REL: December 6, 2019

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2019-2020

2180532

Colby Furniture Company, Inc.

v.

Belinda J. Overton

Appeal from Marion Circuit Court
(CV-95-118.02)

MOORE, Judge.

Colby Furniture Company, Inc. ("the employer"), appeals from a judgment entered by the Marion Circuit Court ("the trial court") requiring the employer to provide Belinda J.

Overton ("the employee") with a panel of four physicians from which to select a new authorized treating physician or, alternatively, to negotiate with the employee to close her claim for future medical benefits under the Alabama Workers' Compensation Act ("the Act"), § 25-5-1 et seq., Ala. Code 1975. We affirm the trial court's judgment.

Background

The employee sustained a neck injury on November 11, 1994, in an accident arising out of and in the course of her employment with the employer. On January 28, 1998, the trial court entered a judgment approving a settlement agreement between the employer and the employee, pursuant to which "[the employer shall] remain liable to [the employee] for future medical benefits as required by the Workers' Compensation Act of Alabama which was in effect at the time of the accident."

The employer designated an authorized treating physician to treat the employee's 1994 work-related injury and that physician referred the employee to a "Dr. Gibson" for pain management. In 2005, the employee complained that Dr. Gibson's office was too remote from her home. The employer provided the employee with a panel of four physicians, from

which the employee selected Dr. George Hammitt as her new authorized pain-management physician. In 2006, the employee moved to Texas, where she received treatment from a "Dr. Moore" at the expense of the employer. When the employee returned to Alabama in 2009, the employer provided the employee with a panel of four physicians, including Dr. Hammitt, from which to select a new authorized treating physician. The employee chose Dr. Hammitt, but she was informed that he was no longer available to treat her. The employee subsequently selected Dr. Laura Gray as her new authorized treating physician. Dr. Gray treated the employee from 2009 to August 26, 2015, when Dr. Gray discharged the employee as a patient.

On September 4, 2015, the employer filed a motion requesting postjudgment discovery and a hearing to determine whether the employee was entitled to any further medical care.[1] The trial court entered an order on September 15, 2015, permitting the parties to engage in discovery and requiring the parties to notify the court when discovery was completed and they were ready for a hearing.

[1]The employer had previously filed a similar motion, but it subsequently withdrew the motion.

On August 2, 2016, the employer filed a motion for a summary judgment. In that motion, the employer argued that the employee had no right to further medical treatment at its expense. The employer maintained that the employee had exhausted her statutory right to a panel of four in 2005 and, therefore, that it no longer had any duty to provide her with a panel of four from which to select a new authorized treating physician. The employer also argued that the employee had forfeited her right to authorized medical treatment through her misconduct in violating a narcotics agreement with Dr. Gray. On October 7, 2016, the trial court denied the motion for a summary judgment and subsequently set a hearing on the issue of the employee's right to future medical benefits for April 20, 2017.

At the April 20, 2017, hearing, the employee testified that she had signed a narcotics agreement upon becoming a patient of Dr. Gray. Under the terms of that agreement, the employee promised, among other things, to use only narcotic pain medication authorized by Dr. Gray and only in the dosages and intervals prescribed by Dr. Gray. The employee testified that she would regularly use more narcotic pain medication

than had been prescribed by Dr. Gray because, she asserted, Dr. Gray had prescribed her lower dosages than necessary to treat her pain. In her medical records, Dr. Gray stated that she had discharged the employee for violating the narcotics agreement and for using narcotic medications in a dangerous manner; however, the employee denied that she had been discharged for those reasons. At the close of the hearing, the employer reiterated its arguments from its motion for a summary judgment.

The trial court entered a judgment on May 19, 2017, providing:

> "After hearing and full consideration of the evidence presented therein, the Court finds as follows:
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> "Under the terms of a January 13, 1998 Settlement Agreement, the [employee's] medical benefits remained open. [The employee] has been treated with addictive medications for her pain for many years. She moved to Texas for a period of time and then back to Alabama. Upon her return to Alabama, [the employee] was assigned a new doctor. The physician tried to lower the amount of [the employee's] medication by prescribing lower doses. [The employee] was used to taking higher doses and complained that the lower dose was not reducing the pain, so she would take more medication than what she was prescribed. [The employee's] physician terminated her treatment for failing to follow the prescribed dosage.

> "It is therefore ORDERED, ADJUDGED and DECREED that [the employee] is entitled to recover medical benefits under the provisions of the ... Act and [the employer] shall provide to the [employee] a second panel selection for a new doctor."

On November 27, 2017, the employer filed a "motion for additional instructions," alleging in part:

> "2. In compliance with the Court's order and on May 24, 2017, the [employer] sent the [employee] a panel of four physicians from which to choose a new authorized treating physician. ... The first panel of physicians included the following physicians: (1) Dr. Keith C. Anderson (Huntsville, AL); (2) Dr. Eric Beck (Huntsville, AL); (3) Dr. Stephen Howell (Florence, AL); and (4) Dr. Pavan Telang (Florence, AL). By response dated June 19, 2017, the [employee] initially chose Dr. Telang to be her new doctor. ... However, counsel understands that after the [employee] was informed that Dr. Telang wanted to treat her with procedures only and not medications (but before her first appointment with Dr. Telang), the [employee] informed the [employer] through her nurse case manager that she no longer wanted Dr. Telang as her panel choice. Instead, the [employee] changed her panel selection to Dr. Stephen Howell. Counsel confirmed this change by letter on August 10, 2017. ... Unfortunately, when the [employee's] records were sent for review to Dr. Howell, the doctor refused to take her as a new patient.
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> "3. After Dr. Howell declined to take her on as a new patient and on August 15, 2017, the [employer] sent the [employee] a second panel letter, which replaced Dr. Howell with Dr. Ahmed Shikhtholth. ... Thus, the second panel consisted of the following physicians: (1) Dr. Keith C. Anderson (Huntsville, AL); (2) Dr. Eric Beck (Huntsville, AL); (3) Dr. Ahmed Shikhtholth (Decatur, AL); and (4) Dr. Pavan Telang (Florence, AL). By response of August 28,

2017, the [employee] chose Dr. Shikhtholth from the panel. ... However, for a second time, the selected panel physician, Dr. Shikhtholth, declined to take the [employee] as a new patient after reviewing her records.

"4. After Dr. Shikhtholth declined to provide treatment to the [employee], the [employer] continued to endeavor to comply with this Court's order and to find a panel from which the [employee] could select a new doctor. On October 2, 2017, the [employer] sent the [employee] a third panel of four physicians, replacing Dr. Ahmed Shikhtholth with Dr. Michael Cosgrove of The Orthopaedic Center in Huntsville, Alabama. ... Therefore, the third panel of four physicians consisted of the following doctors: (1) Dr. Keith C. Anderson (Huntsville, AL); (2) Dr. Eric Beck (Huntsville, AL); (3) Dr. Michael Cosgrove (Huntsville, AL); and (4) Dr. Pavan Telang (Florence, AL). After the [employee] received the third panel from the [employer], she called counsel for the [employer] and complained that three of the physicians were from Huntsville, Alabama and, thus, were some distance from her home. In the spirit of cooperation, the [employer] agreed to issue a fourth panel, replacing one of the Huntsville physicians with a physician from Cullman, Alabama.

"5. On October 25, 2017, the [employer] sent the [employee] a fourth panel letter, which replaced Dr. Michael Cosgrove with Dr. Ann Still of Comprehensive Pain Specialists in Cullman, Alabama. ... Therefore, the fourth panel of four physicians consisted of the following doctors: (1) Dr. Keith C. Anderson (Huntsville, AL); (2) Dr. Eric Beck (Huntsville, AL); (3) Dr. Ann Still (Cullman, AL); and (4) Dr. Pavan Telang (Florence, AL). The [employee] chose Dr. Ann Still on November 2, 2017. ... The [employer] learned on or about November 21, 2017, that, after review of the [employee's] records, Dr. Still declined to take on the [employee] as a new patient.

"6. Since this Honorable Court has issued its Order of May 19, 2017, the [employer] has provided the [employee] with four physician panels without a physician being successfully chosen. During the course of the [employer's] providing those four panels to the [employee], the following have occurred: (1) the [employee], in one instance, changed her selection from one panel physician to another physician on the panel, when the first physician stated that he would only treat with procedures and would not treat with medications; (2) the [employer], in one instance and upon request of the [employee], voluntarily issued an additional and different panel of physicians when the [employee] complained about the location (Huntsville, Alabama) of three of the four physicians on the panel; and (3) three times the [employee's] chosen physician, after review of her records, declined to take her on as a patient.

"7. Respectfully, the [employer] seeks additional instructions from the Court regarding how it should proceed because of the number of panels already issued and because of the number of physicians that have declined to take on the [employee] as a patient. Of course, the [employer] stands ready to continue sending additional panels of physicians to the [employee], if directed to do so by the Court. However, this could cause delay in the treatment of the [employee] because, except for Dr. Telang (who the [employee] rejected after learning of his treatment strategy), all of the physicians that have been selected by the [employee] to this point have declined to provide treatment after reviewing her records. Moreover, with each new panel, there are fewer pain management physicians from which to add to the panel and those physicians remaining become more remote in distance from the [employee]. As an alternative to more panels, the [employer] respectfully suggests that the Court might order that the [employee's] new physician be Dr. Pavan Telang, who agreed to treat the [employee]

> with procedures, or order some other action as the Court deems necessary.
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> "WHEREFORE, the [employer] respectfully requests that this Court issue an order providing further instructions to the parties as to whether the [employer] should continue to provide additional panels or whether the [employer] should take some other action."

After a hearing,[2] the trial court entered a judgment on February 25, 2019, providing: "After hearing, it is ORDERED that the [employer] shall provide the [employee] with another panel or negotiate with [the employee] to close medicals." On March 27, 2019, the employer filed a motion "to alter, amend, or vacate or revise" the judgment. On April 5, 2019, the employer filed its notice of appeal; however, that notice was held in abeyance pending the disposition of the employer's postjudgment motion, which was denied by operation of law on June 25, 2019. See Rule 59.1, Ala. R. Civ. P.; and Rule 4(a)(5), Ala. R. App. P.

Discussion

I. The Panel-of-Four Controversy

Section 25-5-77(a), Ala. Code 1975, a part of the Act,[3] provides that an employee dissatisfied with treatment provided

[2]The record does not contain a transcript of that hearing.

[3]The provisions of the Act pertinent to this appeal have been in effect substantially unchanged since the date of the employee's injury.

by an authorized treating physician selected by the employer may demand from the employer a panel of four physicians from which to select a second authorized treating physician. See City of Thomasville v. Tate, 175 So. 3d 663, 671 (Ala. Civ. App. 2015). Once a second authorized treating physician has been selected, the employee has no statutory right to additional panels of four from which to select a new physician. See Ex parte Brookwood Med. Ctr., Inc., 895 So. 2d 1000, 1004 (Ala. Civ. App. 2004). The employer argues that the trial court erred in ordering it to provide the employee with additional panels of four after the employee had exhausted her right to a second panel of four.

The record shows that the employer raised the issue whether the employee had exhausted her statutory right to a panel of four in its motion for a summary judgment filed on August 2, 2016. In that motion, the employer argued that the employee had exercised her "one-time" right to a panel of four in 2005 and, thus, had no right to demand another panel of four physicians from which to select a new authorized treating physician. The trial court denied that motion for a summary judgment and set the matter for a hearing. At that hearing on

April 20, 2017, the employer again argued that the employee had exhausted her right to an additional panel of four. On May 19, 2017, the trial court entered a judgment determining that the employer was required to provide the employee with another panel of four physicians from which to select a new authorized treating physician.

We conclude that the trial court held a hearing on April 20, 2017, to determine the controversy between the parties as to whether the employee had exhausted her right to an additional panel of four physicians. On May 19, 2017, the trial court entered a judgment in favor of the employee, finding that she had a right to another panel of four physicians and ordering the employer to provide the same. That determination was "conclusive and binding between the parties, subject to the right of appeal provided for in" the Act. Ala. Code 1975, § 25-5-81(a)(1). The employer did not appeal the May 19, 2017, judgment. "On appeal from one judgment, an appellate court cannot consider arguments relating to errors committed in a previously entered final judgment from which no appeal was taken. See Moody v. Myers, 268 Ala. 177, 105 So. 2d 54 (1958)." N.T. v. P.G. 54 So. 3d

918, 921 (Ala. Civ. App. 2010). Thus, this court is foreclosed from addressing any argument that the trial court, in its May 19, 2017, judgment, violated the holding in Ex parte Brookwood Medical Center by ordering the employer to provide the employee with an additional panel of four physicians.

In reaching our decision, we reject any contention that the issue whether the employee had exhausted her right to a panel of four was also adjudicated in the February 25, 2019, judgment. A judgment should be interpreted in light of the pleadings and the entire record. See Brown v. Brown, 276 Ala. 153, 156, 159 So. 2d 855, 857 (1964). In the "motion for additional instructions" filed by the employer, the employer did not argue that the employee had exhausted her right to a panel of four physicians, either by exercising that right in 2005, by selecting Dr. Telang from the panel of four proffered by the employer in 2017, or otherwise. To the contrary, the employer stated in its motion that it "stands ready to continue sending additional panels of physicians to the [employee], if directed to do so by the [trial court]," which contradicts any claim that the employer argued that the

employee had exhausted her right to a panel of four. In ordering the employer to provide the employee with another panel of four physicians or to negotiate with the employee to close her claim for future medical benefits, the trial court did not adjudicate the issue whether the employee had exhausted her right to a panel of four, an issue not before the trial court at that time. Rather, the trial court simply responded to the request from the employer for guidance on how it should proceed in order to comply with the May 19, 2017, judgment, in light of the developments since that judgment had been entered.

II. Clean-Hands Doctrine

The clean-hands doctrine "prevent[s] a party from asserting his ... rights under the law when that party's own wrongful conduct renders the assertion of such legal rights 'contrary to equity and good conscience.'" J & M Bail Bonding Co. v. Hayes, 748 So. 2d 198, 199 (Ala. 1999) (quoting Draughon v. General Fin. Credit Corp., 362 So. 2d 880, 884 (Ala. 1978)). In Holy Family Catholic School v. Boley, 847 So. 2d 371 (Ala. Civ. App. 2002), this court applied the clean-hands doctrine in the context of a workers' compensation

claim. In Boley, the Holy Family Catholic School opened an account at a Monroeville pharmacy for the benefit of Charles Boley so that he could obtain prescription medication for his work-related injury. Boley abused the account by charging items unrelated to his occupational injury. The school closed the account and informed Boley that, in the future, he would have to comply with the school's new policy requiring its employees to pay for their prescription medication and to be reimbursed after screening substantiated coverage for the purchase. Boley filed a motion to order the employer to maintain the account, which the trial court granted. On appeal, this court held that

> "Boley's abuse of the employer's charge account by attempting to have the employer pay for medication not related to his on-the-job injury necessitates a finding that Boley had 'unclean hands' and that Boley's assertion that the employer be required to maintain that account is 'contrary to equity and good conscience.' Basic principals of equity dictate that Boley be required to comply with the requirements of the employer's new policy."

847 So. 2d at 374-75.

The employer relies on Boley to argue that the clean-hands doctrine prevents the employee from enforcing her right to future medical benefits. We do not address this issue for

the same reason we do not address the issue regarding the exhaustion of the right to a panel of four. In its motion for a summary judgment and again at the April 20, 2017, hearing, the employer asserted that the employee had been discharged by Dr. Gray for violating the narcotics agreement. The employer argued that, absent her wrongful conduct, the employee would still be being treated by Dr. Gray and that any order requiring the employer to provide a panel of four physicians to facilitate further treatment for the employee would violate the clean-hands doctrine. The trial court rejected the argument in ordering the employer to provide the panel of four in its May 19, 2017, judgment, from which the employer did not appeal. Additionally, this court is foreclosed from considering the issue on appeal from the February 25, 2019, judgment, which does not address the clean-hands doctrine. See N.T. v. P.G., supra.[4]

[4]To the extent that the employer argues that the clean-hands doctrine applies because the employee wrongfully withdrew her selection of Dr. Telang, we note that this argument was not made in the trial court and cannot be considered for the first time on appeal. Millry Mill Co. v. Manuel, 999 So. 2d 508, 520 (Ala. Civ. App. 2008).

III. Reasonable Necessity

The employer next argues that the February 25, 2019, judgment erroneously requires the employer to provide the employee with unnecessary medical treatment in violation of § 25-5-77(a), Ala. Code 1975 (requiring the employer to pay only for "reasonably necessary" medical treatment). This specific argument was not raised in the trial court. "'This Court cannot consider arguments raised for the first time on appeal; rather, our review is restricted to the evidence and arguments considered by the trial court.' Andrews v. Merritt Oil Co., 612 So. 2d 409, 410 (Ala. 1992)." Berry v. H.M. Michael, Inc., 993 So. 2d 1, 7 (Ala. Civ. App. 2008).

IV. Findings of Fact and Conclusions of Law

Because the employer raises only issues that we cannot address on appeal from the February 25, 2019, judgment, we reject any contention that the February 25, 2019, judgment should be reversed for failing to include findings of fact and conclusions of law. Section 25-5-88, Ala. Code 1975, generally requires each determination made by a circuit-court judge hearing a workers' compensation case to "contain a statement of the law and facts and conclusions as determined

by said judge." Generally speaking, a judgment that determines a controversy between the parties that does not contain the required findings of fact and conclusions of law will be summarily reversed for the trial court to comply with § 25-5-88. See, e.g., Norwood v. James River Corp., 655 So. 2d 1047 (Ala. Civ. App. 1995). However, our supreme court has explained that the entire purpose of the findings of facts and conclusions of law is to facilitate appellate review. See Ex parte Sloss-Sheffield Steel & Iron Co., 207 Ala. 219, 220, 92 So. 458, 459 (1922). In this case, the employer has not raised any issue on appeal that can be reviewed. Hence, this court does not require any guidance from the trial court as to its particular findings of fact or conclusions of law in order to dispose of this appeal, and a remand for entry of findings of fact and conclusions of law would serve no useful purpose. We, therefore, conclude that the failure of the trial court to make any findings of fact or conclusions of law in its February 25, 2019, judgment, if error, does not prejudice the substantial rights of the employer so as to warrant reversal of the judgment. See Rule 45, Ala. R. App. P.

Conclusion

For the foregoing reasons, the judgment of the trial court is affirmed.

AFFIRMED.

Thompson, P.J., and Donaldson and Edwards, JJ., concur.

Hanson, J., concurs in part and concurs in the result, with writing.

HANSON, Judge, concurring in part and concurring in the result.

Although I believe that filing a petition for the writ of mandamus, not a notice of appeal, would have been the proper method for seeking review of the May 19, 2017, order requiring the employer to provide a second panel of four physicians, see Ex parte Everest Nat'l Ins. Co., 80 So. 3d 954, 956 (Ala. Civ. App. 2011) (treating insurer's appeal from postjudgment order requiring the insurer to provide a panel of four as a mandamus petition), I concur in the result because the employer's failure to seek mandamus review within the presumptively reasonable time after that order was entered (see Rule 21(a)(3), Ala. R. App. P.) warrants rejection of the relief desired by the employer as to issues I and II discussed in the main opinion. As to issues III and IV, I concur.