer are barred by the exclusivity provisions of the Act, contending that the allegations of the supervisor's willful and intentional conduct do not in themselves remove her tort claims against the employer from the ambit of the Act. The Alabama Supreme Court agreed, explaining that "if the rational mind could determine that the proximate cause of the injury was set in motion by the employment, then the assault arose out of and in the course of the employment." *Austin v. Ryan's Family Steakhouses*, 668 So. 2d 806, 807 (Ala. Civ. App. 1995). The Court stated that it was clear the incident in which she was injured arose out of her employment with the employer because it was precipitated by the employee's resignation, it occurred while the employee was still on the employer's premises, and the altercation concerned possession of the employer's documents. The Court further noted that the alleged injuries were an "accident" within the meaning of the Act. Thus, the Court held that the trial court erred in refusing to dismiss the tort claims against the employer, as they are subsumed under the exclusivity provisions of the Act.

Regarding the supervisor's contention that the employee's tort-of-outrage claim should have been dismissed for failing to state a claim, the Court held that the denial of a motion to dismiss is not reviewable through a petition for a writ of mandamus. In addition, the defendants failed to cite any supporting authority for such argument. As such, the mandamus petition was denied in that regard. Lastly, the Court held that the employee was entitled to a jury trial on her tort claims against the supervisor because the supervisor is not a party to the jury waiver. The Court also noted the principles regarding the strict construction to be given any waiver of the right to a jury trial. The Court thus found no basis to strike the jury demand as to the claims against the supervisor.

Decision: Petition Granted in Part and Denied in Part

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13. Smith v. Brett/Robinson Construction Company, Inc.,, 2016 Ala. Civ. App. LEXIS 187 (Ala. Civ. App. July 22, 2016)

Holding: The Court upheld the trial court's determination that the employee's knee pain was caused by arthritis and unrelated to the accident, and noted that a mere possibility is not sufficient to demonstrate medical causation.
Affirmed

Trial Court Details:
Venue: Baldwin County
Judge: Jody W. Bishop
Employee's Counsel: Eaton Gaston Barnard
Employer's Counsel: William Eugene Pipkin

Summary:

Employee, a construction superintendent, injured her knee at work when she tripped over a pallet of tile. She testified that she has been in pain ever since. Six weeks after the accident, Dr. Greg Terral, employee's initial authorized treating physician, performed arthroscopic surgery on her knee, and the postoperative notes stated, "findings . . . [were] that of intact meniscal tissue." Employee testified that her pain worsened after surgery, and requested a new authorized treating physician, Dr. Joseph McGowin. After examining employee, Dr. McGowin recommended physical therapy and noted the employee had a contusion and sprain of the knee initially with a bone bruise that resolved on subsequent MRI. He further noted that her main symptoms seem to be from the arthritis which preexisted her fall, and that there were no evident meniscal tears or anterior cruciate ligament tears. In addition, Dr. McGowin later ordered a bone scan, and the results were "suggestive of osteoarthritis." He also noted that he did not believe the arthritis noted during the surgery was caused by the on the job injury, but that the injury could have aggravated the arthritis. In January 2014, approximately eight months after the injury, Dr. McGowin determined that the employee was at MMI, assigned her a 5% permanent partial impairment of the leg, and released her to return to work.

The employee's coworkers and supervisors testified that she had never complained of knee pain before the accident, and that they witnessed her consistently demonstrating pain after she returned to work that January. The employee continued to see Dr. McGowin complaining of pain, and reported in February 2015 that she "turned, heard and felt a pop." However, Dr. McGowin noted that he believed her main symptoms were IT band tendinitis and arthritis, and there is limited benefit to considering surgery. After seeing Dr. James Cockrell for reevaluation, the employee wanted to proceed with diagnostic arthroscopy and meniscectomy. The employer's workers' compensation insurer refused to pay for the surgery.

The trial court held that the employer was not responsible for paying for the proposed additional surgery and that the employer had properly paid for all reasonable and necessary medical treatment related to the injury. The employee appealed.

The employee contended that the fall resulted in a torn meniscus that has not been repaired. She further asserted that the testimony demonstrates she did not suffer from knee problems before the accident and that she has been in pain ever since, pointing to Equity Group-Alabama Division v. Harris, 55 So. 3d 299 (Ala. Civ. App. 2010)(noting "[a] trial court may infer medical causation from circumstantial evidence indicating that, before the accident, the worker was working normally with no disabling symptoms but that, immediately afterwards, those symptoms appeared and have persisted ever since.").

The Court acknowledged that the medical evidence suggests a possibility of a torn meniscus, but that it could not conclude that substantial evidence does not support the trial court's conclusion. See Hammons v. Roses Stores, Inc., 547 So. 2d 883, 885 (Ala. Civ. App. 1989) (stating that "evidence presented by a workmen's compensation claimant must be more than evidence of mere possibilities"). The employee further pointed out that "[i]t is well settled that no preexisting condition is deemed to exist for the purposes of a workers' compensation award if the employee was able to perform the duties of his job before suffering the injury made the basis of the claim." Reeves Rubber, Inc. v. Wallace, 912 So. 2d 274, 279 (Ala. Civ. App. 2005). However, the Court again noted that evidence of a mere possibility is not sufficient to demonstrate medical causation, and ultimately held that they cannot conclude the trial court erred. Thus, the judgment was affirmed.

Decision: Affirmed

14. City of Birmingham v. Thomas, 2016 Ala. Civ. App. LEXIS 186 (Ala. Civ. App. July 22, 2016)

Holding: Court reversed trial court judgment that ordered employer to repay employee benefits it withheld based on the employee receiving disability benefits in addition to his workers' compensation award because the City of Birmingham Retirement and Relief System is a separate entity from the City of Birmingham (the employer), and the City cannot have "waived" any right the Board might have to assert the employee's EOD pension benefits are subject to a setoff under Ala. Code § 45-37A-51.226(b)
Reversed and remanded.

Trial Court Details:
Venue: Jefferson County
Judge: Elisabeth A. French
Employee's Counsel: Allwin Horn
Employer's Counsel: Rozalind Terese Simon

Summary:

Employee brought action against the City of Birmingham ("employer") for benefits under the Alabama Workers' Compensation Act. The parties reached a mediated settlement and filed a joint petition, noting their agreement that the employee would release all claims except those for future medical benefits, and the employer would pay a total amount of $225,000, of which $165,000 would be payable to the employee and his counsel as a lump sum, and the remaining $60,000 would be payable on a biweekly or monthly basis over the following five years. The trial court approved the settlement agreement and noted in its judgment that the employee was informed of his eligibility to apply for Ordinary Disability or Extraordinary Disability Benefits. The employee submitted an "Application for Disability Benefits" addressed to the "Members of the Retirement and Relief Pension Board." The application contained provisions noting there will be a set off with any workers' compensation benefits, and noted that the applicant was aware of the dollar-for-dollar adjustment between his pension and workers' compensation benefit.

Approximately 21 months after the court's judgment, the employee filed a "Motion to Enforce Settlement Agreement," in which he asserted that the employer had "unilaterally decided to reduce any available pension benefits owed to the [employee]," and that the alleged conduct was contrary to the settlement agreement. The employer responded by asserting that they had made all payments agreed upon in the settlement; that the employee had applied for EOD benefits to the City of Birmingham Retirement and Relief Board; that the Board was a "separate entity" from the employer (The City of Birmingham); and that the employee had been informed when he applied for the EOD benefits that those benefits would be offset by the employer's workers' compensation payments. The employee responded by contending that the Board's EOD –benefit-offset right should have been set forth in the settlement agreement.

The trial court held that the silence of the settlement agreement and judgment regarding any right of setoff warranted a conclusion that the employer had waived, or was estopped to assert, a right of setoff, and directed the employer to pay, within 30 days, all EOD benefits and to make monthly payments thereafter. The employer appealed.

The employee asserted that the Board is merely an "instrumentality" of the City (employer). The Court agreed with the employer that the Board is a separate entity from the City, and that the Board is not a mere instrumentality of the City. The Court noted that the employer demonstrated it had fully complied with the financial obligations of the workers' compensation judgment that had ratified the settlement agreement. In addition, the fact that the Board did or did not pay additional pension benefits as to which the judgment merely reserved the employee' right to apply (not a right to receive) did not present an issue properly within the trial court's inherent enforcement power. *See City of Gadsden v. Boman*, 104 So. 3d 882, 888 (Ala. 2012). The Court further held that because the City was a separate entity from the Board (which controls the pension system and the fund from which the employee has claimed

benefits), they cannot properly be said to have "waived" any right the Board might have to assert that the employee's EOD pension benefits are subject to a setoff under Ala. Code § 45-37A-51.226(b). The Court reversed the trial court's judgment that directed the City to pay EOD pension benefits, and remanded with instructions to deny the employee's motion to enforce.

Decision: Reversed and Remanded

15. Hospice Family Care v. Allen, 2016 Ala. Civ. App. LEXIS 154 (Ala. Civ. App. June 10, 2016)

Holding: (1) The employee's death in an automobile accident was compensable under the Alabama Workers' Compensation Act because the employee's workday had not ended at the time of her death; (2) Because the employer had encouraged nurses to complete integral parts of their duties at home or in any other location they chose, and because the employee was still in the process of performing her duties at the time of the accident, the case falls under the exception to the going and coming rule.
Affirmed in part, reversed in part.

Trial Court Details:
Venue: Madison County
Judge: Dennis E. O'Dell
Employee's Counsel: James Barton Warren
Employer's Counsel: Frederick Fohrell and Christopher Lockwood

Summary:

The employee was a registered nurse employed by Hospice Family Care ("employer"). Day-shift nurses worked from 8 am to 4:30 pm. As a day-shift nurse, the employee's responsibilities included driving to the residences of and providing care to approximately four patients, recording a voice message at the end of the shift regarding each patient's condition, entering the billing codes of services provided, and transcribing the medical information regarding each patient, known as "charting." Charting was mandatory within 24 hours of a home visit, and could be done anywhere a laptop computer could be used. At the time of the automobile accident, the employee was on her way home from her last patient visit. The employee was pronounced dead at the scene at 4:10 pm. At that time, she had not recorded a voice message, entered the billing codes, or charted.

The employee's dependent spouse filed a complaint against several defendants arising out of the accident, and then later filed an amended complaint adding the employer seeking death benefits and burial expenses pursuant to the Alabama Workers' Compensation Act ("the Act"). The workers' compensation case was tried separately, and the circuit court concluded that the employee had been an employee of the employer, that the spouse had been wholly supported by the employee at the time of her death, that the employee was a "traveling employee," that the employee had been acting in the scope of her employment at the time of her death, and that there was no substantial deviation from her employment that would bar recovery under the Act. The court also held that certain policies of insurance were neither

intended nor contemplated "to be substitute coverage for the requirement of [the employer] to provide workers' compensation benefits through a self-insured program, comp insurance or any other plan." The court awarded the spouse $6,500 in burial expenses, $51,254.64 (including attorney fees) in accrued benefits, and $695.09 per week (excluding attorney fees) in future benefits for 428 weeks. The employer appealed.

The employer first argued that the spouse's claim is barred by the going and coming rule, which provides that accidents occurring while a worker is traveling on a public road while going to or coming from work generally fall outside the course of the employment. *McDaniel v. Helmerich & Payne Int'l Drilling Co.*, 61 So. 3d 1091, 1093 (Ala. Civ. App. 2010). According to the employer, the employee was neither at work nor performing any work at the time of the accident. The court noted that whether the employee was involved in an activity within the course of her employment when the accident occurs should be determined on a case-by-case basis. The court cited, "[a]n injury to an employee arises in the course of his employment when it occurs within the period of his employment, at a place where he may reasonably be and while he is reasonably fulfilling the duties of his employment or engaged in doing something incident to it." *Massey v. United States Steel Corp.*, 86 So. 2d 375, 378 (1955). In regards to exceptions under the going and coming rule, "[a]n additional exception to the general rule arises when an employee, during his travel to and from work, is engaged in some duty for his employer that is in furtherance of the employer's business." *Ex parte Shelby County Health Care Auth.*, 850 So. 2d 332, 336 (Ala. 2002).

The court concluded that the employee was acting in furtherance of the employer's business affairs because 1) the employee was required to be available to care for her patients until 4:30 p.m., 2) the employer furnished a laptop computer and cell phone to enable the employee to work from home, and 3) the employer discouraged the employee from returning to the office after seeing patients each day due to the character of the employer's neighborhood. Moreover, the employee had not requested any leave on the day of the accident, and it had been the employee's habit to discharge certain duties at home. The court thus held that the employer had encouraged nurses to complete integral parts of their duties at home or in any other location they chose, and because the employee was still in the process of performing her duties at the time of the accident, the case falls under the exception to the going and coming rule.

Next, the employer argued that because workers' compensation is not designed to allow for a double recovery, the circuit court erred by failing to award a setoff for the life-insurance and death benefits that had already been paid. The employer relied on Alacode § 25-5-57(c)(3) in basing their arguments. However, the court stated that the plain language of § 25-5-57(c)(3) does not apply to a deceased employee, but rather, applies to a setoff for disability benefits or sick pay paid to an 'injured employee' during the weeks the employee's salary or similar compensation was continued while the employee could not work. Lastly, because the spouse conceded that the circuit court erred in awarding $6,500 in burial expenses, the court reversed the judgment regarding the award of those expenses.

Decision: Affirmed in part, reversed in part.

16. Wyatt v. Baptist Health Sys., 2016 Ala. Civ. App. LEXIS 138 (Ala. Civ. App. May 27, 2016)

Holding:
The Court grants petition for mandamus relief and holds that it was error for the trial court to deny the employer's motion to transfer the workers' compensation action to the Shelby Circuit Court because the employee resides in Shelby County and was injured at her place of employment in Shelby County.

Trial Court Details:
Venue: Jefferson County
Judge: Elisabeth A. French
Employee's Counsel: John Riley Jacobs and Joseph Thomas Walker
Employer's Counsel: Keith James Pflaum

Summary:

Employee filed a workers' compensation claim in the Jefferson Circuit Court seeking benefits from her employer, Baptist Health System. The employer then filed a motion to change venue under the forum non conveniens statute, Ala. Code § 6-3-21.1 (1975), seeking to have the action transferred to the Shelby Circuit Court. According to the employer, the employee resided in Shelby County, the employee was employed at the medical center located in Shelby County, the incident occurred at that medical center, and the employee was initially treated for her injuries at the medical center. The employer thus argued that transfer to Shelby Circuit Court was required because it would be the most convenient forum for the parties and witnesses, and also because Shelby County has a stronger nexus to the action than Jefferson County.

According to the employee, Jefferson County had sufficient connection to the action, and the action should not be transferred because the employer's principal place of business was located in Jefferson County and that she received further treatment for her injuries in Jefferson County. In addition, the employee argued that the employer had not presented enough evidence indicating that Shelby County would be a "significantly more convenient" forum. See *Ex parte Nichols*, 757 So. 2d 374, 378 (Ala. 1999). The trial court denied the employer's motion, and the employer filed this petition for a writ of mandamus.

After reviewing the authorities discussed in *Ex parte Waltman, Ex parte Autauga Heating & Cooling,* and *Ex parte McKenzie Oil*, the Court found that the employer's motion to change venue was proper since the employee lives in Shelby County and she was injured in Shelby County at her place of employment. *Ex parte Waltman,*116 So. 3d 1111 (Ala. 2013)*; Ex parte Autauga Heating & Cooling* , 58 So. 3d 745 (Ala. 2010); *Ex parte McKenzie Oil*, 13 So. 3d 346 (Ala. 2008). The Court explained that although the employer has its principal place of business in Jefferson County, that factor is of marginal importance in the analysis under Ala. Code § 6-3-21.1, especially when the venue to which the movant seeks to have the action transferred is the

county in which the accident occurred. *See Ex parte Waltman*, 116 So. 3d at 1117-17; *Ex parte McKenzie Oil*, 13 So. 3d at 349. The Court further explained that the employee is seeking workers' compensation benefits from the employer based on an alleged work-related accident at the medical center, and many of the facts and circumstances establishing her right to such benefits would have arisen in Shelby County. Moreover, Jefferson County would have little interest in a case involving whether a Shelby county resident is due workers' compensation benefits arising from her employment in Shelby County. Consequently, the Court directed the Jefferson Circuit Court to enter an order transferring the action to the Shelby Circuit Court.
Decision: Petition Granted; writ issued.

17. Brown v. Lowe's Home Ctrs., LLC., 2016 Ala. Civ. App. LEXIS 111 (Ala. Civ. App. May 6, 2016)

Holding: The Court reverses prior precedent and holds that if a trial court finds that an injury is compensable, orders payment for medical treatment, and awards temporary-total disability benefits, its judgment is final for purposes of appeal. In addition, because there was no evidence that the employee could not work prior to this accident, the Court affirms the trial court's ruling finding that the employee suffered a compensable injury.
Opinion of January 22, 2016 withdrawn and substituted; Affirmed.

Trial Court Details:
Venue: St. Clair County
Judge: Billy R. Weathington Jr.
Employee's Counsel: Robert French
Employer's Counsel: Christopher Dorough

Summary:

On rehearing, employer appeals from the trial court finding that its employee's injury arose out of and in the course of her employment, and ordered the employer to pay for medical treatment and TTD benefits. The employee filed the workers' compensation against Lowe's ("the employer") seeking medical treatment for her back and an award of workers' compensation benefits. After the employer requested an evidentiary hearing on the compensability issue, the trial court granted the employer's request for a hearing to determine the medical necessity and causal relationship for treatment.

The evidentiary hearing suggested the following: The employee had worked for the employer for three years prior to the incident. The employee's manager testified that on the day of the incident, the employee told her that "she may not be able to do much that day because she had hurt herself over the weekend." The manager testified that the employee told her she hurt her back. However, the employee denied the entire discussion. According to the employee, she unloaded lawn mowers and "stuff" from the trucks and put the merchandise out in the store. The employee indicated that she helped unload the truck because the unload associates were understaffed that morning. Further, she stated that the work was strenuous, physical work, and that her back was not hurting before she helped with unloading. In addition, the employee

stated that after unloading the freight, she helped another associate, who was pregnant, with stacking air-conditioning units, which consisted of her bending, pivoting, and stooping to slide or push the units on top of another to use the "order-picker" to raise the units onto the rack. She further testified that as she was trying to place one unit on the rack, she "felt an immediate pop in [her] back exactly four times, and [her] legs went completely numb and [she] had shooting pain down both sides." However, the associate testified that the employee did not assist her with stacking the air-conditioner units that morning, and that the employee told her that her lower back was hurting and she believed it to be her sciatic nerve.

The treating physician notes indicate that the day of the incident was the first day she was seen for her back pain, and the injury was sustained at work. However, the notes also indicated that the symptoms had been present for a few days. The physician diagnosed the employee with a herniated disc and a sprain or strain, referred her to her primary-care physician, and advised her not to return to work at the time. The primary-care physician's notes indicate that the employee had a disc bulge of her spine. Although the notes did not suggest the cause of the disc bulge, they indicated it was a chronic condition. Further, an MRI on the employee's spine indicated "degenerative desiccation and loss of disc height."

Following the hearing, the trial court approved the employee's claim for workers' compensation benefits and ordered the employer to "immediately provide and pay for [employee's] medical treatment related to her back and to pay such other workers' compensation benefits to which [employee] is entitled pursuant to the Workers' Compensation Act including, without limitation, temporary total disability benefits." The order stated that the employee had met her burden of proving both legal and medical causation, specifically finding that the employee had suffered an accident that arose out of and in the course of her employment, that the accident caused the injury for which she sought treatment, and that the medical treatment sought for her back was related to the accident.

The employer's following motion to alter, amend, or vacate the order was denied, and they subsequently filed a notice of appeal in the trial court and a motion seeking a stay of further proceedings in the workers' compensation case pending the outcome of the appeal. On the initial appeal, the Court of Civil Appeals held that because the trial court did not determine the extent, if any, of the employee's disability, there was no final judgment capable of supporting an appeal and the time for filing a timely petition for a writ of mandamus had passed. Thus, the Court declined to review what it considered an untimely mandamus petition.

On rehearing, the employer noted *Belcher-Robinson Foundry, LLC v. Narr*, wherein the court held that a "judgment determining compensability and awarding both medical benefits and temporary-total-disability benefits [is] final for purposes of appeal." 42 So. 3d 774, 775-76 (Ala. Civ. App. 2010). As in this instant case, the court in *Belcher-Robinson* did not specify the amount of TTD benefits to be paid to the employee. *Id.* Thus, the Court held, "on the authority of *Belcher-Robinson,* we now expressly hold that if a trial court enters a judgment finding that an injury is compensable, ordering payment for medical treatment, and awarding temporary-total-disability benefits, regardless of whether the amount of those benefits is specified in the judgment, this court will treat such a judgment as final for purposes of appeal."

The employer then contended that the trial court erred in finding that the employee had suffered a work-related accident, or that the back injury was related to any such accident. In its

order, the trial court recognized the conflicting testimony, and acknowledged that it could not reconcile those conflicts. However, the Court stated that it is not the function of an appellate court to decide which party's evidence is better or more credible, and that it cannot say that the trial court's determination that the employee proved legal causation is plainly wrong. Further, the Court explained that although the logical inference from the evidence would be that the employee already had a degenerative back condition, there is no evidence to indicate that she was unable to do her job before the incident. It noted that there was also no medical evidence in the record indicating she sought medical treatment for a back condition before the date of this incident. Thus, the Court held that the trial court reasonably could have found that the employee's back condition was asymptomatic before the incident, but that in moving the air-conditioning unit, the employee sustained an injury that has left her unable to perform her job. Therefore, the Court affirmed the trial court's judgment finding that the employee suffered a compensable injury and ordered the employer to pay for the medical treatment, as well as TTD benefits.

Decision: Opinion of January 22, 2016 withdrawn and substituted. Trial Court Judgment Affirmed

18. Leesburg Yarn Mills, Inc. v. Hood, 2016 Ala. Civ. App. LEXIS 99 (Ala. Civ. App. April 29, 2016)

Holding: The Court affirms the trial court's judgment and finds that the record supports a finding that the employee's injury arose out of and in the course of employee' employment, which required the claimant to establish both legal and medical causation.

Affirmed.

Trial Court Details:
Venue: Cherokee County
Judge: Randall L. Cole
Employee's Counsel: Donald Robert Rhea
Employer's Counsel: Richard Crum and Kelly Harmon

Summary:

Employer appeals from judgment finding that employee suffered a compensable injury under § 25-5-1 of the Alabama Workers' Compensation Act and awarded medical and compensation benefits. The employee suffered from stenosing tenosynovitis, also known as trigger finger, and eventually underwent surgery. The trial court found that the employee's injury was a result of "cumulative trauma contributed to by the performance of his duties as an employee."

Since it is undisputed the employee's injury falls under the category of "cumulative trauma disorder," the employee must demonstrate that the injury arose out of and in the course of employee's employment by producing substantial evidence establishing both legal causation

and medical causation. *Ex parte Trinity Indus., Inc.,* 680 So. 2d 269 (Ala. 1996). In order to establish legal causation, one must present evidence that the performance of the employee's duties exposed him to a danger or risk materially in excess of that to which people are normally exposed. *Id.* Next, the employee must show that the exposure to risk or danger was in fact a contributing cause of the injury in order to establish medical causation. *Id.* According to the trial court, the employee's manual labor involving "repetitive motion as a routine part of his job over an extended period of time exposed him to a danger of injury materially in excess of the baseline risk to which persons are exposed in everyday life." The employee testified that his job duties consisted of him performing repetitive pinching and grasping motions with his hands multiple times each day in order to operate "carding" machines and transport cans of cotton. The employee's treating physician also testified that he believed the repetitive nature of the employee's job duties could cause his trigger finger injury.

The Court of Civil Appeals noted that it is well established that factual and credibility determinations are for the trier of fact. In addition, in workers' compensation appeals involving cumulative-stress injuries, "[t]he trial court's judgment is to be affirmed if the trial court was presented with evidence of such weight and quality that fair-minded persons . . . reasonably could reach a firm conviction as to each essential element of the claim and infer a high probability as to the correctness of the conclusion." *DeShazo Crane Co. v. Harris*, 57 So. 3d 105, 108 (Ala. Civ. App. 2009). The employee presented evidence that his duties exposed him to a danger greater than the risk of incurring such an injury experienced by persons in their everyday lives of incurring trigger finger. Since a trial court reasonably could have been convinced that the employee's cumulative trauma in his employment legally and medically caused the injury, the trial court's judgment was affirmed.
Decision: Trial Court Judgment Affirmed

19. Ex parte Rock Wool Mfg. Co., 2016 Ala. LEXIS 35 (Ala. Mar. 18, 2016)

Holding: An employer was entitled to mandamus relief because the circuit court erred in denying the employer's motions to dismiss a complaint filed against it by an employee and his wife (jointly, the employee) where the employer asserted an immunity defense, the Workers' Compensation Act (the Act), Ala. Code § 25-5-1 et seq., and the Employer's Liability Act, Ala. Code § 25-6-1 et seq., were mutually exclusive. The employee did not argue that the Employer's Liability Act claim came under any of the exemptions from coverage in the Act or that the tort claims were not barred by the Act. The accident forming the basis of the employee's complaint occurred during the course of and arose out of his employment and within the bounds of the employer's proper role, and, even assuming that the employer acted intentionally with regard to the accident, it was nonetheless a workplace accident.

Petition granted and writ issued.

Trial Court Details:
Venue: Jefferson County
Judge: Bentley H. Patrick
Employee's Counsel: Moses Oscar Stone, Hoyt Gregory Harp
Employer's Counsel: Mary Stewart Nelson

The employee was injured during a furnace explosion while working as a furnace operator for Rock Wool. Prior to the explosion, the employer removed certain safety equipment called "explosion doors" from the furnace the employee was operating. The "explosion doors" had the capacity to mitigate injury to the operator in the event of an explosion. After suing several of his coworkers, the employee filed an amended complaint adding the employer as a defendant, claiming wantonness, outrage, and negligence against the employer. The employer filed a motion to dismiss, arguing that the Alabama Workers' Compensation Act, Ala. Code 1975, § 25-5-1 et seq., provides the exclusive remedy for employees who are injured during the course of their employment. The employee then filed a second amended complaint, asserting a claim under the Alabama Employer's Liability Act, Ala. Code § 25-6-1 et seq. (1975). The employer filed a motion to dismiss the second amended complaint. The trial court entered an order denying the employer's motions to dismiss and the employer filed a petition for mandamus relief.

The employer contends that the employee's Employer's Liability Act claim is barred because the claim does not fall within an exception to coverage under the Workers' Compensation Act. According to *Veterans of Foreign Wars Post 7320 v. Sheffield*:

> Because the Workers' Compensation Act and the Employer's Liability Act are mutually exclusive and cannot apply to the same set of facts, an employee who seeks to recover damages from her employer under the Employer's Liability Act must bring herself within an exception to the Workers' Compensation Act by alleging in her complaint facts sufficient to establish that exception.

398 So. 2d 262, 263 (Ala. 1981). The Court noted that the employee did not address the argument that the Workers' Compensation Act and the Employer's Liability Act are mutually exclusive, nor did he argue that his Employer's Liability Act claim falls under any of the exemptions from coverage under the Workers' Compensation Act. The employee's claim under the Employer's Liability Act was therefore barred.

The employee maintained his Employer's Liability Act claim against the employer based on the Court's decision in *Birmingham v. Waits*, 706 So. 2d 1127 (Ala. 1997). The employee argued that the employer created an unsafe workplace by removing safety devices from the furnace. The Court noted that the Workers' Compensation Act was not at issue in *Waits*, and *Waits* was thus inapplicable in this case.

Next, the employer argued that the employee's tort claims were barred by the exclusive-remedy provision of the Workers' Compensation Act and that the facts of this case were distinguishable from those in *Lowman v. Piedmont Executive Shirt Manufacturing Co.,* 547 So. 2d 90 (Ala. 1989). The Court noted that *Lowman* is best characterized as a factual scenario in which the exclusive-remedy provisions of the Workers' Compensation Act simply did not apply because there was no "accident" that brought the case under the coverage of the Workers'

Compensation Act. The employee's claims in that case were based on the employer's actions following the injury, not on the injury itself. In addition, the Court noted that the employee made no argument that this case is analogous to *Lowman*, nor did he make any argument as to why the tort claims are not barred by the Workers' Compensation Act.

Moreover, the Court explained that even assuming the employer acted intentionally (allegedly removing the 'explosion doors') with regard to the employee's workplace accident, it was nonetheless a workplace accident. Thus, the Court held that the Workers' Compensation Act applies, along with the exclusive-remedy provisions.
Petition granted; writ issued.

20. Ex parte Reed Contr. Servs., Inc., 2016 Ala. Civ. App. LEXIS 34 (Ala. Civ. App. Jan. 29, 2016)

Holding: Employer petitioned for writ of mandamus after trial court ordered them to reinstate payment of temporary-total-disability benefits and pay the employee back pay for the period the employer ended such payments. The trial court determined that knee-replacement surgeries are necessary and that the employee had not yet reached MMI, thus making him ineligible to recover permanent-partial-disability or permanent-total-disability benefits. Because Ala. Code §25-5-57(a)(1) and (2) provides that temporary-disability benefits are to be paid during the period of disability until the disability becomes permanent or, in the case of temporary partial disability, not beyond 300 weeks, the trial court held that the employee is entitled to receive temporary-disability benefits for such period and the period when he has knee-replacement surgeries. Employer's petition for writ of mandamus was denied because the Court found substantial evidence supporting the trial court's finding that the employee has not yet reached MMI.
Petition Denied

Trial Court Details:
Venue: Madison County
Judge: James P. Smith
Employee's Counsel: James Barton Warren
Employer's Counsel: Dennis Gerard Riley

Summary:

The employee was employed by Reed Contracting ("employer") as a tire technician. He was responsible for repairing tires on all vehicles the employer used. On March 29, 2012, the employee was working in a "man lift" when he lost his footing and fell approximately six feet to the below asphalt, landing directly on his hands and knees. He was taken to the employer's company physician and treated for pain in both wrists and both knees. An MRI indicated that he had a tear in the medial collateral ligament ("MCL"), or the inside part of his right knee. The employee was referred to Dr. Michael Cantrell, an orthopedic surgeon. The employee was complaining about pain in both of his knees when Dr. Cantrell treated him on May 7, 2012. The doctor diagnosed him with osteoarthritis in addition to the torn MCL, and recommended conservative treatment. In August 2012, he was diagnosed as having a fracture in his left kneecap, and the doctor testified he believed it to be due to the 2012 fall. While concentrating

on obtaining treatment for his wrists, the employee next sought treatment for his knees in May 2014. Dr. Cantrell then opined that the employee no longer had a fracture or an indication of a fracture site, but rather he had arthritis in his knees, which was not directly related to the work injury. Dr. Cantrell placed him on MMI on June 17, 2014 and determined that the employee had no impairment to his knees.

Because he was unsatisfied with Dr. Cantrell's treatment and was still having pain, the employee requested a panel of four physicians, as he is permitted to do pursuant to Ala. Code § 25-5-77(a) (1975). He chose Dr. Jeffrey Davis, an orthopedic surgeon. Dr. Davis testified that the employee had knee arthritis that predated his March 2012 injury, but that the condition was "made worse and more symptomatic as a result of his on-the-job injury." Dr. Davis testified that the employee's fall aggravated his pre-existing arthritis to produce symptoms that warrant bilateral knee-replacement surgery. However he did express some concern as to the potential success of the surgeries.

After a hearing, the trial court entered an order finding that the employee's fall caused a "permanent aggravation" of his arthritis, and found that the knee replacement surgeries were medically necessary. It directed the employer to authorize the surgeries within ten days of its order. The trial court also rejected the date Dr. Cantrell had given for the employee's having reached MMI because the recommended knee surgeries had not yet been performed. The employer was ordered to reinstate the employee's benefits for temporary total disability and to pay him the amount that had accrued since the date it had denied authorization of the knee replacement surgeries and stopped paying benefits. The trial court reserved ruling on the extent of the employee's permanent disability and the loss of earning capacity. The employer timely filed a petition for writ of mandamus.

The employer contends that there was not substantial evidence to support the trial court's finding that the employee's knee replacement surgeries were necessitated by the March 2012 work injury rather than his preexisting arthritis. For an injury to be compensable under the Worker's Compensation Act, the employee must establish both legal and medical causation. The court noted, "[a] worker who has a preexisting condition is not precluded from collecting workers' compensation benefits if the employment aggravates, accelerates, or combines with, a latent disease or infirmity to produce disability." *Ex parte Lewis,* 469 So. 2d 599 (Ala. 1985). In this case, evidence as to whether the employee's need for knee replacement surgeries was related to his March 2012 injuries was disputed. Dr. Cantrell opined that any treatment provided after June 17, 2014 would be for his arthritic symptoms, which were unrelated to his work injury. However, he also testified that trauma to an arthritic knee can aggravate an underlying arthritic condition. Dr. Davis testified that the March 2012 injury aggravated his pre-existing arthritis and accelerated the employee's need for knee-replacement surgery. The court noted there is no evidence that the employee had significant prior knee problems before the accident, and also noted that there is no evidence indicating the pain in the employee's knee has been alleviated. The court concluded that substantial evidence supports the trial court's findings that the accident produced a permanent aggravation of the employee's pre-existing knee condition, that the accident was a contributing cause of his need for bilateral knee-replacement surgery, and that the surgeries were compensable under the Act.

The court also rejected the employer's argument that it should not have been required to reinstate temporary total disability payments retroactive to the date it denied authorization for

the employee's surgery. The employee argued that because he has yet to have the surgeries, he has not reached MMI. "We conclude that, under the facts of this case, [the employee] has the better argument." The court reasoned since the March 2012 injury, the employee has never been able to return to his job as a tire technician, and there has never been a period of "nondisability." In addition, the court noted that the trial court is not bound by Dr. Cantrell's opinion that the employee reached MMI on June 17, 2014. If the Court accepted the employer's argument, there would be a gap in the employee's benefits that he is entitled to receive. Thus, the petition for writ of mandamus is due to be denied.

Decision: Petition denied.

21. Brown v. Lowe's Home Ctrs., LLC., 2016 Ala. Civ. App. LEXIS 25 (Ala. Civ. App. Jan. 22, 2016)

Holding: [1]-When a trial court ordered petitioner employer to immediately pay respondent employee's medical expenses, the employer's appeal was treated as a petition for a writ of mandamus because the order was interlocutory, as the employee's disability benefits had not been determined, but making the employer await a final judgment was inadequate; [2]-The employer's petition had to be dismissed because Ala. R. App. P. 21(a)(3) established the presumptively reasonable time within which to file the petition, which was the same as the time in Ala. R. App. P. 4(a)(1) for appealing a judgment, the employer did not appeal within that time, and the employer did not comply with the mandatory requirement of Ala. R. App. P. 21(a)(3) to provide an explanation for the untimely filing.

Petition Dismissed

Trial Court Details:
Venue: St. Clair County
Judge: Billy R. Weathington Jr.
Employee's Counsel: Robert French
Employer's Counsel: Anthony Fox

Summary:

Employee filed a workers' compensation action seeking medical treatment for her back and award of disability benefits against Lowe's Home Centers, Inc. ("employer"). Employer denied that employee had sustained a work-related injury and it filed a motion requesting an evidentiary hearing to determine the medical necessity and causal relationship for treatment. The trial court granted employer's request and held an evidentiary hearing on the issue of compensability. After the hearing, the trial court approved the employee's claim for workers' compensation benefits and ordered the employer to provide and pay for the medical treatment related to her back. The trial court specifically found that employee had suffered an accident on

May 19, 2014, that arose out of, and in the course of, her employment and further that the accident had caused the injury for which employee sought treatment. The employer appealed.

The Court of Civil Appeals noted, "a majority of this court [has] ruled that this court may elect to treat an appeal that is erroneously filed following the entry of a nonfinal judgment in a workers' compensation case as a petition or a writ of mandamus if later appeal would be an inadequate remedy." The court also noted *Ex parte Cowabunga*, *Inc.* 67 So. 3d 136, 138 (Ala. Civ. App. 2011)(an order that finds an injury to be compensable but only requires payment of medical expenses is not a final judgment), and determined that because no final order had been entered, the appeal should be treated as a petition for writ of mandamus.

Next, the court considered whether the petition for writ of mandamus was timely filed; a petition for writ of mandamus must be filed within a reasonable time. The presumptively reasonable time for filing a petition for writ of mandamus is the same time as the time for taking an appeal. *See Ex parte Onyx Waste Servs. Of Florida*, 979 So. 2d 833, 834 (Ala. Civ. App. 2007). In this case, the order was entered on May 21, 2015, and the employer filed a post judgment motion on June 2, 2015. The post judgment motion was denied on July 9, 2015, and employer filed a notice of appeal on July 22, 2015. Because the post judgment motion filed by employer did not toll the presumptively reasonable time for filing a petition for writ of mandamus, employer had 42 days from May 21, 2015, within which to file a petition for writ of mandamus. Because the petition was not filed until after that date, it is not timely. However, an appellate court may consider an untimely petition if the petitioner includes a "statement of circumstances constituting good cause." *Ex parte Fiber Transp., LLC*, 902 So. 2d 98, 100 (Ala. Civ. App. 2004). However, the filing of such a statement is mandatory. *Id.* In this case, the employer did not provide the court with a necessary explanation as to why it did not file its petition within a reasonable time. Given the petition was untimely and the necessary explanation was not provided, the petition cannot be considered.

Decision: Petition Dismissed