REL: February 15, 2019

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2018-2019

2170750

Georgia Pacific Consumer Products LP

v.

Sheryl D. Gamble

Appeal from Choctaw Circuit Court
(CV-15-900061)

EDWARDS, Judge.

In June 2014, Sheryl D. Gamble was employed by Georgia Pacific Consumer Products LP ("GP") at its plant in Pennington. On June 17, 2014, while operating a "ram truck" and performing the duties of her employment, Gamble suffered

an injury to her back and neck when the truck became inoperable and ran into a guardrail. GP admits that Gamble was injured in an on-the-job accident, and it paid Gamble temporary-total-disability benefits for approximately 17 weeks. GP laid off Gamble on October 27, 2014.

Gamble sued GP in the Choctaw Circuit Court ("the trial court") in August 2015, seeking workers' compensation benefits. After a trial, which was held on August 9, 2017, the trial court entered a detailed judgment on March 29, 2018. In that judgment, the trial court determined that Gamble was 100% permanently and totally disabled as a result of neck and lower-back injuries she sustained in the June 2014 accident while working for GP. The trial court determined that Gamble reached maximum medical improvement ("MMI") on June 9, 2017, the MMI date determined by Gamble's surgeon, Dr. Timothy Holt, and calculated benefits accordingly.[1] The trial court also taxed the costs associated with the action against GP and

[1]"The date of MMI indicates the date on which the claimant has reached such a plateau that there is no further medical care or treatment that could be reasonably anticipated to lessen the claimant's disability." G.UB.MK. Constructors v. Traffanstedt, 726 So. 2d 704, 709 (Ala. Civ. App. 1998).

ordered Gamble to file a costs bill with the clerk within 45 days of the entry of the judgment.

GP appeals the judgment, raising several issues relating to the language of the judgment and the sufficiency of the evidence. Specifically, GP contests the trial court's determination that Gamble is 100% permanently and totally disabled and contends that the trial court improperly determined the date Gamble reached MMI. GP also complains that the trial court's judgment makes it responsible for all of Gamble's medical treatment, including unauthorized treatment, and that the trial court considered evidence that was not admitted at trial. GP further challenges the trial court's award of litigation costs to Gamble because, GP contends, Gamble had not presented evidence to support the award at the time of the entry of the judgment.

The evidence of record reveals the following. After the accident, Gamble was initially taken to the on-site medical-treatment room at GP's plant and was then sent to an urgent-care facility, where she was treated and released. When Gamble continued to complain of pain, GP sent her to Dr. Gentry Dodd, who prescribed pain medication and epidural-block

injections and referred Gamble to physical therapy. When those measures did not reduce Gamble's pain, Dr. Dodd referred her to Dr. Bryan Givhan, a neurosurgeon, for assessment and possible treatment.

Dr. Givhan first saw Gamble on November 18, 2014. According to Dr. Givhan, Gamble's reported complaints included severe neck pain, shoulder and arm pain, and numbness and tingling in her arms. Dr. Givhan performed a neurological examination, which, he testified, appeared normal and showed no signs of neural impingement that might be causing Gamble's symptoms; he noted, however, that she did have decreased range of motion in her neck. Dr. Givhan also reviewed magnetic resonance imaging ("MRI") scans of Gamble's cervical spine and lumbar spine, both of which, he testified, reflected age-appropriate degenerative changes and a small osteophyte but no bulging disks or nerve impingements. To be certain that the osteophyte was not causing any nerve compression, Dr. Givhan had Gamble undergo a myelogram, which, he testified, did not reveal any nerve impingement.

Thus, Dr. Givhan explained, he concluded that Gamble had suffered only a musculoskeletal injury that would eventually

resolve. He prescribed Gamble a non-narcotic pain reliever, a muscle relaxer, and gabapentin, which is sometimes prescribed to treat neuropathic pain. According to Dr. Givhan, Gamble reached MMI on December 23, 2014. Dr. Givhan opined that Gamble would be able to return to her former employment without restrictions. Gamble saw Dr. Givhan once more on January 29, 2015, after which he referred her to physical therapy in an attempt to assist her with her pain.

Because she had not achieved relief from her pain, Gamble sought assistance from her personal doctor, Dr. Huey Kidd. Dr. Kidd referred Gamble to Dr. Timothy Holt, an orthopedic surgeon.[2] Dr. Holt first saw Gamble on February 12, 2015. He testified that Gamble had explained to him on her initial visit that she had suffered neck pain, arm pain, and lower

[2]Gamble did not seek a panel of four physicians after her dissatisfaction with Dr. Givhan, and, thus, GP did not pay for her treatment by Dr. Kidd or Dr. Holt, who were not Gamble's authorized treating physicians. See Ala. Code 1975, § 25-5-77(a) (explaining that, if an employee is dissatisfied with the initial treating physician, he or she may choose a new physician from a panel of four physicians selected by the employer); Fluor Enters., Inc. v. Lawshe, 16 So. 3d 96, 100 (Ala. Civ. App. 2009) (explaining that, because the employer has the right to select the employee's treating physician, "[i]n general, employers are not liable to the employee for the cost of treatment provided by an unauthorized physician").

back pain since her accident in June 2014. He further noted that Gamble discussed the fact that she had tried physical therapy, epidural-block injections, and both over-the-counter and prescribed pain relievers but still suffered regular pain that placed limits on her ability to sit, stand, and walk for any length of time. Dr. Holt testified that he performed a neurological examination of Gamble, which, he said, revealed that Gamble was suffering some nerve compression in her neck and lower back.

According to Dr. Holt, he reviewed Gamble's previous MRI scans, which, he said, revealed degenerative disk disease, as would be expected in someone Gamble's age, but did not reveal any significant abnormalities. Based upon his reading of the MRI scans, Dr. Holt determined that Gamble's "worst" disk was at the C5-6 level. Dr. Holt then ordered a diskogram of Gamble's C4-5, C5-6, and C6-7 vertebrae. That test revealed that the disks at the C4-5 and the C5-6 level were compressing nerve roots and causing Gamble's neck pain. Dr. Holt then performed an anterior cervical diskectomy and fusion surgery on July 27, 2015.

Dr. Holt testified that Gamble's post-surgery recovery had gone well. He said that his records revealed that Gamble had reported that her neck pain had improved after the surgery. However, he noted that, as a result of the diskectomy and fusion surgery, Gamble's neighboring cervical disk had been producing further symptoms, including arm pain and tingling in her hands. According to Dr. Holt, Gamble had indicated in the months following her surgery that she continued to suffer lower back pain, and he ordered an MRI. That MRI revealed a possible annular tear in the L5-S1 disk.

Dr. Holt assigned a 12% impairment rating to Gamble for her neck injury and a 2% impairment rating for the annular tear he discovered in her lower back. He also placed permanent restrictions on Gamble, including lifting no more than 25 pounds, limiting sitting, no climbing ladders, no repetitive stair climbing, and no repetitive or frequent looking overhead. Thus, Dr. Holt said, Gamble was permanently restricted to light-duty work. Dr. Holt assigned an MMI date of June 9, 2017.

Gamble testified at trial that she had tried to resume performing the functions of her job with GP shortly after her

accident to no avail. She said that she had continued to suffer pain after the accident and that she had sought assistance from Dr. Kidd because Dr. Givhan kept "telling [her] that [she] was fine." According to Gamble, Dr. Holt's surgery had helped her, but, she testified, although she does have some good days, she has headaches nearly every day, continues to suffer from some neck pain, and also regularly suffers from back pain. She explained that, when she has a headache, she takes her prescribed medication, which puts her to sleep. Gamble said that she is unable to do the things that she used to do, like cook, perform household tasks, engage in activities with her children, and go shopping. Gamble testified that she would work if she could but that she did not think she could get up every day and work even part-time.

Russ Gurley, a vocational consultant, testified on behalf of GP. Gurley testified that he routinely performs vocational evaluations. Those evaluations, he explained, determine the potential wage loss and the loss of job access a person suffers as the result of an injury. He testified that, in the process of performing a vocational evaluation on Gamble, he

interviewed her, requesting information on her vocational history, educational background, and medical history; administered math, reading, and IQ tests; and reviewed her medical records. He said that he had also reviewed the depositions of Dr. Givhan and Dr. Holt after he concluded his report but that they were "consistent with the report."

Gurley testified that, based on Dr. Givhan's conclusions that Gamble had suffered only musculoskeletal injuries and could return to work, he would assign Gamble a 0% vocational-disability rating. However, he said that, based on Dr. Holt's restrictions and his belief that Gamble could return to some form of work within those restrictions, he would assign Gamble a 50-55% vocational-disability rating. He explained that in his analysis he had considered Gamble's past vocational experience as a cashier and her community-college bookkeeping instruction.[3] According to Gurley, he was able to locate several jobs in the surrounding area within Gamble's

[3]Gurley testified that Gamble told him she had earned an associate's degree and had taken classes in bookkeeping, accounting, and computer application; however, Gamble's testimony at trial was that she had attended community college for one year in approximately 2011 and had earned a "certificate" in "computer."

restrictions, including positions as a night auditor at a hotel, as a cashier, as a teller at a bank, and as a customer-service representative. Gurley said that jobs like those he had discovered typically paid between $8 and $10 per hour.

When cross-examined and when questioned by the trial court, Gurley admitted that he had not considered Gamble's subjective complaints of pain or whether her pain would prevent her from working. He said that, if Dr. Givhan and Dr. Holt were wrong about Gamble's ability to resume employment activities, then Gamble would be more vocationally disabled than he had previously concluded. He also testified that, if Gamble could not work because of the effects of her pain, she would be considered 100% vocationally disabled.

Donald Blanton testified on behalf of Gamble. He testified that he is a licensed professional counselor and that he performs vocational evaluations in workers' compensation and Social Security disability matters. Blanton said that, in order to prepare his evaluation, he had interviewed Gamble, had reviewed her medical records, and had read Dr. Holt's deposition. According to Blanton, based upon "the combination of Gamble's physical problems and pain [she

regularly suffered and] her lack of transferable skills," Gamble was 100% vocationally disabled.[4]

Our review of workers' compensation judgments is well settled. "In reviewing pure findings of fact, the finding of the circuit court shall not be reversed if that finding is supported by substantial evidence." Ala. Code 1975, § 25-5-81(e)(2). Our supreme court has explained that a trial court's finding of fact is supported by substantial evidence if it is "supported by '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, 269 (Ala. 1996) (quoting West v. Founders Life Assurance Co. of Florida, 547 So. 2d 870, 871 (Ala. 1989)); see also § 12-21-12(d). In completing our review, this court "will view the facts in the light most favorable to the findings of the trial court." Whitsett v. BAMSI, Inc., 652 So. 2d 287, 290 (Ala. Civ. App. 1994), overruled on other grounds, Ex parte Trinity

[4]Blanton testified that he had not considered the "certificate" in "computer" Gamble had earned to be a transferable skill because Gamble had not ever been employed in a position that utilized computer skills.

Indus., 680 So. 2d at 269. Further, we review legal issues without a presumption of correctness. See Ala. Code 1975, § 25-5-81(e)(1).

In its brief on appeal, GP's first issue statement reads: "The trial court correctly found [Gamble] totally disabled due to Dr. Holt's unauthorized and unnecessary surgery and subsequent MMI date of June 9, 2017[,] versus her accident with GP." GP's first argument centers on one of the trial court's findings and conclusions, which reads: "As a result of her injury, [Gamble] has become permanently and totally disabled as of June 9, 2017, the Maximum Medical Improvement date assigned by Dr. Holt and stipulated to by the parties, which makes it impossible for her to return to any type of work or gainful employment." Thus, it appears that GP is contending that the trial court's conclusion that Gamble became permanently and totally disabled on June 9, 2017, when she reached MMI, is somehow a finding that Gamble's disability is not related to her June 17, 2014, accident. However, in so concluding, GP misreads the particular finding at issue, which simply states the date Gamble reached MMI and thus the date that her disability became permanent as opposed to remaining

temporary. In order to receive benefits for permanent and total disability, an employee must have reached MMI. Hillery v. MacMillan Bloedel, Inc., 717 So. 2d 824, 825 (Ala. Civ. App. 1998). The trial court's correlation of Dr. Holt's MMI date and the date on which Gamble became permanently and totally disabled is not erroneous and does not amount to a finding that Gamble's disability resulted from her surgery.[5]

Secondly, GP argues "alternatively" that the trial court "erred to reversal in finding [Gamble] totally disabled as of June 9, 2017[,] versus June 17, 2014." We have explained above the importance of the MMI date in the determination of permanent and total disability. GP appears to contend in this portion of its brief on appeal that the trial court "used two different dates for the start of Gamble's disability: June 17, 2014 (the actual accident date)[,] and June 9, 2017 (the MMI date issued by Dr. Holt)," which, according to GP, requires reversal because the trial court's reliance on an allegedly incorrect date impacted the calculations of the benefits due

[5]Furthermore, we note that the trial court's judgment, when read in its entirety, clearly determines that Gamble's disability resulted from her June 2014 accident.

in some unspecified way.[6] However, other than one specific typographical error in the trial court's final judgment,[7] which error can be rectified by use of Rule 60(a), Ala. R.

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[6]We note that Rule 28(a)(10), Ala. R. Civ. P., and the principles espoused in White Sands Group, L.L.C. v. PRS II, LLC, 998 So. 2d 1042, 1058 (Ala. 2008), require that "arguments in briefs contain discussions of facts and relevant legal authorities that support the party's position." Furthermore, as we have recently observed:

> "We have before cited United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990), in which a federal court of appeals cautioned appellants: 'It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones.'"

D.I. v. I.G., [Ms. 2160781, March 9, 2018] ___ So. 3d ___, ___ (Ala. Civ. App. 2018) (citing D.B. v. T.E., 203 So. 3d 1255, 1258 (Ala. Civ. App. 2016), and Huntsville City Bd. of Educ. v. Jacobs, 194 So. 3d 929, 945 (Ala. Civ. App. 2014)).

In its brief, GP merely complains that the trial court made errors in some dates, which it then contends caused the trial court to make erroneous computations. GP does not point out the exact error or errors the trial court committed, leaving this court with no actual argument to consider. Other than the one error candidly pointed out by Gamble and discussed in note 7, infra, this court will not search out erroneous dates or computations in the judgment.

[7]Paragraph "a." on the seventh page of the trial court's judgment reads: "For the period following 17.432 weeks from June 17, 2017 ...." That date should read "2014." However, the calculations in the judgment are clearly made from the correct date, June 17, 2014.

Civ. P., if necessary, we can discern no confusion in the trial court's judgment relating to the date of the accident, to the date that Gamble became permanently and totally disabled, or in the calculation of the benefits due. Thus, GP has not presented a basis for reversal on this ground.

GP next argues that the trial court erred in making it responsible for all of Gamble's medical treatment, including unauthorized medical treatment. The trial court's judgment acknowledges that GP paid for all authorized medical treatment. At trial, Gamble stipulated that GP was not required to pay for any medical treatment provided by Dr. Kidd and Dr. Holt, who were not authorized treating physicians. One sentence in the trial court's judgment states that "[GP] shall remain responsible for all medical treatment necessary as a result of said injury and complications pursuant to [§] 25-5-77 of the Code of Alabama 1975, as amended." However, nothing in the trial court's judgment indicates that GP is required to pay for any unauthorized medical treatment Gamble received. In the final section of its judgment, the trial court concludes that Gamble "is entitled to future medical benefits as provided by the Workers' Compensation Laws of the

State of Alabama as existing on June 17, 2014." Thus, based on the stipulations of the parties and the entirety of the judgment, we conclude that the trial court merely intended to indicate that GP remained liable for future authorized medical treatment resulting from Gamble's injury and that it did not order GP to pay for any unauthorized medical treatment Gamble had already received.

GP next argues that the trial court erred by concluding that Gamble reached MMI on June 9, 2017, instead of December 23, 2014. GP contends that the trial court performed no analysis explaining its choice of MMI date and that the parties had stipulated that December 23, 2014, was Gamble's MMI date. However, a review of the transcript and GP's trial brief indicates that such is not the case. The parties stipulated that Dr. Givhan had assigned a December 23, 2014, MMI date to Gamble. The parties also stipulated that Dr. Holt had assigned a June 9, 2017, MMI date to Gamble. Thus, the trial court was faced with conflicting MMI dates from the physicians who treated Gamble.

Contrary to GP's assertion, the trial court plainly set out why it selected June 9, 2017, as Gamble's MMI date. The

trial court believed Gamble's testimony that, despite treatment with Dr. Dodd and Dr. Givhan, who had indicated that further treatment of Gamble's condition was unnecessary and that her condition would not prevent her return to work, she had continued to suffer with neck and back pain, prompting her to seek further medical treatment. Thus, as Gamble suggests, this case is similar to Fort James Operating Co. v. Stephens, 996 So. 2d 833 (Ala. 2008).

In Stephens, our supreme court was faced with an argument that the trial court had incorrectly determined an employee's MMI date. Stephens, 996 So. 2d at 839. The evidence reflected that the employee had sought treatment from one physician but had declined to return to that physician because he did not like that physician and because of the distance he had to travel to see that physician. Id. The initial physician, based upon the employee's failure to return to his office, placed the employee at MMI on June 7, 1999. Id. However, the employee testified that his symptoms had persisted and that he had sought further treatment from a second physician, who later placed the employee at MMI on March 23, 2000. Id. at 839-40. The trial court determined

the employee's MMI date to be March 23, 2000, and the employer appealed, arguing that the evidence indicated that the employee's injury had "stabilized" by June 7, 1999. Id. at 839.

Our supreme court rejected the employer's argument, explaining that

> "'[i]t is well settled that in order for an employee to recover permanent partial or permanent total disability benefits the employee must have reached MMI. Ex parte Phenix Rental Ctr., 873 So. 2d 226 (Ala. 2003); Hillery v. MacMillan Bloedel, Inc., 717 So. 2d 824 (Ala. Civ. App. 1998); Edward Wiggins Logging Co. v. Wiggins, 603 So. 2d 1094 (Ala. Civ. App. 1992); Pemco Aeroplex, Inc. v. Johnson, 634 So. 2d 1018 (Ala. Civ. App. 1994); and Alabama By-Products Corp. v. Lolley, 506 So. 2d 343 (Ala. Civ. App. 1987). A claimant has reached MMI when "there is no further medical care or treatment that could be reasonably anticipated to lessen the claimant's disability." G.UB.MK. Constructors v. Traffanstedt, 726 So. 2d 704, 709 (Ala. Civ. App. 1998). When MMI is reached depends on the circumstances of the particular case. Hillery v. MacMillan Bloedel, Inc., supra; Pemco Aeroplex, Inc. v. Johnson, supra.'
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> "Halsey v. Dillard's, Inc., 897 So. 2d 1142, 1148 (Ala. Civ. App. 2004). 'While the treating physicians generally provide the best evidence concerning maximum medical improvement, the trial court is not bound by their opinions in assigning the date of maximum medical improvement.' 1 Terry A.

> Moore, Alabama's Workers' Compensation § 13:6 (1998) (footnote omitted). See also Guardian Cos. v. Kennedy, 603 So. 2d 1053 (Ala. Civ. App. 1992)."

Stephens, 996 So. 2d at 839. After noting that an appellate court's role is not to reweigh the evidence on appeal, our supreme court stated that the evidence recited above was substantial evidence supporting the trial court's chosen MMI date. Id. at 840.

The record in the present case contains similar evidence to that presented in Stephens. Gamble complained that Dr. Givhan kept "telling [her] that [she] was fine" despite her continued pain, and, as the trial court noted in its judgment, Dr. Givhan placed Gamble at MMI after her second visit to his office. Gamble was dissatisfied with Dr. Givhan's treatment, which had not resolved her pain, so she sought treatment from Dr. Kidd, who referred her to Dr. Holt. Dr. Holt treated Gamble and performed a cervical diskectomy and fusion surgery, after which he placed her at MMI on June 9, 2017. Thus, we conclude that the record contains substantial evidence supporting the trial court's determination that Gamble reached MMI on June 9, 2017.

GP further argues that the trial court erred in concluding that Gamble is permanently and totally disabled. According to GP, "all the objective medical evidence ... did not indicate any physiological changes" in Gamble's spine before she saw Dr. Holt. Based on that premise, GP argues that no medical evidence supports a conclusion that Gamble is permanently and totally disabled as a result of the 2014 accident. In fact, GP contends, Dr. Holt performed an unnecessary surgery that has, in turn, resulted in the development of further problems in Gamble's neck and lower back. In addition, according to GP, the trial court should have rejected Blanton's testimony because he admitted that he had not considered all of Gamble's medical records or Dr. Givhan's deposition.

We begin our analysis by discussing the test for permanent and total disability.[8]

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[8]In its brief, GP fails to discuss the test for permanent and total disability, instead focusing on its attempt to discredit Dr. Holt as financially interested and biased. See Rule 616, Ala. R. Evid. (permitting a party to attack the credibility of a witness by showing that witness is biased or prejudiced against or in favor of a party). However, these allegations appear to have been raised for the first time on appeal. Furthermore, the 305 pages of material appended to GP's brief purporting to show Dr. Holt's connection to

"'With regard to determining whether an employee is permanently and totally disabled, this court has stated:

> "'"'The test for total and permanent disability is the inability to perform one's trade and the inability to find gainful employment.' Fuqua v. City of Fairhope, 628 So. 2d 758, 759 (Ala. Civ. App. 1993). See also Liberty Trousers v. King, 627 So. 2d 422, 424 (Ala. Civ. App. 1993). A 'permanent total disability' is defined as including 'any physical injury or mental impairment resulting from an accident, which injury or impairment permanently and totally incapacitates the employee from working at and being retrained for gainful employment.' § 25-5-57(a)(4)d., Ala. Code 1975; Russell v. Beech Aerospace Services, Inc., 598 So. 2d 991, 992 (Ala. Civ. App. 1992)."

Gamble's attorney, Frederick Gilmore, were not a part of the record before the trial court. As an appellate court, we are not empowered to determine in the first instance whether a particular witness is financially interested or biased; the trial court alone is clothed with the ability to make determinations regarding those issues. See Trull v. Long, 621 So. 2d 1278, 1282 (Ala. 1993) (quoting Thibodeaux v. Aetna Cas. & Sur. Co., 216 So. 2d 314, 317 (La. Ct. App. 1968)) (affirming the exclusion of bias evidence when the record did not demonstrate that a proper predicate had been laid for such evidence and noting that an appellate court may only "'consider the record as it is'").

> "'Alabama Catfish, Inc. v. James, 669 So. 2d 917, 918 (Ala. Civ. App. 1995). See also Boyd Bros. Transp., Inc. v. Asmus, 540 So. 2d 757, 759 (Ala. Civ. App. 1988) (stating that § 25-5-57(a)(4)d., Ala. Code 1975, "requires that the employee be unable to perform his trade or unable to obtain reasonably gainful employment").'"

Caseco, LLC v. Dingman, 65 So. 3d 909, 924 (Ala. Civ. App. 2010) (quoting CVS Corp. v. Smith, 981 So. 2d 1128, 1136 (Ala. Civ. App. 2007)).

Furthermore,

> "[t]he test for permanent total disability does not require absolute helplessness. Dolgencorp, Inc. v. Hudson, 924 So. 2d 727, 734 (Ala. Civ. App. 2005). Although a trial court is certainly free to believe the testimony of the expert witnesses presented by the parties, it is not bound by that testimony. Elite Transp. Servs. v. Humphreys, 690 So. 2d 439, 441 (Ala. Civ. App. 1997). As part of its duty of reconciling conflicting testimony, a trial court 'may consider a worker's testimony concerning subjective pain in its determination of disability.' Humphreys, 690 So. 2d at 441; see also Hudson, 924 So. 2d at 735."

Dingman, 65 So. 3d at 925.

The testimony was, in fact, undisputed that Gamble's initial MRI scans did not reveal any significant abnormalities in her spine. The evidence concerning whether Gamble's injury required surgery or was more significant than a mere strain that would resolve independently over time was, however,

disputed. Dr. Givhan testified that Gamble had suffered a musculoskeletal injury that would resolve over time and that did not require surgical intervention. In contrast, Dr. Holt testified that he had performed a different test, a diskogram, which, he testified, revealed that Gamble's pain was being caused by root compression in her C4-5 and C5-6 disks. Based on the results of the diskogram, Dr. Holt recommended, and ultimately performed, a diskectomy and fusion surgery, which, he said, was a reasonably necessary treatment of Gamble's condition, which he opined had resulted from her June 2014 accident.

Similarly, the evidence regarding the extent of Gamble's vocational disability was disputed. Blanton testified that he had considered Dr. Holt's restrictions and an interview with Gamble in performing his evaluation. He further explained that Gamble's restrictions, her pain, her use of medication that caused her to sleep, and her lack of transferable skills combined to cause her to be 100% vocationally disabled. Gurley testified that, depending on whether one believed Dr. Givhan or Dr. Holt, Gamble's vocational disability could be 0% or as high as 55%. However, Gurley admitted to the trial

court that, if the trial court believed Gamble's pain to be seriously debilitating, she could be 100% vocationally disabled.

> "It is not within the province of an appellate court to determine or establish the percentage of disability of an injured employee. Hill v. Stevens & Co., 360 So. 2d 1035 (Ala. Civ. App. 1978). Our review is restricted to a determination of whether the trial court's factual findings are supported by substantial evidence. Ala. Code 1975, § 25-5-81(e)(2). This statutorily mandated scope of review does not permit this court to reverse the trial court's judgment based on a particular factual finding on the ground that substantial evidence supports a contrary factual finding; rather, it permits this court to reverse the trial court's judgment only if its factual finding is not supported by substantial evidence. See Ex parte M & D Mech. Contractors, Inc., 725 So. 2d 292 (Ala. 1998). A trial court's findings of fact on conflicting evidence are conclusive if they are supported by substantial evidence. Edwards v. Jesse Stutts, Inc., 655 So. 2d 1012 (Ala. Civ. App. 1995)."

Landers v. Lowe's Home Ctrs., Inc., 14 So. 3d 144, 151 (Ala. Civ. App. 2007) (emphasis added).

In light of the conflicting evidence presented to the trial court, we cannot conclude that GP has established that the trial court's conclusion that Gamble is permanently and totally disabled is not supported by substantial evidence. Certainly, some of the evidence presented to the trial court

would support a conclusion that Gamble is not permanently and totally disabled as a result of the June 2014 accident. However, our duty is not to determine whether Gamble is permanently and totally disabled based on our view of the evidence. Instead, we must consider only whether one view of the evidence before the trial court amounts to substantial evidence to support its judgment. See Landers, 14 So. 3d at 151.

The trial court expressly found Gamble to be credible and noted that it had observed her exhibiting symptoms of pain during the trial. See Ex parte Alabama Ins. Guar. Ass'n, 667 So. 2d 97, 101 (Ala. 1995) (quoting Williams v. Lee Apparel Co., 610 So. 2d 410, 412 (Ala. Civ. App. 1992)) (emphasis omitted) (stating that "'[t]he trial court is in the best position to observe the demeanor of the employee and other witnesses'"); Reeves Rubber, Inc. v. Wallace, 912 So. 2d 274, 281 (Ala. Civ. App. 2005) (noting that "[a] trial court's observations are of critical importance in a workers' compensation case"). Based on all the evidence presented, the trial court concluded that Gamble's injury was more severe than Dr. Givhan had determined and further concluded that Dr.

Holt's treatment of Gamble was reasonably necessary to address her condition, which, the trial court determined, had resulted from the 2014 accident. Thus, in accordance with our standard of review, we affirm the trial court's determination that Gamble is permanently and totally disabled.

GP also complains that the trial court considered evidence that was not admitted at trial. Indeed, the trial court's judgment lists the exhibits supposedly admitted by each party; however, the list of evidence admitted by Gamble included items that were not actually admitted at trial and are not contained in the record on appeal. Gamble's attorney points out that GP admits that the inclusion of Dr. Blanton's written report, Gamble's tax return, a disability award, and a mortality table in the list of admitted exhibits was likely a typographical error, because those items were listed on the potential exhibit list that Gamble had submitted before trial. GP further admits that any potential consideration of three of the four erroneously listed exhibits would amount to harmless error. See Rule 45, Ala. R. App. P. ("No judgment may be reversed ... on the ground of ... the improper admission or rejection of evidence ... unless in the opinion of the court

to which the appeal is taken or application is made, after an examination of the entire cause, it should appear that the error complained of has probably injuriously affected substantial rights of the parties."). However, GP argues that the trial court's consideration of Blanton's written report amounts to reversible error.

We first note that GP did not apprise the trial court of its alleged error at any time. Thus, GP failed to preserve any potential error for appellate review. See Jack's Restaurant v. Turnbow, 674 So. 2d 573, 575 (Ala. Civ. App. 1995). In Turnbow, the appellant argued that the trial court had improperly considered in its judgment a deposition that was allegedly not admitted into evidence. We rejected the appellant's argument, explaining:

> "Finally, the judgment refers to the neurosurgeon's deposition. The [appellant] filed no motion with the trial court alleging any improper use of this deposition by the court when it was entering its judgment. This court will not entertain arguments not advanced at the trial level. Blackmon v. R.L. Zeigler Co., 390 So. 2d 628 (Ala. Civ. App. 1980), cert. denied, Ex parte Blackmon, 390 So. 2d 635 (Ala. 1980). Matters raised on appeal must have been presented to the trial court at some stage. Rule 4(a)(3) and Committee Comments thereto, [Ala.] R. App. P."

Turnbow, 674 So. 2d at 575.

However, were we to consider GP's argument, we would reject it. Gamble argues that, assuming that the trial court had acquired and considered Blanton's written report, any such error would have been harmless because the report was duplicative of Blanton's trial testimony. According to GP, the trial court could not have found in its judgment that "Gamble is not capable of being retrained and is, therefore, not a candidate for vocational rehabilitation into some other line of work" unless it had reviewed Blanton's written report. However, we agree with Gamble that the trial court's finding is amply supported by Blanton's trial testimony, which was to the effect that Gamble lacked transferable skills and that "[i]t would be really hard to get her over into another job" based on her work experience and her pain level, which would prevent her from being able to "relearn" and change to a job requiring far less manual-labor ability than those she had previously held. Thus, assuming, without deciding, that the trial court did improperly acquire and consider Blanton's written report, any consideration of it would have been harmless in this context and not a basis for reversal. See

Pipeline Technic, L.L.C. v. Mason, 6 So. 3d 1176, 1181 (Ala. Civ. App. 2008).

Finally, GP contends, relying on Bostrom Seating, Inc. v. Adderhold, 852 So. 2d 784, 799 (Ala. Civ. App. 2002), that the trial court wrongfully required it to pay Gamble's litigation costs without proof of those costs. Although GP is correct that an award of costs without proof substantiating those costs is reversible error, see Bostrom Seating, 852 So. 2d at 799, the trial court in the present case did not award costs without substantiating proof. Instead, the trial court announced that it would award costs upon Gamble's filing a cost bill, presumably with proper substantiation, within 45 days of the entry of the judgment.

According to Gamble, "[t]he 45-day window was subsequently interrupted by GP's filing of its notice of appeal on May 9, 2018." We take that to mean that Gamble has yet to file her cost bill and, therefore, that no costs have been taxed to GP as of the date of this opinion. Contrary to Gamble's apparent belief, the trial court did not lose jurisdiction to tax costs after the filing of GP's notice of

appeal. See Hinson v. Holt, 776 So. 2d 804, 813 (Ala. Civ. App. 1998). In Hinson, we determined that,

> "[b]ecause '[t]he assessment of costs is merely incidental to the judgment and may be done at any time prior to issuance of execution,' Littleton v. Gold Kist, Inc., 480 So. 2d 1236, 1238 (Ala. Civ. App. 1985), we conclude that a motion for costs pursuant to Rule 54(d), Ala. R. Civ. P., may properly be ruled upon by the trial court at any time before the issuance of execution, regardless of the pendency of an appeal."

Hinson, 776 So. 2d at 813. Until Gamble presents the trial court with a list of the costs she claims and the trial court orders GP to be responsible for those requested costs, we have nothing to review on the taxation-of-costs issue, and GP's appeal, insofar as it relates to this issue, is premature and must be dismissed.

In conclusion, after a thorough consideration of the record on appeal and GP's arguments pertaining to the trial court's judgment, we perceive no error insofar as the trial court determined Gamble's MMI date, determined Gamble to be permanently and totally disabled, and calculated the benefits due to Gamble; therefore, we affirm the trial court's judgment. However, insofar as GP challenges the trial court's award of costs to Gamble, we note that the trial court has yet

to issue a judgment on the issue of costs, rendering GP's appeal on this issue premature, and, thus, we dismiss GP's appeal as to this issue.

APPEAL DISMISSED IN PART; AFFIRMED.

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