UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1668

September Term, 2013

NYLENE B. LOGAN

v.

BOARD OF EDUCATION FOR
PRINCE GEORGE'S COUNTY

Arthur,
Friedman,
Davis, Arrie W.,
(Retired, Specially Assigned),

JJ.

Opinion by Davis, J.

Filed: August 5, 2015

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland court as either precedent within the rule of *stare decisis* or as persuasive authority. Md. Rule 1-104.

Appellant, Nylene B. Logan, appeals from a verdict rendered by a jury in the Circuit Court for Prince George's County (Clarke, J.) affirming the decision of the Maryland Worker's Compensation Commission, which had determined that the injury that she alleged she sustained in the course of her employment as a public school teacher, *i.e.*, carpal tunnel syndrome, was not proximately caused as a result of being struck on her right hand by a broom wielded by a student during the course of an affray. Appellant filed the instant appeal in which she raises the following issue,[1] which we quote:

> Did the circuit court err in failing to properly instruct the jury regarding an aggravation of a pre-existing condition?

FACTS AND LEGAL PROCEEDINGS

Appellant, who had been employed as a "para-professional educator for special ed" approximately 13 years on April 6, 2011, was struck on her hand and wrist by a broom as she attempted to stop two of her students from fighting. She testified that, as a consequence of being struck by the broom, she experienced "tingling"in her hand and her wrist was swollen. According to appellant, on May 18, 2011, she sought treatment with Kaiser Permanente and later was treated by Dr. McGovern who diagnosed her condition as "traumatic carpal tunnel syndrome" of the right hand and wrist and further rendered the opinion that she did not have any pre-existing problems with her hand or wrist.

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[1] Appellee submits the following questions for our review:

I. Was the issue at bar, the refusal of the trial court to give a jury instruction, preserved by the appellant?

II. Did the circuit court correctly refuse an instruction that was not generated by the evidence and likely to confuse the jury?

On October 11, 2011, pursuant to the recommendation of the appellee, appellant was evaluated by Dr. Peter Innis, who concluded that appellant's carpal tunnel syndrome was not related to her accidental injury, but rather was related to her pre-existing "risk factors." Dr. Innis noted that appellant was " 48 years old," that she had a "body mass index greater than 30," and that she had "parimenopausal status." Dr. Innis also stated that trauma can cause carpal tunnel syndrome, but it was his opinion that trauma did not cause the condition in appellant's case. Finally, Dr. Innis opined that patients with the aforesaid risk factors and conditions are more likely to develop carpal tunnel syndrome if they are subjected to traumatic injury.

On January 4, 2012, a hearing was held by the Maryland Worker's Compensation Commission. The Commission determined that appellant's condition was not causally related to the accidental injury sustained by appellant on April 6, 2011; consequently, appellant's claim for surgery was disallowed.

Appellant appealed the decision of the Maryland Worker's Compensation Commission to the Circuit Court for Prince George's County, which commenced its hearing on August 20, 2013. Before the Circuit Court, appellant reiterated the testimony that she had presented before the Worker's Compensation Commission, *i.e.*, that she had been struck by the broom wielded by a student during an affray, that she had not been involved in any prior accidents, that she had never had any prior treatment to her right hand or wrist, nor had

she had any treatment to her left hand or wrist, nor had she experienced any numbness or tingling in either hand prior to the accident.

Moreover, she had not experienced any problems with her left hand, nor had she participated in any activities that involve the repetitive use of the hands, and she was neither diabetic nor suffered from hypothyroidism. She further testified that she had never had EMG/nerve conduction studies done, nor had she ever had a diagnosis of carpal tunnel syndrome prior to the accident. She also testified that she had never engaged in activities that involve repetitive use of the hands; she was neither diabetic nor had she ever suffered from hypothyroidism. Finally, she had never had EMG/nerve conduction studies done prior to the accident and she had never had a diagnosis of carpal tunnel syndrome prior to the accident.

On August 6, 2013, the deposition of Dr. Kevin McGovern was taken and, on August 7, 2013, Dr. Peter Innis was deposed. The depositions of the two doctors were presented to the jury on August 20, 2013.

Dr. McGovern, testifying, on appellant's behalf, stated that:

> Trauma is a very common cause of carpal tunnel syndrome. It's well accepted that trauma can cause carpal tunnel syndrome. It can cause it in two ways. It can result in the carpal tunnel syndrome by causing swelling. Swelling in the carpal tunnel in the wrist area causes pressure on the nerve or it can be the result of an injury that causes the canal to be made smaller, which would happen if you have a fracture. So if you have a fractured wrist, you can get carpal tunnel because you change the shape and size of the canal. If you have wrist sprains, or injuries, such as this, where you're struck over the wrist and

> you develop swelling near the carpal tunnel, you can develop carpal tunnel as well.
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> ***

Dr. McGovern, further testified that, as a result of the accident, she experienced a strain to her right hand, he opined, and "she developed carpal tunnel syndrome as a result of being hit by a broomstick on her wrists and hands, causing the swelling in the hand and wrist at that time." Dr. McGovern concluded that, because there was no medical evidence that appellant had a pre-existing carpal tunnel syndrome, the accident was the direct cause of appellant's carpal tunnel syndrome.

On cross-examination, Dr. McGovern opined that, because appellant suffered from carpal tunnel syndrome only in one hand, the cause of appellant's condition is trauma, and not systemic. He further testified that appellant's condition had not been caused by "other risk factors" because in such case, there would have been impairment to both hands had the cause been systemic and not traumatic. On redirect examination, Dr. McGovern reiterated his opinion that appellant's condition was the result of a direct causal relationship and of the noninvolvement of any risk factors.

The body of the testimony of Dr. Innis indicates that the "type of injury sustained by appellant, with minimal swelling and atypical presentation, is not causative of traumatic carpal tunnel syndrome. Had appellant's wrist been swollen to twice its size for at least a week or two, Dr. Innis testified that he "would have concluded otherwise, ...that is because that activism of injury, carpal tunnel syndrome only in one hand."

Appellant submitted the following proposed Claimant's Instruction No. 9 to the Circuit Court:

> An employee may receive workers compensation benefits, even if the accidental injury only worsens or hastens a condition which existed before the injury.

The trial judge, pursuant to the request of appellant's counsel, instructed the jury. as follows:

> For claimant to prevail, the accidental injury of April 6th, 2011 must be the cause of the carpal tunnel syndrome.

After the trial judge promulgated its instructions to the jury, the following colloquy transpired:

> The Court: Satisfied with the instructions?
>
> Mr. Schulz: I would just - -
>
> Mr. Sturm: Yes
>
> *Mr. Schulz*: - - Renew my objection to the aggravation instruction not being given.
>
> The Court: All right. So that's 30.2.
>
> Mr. Schulz: Yes.
>
> The Court: All right
>
> *Mr. Sturm*: And I'll renew my argument, Your Honor, that there is no evidence of any prior condition.
>
> The Court: Well, I didn't - -
>
> Mr. Schulz: No. No.

The Court: He's just - -

Mr. Schulz: Yeah. I'm just - - I'm just - -

Mr. Sturm: Oh, I thought you were looking for my response.

The Court: I just wanted to make sure you were satisfied with - -

Mr. Sturm: I'm satisfied.

The Court: Okay. Great.

Mr. Sturm: Thank you.

Mr. Schulz: Thank you, Your Honor

(Emphasis supplied.)

LEGAL ANALYSIS

I

Appellant, in essence, raises only one issue on this appeal, *i.e., "*Whether the circuit court erred in failing to instruct the jury regarding the appropriate law concerning aggravations of pre-existing condition." In support of that singular issue, she asks that we consider (1) whether the instruction is an accurate statement of the law, (2) whether the instruction is relevant considering the evidence presented to the jury and (3) whether the substance of the requested instruction was promulgated by the instructions actually given to the jury. In light of the fact that the questions presented by appellee, *i.e.,* whether the trial judge's refusal to grant appellant's requests was preserved and whether the substance of the requested instruction was actually propounded by the trial judge have not been put at issue

by appellee's response, these issues need not detain us long. Stated otherwise, appellee's retort, on this appeal, essentially concedes that the requested instruction was not given and that the substance of the requested instruction was not promulgated by the instructions actually given; thus, the only issue presented is whether the requested instruction was relevant considering the evidence presented to the jury.

Appellee, in asserting that appellant did not preserve the issue as to whether the trial court correctly refused to give a jury instruction, cites Md. Rule 2- 520, which provides:

> (e) Objections. No party may assign as error the giving or the failure to give an instruction unless the party objects on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection. Upon request of any party, the court shall receive objections out of the hearing of the jury.

In support of her argument that her counsel complied with the mandate of Maryland Rule 2-520, appellant points out that the record indicates she "noted an exception to the court's failure to instruct the jury on the law regarding aggravation of a pre-existing condition after the court instructed the jury." The trial judge, at E.152 of the record, stated: "All right. You can pause that for a minute" and the transcript, at line 13, reflects that the recording was paused at 2:37 P.M. , and resumed at line 14 at 2:55 P.M.; thereafter the trial judge engaged in discussions of the verdict sheet, but there was no further mention of instructions.

Appellee's counsel concedes, "Although, to be fair, the Court seemed to understand which instruction was being sought which might explain the proponent's less than strict

compliance with Rule 2-520."[2] Counsel, however, submits that it was incumbent on appellant's counsel "to make sure the record fully reflected the specific objection and the specific request and the reasons and grounds why counsel believed the instruction was generated by the evidence and proper on the law." We agree.

Once appellant's appellate counsel reviewed the record, the fact that the record reflected that it was the Board's counsel, Charles Schultz, that stated, " Renew my objection to the aggravation instruction not being given," rather than appellee's counsel, he should have alerted appellant's counsel of the need to correct the record. Maryland Rule 8-413 provides, in pertinent part:

> The lower court may order that the original papers in the action be kept in the lower court pending the appeal, in which case the clerk of the lower court shall transmit only a certified copy of the original papers. The lower court, by order, shall resolve any dispute whether the record accurately discloses what occurred in the lower court, and shall cause the record to conform to its decision.

It was incumbent upon appellant's counsel to have the record corrected, pursuant to Maryland Rule 8-413, as soon as the transposition of the names of the lawyers was discovered. Because we deem it clear, on its face, that appellant's counsel attempted to register his exception to the court's failure to give the requested instruction and, because of the bizarre circumstances surrounding the eighteen-minute conference off the record, we shall find that appellant's trial counsel preserved the issue for our review.

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[2]Appellee's counsel advises us that he was not trial counsel in the instant case.

II

It is incumbent on appellant, in order to receive worker's compensation benefits, pursuant to Clamant's Instruction No. 9, to adduce credible evidence that, in her capacity as an employee of the Prince George's County Public Schools, she sustained an accidental injury that "worsen[ed]or hasten[ed] a condition which existed before the injury. When an issue involves a complicated medical question, such as causal connection of a person's disability to an injury, expert testimony is required. *Baltimore County v. Kelly*, 391 Md. 64, 891 A. 2d 1103 (2006); *Kantar v Grand Marques Café*, 169 Md. App. 275, 900 A.2d 295 (2006). In other words, she was required to adduce expert testimony of the presence of an existing condition before her work-related injury and testimony that the work-related injury, in fact, "worsen[ed] or hasten[ed]" the pre-existing condition.

Dr. McGovern and Dr. Innis both testified that appellant had the following risk factors: Appellant's age (48 years old), body-mass index greater than 30, hot flashes, high blood pressure, perimenopausal status, hypertension and the fact that she weighed, 160 pounds, *vis a vis* her height of five feet four inches. Dr. McGovern, however, when asked if appellant had risk factors, responded, "It's not a true risk factor."

Both witnesses responded to hypothetical questions regarding the onset of carpal tunnel syndrome as a result of worsening of a pre-existing condition. In the final analysis, Dr. Innis concluded:

> My opinion, within a reasonable degree of medical certainty at that time was that she had sustained a sprain/contusion from getting hit on the hand with a broom handle. *She didn't have the typical story for carpal tunnel. She had a totally normal examination and nothing abnormal on exam to suggest carpal tunnel*.

(Emphasis supplied.)

The sum total of Dr. McGovern's testimony was his response to counsel's question regarding why it would not be important to him that he had no medical records to indicate appellant had never had any prior problems with her right hand or wrist:

> If this patient had symptoms of carpal tunnel before the injury, then we would now that the carpal tunnel was there before the injury. There would still be a possibility that the injury could worsen it by causing increased swelling, but, in that case, we would only be able to say that the carpal tunnel has worsened. We wouldn't be able to say that it was caused by it. *In this case*, to a reasonable degree of medical probability, *this injury caused her carpal tunnel*.

(Emphasis added.)

Dr. Innis similarly opined:

> My opinion, within a reasonable degree of medical certainty, is, if Ms. Logan, in fact, has carpal tunnel syndrome, because I'm still not certain of that, that *it would not be causally related to the work injury where she was hit with a broom handle.*
>
> ***
>
> That is because the mechanism of injury which, through the medical records, caused the minimal swelling, minimal trauma to the area of the wrist and the area of the carpal tunnel, that mechanism could not be causal for carpal tunnel syndrome. And this patient, again, has totally normal physical exam, not

> completely typical history for carpal tunnel syndrome and a minimally abnormal electric test, which I've seen like this a number of times.

(Emphasis added.)

The focus of the questioning of the expert witnesses by both counsel was on whether a pre–existing condition *caused* appellant's carpal tunnel syndrome, rather than whether appellant's pre-existing condition was aggravated or worsened by carpel tunnel syndrome. We surmise, from our review of the record, *in toto*, that the emphasis on what caused, rather than what worsened, appellant's carpal tunnel syndrome, was because the jury was guided by the instruction actually given. Nevertheless, counsel for appellant and appellee posited innumerable hypothetical and direct questions to the expert witnesses as to whether a pre-existing condition was either aggravated or worsened or was the cause of appellant's carpal tunnel syndrome.

Notwithstanding that both expert witnesses testified as to appellant's pre-existing "risk factors," the testimony of Dr. McGovern ruled out the postulation that the carpal tunnel syndrome *worsened* any pre-existing physical condition, but instead testified that there was no prior existing condition; rather the carpal tunnel syndrome *caused* appellant's present condition. Likewise, Dr. Innis concluded that, rather than worsening a pre-existing condition, appellant may "not even have carpal tunnel syndrome," but, if she does, the carpal tunnel syndrome *caused* her present condition. Despite the innumerable hypothetical questions posited to the medical experts as to what *could result* under certain circumstances (not present in the instant case) regarding aggravation or worsening of appellant's condition,

neither witness testified that the carpal tunnel syndrome was worsened by a pre-existing condition of appellant. Consequently, Instruction No. 9, requesting that the jury be instructed that appellant's accidental injury worsened or hastened a pre-existing condition, was not generated by the evidence.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED;
COSTS TO BE PAID BY APPELLANT.