Rel: March 12, 2021

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2020-2021

2190773

City of Guntersville

v.

Johnny Looney

Appeal from Marshall Circuit Court
(CV-14-900336)

THOMPSON, Presiding Judge.

The City of Guntersville ("the City") appeals the judgment of the Marshall Circuit Court ("the trial court") awarding Johnny Looney

permanent-total-disability benefits on his claim brought under the Alabama Workers' Compensation Act, § 25-5-1 et seq., Ala. Code 1975. We affirm.

Facts and Procedural History

Looney, who was 68 years old at the time of trial, completed high school in the late 1960's. According to testing results admitted into evidence at trial, Looney reads at a 9th grade level, spells at a 4th grade level, and performs at a 5th grade level in math. From the beginning of Looney's working career, he has exclusively performed physical labor.

From April 17, 2001, to May 1, 2016, Looney was employed by the City as a laborer, mainly performing grounds upkeep. For the majority of his career with the City, Looney's job involved the manual cleaning and maintenance of city streets and properties, including mowing grass, trimming weeds, pruning shrubs, cleaning rights-of-way and public property, operating a leaf/brush truck, and collecting trash. In deposition testimony, the City's personnel director stated that Looney was a good employee.

On April 15, 2008, while exiting one of the City's maintenance trucks, Looney fell and injured his lower back. Looney reported the on-the-job injury to his supervisor and requested medical care. The City sent him to its occupational physician, Dr. Alex Nixon, who diagnosed Looney as suffering from a lumbar contusion/strain. In July 2008, because he was still suffering from back pain that radiated from his back to his legs, Looney saw Dr. John Johnson, Jr., who subsequently performed a 2-level lumbar fusion at the L4-5 and L5-S1 levels of Looney's back.

Dr. Johnson referred Looney to Dr. Keith Anderson, a rehabilitation doctor, who took over Looney's care from Dr. Johnson and performed a functional-capacity examination. In March 2009, Dr. Anderson evaluated Looney's functional capacity and determined that Looney could return to work with a 40-pound lifting limitation. In April 2009, Dr. Anderson assigned Looney a 20% permanent partial impairment to the body as a whole and released him to return to work in accord with the lifting limitation. The evidence indicated that the City's personnel director told Looney to return to his position as a laborer but to seek assistance if he thought that an object that needed lifting weighed more than his lifting

limit. The City's personnel director made Looney's supervisor aware of Looney's lifting restriction and of the City's agreement to accommodate Looney's disability.

Looney, who had been out of work for approximately 38 weeks, returned to his previous job. At trial, Looney testified that he had recovered significantly from the 2008 work-related injury, that the surgery had healed his issues with radiating pain,[1] and that he had been able to continue to perform the manual labor required for his position without pain until he suffered a 2012 work-related accident.

On July 11, 2012, while working at the City's shop, Looney was struck by one of the City's F-150 trucks that a driver was backing out of the shop. The truck hit Looney from behind, injuring his left elbow and bumping him forward. Looney tried to continue to work, but within 10-15

[1]Evidence was admitted indicating that in an earlier action addressing the 2008 work-related injury, the trial court approved an agreement between the City and Looney in which the City agreed to pay Looney $15,758.01 to settle Looney's workers' compensation claim arising from the 2008 injury.

minutes he began suffering pain. Looney reported his injuries to his supervisor and requested medical care.

The City again sent Looney to Dr. Nixon, whom Looney saw regularly for the next few months. During a July 11 visit, Dr. Nixon observed contusions along Looney's left arm and elbow and noted that Looney had some numbness and tingling in his arm. During a July 16 visit, Dr. Nixon noted that Looney had informed him that his back had tightened up over the weekend and that he had radiating pain across his shoulder blades. Dr. Nixon diagnosed the pain as muscle-related and prescribed Flexeril and a pain narcotic. He also ordered Looney not to work and restricted his lifting for a week. On July 23, Dr. Nixon noted that Looney had indicated that the muscle spasms were continuing and that he had begun experiencing pain in his lower back radiating into his left leg. On August 14, Dr. Nixon prescribed physical therapy for Looney's continued discomfort. On September 17, Dr. Nixon noted that, although Looney had completed physical therapy, he still suffered from back pain, did not appear to be improving, and remained limited in his daily activities. Specifically, Dr. Nixon noted that "[t]he onset of this problem

has been sudden and has hit a place where it is no longer improving, remains limited in daily activities." On that same day, Dr. Nixon issued Looney a release to return to work on September 28 without additional restrictions. Looney returned to work on September 28 and was assigned to the "brush truck." At Looney's October 10 appointment with Dr. Nixon, Dr. Nixon observed that Looney was still suffering back pain and that his range of motion and mobility remained limited. At a subsequent October visit, Dr. Nixon noted that he had advised Looney "to seek advice from city HR on next step in process."

The evidence at trial demonstrated that, when he returned to work after being off for over 11 weeks recovering from the 2012 work-related injury, Looney experienced significant pain and limitations that made it difficult for him to be productive at work. Looney testified that, after returning to work, he had pain when riding in a truck because he felt every bump in the road in his back. He testified that throughout each day his pain increased and he had to take frequent breaks. Evidence was presented indicating that, during this time, Looney utilized several treatments, including a heating pad, a transcutaneous nerve stimulation

("TENS") unit, biofreeze, pain patches, and prescribed pain narcotics, to alleviate the pain and make work bearable.

The evidence at trial reflected that in 2014, when the City advertised a new position for a person responsible for picking up litter, Looney requested a transfer to that position. The City subsequently assigned Looney to that position. The City did not require Looney to pick up a certain amount of litter and he was provided with little to no supervision. The City did provide Looney with a coworker to assist with the collection of heavier litter, and, occasionally, when assistance was needed on the loader truck, the City would assign Looney to that detail. Although the litter-patrol position was less strenuous, Looney testified that his back pain continued to increase over time and that he had to take prescribed pain medication throughout the day to lessen the pain.

According to Looney, when the pain and discomfort became unbearable and prevented him from performing his litter-patrol duties, he decided to retire from the City's employment on May 1, 2016. At trial, Looney testified: "I tried to work as long as I could, yes sir. I wanted to

work past retirement age, but I got to the point where I just couldn't do it any more on a daily basis." (R. 69-70.)

With regard to Looney's reason for retiring, the City relies on the following exchange between the City's counsel and Looney at trial as constituting an admission from Looney that could have continued to work as a laborer but, instead, chose to retire:

> "Q. ... Now, I understand you've testified that you couldn't work anymore because of pain and suffering, correct?
>
> "A. Pain in my back.
>
> "Q. And that was the reason that you left your employment with the City?
>
> "A. One of the reasons.
>
> "Q. It got to the point where you just couldn't do it anymore?
>
> "A. Not like what I wanted to. I could have did it -- I've done it for those years, I could have done it, but I couldn't have done it like I wanted to. I was always a hard worker and wanted to do the best I could, and I wasn't doing the best I could.
>
> "Q. You could have kept doing it?
>
> "A. I might have, without the pain.
>
> "Q. How long do you think you could have kept doing it?

> "A. I don't know. I can't tell you that. Only the good Lord knows that. I can't tell you that.
>
> "Q. When you told [the City's personnel director that] ... you wanted to retire you didn't tell her you wanted to retire because you couldn't physically do it anymore, did you?
>
> "A. No. Wasn't necessary for me to tell her, why.
>
> "Q. You just told her April 17th, 2016, was your 15-year work anniversary and you wanted to retire?
>
> "A. That's a good number.
>
> "Q. And she told you you can't retire in the middle of the month, either going to have to be April 1st or May 1st, and you took two weeks after your 15-year anniversary. So you took May 1st, correct?
>
> "A. Yes.

On July 7, 2014, Looney filed a complaint for workers' compensation benefits, alleging that he is permanently and totally disabled as a result of the July 2012 work-related accident and injury. On August 6, 2014, the City filed its answer. On December 16, 2019, the City filed a motion in limine, requesting that the trial court exclude evidence of vocational disability, pursuant to § 25-5-57(a)(3)i., Ala. Code 1975.

At trial, the City renewed its argument that the admission of evidence of vocational disability was precluded, pursuant to § 25-5-57(a)(3)i., because Looney had returned to work after the July 2012 work-related injury at a wage equal to or higher than his pre-work-related-injury wage and asserted that Looney was barred from recovering permanent-total-disability benefits, pursuant to § 25-5-57(a)(4)d., Ala. Code 1975, because, it said, Looney had refused the City's accommodation of his alleged disability.

On December 17, 2019, the trial court conducted a trial. Dr. Anderson and Dr. Johnson testified by deposition regarding whether the July 2012 work-related injury caused Looney's back pain.

The evidence reflects that Looney had continued to see Dr. Anderson periodically after his 2008 back injury and that, at his September 27, 2012, appointment with Dr. Anderson, Looney had informed him of the July 2012 work-related accident and the subsequent lower back pain that had continued to increase. The evidence indicates that Looney saw Dr. Anderson multiple times for lower back care after the 2012 work-related

injury.[2] The record indicates that Dr. Anderson prescribed various treatments for Looney's lower back pain, including pain patches, narcotics, and a TENS unit.

When asked to explain the difference between Dr. Nixon's diagnosis that Looney had suffered from a strained back and his diagnosis that Looney had suffered a substantial back injury as a consequence of the 2012 accident, Dr. Anderson explained that when he first saw Looney following the accident, he, too, could not determine whether the condition was a sprain/contusion or a long-term aggravation of Looney's condition. Dr. Anderson testified that the persistence of pain over an extended period indicated that Looney's injury was more than a sprain.

When Dr. Johnson was questioned by the City's counsel during his deposition concerning the change from an initial sprain diagnosis to a more chronic diagnosis, he explained: "Well, you diagnose it as a strain

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[2]Specifically, the evidence reflects that Looney saw Dr. Anderson on September 27, 2012; January 7, 2013; July 8, 2013; January 9, 2014; July 10, 2014; January 12, 2015; July 13, 2015; January 12, 2016; June 13, 2016; January 12, 2017; June 27, 2017; December 19, 2017; and June 5, 2018.

on the front end and you diagnose it as a chronic issue on the back end." According to Dr. Johnson, the typical initial diagnosis is a strain/sprain in the hope that the back injury will resolve itself; however, he said, when the pain does not cease, the back injury can result in significant mobility limitations and chronic pain. Dr. Johnson further explained that if a back problem is "ongoing for more than, you know, six months, it's more than a strain."

Both Dr. Anderson and Dr. Johnson testified that the 2012 work-related accident was a cause of Looney's current back injury and condition. Specifically, Dr. Johnson testified that, based on the history in Looney's case, the 2012 work-related injury had aggravated and worsened Looney's lower back, causing him to suffer continued pain. Dr. Anderson testified that, because of the onset of radiating pain from Looney's back into his legs after the 2012 work-related accident, he believed, with a reasonable degree of medical probability, that the 2012 work-related accident had aggravated Looney's prior condition or problems resulting in his current problems. Dr. Anderson also provided

written documentation noting his medical opinion that Looney's continued care in 2012, and afterward, was due to the 2012 work-related accident.

Concerning Looney's current limitations and ability to function, Dr. Anderson, in deposition, testified that Looney is functionally limited to sitting, standing, and alternating between the two, and limited in bending and stooping activities. Dr. Anderson stated that because any activity causes pain in Looney's back, Looney is limited to sedentary functions.

Eric Anderson, a vocational expert who had tested and evaluated Looney, testified that Looney was not totally vocationally disabled. He submitted a report explaining his testing and findings. Anderson, however, admitted that he had not considered medical testimony from either Dr. Anderson or Dr. Johnson when reaching his conclusion.

John McKinney, another vocational expert who had evaluated and tested Looney and had examined Looney's medical records, testified that, after considering the testing results and the physical/functional limitations placed on Looney by Dr. Anderson, he concluded that Looney could resume future work activities only in the sedentary occupational-demand level. McKinney explained that this limitation would prevent

Looney from returning to any of his prior positions and that Looney had not acquired job skills readily transferable to positions that accommodate the limitation. He further opined that there is no reasonable expectation, based on Looney's current skills and disability, that Looney could consistently maintain future employment; therefore, he considered Looney to be 100% vocationally disabled and not a viable candidate for vocational-retraining assistance.

On March 3, 2020, the trial court entered it final judgment, determining that Looney's 2012 work-related accident and injury had rendered him permanently and totally disabled. The trial court, in its judgment, stated:

> "During the trial, the court considered not only the content of the testimony, but also the manner and demeanor of witnesses as they testified. The court had the opportunity to weigh the frankness or evasiveness of witnesses. In addition to weighing the testimony of [Looney] as a witness, the court had the opportunity to observe [Looney] during the course of trial. The court observed the positions taken by [Looney] while sitting in his chair, expressions on his face, and his movements as he moved about the courtroom and testified. The court notes [that Looney] appeared genuinely uncomfortable and in pain while present in the courtroom. [Looney] had difficulty finding a comfortable position while seated, frequently moving in his seat. And, [Looney] could not

> remain seated for long periods of time. During his time in the courtroom, [Looney] had to alternate between sitting and standing. He appeared genuinely in pain while doing so. He also appeared genuinely in pain while moving about the courtroom. The court is reasonably satisfied that, during his presence in court, [Looney] was in pain and had difficulty physically functioning."

After considering the evidence, the trial court made the following findings:

> -- Looney can no longer maintain any of his past employment positions as a result of his current physical condition;
>
> -- Looney suffered an accident and injury on July 11, 2012, that arose out of and in the course of his work for the City;
>
> -- Looney continued to suffer significant limitations and pain after receiving treatment from Dr. Nixon;
>
> -- Looney reached maximum medical improvement regarding his condition on January 9, 2014;
>
> -- Looney's 2012 work-related injury caused a permanent aggravation and/or worsening of his lower back resulting in physical problems, limitations, and disability;
>
> -- Looney could not perform all the duties of his position when he returned to work after the 2012 work-related injury;
>
> -- Looney's last position, working litter patrol with the City, "required little or no significant physical activities";
>
> -- Looney left his employment due to the 2012 work-related injury and the chronic limitations it produced;

> -- § 25-5-57(a)(3)i., Ala. Code 1975, the return-to-work statute, has no application in this case; and
>
> -- Looney is permanently and totally disabled as a result of the 2012 work-related accident and injury and is not a candidate for vocational rehabilitation.

The trial court then determined the amount of Looney's workers' compensation benefits as a result of his permanent total disability.

On March 13, 2020, the City filed a motion to alter, amend, or vacate the March 3, 2020 judgment. On June 9, 2020, the trial court denied the City's motion. On July 21, 2020, the City appealed.

Standard of Review

> "This court will not reverse a judgment based on the factual findings of the trial court in a workers' compensation case if those findings are supported by 'substantial evidence.' Ala. Code 1975, § 25-5-81(e)(2). 'Substantial evidence' is ' "evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved." ' Ex parte Trinity Indus., Inc., 680 So. 2d 262, 268 (Ala.1996) (quoting West v. Founders Life Assurance Co. of Florida, 547 So. 2d 870, 871 (Ala.1989)). Pursuant to that principle of review, ' "the trial court's findings on disputed evidence in a workers' compensation case are conclusive," ' and this court must not ' " weigh the evidence before the trial court." ' Ex parte Golden Poultry Co., 772 So. 2d 1175, 1176 (Ala. 2000) (quoting Ex parte Ellenburg, 627 So. 2d 398, 399 (Ala.1993), and Edwards v. Jesse Stutts, Inc., 655 So. 2d 1012, 1014 (Ala. Civ. App.

> 1995)); see also Ex parte Holton, 886 So. 2d 83, 84-85 (Ala. 2003). Moreover, we must 'consider the evidence in a light most favorable to the findings of the trial court.' Ex parte Staggs, 825 So. 2d 820, 822 n.1 (Ala. 2001). However, our review as to purely legal issues is without a presumption of correctness. See Holy Family Catholic School v. Boley, 847 So. 2d 371, 374 (Ala. Civ. App. 2002) (citing § 25-5-81(e)(1), Ala. Code 1975)."

Fort James Operating Co. v. Kirklewski, 893 So. 2d 434, 436-37 (Ala. Civ. App. 2004).

Analysis

Initially, we note that, in asserting their arguments before this court, the parties do not dispute that, when he returned to work after his 2012 work-related injury, Looney earned a wage as high or higher than his wage before the 2012 work-related injury or that Looney was not working at the time of trial.

The City first contends that the trial court exceeded its discretion by awarding Looney workers' compensation benefits based on his alleged vocational disability. According to the City, because Looney returned to work for an equal or higher wage after his injury, the trial court was limited by § 25-5-57(a)(3)i. ("the return-to-work statute") to awarding

Looney benefits based solely on his physical impairment. The return-to-work statute states, in pertinent part:

> "If, on or after the date of maximum medical improvement, except for scheduled injuries as provided in Section 25-5-57(a)(3), [Ala. Code 1975,] an injured worker returns to work at a wage equal to or greater than the worker's pre-injury wage, the worker's permanent partial disability rating shall be equal to his or her physical impairment and the court shall not consider any evidence of vocational disability."

The trial court concluded that the return-to-work statute was not applicable in this case because, it held, generally "the return to work provision does not apply in cases involving an initial disability determination where the employee is no longer working at the time of trial." The trial court rested its decision on Grieser v. Advanced Disposal Services Alabama, LLC, 252 So. 3d 664 (Ala. Civ. App. 2017), and Pemco Aeroplex, Inc. v. Moore, 775 So. 2d 215, 218 (Ala. Civ. App. 1999).

In support of its argument that the return-to-work statute applies, the City relies on Grace v. Standard Furniture Manufacturing Co., 54 So. 3d 909 (Ala. Civ. App. 2010), and Gibbons v. Shaddix Pulpwood Co., 699 So. 2d 225 (Ala. Civ. App. 1997). In Grace, an employee suffered a work-related injury. After treatment, the employee's doctor placed the

employee under permanent restrictions that prevented him from resuming his previous position. The employee returned to work and was ultimately placed in a position within his restrictions and with wages as high or higher than his wages before the work-related injury had occurred. The employee filed an action against the employer seeking workers' compensation benefits. The employee was employed in the higher paying position that accommodated his physical limitations at the time of trial. The trial court concluded that the return-to-work statute applied in determining the employee's disability award. In considering the propriety of the application of the return-to-work statute, this court opined:

> "Before 1992, when the return-to-work statute was enacted, see Ala. Acts 1992, Act No. 92-537, § 17, Alabama caselaw held that, when an injured employee returned to work earning the same or higher wages, those facts raised a presumption that the employee had not sustained a loss of earning capacity, which presumption could be rebutted by evidence independently showing incapacity or explaining away the post-injury earnings as an unreliable indicator of earning capacity. See, e.g., Goodyear Tire & Rubber Co. v. Downey, 266 Ala. 344, 96 So. 2d 278 (1957); and United States Steel Mining Co. v. Riddle, 627 So. 2d 455 (Ala. Civ. App.1993) (applying pre-1992 law). Because caselaw allowed the presumption to be easily rebutted, injured employees routinely received compensation for loss of earning capacity despite having experienced no actual wage loss. See 1 Terry A. Moore,

Alabama Workers' Compensation §§ 13:40-13:51 (1998). Apparently, the legislature concluded that the caselaw allowing employees to receive compensation based on loss of earning capacity, despite the fact that their injuries did not immediately result in reduced wages, should be superseded. In order to limit compensation in cases in which an injured employee returns to work earning the same or higher wages following a permanent nonscheduled injury, the legislature resolved that, in such cases, the employee's degree of physical impairment, and not his or her loss of earning capacity, should be the measure for compensation. See T. Moore, supra, at § 13:51. Any reading of the return-to-work statute that restores the applicability of caselaw regarding the presumption of a loss of earning capacity created by an employee's returning to work earning the same or higher wages would be totally inapposite to the purpose of the statute. See Ala. Acts 1992, Act No. 92-357, § 1 (requiring workers' compensation laws to be construed to effect their purposes).

"The return-to-work statute does not create any presumption that an employee has not sustained a loss of earning capacity. Rather, the return-to-work statute conclusively states that, when an employee returns to work after reaching maximum medical improvement and the employee is earning the same or higher wages, loss of earning capacity shall not be considered in assessing the compensation due the employee for any permanent disability. Upon concluding that the return-to-work statute governs the amount of compensation due, a trial court need not undergo any analysis to determine whether an employee's post-maximum-medical-improvement earnings reliably indicate the earning capacity of the employee because earning capacity is not even at issue. To the extent that Discovery Zone [v. Waters, 753 So. 2d 515 (Ala. Civ. App. 1999)], Pemco Aeroplex [v. Moore, 775 So. 2d 215 (Ala. Civ. App., 1999)], and

> Lanthrip [v. Wal-Mart Stores, Inc., 864 So. 2d 1079 (Ala. Civ. App. 2002),] construe the return-to-work statute incorrectly by applying pre-statute caselaw indicating that a return to work at the same or a higher wage creates only a presumption that the employee has suffered no loss of earning capacity, those cases are overruled."

54 So. 3d at 914 (emphasis added; footnote omitted). According to the City, the Grace court held that

> "the return-to-work statute conclusively provides that loss of earnings capacity shall not be considered in determining the degree of disability when an employee returns to work after reaching maximum medical improvement and the employee is earning the same or higher wages."

City's brief at p. 25.

In Gibbons, an employee, after suffering a work-related back injury, voluntarily left his employment and accepted employment in another state but subsequently suffered a stroke and could no longer work. The employee filed an action against his employer at the time of his work-related back injury. The trial court applied the return-to-work statute and determined that the employee was permanently and partially disabled. The employee argued on appeal that the return-to-work statute did not apply to cases involving permanent and total disabilities. This

court held that the trial court did not err in applying the return-to-work statute because, it determined, the evidence did not support a finding that Gibbons was permanently and totally disabled.

Our caselaw establishes that the return-to-work statute does not apply when an employee is not employed at the time of an initial disability finding. In Pemco Aeroplex, Inc. v. Moore, 775 So. 2d 215 (Ala. Civ. App. 1999), overruled on other grounds by Grace v. Standard Furniture Manufacturing Co., 54 So. 3d 909 (Ala. Civ. App. 2010), an employee suffered a work-related injury and returned to work at the same or higher wages than his preinjury wage. The employee, however, worked for only two months before resigning due to an inability to perform his job. The employee sought workers' compensation benefits. The employer maintained that the return-to-work statute restricted the employee's recovery to benefits based on his physical impairment. This court held that the return-to-work statute did not apply because the trial court had not assigned the employee a disability rating before his resignation. The court reasoned that because the employee was not attempting to reopen his case under the return-to-work statute, but was seeking an initial

determination regarding his disability, the return-to-work statute did not apply. The court further reasoned that, because the employee was not earning the same or higher wages at the time of trial, the return-to-work statute had no field of operation. Consequently, the court held that consideration of evidence of the employee's vocational disability when making the initial disability determination was proper. See Grieser v. Advanced Disposal Services, LLC, 252 So. 2d 664 (2017) (holding that the return-to-work statute does not apply when employee is no longer working at the time of the initial disability determination).

In this case, the trial court was asked to make an initial disability determination and Looney was not working at the time of trial; therefore, in accord with Pemco and Grieser, the trial court did not err in refusing to apply the return-to-work statute in this case. Grace is easily distinguishable because, unlike Looney, who was not working at the time of the trial concerning the initial determination regarding his disability, the employee in Grace was working at the time of the trial court's initial determination of the employee's disability. Gibbons is also distinguishable because, although the employee in Gibbons was not working at the time

of the initial disability determination, clear and convincing evidence did not support a finding that the employee was permanently and totally disabled as a consequence of his work-related injury. Here, because Looney was not employed at the time of the trial concerning the initial determination of his disability, the return-to-work statute did not apply and the trial court's judgment is due to be affirmed in this regard.

Next, the City contends that the trial court erred in awarding Looney permanent-total-disability benefits because, it says, undisputed evidence establishes that Looney refused to accept reasonable accommodations made by the City.

Section 25-5-57(a)(4)d. provides, in pertinent part:

> "Any employee whose disability results from an injury or impairment and who shall have refused to undergo physical or vocational rehabilitation or to accept reasonable accommodation shall not be deemed permanently and totally disabled."

In Bostrom Seating, Inc. v. Adderhold, 852 So. 2d, 795 (Ala. Civ. App. 2002), an employer made accommodations for an employee to return to work. The employee informed the employer that she did not intend to return to work because she did not believe that she could perform the job

based on her level of pain. This court noted that if a reasonable accommodation will enable an employee to perform the essential functions of the job, the trial court should consider that fact when determining the employee's ability to perform the employment. Recognizing that it was the trial court's duty to observe the witnesses and their demeanor and this court's duty not to reweigh the evidence, this court held that the record contained substantial evidence indicating that the employee did not want to return to work because of her pain level and appears to have held implicitly that, although the employer offered an accommodation, the accommodation was not reasonable in light of the employee's level of pain.

The City maintains that Looney unjustifiably refused employment offered by the City that was suitable to his capacity. In support of its argument that Looney is not "obviously unemployable" and refused a reasonable accommodation, the City cites Fort James, supra, in which this court opined:

> "The refusal-of-reasonable-accommodation provision of § 25-5-57(a)(4)d., which pertains to permanent and total disability, is analogous to § 25-5-57(a)(3)e., which bars an employee from recovering workers' compensation benefits based upon a permanent partial disability when the employee

has unjustifiably refused 'employment suitable to his or her capacity offered to or procured for him or her.' ...

"In their treatise on American workers' compensation law, Professor Arthur Larson and Lex K. Larson discuss what is called the 'odd-lot' doctrine, under which total disability may be found even where an employee is not totally incapacitated for work where that employee is so handicapped that he or she will not be employed regularly in any well-known branch of the labor market. 4 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 83.01 (2003). This principle, although not referred to by that name, is recognized in Alabama in that permanent and total disability 'does not mean absolute helplessness or entire physical disability.' Lewis G. Reed & Sons, Inc. v. Wimbley, 533 So. 2d 628, 631 (Ala. Civ. App. 1988) (emphasis added). Rather, '[t]he test for permanent total disability is the inability to perform one's trade and the inability to find gainful employment.' TAJ–Rack Div., Inc. v. Harris, 603 So. 2d 1061, 1064 (Ala. Civ. App. 1992) (citing Mead Paper Co. v. Brizendine, 575 So. 2d 571 (Ala. Civ. App.1990)).

"The general principles governing the respective burdens of an employee and an employer concerning the availability of suitable work have been synthesized as follows:

> " 'If the evidence of degree of obvious physical impairment, coupled with other facts such as claimant's mental capacity, education, training, or age, places claimant prima facie in the odd-lot category, the burden should be on the employer to show that some kind of suitable work is regularly and continuously available to the claimant.'

> "4 Larson's Workers' Compensation Law § 84.01[3] (footnotes omitted). However, as that treatise goes on to explain,
>
> > "'[i]f the claimant's medical impairment is so limited or specialized in nature that he or she is not obviously unemployable or relegated to the odd-lot category, it is not unreasonable to place the burden of proof on that claimant to establish unavailability of work to a person in his or her circumstances.'
>
> "Id. at § 84.01[4] (footnote omitted)."

893 So. 2d at 441-42.

According to the City, because Looney returned to work and continued to work for nearly four years as a laborer before he retired, he had the burden of proving that no suitable gainful work was available to him in his disabled condition. Specifically, the City contends that Looney admitted that he could have continued to work as a laborer, but chose to retire. A fair reading of the exchange between Looney and the City's counsel upon which the City bases its argument, however, indicates that Looney testified that if he had not been in pain he could have continued to work as a laborer. However, Looney maintained that, because his pain

level was chronic and debilitating, he was unable to continue performing work as a laborer and retired.

The City also relies on Gibbons, supra. In Gibbons, an employee argued that his case involved a permanent-and-total disability and that, therefore, the trial court had erred in applying the return-to-work statute. In rejecting the employee's argument that he had good cause for not returning to work because he was limited to light-duty work and his position involved heavy-duty work, this court noted that, before he quit his job, the employee never gave the employer an opportunity to move him to a job the employee thought he was physically capable of doing. The City reasons that, because Looney did not inform the City's personnel director when he retired that one reason he was retiring was because he could no longer physically perform the requirements of the job, Looney did not provide the City with an opportunity to offer a reasonable accommodation.

In further support of its argument, the City urges that Looney constructively refused a reasonable accommodation when he voluntarily retired. The City cites Steelcase, Inc. v. Richardson, 893 So. 2d 413, 428

(Ala. Civ. App. 2003), in which Judge Pittman in his dissent opined that, because an injured employee had voluntarily quit without notice and without giving the employer an opportunity to move him to another position, the employee had ended his employment without good cause and had effectively refused the employer's accommodations.

Here, the evidence establishes that the City attempted to accommodate Looney's physical restrictions by providing suitable work throughout his employment from 2008-2016. The evidence clearly reflects that Looney's last position on litter patrol was an attempt initiated by Looney and agreed to by the City to provide him with a reasonable accommodation, and the trial court's finding that Looney's position on litter patrol was the least physically intensive work for a laborer in the City's employ is supported by substantial evidence in the record. Looney's testimony that over time the pain became relentless and that he was not able to consistently perform the labor required for the litter-patrol position -- i.e., he could not walk for periods or sit for periods, etc. -- supports the trial court's finding that when Looney quit, the accommodation offered by the City was no longer suitable. No evidence

was presented indicating that, when Looney was no longer physically able to perform the litter-patrol job, the City had a position available for a laborer that was less physically intensive than litter patrol that could have accommodated Looney's physical limitations. Although the evidence does not demonstrate that Looney informed the City directly that one of the reasons for his retirement was his inability to perform the litter-patrol position due to his back pain, Looney's testimony regarding his physical discomfort and chronic pain and the trial court's observations of Looney during the trial indicate that Looney's physical issues were obvious. Additionally, the City does not direct this court to any evidence indicating that it had a position available that would have accommodated Looney's declining health. The evidence establishes, and the City does not dispute, that Looney desired to work and tried to work but that his condition progressively worsened with time and his ability to perform simple tasks became too difficult. Thus, sufficient evidence was presented indicating that Looney did not refuse to work and that the City's accommodation, considering Looney's declining physical condition, was not reasonable. Therefore, the trial court's judgment in this regard is due to be affirmed.

Conclusion

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

AFFIRMED.

Hanson and Fridy, JJ., concur.

Moore and Edwards, JJ., concur in the result, without writing.