

ADVERSE CASE ALERT – EX PARTE HAYES

DAVID HANNAN JOHNSTONE, ADAMS, BAILEY, GORDON & HARRIS, LLC



On March 18, 2011, in a unanimous opinion, the Alabama Supreme Court reversed a favorable opinion for employers from the Alabama Court of Civil Appeals.

Previously the Court of Appeals in *Vintage Pharmaceuticals, LLC v. Hayes* 2007 WL 268453 (Ala. Ct. Civ. App. September 14, 2007) had itself unanimously reversed a finding of permanent and total disability by the Circuit Court Judge of Madison County. The trial court below had concluded that an injury to a foot had resulted in a non-scheduled injury to the body as a whole and found that the claimant Thomas Hayes was permanently and totally disabled. Mr. Hayes had worked as a custodian and sustained an open fracture of his right heel bone in a forklift accident. The injury was severe and involved several complications. Just as significantly, Hayes had a congenital defect to his left foot on which he had received surgery as a child. Hayes had been able to accommodate the congenital left foot defect with a normal right foot, but, after the right foot was injured in the subject accident, his feet could no longer function properly and, in addition he had to elevate his right foot throughout the day. After observing the various witnesses, including the claimant Hayes, the trial court concluded that the

effect of Hayes' physical injury to his right foot extended beyond that member and was entitled to compensation outside the schedule set out at § 25-5-57(a)(3)a., Ala. Code 1975. The trial court then specifically considered the vocational disability evidence and concluded that, because of all of Mr. Hayes' previous deficits, the loss of the right lower extremity had an increased impact upon the patient's ability to stand, walk, and perform functional activities, and, finally, based upon all factors, along with the age of the plaintiff, the trial court opined that Mr. Hayes had sustained an injury to his right foot that resulted in a **permanent total disability**.

Vintage Pharmaceuticals appealed to the Court of Civil Appeals, which compared Mr. Hayes' condition favorably to those suffered by the plaintiff in *Ex parte Drummond Co.*, 837 So. 2d 831 (Ala. 2002), who coincidentally had sustained a damage to a lower extremity and apparently had to elevate one leg at night. The Court of Civil Appeals analogized that the injury sustained by the plaintiff in *Drummond*, Mr. Pate, were very similar to those sustained by Mr. Hayes and further stated that Hayes had not "established that his right-foot injury caused an injury to any particular non-scheduled part of the body". *Vintage Pharmaceuticals, LLC v. Hayes* at *3. Based on the foregoing rationale, the Alabama Court of Civil Appeals reversed the judgment of the trial court and held that injury to Mr. Hayes was a scheduled injury and reversed the trial court.

Mr. Hayes then sought certiorari to the Alabama Supreme Court to review whether the Alabama Court of Civil Appeals' decision conflicted with the Alabama Supreme Court's prior decisions in *Ex parte Drummond Co.*, supra, and *Ex parte Jackson*, 997 So. 2d 103 (Ala. 2008).

The Alabama Supreme Court unanimously reversed the Alabama Court of Civil Appeals. *Ex parte Hayes*, 2011 WL 926047 (Ala., March 18, 2011). Relying principally upon the factors enumerated in the *Drummond* case, the Alabama Supreme Court reiterated its considerations from *Drummond* and also specifically relied upon an earlier decision of *Bell v. Driskell*, 213 So. 2d 806 (Ala. 1968), and language from 4 Lex K. Larson, *Larson's Workers' Compensation Law* 87.02 (2001), as follows:

"The great majority of modern decisions agree that, if the effects of the loss of the member extend to other parts of the body and interfere with their efficiency, the schedule allowance for the lost member is not exclusive."

Hayes, 2011 WL 926047 at *4

The Alabama Supreme Court emphasized that when evidence is presented to a trial court sitting without a jury, appellate courts should defer to the trial court to make credibility determinations and to weigh the evidence presented and pointed out that the role of the appellate court is not to reweigh the evidence but to affirm the judgment of the trial court if its findings are reasonably supported by the evidence and the correct legal conclusions have been drawn therefrom. *Hayes*, 2011 WL 926047 at *3

In the final analysis, the Alabama Supreme Court simply concluded that the Alabama Court of Civil Appeals had not appropriately reviewed the evidence and had favorably – but mistakenly so – compared the injury sustained by Hayes with the injury discussed in *Drummond*. Interestingly, in *Drummond*, the Alabama Supreme Court, despite setting out parameters that would allow a plaintiff to claim compensation outside the workers' compensation schedule, actually concluded that the plaintiff in that case had **not** done so. (Maybe that was because Charles Carr helped with the appeal on that one.) Therefore, we should all be aware if there is enough evidence at the trial court level to support a circuit court judge's decision taking the injury outside the schedule (based principally upon the language cited above from *Larsen's Workers' Compensation Law*), then the

employer will be significantly at risk before the Alabama Supreme Court in spite of what the Alabama Court of Civil Appeals might do at the first level of appeal.

David Hannan graduated from Auburn University in 1968, and from the University of Alabama Law School in 1971. Upon graduation, David began his law practice with the firm of Johnstone, Adams, Bailey, Gordon & Harris, LLC, where he has practiced ever since. After coming to Mobile, David has been active in professional as well as numerous civic organizations. He is a member of the International Association of Defense Counsel and the Maritime Law Association. David's workers' compensation experience began in the 1970s when he was one of the first lawyers to depose Dr. Irving Selikoff at New York City's Mount Sinai Hospital in a mesothelioma case. A long-time member of ASIA, David has been an AV-rated lawyer in Martindale-Hubbell for 25 years. Mr. Hannan may be reached at Johnstone Adams, P. O. Box 1988, Mobile, Alabama, 36633, phone (251) 432-7682, email dch@johnstoneadams.com.