UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1890

September Term, 2014

WILBERT LEE TAYLOR

v.

BUDGET RENT A CAR, INC. ET AL.

Graeff,
Friedman,
Moylan, Charlie E., Jr.
(Retired, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: January 19, 2016

Wilbert L. Taylor, appellant and cross-appellee, appeals from a jury verdict in the Circuit Court for Baltimore City, affirming a decision of the Workers' Compensation Commission ("WCC"), which found: (1) Mr. Taylor had not proved that the disability of his lumber spine was causally related to his October, 19, 2011, accidental injury; (2) any disability related to the accidental injury on October 19, 2011, did not cause Mr. Taylor to become temporarily and totally disabled; and (3) Mr. Taylor did not prove that the subsequent injury to his left leg and knee on September 17, 2013, was causally related to the accidental injury of October 19, 2011.

Mr. Taylor presents the following question for this Court's review:

> Did the Workers' Compensation Commission by its November 25, 2014 Order, or the circuit court subsequently, misconstrue and misapply the law and the facts or otherwise err or abuse its discretion in deciding [a]ppellant's case.

Budget Rent A Car, Inc. and American Casualty Insurance Company of Reading ("Budget Rent A Car"), appellees/cross-appellants, present one additional question for our review, as follows:

> Did the circuit court improperly allow hearsay medical records and opinions into evidence without a proper foundation, and if so, should summary judgment have been granted to cross-appellants after Mr. Taylor proffered that he was not presenting any expert medical testimony?

For the reasons set forth below, we shall affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

On October 19, 2011, Mr. Taylor was working part-time as a shuttle driver for Budget Rent A Car in Hanover, Maryland. Mr. Taylor sustained an injury when he bent down to pick up a piece of trash and slipped on a wet, oily patch of ground. Mr. Taylor

reported that he "did a split" and slid "spread-eagled" onto the ground, striking his right hip, buttock, and back of his right leg on the concrete. Mr. Taylor filled out an incident report that day, stating that his "right hip/leg tightened up" approximately two hours after the incident.

On December 24, 2011, Mr. Taylor visited his primary care provider. The treatment notes from that visit indicate that Mr. Taylor complained of a dental abscess. The notes further state: "R[ight] leg sprain – 1 week ago at work – R[ight] thigh and leg was hurting for a few days, but now it feels fine. . . . Myalgia – R[ight] leg."[1] Mr. Taylor was prescribed "Advil."

On February 23, 2012, Mr. Taylor filed a claim for benefits with the WCC.[2] On April 5, 2012, the WCC "determined that [Mr. Taylor] sustained an accidental injury . . . arising out of and in the course of employment on 10/19/2011 and that the average weekly wage was $175.00." It ordered that "the claim for compensation filed with this Commission in this case by the said claimant against the said employer and insurer be held pending until such time as the nature and extent of the claimant's disability, if any, can be determined."

[1] "Myalgia" is medical term meaning "tenderness or pain in the muscles; muscular rheumatism." *Taber's Cyclopedic Medical Dictionary* 1519 (21st ed. 2009).

[2] Appellant included in his record extract a claim form dated 1/31/2012. He stated at oral argument that the Workers' Compensation Commission ("WCC") would not accept this because it had changed forms, but he included it in the record extract because it was the only one that he had.

On March 10, 2013, Mr. Taylor requested an examination with Multi-Speciality Health Care. His new patient form stated that he had "occasional numbness, tingling [and] weakness" in his low back, hip, knee, and leg. Mr. Taylor states that appellee's insurer refused to authorize payment for this treatment visit.

On July 3, 2013, after a hearing, the WCC ordered that appellees authorize x-rays to Mr. Taylor's right hip, right thigh, and right knee. It further ordered that the issue of permanent disability was reserved and would be reset only upon request.

On July 17, 2013, Mr. Taylor was evaluated by Constantine A. Misoul, M.D., at Multi-Specialty Health Care. Dr. Misoul noted in his report that Mr. Taylor

> complains of pain on the right side of his low back and buttock region, which radiates into the back of his thigh with numbness and tingling. . . . It hurts him with prolonged ambulation and climbing stairs. His right knee, which he hurt as well, is still sore on the medial aspect with kneeling, squatting and climbing stairs. He denies any locking or giving way episodes.

Dr. Misoul's impressions from the visit were as follows:

1. Facet driven lumbar spine pain, post-traumatic, work related.
2. Right lumbar radiculitis, post-traumatic, work related.
3. Right sacroiliitis, post-traumatic, work related.
4. Possible medial meniscus tear right knee, post-traumatic, work related.

Dr. Misoul recommended that Mr. Taylor "get his claim amended at the Workman's Compensation Commission level" because "his problem is not hip related, but is actually low back and sacroiliac joint related, even though he fell on his hip." Dr. Misoul stated "within a reasonable degree of medical certainty, that [Mr. Taylor's] present difficulty is directly and causally related to [Mr. Taylor's] work-related injury."

On July 23, 2013, Mr. Taylor received an MRI of his spine and right knee. His doctors conducted a follow-up evaluation on August 7, 2013. The MRI of Mr. Taylor's right knee revealed "small cystic abnormality . . . which may represent a small synovial cyst, thickening of the medical [sic] collateral ligament, lateral meniscal degeneration with possible fraying or small under surface tear of the anterior horn, diffuse thickening of the distal iliotibial band. Mild cartilage thinning and degeneration without focal full thickness cartilage defect." The MRI from Mr. Taylor's lumbar spine revealed "subtle spondylolisthesis at L5-S1," "mild disc degeneration with disc bulge at the L1-L2, L3-L4, L4-L5 levels, as well as the L5-S1 level with narrowing of the foramina at the L3-L4 and L5-S1 levels." Mr. Taylor was provided a "Disability Form" from his healthcare provider, which indicated that he was "disabled and therefore unable to perform [his] usual work duties from 08/07/2013 to 08/28/2013."

On August 22, 2013, Mr. Taylor received an electrodiagnostic consultation. The report from that visit indicated that all the tests performed produced normal results. On August 28, 2013, Mr. Taylor had another follow-up visit with his doctor, who issued another "Disability Form," indicating that he would be unable to work until September 25, 2013.

On September 3, 2013, Robert Riederman, M.D. conducted an Independent Medical Evaluation of Mr. Taylor. Dr. Riederman reviewed Mr. Taylor's medical records, including those from Dr. Misoul. He stated that, "[b]ased on the history that has been provided, Mr. Taylor sustained soft tissue injuries to his low back, buttocks, right thigh,

and right knee when injured during the course of his employment on October 19, 2011," and "a favorable prognosis should be expected following the self-limited injury." Dr. Riederman continued:

> Mr. Taylor gives history of prior low back and right knee injuries with full recovery. The injury of October 19, 2011, was superimposed upon pre-existing degenerative disease, spondylolysis, and degenerative spondylolisthesis at L5-S1 of the lumbar spine and pre-existing mild age-related degenerative disease of the right knee.
>
> Based on available objective clinical data, a favorable prognosis should be expected following the October 19, 2011, injury.
>
> Based on available objective clinical data, I do not believe that Mr. Taylor's current subjective complaints are causally related to the injury of October 19, 2011. His objective findings are those pre-existing degenerative disease of the lumbar spine and right knee and pre-existing degenerative spondylolisthesis at L5-S1 of the lumbar spine.
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> * * *
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> Mr. Taylor has reached the point of maximum medical improvement and may be rated for permanency. . . . Based on available objective clinical findings, I have assigned 0% permanent partial impairment to the right lower extremity related to the right hip and knee.

On September 10, 2013, Mr. Taylor filed "Issues" with the WCC. He sought medical expenses, authorization for medical treatment, and "temporary total" disability from March 12, 2013, to the date the form was filed "and continuing."

On September 17, 2013, Mr. Taylor sustained an injury to his left leg, the cause of which he attributes to his October 19, 2011, injuries. On that day, Mr. Taylor was moving a 40 pound window air conditioning unit, measuring approximately 21 inches by 19 inches by 17 inches, down his basement stairs. He was approximately three steps from the bottom when he fell. He states that he lost feeling in his right foot, his "heel would not plant on

the step," and his "foot just slipped off," causing him to fall. During the fall, he hyperextended his right leg and slammed the air conditioner onto his thigh. Mr. Taylor slid to the bottom of the stairs, and when he tried to stand and take a step, his left foot buckled. On October 22, 2013, Mr. Taylor provided written notice to appellees of this injury.

On November 19, 2013, the WCC held a hearing. On December 4, 2013, the WCC issued an order, finding that the disability of Mr. Taylor's lumbar spine was not causally related to his October 19, 2011, injury. The WCC also found that Mr. Taylor's September 17, 2013, injury was not causally related to Mr. Taylor's October 19, 2011, injury. It ordered appellees to pay for Mr. Taylor's medical expenses through July 23, 2013, but it denied Mr. Taylor's request for medical expenses after that date. It also denied Mr. Taylor's request for temporary total disability from March 12, 2013.[3]

On December 19, 2013, pursuant to Md. Code (2008 Rep. Vol.) § 9-745(d) of the Labor and Employment Article ("LE") and Maryland Rule 2-325, Mr. Taylor petitioned the Circuit Court for Baltimore City for judicial review of the WCC's order. On June 20, 2014, Mr. Taylor propounded interrogatories upon appellees. On July 29, 2014, appellees filed a motion to strike Mr. Taylor's interrogatories, arguing that he had not filed proper interrogatories. The circuit court never directly addressed appellees' motion.

[3] The WCC reimbursed appellant for mileage through July 23, 2013, but it denied his request for penalties.

On July 21, 2014, Mr. Taylor filed a motion for summary judgment, citing Maryland Rule 2-501 and arguing that there was no genuine dispute of material fact. In an attached affidavit in support of his motion, Mr. Taylor recounted the factual history of his original injury and his subsequent medical evaluations. Mr. Taylor cited no case law and made no legal argument beyond the bare demand for summary judgment.

On July 29, 2014, appellees filed an opposition to Mr. Taylor's motion for summary judgment, arguing that Mr. Taylor's motion did "not request any legal relief, and must be denied on its face." Appellees argued in the alternative that "Summary Judgment must be denied because the allegations concerning the causal connection of the claimant's low back [injury] to the Workers' Compensation claim are material facts in dispute." On August 22, 2014, the circuit court denied Mr. Taylor's motion for summary judgment.

On September 4, 2014, appellees filed a notice to take the *de bene esse* video deposition of their medical expert, Dr. Riederman. On September 17, 2014, Mr. Taylor filed a Motion for Immediate Sanctions for Discovery Failure regarding appellees' failure to respond to his June 20, 2014, interrogatories, and on September 19, 2014, Mr. Taylor filed a Motion for Protective Order to preclude appellees from conducting the *de bene esse* deposition of Dr. Reiderman. The court ultimately denied these motions.

On October 7, 2014, before the start of trial, the court discussed the witnesses that the parties intended to present. Mr. Taylor told the court that he was intending to call only himself as a witness. At this point, appellees moved for summary judgment, arguing that Mr. Taylor could not "meet his burden of proof without medical testimony supporting a

causal relationship." The court denied appellees' motion, stating that this was "a factual dispute between the parties" that would "be sent [to] the trier of fact for its determination." The court noted that Mr. Taylor "may have a difficult argument, but it is one that can be argued."

On October 8, 2014, the parties submitted their proposed verdict sheets. The court finalized the verdict sheet during closing arguments, received the parties' approval, and provided it to the jury for deliberations. As indicated, the jury returned a verdict in appellees' favor, finding no causal connection between Mr. Taylor's October, 19, 2011, injury and his lumber spine disability or his September 17, 2013, injuries. The jury also concluded that Mr. Taylor failed to prove by a preponderance of the evidence that his October 19, 2011, injuries caused him to be temporarily and totally disabled. On October 9, 2014, after the jury rendered its verdict affirming the decision of the WCC, the court issued an order remanding the case to the WCC.

DISCUSSION

Mr. Taylor argues that the "WCC and circuit court misconstrued the law . . . and misapplied the law to the facts applicable in the case decided." Although Mr. Taylor lists various complaints, the only allegation of court error that he argued with any legal support or pursued when questioned at oral argument was that the court erred in allocating the burden of proof regarding causation. *See Honeycutt v. Honeycutt*, 150 Md. App. 604, 618 (when party fails to adequately brief an argument, court may decline to address it on appeal), *cert. denied*, 376 Md. 544 (2003); *Anderson v. Litzenberg*, 115 Md. App. 549,

577-78 (1997) (refusing to address argument because appellants failed to cite any legal authority to support their contention of error). With respect to that argument, he asserts that the circuit court failed to recognize that appellees had the burdens of production and persuasion as to affirmative defense of non-causation.

Appellees argue that Mr. Taylor's contention that the burden of proof was incorrectly applied in the circuit court is waived because it was not raised in the circuit court, noting that Mr. Taylor did not object to the court's jury instructions or the final verdict sheet provided by the circuit court. In any event, they contend that the verdict sheet provided to the jury correctly applied the law, asserting that Mr. Taylor, "as the appealing party, had the burden of proving that the WCC decision was incorrect, including, but not limited to, the causal relationship between his current disability and the original accident as well as the causal connection between the original accident and the second injury."

Initially, we agree with appellees that Mr. Taylor's contention that the circuit court erred in its application of the law is not preserved for this Court's review. Maryland Rule 2-522(b)(5) provides as follows:

> No party may assign as error the submission of issues to the jury, the instructions of the court, or the refusal of the court to submit a requested issue unless the party objects on the record before the jury retires to consider its verdict, stating distinctly the matter to which the party objects and the grounds of the objection.

And, this Court generally will not decide an issue "unless it plainly appears by the record to have been raised in or decided by the trial court." Md. Rule 8-131(a).

Here, Mr. Taylor directs us to no place in the record where he objected to the legal principles applied by the circuit court at trial. Indeed, our review of the record indicates that Mr. Taylor's only objection to the court's jury instructions, the critical point in the trial where challenges to the basic law applicable to the case would be appropriate, was the form of the jury verdict sheet. With respect to that issue, the court ultimately adopted the substance of appellant's proposed changes, and appellant subsequently withdrew his objection. No further objection was made regarding the instructions or the verdict sheet before the jury retired. Accordingly, because Mr. Taylor did not object below to the court's instructions to the jury regarding the burden of proof, his appellate contention in this regard is not properly before this Court.[4]

Even if Mr. Taylor's arguments were preserved for this Court's review, we would find them to be without merit. Mr. Taylor is correct that under *Board of Education for Montgomery County v. Spradlin*, 161 Md. App. 155, 223 (2005), "the employer in a Workers' Compensation case bears the burden of establishing an affirmative defense, such as willful misconduct." Lack of causation, however, is not an affirmative defense. "'An affirmative defense is one which directly or implicitly concedes the basic position of the

[4] At oral argument, when asked how the circuit court erred with respect to the burden of proof, Mr. Taylor stated that the court erred in submitting the case to the jury. Although Mr. Taylor did file a motion for summary judgment, we agree with appellees that the motion properly was denied because it "did not contain any argument, was not supported by and statutory or case law, and failed utterly to request any specific relief. It merely attaches an Affidavit, which for the most part recites his medical treatment." *See* Md. Rule 2-311(c) ("A written motion and a response to a motion shall state with particularity the grounds and the authorities in support of each ground."). Mr. Taylor did not argue in his motion, as he does on appeal, that appellees had the burden of proof regarding causation.

opposing party, but which asserts that notwithstanding that concession the opponent is not entitled to prevail because he is precluded for some other reason.'" *Liberty Mut. Ins. Co. v. Ben Lewis Plumbing, Heating & Air Conditioning, Inc.*, 121 Md. App. 467, 478 (1998) (quoting *Armstrong v. Johnson Motor Lines, Inc.*, 12 Md. App. 492, 500 (1971)), *aff'd*, 354 Md. 452 (1999). Affirmative defenses include drug usage, intoxication, willful misconduct, and injuries that were self-inflicted. LE § 9-506. All of these defenses fit the definition of an "affirmative defense" because they concede that the claimant's allegations are essentially true, but they nonetheless argue that an additional fact or circumstance relieves the employer of responsibility.

Causation, on the other hand, is not an affirmative defense. Rather, it is an element of the claimant's prima facie case. *See Mackin & Assoc. v. Harris*, 342 Md. 1, 10 (1996) ("[T]he claimant must establish 'a direct causal connection' between the original accidental injury and the subsequent injury or condition.") (quoting *Unger & Mahon, Inc. v. Lidston*, 177 Md. 265, 269 (1939)).

Moreover, when a claimant loses before the WCC and seeks a *de novo* review of the WCC's decision at the circuit court level, he or she retains the same burdens of production and persuasion that the claimant faced at the Commission level. *Spradlin*, 161 Md. App. at 195. Therefore, Mr. Taylor was required to show that his subsequent disability and injury had a causal nexus with the original injury.[5]

[5] We agree with Mr. Taylor that a preexisting condition does not bar workers' compensation for a work-related injury that made the original condition (continued . . .)

The circuit court did not, as Mr. Taylor contends, misconstrue the law in this regard. Mr. Taylor states no claim for appellate relief.[6]

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT/CROSS-APPELLEE.

(. . . continued) worse. *See Employees' Ret. Sys. of City of Baltimore v. Dorsey*, 430 Md. 100, 117-18 (2013) ("[A] preexisting condition that is worsened by an accidental injury does not automatically disqualify an employee from receiving workers' compensation benefits, provided there is some causal relationship between the compensable accident and the injury sustained."). He still had to persuade the jury, however, of a causal relationship, which he failed to do.

[6] Given our resolution of this case, it is not necessary to address the cross-appeal of appellees. We note, however, that Mr. Taylor appeared to get more than that to which he was entitled, when the court denied appellee's motion for summary judgment and permitted him to present his case to the jury, without an expert medical witness to testify regarding causation. *See S.B. Thomas, Inc. v. Thompson*, 114 Md. App. 357, 385 (1997) ("Whether an injury to the back could set in motion a process that could result in a herniated disc eight months later was a question that self-evidently called for input from medical experts."); *Strong v. Prince George's County*, 77 Md. App. 177, 184 (1988) (concluding that expert medical testimony was required to establish the causal connection between a car accident and the claimant's subsequent pancreatitis).