Rel: September 23, 2022

ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2022

2210341

Ron Dillard

v.

Calvary Assembly of God

Appeal from Morgan Circuit Court
(CV-20-900306)

THOMPSON, Presiding Judge.

Ron Dillard appeals the judgment entered by the Morgan Circuit Court ("the trial court") in favor of Calvary Assembly of God ("Calvary"), holding that his workers' compensation action is barred by the two-year

statute of limitations set forth in § 25-5-80, Ala. Code 1975, of the Alabama Workers' Compensation Act. We affirm.

On September 1, 2020, Dillard filed a complaint in the trial court seeking workers' compensation benefits for a work-related injury that had occurred on September 20, 2017. According to Dillard, he suffered a latent injury to his back. Calvary filed an answer denying that Dillard was entitled to workers' compensation benefits. On June 24, 2021, Calvary filed a motion for a summary judgment, arguing that the evidence did not support a conclusion that Dillard had suffered a latent injury and that, therefore, because Dillard did not file his complaint within two years of his work-related injury, his action seeking workers' compensation benefits was time-barred. On September 10, 2021, Dillard filed a response. The trial court conducted a hearing on September 22, 2021.

The evidence submitted to the trial court indicated that in May 1996 Calvary hired Dillard as a maintenance employee. On September 20, 2017, while moving some of Calvary's tax files, Dillard suffered a work-related injury when the tread on a stair came loose and he fell down at least five stairs. Dillard landed in a seated position, suffered an injury

to his lower back, and experienced lower back pain. Dillard reported his injury to Calvary's secretary. When the secretary asked him if he wanted to see a doctor, Dillard responded that he would keep working and would decide later if he needed treatment.

On October 10, 2017, Dillard fell down several stairs at his home and on October 13, 2017, he sought treatment at Decatur Morgan Hospital. During that visit, he informed the medical staff that he had been suffering from lower back pain since falling at work on September 20, 2017. X-rays of Dillard's lumbar spine taken at the hospital revealed that Dillard had mild degenerative changes, but no acute changes, in his lower back. He was diagnosed with lower back pain, prescribed medication, and sent home. Dillard did not miss any time from work.

Although Dillard continued to work, he also continued to experience lower back pain, and on November 28, 2017, Dillard decided to seek treatment from Dr. Derrick Cho at Huntsville Hospital Spine and Neurology.[1] Dr. Cho ordered a Magnetic Resonance Imaging ("MRI") scan of Dillard's spine that revealed that Dillard suffered from disk

[1]It is undisputed that Calvary had not authorized Dr. Cho to treat Dillard.

protrusions in the lower lumbar levels. On December 14, 2017, Dr. Cho discussed with Dillard the results of the MRI scan and the potential benefits, risks, and outcomes of various treatment options, including surgery that would likely involve a lumbar diskectomy and spinal fusion at the L5-S1 joint. Dillard decided not to have surgery at that time and to try other, less invasive treatments, including manipulations of the spine by a chiropractor. Those less invasive treatments, however, did not provide Dillard with relief from his lower back pain, and on February 27, 2018, after meeting with Dr. Cho to discuss surgery, Dillard decided to proceed with the surgery. Dillard did not miss any time from work while under Dr. Cho's care.

Upon making the decision to undergo surgery, Dillard informed Calvary, and, at Calvary's instruction, Dillard proceeded through the workers' compensation process. On April 3, 2018, Dillard saw Dr. Larry Parker, a physician who Calvary had authorized to treat Dillard. Dr. Parker recommended conservative treatment, ordered physical therapy, and prescribed nonnarcotic pain medication and "LidoPro" patches and gel. Dr. Parker did not assign any work restrictions and indicated that he anticipated a "0% impairment rating, and no long-term sequelae in

terms of his low back issue." According to evidence presented by Dillard, Dr. Parker led Dillard to believe that his injury was a muscular problem and that surgery was not needed. After Dr. Parker, on June 7, 2018, opined that Dillard's injury was a musculoligamentous complaint, determined that Dillard had reached maximum medical improvement ("MMI"), and assigned Dillard a 0% physical-impairment rating, Dillard exercised his right under § 25-5-77, Ala. Code 1975, to choose a new authorized treating physician from a panel of four doctors provided by Calvary and selected Dr. Blake Boyett. Dillard did not miss any work while under Dr. Parker's care.

On October 17, 2018, Dillard began treatment for his lower back pain with Dr. Boyett, who recommended epidural steroid injections. On November 1, 2018, Dillard received an epidural steroid injection at the L5-S1 joint. On November 15, 2018, Dr. Boyett noted that Dillard's pain had returned to baseline and that Dillard had reached MMI. Dr. Boyett instructed Dillard to follow up as needed.

On July 2, 2019, Dillard returned to Dr. Boyett complaining of lower back pain and Dr. Boyett ordered another epidural steroid injection. On July 16, 2019, Dillard received the injection and by August

20, 2019, his pain had returned to baseline according to Dr. Boyett. On December 17, 2019, Dillard received a lumbar-facet injection, and on January 2, 2020, Dr. Boyett concluded that Dillard was at "non-surgical MMI." Dillard's medical records reflect that Dr. Boyett would recommend surgery if Dillard's pain returned.

On February 14, 2020, Dr. Boyett noted in one of Dillard's medical records that, because Dillard had continued to complain of lower back pain, he had ordered an MRI scan of Dillard's spine and that, after having evaluated the MRI scan, he had recommended spinal-fusion surgery to Dillard. Dr. Boyett's notes indicate that he believed that Dillard's pain originated from the 2017 work-related injury. On March 2, 2020, Dillard underwent surgery that included a L5-S1 transfemoral lumbar interbody fusion, a nerve-root decompression, and a bilateral L5-S1 posterolateral fusion. Calvary's workers' compensation insurance carrier paid for the surgery.

Dillard had continued to work while under Dr. Boyett's care until he had the March 2, 2020, surgery. However, during his rehabilitation from the surgery, Dillard was unable to work. The evidence indicates that, while Dillard was recovering from the March 2, 2020, surgery,

Calvary did not pay Dillard any temporary-total-disability benefits. Dillard returned to work in May 2020.

On August 18, 2020, because Dillard continued to experience lower back pain, Dr. Boyett ordered a left-side sacroiliac-joint injection. On August 25, 2020, Dillard saw Dr. Boyett, who, in a record of that visit, noted that Dillard had received some pain relief from the injection and ordered an additional sacroiliac-joint injection for Dillard's continued lower back pain. Because the injections failed to provide Dillard with any long-term relief from the lower back pain, Dillard underwent a second spinal-fusion surgery on February 10, 2021. During the rehabilitation period from that second surgery, Dillard was unable to work, and Calvary did not pay Dillard any temporary-total-disability benefits. Dillard returned to work after he was released by his doctor.

The evidence Dillard presented to the trial court indicates that he has limited ability to lift, to bend, to sit, and to tie his shoes. Dillard stated that he had continued to work from when he suffered his September 2017 work-related injury until the recovery period after his March 2, 2020, surgery. He stated that, because he had been able to continue to work, he had not realized that he had a compensable injury

and a viable claim for workers' compensation benefits until undergoing his March 2, 2020, surgery. The evidence indicated that Dillard had two surgeries after, which he received no temporary-total-disability benefits, and that he never requested any.

On November 10, 2021, the trial court entered a summary judgment in favor of Calvary, holding that Dillard's action was barred by the two-year limitations period. On November 19, 2021, Dillard filed a postjudgment motion. On December 21, 2021, the trial court entered an order denying Dillard's postjudgment motion. On January 22, 2022, Dillard filed his notice of appeal.

> "This court's review of legal issues in a workers' compensation case is without a presumption of correctness. See § 25-5-81(e)(1), Ala. Code 1975, and Flesher v. Saginaw Div., Gen. Motors Corp., 689 So. 2d 113 (Ala. Civ. App. 1996). In Bailey v. R.E. Garrison Trucking Co., 834 So. 2d 122, 123 (Ala. Civ. App. 2002), this court reviewed a summary judgment in a workers' compensation case and stated our standard of review as follows:
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> > "'A motion for a summary judgment is to be granted when no genuine issue of material fact exists and the moving party is entitled to a judgment as a matter of law. Rule 56(c)(3), Ala. R. Civ. P. A party moving for a summary judgment must make a prima facie showing "that there is no genuine issue as to any material fact and that [he] is entitled to a judgment as a matter of law." Rule 56(c)(3), Ala. R. Civ. P. The court must view the

> evidence in a light most favorable to the nonmoving party and must resolve all reasonable doubts against the movant. Hanners v. Balfour Guthrie, Inc., 564 So. 2d 412 (Ala. 1990). If the movant meets this burden, "the burden then shifts to the nonmovant to rebut the movant's prima facie showing by 'substantial evidence.'" Lee v. City of Gadsden, 592 So. 2d 1036, 1038 (Ala. 1992).'
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> "834 So. 2d at 123."

Walker v. Flagstar Enters., Inc., 981 So. 2d 1137, 1139-40 (Ala. Civ. App. 2007).

On appeal Dillard contends that the trial court erred by entering a summary judgment in favor of Calvary because, he says, he did not realize the extent of his work-related injury until he had surgery on his lower back in March 2020, and, therefore, he maintains, he suffered a latent injury and his action for workers' compensation benefits is not barred by the two-year statute of limitations, set forth in § 25-5-80, Ala. Code 1975. Calvary disagrees, arguing that Dillard knew or should have known that he had suffered a compensable injury in December 2017, when Dr. Cho informed him that surgery was needed to relieve his lower back pain and that, because Dillard did not file his complaint for workers' compensation benefits until September 2020, more than two and one-half

years after he was informed that he needed surgery, his action is barred by the two-year limitations period.

> "Generally, workers' compensation claims for injuries resulting from work-related accidents must be brought within two years of either: 1) the accident or 2) the date of the employer's last voluntary payment of compensation benefits resulting from the accident. If a claim is not filed before the applicable period expires, the claim is barred by the statute of limitations in the Act. Ala. Code 1975, § 25-5-80.
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> "However, in American Cyanamid v. Shepherd, 668 So. 2d 26 (Ala. Civ. App. 1995), this court adopted a judicial exception to the general rule that a claim is barred if not filed within two years of the date of the injury. According to Shepherd, '"[t]he time period [of the statute of limitations] does not begin to run until the claimant, as a reasonable person, should recognize the nature, seriousness, and compensable character of his injury or disease."' 668 So. 2d at 28 (quoting 2B A. Larson, The Law of Workmen's Compensation § 78.41(a) (1989)). Thus, for a latent injury, the two-year period for filing a claim begins to run from the time the party, acting reasonably, should have known of the nature, seriousness, and compensability of the injury. See Shepherd, supra; Dun & Bradstreet Corp. v. Jones, 678 So. 2d 181 (Ala. Civ. App. 1996); and Smith v. ConAgra, Inc., 694 So. 2d 32 (Ala. Civ. App. 1997).
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> "Sections 25-5-80 and 25-5-1(1) (defining 'compensation') distinguish 'medical' payments from 'compensation' payments, the latter of which toll the running of the statute of limitations until two years after the last payment date. This court has held that an employer's provision of medical benefits does not function as 'compensation' and does not toll the statute of limitations. See Blackmon v. R.L. Zeigler Co., 390 So. 2d 628 (Ala. Civ. App. 1980) (noting that our legislature has made it clear that

> medical payments, unlike compensation payments, do not toll the statute of limitations)."

Walker, 981 So. 2d at 1140.

In Walker, the employee filed her workers' compensation complaint approximately nine and one-half years after the date of the work-related injury, and, she alleged, her complaint was timely filed due to her injury being latent and falling within the exception to the two-year statute of limitations created in American Cyanamid v. Shepherd, 668 So. 2d 26 (Ala. Civ. App. 1995). The employee argued that, even though she was aware of the damage to her shoulder and neck, and her resulting pain, as a result of the work-related injury, the injury was latent because, she said, the "full extent" of her injury was not known to her until after the two-year limitations period had expired. This court rejected the employee's argument that she had suffered a latent injury because the undisputed facts as set forth in the employee's complaint revealed that more than two years before the employee filed her complaint she knew, or reasonably should have known, that her work-related injury "was one that had likely resulted in some type of permanent disability, whether partial or total." 981 So. 2d at 1141.

In holding that the injury to the employee in Walker was distinguishable from the latent injury in Shepherd, we noted that the employee in Shepherd had missed no time from work and had suffered little to no pain in the six to seven years following the work-related injury. We further noted that, in Shepherd, the employee's problems developed several years after the work-related injury that led to the surgery and the employee's inability to work during eight weeks of rehabilitation.

In Walker, this court further rejected the argument that the Shepherd latent-injury exception should apply when an employee does not know or have reason to know the "full extent" of the disability. We opined:

> "In effect, [the employee] argues that Shepherd should be interpreted to save any claim alleging permanent total disability from being barred by the statute of limitations if the 'permanency' or the 'totality' of the disability was neither known nor reasonably knowable within the limitations period. We hold that our decision in Shepherd is not susceptible to such an interpretation.
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> "In Shepherd, we considered it important that the employee had no basis upon which to make a claim within two years of his on-the-job accident. We explained the effect of our adoption of the latent-injury exception to the general statute of limitations for claims under the Act as follows:

> "'[Adopting the latent-injury exception to the statute of limitations in the Act] puts us in the company of "the great majority of the courts [that] ... read in an implied condition suspending the running of the statute until by reasonable care and diligence it is discoverable and apparent that a compensable injury has been sustained."'

"Shepherd, 668 So. 2d at 28 (quoting 2B A. Larson, The Law of Workmen's Compensation § 78.41(b)) (emphasis added). See also Gloria v. Nebraska Pub. Power Dist., 231 Neb. 786, 438 N.W. 2d 142 (1989) (holding that the limitations period is tolled until it is or should be reasonably apparent to a claimant that he is suffering from a compensable disability). Thus, we cannot agree that our decision in Shepherd should be interpreted as tolling the statute of limitations in the Act until an employee becomes aware, or reasonably should be aware, of the 'full extent' of the employee's disability -- i.e., whether a disability is temporary versus permanent or partial versus total. Rather, we hold that, in accordance with Shepherd, the statute of limitations in the Act is tolled until an employee recognizes or should reasonably recognize the 'nature, seriousness, and compensable character' of an injury so that the employee knows, or should reasonably know, that he or she has sustained an injury that is compensable -- regardless of whether the employee yet recognizes whether the injury is temporary or permanent or whether the injury is partial or total. See Shepherd, 668 So. 2d at 28.

"Although this court has never addressed this specific issue, our interpretation of the latent-injury exception is in line with the interpretation of similar exceptions by other jurisdictions. See, e.g., Ranney v. Parawax Co., 582 N.W.2d 152 (Iowa 1998)(stating that, under Iowa law, once a claimant knows or should know that his or her condition is possibly compensable, he or she has the duty to investigate to ascertain whether the known condition is probably, as opposed to merely possibly, compensable); Quaker Oats Co. v.

> Miller, 370 So. 2d 1363 (Miss. 1979)(reiterating that the two-year limitations period does not begin to run until by reasonable care and diligence it is discoverable and apparent that a compensable injury has been sustained, and clarifying that 'compensable' injury means that the disabling injury was work-connected); Torres v. Plastech Corp., 124 N.M. 197, 947 P.2d 154 (1997)(holding that the mere fact that a claimant did not know the full extent of his injury from a medical standpoint did not excuse him from filing his claim); Escarra v. Winn Dixie Stores, Inc., 131 So. 2d 483 (Fla. 1961)(explaining that recognition of the 'probable compensable character' of an injury or disease would require that a claimant have knowledge of facts that would indicate to a reasonable person that a physical impairment was causally related to a previous minor accident); and Florida Hosp. v. Williams, 689 So. 2d 1255 (Fla. Dist. Ct. App. 1997) (holding that the 'reasonable person' exception does not cover long-term complications of a known serious injury or compensable medical procedure, after the two-year statute of limitations has expired, despite the fact that an employee may not have foreseen the exact complication that later developed but was aware of the injury, the subsequent surgery, and the ensuing pain therefrom).
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> "Larson, in his treatise on workers' compensation law, explains that the 'compensable character' of an injury is connected with its relation to employment, not with what might be considered the 'full extent' of an injury or disability. See 7 A. Larson & L. Larson, Larson's Workers' Compensation Law § 126.05[6] (2007). See also Quaker Oats Co. v. Miller, supra (noting that in many of the cases cited in Larson's Workers' Compensation Law the term 'probable compensable character' means nothing more than that the injury or disease was work related)."

981 So. 2d 1141-43.

Applying the foregoing law and analysis to the evidence in a light most favorable to Dillard, as our standard of review requires, we cannot hold that a genuine issue of material fact exists as to whether his injury was a latent injury such that the latent-injury exception to the two-year limitations period applies. The evidence indicates that, from within a few weeks of his work-related injury to his back in September 2017 until his first surgery in March 2020, Dillard suffered from continual lower back pain, sought a variety of treatments for the pain, and received minimal, intermittent relief. The evidence also indicates that Dillard had two surgeries, after which he received no temporary-total-disability benefits and that Dillard never requested any such benefits. The fact that Dillard continued to work until his March 2020 surgery does not negate the fact that, when he discussed his injury with Dr. Cho in December 2017 and learned that surgery was a recommended treatment, Dillard knew or should have known of the compensable character of his injury. The evidence supports the conclusion that a reasonable person would have known or reasonably should have known the nature, seriousness, and probable compensable nature of Dillard's work-related injury in December 2017. Consequently, Dillard's workers' compensation claim

became ripe in December 2017, not when he actually missed work after the surgery and Calvary refused to pay him compensation. The evidence presented to the trial court does not create a genuine issue of material fact regarding whether Dillard's injury was latent. Therefore, Calvary was entitled to a summary judgment because the latent-injury exception does not apply to Dillard's workers' compensation claim, and the trial court's determination that Dillard's action was barred by the statute of limitations is supported by evidence in the record.

Based on the foregoing, the trial court's judgment is affirmed.

AFFIRMED.

Hanson and Fridy, JJ., concur.

Moore, J., concurs specially, with opinion, which Edwards, J., joins.

MOORE, Judge, concurring specially.

I concur to affirm the summary judgment entered by the Morgan Circuit Court ("the trial court") determining that the claim for workers' compensation benefits asserted by Ron Dillard in his complaint against Cavalry Assembly of God is barred by the statute of limitations contained in Ala. Code 1975, § 25-5-80, a part of the Alabama Workers' Compensation Act ("the Act"), Ala. Code 1975, § 25-5-1 et seq. The undisputed material facts show that Dillard did not sustain a latent injury within the meaning of American Cyanamid v. Shepherd, 668 So. 2d 26, 28 (Ala. Civ. App. 1995), see Walker v. Flagstar Enters., Inc., 981 So. 2d 1137, 1141 (Ala. Civ. App. 2007); Poff v. General Motors Corp., 705 So. 2d 442, 443 (Ala. Civ. App. 1997) (Monroe, J., concurring specially); see also J.H. Moon & Sons, Inc. v. Johnson, 753 So. 2d 445, 448 (Miss. 1999) (defining a "latent injury" as one "that a reasonably prudent man would not be aware of at the moment it was sustained"), and that, even if he did, he had sufficient information of the nature, seriousness, and compensable character of his injury over two years before he filed his complaint on September 20, 2020. See Walker, supra; see also

Swartzendruber v. Schimmel, 613 N.W.2d 646, 651 (Iowa 2000). Nevertheless, I am disturbed by the unfairness of this result.

Section 25-5-80 provides, in pertinent part:

> "In case of a personal injury not involving cumulative physical stress, all claims for compensation under [the Act] shall be forever barred unless within two years after the accident the parties shall have agreed upon the compensation payable under [the Act] or unless within two years after the accident one of the parties shall have filed a verified complaint as provided in [Ala. Code 1975, §] 25-5-88."

In this case, the accident occurred on September 20, 2017. Based on the plain and unambiguous language of § 25-5-80, Dillard had until September 20, 2019, to file a complaint containing a claim for "compensation," i.e., "[t]he money benefits to be paid on account of injury ...." Ala. Code 1975, § 25-5-1(1). However, Dillard did not have a viable claim to any "compensation" at that time. His claim for compensation did not accrue until, at the earliest, he missed time from work following his March 2, 2020, surgery. See Salt Lake City v. Industrial Comm'n, 93 Utah 510, 510, 74 P.2d 657, 659 (1937) ("Not until there is an accident and injury and a disability or loss from the injury does the duty to pay [compensation] arise."), superseded by statute as recognized in McKee v. Industrial Comm'n, 115 Utah 550, 206 P.2d 715 (1949). It is unfair that

his claim for workers' compensation benefits was extinguished by operation of the statute of limitations before the claim had even matured.

This court attempted to ameliorate this problem in Shepherd by reading into § 25-5-80 " 'an implied condition suspending the running of the statute until by reasonable care and diligence it is discoverable and apparent that a compensable injury has been sustained.' 2B A. Larson, The Law of Workmen's Compensation § 78.41(b) at 15-234." 668 So. 2d at 28. However, the "discovery rule" in Shepherd does not aid an employee, like Dillard, who has not sustained a latent injury and who was well aware that he or she had sustained a serious work-related injury within the limitations period, but who had not actually suffered any recoverable wage loss or loss of earning capacity, in recovering money benefits payable on account of the injury. Such an employee would have a viable claim only if the statute of limitations commenced on the date the claim for disability benefits accrued as opposed to the date of the accident or the date of the discovery of the nature, seriousness, and compensable character of the injury. See, e.g., Hall's Cleaners v. Wortham, 38 Ark. App. 86, 88, 829 S.W.2d 424, 425, aff'd, 311 Ark. 103, 842 S.W.2d 7 (1992) (holding that the Arkansas statute-of-limitations

period "does not begin to run until the true extent of the injury manifests and causes an incapacity to earn the wages which the employee was receiving at the time of the accident, which wage loss continued long enough to entitle him to benefits").

However, like Judge Monroe, who dissented in Shepherd, I believe that this court has no authority to "correct" a statute of limitations, see Shepherd, 668 So. 2d at 29 ("The majority's opinion changes the law regarding the statute of limitations in workmen's compensation cases, which is the function of the Legislature and not this court." (Monroe, J., dissenting)), no matter how strong the appeal to do otherwise. See 7 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 126.06 (2014) (criticizing statutes of limitation dating from the time of "accident" and judicial opinions applying that plain language). Although the Act is to be liberally construed, this court cannot, under the guise of judicial interpretation, amend or repeal a statute. See Ex parte Brookwood Med. Ctr., Inc., 895 So. 2d 1000 (Ala. Civ. App. 2004). The legislature has indicated, in plain and unambiguous terms, that, in personal-injury cases, the statute-of-limitations period runs from the date of the accident, see Davis v. Standard Oil Co. of Kentucky, 261 Ala.

410, 413, 74 So. 2d 625, 627 (1954), and we may not, based on the perceived harshness or unfairness of that rule, "liberally construe" the statute to mean something other than what it says. See 1 Terry A. Moore, Alabama Workers' Compensation § 3:7 (2d ed. 2013). I can only point out that, unless the legislature amends the statute of limitations, some employees with otherwise meritorious claims will be denied a remedy for a work-related disability contrary to the beneficent purposes of the Act. See Moore, supra, § 2:5.

Edwards, J., concurs.