ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2006-2007

2050480

Davis Plumbing Company, Inc.

v.

William Burns

Appeal from Jefferson Circuit Court
(CV-05-3634)

On Application for Rehearing

PER CURIAM.

This court's opinion of December 8, 2006, is withdrawn, and the following is substituted therefor.

Davis Plumbing Company, Inc., petitioned this court for a writ of mandamus directing the trial court to vacate its

order granting William Burns's motion for a declaratory judgment and to enter an order in Davis Plumbing's favor. We conclude that the trial court's order was a final judgment, treat the petition for a writ of mandamus as an appeal, and affirm the judgment of the trial court.

Burns sued his employer Davis Plumbing for workers' compensation benefits, alleging that he had sustained an injury as a result of a work-related accident. Burns and Davis Plumbing subsequently entered into a settlement agreement, which the trial court approved by order on November 18, 2005. The settlement agreement stated that Davis Plumbing did not dispute that Burns was permanently and totally disabled and that Burns would receive certain compensation for his disability. The settlement agreement also stated that Burns's medical and vocational benefits were to remain open in accordance with the Alabama Workers' Compensation Act, § 25-5-1 et seq., Ala. Code 1975 ("the Act").

On January 24, 2006, Burns filed a "motion for declaratory judgment" against Davis Plumbing. The motion asserted that Burns was using "Innoviant Pharmacy/Workers Comp RX" ("Innoviant Pharmacy") to fill prescriptions for medicines

relating to his workers' compensation disability. The motion asserted that, since December 27, 2005, Davis Plumbing had refused to pay for the workers'-compensation-related medicines obtained by Burns through Innoviant Pharmacy. Burns's motion further asserted that Davis Plumbing had not paid for the prescription medicines because Davis Plumbing wanted Burns to use a pharmacy other than Innoviant Pharmacy. The motion sought an order determining Burns's right to use the pharmacy of his choice and Davis Plumbing's obligation to pay for Burns's prescription medicines. Following a hearing, the trial court entered an order granting Burns's motion for a declaratory judgment. Davis Plumbing filed a "motion to reconsider," which the trial court denied.

Davis Plumbing, apparently treating the trial court's order as an interlocutory order, filed a petition for a writ of mandamus with this court. See Ex parte Turpin Vise Ins. Agency, Inc., 705 So. 2d 368, 369 (Ala. 1997) ("The writ of mandamus is an extraordinary writ that applies 'where a party seeks emergency and immediate appellate review of an order that is otherwise interlocutory and not appealable.' Rule 21(e)(4), Ala. R. App. P."). However, because the trial

court's order conclusively determined the declaratory-judgment issue before the trial court and ascertained and declared the rights of Burns and Davis Plumbing, the trial court's order was a final, appealable judgment. See George v. Sims, 888 So. 2d 1224, 1226-27 (Ala. 2004) ("'A final judgment is an order "that conclusively determines the issues before the court and ascertains and declares the rights of the parties involved."'"). Davis Plumbing filed its petition for a writ of mandamus within the 42-day period allowed for filing a notice of appeal after the denial of Davis Plumbing's postjudgment motion. See Rule 4(a)(1) and (3), Ala. R. App. P. Therefore, we elect to treat Davis Plumbing's petition as an appeal. See, e.g., Ex parte W.H., Jr., 941 So. 2d 290 (Ala. Civ. App. 2006); and Wix Corp. v. Davis, 945 So. 2d 1040 (Ala. Civ. App. 2005).

Davis Plumbing argues on appeal that the trial court erred by concluding that Burns has the right to use the pharmacy of his choice to obtain his workers'-compensation-related prescription medicines. Because Davis Plumbing's appeal presents a purely legal issue, our review of the trial court's judgment is without a presumption of correctness. §

25-5-81(e), Ala. Code 1975. The Act does not specifically address who has the authority in a workers' compensation case to select the pharmacy to be used by the employee receiving workers' compensation benefits. In Ex parte Brookwood Medical Center, Inc., 895 So. 2d 1000, 1003 (Ala. Civ. App. 2004), this court noted that the employer exercises "considerable control" over the compensation process:

> "'Section 25-5-77(a), Ala. Code 1975, a portion of the Act, provides, among other things, that an employer of an injured worker shall timely pay for that worker's "reasonably necessary medical and surgical treatment and attention, physical rehabilitation, medicine, [and] medical and surgical supplies ... as the result of an accident arising out of and in the course of the employment." See also § 25-5-77(h). That duty to pay is accompanied under the Act by a corresponding power in the employer to exercise considerable control over the medical care for which it must pay, including the right to choose the employee's physician in the first instance and the right to compel the injured employee to submit to an examination by that physician at all reasonable times. See § 25-5-77(a) and (b), Ala. Code 1975. Although the Act provides that the employee may advise the employer if he or she is dissatisfied with the physician designated by the employer, the employee's remedy in such a circumstance is to select another physician from a panel or list of available physicians (usually four) specified by the employer. See § 25-5-77(a), Ala. Code 1975.'"

(Quoting Ex parte Alabama Power Co., 863 So. 2d 1099, 1102 (Ala. Civ. App. 2003).)

Davis Plumbing argues that the "considerable control," 895 So. 2d at 1003, granted to the employer by the Act includes the employer's authority to select which pharmacy the injured employee must use. Although the Act grants the employer a measure of control over the workers' compensation process, the Act does not grant the employer the authority to select which pharmacy an employee receiving workers' compensation benefits must use. Section 25-5-77(a), Ala. Code 1975, provides that "the employer ... shall pay an amount not to exceed the prevailing rate or maximum schedule of fees as established herein of reasonably necessary ... medicine ... as may be obtained by the injured employee ...." Davis Plumbing does not dispute that Burns's prescription medicines are reasonably necessary or that the cost of his prescription medicines is within the prevailing rate or maximum schedule of fees; Davis Plumbing only disputes where those prescription medicines are to be obtained. The Act establishes the employer's obligation to pay for the employee's medicine prescribed by an authorized physician pursuant to the conditions stated in § 25-5-77(a). However, the Act contains no provision excusing the employer from its obligation

pursuant to § 25-5-77(a) to pay for the employee's prescription medicine merely because the employee uses a pharmacy that was not selected by the employer.

Davis Plumbing also argues that the following provision of § 25-5-77(b), Ala. Code 1975, merits a reversal of the trial court's judgment:

> "If the injured employee refuses to comply with reasonable request for examination, or refuses to accept the medical service or physical rehabilitation, which the employer elects to furnish under this chapter, the employee's right to compensation shall be suspended and no compensation shall be payable for the period of the refusal. ..."

Davis Plumbing notes that § 25-5-1(14), Ala. Code 1975, defines "medical" as "[a]ll services, treatment, or equipment provided by a provider" and that § 25-5-1(13), Ala. Code 1975, includes a "pharmacist" and a "pharmaceutical supply company" in its definition of "providers." Therefore, Davis Plumbing argues, § 25-5-77(b) authorizes an employer to "elect" which pharmacy an injured employee must use. However, § 25-5-77(b) is inapplicable to the present case. The above-quoted provision of § 25-5-77(b) has no application if an authorized physician is providing treatment to the employee, as in the present case. See Sunnyland Foods, Inc. v. Catrett, 395 So.

2d 1005, 1008-09 (Ala. Civ. App. 1980). "The purpose of [the above-quoted provision of § 25-5-77(b)] is to prevent malingering by one drawing compensation or to determine if the claimed injury is real, reparable, or capable of being minimized." Lewis G. Reed & Sons, Inc. v. Wimbley, 533 So. 2d 628, 630 (Ala. Civ. App. 1988). Moreover, § 25-5-77(b) "applies only to pending cases before final judgment of the circuit court, or after such judgment is procedurally reopened for alteration, amendment, or revision." Cerrock Wire & Cable Co. v. Johnson, 533 So. 2d 622, 625 (Ala. Civ. App. 1988).

Davis Plumbing also contends that § 25-5-314, Ala. Code 1975, supports its argument that an employer has the authority to select the pharmacy to be used by an injured employee. Section 25-5-314, Ala. Code 1975, provides:

> "Notwithstanding any other provisions of this article to the contrary, any employer, workers' compensation insurance carrier, self-insured employer, or group fund, may contract with physicians, hospitals, and any other health care provider for the provision of medical services to injured workers at any rates, fees, or levels of reimbursement which shall be mutually agreed upon between the physician, hospitals, and any other health care provider and the employer, workers'

> compensation insurance carrier, self-insured employer, or group fund."[1]

Davis Plumbing argues that it will lose its ability to negotiate with pharmacies for lower rates as contemplated by § 25-5-314 if Davis Plumbing is not permitted to select the pharmacy that Burns and other injured employees must use. As we have stated, Davis Plumbing is obligated, pursuant to § 25-5-77(a), to pay for Burns's reasonably necessary prescription medicines, in an amount not to exceed the prevailing rate or maximum schedule of fees, regardless of where those medicines are obtained. We find nothing in § 25-5-314 that would relieve Davis Plumbing from its obligation to pay for Burns's prescription medicines. Section 25-5-314 merely permits the employer to contract with providers for a rate lower than the prevailing rate.

Davis Plumbing essentially asks this court to construe the Act to establish a right in favor of employers that is not expressly granted in the Act. "An action brought under the Alabama Work[ers'] Compensation laws is purely statutory." Slagle v. Reynolds Metals Co., 344 So. 2d 1216, 1217 (Ala.

[1]The definition in the Act of "providers" includes pharmacists. § 25-5-1(13), Ala. Code 1975.

1977). If the legislature had intended for an employer to have the authority to select the pharmacy to be used by an injured employee, the legislature could have granted that authority in the Act. See Ex parte Jackson, 614 So. 2d 405, 407 (Ala. 1993) (stating that the legislature knows how to draft a statute to reach a particular end and that "[t]he judiciary will not add that which the Legislature chose to omit"). We note that the legislature expressly granted employers certain rights regarding the selection of physicians and surgeons, see 25-5-77(a), Ala. Code 1975, but not pharmacies. Under the principle of expressio unis est exclusio alterius, "the expression of one thing implies an intent to exclude another not so expressed." Ex parte Oswalt, 686 So. 2d 368, 373 (Ala. 1996). Moreover, the Act, "'being remedial in nature, should be given liberal construction to accomplish the beneficent purposes, and all reasonable doubts must be resolved in favor of the employee.'" Ex parte Byrom, 895 So. 2d 942, 946 (Ala. 2004) (quoting Riley v. Perkins, 282 Ala. 629, 632, 213 So. 2d 796, 798 (1968)).

"It is of course well understood that the only authority which has the power to make State laws is the legislature.

[Article III,] Section 44 [of the Alabama] Constitution [of 1901]." Personnel Bd. of Mobile County v. City of Mobile, 264 Ala. 56, 60-61, 84 So. 2d 365, 369 (1956). "It is [this court's] job to say what the law is, not to say what it should be." DeKalb County LP Gas Co. v. Suburban Gas, Inc., 729 So. 2d 270, 276 (Ala. 1998). Moreover, "[t]here is a presumption that the legislature did not intend to make any alteration in the law beyond what it declares either expressly or by unmistakable implication." Beasley v. MacDonald Eng'g Co., 287 Ala. 189, 197, 249 So. 2d 844, 851 (1970). The Act contains no provision granting an employer the right to select the pharmacy that an injured employee must use. The Act does, however, obligate an employer to pay for pharmacy expenses incurred by an injured employee in obtaining reasonably necessary prescription medicines. Accordingly, the trial court's judgment declaring Burns's right to use the pharmacy of his choice and Davis Plumbing's obligation to pay for Burns's pharmacy expenses is due to be affirmed.

Burns filed with this court a motion to strike an exhibit attached to Davis Plumbing's reply brief. We deny Burns's motion to strike as moot.

APPLICATION OVERRULED; OPINION OF DECEMBER 8, 2006, WITHDRAWN; OPINION SUBSTITUTED; AFFIRMED.

Thomas, J.,* concurs.

Pittman, J., concurs specially.

Thompson, P.J., and Bryan and Moore,* JJ., concur in the result, with writings.

*Although Judge Thomas and Judge Moore were not members of this court when this case was orally argued, they have listened to the audiotapes of that oral argument.

PITTMAN, Judge, concurring specially.

Having written both Ex parte Alabama Power Co., 863 So. 2d 1099 (Ala. Civ. App. 2003), and Ex Parte Brookwood Medical Center, Inc., 895 So. 2d 1000 (Ala. Civ. App. 2004), two cases upon which Davis Plumbing has placed great reliance, I fully endorse the principle that the Alabama Workers' Compensation Act places "considerable control" in the hands of employers with respect to the medical and surgical care and treatment of injured employees. Considerable control of medical and surgical care is not, however, total control of all issues related to such care. Like Judge Thompson, I am loath to declare the existence of a power to dictate an employee's choice of pharmacies when the Act itself does not expressly provide for such power, even if amending the Act to expressly confer such power might reasonably be viewed as furthering the cost-reduction goals that the legislature sought to further in its 1992 amendments to the Act (see Act No. 92-537, § 1, Ala. Acts 1992). I therefore concur in the main opinion.

THOMPSON, Presiding Judge, concurring in the result.

The Alabama Legislature enacted Article 11 of the Workers' Compensation Act in 1992 with the "express legislative intent of [the Article] to ensure that the highest quality health care is available to employees who become injured or ill as a result of employment, at an appropriate rate of provider reimbursement." § 25-5-293(g), Ala. Code 1975. Section 25-5-293, Ala. Code 1975, of that article describes the duties of the director of the Department of Industrial Relations and provides for the appointment of advisory committees on workers' compensation matters. One such advisory committee consists of "three pharmacists who are members in good standing with the Alabama Pharmaceutical Association." § 25-5-293(d), Ala. Code 1975. The purpose of the committees, among other things, is to "guide the director and make recommendations to ascertain the prevailing rate of reimbursement or payment of medical costs in the State of Alabama" and to "guide the director in determining all other rules and regulations required to accomplish the intent of the Legislature in assuring the quality of medical care and

achieving medical cost control." § 25-5-293(d), Ala. Code 1975.

In keeping with the goal to achieve "medical cost control," our legislature expressed its intent that "final reimbursements related to workers' compensation claims be commensurate and in line with the prevailing rate of reimbursement or payment in the State of Alabama, or as otherwise provided in [Article 11]." § 25-5-293(f), Ala. Code 1975. "By definition, the prevailing rate of payment or reimbursement is self-defining and self-setting and shall be updated annually." § 25-5-293(f).

The legislature established the above mechanism as the preferred cost-control method for pharmaceutical-care expenses in workers' compensation cases in Alabama. The legislature did not provide for an additional cost-control measure of allowing the employer to select a specific pharmacy for the use of the employee.

> "In the area of statutory construction, the duty of a court is to ascertain the legislative intent from the language used in the enactment. When the statutory pronouncement is clear and not susceptible to a different interpretation, it is the paramount judicial duty of a court to abide by that clear pronouncement. See Ex parte Rodgers, 554 So. 2d 1120 (Ala. 1989), and East Montgomery Water, Sewer & Fire

> Protection Authority v. Water Works and Sanitary Sewer Bd. of the City of Montgomery, 474 So. 2d 1088 (Ala. 1985). Courts are supposed to interpret statutes, not to amend or repeal them under the guise of judicial interpretation."

Parker v. Hilliard, 567 So. 2d 1343, 1346 (Ala. 1990). We presume that the legislature would have provided in the Act for the employer to control the employee's choice of which pharmacy to use had it desired to do so. "The judiciary will not add that which the Legislature chose to omit." Ex parte Jackson, 614 So. 2d 405, 407 (Ala. 1993). Therefore, this court cannot hold the trial court in error for declining to go beyond the stated intent of the legislature by interpreting the Act in favor of Davis Plumbing.

BRYAN, Judge, concurring in the result.

Although Davis Plumbing and the amici curiae present sensible policy reasons why an employer should have a statutory right to select the pharmacy used by an employee receiving workers' compensation benefits, I note that "[a]ll questions of propriety, wisdom, necessity, utility, and expediency of legislation are exclusively for the Legislature" and are not questions for this court to decide. Johnson v. Price, 743 So. 2d 436, 438 (Ala. 1999). "'[I]t is [the court's] job to say what the law is, not what it should be.'" Bassie v. Obstetrics & Gynecology Assocs. of Northwest Alabama, P.C., 828 So. 2d 280, 284 (Ala. 2002) (quoting DeKalb County LP Gas Co. v. Suburban Gas, Inc., 729 So. 2d 270, 276 (Ala. 1998)). Therefore, I am constrained to agree with the result reached by the main opinion.

MOORE, Judge, concurring in the result.

I concur in the result reached by the majority, but I do not agree with the reasoning of that opinion. The issue presented for our review is not whether the Alabama Workers' Compensation Act, § 25-5-1 et seq., Ala. Code 1975 ("the Act"), grants to an employer the right to select the pharmacy at which an employee obtains his reasonably necessary prescription medication; it is whether the Act grants to an employee the right to obtain reasonably necessary prescription medication at a pharmacy of his or her own choosing.

It may be conceded that the Act does not expressly grant to an employer the right to select the pharmacy that dispenses reasonably necessary prescription medication to an employee. Section 25-5-77(a) does not specifically state that an employer may select an employee's pharmacist; its selection procedures relate solely to physicians and surgeons.

Section 25-5-77(b) mentions an employer's right to elect to furnish medical services. However, this reference to election dates back to the time when the workers' compensation law conferred upon employers the right to elect whether to provide medical treatment beyond the statutorily required

period. See Ala. Code 1940, § 293. The legislature eventually removed the elective feature of the medical-benefits statute, mandating payment of medical benefits so long as they are reasonably necessary. See Act No. 86, § 8, Ala. Acts 1975. Due probably to oversight, however, § 25-5-77(b) has never been amended to remove the reference to the former elective nature of the statute. However, this language does not express any intention that an employer has the right to select the provider of pharmaceutical services.

Section 25-5-314 provides that "any employer ... may contract with ... any ... health care provider for the provision of medical services to injured workers at any rates, fees, or levels of reimbursement which shall be mutually agreed upon between the ... health care provider ... and the employer." The Act defines "provider" to include a "pharmacist ... or person or entity providing facilities at which the employee receives treatment." Ala. Code 1975, § 25-5-1(13). However, the definition of "provider" contained in § 25-5-1 applies "unless the context shall clearly indicate a different meaning in the connection used." Ala. Code 1975, § 25-5-1. Section 25-5-310(2) defines "medical services" as

"[a]ny and all medical or surgical services provided by physicians under this article [article 12 of the Act, §§ 25-5-310 to 25-5-340]." Section 25-5-310(3) defines "physician" as "[a] doctor of medicine or doctor of osteopathy licensed to practice medicine." These definitions, which are contained in the same article as § 25-5-314 and provide the context for that section, clearly evidence the legislative intent that § 25-5-314 is to apply solely to the selection of and payment to medical doctors. Thus, § 25-5-314 does not grant an employer any right to select the pharmacy at which an employee obtains his or her medication.

However, the omission of an express right of an employer to select a pharmacy does not imply the right of an employee to choose any pharmacy. That right must arise from the language of the Act, either expressly or by necessary implication. See Beasley v. MacDonald Eng'g Co., 287 Ala. 189, 197, 249 So. 2d 844, 851 (1970).

Section 25-5-77(a) requires an employer to pay the actual costs of reasonably necessary medicine "as may be obtained by the injured employee." Although this language has appeared in Alabama's workers' compensation law since its inception, see

Act No. 245, § 18, Ala. Acts 1919, its meaning has never been considered. The language at issue was not derived from the Minnesota statute upon which Alabama's first workers' compensation law was based; rather, at the time Alabama's workers' compensation law was originally enacted, Minnesota law provided that the employer was obligated to pay for medical treatment "required at the time of the injury." See State ex rel. Anseth v. District Ct. of Koochiching County, 134 Minn. 16, 20, 158 N.W. 713, 715 (1916) (citing § 18, Ch. 208, Minn. Laws 1915). A review of other state statutes from the time our workers' compensation law was first enacted to the present shows that this clause is unique to Alabama.

When construing the Act, the court should give effect to the plain and ordinary meaning of its words. See Geter v. United States Steel Corp., 264 Ala. 94, 96-97, 84 So. 2d 770, 772 (1956) ("[L]egislative language which is clear and deliberately made[] is conclusive on the Court in regard to its meaning."). The ordinary meaning of the words "as may be obtained by the injured employee" compel the conclusion that an employee has the right to obtain reasonably necessary prescription medication from the pharmacy of his or her own

choosing. The statutory language "as may be obtained" unambiguously endorses any reasonable method by which an employee obtains medication, including the choice of pharmacy.

That is not to say that an employee has an unrestricted right to choose a pharmacy. A statutory right to medical benefits under § 25-5-77(a) may be waived or forfeited if the party seeking to enforce that right has acted inequitably. See Holy Family Catholic School v. Boley, 847 So. 2d 371 (Ala. Civ. App. 2003). For example, an employee may not randomly and repeatedly change pharmacies, thus forcing the employer to incur additional and unnecessary costs in establishing new accounts or new reimbursement plans with new pharmacies. An employee may not choose a pharmacy beyond a reasonable distance from his home simply to obtain additional mileage expenses. See Ala. Code 1975, § 25-5-77(f). When the workers' compensation law grants the employee discretion, such as the choice to refuse medical treatment or suitable employment, this court has always held that the employee must exercise that discretion within the bounds of reason. See, e.g., Baptist Mem'l Hosp. v. Gaylor, 646 So. 2d 93 (Ala. Civ. App. 1994); and Kiracofe v. BE & K Constr. Co., 695 So. 2d 62 (Ala.

Civ. App. 1997). If an employee unreasonably abuses the right to choose a pharmacy, the employer may petition the court having jurisdiction over any medical-necessity dispute to provide appropriate relief, up to and including termination of that right. See Boley, supra.

Because the Act expressly and unambiguously addresses who has the authority in a workers' compensation case to select the pharmacy to be used by an employee receiving workers' compensation benefits, I would affirm the judgment of the trial court without addressing any implication or policy reasons that may support a different selection method.