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# ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2018-2019

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**Enterprise Leasing Company-South Central, LLC**

**v.**

**Benson Drake**

**Appeal from Jefferson Circuit Court  
(CV-16-903224)**

MOORE, Judge.

Enterprise Leasing Company-South Central, LLC ("the employer"), appeals from a judgment of the Jefferson Circuit Court ("the trial court") awarding workers' compensation benefits to Benson Drake ("the employee"). We reverse the

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trial court's judgment and remand the cause to the trial court.

### Procedural History

On September 1, 2016, the employee filed a verified complaint against the employer<sup>1</sup> alleging, among other things, that, on August 21, 2015, he had suffered an injury to his left knee while acting in the line and scope of his employment with the employer and that he had also suffered an injury to his right knee as a result of the injury to his left knee. The employee sought an award of benefits pursuant to the Alabama Workers' Compensation Act ("the Act"), Ala. Code 1975, § 25-5-1 et seq. The employer filed an answer on October 12, 2016.

On February 28, 2018, the parties filed in the trial court a number of stipulations of fact. A bench trial was conducted on March 8, 2018, after which both parties filed trial briefs with the court. On March 27, 2018, the trial court entered a final judgment in favor of the employee; on

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<sup>1</sup>In his complaint, Drake named as defendants "Enterprise Holdings, Inc. d/b/a Enterprise Rent-A-Car" and a number of fictitiously named defendants. On April 18, 2017, the employer filed a motion to substitute the correct name of the defendant as "Enterprise Leasing Company-South Central, LLC." The trial court granted that motion on April 19, 2017.

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that same date, the trial court entered an amended judgment in favor of the employee and against the employer, assigning the employee "a 50% permanent partial impairment rating to both his legs as a result of his on-the-job-injuries" and concluding that the employee "is entitled to a 15% fee of the award for Permanent Partial Disability benefits." The employer filed a postjudgment motion on April 26, 2018; the trial court denied that motion on April 30, 2018. The employer filed its notice of appeal to this court on June 5, 2018.

#### Facts

The employee testified that he began working for the employer on May 17, 2000, as a driver who transported vehicles from one branch of the employer's automobile-rental business to another. He stated that, on certain days, he was tasked with moving vehicles from the "wash line" to the kiosks from which the vehicles were rented at the employer's airport location. The employee testified that he and the other drivers were transported in a 15-passenger van to the location from which they would move vehicles to the kiosks. According

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to the employee, on August 20, 2015,<sup>2</sup> his supervisor directed him and other drivers to move vehicles from the "wash line." He stated that, on the second or third trip he had made to move vehicles on that date, he slid out of the front passenger seat of the transport van and landed on his left heel, causing an explosion of pain in his left knee. The employee testified that he "shook it off" but that, as the day progressed, his left knee became swollen and he had difficulty walking.

According to the employee, he went to the emergency room, where he was told that he had a severe sprain in his left knee; he was released with a cast on his left leg, pain medication, and a referral to Dr. Gaylon Rogers, an orthopedic surgeon. The employee testified that he had made an appointment with Dr. Rogers, who, he said, ultimately performed surgery on the employee's left knee before referring him to physical therapy and prescribing him pain medication. The employee stated that physical therapy had been unsuccessful and that Dr. Rogers had sent him to the Alabama

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<sup>2</sup>Although the employee alleged in his complaint that the injury to his left knee occurred on August 21, 2015, he testified that the injury to his left knee occurred on August 20, 2015.

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Pain Clinic, where, at the time of trial, he was continuing to receive pain medication and injections in his left knee.

The employee testified that, as a result of protecting his left knee, he had overworked his right knee; he testified further that he had been given an injection in his right knee to help alleviate the pain and swelling in that knee. According to the employee, at the time of the trial, he was still experiencing swelling in both of his knees.

The employee testified that he was 81 years old at the time of the accident and that he had not been able to drive or work since that time. He stated that he cannot shower, use the bathroom, or get in and out of vehicles without assistance; that he can no longer mow the grass; that he can no longer "hold [his] wife"; and that he had not returned to work since the accident. According to the employee, he had had surgery on his left knee when he was 12 or 13 years old, but, he said, he had had no other surgeries on that knee since that time until the 2015 accident; he also testified that he had not had any surgeries on his right knee. The employee testified that he had been involved in an automobile accident in 2012, that he had experienced pain in his right knee at

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that time but it had not limited him from performing his duties for the employer, and that he had been able to perform his job without restrictions before the 2015 accident.

The deposition of Dr. Rogers was submitted as an exhibit. In that deposition, Dr. Rogers testified, among other things, that the employee had cartilage tears and arthritis in his left knee and that, at the employee's age, osteoarthritis could sometimes cause such tears without an accident occurring. Dr. Rogers stated that he had discussed with the employee that he might do better with a total knee replacement, but, he said, the employee had not felt that was necessary. According to Dr. Rogers, the employee began having problems with his right knee approximately four months after the 2015 accident. Dr. Rogers testified that it was difficult to say whether the employee's right-knee injury had been caused by the injury to his left knee, particularly in light of the employee's age, because he did not have a history of treating the employee before his left-knee injury. He stated that the right-knee injury "certainly can be" caused by the left-knee injury. According to Dr. Rogers, the left-knee injury might have been present and the accident might have

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made it symptomatic, aggravating an already existing tear in the employee's knee. He stated that the employee's overuse of his right knee compensating for his left-knee injury could have contributed to cause the employee's right-knee symptoms. Dr. Rogers reiterated, however, that the employee's age and arthritis were the main contributors to his current conditions.

#### Standard of Review

Section 25-5-81(e), Ala. Code 1975, of the Act provides the applicable standard of review:

"From an order or judgment, any aggrieved party may, within 42 days thereafter, appeal to the Court of Civil Appeals and review shall be as in cases reviewed as follows:

"(1) In reviewing the standard of proof set forth herein and other legal issues, review by the Court of Civil Appeals shall be without a presumption of correctness.

"(2) In reviewing pure findings of fact, the finding of the circuit court shall not be reversed if that finding is supported by substantial evidence."

#### Analysis

The employer raises four issues on appeal: (1) that the trial court erred in finding that the employee's right-knee

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injury is compensable; (2) that the employee failed to present substantial evidence demonstrating that the accident contributed to his current conditions; (3) that the trial court's final judgment, as amended, subjects the employer to liability for conditions that are not work-related; and (4) that the trial court erred in considering conditions that are not work-related in determining the employee's disability rating. Because we conclude that the first issue raised by the employer requires reversal of the trial court's judgment, we pretermitt discussion of the remaining issues, which may be affected by the trial court's judgment on remand.

Section 25-5-81(c), Ala. Code 1975, provides:

"The decision of the court shall be based on a preponderance of the evidence as contained in the record of the hearing, except in cases involving injuries which have resulted from gradual deterioration or cumulative physical stress disorders, which shall be deemed compensable only upon a finding of clear and convincing proof that those injuries arose out of and in the course of the employee's employment.

"For the purposes of this amendatory act, 'clear and convincing' shall mean evidence that, when weighted against evidence in opposition, will produce in the mind of the trier of fact a firm conviction as to each essential element of the claim and a high probability as to the correctness of the conclusion. Proof by clear and convincing evidence requires a level of proof greater than a



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preponderance of the evidence or the substantial weight of the evidence, but less than beyond a reasonable doubt."

Under § 25-5-81(c), the burden of proof for an accidental injury differs from that of an injury due to cumulative physical stress. "At the trial-court level, to establish medical causation [for an accidental injury], the employee must show, through a preponderance of the evidence, that the accident arising out of and in the course of the employment was, in fact, a contributing cause of the claimed injury." Waters Bros. Contractors, Inc. v. Wimberley, 20 So. 3d 125, 134 (Ala. Civ. App. 2009) (footnote omitted). "To prove that an injury arose from work-related cumulative trauma, an employee must present clear and convincing evidence of legal and medical causation." Ex parte West Fraser, Inc., 249 So. 3d 506, 510 (Ala. Civ. App. 2017).

In Mobile Airport Authority v. Etheredge, 94 So. 3d 397, 399-401 (Ala. Civ. App. 2012), an airfield technician suffered an injury when a 300-pound manhole cover fell on his left foot; the technician later began suffering from back pain and some testimony indicated that his altered gait from the foot injury had aggravated or accelerated his preexisting

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degenerative-disk disease in his back. With regard to the proper burden of proof for the technician's back injury, this court stated, in pertinent part:

"[T]o the extent that the employee's back-injury claim was based on his altered gait, that claim was subject to the clear-and-convincing-evidence standard. See Wal-Mart Stores v. Orr, [29 So. 3d 210 (Ala. Civ. App. 2009)]; Sistrunk [v. Sikorsky Support Servs., Inc.], [961 So. 2d 166 (Ala. Civ. App. 2007)]. In Harris v. Russell Petroleum Corp., 55 So. 3d 1225 (Ala. Civ. App. 2010), this court explained:

"If the worker asserts that the original compensable injury caused the worker to gradually acquire a successive injury due to cumulative trauma, then the clear-and-convincing-evidence standard applies to that claim. See Wal-Mart Stores, Inc. v. Kennedy, 799 So. 2d 188 (Ala. Civ. App. 2001) (holding that the clear-and-convincing-evidence standard applied to the claim of an injured worker who asserted that she had acquired carpal tunnel syndrome from repetitively using a cane and walker while convalescing from work-related hip injuries); and Sistrunk v. Sikorsky Support Servs., Inc., 961 So. 2d 166 (Ala. Civ. App. 2007) (applying clear-and-convincing-evidence standard to claim that worker injured left shoulder due to overuse following work-related right-shoulder injury). On the other hand, if the worker alleges that the original compensable injury caused the worker to suffer a later sudden, traumatic injury, it follows that the

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clear-and-convincing-evidence standard  
would not apply to that claim.'

"55 So. 3d at 1229."

94 So. 3d at 407.

In the present case, the employee asserts that, as a result of his left-knee injury, he overused his right knee, resulting in an injury to his right knee. Like in Etheredge, to the extent the employee's right-knee injury is a result of overuse of his right knee following the injury to his left knee, that claim is subject to the clear-and-convincing-evidence standard.

The employer argued this point to the trial court extensively in its posttrial brief. In its final judgment, as amended, the trial court stated, in pertinent part:

"Compensability of [the Employee's] Left Knee

"Though [the employer's] argument that the on-the-job incident was not an 'accident' as that term is defined by the Alabama Workers' Compensation Act, the Court cannot agree:

"Nonaccidental injuries are those for which there is no sudden and traumatic external event. Ex parte Trinity Industries, Inc., [680 So. 2d 262 (Ala. 1996)]. The law regarding nonaccidental injuries was established for cases involving ailments such as pneumonia, heart attack, stroke, aneurysm, and diabetic

coma. See Ex parte Trinity Industries, Inc., supra. Because this type of injury could be the result of natural causes, it would not be related to employment, other than perhaps the fact that the disease struck while the employee was at work or immediately after leaving work. Id. In [this] case, the trial court found that [Ainslie E.] Morell had injured her back at work when she coughed while raising the lid on the plate burner. This is a sudden traumatic event. Thus, the trial court should have applied the law regarding accidental injuries. An injury does not become 'nonaccidental' just because the ultimate injury at issue (in this case the ruptured disc) occurred a few months after the incident or could have been caused by factors unrelated to employment.'

"Morell v. Tennessee Valley Press, Inc., 716 So. 2d 1282, 1285-86 (Ala. Civ. App. 1998). Because the Court finds that [the employee] suffered an accidental injury, the lower burden of proof applies. In accidental injury cases, the employee must produce substantial evidence showing that the alleged accident occurred during and arose out of the employment. The employee must also produce substantial evidence of medical causation by showing that the accident was in fact a contributing cause of the injury. Id. at 1286.

"The Court finds that [the employee] presented substantial evidence that he injured his left knee as a result of an accident occurring in and arising out of his employment with [the employer]. Therefore, the Court finds that [the employee's] left knee injury is compensable.

"Compensability of [the Employee's] Right Knee

"No impairment rating was assigned to [the employee's] right lower extremity. However, the Court is not bound by the evidence of Dr. Rogers' impairment rating in determining [the employee's] physical impairment resulting from his on-the-job injuries. Fuller v. BAMSI, Inc., 689 So. 2d 128 (Ala. Civ. App. 1996). Having considered the evidence in this case and the Court's own observations of [the employee] at trial, the Court is able to determine and assign [the employee's] impairment.

"The Court finds that [the employee] presented substantial evidence that his on the job accident is a contributing cause of his current symptoms affecting [the employee's] left knee and lower left extremity.

"The Court specifically finds that [the employee] met his burden of proving both legal and medical causation for his claimed left knee and left lower extremity injury and his right knee and right lower extremity injury based upon the testimony and records admitted at trial."

The above findings relating to the compensability of the right-knee injury set forth that the employee produced "substantial evidence" of medical causation and that the employee "met his burden of proving both legal and medical causation," without further elaborating on the burden of proof. We conclude that those findings indicate that the trial court erroneously rejected the employer's contention that the clear-and-convincing-evidence standard applied.

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The "substantial evidence" standard to which the trial court explicitly refers in its judgment does not apply when a trial court is making findings of fact following ore tenus proceedings. Rather, this court applies the substantial-evidence standard on appeal, pursuant to § 25-5-81(e)(2), when assessing the sufficiency of the evidence to support a trial court's finding of fact. See Ex parte McInish, 47 So. 3d 767, 778 (Ala. 2008). In making initial findings of fact, a trial court must apply the burden of proof mandated by the legislature in § 25-5-81(c).

Because the trial court used an incorrect evidentiary standard when determining the compensability of the employee's right-knee injury, we reverse the trial court's judgment and remand the cause to the trial court for it to enter an amended judgment applying the correct clear-and-convincing-evidence standard in deciding that claim. We instruct the trial court, on remand, to review the evidence adduced at trial and to determine whether the employee proved by clear and convincing evidence that his right-knee injury was a direct and natural consequence of his left-knee injury and to amend its judgment to make appropriate findings of fact using the correct

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evidentiary standard and to make any and all other amendments necessary to its judgment based on its determination.

REVERSED AND REMANDED WITH INSTRUCTIONS.

Thompson, P.J., and Pittman, Thomas, and Donaldson, JJ.,  
concur.