REL: January 17, 2020

Notice: This opinion is subject to formal revision before publication in the advance sheets of **Southern Reporter**. Readers are requested to notify the **Reporter of Decisions**, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((334) 229-0649), of any typographical or other errors, in order that corrections may be made before the opinion is printed in **Southern Reporter**.

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2019-2020

2190081

Ex parte Kohler Company, Inc.

PETITION FOR WRIT OF MANDAMUS

(In re: Mamie Lee White

v.

Kohler Company, Inc.)

(Madison Circuit Court, CV-18-902073)

MOORE, Judge.

Kohler Company, Inc. ("the employer"), petitions this court for a writ of mandamus directing the Madison Circuit Court ("the trial court") to vacate its order requiring the

employer to refer Mamie Lee White ("the employee") to an orthopedic specialist for a second opinion regarding her alleged work-related left-foot injury, pursuant to the Alabama Workers' Compensation Act ("the Act"), Ala. Code 1975, § 25-5-1 et seq. We deny the petition.

Background

On July 27, 2018, the employee reported to the employer that she had stepped in a pothole, twisted her left foot, and fell while working on the employment premises. The employer referred the employee to HealthGroup of Alabama OHG MAD, where, beginning on July 30, 2018, she received treatment from Dr. Frank Francone and Dr. Joseph Rea ("the physicians"). After physical therapy did not resolve the pain, swelling, and other symptoms in the employee's left foot and ankle, the physicians ordered a magnetic-resonance-imaging ("MRI") scan, which revealed that the employee had sustained a "subchondral fracture at the talus." Upon reviewing those findings, Dr. Rea wrote in a note dated September 19, 2018: "At this point would advise referral to Orthopedics to make sure therapy is optimized perhaps considering further stabilization or other appropriate therapy." In her answer to the petition for a

writ of mandamus, the employee asserts that neither she nor her attorney, who she evidently had retained on September 18, 2018, were aware of the referral.

The employer did not immediately arrange for the employee to see an orthopedic specialist as recommended by Dr. Rea. On September 24, 2018, the employee conferred with the workers' compensation adjuster by telephone. The workers' compensation adjuster attested in an affidavit that, during that telephone call, the employee had specifically requested a panel of four physicians from which to select a new authorized treating physician. The workers' compensation adjuster proffered a panel of four physicians from which the employee could select an orthopedic specialist. The employee selected Dr. Jeffery McKee, but, because he declined to accept any workers' compensation patients, the workers' compensation adjuster revised the panel of four and the employee selected Dr. Patrick Boyett from that revised panel.

Dr. Boyett saw the employee and referred her for treatment by Dr. Jefferson Sabatini, a physician within the same orthopedic group. Dr. Sabatini treated the employee until March 19, 2019, when he noted:

> "[The employee] did have a previous MRI that showed subchondral fractures of multiple bones in the foot, but the repeat MRI showed that this has actually resolved. The 1 spot where there did appear to be some inflammation on the MRI, we have injected, and [the employee] got absolutely no relief. Therefore, I am not able to determine exactly what might be causing the [employee's] pain. At the last visit, the [employee] talked about possibly having a second opinion. At this time, I do not believe that I am actually going to be able to give [the employee] a diagnosis as to what is causing her continued pain, as I see no mechanical reason for it. Therefore, if [the employee] desires a second opinion then I think this would be okay. Otherwise, I think the [employee] will be [at maximum medical improvement] from my care as I do not believe that I am doing anything to get her better, nor can I find an actual reason for her pain. The case manager and the [employee] will get together and we will find out whether or not a second opinion is a possibility. If not, then we will have to make the [employee] [at maximum medical improvement] and switch her from light duty back to full duty without restrictions as I do not have a mechanical reason to keep her on light duty. [The employee] may end up requiring [a functional-capacity evaluation] as she states that she has functional limitations from her pain. In any event, I am unable to exactly put permanent restrictions on her as the very intense restrictions that we put her on still have not been enough."

The employer did not authorize a referral to another physician for a second opinion.

While she was undergoing treatment by Dr. Sabatini, the employee filed a complaint in the trial court seeking workers' compensation benefits. On September 13, 2019, the employee

filed in that action a "Motion to Provide a Second Opinion Doctor and a Motion for a Continuance." In that motion, the employee moved the trial court to allow her "to have a second opinion by an independent doctor as recommended by [Dr. Sabatini,] the workers' compensation doctor." The trial court granted the motion on September 16, 2019, by an order stating: "Motion to provide a second opinion doctor ... is hereby granted."

On October 8, 2019, the employer filed a motion to vacate the order. In that motion, the employer noted that the employee had been provided a panel of four physicians from which she had selected Dr. Boyett. The employer argued that, under Ex parte Brookwood Medical Center, Inc., 895 So. 2d 1000 (Ala. Civ. App. 2004), once the employee exercised her right to select a second authorized treating physician from the panel of four provided by the employer, the employer had no further obligation to provide the employee with a referral to another physician. The employee filed a response to that motion, asserting that the employee had not actually exhausted her right to a panel of four and that, even if she had, she remained entitled to a second opinion to treat her unresolved

left-foot pain. The trial court denied the employer's motion to vacate on October 9, 2019.

The employer timely filed a petition for a writ of mandamus in this court on October 25, 2019. This court issued an order directing the trial court to enter findings of fact and conclusions of law. See Ex parte Cowabunga, Inc., 67 So. 3d 136 (Ala. Civ. App. 2011). The trial court entered the required findings of fact and conclusions of law on November 20, 2019. The parties then filed supplemental briefs with this court.

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 Cowabunga, 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)."

Ex parte Trusswalk, Inc., 282 So. 3d 39, 42 (Ala. Civ. App. 2019).

Discussion

The employer maintains that the trial court effectively ordered the employer to furnish the employee with a third authorized treating physician after she had already selected a second authorized treating physician from a panel of four. The employer argues that the trial court's order violates the holding in Ex parte Brookwood Medical Center, supra.

Section 25-5-77(a), Ala. Code 1975, provides an employer with the right to select the initial "authorized treating physician" who will treat an injured employee at the expense of the employer. Ex parte Imerys USA, 75 So. 3d 679, 682 (Ala. Civ. App. 2011). Section 25-5-77(a) further provides:

> "If the employee is dissatisfied with the initial treating physician selected by the employer and if further treatment is required, the employee may so advise the employer, and the employee shall be entitled to select a second physician from a panel

> or list of four physicians selected by the employer."

In Ex parte Brookwood Medical Center, this court canvassed the legislative history behind this part of § 25-5-77(a). The court noted that, in 1975, the legislature amended the Act to provide injured employees with a right not only to demand a second authorized treating physician if dissatisfied with the initial authorized treating physician selected by the employer, but also to demand a third authorized treating physician if dissatisfied with the second authorized treating physician. See 895 So. 2d at 1002; Act No. 86, § 8, Ala. Acts 1975 (Fourth Special Session). However, in 1985, the legislature repealed that provision and replaced it with the current statutory scheme, see 895 So. 2d at 1003; Act No. 85-41, § 8, Ala. Acts 1985 (Second Special Session, 1984-1985), thus eliminating the right of an employee to request a third authorized treating physician. This court held in Ex parte Brookwood Medical Center that "an employee's former right to dissent to two employer-selected physicians or surgeons rather than one was replaced by a single right of dissent." 895 So. 2d at 1003. The court held that, under the current statutory scheme, once an employee has exercised his or her right under

§ 25-5-77(a) to select a second authorized treating physician from a panel of four provided by the employer, a trial court cannot order the employer to provide any additional panels from which the employee may choose a third authorized treating physician. This court stated:

> "'[O]nce the employee has exercised his or her right to a panel of four, the [Act] does not provide for additional panels,' and '[i]f the employee becomes dissatisfied with the doctor selected from the panel of four, he or she has no statutory right to request a second panel of four.' 2 Terry A. Moore, Alabama Workers' Compensation § 17:21 (Supp. 2003)."

895 So. 2d 1005–06.

In this case, the trial court did not order the employer to provide a second panel of four physicians from which the employee could select a third authorized treating physician. The trial court ordered the employer to refer the employee to an orthopedic specialist for a second opinion. The employer contends that the order nevertheless circumvents the holding in Ex parte Brookwood Medical Center by affording the employee a "second right of dissent." The employer argues that the employee had already dissented to the care provided by her initial authorized treating physicians by requesting a panel of four in September 2018. The employer further contends

that, on September 19, 2019, the employee expressed dissatisfaction with Dr. Sabatini's opinion regarding her left-foot injury and requested a referral for a second opinion, which, it says, in essence, amounts to a "second dissent" and an improper request for a third authorized treating physician.

In its findings of fact and conclusions of law, the trial court rejected that argument on two grounds. First, the trial court determined that the employer had prematurely provided the panel of four to the employee in September 2018. Second, the trial court determined that the employee had a right to a second opinion based on Dr. Sabatini's statements in his March 19, 2019, treatment note. We find the first ground dispositive of the mandamus petition.

The trial court determined that the employer had "failed to follow recommendation of the authorized treating physicians by failing to provide a referral to an orthopedic physician." The trial court was referring to the recommendation by Dr. Rea on September 19, 2018, that the employee be referred for orthopedic care. The materials before this court indicate that, in fact, the employer did not arrange for the employee

to see an orthopedic specialist as recommended by Dr. Rea, which it was required to do. See Ex parte Wal-Mart Stores, Inc., 794 So. 2d 1085, 1088 (Ala. 2001) (holding that, as a general rule, the authorized treating physician directs the treatment of the injured employee and an employer cannot refuse the injured employee treatment recommended by that physician).

The trial court further determined that the failure of the employer to follow Dr. Rea's recommendation "prematurely necessitated the panel of four." That determination is a fair inference from the materials before this court. The employee could have filed a motion with the trial court to require the employer to follow the recommendation of Dr. Rea, but the employee asserts in her answer to the petition for a writ of mandamus that she and her attorney did not know that Dr. Rea had made the recommendation for a referral at that time, which assertion the employer does not contradict. See Tingle v. J.D. Pittman Tractor Co., 267 Ala. 29, 31, 99 So. 2d 435, 437 (1957) ("It is well settled that the averments of fact in the answer to the alternative writ in mandamus proceedings, when not controverted, are to be taken as true."). As a result,

the employee sought orthopedic care through the only means known to her, by requesting a panel of four.

In her affidavit, the workers' compensation adjuster explained that she provided the panel of four to the employee because the employee had telephoned her on September 24, 2018, to specifically request a panel of four. However, that affidavit testimony does not negate the fact that the request for a panel of four was necessitated by the failure of the employer to refer the employee to an orthopedic specialist as recommended by Dr. Rea and as required by law. As the trial court concluded, "if [the employer] had provided [the employee] with a referral to an orthopedic specialist in accordance with [Dr. Rea's] (the authorized treating physician) recommendation, [the employee] would have had no need to obtain a panel of four ...."

We agree with the implication in the trial court's November 20, 2019, order that it would be inequitable to enforce the panel-of-four provision in § 25-5-77(a) against the employee to prevent her from obtaining a second opinion. The purpose of the doctrine of equitable estoppel is to promote equity and justice in an individual case by preventing

a party from asserting rights under a general rule of law when his or her own conduct renders the assertion of such rights contrary to equity and good conscience. Mazer v. Jackson Ins. Agency, 340 So. 2d 770 (Ala. 1976). We do not mean to imply that the workers' compensation adjuster willfully and maliciously deceived the employee into prematurely requesting a panel of four. The materials before this court do not shed any light on the reasons for the failure to follow the recommendation of Dr. Rea, which more probably resulted from oversight or mistake. We hold only that the employer had an affirmative duty to follow the treatment plan recommended by Dr. Rea and that its failure to do so led the employee to request a panel of four unnecessarily. Consequently, the employer is estopped from asserting that the employee exhausted her right to dissent to the care provided by her authorized treating physicians and to seek alternative treatment from a third physician at the expense of the employer.[1]

---

[1]Based on our holding, we need not decide the separate question of whether the employer was legally obligated to provide the employee a second opinion based on Dr. Sabatini's acquiescence to her request. Cf. Ex parte City of Prattville, 56 So. 3d 684, 693 (Ala. Civ. App. 2010) ("We do not decide how we would treat a case in which an authorized physician

Conclusion

The employer has not shown a clear legal right to the relief sought. We therefore deny the petition for a writ of mandamus.

PETITION DENIED.

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

---

merely deferred to the case planning of the injured employee or simply referred an employee to a prior physician for convenience or for purely financial considerations because those facts are not before us.").