

# Case Law Update

for  
AWCO

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# Unauthorized Medical Treatment

- City of Thomasville v. Tate, 2015 Ala. Civ. App. LEXIS 56 (Ala. Civ. App. Mar. 6, 2015)
- FACTS: Tate was a police officer injured in a motor vehicle accident. The ER contested liability on several grounds. Tate did not like the opinion of his authorized physician and went, on his own, to Dr. Tim Holt, who performed surgery. Tate was awarded total disability and the Court ordered the ER to pay for unauthorized medical care.
- ISSUE: Whether it is error for a Trial Court to order the ER to pay for unauthorized medical care?

## Unauthorized Medical Treatment (cont...)

- **HOLDING:** The Trial Court ignored testimony that Tate's medical treatment by Dr. Timothy Holt was unauthorized. The Court of Civil Appeals, on March 6, 2015, reversed the Trial Court's order compelling the ER to pay for unauthorized medical treatment.
- **LESSON:** Document who the authorized physicians are and, if an employee seeks unauthorized treatment, document that the unauthorized treatment is indeed unauthorized.

# Other Apparatus

- Flanagan Lumber Co. v. Tennison, 2014 Ala. Civ. App. LEXIS 157 (Ala. Civ. App. Aug. 22, 2014)
- FACTS: Joe Tennison suffered a lumbar back injury while working for Flanagan Lumber. The claim was settled with future medical benefits remaining open. Tennison continued treatment with Dr. John Roberts (pain management). At one such appointment, Tennison inquired about a walk-in bathtub and indicated that he could not step over the side of his tub to take an actual bath.

## Other Apparatus (cont...)

- Facts Continued: Dr. Roberts wrote two letters on the issue. The first letter stated

*“Mr. Tennison has had a two level lumbar fusion but has persistent low back and left lower extremity pain. I believe he is significantly disabled and qualifies for a walk-in tub. I believe this is medically necessary.”*

Dr. Roberts’ second letter, which was addressed to Flanagan’s workers’ compensation carrier, provided

*“I believe because of Mr. Tennison's significant disability and deconditioned body that a walk-in bathtub is very reasonable in his situation. I believe this would avoid future falls getting in and out of a tub shower.”*

## Other Apparatus (cont...)

- Facts Continued: During his deposition, Dr. Roberts testified, among other things, that the walk-in bathtub is also expected to provide Tennison with temporary pain relief and would reduce his risk of falling, but is not expected to dramatically improve his condition.

Evidence was presented that the walk-in bathtub would cost \$18,500.00. The ER presented evidence that a shower transfer bench, which would allow Tennison to use his current bathtub, would cost \$110.95.

## Other Apparatus (cont...)

- Issue: Whether the ER must provide a walk-in bathtub to the EE as an “other apparatus” pursuant to § 25-5-77(a)?
- Holding: Under the facts of this case, no. This requires a fact specific case-by-case analysis. Here, the Court determined that the bathtub was not expected to improve the EE's condition and the potential temporary symptom relief provided by a bathtub does not arise to the level of restoring EE to a basic level of appearance or functioning.

## Other Apparatus (cont...)

- Lesson: Just because something qualifies as an “other apparatus” in one case does not mean that it will in all cases. Pay close attention to the facts (particularly whether the requested apparatus will improve the EE's injured condition)

# Utilization Review: Penalties for failure to follow UR process

- Good Hope Contr. Co. v. McCall, 2015 Ala. Civ. App. LEXIS 61 (Ala. Civ. App. Mar. 20, 2015)
- FACTS: McCall suffered a cervical injury and settled claim in 2004 with open medical benefits. Between 2002 and 2013 McCall received 21 epidural injections. The doctor requested a 22<sup>nd</sup> ESI and the ER submitted the request to UR. A *first level clinic review* was performed by a nurse. She did not certify the procedure and a *second level clinical review* was performed by an orthopedic surgeon, who opined the procedure was not necessary.

# Utilization Review: (cont...)

- FACTS (cont): Following the non-certification McCall filed a Motion to compel medical treatment. The Trial Court ordered the treatment and taxed costs of over \$18,000 in attorney fees.
- ISSUE: Whether a court can tax attorney's fees in medical disputes where the ER follows the UR procedures?
- HOLDING: Attorney fees are recoverable only where authorized by statute; when provided in a contract; or in certain equitable proceedings when the interests of justice so require, as in the case when the opposing party has acted in bad faith.

# Utilization Review: (cont...)

- HOLDING (cont): Even though the Trial Court awarded attorney fees, it found that the ER had a legitimate, debatable and arguable basis for its non-certification decision. The Court of Civil Appeals reversed the award of attorney fees holding that attorney fees can only be awarded where the ER is guilty of contempt for willful and contumacious refusal to pay reasonable and necessary medical expenses.
- LESSON: Strictly follow the UR procedure, especially when selecting a peer physician.

# Dependent Death Benefits

- Banks v. Premier Serv. Co., 2014 Ala. Civ. App. LEXIS 158 (Ala. Civ. App. Aug. 22, 2014)
- FACTS: Thomas Banks was murdered by a co-worker while on the job for Premier. Banks was survived by his wife and his daughter, who was a 22-year-old college student. His daughter resided in a trailer, which was owned by her father, along with her fiancé and infant daughter. She was neither physically nor mentally incapacitated. The daughter sought partial death benefits because she regularly received part of her support from her father.

## Dependent Death Benefits (cont...)

- ISSUE: Whether an adult child who derives partial support from a deceased worker is entitled to death benefits?
- HOLDING: Unless physically or mentally incapacitated from earning, adult dependents (over the age of 18) are not entitled to death benefits under the Act.

## Dependent Death Benefits (cont...)

- LESSON: The lesson to take from this case is that we can now point to a case where the appellate court applies the Act just as it is written.

However, in order to apply the plain language of the Act, the Court had to overrule an exception which had previously been made.

# MMI required for Permanent Total Disability

- Fab Arc Steel Supply, Inc. v. Dodd, 2015 Ala. Civ. App. LEXIS 14, 34 (Ala. Civ. App. Jan. 16, 2015)
- FACTS: EE suffered a compensable accident when he was struck in the chest by a “C clamp” attached to a steel beam. Almost 2 years after the accident EE’s private physician diagnosed him with a L-1 herniation and testified the accident “certainly could have caused the injury”. The ER refused to treat the L-1 herniation. The Trial Court found the L-1 injury was compensable, ordered medical treatment, and found the EE permanently totally disabled.

## MMI required for PTD (cont...)

- **HOLDING:** MMI is reached when an employee has recovered from his or her work-related injuries as much as medically possible such that the extent of permanent disability, if any, can be estimated. The evidence showed that EE's physician recommended surgery for the L-1 herniation and that EE desired to have that surgery. Once the Trial Court found the L-1 injury was related to the compensable accident, that surgery was recommended, and that EE was willing to undergo surgery, the Court was required to find that MMI had not been reached. The Supreme Court reversed and required the Trial Court to wait until MMI was reached to determine disability.

# MMI required for PTD (cont...)

- LESSONS:

- A Trial Court is not bound by the opinions of authorized medical providers
- An EE must be at MMI for a determination of permanent disability
- Alabama authority does not estop an employer who has denied medical treatment for a particular injury from arguing that an employee has not reached MMI as to that injury.

# Arising out of and In the Course of Employment

- Pollock v. Girl Scouts of S. Ala., Inc., 2015 Ala. Civ. App. LEXIS 43 (Ala. Civ. App. Feb. 27, 2015)
- FACTS: Pollock was employed by ER as business mgr of the summer camp. ER holds a 6 week summer camp each year. Pollock would be hired to work for the camp each year and the employment would terminate at the end of the 6 week camp. ER conducted a voluntary horseback ride after camp each year. The ride was not part of EE compensation and not a reward for good work.

# Arising out of and In the Course of Employment (cont...)

- FACTS (cont...): Pollock hurt her low back during the ride. The ER filed a summary judgment motion arguing that the accident did not arise out of or occur in the course of the employment. The Trial Court granted the summary judgment and held the accident occurred while EE was engaged in a voluntary activity unrelated to her employment as business manager.
- ISSUE: Whether an injury that occurs on the ER's premises and while the EE is receiving a wage is always compensable?

# Arising out of and In the Course of Employment (cont...)

- **HOLDING:** In order to prevail on claims that recreational activities are compensable, the EE must show:
  - (1) They occur on the premises during a lunch or recreation period as a regular incident of the employment; or
  - (2) The employer, by expressly or impliedly requiring participation, or by making the activity part of the services of an employee, brings the activity within the orbit of the employment; or
  - (3) The employer derives substantial direct benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life.

# Arising out of and In the Course of Employment (cont...)

- LESSON: If you hope to win an argument that a recreational activity resulting in an EE injury is not compensable, you need to preserve and present overwhelming evidence.
- CAVEAT: This case is on appeal to the Alabama Supreme Court and subject to reversal.

# Injuries Sustained While Traveling to ATP

- Flexicrew Staffing, Inc. v. Champion., 2014 Ala. Civ. App. LEXIS 247 (Ala. Civ. App. Dec. 12, 2014)
- FACTS: Champion cut his leg while operating a concrete saw for Flexicrew. Compensability of this accident was not contested. Stitches were needed and the ER referred EE to an ATP. EE did not believe it was an emergency situation and drove himself to the ATP. He began feeling nauseous and light-headed on the drive and drove through a red light. EE suffered a broken neck, leg and ankle in the resulting accident.

# Injuries Sustained While Traveling to ATP (cont...)

- ISSUE: Whether injuries sustained by EE in an automobile accident while in-route to obtain treatment from an ATP are compensable?
- HOLDING: Injuries sustained by an EE while traveling to see an employer-designated physician for initial treatment of a work-related injury are compensable under the Act.

# Injuries Sustained While Traveling to ATP (cont...)

- LESSON: Employers need to give careful consideration to an EE's condition after the occurrence of an accident. If there is any concern regarding the EE's ability to drive, then transportation should be provided for initial treatment at an ATP.

# Subject-Matter Jurisdiction

- Ex parte Lost River Oilfield Servs., 2014 Ala. Civ. App. LEXIS 224 (Ala. Civ. App. Nov. 14, 2014)
- FACTS: The EE, an Alabama resident, was injured while working at the ER's location in Texas. The ER's principal place of business was in North Dakota and it obtained WC coverage through a N.D. state agency. EE entered a contract for hire with ER while in AL, took a pre-employment drug test in AL and took the ER's two week online training from his home in AL. However, EE never worked in AL. EE received WC benefits pursuant to N.D. laws prior to filing suit in AL.

# Subject-Matter

## Jurisdiction (cont...)

- ISSUE: Whether a contract for hire entered in Alabama gives Alabama courts subject matter jurisdiction over accidents occurring outside of this state?
- HOLDING: Because the EE's employment was principally localized in Texas and the EE failed to prove that Texas law was inapplicable to his claim, the Alabama contract for hire does not give rise to subject matter jurisdiction of Alabama courts.

# Subject-Matter

## Jurisdiction (cont...)

- LESSON: Employers conducting business outside of this state need to give careful consideration to the jurisdiction for workers' compensation claims. If the ER prefers a particular jurisdiction, then a carefully drafted forum selection clause should be included in the contract for hire. The majority of courts, including Alabama, will enforce a properly drafted forum selection clause.

# Officer Exemptions

- Hooks v. Coastal Stone Works, Inc., 2014 Ala. Civ. App. LEXIS 167 (Ala. Civ. App. Sept. 5, 2014)
- FACTS: Hooks became the president of Coastal in 2005. The following year, he filed a certificate of exemption electing to be exempt from coverage under the Act pursuant to § 25-5-50. Hooks was injured in an automobile accident arising out of his employment in 2011 and demanded compensation and benefits under the Act. Evidence showed that Hooks did not file any documents regarding his coverage status subsequent to 2006.

## Officer Exemptions (cont...)

- **ISSUE:** Whether affirmative action is required by an officer to revoke a properly filed certificate of exemption?
- **HOLDING:** A certificate of exemption does not expire each year. Rather, a corporate officer must take action to revoke that exemption by filing a written certification of his or her election to accept coverage with the Alabama Department of Labor.

## Officer Exemptions (cont...)

- **LESSON:** When a claim for workers' compensation benefits is filed by a corporate officer, always take five minutes to determine whether that officer has exempted himself/herself from coverage under the Act.

A quick search for inclusions and exclusions can be made on the DOL's website:

[https://labor.alabama.gov/wc/COE/Search\\_COE.aspx](https://labor.alabama.gov/wc/COE/Search_COE.aspx)

