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# ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2020-2021

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**Ronald Turner**

v.

**Robert J. Baggett, Inc.**

**Appeal from Mobile Circuit Court  
(CV-16-173)**

MOORE, Judge.

Ronald Turner ("the employee") appeals from a judgment entered by the Mobile Circuit Court ("the trial court") insofar as it awarded him permanent-partial-disability benefits under the Alabama Workers'

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Compensation Act ("the Act"), Ala. Code 1975, § 25-5-1 et seq. We reverse the trial court's judgment and remand the case for further proceedings consistent with this opinion.

### Procedural History

On July 21, 2016, the employee filed a complaint seeking workers' compensation benefits from Robert J. Baggett, Inc. ("the employer"), for an injury the employee sustained on August 19, 2014. The employer answered the complaint on August 17, 2016, disputing the extent of the employee's injury. After a trial, the trial court entered a final judgment on June 22, 2020, awarding the employee, among other things, "compensation for permanent partial disability pursuant to the schedule for a 59% loss of his right arm." On July 13, 2020, the employee filed his notice of appeal to this court.

### Issue on Appeal

The employee raises several issues regarding the propriety of the trial court's judgment, but we find the dispositive issue to be whether the trial court erred in limiting the employee's compensation to permanent-

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partial-disability benefits for the loss of the use of his right arm under "the schedule" in the Act. See § 25-5-57(a), Ala. Code 1975.

As a general rule, an employee who sustains a permanent loss of use of an arm in a work-related accident is entitled to the benefits set forth in the schedule. Specifically, § 25-5-57(a)(3)a. provides, in pertinent part:

"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:

"....

"13. For the loss of an arm, 222 weeks."

Section 25-5-57(a)(3)d. provides:

"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."

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However, " 'if the effects of the loss of the member extend to other parts of the body and interfere with their efficiency, the schedule allowance for the lost member is not exclusive.' " Ex parte Drummond Co., 837 So. 2d 831, 834 (Ala. 2002) (quoting 4 Lex K. Larson, Larson's Workers' Compensation Law § 87.02 (2001)).

" 'Based on the holding in Ex parte Jackson, [997 So. 2d 1038 (Ala. 2007) ], in order to prove that the effects of the injury to the scheduled member "extend to other parts of the body and interfere with their efficiency," the employee does not have to prove that the effects actually cause a permanent physical injury to nonscheduled parts of the body. Rather, the employee must prove that the injury to the scheduled member causes pain or other symptoms that render the nonscheduled parts of the body less efficient.'

"Boise Cascade Corp. v. Jackson, 997 So. 2d 1042, 1044 (Ala. Civ. App. 2008). In order to prove that the loss of a member 'interferes with the efficiency' of other parts of his or her body, [an employee] must prove that the normal effective functioning of another part of his or her body has been hindered or impeded due to the loss of the member. Id."

Norandal U.S.A., Inc. v. Graben, 18 So. 3d 405, 410 (Ala. Civ. App. 2009).

Likewise, "a worker who sustains a permanent injury to a scheduled member resulting in chronic pain in the scheduled member that is so

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severe that it virtually totally physically disables the worker would not be limited to the benefits set out in the schedule." Graben, 18 So. 3d at 416 (citing Ex parte Drummond Co., 837 So. 2d at 836 n.11).

In its judgment, the trial court awarded the employee benefits for a 59% loss of the use of his right arm. The trial court determined that the employee had not presented sufficient evidence indicating that the effects of his injury extended to and interfered with other, nonscheduled parts of his body or that his scheduled injury virtually totally disabled him so as to qualify him to receive compensation outside the schedule. The employee argues on appeal that the trial court erred in those determinations and that he should have been awarded compensation for a nonscheduled injury.

### Facts

The facts pertinent to the issue before this court are as follows. On August 19, 2014, while pulling strenuously on a wrench, the employee ruptured his right biceps tendon. Dr. Nick Rachel, an orthopedic surgeon, surgically repaired the ruptured tendon on August 27, 2014. Dr. Rachel's notes indicate that, following the surgery, the employee complained of

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continuing burning right-arm pain as well as swelling and intermittent numbness and tingling in his right hand and wrist, which prompted Dr. Rachel to refer the employee to Dr. David Hinton, a neurologist.

Dr. Hinton recorded in his notes that the employee complained of persistent swelling and numbness in his right hand and forearm, tingling, weakness, and sensory changes in unspecified portions of his body, as well as neck pain, headaches, and depression. Dr. Hinton diagnosed the employee with "complex regional pain syndrome of upper extremity" with a resulting permanent disability directly resulting from his work-related injury. On July 8, 2016, Dr. Hinton wrote a letter stating:

"[The employee] has been under my care for his work-related injury to his right shoulder, arm and hand since 2/13/2015. ... He suffered a biceps tendon rupture to his arm, while working in a tank on 08/8/14. He has suffered post surgical complex regional syndrome/reflex sympathetic dystrophy, and extreme swelling to the right arm due to the complexity of his injury. We will continue to follow patient as he is still having severe persistent swelling to the right hand and forearm despite therapy, home elevation exercises and compression sleeve wear. It is ... my medical neurological opinion that [the employee] cannot function normally day to day and is permanently disabled from this injury."

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In his deposition, Dr. Hinton explained that complex-regional-pain syndrome occurs when a chronic injury causes permanent damage, or, as he put it, a "remodeling" of the nervous system in the spinal cord, that results in increased pain to the sufferer from even minor stimulation. Dr. Hinton testified that he had diagnosed the employee with that condition based on four classic signs the employee exhibited, including hypersensitivity, color and temperature changes in the affected extremity, and swelling. Dr. Hinton noted that the employee had preexisting peripheral neuropathy but that the employee's right-biceps-tendon injury was the precipitating factor causing the complex-regional-pain syndrome. Dr. Hinton testified that the employee experiences neck pain due, in part, to his injury. Dr. Hinton prescribed anti-inflammatory medication that led the employee to engage in suicidal thoughts, so that medication was discontinued. The employee was also given high doses of narcotic medication and was instructed not to work. However, Dr. Hinton stated that the employee might be able to perform purely "intellectual" -- i.e., nonphysical -- duties. Dr. Hinton testified that the employee's condition will not be cured, although, he said, he expects that the employee might

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get some relief from his symptoms over time. Dr. Hinton assigned the employee a 59% impairment to his right upper extremity, which, he determined, translated to a 35% impairment to the body as a whole, but he testified that he believes the employee is permanently and totally disabled.

The employee testified that he began having swelling and pain "running all the way up through [his] shoulder and neck" while participating in physical therapy following his surgery. The employee testified that he cannot use his right arm at all and that he has unbearable pain all the way up to his neck. He testified that his pain never gets below an 8 on a scale of 1 to 10. According to the employee, he has to elevate his arm twice during an eight-hour period; he testified that he lies down and elevates his arm for a total of four to six hours per day and that some days he cannot get back up once he lies down. He testified that sometimes his neck pain is so severe that he cannot turn his head and that, therefore, he is unable to drive. He testified that the neck pain also triggers migraine headaches. He explained that his symptoms had gotten progressively worse so that he could no longer even walk around

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the yard and pick up limbs. According to the employee, he also suffers from depression; however, he is not seeing a doctor for that condition.

The employer presented evidence indicating that, before the August 2014 injury, the employee had suffered from peripheral neuropathy related to chemotherapy treatments he had received for a cancerous condition and that the employee had contemplated filing for disability as a result of that condition. However, Dr. Hinton testified that the employee was working normally before his work-related injury, that the employee had developed complex-regional-pain syndrome as a result of that work-related injury, and that the employee is now disabled predominantly as a result of his complex-regional-pain syndrome.

#### The Trial Court's Findings

In its judgment, the trial court addressed the exclusivity of the schedule as follows:

#### "CONCLUSIONS OF LAW

"....

"5. The Court finds that the injury suffered by [the employee] on August 19, 2014, was to his right arm, specifically a ruptured biceps tendon. Therefore, it is a

scheduled injury and is due to be compensated pursuant to Section 25-5-57(a)(3), Ala. Code (1975).

"6. [The employee], on the other hand, contends that he is disabled on a permanent and total basis and should be compensated outside the schedule.

"7. There are two exceptions to the statutory mandate that an injury to a scheduled member must be compensated pursuant to the schedule. The first exception is 'if the effects of the loss of the member extend to other parts of the body and interfere with their efficiency.' The second exception is for pain that completely, or almost completely, physically debilitates the worker. Norandal USA, Inc. v. Graben, 133 So. 3d 386 (Ala. Civ. App. 2010).

"8. The Court is mindful of the Graben court's guidance that the pain exception is not satisfied 'by evidence that the worker experiences abnormal, constant, and severe pain even when not using the affected member.' Rather, it requires competent proof that whatever pain the worker experiences completely, or almost completely, physically debilitates the worker. The Court, after considering all the legal evidence bearing on the existence, duration, intensity, and disabling effect of pain in [the employee's] right arm, finds that [the employee] does not meet the exception for pain.

"9. The second exception under which a scheduled injury may be treated as a non-scheduled injury is 'if the effects of the loss of the member extend to other parts of the body and interfere with their efficiency, the schedule allowance for the lost member is not exclusive.' Ex parte Drummond Co., 837 So. 2d 831 (Ala. 2002). The Court finds that there is insufficient evidence that this exception to the schedule should be applied, and the Court declines to do so.

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"10. The Court finds that, based on the evidence submitted at trial, neither recognized exception would remove [the employee's] claim from the schedule so as to be compensated outside of the schedule."

### Standard of Review

In a workers' compensation case, the findings of a trial court based in part on ore tenus testimony are presumed correct, and a judgment entered in accordance with those findings will be affirmed so long as the findings are supported by substantial evidence. Ex parte Lowe's Home Ctrs., LLC, 209 So. 3d 496, 504 (Ala. Civ. App. 2016). However, the legal conclusions of a trial court are reviewed de novo. See Ala. Code 1975, § 25-5-81(e)(1).

### Analysis

Substantial evidence supports the trial court's factual finding that the employee sustained a ruptured right biceps tendon as the result of a work-related accident. However, substantial evidence does not support the trial court's factual determination that the injury was contained solely within the right arm. The undisputed objective medical evidence indicates that the injury affected the employee's spinal-cord nerves, causing a

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painful debilitating condition. The employer points to some discrepancies in the evidence that might have affected the credibility of the employee's claim that his injury caused him neck pain and depression, but, even assuming that the trial court could have discounted those complaints, it remains undisputed that the employee exhibits objective signs of complex-regional-pain syndrome impairing an area of his body beyond his right arm, i.e., his central nervous system. "[T]he trial court is not free to disregard undisputed evidence in order to support its findings." Benton v. Winn-Dixie Montgomery, Inc., 705 So. 2d 495, 497 (Ala. Civ. App. 1997). Under the circumstances, the only factual conclusion to be drawn was that the injury to the employee's right arm extends to another nonscheduled part of the employee's body and interferes with its efficiency. Under the holding in Ex parte Drummond Co., as explicated by Boise Cascade Corp. v. Jackson, 997 So. 2d 1042 (Ala. Civ. App. 2008), as a matter of law, the employee's injury could be considered only a nonscheduled injury.

The employee argues further that he met the exceedingly high criteria set forth in Graben because, he says, the pain from his injury virtually totally disables him, similar to the worker in Goodyear Tire &

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Rubber Co. v. Haygood, 93 So. 3d 132, 142 (Ala. Civ. App. 2012).

However, we need not decide whether the trial court erred in determining that the employee failed to present sufficient evidence to meet the Graben test because we have already concluded that the schedule does not apply under the analysis set forth in Ex parte Drummond Co. Any discussion regarding Graben in this context would amount to nothing more than dictum.

### Conclusion

We reverse the trial court's judgment and remand the case to the trial court for that court to enter a new judgment concluding that the award of compensation is not governed by the schedule in the Act. We decline to render a judgment finding the employee permanently and totally disabled, as the employee requests, because the duty of determining the extent of disability is a function of the trial court as the fact-finder. See Reed v. James R. Fincher Timber Co., 659 So. 2d 660 (Ala. Civ. App. 1995). Instead, we direct the trial court to award the employee compensation based on the permanent loss of earning capacity sustained

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by the employee from the injury, which determination shall be based on the evidence in the record.

**REVERSED AND REMANDED WITH INSTRUCTIONS.**

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