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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2019-2020

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Enterprise Leasing Company - South Central, LLC

v.

Benson Drake

**Appeal from Jefferson Circuit Court
(CV-16-903224)**

MOORE, Judge.

Enterprise Leasing Company - South Central, LLC ("the employer"), appeals from a judgment of the Jefferson Circuit Court ("the trial court") awarding workers' compensation

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benefits to Benson Drake ("the employee"). We affirm the trial court's judgment.

Procedural History

The parties have previously appeared before this court. See Enterprise Leasing Company-South Central, LLC v. Drake, [Ms. 2170870, Jan. 4, 2019] ___ So. 3d ___ (Ala. Civ. App. 2019).¹ In Drake, this court summarized the procedural history of the case:

"On September 1, 2016, the employee filed a verified complaint against the employer alleging, among other things, that, on August 21, 2015, he had suffered an injury to his left knee while acting in the line and scope of his employment with the employer and that he had also suffered an injury to his right knee as a result of the injury to his left knee. The employee sought an award of benefits pursuant to the Alabama Workers' Compensation Act ('the Act'), Ala. Code 1975, § 25-5-1 et seq. The employer filed an answer on October 12, 2016.

"On February 28, 2018, the parties filed in the trial court a number of stipulations of fact. A bench trial was conducted on March 8, 2018, after which both parties filed trial briefs with the court. On March 27, 2018, the trial court entered a final judgment in favor of the employee; on that same date, the trial court entered an amended judgment in favor of the employee and against the employer, assigning the employee 'a 50% permanent partial impairment rating to both his legs as a result of his on-the-job-injuries' and concluding

¹The record on appeal from Drake was incorporated into the record on appeal in the present appeal.

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that the employee 'is entitled to a 15% fee of the award for Permanent Partial Disability benefits.' The employer filed a postjudgment motion on April 26, 2018; the trial court denied that motion on April 30, 2018. The employer filed its notice of appeal to this court on June 5, 2018."

___ So. 3d at ___ (footnote omitted).

In Drake, this court concluded, among other things, that the employee's claim that his right-knee injury was the result of the overuse of his right knee following the injury to his left knee is subject to the clear-and-convincing standard outlined in § 25-5-81(c), Ala. Code 1975. To the extent that the trial court used an incorrect evidentiary standard, this court reversed the trial court's judgment and remanded the case, directing the trial court to, among other things, apply the correct standard, to make appropriate findings fact, and to determine whether the employee had proved by clear and convincing evidence that his right-knee injury was a direct and natural consequence of his left-knee injury. Following this court's reversal, the trial court entered an amended judgment on January 24, 2019, which, among other things, assigned the employee "a 5% permanent partial impairment rating to his left knee and a 2% permanent partial impairment rating to his right knee due to his on-the-job injury." On

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January 28, 2019, the employee filed a postjudgment motion challenging the trial court's reduction in the permanent-partial-impairment rating to both knees. The employer filed an objection to the employee's postjudgment motion on February 4, 2019.

On March 7, 2019, the trial court entered an order granting the employee's postjudgment motion and amending its January 24, 2019, judgment to state:

"Under § 25-5-81(c)[, Ala. Code 1975], the burden of proof for an accidental injury differs from that of an injury due to cumulative physical stress.

"The decision of the court shall be based on a preponderance of the evidence as contained in the record of the hearing, except in cases involving injuries which have resulted from gradual deterioration or cumulative physical stress disorders, which shall be deemed compensable only upon a finding of clear and convincing proof that those injuries arose out of and in the course of the employee's employment.

"For the purposes of this amendatory act, "clear and convincing" shall mean evidence that, when weighted against evidence in opposition, will produce in the mind of the trier of fact a firm conviction as to each essential element of the claim and a high probability as to the correctness of the conclusion. Proof by clear and convincing evidence requires a level of proof greater than a preponderance

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of the evidence or the substantial weight of the evidence, but less than beyond a reasonable doubt.'

"Ala. Code [1975,] § 25-5-81(c).

"At or shortly prior to the compensability hearing, the parties, through counsel, jointly stipulated that the [employee] was placed at [maximum medical improvement] on January 13, 2016, with a 5% permanent partial impairment rating to his left knee. This Court finds that [the employee] presented clear and convincing evidence that he injured his left knee as a result of an accident occurring on and arising out of his employment with the [employer].

"Further, this Court finds that [the employee] provided clear and convincing evidence that his right-knee injury was a direct and natural consequence of his left-knee injury. Per the evidence presented at trial, Dr. [Gaylon] Rogers testified that it is not uncommon to have somebody with a painful joint on one side subsequently several months later, start complaining about pain on the other side. Dr. Rogers acknowledged that only 1% to 2% was work related. Having considered the evidence in this case and the Court's own observation of [the employee] at trial, the Court is clearly convinced that it can determine and assign [the employee] suffered [sic] a 50% permanent partial impairment rating to his left knee and a 50% permanent partial impairment rating to his right knee."

The employer filed its notice of appeal to this court on April 18, 2019.

Standard of Review

Section 25-5-81(e), Ala. Code 1975, a part of the Alabama Workers' Compensation Act ("the Act"), Ala. Code 1975, § 25-5-1 et seq., provides the applicable standard of review:

"From an order or judgment, any aggrieved party may, within 42 days thereafter, appeal to the Court of Civil Appeals and review shall be as in cases reviewed as follows:

"(1) In reviewing the standard of proof set forth herein and other legal issues, review by the Court of Civil Appeals shall be without a presumption of correctness.

"(2) In reviewing pure findings of fact, the finding of the circuit court shall not be reversed if that finding is supported by substantial evidence."

Analysis

The employer argues on appeal that the trial court erred in finding that the injury to the employee's right knee was a result of the injury to his left knee. Specifically, the employer asserts that the employee failed to present clear and convincing evidence that his right-knee injury is compensable. In its brief on appeal, the employer argues that "the only supposedly 'clear and convincing evidence' cited by the trial court was [the testimony of Dr. Gaylon Rogers] that 'it is not

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uncommon to have somebody with a painful joint on one side subsequently several months later, start complaining about pain on the other side.'" The employer argues that, based on the law of the case, this court's decision in the present appeal should be based solely on whether that single statement by Dr. Rogers constitutes clear and convincing evidence of legal and medical causation.

In Bagley ex rel. Bagley v. Creekside Motors, Inc., 913 So. 2d 441, 445 (Ala. 2005), our supreme court observed that "the doctrine of the law of the case 'merely expresses the practice of courts generally to refuse to reopen what has been decided'" (Quoting Messinger v. Anderson, 225 U.S. 436, 444 (1912).) In Drake, this court held that the correct evidentiary standard to be applied regarding the compensability of the employee's right-knee injury was the clear-and-convincing-evidence standard. In reversing the trial court's judgment for having applied an incorrect evidentiary standard, we instructed the trial court

"to review the evidence adduced at trial and to determine whether the employee proved by clear and convincing evidence that his right-knee injury was a direct and natural consequence of his left-knee injury and to amend its judgment to make appropriate findings of fact using the correct evidentiary

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standard and to make any and all other amendments necessary to its judgment based on its determination."

___ So. 3d at ___.

This court did not require the trial court to limit its consideration of the facts in any way; instead, we required the trial court to review all the evidence adduced at trial and to make appropriate findings of fact using the correct evidentiary standard. The employer's assertion that the trial court was limited to a single statement from a medical expert's deposition testimony is without merit. This court's instructions in Drake did not so limit the trial court in fashioning its judgment following this court's reversal. To the extent the employer argues in its reply brief that, because § 25-5-88, Ala. Code 1975, requires, among other things, that the judgment "contain a statement of the law and facts and conclusions as determined by" the trial court, this court is limited in its review to the statements made in the judgment, we note that the trial court also indicated in its judgment that it had considered the "evidence presented at trial" as well as its own observations of the employee at trial. Accordingly, to the extent the employer argues on

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appeal that the trial court's determination of whether clear and convincing evidence supported its finding that the employee's right-knee injury was a direct consequence of his left-knee injury must be based solely on any single statement derived from Dr. Gaylon Rogers's deposition, that argument is without merit.

The employer cites Wix Corp. v. Davis, 945 So. 2d 1040, 1048 (Ala. Civ. App. 2010), for the proposition that "'evidence presented by a [workers'] compensation claimant must be more than evidence of mere possibilities that would only serve to "guess" the employer into liability.'" (Quoting Hammons v. Roses Stores, Inc., 547 So. 2d 883, 885 (Ala. Civ. App. 1989).) Citing Hammons, the employer argues that the evidence presented by the employee in the present case is insufficient to establish legal and medical causation, which is required for an injury to be compensable. See Hammons, 547 So. 2d at 885. In Hammons, this court affirmed the denial of workmen's compensation benefits to a worker who claimed to have suffered an injury to her back that was allegedly related to her employment. 547 So. 2d at 884. The evidence in Hammons revealed that four orthopedic and/or neurologic

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specialists had examined the worker shortly after the alleged injury and had found no objective symptoms of a back injury. Id. at 885. Although evidence was presented indicating that the worker had later been diagnosed as having a ruptured disk and had undergone surgery to repair the disk, the doctor who performed that surgery testified that the worker's disk problem was primarily degenerative due to "'the general wear and tear that most everybody gets at some time in life'" and that the diagnosis "could be" consistent with the worker's complaint of back pain due to lifting an object but that the ruptured disk could have been caused by many other things. Id. This court affirmed the decision, concluding that the totality of the evidence was insufficient to establish both legal and medical causation in order to support an award of workmen's compensation benefits. Id.

In the present case, the employee testified that he began working for the employer on May 17, 2000, and that, on or about August 20 or 21, 2015, he was 81 years old and was employed by the employer as a driver, transporting vehicles from one branch of the employer to another. According to the employee, on certain days he was tasked with helping other

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drivers move vehicles from the wash line to kiosks, from which the vehicles were rented. He stated that he and other drivers were transported to move vehicles to and from the kiosks in a 15-passenger van and that, on the date of the accident, when he slid out of the van, his "left heel hit the cement before the rest of [his] foot" and that, "when it hit the cement, it sent ... an electrical shockwave," his "knee exploded," and he could not move. The employee testified that he "shook it off" but that, as the day progressed, his left knee became swollen and he could hardly walk.

The employee testified that, on the morning after the accident, he was unable to put his foot on the floor and his knee remained swollen. He stated that he had gone to the emergency room and had been told that he had a severe sprain in his knee. The employee testified that he was released from the hospital with a cast on his left leg, pain medication, and a referral to Dr. Rogers. According to the employee, he made an appointment with Dr. Rogers, who ultimately performed surgery on his left knee and then sent him to physical therapy and prescribed pain medication. The employee testified that physical therapy had been unsuccessful and that he had begun

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taking pain medication daily to help him sleep; he also testified that he receives an injection in his knee every six months. The employee stated that he had overworked his right knee protecting his left knee and that he had been given an injection in his right knee to alleviate the swelling in his right knee and the pain the right knee was absorbing because he could not fully walk on his left knee. He testified that, at the time of the trial, both of his knees were swollen.

According to the employee, he had not had any surgery on his right knee, but, he said, he had been involved in an automobile accident in 2012, had had X-rays taken of his right knee at that time, and had had pain in his right knee following that accident. He testified, however, that pain in his knees had not prevented him from or limited him in performing his job for the employer between the time he had been hired and the date of the accident and that he had been able to perform his job without any restrictions, assistance, or limitations before the accident. The employee also stated that he had had a performance review shortly before the accident and that his work had been satisfactory, according to the employer. The employee testified that, at the time of the

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trial in the present case, he was unable to drive because he could not get in and out of vehicles without assistance and because he could not maneuver or manipulate his right foot to use the pedals of the vehicle because his right knee was overworked and swollen. He stated that he had not worked since the date of his injury, and, he said, he was unable to mow the lawn or to shower or use the bathroom without assistance. The employee testified that, before the accident had occurred, he had planned to work full-time for the employer for another five years.

The deposition of Dr. Rogers was submitted as an exhibit. Dr. Rogers testified in his deposition that he had first seen the employee on September 9, 2015, for his left-knee injury; that the employee had not reported having issues with his right knee at that time; and that, on January 13, 2016, approximately four months after the accident, the employee began to have problems on the right side. When asked whether the right-knee injury had been caused by the employee's left-knee injury, Dr. Rogers responded:

"It certainly can be. At 81, it's really hard to say it was or it wasn't. You know, 81-year-old people generally don't have good joints, and I didn't know him prior to September so I have no way

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of really knowing what he was like before his alleged injury. Certainly we see people even in their 40s and 50s who develop opposite side pain, particularly in knees, when they have an injured lower extremity. On the other hand, somebody his age might well have developed that anyway. I can't answer that yes or no."

He further explained that the employee's right-knee injury "became symptomatic because of arthritis" and that "[w]hether or not it was aggravated by his left knee injury, I think is impossible for anybody to say." Dr. Rogers testified that it would be relevant if the employee had a long history of right-knee pain and that his right-knee injury would not be unusual at the employee's age.

Dr. Rogers stated that he would expect the employee to have some knee problems regardless of the accident because of his age, but, he said, the degree of symptoms the employee had regarding his left knee "should be related certainly ... to his history of stepping down out of a truck tractor and coming down on it hard" and that that is "consistent with causing a flare-up of arthritis." Dr. Rogers was presented with exhibits indicating that the employee had suffered from right-knee pain as early as 2002; he testified that, given that long-standing history of problems with his right knee, it was

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much less likely that the employee's left-knee injury had caused the condition in his right knee. He testified, however, that the injury to the employee's left knee and his overuse of the right knee as a result could have contributed to cause the symptoms in the employee's right knee. Dr. Rogers then stated that "[i]t's not uncommon to have somebody with a painful joint on one side subsequently four, six, eight months later, start complaining about the other side, particularly at that age."

The employer argues that, like in Hammons, Dr. Rogers's testimony in the present case indicates that the employee's right-knee issues were related to his age and that the injury to the employee's left knee was only a possible cause of his symptoms. We note, however, that, unlike in Hammons, in which there was testimony indicating that several specialists who had examined the worker shortly after the alleged injury had found no objective symptoms of an injury whatsoever, the employee in the present case was immediately treated following the accident for an injury to his left knee. The question whether the injury in Hammons was work-related is distinguishable from the question whether the employee's

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right-knee injury in the present case is a direct and natural consequence of the injury to his left knee, the compensability of which is not in dispute in the present appeal.

The employer cites the Alabama Supreme Court's decision Ex parte Price, 555 So. 2d 1060 (Ala. Civ. App. 1989), in support of its assertion that the trial court must base its judgment on the overall substance and effect of the whole of the evidence. We agree. In Price, our supreme court confirmed that "'expert medical testimony is not a prerequisite to a finding of a physical disability, its degree or duration.'" 555 So. 2d at 1062 (quoting Fruehauf Corp. v. Prater, 360 So. 2d 999, 1002 (Ala. Civ. App. 1978)). Our supreme court stated further:

"Central to our holding ... is the proposition that lay testimony may combine with medical testimony to supply [the] requisite proof [of medical causation]; and that the medical testimony, when viewed in light of lay evidence, may amply support the medical causation element without the expert witness's employing any particular requisite language. It is in the overall substance and effect of the whole of the evidence, when viewed in the full context of all the lay and expert evidence, and not in the witness's use of any magical words or phrases, that the test finds its application. Odell v. Myers, 52 Ala. App. 558, 295 So. 2d 413 (1974)."

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555 So. 2d at 1063. Thus, the employer's assertion in its reply brief on appeal that the employee's testimony that he had overworked his right knee is irrelevant to the question of medical causation is without merit.

The trial court was required to determine whether the employee's right-knee injury was related to his left-knee injury. In Ex parte Pike County Commission, 740 So. 2d 1080, 1084 (Ala. 1999), our supreme court stated that "the general rule is that '[w]hen the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent intervening cause attributable to [the] claimant's own intentional conduct.'" (Quoting 1 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 13.00 (1998).) In the present case, the trial court considered evidence from the employee indicating that, although he had suffered from pain in his right knee before the accident, that pain had not prevented him from driving, walking, or working without limitations and that, following the accident, he had been unable to drive a vehicle, to enter and exit a vehicle without

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assistance, or to perform other daily tasks without assistance. Dr. Rogers testified that the employee's overuse of his right knee following the injury to his left knee could have contributed to cause the symptoms in his right knee and that it was not uncommon, particularly for someone of the employee's age, to begin complaining about a joint on one side of the body following an injury to the corresponding joint on the other side of the body.

Although the employer points to medical records indicating that the employee suffered from pain in his right knee before the accident, we note that the employee admitted to having had pain in his knee, but he also testified that that pain had not limited him from performing his duties for the employer, among other things. The medical records dated December 27, 2012, support that assertion; they indicate that the employee had pain and stiffness in his right knee, in addition to occasional swelling, but that the employee had continued to work part-time for the employer and that he was able to walk up to 1/4 mile without assistance. Progress notes from a May 5, 2015, medical record indicate that the employee suffered from right-knee pain, that he suffered from

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degenerative joint disease of that knee, and that his gait was altered as a result, but that he had appeared on that date only for a routine visit, and there is no indication that the employee was unable to work or to walk at that time. Although Dr. Rogers was unable to state definitively whether the injury to the employee's left knee had caused the injury to the employee's right knee, the trial court had before it lay testimony that, when combined with the testimony of Dr. Rogers and the trial court's own observations of the employee during the trial, would support the trial court's determination that the employee's right-knee injury was compensable as a direct and natural consequence of his left-knee injury. See Price, supra. Accordingly, the trial court's judgment is affirmed.

AFFIRMED.

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