REL: September 6, 2019

ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2019

2180740

Ex parte Warrior Met Coal, Inc.

PETITION FOR WRIT OF MANDAMUS

(In re: Steve Barnes

v.

Alabama Workmen's Compensation Self-Insurer's Guaranty Association, Inc., and Warrior Met Coal, Inc.)

(Tuscaloosa Circuit Court, CV-17-900913)

EDWARDS, Judge.

Steve Barnes filed a complaint in the Tuscaloosa Circuit Court ("the trial court") seeking benefits from the Alabama Workmen's Compensation Self-Insurer's Guaranty Association,

Inc. ("the Guaranty Association"), and Warrior Met Coal, Inc. ("WMC"), under the Alabama Workers' Compensation Act ("the Act"), Ala. Code 1975, § 25-5-1 et seq. WMC has filed with this court a petition for a writ of mandamus in which it seeks a writ directing the trial court to vacate its order denying WMC's motion for a summary judgment and to enter an order granting that motion because, according to WMC, the trial court lacks subject-matter jurisdiction over Barnes's claim because his claim is not ripe.

Facts and Procedural History

Based on the materials before us, Barnes worked for Jim Walter Resources, Inc. ("JWR"), from 1985 until approximately August 7, 2015, after which JWR declared bankruptcy and was determined to be insolvent. Thereafter, the Guaranty Association allegedly assumed responsibility for the payment of workers' compensation claims filed against JWR. Barnes's last employment with JWR was as a washerman at the "#5 mine."

WMC began operation of the #5 mine on April 1, 2016. In mid-April 2016, Barnes allegedly began his employment with WMC, working as an electrician at the #5 mine washer. On July

28, 2017, Barnes filed a complaint in the trial court against the Guaranty Association and WMC for workers' compensation benefits. According to Barnes, as a result of his employment with JWR and WMC, he was repeatedly exposed to loud noises that caused hearing loss in both of his ears.[1] Barnes alleged that he was last exposed to the "injurious activities and/or occupational conditions" causing his hearing loss on July 25, 2017. Barnes also alleged that he "was receiving a weekly wage at all times relevant to" his complaint, and the materials before us do not indicate that Barnes has missed any time at work or lost any pay based on his alleged hearing loss. He apparently continues to work for WMC "as an electrician at the #5 [mine] washer," where, according to Barnes, he is "exposed to various noises, including, but not limited to, noises from rock screens, coal screens, motors, fans, pumps, belt lines, belt drive, decanters, dryers,

[1]According to Barnes, "[WMC] and [the Guaranty Association] were named as defendants since [he] was not able to determine whether the hazards of his employment with [WMC] caused or increased the extent of his hearing loss or whether his hearing loss was solely caused by the hazards of his employment with JWR." However, the trial court has entered a summary judgment in favor of the Guaranty Association regarding Barnes's claims against it, and WMC consented to that summary judgment.

feeders and air compressors," the same noises he allegedly was exposed to while working at the washer for JWR. According to Barnes, both WMC and JWR provided some form of hearing protection to him, but neither required employees to wear hearing protection. Nevertheless, Barnes purportedly used hearing protection when he was able to do so.

Barnes alleged that he had incurred medical expenses for his hearing loss, that such expenses would continue in the future, and, based on his answers to WMC's interrogatories, that at least some of his incurred medical expenses had not been paid by WMC. Barnes's complaint further alleged that he had suffered "temporary total disability and permanent partial and/or permanent total disability ... rendering [him] incapacitated" within the meaning of the Act. However, in his answers to WMC's interrogatories, Barnes stated that he was "not claiming any temporary total disability benefits at this time." In his response to WMC's interrogatory regarding "what permanent and partial disability [he was] claiming," Barnes stated: "I am claiming all benefits that I am entitled to for my bilateral hearing loss pursuant to the ... Act." In

response to WMC's interrogatory regarding any alleged loss of earning capacity, Barnes stated:

> "[Barnes] objects to this interrogatory on grounds said interrogatory is not relevant to any party's claim or defense and not reasonably calculated to lead to the discovery of admissible evidence. Subject to these objections, [Barnes] is not aware of any lost earning capacity at this time but reserves the right to supplement this answer in accordance with the Alabama Rules of Civil Procedure and any Pre-Trial Order ...."

On December 11, 2018, WMC filed a motion for a summary judgment arguing that Barnes's claim for his alleged hearing loss was not ripe for adjudication because, according to WMC, Barnes could not establish his "date of injury" under Ala. Code 1975, § 25-5-117(b), because, WMC said, he continued to work for WMC and to be exposed to the same hazards that allegedly had caused his injury. Further, WMC contended, its conclusion regarding a lack of ripeness was supported by Ala. Code 1975, § 25-5-116(a), and the precedents thereunder that purportedly preclude any apportionment of benefits in an occupational-disease case. Further, WMC argued, Barnes continued to be exposed to the hazards that allegedly caused his hearing loss and, WMC said, "it can be presumed that ...

the impairment caused by the hearing loss will increase." WMC continued:

> "As the final alleged disability that may arise from the exposures cannot be established, it cannot be determined that there is no medical treatment that will improve that disability, nor can a final permanent impairment be established. Alabama Courts have long held that a permanent impairment cannot be established before a Plaintiff reaches [maximum medical improvement]."[2]

WMC's motion for a summary judgment concluded:

> "[Barnes] has admitted that he is currently still exposed to the hazards of his alleged disease. As a result, he cannot establish a date of injury, cannot establish ... who will ultimately be liable for the disease, and cannot establish a final degree of impairment. As several fundamental elements of [Barnes's] claim cannot be adjudicated, [his] claim is not ripe, and should be dismissed, without prejudice, to refile when [he] can establish a date of loss."

Barnes filed a response opposing WMC's motion for a summary judgment. Barnes argued, in part, that he had reached maximum medical improvement ("MMI"), that issues of material

---

[2]See G.UB.MK. Constructors v. Traffanstedt, 726 So. 2d 704, 709 (Ala. Civ. App. 1998) ("The date of [maximum medical improvement] indicates the date on which the claimant has reached such a plateau that there is no further medical care or treatment that could be reasonably anticipated to lessen the claimant's disability."); see also Alabama By-Prods. Corp. v. Lolley, 506 So. 2d 343, 344 (Ala. Civ. App. 1987).

fact precluded the entry of a summary judgment in favor of WMC, and that WMC had misinterpreted § 25-5-117(b). Among the materials Barnes submitted in support of his response opposing WMC's summary-judgment motion were his affidavit and an affidavit from Dr. Salem K. David, who allegedly performed all medical services associated with Barnes's purported hearing loss. Dr. David's affidavit included as an exhibit a letter from Sandra M. Hinman, the audiologist who evaluated Barnes for Dr. David. Hinman's letter states:

> "[Barnes's] ideogram/test results reveal that he has a mild sensorineural hearing loss at 250 Hz - 500 Hz for the right ear and borderline normal hearing at 1000 Hz - 2000 Hz, dropping to a moderate to severe loss at 3000 Hz - 8000 Hz. For the left ear, he has a mild sensorineural hearing loss at 250 Hz - 500 Hz, and borderline normal hearing at 1000 Hz only, dropping to a varying loss at 2000 Hz - 3000 Hz, and a profound loss at 4000 Hz - 8000 Hz. His hearing loss is most likely a combination of age related and noise induced factors."

In Dr. David's affidavit, he averred that he had diagnosed Barnes "with bilateral sensorineural hearing loss" and that it was Dr. David's "opinion[] [that] the noise exposure in the mines has been a contributing factor in causing ... Barnes's hearing loss." Dr. David further averred:

> "Sensorineural hearing loss, due to ongoing noise, is most often permanent and no further medical care

> or treatment could be reasonably anticipated to medically treat ... Barnes or lessen his impairment or disability. Continued unprotected exposure can cause further decrease in hearing from which ... Barnes is not expected to recover. After each injurious exposure, no further medical treatment will likely yield additional improvement or lessen his impairment or disability."

On May 4, 2019, the trial court entered an order denying WMC's motion for a summary judgment. WMC timely petitioned this court for a writ of mandamus.

Standard of Review

> "'Mandamus is a drastic and extraordinary writ, to be issued only where there is (1) a clear legal right in the petitioner to the order sought; (2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; (3) the lack of another adequate remedy; and (4) properly invoked jurisdiction of the court.'"

Ex parte Perfection Siding, Inc., 882 So. 2d 307, 309-10 (Ala. 2003) (quoting Ex parte Integon Corp., 672 So. 2d 497, 499 (Ala. 1995)). "Subject to certain narrow exceptions ..., because an 'adequate remedy' exists by way of an appeal, the denial of ... a motion for a summary judgment is not reviewable by petition for writ of mandamus." Ex parte Liberty Nat'l Life Ins. Co., 825 So. 2d 758, 761-62 (Ala. 2002); see also Ex parte University of S. Alabama, 183 So. 3d 915, 918 (Ala. 2016). One of those narrow exceptions is when

a trial court lacks subject-matter jurisdiction. See, e.g., Ex parte Sanderson, 263 So. 3d 681, 685 (Ala. 2018). The supreme court has stated that, when a "claim is not ripe for adjudication, ... the trial court lacks subject-matter jurisdiction." Ex parte Safeway Ins. Co. of Alabama, Inc., 990 So. 2d 344, 352 (Ala. 2008) (footnote omitted). In Ex parte Safeway Ins. Co. of Alabama, Inc., the supreme court noted that

> "[r]ipeness is defined as '[t]he circumstance existing when a case has reached, but has not passed, the point when the facts have developed sufficiently to permit an intelligent and useful decision to be made' or '[t]he requirement that this circumstance must exist before a court will decide a controversy.' Black's Law Dictionary 1353 (8th ed. 2004)."

990 So. 2d at 352 n.5.

Analysis

WMC's petition for a writ of mandamus essentially restates the ripeness arguments made in its motion for a summary judgment. Central to WMC's argument is the meaning of "the date of the injury" in § 25-5-117, which supplies the statute of limitations for occupational-disease claims under the Act. In pertinent part, that Code section provides:

> "(a) In case of the contraction of an occupational disease, as defined in this article

> [i.e., Article 4 of the Act, pertaining to compensation for occupational diseases], or of injury or disability resulting therefrom, a claim for compensation, as defined in [Ala. Code 1975, §] 25-5-1, shall be forever barred, unless within two years after the date of the injury, as hereinafter defined, the parties shall have agreed upon the compensation payable under this article, or unless within two years after the date of the injury, one of the parties shall have filed a verified complaint as provided in [Ala. Code 1975, §] 25-5-88. ...
>
> "(b) For the purposes of occupational diseases other than pneumoconiosis or radiation, 'the date of the injury' shall mean the date of the last exposure to the hazards of the disease in the employment of the employer in whose employment the employee was last exposed to the hazards of the disease."

Based on the language of § 25-5-117(b), WMC argues that Barnes's "claim was not ripe for adjudication because [he] could not establish [his] 'date of injury.'" According to WMC, Barnes's

> "actual date of injury is ephemeral, changing every day [he] returns to his job with [WMC]. ...
>
> "... The true 'date of last exposure to the hazards of the disease' cannot be determined until it actually occurs, i.e.[,] [Barnes] is no longer exposed to the hazards which he is alleging caused his hearing loss. Until that date can be established, this case is not ripe for adjudication, as this case has not reached the point when a decision can be made."

WMC contends that the foregoing conclusion is buttressed by this court's precedents applying § 25-5-116(a), which,

according to WMC, "bars any apportionment of compensation benefits in occupation[al] disease cases, including for hearing loss." In support of that argument, WMC cites James River Corp. v. Mays, 572 So. 2d 469, 473 (Ala. Civ. App. 1990), and Edmonds Industrial Coatings, Inc. v. Lolley, 893 So. 2d 1197, 1210 (Ala. Civ. App. 2004). Based on its understanding of § 25-5-116(a), WMC argues, "[i]f [Barnes] moves to a neighboring mine, or ownership of this mine changes, or [WMC] changes insurance carriers, there exists no procedure by which [WMC] or its carrier can recover the proceeds that, under ... § 25-5-116, it should no longer be legally responsible for."

WMC further urges that the conclusion that Barnes's claim is not ripe is required because, WMC contends, Barnes is still being exposed to the hazards of the disease and his condition has not reached a plateau or stabilized. Thus, according to WMC, no final impairment rating or date of MMI can be determined. See G.UB.MK. Constructors v. Traffanstedt, 726 So. 2d 704, 709 (Ala. Civ. App. 1998).

Before addressing WMC's arguments, some understanding of how the Act treats Barnes's purported injury will be helpful. Hearing loss can qualify as an occupational disease, see Ala.

Code 1975, § 25-5-110(1),[3] and Ala. Code 1975, § 25-5-111, provides:

> "Where the employer and employee are subject to this chapter [i.e., the Act], the disablement or death of an employee caused by the contraction of an occupational disease, as defined in [Ala. Code 1975, §] 25-5-110, shall be treated as an injury by accident, and the employee or, in case of his death, his dependents shall be entitled to compensation as provided in this article [i.e., Article 4 of the Act]."

Thus, it is "disablement or death" caused by the "contraction of an occupational disease" (1) that gives rise to the injured

---

[3]Section 25-5-110(1), Ala. Code 1975, defines "occupational disease" as

> "[a] disease arising out of and in the course of employment ... which is due to hazards in excess of those ordinarily incident to employment in general and is peculiar to the occupation in which the employee is engaged but without regard to negligence or fault, if any, of the employer. A disease, including, but not limited to, loss of hearing due to noise, shall be deemed an occupational disease only if caused by a hazard recognized as peculiar to a particular trade, process, occupation, or employment as a direct result of exposure, over a period of time, to the normal working conditions of the trade, process, occupation, or employment."

See also Ala. Code 1975, § 25-5-110(5) (defining "contraction of an occupational disease" to "include any aggravation of the disease without regard to the employment in which the disease was contracted"); Taylor v. United States Steel Corp., 456 So. 2d 831, 832 (Ala. Civ. App. 1984) ("It is axiomatic that an occupational disease is not compensable if it is not caused or aggravated by the nature of the employment.").

employee's entitlement to compensation as provided in Article 4 of the Act and (2) that "shall be treated as an injury by accident." As this court has stated, "'disablement'" is not "synonymous with 'loss of earning capacity'"; "requiring a claimant to show that his occupational disease has resulted in 'disablement' merely places on the claimant the burden of establishing that his occupational disease has resulted in a compensable physiological condition or impairment." Scott Paper Co. v. Hughes, 628 So. 2d 638, 640 (Ala. Civ. App. 1993).

Section 25-5-119, Ala. Code 1975, provides that

> "[t]he compensation payable for death or disability caused by an occupational disease ... shall be computed in the same manner and in the same amounts as provided in Article 3 of [the Act] for computing compensation for disability or death resulting from an accident arising out of and in the course of the employment and the medical, surgical, hospital, and burial benefits payable under this article [i.e., Article 4 of the Act] caused by said disease shall be computed in the same manner and in the same amounts as provided in Article 3 of [the Act] for computing like benefits."

See also Hughes, 628 So. 2d at 640 ("[T]he legislature clearly provides that occupational diseases are to be compensated in the same manner as injuries resulting from accidents.").

Regarding compensation payable for hearing loss as an occupational disease, hearing loss is, unlike some occupational diseases, a scheduled injury under Ala. Code 1975, § 25-5-57(a)(3), which provides, in pertinent part::

> "a. Amount and Duration of Compensation. For permanent partial disability, the compensation shall be based upon the extent of the disability. In cases included in the following schedule, the compensation shall be 66 2/3 percent of the average weekly earnings, during the number of weeks set out in the following schedule:
>
> "....
>
> "18. For the complete and permanent loss of hearing in both ears, 163 weeks.
>
> "....
>
> "d. Loss of Use of Member. The permanent and total loss of the use of a member shall be considered as equivalent to the loss of that member, but in such cases the compensation specified in the schedule for such injury shall be in lieu of all other compensation, except as otherwise provided herein. For permanent disability due to injury to a member resulting in less than total loss of use of the member not otherwise compensated in this schedule, compensation shall be paid at the prescribed rate during that part of the time specified in the schedule for the total loss or total loss of use of the respective member which the extent of the injury to the member bears to its total loss."

See also Hughes, 628 So. 2d at 640 (rejecting the argument that an occupational disease cannot be treated as a scheduled injury).

As the supreme court has stated, "[w]here scheduled benefits are provided for compensation for loss of a member they are not dependent on actual wage loss. There may be no loss of time involved." Leach Mfg. Co. v. Puckett, 284 Ala. 209, 214, 224 So. 2d 242, 246 (1969); see also Agricola Furnace Co. v. Smith, 239 Ala. 488, 491, 195 So. 743, 745 (1940); Hughes, supra; Mays, 572 So. 2d at 474 (holding that "loss of earning capacity is not required when a scheduled injury is the basis for the award of compensation"). See generally 1 Terry A. Moore, Alabama Workers' Compensation § 14:3 (2d ed. 2013) ("When a permanent injury [afflicts] a scheduled member, it must be conceded that compensation benefits are based solely on physical disability. Although the awards may be said to encompass damages for loss of earning capacity, the employee remains entitled to schedule benefits even if the employee has returned to work making the same or higher wages, has not lost any time from work, or has otherwise sustained no loss of earning power. Schedule benefits are even payable when the member had no function whatsoever prior to its loss or loss of use." (Footnotes omitted.)). Thus, Barnes's ability to continue working at his

former position would not, in and of itself, preclude him from establishing that he is entitled to compensation for a permanent partial disability based on his purported hearing loss. See generally, Moore at § 9:21 ("Because an employee is entitled to benefits for any physiological condition or impairment caused by an occupational disease without necessarily proving loss of earning capacity, benefits may be awarded according to the schedule set out in section 25-5-57(a)3a. That reasoning has had its most profound effect on occupational loss of hearing cases. Because the Act prescribes benefits for the complete and permanent loss of hearing in one, or both, ears, scheduled benefits may be awarded in cases where the employee continues to work with a hearing deficit." (Footnotes omitted.)). As a final observation before addressing WMC's argument, we must also note that the last sentence of § 25-5-119 provides:

> "The date of injury, as defined in [Ala. Code 1975, §] 25-5-117, shall be considered the date of the accident for determining the applicable medical, surgical, and hospital benefits, the minimum and maximum weekly benefits and the limitation on the total amount of compensation payable for such occupational disease."

Thus, whatever "the date of the injury" as described in § 25-5-117 is, that date is equally applicable for purposes of

determining the "medical, surgical, and hospital benefits" payable for an employee and the compensation payable to the employee. This latter observation is important because WMC -- perhaps perceiving the potential harshness of its ripeness argument in the context of an injured employee's medical expenses -- attempts to avoid our consideration of the issue of payment of any medical expenses under the Act, citing Ex parte Tuscaloosa County, 522 So. 2d 782 (Ala. 1988). See WMC's petition at note 9. In Ex parte Tuscaloosa County, the supreme court construed Ala. Code 1975, §§ 25-5-77 and 25-5-80, and stated that the Act "does not prescribe, as a condition precedent to the right to sue for accrued medical expenses, that the injured employee be entitled to weekly compensation benefits." 522 So. 2d at 784. The supreme court noted that,

> "[p]ursuant to [Ala. Code 1975,] § 25-5-77, an employer (or its insurer), without limitations of time, is liable for all reasonably necessary medical expenses incurred as the result of an employee's work-related injury. Likewise, [Ala. Code 1975,] § 25-5-80 -- the Code section that prescribes the only period of limitations applicable to the instant employee's injury -- applies only to compensation benefits, not to medical expenses. See § 25-5-1(1)."

Ex parte Tuscaloosa Cty., 522 So. 2d at 783 (footnote omitted). Notwithstanding WMC's attempt to limit our review and the holding in Ex parte Tuscaloosa County, however, the materials before us indicate that Barnes was claiming unpaid medical expenses allegedly associated with his hearing loss, and the last sentence of § 25-5-119, which was not at issue in Ex parte Tuscaloosa County, permits no distinction between the date of the injury for purposes of a claim for compensation and the date of the injury for purposes of a claim for medical expenses. In other words, if Barnes cannot yet establish the date of the injury for purposes of determining his claim for compensation, he likewise cannot establish the date of the injury for purposes of determining his claim for unpaid medical expenses. Additionally, even if Barnes were making no claim for unpaid medical expenses, this court cannot simply ignore pertinent statutory provisions or the logical consequences of our decisions when determining a question of law under the Act.

In light of the foregoing, WMC's ripeness argument immediately appears to be in tension with the Act and our precedents. Specifically, why would the fact that an injured

employee is or may be exposed again to the conditions that have caused his or her occupational disease and may suffer additional injury as a result of such future exposure, whether from the same employer or a third-party employer, present an issue of ripeness regarding a claim for the injury already suffered, as opposed to an issue of what type and amount of compensation the employee might be entitled to assuming the employee presents the evidence necessary to support the employee's claim? Nevertheless, WMC reads § 25-5-117 as precluding a claim for hearing loss until an employee can establish that there has been a final exposure to the hazards allegedly causing the hearing loss. WMC's argument, however, is based on a misunderstanding of § 25-5-117(b).

First, we note that § 25-5-117 establishes the pertinent statute of limitations for purposes of a claim for compensation based on an occupational disease. Generally, reading a statute of limitations as establishing a prerequisite for the accrual of a claim would be placing the cart before the horse. See Ex parte Dan River, Inc., 794 So. 2d 386, 387 n.1 (Ala. 2000) ("[T]he statute of limitations is an affirmative defense. Therefore, the burden was on Dan

River to show that Higgins had not been exposed to the materials for more than two years before the filing of the complaint."); see also Moss v. Standridge, 215 Ala. 237, 238, 110 So. 17, 18 (1926) ("[T]he limitation period was fixed for the purpose of excluding claims which were not bona fide and stimulate procedure at a time when the facts and circumstances were available."). However, the definition of "the date of the injury" from § 25-5-117(b) is imported into § 25-5-119 for purposes of establishing "the date of the accident for determining the applicable medical, surgical, and hospital benefits, the minimum and maximum weekly benefits and the limitation on the total amount of compensation payable for such occupational disease." Thus, WMC's argument that Barnes's claim is not ripe because he cannot establish "the date of the injury" at issue must be considered further.

Turning to the principles of statutory construction, we note that

> "[t]he fundamental rule ... is to ascertain and give effect to the intent of the legislature in enacting the statute. Words used in a statute must be given their natural, plain, ordinary, and commonly understood meaning, and where plain language is used a court is bound to interpret that language to mean exactly what it says. If the language of the statute is unambiguous, then there

> is no room for judicial construction and the clearly expressed intent of the legislature must be given effect."

IMED Corp. v. Systems Eng'g Assocs. Corp., 602 So. 2d 344, 346 (Ala. 1992). Nevertheless, we must "engage in judicial construction ... if the language in the statute is ambiguous." Ex parte Pratt, 815 So. 2d 532, 535 (Ala. 2001); City of Pike Road v. City of Montgomery, 202 So. 3d 644, 650 (Ala. 2015) ("Because the plain language of [Ala. Code 1975,] § 11-40-10[,] does not give explicit guidance on this issue, we must ascertain the legislature's intent through other means."); Dennis v. Pendley, 518 So. 2d 688, 690 (Ala. 1987) ("It is the court's function to make clear the intent of the legislature when some degree of ambiguity is found in a statute.").

"'A statute or portion thereof is ambiguous when it is capable of being understood by reasonably well-informed persons in either of two or more senses. ...' State ex rel. Neelen v. Lucas, 24 Wis. 2d 262, 267, 128 N.W.2d 425, 428 (1964)." S & S Distrib. Co. v. Town of New Hope, 334 So. 2d 905, 907 (Ala. 1976). Although neither WMC nor Barnes addresses or discusses the ambiguity of the term "last" as

used in § 25-5-117(b), that term is capable of more than one meaning. The term "last" may mean coming after all others in time or order, i.e., "final," or most recent in time or order, i.e., "latest." Merriam-Webster's Collegiate Dictionary 702 (11th ed. 2003). Considering those two definitions of "last," § 25-5-117(b) is susceptible to any of the four following constructions:

> 1. "'[T]he date of the injury' shall mean the date of the [final] exposure to the hazards of the disease in the employment of the employer in whose employment the employee was [finally] exposed to the hazards of the disease."
>
> 2. "'[T]he date of the injury' shall mean the date of the [most recent] exposure to the hazards of the disease in the employment of the employer in whose employment the employee was [finally] exposed to the hazards of the disease."
>
> 3. "'[T]he date of the injury' shall mean the date of the [final] exposure to the hazards of the disease in the employment of the employer in whose employment the employee was [most recently] exposed to the hazards of the disease."
>
> 4. "'[T]he date of the injury' shall mean the date of the [most recent] exposure to the hazards of the disease in the employment of the employer in whose employment the employee was [most recently] exposed to the hazards of the disease."

In evaluating the foregoing possible constructions, we must consider the following principles. First, by definition

an ambiguity concerns alternate reasonable interpretations, and an unreasonable construction must be rejected. See, e.g., Mann v. GTE Mobilnet of Birmingham Inc., 730 So. 2d 150, 155 (Ala. 1999); see also Slagle v. Ross, 125 So. 3d 117, 136 (Ala. 2012) (Shaw, J., concurring in the result in part and dissenting in part). Also, among reasonable interpretations, the most reasonable interpretation generally is preferred. See Alabama Mut. Ins. Corp. v. City of Vernon, 178 So. 3d 350, 361 (Ala. 2013). Further, "'[s]ections of the Code dealing with the same subject matter are in pari materia. As a general rule, such statutes should be construed together to ascertain the meaning and intent of each.' Locke v. Wheat, 350 So. 2d 451, 453 (Ala. 1977) (citations omitted)." Ex parte Weaver, 871 So. 2d 820, 824 (Ala. 2003). Thus, we must consider other provisions of the Act, and particularly those addressing the legal treatment of occupational diseases, in construing § 25-5-117(b). Finally, it is well settled that, when faced with a statutory ambiguity regarding the Act, this court must liberally construe the language to effectuate the beneficent purposes of the Act. See Robert Burton & Assocs., Ltd. v. Morris, 999 So. 2d 927, 930 (Ala. Civ. App. 2007),

aff'd, 999 So. 2d 932 (Ala. 2008); see also, e.g., Ex parte Weaver, 871 So. 2d at 824.

In considering the four possible constructions referenced above, we note that Ala. Code 1975, § 25-5-115, contemplates that an employee may file a workers' compensation claim and receive compensation for an occupational disease based on exposures by successive employers. Section 25-5-115 provides:

> "If an employee, at the time of or in the course of entering into the employment of the employer by whom the compensation would otherwise be paid, wilfully and falsely represented himself in writing to such employer as not having previously been compensated ... under this article [i.e., Article 4 of the Act], because of occupational disease, as defined in this article, such employee, his personal representative, parents, surviving spouse, dependents, and next of kin shall be barred from compensation or other benefits provided by this article or from recovery at common law by statute, contract, or otherwise on account of occupational disease as defined in this article, resulting from exposure to the hazards of such disease subsequent to such representation and while in the employ of such employer."

(Emphasis added.) See also Ala. Code 1975, § 25-5-195 (statute similar to § 25-5-115 addressing employees suffering disablement from occupational exposure to radiation). Section 25-5-115 makes no attempt to limit its application to different occupational diseases -- one previously compensated

and a different one at issue with the new employer. Thus, reading § 25-5-115 in pari materia with § 25-5-117(b) eliminates possible construction 1 and possible construction 2 from further consideration.[4] An employee need not prove that he or she is working for the final employer who will expose the employee to the hazards of the disease in order to pursue an occupational-disease claim.

In contrast to possible construction 1 and possible construction 2, possible construction 3 would require only that the employee prove that he or she has suffered his or her final exposure to the hazards of the occupational disease in the employment of the employer at issue and that no subsequent employer had exposed the employee to the hazards of the disease. Thus, possible construction 3 would mean that as long as the employee continues to work and is exposed to the hazards of the disease by a particular employer, the employee cannot pursue a claim for compensation against that employer.

[4]Possible construction 1 and possible construction 2 suffer from additional problems. For example, what is the result if, after the claim is adjudicated in the employee's favor and against the employer, the employee subsequently accepts new employment where he or she again is exposed to the hazards of the disease? Has the employee's formerly ripe, adjudicated claim now become unripe and void for lack of subject-matter jurisdiction?

Like possible construction 1 and possible construction 2, however, possible construction 3 is beset with problems. As noted above, assuming possible construction 3 is the proper construction, it would mean that an employee could not establish the date of his or her injury for purposes of pursuing a claim for medical expenses while he or she continued working for the employer at issue, at least until the employee could prove that the final exposure to the hazards of the disease had occurred. Also, possible construction 3 would appear to create an incentive to quit working for an employer simply so an occupational-disease claim could be pursued. And, possible construction 3 raises the question why the legislature would have intended for an employee who ceased working for employer X (who had exposed the employee to the hazards of the disease) and thereafter was employed by employer Y, who simply may not yet have exposed the employee to the hazards of the disease, could pursue a compensation claim against employer X while an employee who remained in the employment of employer X could not pursue a claim against employer X unless he or she could prove that his or her final exposure had occurred. See Green Bay Drop Forge

Co. v. Industrial Comm'n, 265 Wis. 38, 48 & 49, 60 N.W.2d 409, 414 (1953) (describing such a scenario as leading to an "absurd result" that "the legislature could not have intended"). As to that question, Ala. Code 1975, § 25-5-116(a), raises an additional issue. Section 25-5-116(a) provides:

> "If compensation is payable for an occupational disease other than pneumoconiosis or radiation, the only employer liable, if any, shall be the employer in whose employment the employee was last exposed to the hazards of the disease. The employer who is liable shall not be entitled to contribution from any other employer of the employee except one who furnished workers' compensation for the employee during the employment of last exposure."

Before addressing § 25-5-116(a), however, which forms the basis for WMC's apportionment argument, we will discuss possible construction 4.

In contrast to possible construction 3, possible construction 4 encourages an employee to pursue an occupational-disease claim when the employee becomes aware that he or she has contracted the disease and suffered disablement -- rather than waiting for a final exposure to occur -- but does not penalize the employee for a delay in filing his or her claim provided that the claim is filed

within two years of the most recent exposure to the hazards of the disease.[5] See Chrysler Corp. v. Henley, 400 So. 2d 412, 416 (Ala. Civ. App. 1981) (Section 25-5-117 "does not limit or even purport to limit the amount of compensation an injured employee may be entitled to receive from his employer to that portion of the disabling disease accruing in the period of one year [now two years] next preceding the filing of the complaint and the date of last exposure to the hazards causing the disease. An employee seeking workmen's compensation benefits is entitled to all of the benefits permitted by law regardless of the date of filing of his claim within the statutory period."). Possible construction 4 is not in conflict with § 25-5-115 and provides no impediment to an employee's seeking payment of medical expenses while he or she continues working and is exposed to the hazards of the disease. And, among the posited constructions, possible

[5]By definition an occupational diseases must arise from the "normal working conditions" of the employee, see Ala. Code 1975, § 25-5-110(1), and, although the final exposure to the hazards of the disease may be the last day of work for a particular employee, see, e.g., Goodyear Tire & Rubber Co. v. Latta, 878 So. 2d 1181, 1186 (Ala. Civ. App. 2003), that is not always the case, see Dueitt v. Scott Paper Co., 695 So. 2d 40, 44 (Ala. Civ. App. 1996), and Singleterry v. ABC Rail Prods. Corp., 716 So. 2d 1241, 1242 (Ala. Civ. App. 1998).

construction 4 appears to be the most reasonable construction and the construction that best effectuates the beneficent purposes of the Act. However, WMC's argument suggests that such a construction would create a conflict between § 25-5-117(b) and § 25-5-116(a) and our precedents discussing apportionment, specifically, Mays and Lolley. We disagree.

The first problem with WMC's argument regarding § 25-5-116(a) is the unusual logic of using an apportionment argument to establish that a claim is not ripe. The question whether apportionment is permitted presumes that the liability of a defendant has been established, and we need read no further than the first clause of § 25-5-116(a) to support that conclusion: "If compensation is payable for an occupational disease ...." Thus, § 25-5-116(a) is addressing which employer is liable for a compensation claim that is due to be paid, not purporting to determine whether the compensation claim is due to be paid.

More importantly, § 25-5-116(a) provides that "the only employer liable" for the compensation that "is payable" is "the employer in whose employment the employee was last exposed to the hazards of the disease," as necessarily

determined when that claim was filed. See Green Bay Drop Forge Co., 265 Wis. at 50, 60 N.W.2d at 415 (affirming statutory construction that "'the last day of work for the last employer whose employment caused disability' ... mean[t] the last day of work before the filing of the application for compensation"). Nothing in the language of the first sentence of § 25-5-116(a) addresses the compensability of a subsequent claim filed against the same employer for additional injury resulting from subsequent exposure to the hazards of the disease or a claim filed against a subsequent employer who has exposed the employee to the hazards of the disease after the adjudication of a previous claim against another employer.[6] In other words, the first sentence of § 25-5-116(a) provides that when an employee has filed a claim and established that compensation is payable for his or her occupational disease, the employer who last exposed the employee to the hazards of the disease is "the only employer liable." As to such a compensation claim, this court has held that an employer may not seek apportionment of its liability to the employee among previous employers who merely had exposed the employee to the

[6]As noted above, the latter scenario is clearly contemplated by § 25-5-115.

hazards of the disease or insurers who had provided coverage during previous exposures. See Mays, 572 So. 2d at 473 (rejecting James River Corporation's argument that it "was error for the trial court to find James River completely liable for Mays's loss of hearing because documented and demonstrated prior loss of hearing occurred during prior employments"); Lolley, 893 So. 2d at 1211 (holding that the insurer that covered the employer when the last exposure of the employee to the hazard occurred was fully liable and that the employer's previous insurers during the employee's previous exposures were properly dismissed). However, we have not held that an occupational-disease claim is always limited to a single adjudicated claim despite any subsequent exposure to the hazards of the disease and additional harm caused by such exposure after that adjudication, whether the subsequent exposure is by the same employer against whom the previous claim was adjudicated or by another employer.[7] Thus, we

[7]Compensation payments to be made to Barnes based on a previously filed occupational-disease claim are not at issue in this case. Barnes's most recent exposure to the hazards of the disease was purportedly during his employment by WMC, and his claim for compensation for his injury, as it existed when he filed his claim, is only against WMC. Thus, we need not decide, and do not address, any issue of contribution, the circumstances under which contribution would be proper, or the

reject WMC's contention that 25-5-116(a) and our precedents discussing apportionment support the conclusion that Barnes's claim is not ripe.

Finally, regarding WMC's argument that Barnes's claim is not ripe because he purportedly cannot establish that he has reached MMI,

> "[a] claimant has reached MMI when 'there is no further medical care or treatment that could be reasonably anticipated to lessen the claimant's disability.' G.UB.MK. Constructors v. Traffanstedt, 726 So. 2d 704, 709 (Ala. Civ. App. 1998). '[M]aximum medical improvement is reached when the employee has recovered as much as medically possible from the wound such that the extent of permanent disability, if any, can be estimated.' 1 Terry A. Moore, Alabama's Workers' Compensation § 13:5, p. 502 (1998)(footnotes omitted). 'Maximum medical improvement does not mean complete cure or total recovery from the work-related injury.' Id."

Ex parte Phenix Rental Ctr., 873 So. 2d 226, 229 (Ala. 2003) (emphasis added).

The issue whether an employee has attained MMI is important for purposes of determining the extent of the employee's disability and the type of benefits an employee is entitled to receive for that disability. The Act provides for the payment of workers' compensation benefits both before and

---

relationship, if any, between the last sentence of § 25-5-116(a) and § 25-5-115.

after an employee has attained MMI -- temporary-disability benefits may be due from the date of the injury until the date of MMI, see Ex parte Moncrief, 627 So. 2d 385, 387-88 (Ala. 1993), and, "[b]efore a trial court can award permanent total or permanent partial disability benefits, the worker must have reached MMI." Hillery v. MacMillan Bloedel, Inc., 717 So. 2d 824, 825 (Ala. Civ. App. 1998); see also Ex parte Phenix Rental Ctr., 873 So. 2d at 229; Alabama By-Prods. Corp. v. Lolley, 506 So. 2d 343, 344 (Ala. Civ. App. 1987). Also, a claim for permanent-disability benefits generally is due to be dismissed as premature if an employee cannot prove or fails to prove that he or she has reached MMI. See, e.g., Ex parte Phenix Rental Ctr., 873 So. 2d at 235 ("[T]he record is devoid of any evidence indicating that, as of the time the trial judge issued his April 24, 2001, order finding Batiz to be 'totally and permanently disabled,' Batiz had in fact reached MMI, as that status is defined by the law. That is not to say that, under the state of the record, the trial judge could not have attempted a determination of some sort of temporary disability rating. He acted prematurely, however, in making a determination of permanent disability.").

In the present case, Barnes presented evidence from Dr. David that would support the conclusion that the hearing loss Barnes had suffered as of the filing of his complaint was caused by work-related noise and that such hearing loss "is most often permanent and no further medical care or treatment could be reasonably anticipated to medically treat ... Barnes or lessen his impairment or disability." Thus, in opposition to WMC's motion for a summary judgment, Barnes presented evidence indicating that he had reached MMI insofar as the injury he had suffered when he filed his complaint (or at least a date certain in relation thereto) because that evidence indicates that "'there is no further medical care or treatment that could be reasonably anticipated to lessen [his] disability[,]' G.UB.MK. Constructors v. Traffanstedt, 726 So. 2d 704, 709 (Ala. Civ. App. 1998)," and that Barnes "'has recovered as much as medically possible from the [injury] such that the extent of permanent disability, if any, can be estimated.' 1 Terry A. Moore, Alabama's Workers' Compensation § 13:5, p. 502 (1998)(footnotes omitted)." Ex parte Phenix Rental Ctr., 873 So. 2d at 229. The fact that Barnes's condition might worsen based on subsequent exposures to work-

related noise does not mean that Barnes cannot establish that he has reached the maximum point of medical improvement for the injury he has already suffered from the past exposures on which his claim is based. At a minimum, a question of fact exists regarding that issue.

Conclusion

Based on the foregoing, the trial court did not err in denying WMC's motion for a summary judgment on the basis that the court lacked subject-matter jurisdiction because Barnes's workers' compensation claim purportedly was not ripe. Accordingly, WMC's petition for a writ of mandamus is denied.

PETITION DENIED.

Moore, Donaldson, and Hanson, JJ., concur.

Thompson, P.J., concurs in the result, without writing.