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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2016-2017

2150914

Brewton Area Young Men's Christian Association, Inc.

v.

Georgia H. Lanier

Appeal from Escambia Circuit Court
(CV-13-900235)

THOMAS, Judge.

On December 19, 2012, Georgia H. Lanier ("the employee") was preparing to leave the premises of her employer, Brewton Area Young Men's Christian Association, Inc. ("the employer"),

when she fell behind her desk. The employee suffered comminuted introchanteric and subtrochanteric fractures in her left hip. The employee sued the employer in the Escambia Circuit Court ("the trial court"), seeking workers' compensation benefits. After a trial, the trial court entered a judgment concluding that the employee's injury was compensable, determining that the employee is permanently and totally disabled, calculating the employee's average weekly wage, ordering the employer to pay medical benefits, and awarding the employee temporary and permanent workers' compensation benefits. The employer appeals.

> "Our standard of review in workers' compensation cases was prescribed by the Legislature in Ala. Code 1975, § 25-5-81(e)(2). We recently set forth that standard, as well as the other applicable presumptions:
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> > "'When this court reviews a trial court's factual findings in a workers' compensation case, those findings will not be reversed if they are supported by substantial evidence. § 25-5-81(e)(2), Ala. Code 1975. Substantial evidence is "evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved." West v. Founders Life Assurance Co. of Florida, 547 So. 2d 870, 871 (Ala. 1989). Further, this court reviews the facts "in the light most favorable to the findings of

> the trial court." Whitsett v. BAMSI, Inc., 652 So. 2d 287, 290 (Ala. Civ. App. 1994), overruled on other grounds, Ex parte Trinity Indus., Inc., 680 So. 2d 262 (Ala. 1996). This court has also concluded: "The [1992 Workers' Compensation] Act did not alter the rule that this court does not weigh the evidence before the trial court." Edwards v. Jesse Stutts, Inc., 655 So. 2d 1012, 1014 (Ala. Civ. App. 1995). However, our review as to purely legal issues is without a presumption of correctness. See Holy Family Catholic School v. Boley, 847 So. 2d 371, 374 (Ala. Civ. App. 2002) (citing § 25-5-81(e)(1), Ala. Code 1975).'
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> "Reeves Rubber, Inc. v. Wallace, 912 So. 2d 274, 279 (Ala. Civ. App. 2005)."

Overnite Transp. Co. v. McDuffie, 933 So. 2d 1092, 1095-96 (Ala. Civ. App. 2005).

The record discloses the following evidence. The employee testified that she fell behind her desk when she was preparing to leave work for the day on December 19, 2012. According to the employee, she got up from her chair, pushed the chair back, reached over to the credenza located behind her desk, and picked up a box of items that she was taking home with her. She said that as she started to move, she remembered tripping over the chair and falling; she fractured

her hip in two places.[1] She testified that she had hit her head when she had fallen and that she had lost consciousness; thus, she said, she could not remember anything that occurred after the fall until the emergency medical personnel arrived, and she could remember only a few things that occurred during her transport to the emergency room but nothing from the emergency room. The employee admitted that she could not know whether the fractures had occurred before or after she had fallen.

The employee was transported by ambulance to D.W. McMillan Hospital ("the emergency room"). Records from the emergency room indicate that the employee was conscious upon her arrival and that she provided the history of the injury to the emergency-room personnel. The records do not indicate that the employee characterized the injury as work-related; however, the records indicate that the employee "fell at the Y," which, of course, is the place of her employment. After

[1]The employee described the chair as a wheeled chair having "spiral" legs that extended out further than the seat; the employee's counsel referred to the legs as "spokes." At trial, the employee and a coworker, Daniel McNamara, both indicated that the chair was similar to the chair occupied by the court reporter.

being treated in the emergency room, where the employee was given, among other things, morphine, the employee was transferred to the Mobile Infirmary, where she underwent surgery to repair the fractures in her hip. The surgery, which was performed by Dr. Todd Engerson, required the implantation of two rods in the employee's hip area.

The employee spent just over one week in the Mobile Infirmary recuperating from the surgery. The employee was then transferred to a rehabilitation facility where she underwent physical therapy during her three-week stay. After her discharge from the rehabilitation facility, the employee continued at-home physical therapy for another six weeks. She returned to work on March 11, 2013.

According to the employee, she continued to suffer pain after the conclusion of her physical therapy. Records from Dr. Engerson reveal that the employee, after a period of improvement, indicated in June 2013 that she continued to suffer pain in her groin, buttock, and lateral thigh. Dr. Engerson commented in his notes in June 2013 that the pain the employee was suffering could have been related to both the hip surgery and an irritation of a previous lumbar fusion surgery;

he prescribed a narcotic pain reliever for the employee. Dr. Engerson's notes also mention that the employee suffered a slight limp in April 2013, but the July 2013 note does not contain any such notation.

Dr. Engerson's deposition was admitted into evidence. He testified that there was no way to tell if the employee's fractures had occurred on impact with the floor or whether they occurred because of an abnormal position of her leg as she fell. When asked whether the employee's fractures could have occurred when she simply stood up, Dr. Engerson said that it was possible. However, he went on to explain that "usually there's got to be something -- some underlying process that's weakened the bone like a stress fracture or a tumor or something like that which I don't think that she had any known problem prior to [the fall]." According to Dr. Engerson, the fractures the employee suffered typically require some degree of torque applied to the bone. He explained that "[i]t could be just a slight twist, you know, when you go forward and you twist the leg around and forces get going the wrong way and you could end up in a heap on the ground." He mentioned that a misstep or tripping over an item could result in the injury

suffered by the employee. Dr. Engerson was asked whether the injury the employee had suffered could have aggravated her back condition; he answered "they [sic] certainly could." He also remarked that a gait abnormality during recovery could cause existing back conditions to exhibit symptoms, but he noted that he did not know whether the employee's back condition was asymptomatic before the fall.

In July 2013, the employee saw Dr. Clark Metzger, who had performed her previous back surgeries, for a second opinion. Dr. Metzger's July 15, 2013, notes reflect that he thought that most of the employee's pain was related to her hip injury; he also diagnosed her with chronic pain syndrome, noting in his records that "she has relatively severe back pain, but she has had [that pain] for years." Dr. Metzger suggested that a replacement of one of the rods inserted by Dr. Engerson with a shorter rod might reduce the employee's pain. The employee chose to undergo a second surgery to replace the rod, which Dr. Metzger performed on July 31, 2013. Dr. Metzger's August 14, 2013, note indicates that the employee stated that she was "thrilled" with the outcome of

the surgery, which had reduced her pain. Dr. Metzger released the employee to return to work on August 19, 2013.

The employee saw Dr. Pablo W. Concepcion at Pain Consultants of West Florida ("PC") for pain management. She was prescribed pain medications and periodic epidural injections; she had a monthly appointment at PC. She admitted that she had been going to PC before her fall for pain resulting from her prior back surgeries. In addition, the records from PC reveal that the employee was treated for pain in areas other than her back or hips over the course of her treatment.

The employee continued to work for the employer after her surgeries. However, she testified that certain duties were added to her job requirements, including writing editorials and advertisements for the local paper and more communications-related duties. She complained that she no longer felt welcome at work and that she was often asked when she planned to retire. In January 2014, the employee notified the employer that she would retire effective May 4, 2014.

The employee explained that, at first, she did not think that her injury was work-related. She said that she had

always understood that workers' compensation was for "something like maybe climbing a ladder and falling off a ladder. Or reaching for something and pulling it over on top of you." The employee said that, while she was in the rehabilitation facility, she had been contacted via telephone by a person claiming to be from the employer's workers' compensation carrier. She testified that she had asked who had reported that her injury was covered by workers' compensation; the employee said that the person on the telephone had told her that Steven Dickey, the CEO of the employer, had contacted the carrier to report the accident.

According to the employee, her supervisor, Cathy Green, had told her that her fall was not covered by workers' compensation. The employee testified that she had gone to the office to collect her paycheck one day and that Green had told her that the accident was not a work-related accident and that the employee "did not want to file on work[ers'] comp because it would cause the [employer's] premium to go up." The employee also said that Green had told her that the employer would take care of her. Thus, the employee testified, she had informed the workers' compensation investigator in a second

telephone conversation that the accident was not work-related, as Green had instructed.

The employee explained that "[a]s long as I had vacation leave accumulated, sick leave accumulated, personal leave, I was taken care of, I was paid. But when that was up, it was stopped." The employee admitted that she was paid her full salary through February 2013; she mentioned that she was informed when she received her "last full paycheck" that the following paycheck would be for a lesser amount, but she did not indicate when, or if, she had received a paycheck for a lesser amount or if she had not been paid for any period during her convalescence. The employer did not pay the employee any temporary workers' compensation benefits and did not pay for any medical care.

Green testified that she was at work on the day of the employee's fall. She said that she had heard the employee moaning and that she had called out to the front desk to find out what was wrong. When Daniel McNamara, a coworker, answered, Green said, he told her that she needed to come to the front desk. Green testified that the employee was conscious and lucid after the fall. According to Green, she

had asked the employee what was wrong and whether she should call for an ambulance and that the employee had answered that her leg was injured and indicated that Green should call for an ambulance.

Green denied having instructed the employee to tell the workers' compensation investigator that the fall was not work-related. Although she admitted having had a conversation with the employee when she came to pick up her check, Green said that the employee had told her that she had already informed the workers' compensation investigator that the fall was not work-related. Green also testified that the employee had told her that the doctor had said "that her bone splintered outwards and her leg broke out from under her."

McNamara testified that he was present the day of the fall. He explained that he was only a few feet from the employee when she fell and that he was looking at her when the fall occurred. According to McNamara, the employee was not walking when she fell and he did not see her trip on anything. He said that he was sitting in the chair when she fell when she attempted to pick up a box. He testified that the

employee did not hit her head when she fell, but he admitted that she was in a lot of pain after the fall.

The employer first argues that the trial court's finding that the employee's injury was caused by her tripping over a chair is not supported by substantial evidence. That is, the employer challenges the trial court's conclusion that the employee proved legal causation of her injury. See Equity Grp.-Alabama Div. v. Harris, 55 So. 3d 299, 308-09 (Ala. Civ. App. 2010) (quoting Hammons v. Roses Stores, Inc., 547 So. 2d 883, 885 (Ala. Civ. App. 1989)) (explaining that "'[f]or an injury to be compensable, the employee must establish both legal and medical causation'" and describing "legal causation" as proof "'that an accident arose out of, and in the course of employment'"). The employer specifically contends that the trial court could not have found the employee's testimony to be of "sufficient weight and quality" to support its finding because, the employer contends, the employee's testimony was inconsistent with the allegations made in her complaint,[2] with certain statements in her own testimony indicating that she

[2]The complaint alleges that the employee suffered a work-related injury on December 19, 2012, when she "twisted her left leg as she stumbled on the floor, desk and/or chair."

could not remember much that happened after the fall, and with her alleged admission to Green that her doctor had told her that her leg could have broken when she stood up. The employer also points out that the employee testified that she had hit her head when she fell, which, the employer says, proves either that the employee was not a reliable witness because of her head injury or that her memory of the fall is unreliable because she recalls having hit her head when the medical records indicate that she did not. Furthermore, the employer states, the employee's version of events is directly contradicted by the testimony provided by McNamara, who witnessed the fall.

The evidence regarding the cause of the fall was disputed. As noted above, the employee stated that she recalled tripping over the chair before her fall. McNamara testified differently, stating that the employee just fell and that she had not tripped on the chair. In addition, the employee testified that she had hit her head when she fell and that she did not recall much of what had happened after the fall. The medical records indicate that the employee had not suffered a head injury, which, as the employer suggests, could

be used to undermine the employee's credibility about the other events surrounding the fall. Finally, Green testified that the employee had admitted to her that her doctor had said that her fractures occurred when she arose from her chair, indicating that the employee did not believe that she had tripped on the chair. Dr. Engerson, however, testified that a spontaneous fracture like those suffered by the employee, although possible, was not likely to have occurred.

We must affirm a trial court's finding if it is supported by substantial evidence. Ala. Code 1975, § 25-5-81(e)(2). The employer is correct that "substantial evidence" must be evidence of sufficient "'weight and quality'" to allow persons to "'reasonably infer the existence of the fact sought to be proven.'" Ex parte Trinity Indus., Inc., 680 So. 2d 262, 268 (Ala. 1996) (quoting West v. Founders Life Assurance Co. of Florida, 547 So. 2d 870, 871 (Ala. 1989)). However, we are mindful that "'[t]his statutorily mandated scope of review does not permit this court to reverse the trial court's judgment based on a particular factual finding on the ground that substantial evidence supports a contrary factual finding; rather, it permits this court to reverse the trial court's

judgment only if its factual finding is not supported by substantial evidence.'" Equity Grp.-Alabama Div., 55 So. 3d at 305-306 (quoting Landers v. Lowe's Home Ctrs., Inc., 14 So. 3d 144, 151 (Ala. Civ. App. 2007) (opinion on original submission)).

Much of the employer's contention that the employee's testimony is not of "sufficient weight and quality" turns on its insistence that the trial court could not have found the employee's testimony truthful or credible. Of course, in cases in which a trial court takes oral testimonial evidence, "'the trial court is the sole judge of the facts and of the credibility of witnesses, and the trial court should accept only that testimony it considers to be worthy of belief.'" Engineered Cooling Servs., Inc. v. Star Serv., Inc. of Mobile, 108 So. 3d 1022, 1027 (Ala. Civ. App. 2012) (quoting Woods v. Woods, 653 So. 2d 312, 314 (Ala. Civ. App. 2014), citing in turn Ostrander v. Ostrander, 517 So. 2d 3 (Ala. Civ. App. 1987)). "'This court is precluded from weighing the evidence presented before the trial court.'" Carquest Auto Parts & Tools of Montgomery, Alabama, Inc. v. Waite, 892 So. 2d 422, 426 (Ala. Civ. App. 2004) (quoting Fryfogle v. Springhill

Mem'l Hosp., Inc., 742 So. 2d 1255, 1258 (Ala. Civ. App. 1998), aff'd, 742 So. 2d 1258 (Ala. 1999)). Put another way, "'[t]he resolution of conflicting evidence is within the exclusive province of the trial court, and this court is forbidden to invade that province upon review.'" Hooker Constr., Inc. v. Walker, 825 So. 2d 838, 842 (Ala. Civ. App. 2001) (quoting Mayfield Trucking Co. v. Napier, 724 So. 2d 22, 25 (Ala. Civ. App. 1998)).

Although the evidence regarding the cause of the employee's fall was disputed and, at times, might have appeared inconsistent, the trial court chose to believe the employee's testimony about the fall. Similarly, the trial court, perhaps in light of Dr. Engerson's testimony, must have chosen to disbelieve the testimony that the employee had told Green that her fractures had occurred when she stood up. The evidence presented, even with its conflicts, is substantial evidence supporting the trial court's finding that the employee tripped over the chair, resulting in her fall. We therefore reject the employer's argument, and we conclude that the trial court's finding that the employee's fall resulted

from her tripping over a chair is supported by substantial evidence.

The employer next contends that the trial court erred in concluding that it had received proper notice under Ala. Code 1975, § 25-5-78. The employee admittedly did not provide written notice as required by the statute. As the employer concedes, in the absence of the written notice contemplated by the statute, actual knowledge of an injury will suffice. See Ex parte Brown & Root, Inc., 726 So. 2d 601, 602 (Ala. 1998). However, the employer contends that, although it knew that the employee fell while at work (i.e., in the course of the employment), the employer had no notice that the employee was claiming that the injury she suffered was work-related (i.e., arose out of the employment). To support its claim of a lack of notice, the employer points out that the employee never told Green that her fall was work-related and relies on evidence indicating that the employee had not indicated that her fall and resulting injury were work-related on certain medical forms or when questioned by the workers' compensation investigator.

As noted above, however, the employer notified its workers' compensation carrier of the employee's fall and the carrier conducted an investigation. The trial court specifically pointed out in its judgment that certain medical records contained a form from the workers' compensation investigator requesting information, and the record clearly reflects that a workers' compensation investigator contacted the employee at least twice. We must determine, then, whether the record reflects that the employer had actual knowledge of the employee's injury.

In Ex parte Singleton, 6 So. 3d 515, 519 (Ala. 2008), our supreme court discussed the requirement of notice:

> "In Ex parte Brown & Root, Inc., 726 So. 2d 601, 602 (Ala. 1998), this Court noted that § 25-5-78, Ala. Code 1975, 'requires that an employer be given written notice of a job-related injury so that the employer can "make a prompt examination, provide proper treatment, and protect itself against simulated or exaggerated claims."' (Quoting Russell Coal Co. v. Williams, 550 So. 2d 1007, 1012 (Ala. Civ. App. 1989).) The Court then recognized that 'written notice is not required if the employer had actual knowledge that the employee was injured in the scope of his or her employment.' 726 So. 2d at 602. Continuing, the Court stated:
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> > "'The employer must have actual knowledge that the employee's injury was connected to the employee's work activities. Wal-Mart Stores, Inc. v. Elliott, 650 So. 2d 906,

> 908 (Ala. Civ. App. 1994)]. 'The fact that an employer is aware that an employee [suffers from] a medical problem is not, by itself, sufficient to charge the employer with actual knowledge.' Russell [Coal Co. v. Williams], 550 So. 2d [1007,] 1012 [(Ala. Civ. App. 1989)].'
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> "726 So. 2d at 602."

The employer specifically contends that it was not apprised of the connection between the employee's fall and resulting injury and her employment. Thus, it says, it did not receive proper notice via its knowledge of the fall itself.

This court, in Russell Coal Co. v. Williams, 550 So. 2d 1007, 1012 (Ala. Civ. App. 1989), examined the reason behind the requirement of notice and when written notice might be excused. We noted that "[t]he Supreme Court of Alabama has stated that the aim of actual notice is 'to advise the employer that a certain employee, by name, received a specified injury in the course of his employment on or about a specified time, at or near a certain place specified.'" Williams, 550 So. 2d at 1012 (quoting Baggett v. Builders Transp., Inc., 457 So. 2d 413, 415 (Ala. Civ. App. 1984), quoting in turn Ex parte Stith Coal Co., 213 Ala. 399, 400, 104 So. 756, 757 (1925)). After notice is provided, this

court noted, the employer is able to take steps to investigate the claim so that it can mount a defense against it, if warranted. Williams, 550 So. 2d at 1012 (citing Beatrice Foods Co. v. Clemons, 54 Ala. App. 150, 306 So. 2d 18 (1975)).

The record reflects that, despite any question the employer might have had about whether the employee's fall was related to her employment, the employer notified its workers' compensation carrier of the accident via a first report of injury. The carrier conducted an investigation, contacting the employee at least twice and seeking information from the medical professionals who provided care to the employee. The employer acted in a manner consistent with having received notice of the injury, and we cannot perceive how the employer was prejudiced in any way in this instance by the employee's alleged failure to make known to the employer through written notice or otherwise that she claimed that her fall and the resulting injury were related to her employment. We therefore reject the employer's contention that it did not receive sufficient notice of the injury under the facts and circumstances of the present case.

The employer next argues that the trial court erred by determining that the employee's injury should be treated as a nonscheduled injury based on the trial court's determination that the employee's back pain had been aggravated by her fall or that she had suffered from an altered gait that worsened the employee's preexisting back condition. The employer's argument begins with the premise that the employee suffered a scheduled-member injury to her leg. However, fractures of the exact type suffered by the employee in the present case were determined to be injuries to an employee's hip and therefore to a nonscheduled part of the body in Crown Textile Co. v. Dial, 507 So. 2d 522, 523 (Ala. Civ. App. 1987). Therefore, we need not consider wether the employee's back pain sufficed to take her outside of the schedule under Ex parte Drummond Co., 837 So. 2d 831 (Ala. 2002), or whether her altered gait had resulted in a successive compensable injury to her back under cases like Ex parte Pike County Commission, 740 So. 2d 1080 (Ala. 1999).

We turn next to the employer's argument that the trial court erred in computing the employee's average weekly wage. At trial, the parties stipulated that the employee's weekly

wage, exclusive of fringe benefits, was $582.70. The testimony at trial established that the employer provided health insurance at no expense to the employee at a cost of $462.00 per month (or $106.33 per week) and that it contributed 12% of her annual salary (or $69.92 per week) to a retirement plan on her behalf. The trial court calculated the average weekly wage to be $759.24.[3]

The employer argues that its retirement-plan contribution should not be considered part of the employee's average weekly wage because, it says, the definition of average weekly wage in Ala. Code 1975, § 25-5-1(6), explicitly includes as fringe benefits "only the employer's portion of health, life, and disability insurance premiums." The employer also contends that the employer's contributions to the retirement plan were not taxable to the employee and would therefore not satisfy the requirement in § 25-5-1(6) that, to be considered part of the weekly wage, an employee's earnings must be subject to

[3]However, as the employee notes in her brief, the trial court apparently made a computation error and the actual wage should be $758.95 ($582.70 + $106.33 + $69.92 = $758.95).

federal income taxation.[4] However, the employer never made these arguments to the trial court, and we are therefore precluded from considering them. Roblero v. Cox Pools of Southeast, Inc., 133 So. 3d 904, 910 (Ala. Civ. App. 2013); see also Norman v. Bozeman, 605 So. 2d 1210, 1214 (Ala. 1992) ("Our review is limited to the issues that were before the trial court -- an issue raised on appeal must have first been presented to and ruled on by the trial court.").

The employer's final argument is that the trial court erred in awarding the employee temporary-total-disability ("TTD") benefits and permanent-total-disability ("PTD") benefits during periods after her injury when she was either

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[4]Section 25-5-1(6) reads, in its entirety, as follows:

> "(6) Wages or weekly wages. The terms shall in all cases be construed to mean 'average weekly earnings,' based on those earnings subject to federal income taxation and reportable on the Federal W-2 tax form which shall include voluntary contributions made by the employee to a tax-qualified retirement program, voluntary contributions to a Section 125 cafeteria program, and fringe benefits as defined herein. Average weekly earnings shall not include fringe benefits if and only if the employer continues the benefits during the period of time for which compensation is paid. 'Fringe benefits' shall mean only the employer's portion of health, life, and disability insurance premiums."

working or receiving her total salary while recuperating. See Ala. Code 1975, § 25-5-57(c)(3) ("If an employer continues the salary of an injured employee during the benefit period or pays similar compensation during the benefit period, the employer shall be allowed a setoff in weeks against the compensation owed under this article."); United States Steel Corp. v. McBrayer, 908 So. 2d 947, 952 (Ala. Civ. App. 2005) ("[U]nder Alabama law an injured employee is not entitled to TTD benefits with respect to full-time work intervals during the recovery period."); and Mead Paper Co. v. Brizendine, 575 So. 2d 571, 574 (Ala. Civ. App. 1990) ("[I]f the employee can resume his trade then it is obvious that he is not permanently, totally disabled."). After her December 19, 2012, injury, the employee returned to work on March 19, 2013, and she worked until her second surgery on July 31, 2013, after which she convalesced for just over two weeks. She returned to work after her second surgery on August 19, 2013, and she worked until her retirement on May 4, 2014. The trial court awarded the employee TTD benefits from December 19, 2012, to July 10, 2013 (the date of maximum medical improvement) and awarded the employee PTD benefits from July

13, 2013, to the date of trial. The employee concedes that the judgment is due to be reversed in part and the cause remanded for "a clarification of the periods [the employee] is owed [TTD] benefits and whether those benefits should include fringe benefits." See § 25-5-1(6) ("Average weekly earnings shall not include fringe benefits if and only if the employer continues the benefits during the period of time for which compensation is paid.").

We have concluded that the trial court's determination that the employee proved legal causation is supported by substantial evidence and that the trial court did not err in awarding compensation outside the schedule for the employee's hip fractures. Thus, we affirm those aspects of the trial court's judgment. We cannot consider the employer's argument that its retirement contributions should not be included in the employee's earnings for purposes of computing the average weekly wage because the employer asserts that argument for the first time on appeal. The employee concedes that the award of TTD and PTD benefits during periods when the employee had resumed her employment or was being paid her full salary must be reversed. Accordingly, the trial court's judgment is

reversed insofar as it awarded the employee TTD and PTD benefits, and the cause is remanded for consideration of the dates for which the employee is entitled to TTD benefits and the determination of the proper amount of those benefits.

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

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