REL: April 19, 2019

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2018-2019

2171022

Tuscaloosa County

v.

Chaka Beville

Appeal from Tuscaloosa Circuit Court
(CV-15-901273)

EDWARDS, Judge.

Chaka Beville was employed as a correctional officer at the Tuscaloosa County jail. On December 23, 2014, Beville slipped and fell, injuring her left wrist. After conservative treatments failed, Beville underwent surgery and physical

therapy to address her injury. In November 2015, Beville sued Tuscaloosa County ("the county") in the Tuscaloosa Circuit Court ("the trial court"), seeking workers' compensation benefits.[1] After a trial held on June 28, 2017, the trial court entered a judgment[2] determining that Beville had "suffered a 60% injury to her left upper extremity" and awarding Beville $29,304 in benefits.[3] The county appeals.

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[1]In her complaint, Beville also sought workers' compensation benefits for alleged injuries to her back, neck, and knee. The trial court determined that those injuries were not compensable, and Beville has not appealed that portion of the trial court's judgment. Accordingly, we will confine our discussion to the evidence relevant to only the wrist injury.

[2]The trial court entered an order stating its factual findings and conclusions of law on May 18, 2018. After a subsequent hearing, the trial court entered its final judgment determining the amount of workers' compensation benefits owed to Beville. For ease of reading, we will refer to the findings and conclusions in both orders as if they were contained in one single judgment.

[3]Although the county does not challenge the trial court's use of the incorrect terminology, we note that the schedule set out in Ala. Code 1975, § 25-5-57(3)a., does not refer to the "upper extremity" but refers only to the "arm." Furthermore, § 25-5-57(a)(3) compensates for the loss of, or for the loss of use of, a scheduled member. Thus, we consider the trial court to have determined that Beville suffered the 60% loss of use of her left arm. See Carter v. Southern Aluminum Castings, 626 So. 2d 636 (Ala. Civ. App. 1993) (approving of the treatment of a wrist injury as a scheduled-member injury to the arm).

Our review of workers' compensation judgments is well settled. "In reviewing pure findings of fact, the finding of the circuit court shall not be reversed if that finding is supported by substantial evidence." Ala. Code 1975, § 25-5-81(e)(2). Our supreme court has explained that a trial court's finding of fact is supported by substantial evidence if it is "supported by 'evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved.'" Ex parte Trinity Indus., Inc., 680 So. 2d 262, 269 (Ala. 1996) (quoting West v. Founders Life Assurance Co. of Florida, 547 So. 2d 870, 871 (Ala. 1989)); see also Ala. Code 1975, § 12-21-12(d). In completing our review, this court "will view 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., 680 So. 2d at 269. We review legal issues without a presumption of correctness. See Ala. Code 1975, § 25-5-81(e)(1).

The testimony at trial indicated that Beville continued to work after her December 2013 accident and that she did not

take the nonsteroidal, anti-inflammatory medication prescribed to her by Dr. Phillip Bobo, who initially treated her after her accident. However, Beville also suffered from knee, back, and neck pain after her accident; although the trial court determined that any injury to Beville's left knee, back, and neck were not compensable, Beville testified, and her medical records reveal, that she was prescribed several medications between March 2014 and the date of trial by physicians other than Dr. Bobo, including a muscle relaxer, a synthetic opioid pain reliever, and non-opioid pain relievers. Beville's medical records also reveal that she continued to report wrist pain in the months following the accident and that, after cortisone injections failed to provide lasting relief, Beville underwent surgery on her wrist. After the surgery, she attended physical therapy, at which she continued to complain of varying degrees of pain and of burning and numbness with the use of her wrist throughout therapy. The physical-therapy notes indicate that, although therapy was decreasing her pain in the short term, she continued to have pain after certain treatments "wore off."

In October 2014, after she reached maximum medical improvement ("MMI"), Beville underwent a functional-capacities evaluation ("FCE"). The results of that FCE indicated that Beville could not perform the duties of her employment as a correctional officer because of deficits in her ability to lift, carry, and push. According to the FCE report, "the primary limiting factors during [the FCE] were complaints of wrist pain." The FCE determined that Beville could perform within the "light plus" category, which requires "exerting up to 30 pounds of force occasionally and/or up to 10 pounds of force frequently." The FCE reflected that Beville was able to lift 40 pounds from floor to waist but that she stopped that task complaining of wrist pain and that she was able to lift 30 pounds from waist to overhead but, again, stopped the task complaining of pain in her wrist. The FCE did not specifically state the restrictions placed on Beville.

Dr. John P. Buckley, Beville's authorized treating physician, issued a statement of physical-impairment rating. He stated that he had determined that Beville had suffered a 4% impairment to her left upper extremity. He explained that Beville had "decreased joint mobility and increased stiffness"

in her wrist and limited grip strength in her left hand. However, Dr. Buckley stated that he had not assigned an impairment rating for the loss of strength in Beville's left hand because, he said, he expected her loss of strength to improve over time.

The parties entered into several stipulations at the beginning of the trial. One of those stipulations was that "Dr. Buckley assigned a 4% impairment rating to [Beville's] wrist." The parties also stipulated that "[a] 4% impairment rating to [Beville's] wrist equates to a monetary value of $1,953.60."

Citing, among other authorities, Fab Arc Steel Supply, Inc. v. Dodd, 168 So. 3d 1244, 1257 (Ala. Civ. App. 2015), and Vann Express, Inc. v. Phillips, 539 So. 2d 296, 298 (Ala. Civ. App. 1988), the county argues that the trial court did not honor the parties' joint stipulations or give those stipulations a "reasonable construction." According to the county, the stipulations mentioned above indicate that the parties agreed that Dr. Buckley's 4% physical-impairment rating was, in fact, the physical-impairment rating applicable to Beville. However, Beville contends that the stipulations

indicate the parties' agreement (1) that Dr. Buckley had assigned Beville a 4% physical-impairment rating and (2) that using that 4% rating equated to compensation of $1,953.60. That is, she contends that the stipulations were merely limited to stating Dr. Buckley's assigned physical-impairment rating and the amount of compensation that would correspond to that physical-impairment rating and that they were not intended to foreclose the trial court from considering, based on the evidence presented, Beville's actual physical-impairment rating. We agree. See Dodd, 168 So. 3d at 1257 (explaining that a stipulation that a particular physician had placed the employee at MMI on a certain date did not stipulate the date of MMI but instead "specifically left open for determination by the trial court the assignment of any disability, which would include the date of MMI, as a result of the employee's disputed injuries").

Furthermore, at the close of the trial, the trial court specifically requested posttrial briefs addressing, among other things, whether it could assign a different physical-impairment rating than that assigned by Dr. Buckley. Although the county argued in its posttrial brief that the evidence

supported Dr. Buckley's assigned 4% physical-impairment rating, the county conceded that the trial court was free to assign an impairment rating based upon the evidence and its own observations; at no time did the county indicate that the issue of Beville's physical-impairment rating was not open for the trial court's determination. Thus, because the county did not apprise the trial court that the stipulations foreclosed the trial court's determination of Beville's physical-impairment rating and instead indicated in its posttrial brief that the trial court was free to assign an impairment rating based upon the evidence and its own observations, we need not further consider the county's argument that the trial court was bound by the stipulations to assign Beville a 4% physical-impairment rating. See G.A. West & Co. v. McGhee, 58 So. 3d 167, 177 (Ala. Civ. App. 2010) (quoting State Farm Mut. Auto. Ins. Co. v. Motley, 909 So. 2d 806, 821 (Ala. 2005)) (explaining that this court "'cannot consider arguments advanced for the purpose of reversing the judgment of a trial court when those arguments were never presented to the trial court for consideration or were raised for the first time on appeal'").

The county next argues that the trial court's determination that Beville suffered a 60% impairment to her arm is not supported by the evidence presented at trial. The county concedes that "the trial court must consider all the evidence, including its own observations, and it must interpret the evidence to its own best judgment." Compass Bank v. Glidewell, 685 So. 2d 739, 741 (Ala. Civ. App. 1996). However, the county contends that the record lacks substantial evidence from which the trial court could have concluded that Beville suffered a 60% loss of use of her left arm.

Beville relies on the following principle of law regarding the effect of expert testimony on a trial court's conclusions in workers' compensation cases:

> "It is well settled that the trial court has the duty to determine the extent of disability and is not bound by expert testimony in making that determination; yet, in making its determination, the trial court must consider all the evidence, including its own observations, and it must interpret the evidence to its own best judgment. Wolfe v. Dunlop Tire Corp., 660 So. 2d 1345 (Ala. Civ. App. 1995). Specifically, a trial court is not bound to accept a physician's assigned impairment rating and is free to make its own determination as to an employee's impairment. Checker's Drive-In Restaurant v. Brock, 603 So. 2d 1066 (Ala. Civ. App. 1992)."

Glidewell, 685 So. 2d at 741. We further explained in Glidewell that no language in the Workers' Compensation Act could be

> "interpreted to mean that the trial court is bound by the physician's assigned physical impairment rating and prohibited from considering its own observations with regard to the impairment and then making adjustments to that rating, so long as it does not consider evidence of vocational disability and the disability rating assigned the employee is equal to the physical impairment rating."

Id. Although Glidewell involved the application of Ala. Code 1975, § 25-5-57(a)(3)i., "the return to work" statute, we have applied the underlying principle in cases involving the determination of the loss of use of a scheduled member. See General Elec. Co. v. Baggett, 34 So. 3d 708, 713 (Ala. Civ. App. 2009) (quoting B E & K Constr. Co. v. Hayes, 666 So. 2d 1, 2 (Ala. Civ. App. 1995)) ("The trial court, in determining the degree of the loss of use of an employee's scheduled member, 'is not bound by ... expert testimony and is free to make its own observations and determine the extent of disability.'"); see also Wolfe v. Dunlop Tire Corp., 660 So. 2d 1345 (Ala. 1996). In addition, a trial court may "consider the worker's subjective complaints of pain" in determining his

or her loss of use of a scheduled member. Dairyman's Supply Co. v. Teal, 863 So. 2d 1109, 1113 (Ala. Civ. App. 2003).

The trial court determined in its judgment that Dr. Buckley's 4% impairment rating did not reflect the extent of Beville's left-wrist injury. Specifically, the trial court explained:

> "Dr. Buckley indicated, in his opinion, that [Beville] had suffered a 4% injury to her left upper extremity as a result of the injuries sustained in her fall. The Court, however, does have discretion to determine the extent or percentage of disability based upon all the evidence before it and its own observations. (See Gennak Corp. v. Gibson, 534 So. 2d 312 (Ala. Civ. App. 1988)). Based on the substantial evidence in this case, including [Beville's] having sustained a loss of grip strength and [having] experienced pain and weakness in the ulnar side of her wrist and [having been given] permanent ten (10) pound lift restrictions, and the Court having observed [Beville's] testimony at trial, having reviewed the medical records introduced at trial, the FCE conducted on [Beville], medical testimony at trial and having experts as trial, the Court finds that [Beville's] injuries, limitations, and restrictions to her left wrist as a result of her work-related fall have caused her to suffer a more extensive injury to her left upper extremity as then indicated by Dr. Buckley's records. Based upon the foregoing, the Court finds that [Beville] suffered a 60% injury to her left upper extremity and is due to be compensated accordingly pursuant to § 25-5-57(a)(3), Code of Alabama (1975)."

The county contends that the trial court misapprehended the evidence in determining that Beville was given permanent restrictions on lifting more than 10 pounds. As noted above, the FCE did not specifically state the restrictions placed on Beville. However, it did indicate that Beville could perform jobs that fit into the "light plus" category of labor, which, according to the FCE, "is defined as exerting up to 30 pounds of force occasionally and/or up to 10 pounds of force frequently." Although the FCE reflected that Beville was able to lift 40 pounds from floor to waist and 30 pounds from waist to overhead, the FCE specifically noted that she stopped both tasks to complain of wrist pain, which, the trial court could have concluded, indicates that she cannot repetitively perform such lifting activities. Thus, the trial court could have interpreted the FCE as having revealed that Beville was limited to frequent lifting of no more than 10 pounds. See Tenax Mfg. Alabama, LLC v. Holt, 979 So. 2d 105, 113 (Ala. Civ. App. 2007) (stating that a trial court considering the extent of an employee's disability should "interpret[] what it has heard and observed according to its own best judgment");

Wolfe v. Dunlop Tire Corp., 660 So. 2d 1345, 1347 (Ala. Civ. App. 1995) (stating that a trial court "must interpret the evidence to its own best judgment").

The county further argues that "Dr. Buckley's expert medical opinion was supported by the greater weight of the evidence." However, this court is confined to determining whether the factual findings forming the basis of the trial court's judgment are supported by substantial evidence, not whether a contrary finding or a different judgment is supported by "more" or "better" evidence. See Landers v. Lowe's Home Ctrs., Inc., 14 So. 3d 144, 151 (Ala. Civ. App. 2007) (explaining that the "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"). Furthermore, the testimony of medical professionals is not binding on the trial court; in the context of a discussion of medical causation, our supreme court has explained that a trial court should consider "the

overall substance and effect of the whole of the evidence, when viewed in the full context of all the lay and expert evidence." Ex parte Price, 555 So. 2d 1060, 1063 (Ala. 1989).

Our review of a workers' compensation judgment is still subject to the ore tenus rule.

> "'When evidence is presented ore tenus, it is the duty of the trial court, which had the opportunity to observe the witnesses and their demeanors, and not the appellate court, to make credibility determinations and to weigh the evidence presented. Blackman v. Gray Rider Truck Lines, Inc., 716 So. 2d 698, 700 (Ala. Civ. App. 1998). The role of the appellate court is not to reweigh the evidence but to affirm the judgment of the trial court if its findings are reasonably supported by the evidence and the correct legal conclusions have been drawn therefrom. Ex parte Trinity Indus.[, Inc.], 680 So. 2d [262,] 268-69 [(Ala. 1996)]; Fryfogle v. Springhill Mem'l Hosp., Inc., 742 So. 2d 1255 (Ala. Civ. App. 1998), aff'd, 742 So. 2d 1258 (Ala. 1999). The "appellate court must view the facts in the light most favorable to the findings of the trial court." Ex parte Professional Bus. Owners Ass'n Workers' Comp. Fund, 867 So. 2d 1099, 1102 (Ala. 2003).'"

Ex parte Caldwell, 104 So. 3d 901, 904 (Ala. 2012) (quoting Ex parte Hayes, 70 So. 3d 1211, 1215 (Ala. 2011)).

We conclude that the trial court properly considered the whole of the evidence in determining the extent of Beville's loss of use of her left arm. Much like the trial court in Glidewell, the trial court in the present case stated that it

had considered all the evidence presented at trial, including medical records, the FCE, and its own observations of Beville, in determining that Beville's injury to her wrist resulted in a 60% loss of use of her left arm. Certain evidence, like that indicating that Beville consistently reported pain in her wrist, that lifting 30 pounds or more resulted in pain in her wrist, and that she suffered a substantial loss in grip strength in her left hand, support the conclusion that Beville's injury was more severe than a 4% impairment rating might imply. See B E & K Constr. Co. v. Hayes, 666 So. 2d 1, 2 (Ala. Civ. App. 1995) (affirming a determination that the employee had suffered a 50% loss of use to his arm despite the assignment of a 3% impairment rating by the employee's physician, based, in part, on the employee's complaints of constant pain and inability to perform household tasks); see also Dairyman's Supply Co., 863 So. 2d at 1113 (affirming the assignment of a 30% impairment rating despite the fact that the employee's physicians had not assigned more than a 5% impairment rating, based, in part, upon the employee's complaints of pain and use of pain medication). In addition, "[t]he trial court [was] able to observe [Beville] and to

judge for itself the extent of [her] disability." Holt, 979 So. 2d at 113. Therefore, viewing the evidence, as we must, in the light most favorable to the trial court's findings, we conclude that trial court in the present case had before it substantial evidence supporting its judgment, despite the fact that the trial court's determination of the extent of the loss of use of Beville's left arm exceeds the physical-impairment rating assigned by Dr. Buckley. The judgment of the trial court is therefore affirmed.

AFFIRMED.

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