REL: March 29, 2019

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2018-2019

2180266

Ex parte Trusswalk, Inc.

PETITION FOR WRIT OF MANDAMUS

(In re: Chesley Shawn Price

v.

Trusswalk, Inc.)

(Marshall Circuit Court, CV-17-900072)

MOORE, Judge.

Trusswalk, Inc. ("the employer"), petitions this court for a writ of mandamus directing the Marshall Circuit Court to

vacate its order requiring the employer to refer Chesley Shawn Price ("the employee") to a pain-management specialist for medical treatment. We grant the petition and issue the writ.

Background

On February 16, 2018, the employee commenced in the circuit court a civil action against the employer; the employee alleged that he had suffered a lower-back injury in a work-related accident on November 7, 2016, and he sought benefits for that injury under the Alabama Workers' Compensation Act ("the Act"), Ala. Code 1975, § 25-5-1 et seq. On September 18, 2018, the employee filed a "motion to compel medical treatment" in which he asserted, among other things, that he was suffering from "chronic debilitating pain" in his lower back as a result of the work-related injury, that his authorized treating physician was not treating that pain, and that he had requested and been denied a referral to "pain management." The employee moved the circuit court to order the employer to provide "appropriate medical treatment" for his condition. The employer responded that the motion should be denied because, it asserted, the employee's authorized treating physician who was responsible for directing the

course of the employee's medical treatment had not referred the employee for pain management.[1]

The circuit court held a hearing on the motion at which it received medical records and heard oral arguments of counsel.[2] On December 6, 2018, the circuit court entered an order in which it found that the employee was in "chronic moderate severe to severe pain" "due to and on account of his medical condition from the work-related accident and injury" of November 7, 2016, and that the employee "is not receiving necessary treatment for his chronic pain." The circuit court ordered the employer to "immediately refer [the employee] to a [p]ain [m]anagement [s]pecialist for treatment of his chronic pain condition ...." The employer filed its petition for a writ of mandamus in this court on December 27, 2018.

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[1]Ex parte Publix Supermarkets, Inc., 963 So. 2d 654 (Ala. Civ. App. 2007), holds that the Act does not authorize a trial court to award medical benefits through a "motion to compel medical treatment." However, the employer has not made any argument directed at the procedure used by the circuit court in awarding the employee medical benefits; hence, we consider that argument waived. See Ex parte C.L.L.M., 256 So. 3d 1192, 1196 (Ala. Civ. App. 2018).

[2]The materials provided to this court by the parties do not contain a transcript of the hearing, but, at oral argument before this court, counsel stipulated as to what transpired at the hearing.

This court heard oral argument on the petition on February 20, 2019.

Issue

In its petition, the employer framed the issue for review as follows: "Whether the [circuit court] abused its discretion by directing [the employer] to provide medical treatment which has never been recommended by an authorized physician." In its brief to this court and at oral argument, the employer argued that the real issue concerned the authority of the circuit court to direct a referral for pain-management treatment despite the absence of any medical opinion that such treatment is reasonably necessary. In his brief to this court and at oral argument, the employee engaged on this issue, so we consider the petition in this context.

Standard of Review

Although the Act provides that a judgment entered by a circuit court as to any controversy over medical benefits shall be subject to appeal, see Ala. Code 1975, §§ 25-5-81(a)(1) and 25-5-88, a majority of this court has held that an order resolving a claim for medical benefits, but not awarding any compensation or otherwise resolving the entire

workers' compensation claim, is an interlocutory order reviewable only by a petition for a writ of mandamus. See Ex parte Cowanbunga, Inc., 67 So. 3d 136 (Ala. Civ. App. 2011).

> "Mandamus is an extraordinary remedy. An appellate court will grant a petition for a writ of mandamus only when '(1) the petitioner has a clear legal right to the relief sought; (2) the respondent has an imperative duty to perform and has refused to do so; (3) the petitioner has no other adequate remedy; and (4) this Court's jurisdiction is properly invoked.' Ex parte Flint Constr. Co., 775 So. 2d 805, 808 (Ala. 2000) (citing Ex parte Mercury Fin. Corp., 715 So. 2d 196, 198 (Ala. 1997))."

Ex parte Amerigas, 855 So. 2d 544, 546 (Ala. Civ. App. 2003).

Discussion

Section 25-5-77(a), Ala. Code 1975, a part of the Act, provides, in pertinent part, that an employer "shall pay [for] ... reasonably necessary medical ... treatment and attention, ... as may be obtained by the injured employee ...." To be considered medically necessary,

> "services and supplies shall meet the following criteria: be consistent with the diagnosis and treatment of the work related illness or injury; be consistent with the standard of care for good medical practice; not be solely for the convenience of the patient, family, hospital, physician or other provider; be in the most appropriate and cost effective medical care setting as determined by the patient's condition; and have scientifically established medical value."

Ala. Admin. Code (Department of Labor), Rule 480-5-5-.02(46). Generally speaking, modalities, treatment, and supplies are "reasonably necessary" when designed by medical professionals to directly relieve an employee of the effect and symptoms of the injury. See Flanagan Lumber Co. v. Tennison, 160 So. 3d 801, 803 (Ala. Civ. App. 2014).

In this case, the employee asserted a need for pain-management services and the employer denied that such treatment was needed because it had not been recommended by a medical expert. The employee submitted this controversy to the circuit court, which has jurisdiction over the employee's workers' compensation claim, in accordance with § 25-5-77(a), which provides, in pertinent part, that "[a]ll cases of dispute as to the necessity and value of [medical] services shall be determined by the tribunal having jurisdiction of the claim of the injured employee for compensation." The employer did not contest the authority of the circuit court to decide the dispute but, instead, argued that the circuit court could not award the employee the relief he requested in the absence of a referral by a physician to a pain-management specialist or without some medical opinion that such treatment was

reasonably necessary. Otherwise, the employer maintained, the circuit court would be usurping the role of the authorized treating physician to direct the course of the employee's medical care. See Ex parte El Reposo Nursing Home Grp., Inc., 81 So. 3d 370, 374 (Ala. Civ. App. 2011) ("[The employer] is correct in arguing that it is the role of the authorized treating physician to direct the medical treatment of the injured employee.").

"'Any right of recovery for medicine, medical treatment and hospital charges is statutory, and the burden is on the [employee] to establish the facts essential to an award.'" Mitchell Motor Co. v. Burrow, 37 Ala. App. 222, 227, 66 So. 2d 198, 201 (1953) (quoting trial court's order). An award of medical benefits must be sustained by the evidence before the circuit court. Id. Medical necessity may be proven by opinion evidence from a medical expert, see, e.g., GAF Corp. v. Poston, 656 So. 2d 1225 (Ala. Civ. App. 1995), but, in some cases, the reasonable necessity of medical services may be inferred from lay and circumstantial evidence. See Lowe v. Walters, 491 So. 2d 962, 963-64 (Ala. Civ. App. 1986) ("[T]estimony and other evidence which show the severity of

the employee's injury, the number of physicians he consulted, and the different treatments he required are themselves evidence of the reasonable necessity of the expenses represented by the bills."); Jasper Cmty. Hosp., Inc. v. Hyde, 419 So. 2d 594 (Ala. Civ. App. 1982) (testimony of injured employee that, after leaving hospital, she experienced continuing back pain for which she consulted a physician supported finding that treatment by physician was reasonably necessary).

The materials provided to this court indicate that, in order to prove a need for pain-management services, the employee submitted to the circuit court medical records demonstrating that, between February 2017 and February 2018, he underwent five surgeries to treat his back injury. The employee originally received treatment from a primary-care physician and then an orthopedic surgeon, who performed his first two surgeries. In May 2017, the employee, having become dissatisfied with his medical providers, selected Dr. Stan Faulkner from a panel of four surgeons to take over his care. See § 25-5-77(a). Dr. Faulkner performed the last three surgeries on the employee. The employee visited the emergency

room of the Marshall Medical Center on December 28, 2017, and July 22, 2018, where he was diagnosed with chronic lumbar-back pain and sciatica, was prescribed anti-inflammatory medication, and was referred for treatment by his authorized treating physician, who was, at the time, Dr. Faulkner. According to Dr. Faulkner, the employee reached maximum medical improvement on October 1, 2018, at which time he was assigned permanent physical restrictions and a 26% permanent-impairment rating to the body as a whole.

The employer does not dispute that the medical records support the factual determination of the circuit court that the employee was suffering from chronic lower-back pain, but the employer denies that those records indicate that the employee needs treatment by a pain-management specialist as the circuit court ordered. The medical records do not expressly contain any recommendation by any medical provider that the employee receive pain-management treatment. The question is whether the circuit court could have reasonably inferred from the medical records that such treatment was reasonably necessary.

In Ex parte Price, 555 So. 2d 1060 (Ala. 1989), our supreme court held that medical causation need not be proven by medical experts in every case because, "[a]s the finder of facts, ... the trial court is authorized to draw any reasonable inference from the evidence, including conclusions of medical facts that are not within the peculiar knowledge of medical experts." 555 So. 2d at 1062. However, when the question of medical causation is complicated so that a lay person without medical training cannot infer causation from lay and circumstantial evidence, expert testimony is required in order for a circuit court to make a finding of medical causation in a workers' compensation case. See Ex parte Trinity Indus., Inc., 680 So. 2d 262, 269 (Ala. 1996) (quoting Charles Gamble, McElroy's Alabama Evidence § 128.10(1), pp. 346-47 (4th ed. 1991)) ("'It goes without saying that there are certain medical matters which are subject only to expert testimony and are outside the understanding of the lay witness.'"). By analogy, expert medical testimony will be required in some cases to establish the reasonable necessity of a course of medical treatment when a lay person could not

readily infer a need for such treatment from lay and circumstantial evidence alone.

All types of physicians are qualified to diagnose and treat pain. However, a "pain-management specialist" is a physician registered with the Alabama Board of Medical Examiners to provide pain-management services. See Ala. Admin. Code (Board of Med. Exam'rs), Rule 540-X-19-.03. Pain-management services involve the dispensation of controlled substances and the use of other modalities to alleviate or control pain. See Ala. Admin. Code (Board of Med. Exam'rs), Rule 540-X-19-.02. The Alabama Department of Labor has issued regulation specifically providing that pain-management services shall be precertified as reasonably necessary before those services can be provided to an injured employee through a workers' compensation program. See Ala. Admin. Code (Department of Labor), Rules 480-5-5-.02(60) and 480-5-5-.08(2)(i).

> "'Precertification review' is defined in Chapter 480-5-5 as '[t]he review and assessment of the medical necessity and appropriateness of services before they occur. The appropriateness of the site or level of care is assessed along with the timing, duration and cost effectiveness of the proposed services.' Ala. Admin. Code, r. 480-5-5-.02(60) (emphasis added)."

James River Corp. v. Bolton, 14 So. 3d 868, 872 (Ala. Civ. App. 2008). The tenor of these regulations indicates that pain-management treatment is a specialized form of treatment that is provided only when certain criteria establish its necessity. That criteria does not appear in the regulations, but appears to be within the realm of knowledge of medical professionals.

We agree with the employer that the circuit court exceeded its discretion when it ordered the employer to authorize treatment of the employee by a pain-management specialist. The medical records before the circuit court did not contain sufficient information from which a lay person could make a judgment that such specialized treatment was reasonably necessary. In the absence of such information, the determination that the employee requires pain-management treatment would have to be made by a medical expert. The circuit court could not make that medical judgment based solely on its authority to decide disputes as to necessity under § 25-5-77(a).

Based on the foregoing, we grant the employer's petition for a writ of mandamus, and we direct the circuit court to

vacate its December 6, 2018, order. However, nothing in our opinion shall be construed to prevent the employee from obtaining the necessary evidence to substantiate his claim for pain-management services in the future and from submitting any future controversy as to his right to such services to the circuit court.

PETITION GRANTED; WRIT ISSUED.

Donaldson, Edwards, and Hanson, JJ., concur.

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