REL; May 22, 2020

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2019-2020

2180542

Nucor Steel Birmingham, Inc.

v.

James P. Otwell

Appeal from Jefferson Circuit Court
(CV-14-905079)

DONALDSON, Judge.

Nucor Steel Birmingham, Inc. ("Nucor Steel"), appeals from a judgment entered by the Jefferson Circuit Court ("the trial court") finding that James P. Otwell was permanently and totally disabled as a result of his workplace activities at

Nucor Steel's facility and awarding Otwell benefits pursuant to the Alabama Workers' Compensation Act ("the Act"), Ala. Code 1975, § 25-5-1 et seq. We reverse the judgment and remand the cause.

Facts and Procedural History

On December 11, 2014, Otwell filed a complaint in the trial court against Nucor Steel seeking workers' compensation benefits under the Act.[1] In his complaint, Otwell alleged as follows:

> "2. On or about January 24, 2014, [Otwell] was working as an employee of [Nucor Steel]. ...
>
> "3. On said date, Otwell was working as an employee of [Nucor Steel] when he suffered on-the-job injuries as a result of cumulative trauma and gradual deterioration to his lumbar spine while performing his duties as utility crane operator that required, but was not limited to, shoveling, stooping, bending, climbing/walking down stairs to operate a remote crane, sitting in a crane for 12 hour shifts, operating a Bobcat, and lifting heavy items all of which caused, aggravated, or contributed to his deteriorating spinal condition. More particularly, [Otwell] has sustained injuries as a result of cumulative trauma and gradual deterioration due to his activities as a utility crane operator at [Nucor Steel].

[1]Otwell initially named "Nucor Corporation" as the defendant but subsequently amended the complaint to name the defendant as "Nucor Steel Birmingham, Inc."

> "4. That [Otwell's] duties and performance thereof required repetitively shoveling, stooping, bending, and heavy lifting of items which exposed [him] to a danger and risk materially in excess of that which people are normally exposed in their everyday lives.
>
> "5. [Otwell's] last injurious exposure to the work conditions causing, aggravating or exacerbating his lumbar spine injuries occurred prior to and on January 24, 2014, his last day of employment with [Nucor Steel].
>
> "6. [Otwell], as a proximate result of said aggravation of his lumbar spine injuries, was caused to obtain medical treatment for [his] injuries, and suffers permanent total disability.
>
> "7. [Nucor Steel] had timely notice and/or actual notice of said injuries as provided by law. See a copy of the letter of [Otwell's] attorney addressed to Nucor Corporation, dated April 15, 2014, a copy of which is attached hereto, expressly incorporated herein by reference ...."

Nucor Steel filed an answer denying the material allegations of Otwell's complaint.

On February 4, 2019, the trial court conducted a trial during which it received testimony. The following facts pertinent to this appeal were elicited. In 1993, Otwell began working for Birmingham Steel, Inc., a manufacturer of steel rebar. Otwell testified that his job duties as a "bander, lay-down man and a scrap thrower" at times included flipping and turning objects that weighed 100 pounds or maybe 200

pounds. Later, Otwell operated a billet crane and a shipping crane for Birmingham Steel. In 1995, Otwell injured his back while pulling billets of steel out of a furnace with large tongs. A microsurgical diskectomy was performed at the L5-S1 level of Otwell's spine. Five months after his surgery, Otwell returned to work as a billet-crane operator. Otwell later worked in the steel-mill area, which, he testified, required pulling and lifting heavy steel debris. Otwell testified that he filed a workers' compensation claim regarding the 1995 accident at Birmingham Steel. That claim was settled with Birmingham Steel, which agreed to pay him for his temporary disability during that period and to pay for future medical expenses related to the 1995 injury. As a result of the 1995 accident, Otwell began seeing Dr. Michael Gibson for pain management.

In 2002, Otwell began working for Nucor Steel.[2] At that time, Otwell was working as a shipping-crane operator. According to Otwell, operating a crane oftentimes required bending over to look below. Otwell testified that his duties

[2]At the trial, counsel for both parties agreed that Birmingham Steel went out of business and that Nucor Steel purchased Birmingham Steel's assets in 2002.

in 2004 and 2005 included assisting in floor operations by putting bundles of steel that had broken bands back together, placing timbers between bundles of steel in railroad cars and trucks, and shoveling scale.[3] Otwell testified that, in 2005, those activities affected his back, that he experienced a burning sensation in his back, that he could not perform his job duties for a period, and that a microsurgical diskectomy was performed at the L4-5 level of his spine. The record suggests that the expenses for his medical treatment were paid pursuant to his 1995 workers' compensation settlement with Birmingham Steel. Otwell did not file a claim against Nucor Steel for workers' compensation benefits for his 2005 surgery.

According to Otwell, he returned to full-duty work as a billet-crane operator around three months after his 2005 surgery. From 2008 to 2011, he worked as a trackmobile operator transporting steel scrap to and from the melt shop. Otwell testified that he was taking pain medication, anti-

[3]Otwell testified that "[s]cale is pieces of steel. It's a crust that comes off the billet [of steel]. After the billet's casted, it's a crust that comes off the billet. So it's actually little pieces of steel, ... it's just real fine pieces of steel. And when you set them billets down, a lot of the scale falls off and it creates a mound of scale underneath ...."

inflammatory medication, and muscle relaxers, that he received epidural-block injections, and that he would not have been able to work without the medication and epidural blocks in 2011 and 2012. According to Otwell, he was able to perform his work duties without any major back problems until 2013.

Otwell testified regarding a form dated December 3, 2010, for an application to increase Otwell's coverage for long-term disability insurance at Nucor Steel. The form contained a checkmark for "No" next to the question: "Are you now under treatment or have had or been told you had any of the following diseases or symptoms? Number 1, back or spinal disorder." Otwell affirmed that the name on the form was in his handwriting, but he testified that he did not recall completing the form or making the checkmark. According to Otwell, he had to update the information regarding his long-term disability-insurance coverage once a year.

In 2013, Otwell was working for Nucor Steel as a utility crane operator. The trial court received testimony from Otwell as well as from Marvin Slaughter and Mark Youngblood, supervisors at Nucor Steel, regarding the duties of a utility crane operator. Otwell testified that his duties included

relieving full-time crane operators while they took breaks or substituting for an operator who was unavailable for a shift. Otwell testified that he worked 12-hour shifts 3 to 4 days a week. Youngblood testified that a utility crane operator usually spent a quarter of a 12-hour shift operating a crane and that other duties included stocking with a forklift and operating a Bobcat excavator or loader. Slaughter demonstrated the body positioning of an operator in a cab of a crane and testified that operating a crane involved leaning forward or bending back only when moving materials beneath the operator. Otwell testified that operating one of the cranes involved a lot of bending over and that he often had to climb steps to enter the cab of a crane. According to Otwell, the duties of a crane operator included lifting heavy chains and throwing 50-pound bags of manganese approximately 160 times a day.[4] Otwell testified that the operation of one crane included duties that involved using a sledgehammer and shoveling pieces

[4]We note that Slaughter testified that in 2001 or 2002 a hopper system was installed to feed 50-pound bags of carbon, replacing the need to manually throw those bags into the ladle in the furnace. Slaughter admitted, however, that "[t]here may have been times when [Otwell] had to" lift the bags referenced in Otwell's testimony as part of his job duties as a utility crane operator.

of steel. Slaughter testified that a crane operator only loaded chains onto a hook, that he did not know about the use of a sledgehammer, and that he considered lifting the bags of manganese to be light-duty work because it was required to be done only twice in every 45-minute period. Otwell testified that operating a Bobcat excavator or loader and a forklift required duties involving activities such as shoveling materials, restacking brick pallets, and loading heavy cables. According to Otwell, the operation of the machines and vehicles in his job frequently involved bumpy or jerky rides that affected his back. Russ Gurley, a vocational-rehabilitation specialist, testified that he considered Otwell's position as a utility crane operator to be a heavy labor job based on the description of the work activities in Otwell's testimony.

Otwell testified that, in August 2013, he was experiencing pain in his back and that, in November or December 2013, his back worsened to the point that he could not do any activities after work. According to Otwell, he was experiencing extreme pain in December 2013 and increased pain medication was not providing the same relief as before. Otwell

testified that his work duties were causing him problems and that he had to leave early during one shift. Otwell testified that he told one of his supervisors that he had to see a doctor and did not work December 16-18, 2013. On December 19, 2013, Otwell saw Dr. Gibson and told him that his back pain had worsened and that he had pain from his lower back down his right leg to his foot, causing him to drag his foot, and that he had problems with sitting, standing, and bending his back. Dr. Gibson administered a steroid injection. Afterward, Otwell returned to work for a few days, took a couple of vacation days off around the holidays, and then returned to work for only a few days.

January 22, 2014, was Otwell's last day of active employment for Nucor Steel. Otwell testified that, on that date, he told a supervisor "that my back was messed up and [he] was going to have an MRI done." According to Otwell, on that day, he thought that he would return to work after undergoing medical treatment. Slaughter testified that he was aware that Otwell had suffered a back injury many years ago, that he had a long-standing problem with his back, and that he had left work from time to time for medical appointments

related to his back issues. Slaughter did not recall Otwell saying that his duties as a utility crane operator caused him to have back problems. Youngblood testified that Otwell had told him that he had a hurt back but that he could not recall Otwell telling him that his job duties were too tough for his back and that he did not see Otwell laboring in pain while performing his job.

Otwell testified regarding a posting dated January 28, 2014, that he made on a social-media site. Otwell acknowledged that he had posted a picture of him next to his all-terrain vehicle ("ATV") with a message regarding a "birthday evening hunt." According to Otwell, he had made attempts to go deer hunting around that time but was unable to do so. Otwell testified that he might have tried to go deer hunting on January 28, 2014, but he could not say for certain that he did.

On January 27, 2014, Otwell underwent an MRI, and, on February 3, 2014, a report of the MRI was issued indicating the following:

> "At L4-5, there appears to be a recurrent disk herniation centrally and to the right of midline with a small extruded fragment directly behind the L5 vertebral body in the lateral recess.

> Circumferential broad-based disk bulge is present with right foraminal narrowing. The left foramen is patent. There is some mild epidural enhancement consistent with postoperative fibrosis, but the disk fragment does not enhance.
>
> "At L5-S1, there is marked endplate osteophyte formation posteriorly, which results in encroachment on the inferior foramen bilaterally. This does not appear to result in significant compression, however, of the nerve root. Some lateral recess stenosis is present bilaterally, worsened by facet hypertrophic changes. The central canal is otherwise normal in appearance."

Otwell testified that his back condition worsened on February 3, 2014, stating that "I was getting dressed, and I was already having back issues. And I was getting dressed and I [bent over and I] was -- I was putting my boot on and my back just popped," and, he said, he felt excruciating pain down his leg. Otwell testified that he was not going anywhere special and that putting on his boots was a normal everyday activity. Otwell's wife called Dr. Gibson, who administered an epidural block to Otwell that day. Otwell testified that the epidural block did not help. On February 13, 2014, Otwell underwent a myelogram that indicated:

> "L4-5/L5-S1: There is a central broad-based disc herniation which partially effaces the right lateral recess at L4-5; however, the nerve root still fills with contrast, albeit subtly. This herniation extends inferiorly to the L5-S1 level where it

> compromises the central canal to 4.4 mm and effaces the superior aspect of the right lateral recess. More inferiorly, the right S1 nerve root does not fill with contrast. The disc extends into the neural foraminal ostium, possibly producing significant compromise. This needs comparison with an MRI.
>
> "....
>
> "Conclusion: There is an L4-5 right paracentral/preforaminal disc extrusion, which extends inferiorly 22 mm, measuring 17 x 9 mm partially effacing the right lateral recess at L4-5 with mild deformity of the existing nerve root and abutting the right S1 nerve root taleoff zone with compromise of the central canal to less than 5 mm. To exclude epidural fibrosis (although it should not demonstrate mass effect) and to evaluate the compromise of the right L5/S-1 neural foramina, recommend MRI with and without contrast."

Otwell testified that he did not realize that he was not going to be able to return to work for Nucor Steel until April 9, 2014, when he had a conversation with Dr. Robert Robinson, who later performed surgery on Otwell's back on April 10, 2014, and another surgical procedure on February 17, 2015. Dr. Robinson's medical record after the April 10, 2014, surgery noted that it may not be possible for Otwell to return to work for Nucor Steel. The medical record stated that Otwell had "a massive disc protrusion at L4-5" and "a colossal disc herniation at L4-5 that ... is causing severe L5 nerve root compression."

Dr. Robinson testified that he was familiar with Otwell's surgical and other medical history. Dr. Robinson testified that he first saw Otwell on April 10, 2014, that Otwell had a multilevel degenerative disk disease and large disk herniation at the L4-5 level in his spine, and that he recommended surgery to remove a disk fragment pressing his nerve and to relieve his back and leg pain and numbness. Dr. Robinson performed the surgical procedure and informed Otwell that the procedure was good for alleviating leg pain but not as good for mechanical back pain. Because Otwell continued to suffer from mechanical back pain, Dr. Robinson performed a surgical procedure to fuse Otwell's L4-5 and L5-S1 vertebrae together on February 17, 2015. Dr. Robinson testified that the authorizations and payments for his treatments of Otwell had been handled under workers' compensation medical benefits provided in connection with Otwell's 1995 back injury.

Dr. Robinson testified regarding the cause of Otwell's injury as follows:

> "Q. ... I note in here in one of your notes was that he does very physical work at the steel mill, or did very physical strong, physical work at the steel mill. You were aware of that, were you not?
>
> "A. I was.

> "Q. And would it be that the strong, physical work and strains that he placed on his spine contribute to the recurrent disc herniations?
>
> "A. Yes, sir.
>
> "....
>
> "Q. ... [W]ould you agree that it was obvious that ... Otwell's employment duties at Nucor prior to January, in this case, 24, 2014, contributed to, aggravated, or outright caused his lumbar spine condition?
>
> "A. I think it certainly contributed to it, yeah.
>
> "Q. And would you agree that the nature of his employment activities were heavy lifting, excessive equipment vibration, bouncing, jarring, that type of physical incidents would cause the pathology that was presented to you as a surgeon?
>
> "A. Yes, sir.
>
> "....
>
> "Q. ... In [Otwell's] situation, specifying him, in [his] situation, would it be more probable than not that it was repetitive trauma that caused him to have increased worsening of his degenerative back condition?
>
> "A. I certainly think that has contributed to it, at a minimum."

Dr. Robinson testified that his knowledge of the physical requirements of Otwell's job for Nucor Steel came entirely from Otwell. Dr. Robinson further testified:

"Q. Dr. Robinson, just briefly, the physical requirements of the job duties of [Otwell] in this case as a crane operator, steelworker, those type of duties would create hazards that were in excess of the normal hazards somebody walking down the street would face, wouldn't it?

"A. Yes, sir.

"Q. And I think you stated earlier, but is it your opinion that continuing that type of work, especially in 2014, shortly before you saw him, would contribute to aggravate or exacerbate the preexisting degenerative disc condition that he had in such a [manner] to hasten or increase the need for surgery?

"A. Yes.

"Q. And in this case, you did two surgeries as a result of that, those type of work duties?

"A. I did."

Dr. Robinson further testified:

"Q. ... Dr. Robinson, can you say, as a neurosurgeon, that something seemingly as innocuous as bending over to put your boot on could be an occasion for someone to have a herniated disc?

"....

"A. Well, I mean, you know, Mr. Otwell has had a, you know, back condition for years with these discs, and, you know, a typical scenario of someone that's got a herniated disc is that before it happens, they have an escalation of back pain. And it sounds like he was having that from kind of running the crane, you know, and whatnot, and then he leans over to put his boot on and then pow, it goes. So, I mean, that's a very common scenario with

> the disc herniations. So yes, I mean, I think that's not an unexpected thing.
>
> "....
>
> "Q. ... And in ... Otwell's situation, do you have an opinion as to whether that type of physical activity [at work] prior to him putting on the boot contributed to the ultimate large disc herniation that you worked on?
>
> "A. Yeah. I mean, the pressure had already gone up in his disc and his back was hurting and it was just waiting to kind of go and it happened when he pulled on the boot, it sounds like, so yes."

Dr. Gibson testified that he had been treating Otwell for 22 years. His treatment of Otwell included medication such as anti-inflammatory and pain medicine, but over the years his treatment changed and included interventional pain-management procedures like epidural-block injections. According to Dr. Gibson, Otwell frequently talked about "his work and the type of work that he was doing." Dr. Gibson testified:

> "Q. Okay. And this particular type of work activities prior to January 22nd, 2014, is it your -- do you have an opinion as to whether those contributed to his lumbar spine conditions and aggravating circumstances to his lumbar spine ....
>
> "A. In the absence of any other, you know, conflicting injury, like he had a car accident or something like that, I mean, there's -- at least my opinion would be that the most likely cause of his recurrent disc herniation is going to be any kind of strenuous activity and his work-related activities

> were obviously quite strenuous. So I would say that yes, his -- the type of work that he was doing certainly was the cause and/or aggravating factors involved in his back conditions.
>
> "Q. ... And did Mr. Otwell's work duties at Nucor Steel expose him to a risk of injury that was materially in excess of risk which people are normally exposed to in their everyday life?
>
> "....
>
> "Yeah, I think just knowing him as long as I have and having examined and seen his back numerous times under X-ray and the things that we use during our procedures, it's very clear that he probably should not have been doing any kind of heavy work ever. And he has, obviously, some element of degenerative disc disease, so he was a setup for having these kinds of injuries. And so that -- that continued heavy work activity, I mean, his overall condition probably set him up for that, but those types of activities are certainly what caused that to happen."

Dr. Gibson agreed that repetitive trauma was one of the causes of Otwell's back problems. When asked about the February 3, 2014, incident in which Otwell experienced a "pop" in his back while putting on boots, Dr. Gibson testified as follows:

> "It's -- I mean, there are -- the force required to herniate a disc sometimes can be very mild. So, I mean, but when you're bent over forward, that puts an extraordinary amount of pressure onto the disc, especially on the front of the disc, mechanically, and it will push the piece of disc out of the back. And so, I mean, it makes sense, if that's when he felt the sudden onset or pop in his back that if

> that was what he was -- the activity he was doing, that could be it.
>
> "Q. Would you agree with Dr. Robinson that the pressure in that low back area at that time was rising, was getting up to the point where his back was ready to go, so to speak?
>
> "A. Right. I mean, I think he was -- I mean, he was a prime setup for a disc herniation, and the circumstance and motions that he did were just right to make that happen."

Dr. Gibson testified that, as a result of his back injuries, Otwell has a chronic-pain syndrome that will require pain management for the rest of his life and that, because of his condition, Otwell is permanently and totally disabled. Gurley testified that Otwell was 100% vocationally disabled.

Before the trial, the parties submitted joint stipulations to the trial court. The stipulated facts included the following:

> "The plaintiff has received no workers' compensation benefits from [Nucor Steel] in connection with the claim of a cumulative trauma injury made the basis of his complaint in this civil action.
>
> "....
>
> "On April 15, 2014, [Otwell's counsel] authored a letter giving written notice that [Otwell] claimed a cumulative trauma injury resulting from the performance of his job duties as an employee of [Nucor Steel]. This letter was delivered by

> certified mail to Nucor Steel Birmingham on April 16, 2014."

On February 11, 2019, Nucor Steel filed a posttrial brief in which it argued that the evidence at trial was insufficient to prove legal and medical causation and that Otwell did not provide timely notice of his injury to Nucor Steel.[5]

On February 13, 2019, the trial court entered a 33-page judgment in favor of Otwell on his claim against Nucor Steel for workers' compensation benefits. In the judgment, the trial court stated that "[Otwell] claim[ed] benefits under [the Act] for cumulative trauma or repetitive physical stress that gradually caused or contributed to [his] disability." Accordingly, the trial court applied the "clear and convincing" standard of proof. The trial court also stated in

[5]In its argument regarding causation, Nucor Steel cited Greater Mobile Chrysler-Jeep, Inc. v. Atterberry, 11 So. 3d 835 (Ala. Civ. App. 2008), and stated that that case involved "alternative claims that the plaintiff suffered (1) an occupational disease and (2) a cumulative trauma injury." (Footnote omitted.) Nucor Steel, thus, presented to the trial court a case treating a claim alleging an occupational disease separately from a claim alleging a cumulative-trauma injury. Nucor Steel argued only that our holding and reasoning on the cumulative-trauma claim in Atterberry was applicable to the situation in this case. Although Nucor Steel noted the alternative claims in Atterberry, it did not discuss our holding and reasoning on the occupational-disease claim.

the judgment that "[Otwell] has pled that his injury is an occupational disease" and found "that there is substantial evidence before it that [Otwell's] lumbar spine chronic pain disorder is an occupational disease that arises from [Otwell's] employment ...." The trial court found substantial evidence establishing that the performance of Otwell's work duties was a legal and medical cause of his injury. The trial court did not find that a social-media posting of a photograph of Otwell's ATV and a caption regarding hunting was substantial evidence that Otwell was injured while hunting.

In the judgment, the trial court also discussed the "last injurious exposure" rule and whether Otwell's back condition was a recurrence of his 1995 back injury. The trial court specifically found the following:

> "In the case before this Court, [Otwell] does not allege a new accident that occurred after [Nucor Steel] became his employer. [Otwell] does not allege that the worsening condition in his lumbar spine in December 2013 was the result of an aggravation of a pre-existing condition. There is no evidence of a new work-related injury or of a work-related aggravation of a prior injury.
>
> "....
>
> "[Otwell] has pled and presented evidence that cumulative trauma occurring while he was employed with [Nucor Steel] from his daily work duties

> performed up to January 2014 contributed to [his] disability. The evidence does indicate that while [Otwell] did suffer injury to his lumbar spine in 1995 and again in 2004, following each incident, and with the aid of pain medication, [Otwell] was able to resume his regular employment, performing heavy labor, first with Birmingham Steel, his former employer, and with [Nucor Steel], his more recent employer, without restrictions.
>
> "....
>
> "Without substantial evidence of non-employment related cause; without substantial evidence of a new accident or an incident in which a pre-existing condition was aggravated; and without evidence that [Otwell] was disabled as a result of his prior injury, the only evidence presented is in the medical testimony of Drs. Robinson and Gibson that [Otwell] eventually physically wore down under the repetitive nature of his work -- picking up material, moving it over a distance, depositing the material, returning dead head and picking up more material, all day long on various pieces of equipment and fixtures that required him to bend, twist, be bumped around continuously -- contributed to his final disability. Those duties were carried out while [Otwell] was employed with [Nucor Steel], at least during the twelve-year period of 2002-2014. The evidence, the Court finds, is clear and convincing and substantial to this point."

Regarding the issue of notice to Nucor Steel, the trial court stated:

> "Included in the stipulation of fact is the fact that [Otwell] did not provide [Nucor Steel] with a five (5) day notice of his injury as is required by Ala. Code § 25-5-78 (1975). However, [Otwell] has pled his case using provisions from Article IV of the Act, rather than Article III, to which the

> five-day notice rule is limited. [Otwell] has pled that his injury is an occupational disease ....
>
> "Ala. Code [1975,] § 25-5-123[,] expressly excludes the five (5) day notice requirement for a claim based on an Article IV occupational disease. In any event, it is stipulated that [Otwell] gave notice of his claim on April 16, 2014. Under either Section 25-5-78 of Article III or Section 25-5-110(1) of Article IV, notice is sufficient in this case."

The trial court determined that Otwell was permanently and totally disabled and awarded Otwell temporary total benefits that were not already paid by Nucor Steel, permanent-total-disability weekly benefits, and medical benefits "for all future reasonable and necessary expenses in the treatment of his lumbar spine ... including payment of all reasonable and necessary medical expenses incurred for the treatment of [Otwell's] lumbar spine to date of this decree." Otwell's counsel was awarded an amount in attorney fees based on Otwell's future benefits as well as "15% of the accrued unpaid temporary total disability (TTD) weekly benefits ...."

On February 22, 2019, Otwell filed a "Plaintiff's Motion to Tax Costs." On March 14, 2019, the trial court entered an order granting Otwell's motion.[6]

On March 27, 2019, Nucor Steel filed a notice of appeal to this court. This court has jurisdiction pursuant to § 12-3-10, Ala. Code 1975.

Discussion

I.

We first address Nucor Steel's challenge of the finding in the judgment by the trial court "that [Otwell's] lumbar spine chronic pain disorder is an occupational disease that arises from [Otwell's] employment ...." Section 25-5-110(1), Ala. Code 1975, defines "occupational disease" as follows:

> "A disease arising out of and in the course of employment, including occupational pneumoconiosis and occupational exposure to radiation ..., 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,

[6]On March 15, 2019, the trial court entered an order amending the March 14, 2019, order to correct a clerical mistake.

> 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."

Nucor Steel contends that the pleadings do not mention a claim that Otwell suffered from an occupational disease and that such a claim was not tried by the implied consent of the parties.

> "According to Rule 8(a), Ala. R. Civ. P., a claim for relief must contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief and (2) a demand for judgment for the relief to which the pleader deems himself entitled. To comply with that rule, the claim for relief must give the opposing party fair notice of the pleader's claim and the grounds upon which that claim rests. Christy v. Smith Mountain, Inc., 855 So. 2d 1103 (Ala. Civ. App. 2003)(citing Mitchell v. Mitchell, 506 So. 2d 1009 (Ala. Civ. App. 1987))."

Smith v. Smith, 865 So. 2d 1221, 1224 (Ala. Civ. App. 2003). A complaint seeking workers' compensation benefits should include

> "a full description of the injury, its nature and extent, ... the knowledge of the employer of the injury or the notice to him thereof, which must be of the kind provided for in this article and Article 2 of this chapter and such other facts as may be necessary to enable the court to determine what, if any, compensation the employee ... [is] entitled to under this article and Article 2 of this chapter."

§ 25-5-88, Ala. Code 1975.

In his complaint, Otwell alleged that he "suffered on-the-job injuries as a result of cumulative trauma and gradual deterioration to his lumbar spine ...." "Occupational disease" and "cumulative trauma" are mentioned separately in the definition of "injury" in § 25-5-1, Ala. Code 1975, which states:

> "'Injury and personal injury' shall mean only injury by accident arising out of and in the course of the employment, and shall not include a disease in any form, except for an occupational disease or where it results naturally and unavoidably from the accident. Injury shall include physical injury caused either by carpal tunnel syndrome disorder or by other cumulative trauma disorder if either disorder arises out of and in the course of the employment ...."

We note that Article 4 of the Act is devoted entirely to claims for occupational diseases. We do not view Otwell's allegation of a cumulative-trauma injury as also asserting an allegation of an occupational disease. We also do not discern any factual allegations in the complaint that would provide notice to Nucor Steel of a claim involving an occupational disease. The complaint does not state that Otwell suffered from an occupational disease, cite any statutory provisions regarding occupational diseases, or allege facts particular to the elements of an occupational disease. Otwell alleged only

that he notified Nucor Steel of his injuries in a letter sent in April 2014, which was attached to the complaint. The trial court adopted the parties' stipulation that the April 2014 letter from Otwell's counsel to Nucor Steel provided notice of a claim of a cumulative-trauma injury. Furthermore, the stipulations of the parties referenced the "claim of a cumulative trauma injury made the basis of [Otwell's] complaint in this civil action." The record lacks any allegation that would have put Nucor Steel on notice of an occupational-disease claim. Therefore, we determine that Otwell's complaint does not allege any claim other than that he suffered from a cumulative-trauma injury.

> "'Rule 15(b), Ala. R. Civ. P., provides a trial court with the authority to amend the pleadings to conform to the evidence when the parties impliedly consent to litigate an issue. However, if the evidence purportedly related to an unpleaded claim overlaps with, or actually relates solely to, a pleaded claim, introduction of that evidence will not imply the consent necessary to allow amendment of the pleadings under Rule 15(b). See CVS/Caremark Corp. v. Washington, 121 So. 3d 391, 398-99 (Ala. Civ. App. 2013).'"

Young v. Corrigan, 253 So. 3d 373, 380 (Ala. Civ. App. 2017) (quoting Myers v. Myers, 206 So. 3d 649, 653 (Ala. Civ. App. 2016)). Although the trial court stated that Otwell had "pled

that his injury [was] an occupational disease," the court did not expressly state that the pleadings had been amended by implied consent. Even if a finding of an amendment by implied consent was implicit in the judgment, such an amendment is not supported by the record. We do not discern any factual evidence presented at trial that was particular to an occupational-disease claim and did not overlap with Otwell's cumulative-trauma claim. As a result, we reverse the portion of the judgment finding that Otwell had pleaded an occupational-disease claim. We therefore pretermit discussion of Nucor Steel's argument that insufficient evidence supported the purported occupational-disease claim.

II.

Even though we determine that Otwell did not plead that his injury was an occupational disease, Otwell did plead, and the trial court granted relief on, a claim that the trial court described as seeking "benefits under [the Act] for cumulative trauma or repetitive physical stress that gradually caused or contributed to [Otwell's] disability." We, thus, consider the finding by the trial court that Nucor Steel is liable for workers' compensation benefits under that claim.

Nucor Steel contends that the record and the judgment support only a finding that Otwell's back condition is a recurrence of his 1995 back injury. It is undisputed that, while working for Birmingham Steel, Otwell suffered an accidental injury to his back in 1995 for which he received workers' compensation benefits. Otwell alleged in his complaint that, on his last day of active employment with Nucor Steel in 2014, he suffered a cumulative-trauma injury and that his work activities "caused, aggravated, or contributed to his deteriorating spinal condition." In the judgment, the trial court stated that whether Otwell's back condition was a recurrent injury "is at the core of the controversy between these parties." The trial court then discussed the last-injurious-exposure rule in relation to that issue. In Ex parte Pike County Commission, 740 So. 2d 1080, 1083-84 (Ala. 1999), our supreme court stated:

> "The trial court in this case applied the 'last-injurious-exposure' rule to determine whether Green's herniated disk is a compensable injury. That rule is generally used only to determine which insurance carrier bears responsibility for paying workers' compensation benefits when an employee suffers two or more episodes of compensable disability with an intervening change of employers or change of insurance carriers by the same employer. See 9 Arthur Larson & Lex K. Larson,

Larson's Workers' Compensation Law, § 95.20 (1998). Under the last-injurious-exposure rule, the carrier covering the risk at the time of the most recent compensable injury bearing a causal relation to the disability bears the responsibility to make the required workers' compensation payments. See id. 'The characterization of the second injury as a new injury, an aggravation of a prior injury, or a recurrence of an old injury determines which insurer is liable.' North River Ins. Co. v. Purser, 608 So. 2d 1379, 1382 (Ala. Civ. App. 1992) (citing Larson, supra, § 95.11). If the second injury is a 'new injury'[2] or an 'aggravation of a prior injury,'[3] then the carrier at the time of the second injury is liable for the resulting medical bills and disability payments. See id. (citing Larson, supra, § 95.21). If, however, the second injury is a 'recurrence'[4] of a prior injury, then the carrier at the time of the prior injury is liable for the resulting medical bills and disability payments. See id. (citing Larson, supra, § 95.21).

"[2]The second injury is characterized as a 'new injury' if it is the sole cause of the final disability. See United States Fid. & Guar. Co. v. Stepp, 642 So. 2d 712, 715 (Ala. Civ. App. 1994).

"[3]The second injury is characterized as an 'aggravation of a prior injury' if 'the "second [injury] contribute[s] independently to the final disability."' United States Fid. & Guar. Co. v. Stepp, 642 So. 2d 712, 715 (Ala. Civ. App. 1994) (first alteration in Stepp) (quoting [4 A.] Larson, The Law of Workmen's Compensation, § 95.22 [(1989)]).

"[4]The second injury is characterized as a 'recurrence' if '"the second [injury] does not contribute even slightly to the causation of the [disability]."' United States Fid. & Guar. Co. v.

> Stepp, 642 So. 2d 712, 715 (Ala. Civ. App. 1994) (alterations in Stepp) (quoting Larson, § 95.22)."

See Health-Tex, Inc. v. Humphrey, 747 So. 2d 901, 905 (Ala. Civ. App. 1999) (applying the last-injurious-exposure rule to successive injury of claimant who, "after a few months of performing her repetitive-motion sewing duties ... began to experience pain and numbness characteristic of carpal tunnel syndrome"). "'The last-injurious-exposure rule applies to employers as well as insurance carriers.'" White v. HB & G Bldg. Prods., Inc., 68 So. 3d 155, 160 (Ala. Civ. App. 2010) (quoting Equipment Sales Corp. v. Gwin, 4 So. 3d 1125, 1127 (Ala. Civ. App. 2008), citing in turn Kohler Co. v. Miller, 921 So. 2d 436, 445 (Ala. Civ. App. 2005)).

Under the last-injurious-exposure rule, Nucor Steel is responsible for providing workers' compensation benefits to Otwell only if the injury claimed by Otwell is either a new injury or an aggravation of a prior injury. See Ex parte Pike Cty. Comm'n, supra. In the judgment, the trial court specifically found that "[t]here is no evidence of a new work-related injury or of a work-related aggravation of a prior injury." Those findings are inconsistent with finding Nucor Steel liable for the cumulative-trauma claim. We

therefore reverse the judgment and instruct the trial court on remand to determine whether the injury claimed by Otwell is a recurrence or either an aggravation of a prior injury or a new injury. See Bailey v. Walker Reg'l Med. Ctr., 709 So. 2d 35, 38 (Ala. Civ. App. 1997) (reversing judgment because trial court's findings were inconsistent with its conclusion that the claimant suffered only a permanent partial disability).

Conclusion

For the foregoing reasons, we reverse the judgment and pretermit discussion of Nucor Steel's remaining arguments.[7] We

[7]Nucor Steel argues that "if ... Otwell's February 3, 2014, non-work-related massive disk herniation at home after he stopped working for [Nucor Steel] was not a recurrence of his 1995 Birmingham Steel injury, then the successive compensable injury rule would apply" and Nucor Steel would not be liable for compensation. Nucor Steel also argues that insufficient evidence supports the trial court's findings of legal and medical causation. Nucor Steel further argues that it is not liable for the compensation and medical benefits awarded for the period between the date of Otwell's injury and April 16, 2014, because, it asserts, the letter delivered on April 16, 2014, did not provide notice within five days as required by § 25-5-78, Ala. Code 1975. In addition, Nucor Steel argues that the trial court incorrectly calculated the amount of attorney fees that were based on the compensation awarded for temporary-total-disability benefits and that insufficient evidence supports the trial court's order for it to pay "all reasonable and necessary medical expenses incurred for the treatment of [Otwell's] lumbar spine to date of [the judgment]."

remand the cause to the trial court for proceedings consistent with this opinion.

REVERSED AND REMANDED WITH INSTRUCTIONS.

Thompson, P.J., and Hanson, J., concur.

Moore, J., concurs in part and concurs in the result, with writing, which Edwards, J., joins.

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

I concur with the main opinion that James P. Otwell did not file a claim for an occupational disease against Nucor Steel Birmingham, Inc. ("Nucor Steel"), under Article 4 of the Alabama Workers' Compensation Act ("the Act"), Ala. Code 1975, § 25-5-1 et seq., and that the Jefferson Circuit Court ("the trial court") erred in awarding Otwell benefits for an occupational-disease claim that even Otwell admits was not pleaded and tried. See ArvinMeritor, Inc. v. Handley, 12 So. 3d 669, 689 (Ala. Civ. App. 2007) (holding that trial court had erred in awarding benefits based, in part, on employee's chronic obstructive pulmonary disease that had not been pleaded).

I also concur with the main opinion that the judgment should be reversed and the cause remanded for the trial court to clarify its findings of fact and conclusions of law regarding Otwell's cumulative-trauma claim, but not quite for the same reasons as the main opinion. In the underlying proceedings, the parties controverted whether Otwell's injury to his lumbar spine and resulting disability was compensable

under the last-injurious-exposure rule. Generally speaking, that rule places liability on an employee's employer at the time of the most recent compensable injury bearing a causal relation to the disability. See White v. HB & G Bldg. Prods., Inc., 68 So. 3d 155 (Ala. Civ. App. 2010). More specifically, the characterization of the second injury as a new injury, an aggravation of a prior injury, or a recurrence of an old injury determines which employer is liable. Id. If the second injury is properly characterized as a new injury or an aggravation of a prior injury, then the employer at the time of the second injury is liable; if the second injury is properly characterized as a recurrence of the original compensable injury, then the employee's employer at the time of the original injury is liable. Id.

In the first part of its findings of fact, the trial court in this case found all the facts necessary to conclude that Otwell had sustained a compensable injury from cumulative trauma while working for Nucor Steel that contributed to his disability. The trial court found that Otwell had proven by clear and convincing evidence that his strenuous work duties for Nucor Steel exposed him to a risk of a lumbar-spine injury

materially in excess of that to which persons not so employed are exposed in their everyday lives and that the repetitive exertion while working for Nucor Steel had contributed to the disabling lumbar-spine injury Otwell sustained. Those findings would support a legal conclusion that Nucor Steel should be liable for workers' compensation benefits under the last-injurious-exposure rule, which, again, places liability on the employer at the time of the most recent compensable injury bearing a causal relation to the disability.

However, when characterizing the injury later in its findings of fact, the trial court determined that "[t]here is no evidence of a new work-related injury or of a work-related aggravation of a prior injury." That finding would absolve Nucor Steel of liability under the last-injurious-exposure rule. Complicating matters further, the trial court did not find that the injury Otwell sustained while working for Nucor Steel was a recurrence of his 1995 work-related injury. A recurrence occurs when "'the second [injury] does not contribute even slightly to the causation of the [disability].'" United States Fid. & Guar. Co. v. Stepp, 642 So. 2d 712, 715 (Ala. Civ. App. 1994) (quoting 4 A. Larson,

The Law of Workmen's Compensation § 95.23 at 17-142 (1989)). In the last part of its findings, the trial court reiterated that the cumulative trauma to which Otwell was exposed while working for Nucor Steel did contribute to Otwell's lumbar-spine injury and resulting disability. That finding supports a legal conclusion that the injury was not a recurrence of Otwell's 1995 work-related injury and that Nucor Steel is liable for workers' compensation benefits.

Ordinarily, when a trial court enters findings of fact in a workers' compensation case that are inconsistent with its conclusions of law, the judgment must be reversed and the cause remanded for the entry of a new judgment consistent with the findings of fact. For example, in Weeks v. C.L. Dickert Lumber Co., 270 Ala. 713, 121 So. 2d 894 (1960), the Covington Circuit Court found that C.L. Dickert Lumber Company had reserved the right to control the manner in which Fred Norman Weeks cut timber, but it concluded that Weeks was not an employee of the company. The supreme court determined that the conclusion of law, i.e., that Weeks was not an employee, was inconsistent with the finding of fact that the company controlled the manner in which he worked. The supreme court

determined that the circuit court's conclusion that Weeks was not an employee of the company could not stand, and it reversed the judgment and remanded the cause for the entry of a new judgment finding that Weeks was an employee of the company and awarding him workers' compensation benefits for the injury he had sustained while working for the company. Likewise, in Pemco Aeroplex, Inc. v. Johnson, 634 So. 2d 1018 (Ala. Civ. App. 1994), a case in which the Jefferson Circuit Court awarded Steven R. Johnson permanent-partial-disability benefits for periods that it determined Johnson had not yet reached maximum medical improvement for a work-related injury, this court reversed the judgment and remanded cause for the circuit court to enter a new judgment consistent with its factual findings.

In this case, however, the trial court's findings of fact are not merely inconsistent with its conclusions of law, they are themselves internally inconsistent. The trial court generally found that the cumulative trauma to which Otwell was exposed while working for Nucor Steel had contributed to his lumbar-spine injury and resulting disability, but it also specifically found that the injury was not a new injury or an

aggravation of a prior injury. Thus, some aspects of the findings of fact would lead to the legal conclusion that Nucor Steel is liable for workers' compensation benefits, while other aspects would lead to the legal conclusion that Nucor Steel is not liable for workers' compensation benefits. Because those contradictory findings of fact cannot be reconciled, I agree with the approach taken by the main opinion to reverse the judgment and to remand the cause to the trial court for clarification of its findings of fact, as this court did in Bailey v. Walker Regional Medical Center, 709 So. 2d 35, 38 (Ala. Civ. App. 1997).

Edwards, J., concurs.