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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2015-2016

2140885

Ex parte Lowe's Home Centers, LLC

PETITION FOR WRIT OF MANDAMUS

(In re: Sarah Brown

v.

Lowe's Home Centers, LLC)

(St. Clair Circuit Court, CV-14-900291)

THOMPSON, Presiding Judge.

Lowe's Home Centers, LLC ("Lowe's"), purports to appeal from an order of the St. Clair Circuit Court ("the trial

court") finding that Sarah Brown, its employee, had sustained an injury to her back during the course of her employment with Lowe's. In the order, the trial court directed Lowe's to pay for Brown's medical treatment and an unspecified amount of temporary-total-disability benefits.

The record indicates the following. On August 29, 2014, Brown filed a workers' compensation action against Lowe's, seeking medical treatment for her back and an award of disability benefits. Lowe's answered, denying that Brown had a work-related injury, and it filed a motion requesting a hearing to determine what Lowe's called "medical necessity." In the motion, Lowe's specifically requested "a judicial determination of the medical necessity and causal relationship for any treatment of [Brown's] back." The trial court granted Lowe's request and held an evidentiary hearing on the issue of compensability on April 10, 2015.

On May 21, 2015, the trial court entered an order approving Brown's claim for workers' compensation benefits and ordering Lowe's "to immediately provide and pay for [Brown's] medical treatment related to her back and to pay such other workers' compensation benefits to which [Brown] is entitled

pursuant to the Workers' Compensation Act including, without limitation, temporary total disability benefits." In the order, the trial court stated that the evidence presented was conflicting, that it could not reconcile the evidence, and that, as the trier of fact, it had weighed the evidence, taking into account the interest or bias of the witnesses--noting that some of the witnesses did not appear to be on good terms with each other, the demeanor of the witnesses, and other factors in determining the truthfulness of the evidence presented. In doing so, the trial court said, it found that Brown had met her burden of proving both legal and medical causation. The trial court specifically found that Brown had suffered an accident on May 19, 2014, that arose out of and in the course of her employment with Lowe's and, further, that that accident had caused the injury for which Brown sought treatment. The trial court also found that the medical treatment Brown sought for her back was related to the accident.

Lowe's filed a purported motion to alter, amend, or vacate the order, which was denied on July 9, 2015. On July 22, 2015, Lowe's filed a notice of appeal in the trial court

and a motion seeking a stay of further proceedings in the workers' compensation case pending the outcome of the "appeal." The trial court granted the motion to stay on July 23, 2015, and placed the case on its administrative docket.

As a preliminary matter, we note that

> "[a]n appeal will lie only from a final judgment, i.e.,
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> > "'"a 'terminal decision which demonstrates that there has been a complete adjudication of all matters in controversy between the litigants.' Tidwell v. Tidwell, 496 So. 2d 91, 92 (Ala. Civ. App. 1986). Further, the judgment must be conclusive and certain with all matters decided...."'
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> "Williams Power, Inc. v. Johnson, 880 So. 2d 459, 461 (Ala. Civ. App. 2003) (quoting Dees v. State, 563 So. 2d 1059, 1061 (Ala. Civ. App. 1990)). An order that contains a finding that a worker has sustained an injury as the result of an accident arising out of and in the course of the worker's employment, thereby making the injury compensable under the [Workers' Compensation] Act, and that requires the payment of only medical benefits for that injury is not a final judgment. See SouthernCare, Inc. v. Cowart, 48 So. 3d 632 (Ala. Civ. App. 2009), writ quashed, Ex parte SouthernCare, Inc., 48 So. 3d 635 (Ala. 2010); Homes of Legend, Inc. v. O'Neal, 855 So. 2d 536 (Ala. Civ. App. 2003); and USA Motor Express, Inc. v. Renner, 853 So. 2d 1019 (Ala. Civ. App. 2003). Such an order does not completely adjudicate the workers' compensation claim of the worker because the order

> omits any terminal decision as to the disability benefits due the worker. O'Neal, 855 So. 2d at 538."

Ex parte Cowabunga, Inc., 67 So. 3d 136, 138 (Ala. Civ. App. 2011). Nonetheless, "a majority of this court [has] ruled that this court may elect to treat an appeal that is erroneously filed following the entry of a nonfinal judgment in a workers' compensation case as a petition for a writ of mandamus if a later appeal would be an inadequate remedy." Ex parte Threadgill, 122 So. 3d 215, 217 (Ala. Civ. App. 2013); see also Ex parte Fairhope Health & Rehab, LLC, 175 So. 3d 622, 625-26 (Ala. Civ. App. 2015) (same); and Cowabunga, supra. As this court noted in Cowabunga:

> "Awaiting review of the order [of compensability requiring the payment of only medical benefits] by appeal would only force the employer to incur further expenses that it may not owe and that it may never recover from the employee who, as evidenced by the fact that the employer is now voluntarily paying temporary-total-disability benefits, is currently unable to earn wages. In light of those circumstances, we find that the employer's right to appeal the final judgment that will ultimately be entered in this case, which may not be entered for a year or more, is inadequate."

67 So. 3d at 139.

In this case, the trial court entered an order finding that Brown had suffered a compensable injury and ordering

Lowe's to provide and pay for the medical treatment Brown needed related to her back. The order did not, however, determine the extent of disability, if any, Brown has as a result of the injury or the benefits, if any, to which she is entitled. Accordingly, the order is not a final judgment capable of supporting Lowe's appeal. However, for the reasons set forth in Cowabunga, we conclude that requiring Lowe's to wait until a final judgment has been entered before this court can review whether the trial court properly ordered it to immediately pay for Brown's medical treatment and temporary-total-disability benefits is inadequate. Therefore, we elect to treat Lowe's purported appeal as a petition for a writ of mandamus.

The next issue this court must address is whether Lowe's petition was timely filed, thereby giving this court jurisdiction to consider the petition. This is so because "'jurisdictional matters are of such magnitude that we take notice of them at any time and do so even ex mero motu.'" Wallace v. Tee Jays Mfg. Co., 689 So. 2d 210, 211 (Ala. Civ. App. 1997) (quoting Nunn v. Baker, 518 So. 2d 711, 712 (Ala. 1987)).

> "[U]nlike a postjudgment motion following a final judgment, a motion to reconsider an interlocutory order does not toll the presumptively reasonable time period that a party has to petition an appellate court for a writ of mandamus. Rule 21(a)(3), Ala. R. App. P., and Ex parte Troutman Sanders, LLP, 866 So. 2d 547, 549-50 (Ala. 2003). Rule 21(a)(3), Ala. R. App. P., provides:
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> > "'The petition shall be filed within a reasonable time. The presumptively reasonable time for filing a petition seeking review of an order of a trial court or of a lower appellate court shall be the same as the time for taking an appeal. If a petition is filed outside this presumptively reasonable time, it shall include a statement of circumstances constituting good cause for the appellate court to consider the petition, notwithstanding that it was filed beyond the presumptively reasonable time.'"

Ex parte Onyx Waste Servs. of Florida, 979 So. 2d 833, 834 (Ala. Civ. App. 2007) (emphasis added).

In Ex parte Troutman Sanders, LLP, 866 So. 2d 547, 549-50 (Ala. 2003), our supreme court explicitly rejected the argument that the filing of a purported postjudgment motion should be considered when an appellate court determines whether a petition for a writ of mandamus was filed within a presumptively reasonable time. See also Ex parte Fiber Transp., L.L.C., 902 So. 2d 98, 99-100 (Ala. Civ. App. 2004).

The order for which Lowe's seeks appellate review was entered on May 21, 2015. On June 2, 2015, Lowe's filed a "postjudgment motion" asking the trial court to alter, amend, or vacate the May 21, 2015, order. The trial court denied that motion on July 9, 2015, and Lowe's filed a "notice of appeal" on July 22, 2015. Because the filing of the purported postjudgment motion did not toll the presumptively reasonable time for filing a petition for a writ of mandamus, Lowe's had 42 days from May 21, 2015--i.e., until July 2, 2015--to petition this court for a writ of mandamus in this case. See Rule 4(a)(1), Ala. R. App. P. Because the petition was not filed by July 2, 2015, it is untimely. However,

> "[a]n appellate court may consider an untimely petition for a writ of mandamus if the petitioner includes in its untimely petition a 'statement of circumstances constituting good cause for the appellate court to consider the [untimely] petition.' Rule 21(a), Ala. R. App. P. The filing of such a statement in support of an untimely petition for a writ of mandamus is mandatory. Ex parte Pelham Tank Lines, Inc., [898 So. 2d 733 (Ala. 2004)]; Ex parte Troutman Sanders, LLP, 866 So. 2d [547] at 550 [(Ala. 2003)] (dismissing an untimely petition for a writ of mandamus where the petitioner had 'offered no explanation for its failure to file the petition within a presumptively reasonable time')."

Ex parte Fiber Transp., L.L.C., 902 So. 2d at 100 (emphasis added). In this case, Lowe's has not provided this court with the necessary explanation as to why it did not file its petition within a presumptively reasonable time. Accordingly, based on the authority previously cited, we conclude that Lowe's petition is untimely, and, therefore, this court cannot consider it.

For the reasons set forth above, Lowe's petition for a writ of mandamus is dismissed.

PETITION DISMISSED.

Pittman and Donaldson, JJ., concur.

Moore, J., concurs specially, which Thomas, J., joins.

MOORE, Judge, concurring specially.

Although I maintain that § 25-5-81, Ala. Code 1975, a part of the Alabama Workers' Compensation Act, § 25-5-1 et seq., Ala. Code 1975, authorizes appeals from "nonfinal" judgments like the one at issue in this case, see SCI Alabama Funeral Servs., Inc. v. Hester, 984 So. 2d 1207, 1211 (Ala. Civ. App. 2007) (Moore, J., concurring in the result, with writing, joined by Thomas, J.), and that the merits of a compensability determination cannot be reviewed via a petition for a writ of mandamus, see Ex parte Cowabunga, Inc., 67 So. 3d 136, 143-44 (Ala. Civ. App. 2011) (Moore, J., concurring in part and dissenting in part, with writing, joined by Thomas, J.), I recognize that my opinion remains in the minority on this court. Hence, unless and until a majority of this court, or our supreme court, decides otherwise, I am constrained to follow the binding precedents of this court applying mandamus procedure when reviewing compensability determinations like the one at issue in this case. Because Lowe's Home Centers, LLC, did not timely file its petition for a writ of mandamus, this court must dismiss the petition.

Thomas, J., concurs.