04/04/2014

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2013-2014

2120701

Winn-Dixie Montgomery, LLC

v.

Richard Purser

Appeal from Jefferson Circuit Court
(CV-12-901747)

On Application for Rehearing

THOMPSON, Presiding Judge.

The memorandum affirmance of October 25, 2013, is withdrawn, and the following is substituted therefor.

On June 5, 2012, Richard Purser filed in the Jefferson Circuit Court ("the trial court") an action seeking workers' compensation benefits from his employer, Winn-Dixie Montgomery, LLC ("Winn-Dixie"), for an injury he claimed he suffered during the course of his employment. Winn-Dixie answered and denied liability.

In October 2012, Purser filed a motion seeking a hearing on the issue of the compensability of his claimed injury. In that motion, Purser alleged that Winn-Dixie had refused to pay him temporary-disability benefits and had refused to pay his medical expenses. The trial court granted that motion and scheduled a hearing for December 13, 2012.

The trial court conducted an ore tenus hearing on December 13, 2012, at which, according to the trial court's order, Purser testified. In addition, during that ore tenus hearing, the trial court admitted a number of exhibits into evidence. The transcript of the December 13, 2012, hearing is not contained in the record on appeal.

On January 10, 2013, the trial court entered an order in which it found, among other things, that Purser's injury arose out of and in the course of his employment, that Winn-Dixie

was responsible for the payment of reasonable and necessary medical treatment for Purser's injury, and that Purser was entitled to temporary-total-disability benefits. See Belcher-Robinson Foundry, LLC v. Narr, 42 So. 3d 774, 776 (Ala. Civ. App. 2010) (holding that there existed a final judgment when the trial court's order determined "that the employee's accident arose out of and in the course of his employment, that the employer was responsible for the employee's medical treatment, and that the employer was responsible for payment of temporary-total-disability benefits"). Winn-Dixie filed a postjudgment motion that was denied by operation of law pursuant to Rule 59.1, Ala. R. Civ. P. Winn-Dixie timely appealed.

Winn-Dixie asserts three main issues on appeal, one of which contains numerous subparts. Winn-Dixie contends that the medical exhibits that Purser submitted to the trial court were not properly authenticated, that Purser failed to prove legal and medical causation, and that the trial court erred in awarding Purser temporary-total-disability benefits. However, as is explained below, either this court is unable to consider

those arguments or the arguments do not provide a leal basis on which to reverse the trial court's judgment.

The record on appeal contains no transcript of the ore tenus hearing. Winn-Dixie has represented to this court that the ore tenus hearing was not transcribed. Neither party has submitted a Rule 10(d), Ala. R. App. P., statement of the evidence to this court. See Rule 10(d), Ala. R. App. P. ("If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection.").

> "'"'This court cannot assume error, nor can it presume the existence of facts [as] to which the record is silent.' The appellant has the burden of ensuring that the record contains sufficient evidence to warrant reversal."' White v. Riley Constr., Inc., 745 So. 2d 877, 879 (Ala. Civ. App. 1999) (quoting Alfa Mut. Gen. Ins. Co. v. Oglesby, 711 So. 2d 938, 942 (Ala. 1997)); see also Martin v. Martin, 656 So. 2d 846, 848 (Ala. Civ. App. 1995) ('An error asserted on appeal must be affirmatively demonstrated by the record, and if the record does not disclose the facts upon which the asserted error is based, such error may not be considered on appeal.')."

Kimbrough v. Kimbrough, 963 So. 2d 662, 665-66 (Ala. Civ. App. 2007).

In this case, the trial court received ore tenus evidence that is not contained in the record on appeal. Accordingly, this court must assume that the evidence that is not contained in the record on appeal is sufficient to support the trial court's order. Elliott v. Bud's Truck & Auto Repair, 656 So. 2d 837, 838 (Ala. Civ. App. 1995) ("Where the trial court hears oral testimony, and that testimony is not in the record on appeal, either in a transcript or summarized in a Rule 10(d) statement, it is conclusively presumed that the testimony is sufficient to support affirmance."). Thus, because of the lack of a transcript of the ore tenus hearing before the trial court, this court is unable to determine whether the multiple arguments Winn-Dixie asserts on appeal concerning the admissibility of certain evidence were presented to the trial court and, if so, whether Winn-Dixie timely objected to the admission of that evidence. Ex parte Coulliette, 857 So. 2d 793, 794–95 (Ala. 2003) (explaining the necessity of a timely objection to put the trial court on notice of any error to be corrected); Elliott v. Bud's Truck & Auto Repair, 656 So. 2d at 838 ("Th[ese] issue[s], and

others, simply cannot be addressed by this court, because of the inadequacy of the record.").

In Kimbrough v. Kimbrough, supra, because of the inadequacy of the record, this court rejected an argument asserted by the father in that case that he was denied his right to counsel. This court concluded that it was "unable to determine from the limited record before us whether the father requested appointed counsel or whether the father proved that he was indigent. We cannot assume that the trial court erred when error is not apparent from the record." 963 So. 2d at 666.

As in Kimbrough, this court is unable to determine in this case whether Winn-Dixie asserted before the trial court the various arguments pertaining to the admissibility of certain evidence that it includes in its briefs submitted to this court.[1] "'This court cannot assume error, nor can it

[1]Although Winn-Dixie filed a motion in limine with regard to some of that evidence, the record before this court contains no indication that that motion was properly renewed before the trial court or that the trial court determined that no renewal of the objections in the motion in limine was required. See Owens-Corning Fiberglass Corp. v. James, 646 So. 2d 669, 673 (Ala. 1994) (explaining the necessity of renewing during trial a motion in limine that has either not been ruled on or has been denied, unless the trial court has

presume the existence of facts [as] to which the record is silent. ... The appellant has the burden of ensuring that the record contains sufficient evidence to warrant reversal.'" Alfa Mut. Gen. Ins. Co. v. Oglesby, 711 So. 2d 938, 942 (Ala. 1997) (quoting Newman v. State, 623 So. 2d 1171, 1172 (Ala. Civ. App. 1993)), overruled on other grounds, Ex parte Quality Ins. Co., 962 So. 2d 242 (Ala. 2006); and Kimbrough v. Kimbrough, supra. "The record does not reveal any error, and, thus, we cannot conclude that the trial court committed error." Kimbrough v. Kimbrough, 963 So. 2d at 665-66. See also Drummond Co. v. Lolley, 786 So. 2d 509, 511 (Ala. Civ. App. 2000) ("[The appellant] has the burden to provide this court with a record containing sufficient evidence to warrant reversal. Gotlieb v. Collat, 567 So. 2d 1302 (Ala. 1990). The record cannot be changed, altered, or varied on appeal by statements in briefs. Id.").

Out of an abundance of caution, we note that we have considered whether some of the arguments Winn-Dixie has asserted on appeal could be said to be legal arguments,

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expressly stated that no renewal of the motion in limine is required).

therefore making the absence of a transcript of the hearing below immaterial.[2] Winn-Dixie argues that Purser did not present medical evidence of medical causation.[3] It is true that Purser did not present any evidence from a doctor stating that his injury was caused by his job. However, such expert medical evidence was not required for the trial court to determine that Purser had established medical causation. In Chadwick Timber Co. v. Philon, 10 So. 3d 1014, 1019-21 (Ala. Civ. App. 2007), this court discussed the requirement that a worker claiming workers' compensation benefits present evidence of medical causation. In short, this court held that expert testimony is not required to demonstrate medical causation but that the overall substance of the evidence must

[2]Winn-Dixie submitted to the trial court a postjudgment motion in which it asserted arguments that are similar to the arguments it has asserted in the briefs it has submitted to this court, so any legal, as opposed to factual, argument was preserved by that motion.

[3]We have addressed this argument in slightly more detail because it is clear from the record and the representations of both parties in their briefs submitted to this court that Purser was the only witness who testified at the ore tenus hearing. Thus, it is clear that in this case, the trial court received no expert medical testimony and no medical evidence other than the medical records that were admitted into evidence and are contained in the record on appeal.

establish that the injury was caused by the employment. Evidence indicating merely a possibility that the employment caused the injury is not sufficient. Id. Purser provided evidence to the trial court that Winn-Dixie has failed to include in the record on appeal, and, therefore, this court must presume that the overall substance of that evidence was sufficient to meet the requirements for evidence of medical causation.[4]

Winn-Dixie also contends that the trial court erred in awarding temporary-total-disability benefits; once again, to the extent that Winn-Dixie challenges whether the evidence supports that award, this court is unable to review that issue because of the evidence omitted from the record. As part of its argument on the award of temporary-total-disability benefits, however, Winn-Dixie also argues that the trial court erred in not specifically setting forth the exact amount of

[4]We note that, with regard to legal causation, Winn-Dixie argues that Purser did not present evidence of a "causal connection" between his employment and his injury. See Ex parte Patton, 77 So. 3d 591, 595 (Ala. 2011) (to establish legal causation in a workers' compensation action, the worker must demonstrate a causal connection between the work and the injury). Because Purser presented evidence to the trial court that is not contained in the record on appeal, we presume that that evidence supports the trial court's order on this issue.

the disability payments for which it is responsible. In support of this argument, Winn-Dixie cites only Weaver v. Pilgrim's Pride Corp., 106 So. 3d 417, 419-20 (Ala. Civ. App. 2012). In that case, this court held that the workers' compensation judgment at issue did not satisfy the requirement that the judgment substantially comply with § 25-5-88, Ala. Code 1975; that section requires that a workers' compensation judgment contain findings of fact and conclusions of law. In Ex parte Curry, 607 So. 2d 230, 232 (Ala. 1992), our supreme court held that substantial compliance with § 25-5-88 is sufficient and that, in the absence of detailed factual findings, an appellate court may look at the evidence to determine whether the trial court's judgment should be affirmed. In this case, the trial court's order contains a number of factual findings detailing the nature of Purser's injury and the dates on which Purser was out of work and seeking medical treatment after the denial of his workers' compensation claim.[5] That order also makes factual findings

[5]We also note that the trial court set forth in detail the reasons it found the medical evidence submitted by Winn-Dixie to be unreliable. In short, the workers' compensation doctor who evaluated Purser's left-knee injury opined that the injury was unrelated to his employment because Purser had suffered a

supporting the determination that Purser suffered an injury that warranted the award of temporary-total-disability benefits. Considering the January 10, 2013, order in its entirety, we conclude that, although it could have been more detailed, it substantially complied with § 25-5-88. Ex parte Curry, supra; American Auto. Ins. Co. of Missouri v. Hinote, 498 So. 2d 848, 851 (Ala. Civ. App. 1986).

We also note that Winn-Dixie advocates for a more definitive calculation of benefits in the trial court's order. It cites only § 25-5-88 and Weaver v. Pilgrim's Pride Corp., 106 So. 3d at 419-20, for the proposition that a trial court must make "findings of fact and state conclusions of law that are responsive to the issues presented at trial." (Emphasis added.) In making this part of its argument, Winn-Dixie asserts only that a "proper" order would calculate the specific amount of temporary-disability benefits due Purser. It does not, however, assert that a determination of the

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traumatic leg injury in an automobile accident that had occurred several years earlier. The trial court noted that the medical records upon which Winn-Dixie's doctor relied indicated that the traumatic injury was to Purser's right leg and that there was no evidence indicating that Purser had suffered an earlier injury to his left leg.

specific amount of temporary-disability benefits would be "responsive" to the issues presented to the trial court; in other words, Winn-Dixie does not contend, in either its brief on original submission or its brief on application for rehearing, that the parties asked the trial court to determine the specific amount of temporary-disability benefits due Purser. The January 10, 2013, order states that the matter was before it to make a "determination on the application of the Alabama Workers' Compensation Act, § 25-5-1 et seq., Ala. Code 1975, to [Purser's] alleged injuries at work on or about April 6, 2012." The order focuses on the resolution of the issue whether Purser's injury is compensable, and one of the legal conclusions in the order states that temporary-total-disability benefits are to be paid pursuant to the requirements of § 25-5-68, Ala. Code 1975. Although the amount of Purser's wages are included in an exhibit that was admitted into evidence, the order does not reference Purser's wages. Further, there is nothing in the record before this court to indicate whether the parties requested that the trial court make a determination of the exact amount of benefits due. It is possible that the parties agreed before the trial

court that they could make such a determination themselves following a liability determination, and it is possible that the amount of benefits was another issue in dispute. Without the transcript of the ore tenus hearing before the trial court or a Rule 10(d) statement of the evidence, this court can only speculate regarding the arguments and issues that were litigated by the parties before the trial court.

Further, Winn-Dixie, although expressing a disinclination to perform those calculations itself, does not argue that, based on any conflicting or omissive findings, it is unable to determine the amount of compensation due to Purser. Indeed, Winn-Dixie is in the same position it would have been in had it not rejected Purser's workers' compensation claim and had instead elected, in the absence of a court order, to pay him temporary-total-disability benefits pending the resolution of his workers' compensation claim. In other words, the payment of temporary-total-disability benefits under the January 10, 2013, order poses no challenges different from those encountered by an employer when it pays such benefits without being compelled to do so by a trial court. Accordingly, given the arguments asserted by Winn-Dixie in its briefs submitted

to this court and the record it supplied this court on appeal, we cannot say that Winn-Dixie has demonstrated error with regard to this issue.

Winn-Dixie also contends in its original brief submitted to this court, without citing to any supporting authority, that the trial court erred in finding that the medical charges submitted to it were reasonable and necessary, but also reserving to Winn-Dixie the right to challenge, pursuant to § 25-5-77(a), the cost of any charges by the medical providers. Section § 25-5-77(a) limits Winn-Dixie's payment for reasonably necessary medical treatment to "an amount not to exceed the prevailing rate or maximum schedule of fees." Winn-Dixie contends that Purser was required to demonstrate that each charge was within that limitation. As this court has already held, Winn-Dixie has failed to demonstrate that the evidence presented to the trial court did not support its factual determinations, such as that the medical charges were reasonable and necessary and due to be paid under § 25-5-77(a). Any reservation of an additional right to Winn-Dixie to question the amount of those charges is harmless error.

Rule 45, Ala. R. App. P. In its brief "argument" on this issue, Winn-Dixie has failed to show error.

Winn-Dixie asserts in its brief on application for rehearing that "[t]he parties agreed to and filed a Joint Stipulation of the evidence considered by the trial court.[6] All the evidence that was considered by the trial court was submitted to this court." Those statements are not supported by the materials submitted to this court. After the record on appeal was submitted to this court, the parties filed a "joint stipulation," agreeing to supplement the record on appeal to include "all exhibits that were offered and admitted into

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[6]On application for rehearing, Winn-Dixie repeatedly asserts that the matter was submitted to the trial court on exhibits only and that the record on appeal contains all the evidence that was presented to and considered by the trial court. In another part of its brief on application rehearing, however, Winn-Dixie briefly acknowledges that Purser submitted oral testimony to the trial court during the ore tenus hearing. Winn-Dixie represents to this court, as it did in a footnote in its brief on original submission, that Purser's oral testimony before the trial court did not differ from the testimony that Purser provided in his deposition. Winn-Dixie, however, failed to submit to this court a statement of the evidence pursuant to Rule 10(d), Ala. R. App. P., that might support that assertion. "The unsworn statements, factual assertions, and arguments of counsel are not evidence." Ex parte Russell, 911 So. 2d 719, 725 (Ala. Civ. App. 2005). Accordingly, this court is unable to rely on the representations of Winn-Dixie's attorney regarding the nature of the testimony omitted from the appellate record.

evidence at the trial of this case, which were inadvertently excluded from the record on appeal by the [trial court clerk]." The parties did not place in the record a Rule 10(d) statement concerning the testimony submitted to the trial court at the ore tenus hearing. Contrary to the arguments of Winn-Dixie on application for rehearing, Winn-Dixie failed to present this court with a complete record of all the evidence considered by the trial court. Accordingly, for the reasons expressed in this opinion, this court must affirm the trial court's order.

APPLICATION GRANTED; MEMORANDUM AFFIRMANCE OF OCTOBER 25, 2013, WITHDRAWN; OPINION SUBSTITUTED; AFFIRMED.

Pittman, Thomas, and Donaldson, JJ., concur.

Moore, J., concurs in the rationale in part and concurs in the result, with writing.

MOORE, Judge, concurring in the rationale in part and concurring in the result.

On original submission, I believed that the fact that the record omits a transcript of the trial proceedings occurring on December 13, 2012, precluded our review of the issues raised by Winn-Dixie Montgomery, LLC ("the employer"). Upon further consideration, I am no longer completely convinced of my original conclusion, because I believe some of the issues are reviewable.

Originally, the Alabama Workmen's Compensation Act ("the original Act") allowed only for certiorari review. See Ala. Acts 1919, Act. No. 45, § 21. Certiorari review allowed only for review of legal errors apparent on the face of the record made by the trial court. See Moses v. Pitney Bowes, Inc., 368 So. 2d 545, 546 (Ala. 1979) (Jones, J., concurring specially). To facilitate certiorari review, the original Act required the trial court to make a written determination containing findings of fact and conclusions of law. See Greek v. Sloss-Sheffield Steel & Iron Co., 207 Ala. 219, 220, 92 So. 458, 459 (1922). On certiorari review, the appellate court could merely review the judgment to ascertain the facts as found by

the trial court and the manner in which the trial court applied the law to those facts. Id. An appellate court could accept transcripts of the evidence, but only for the purpose of deciding whether any evidence supported the findings of fact of the trial court, itself a question of law. 207 Ala. at 221, 92 So. at 460.

Today, the Alabama Workers' Compensation Act ("the Act"), Ala. Code 1975, § 25-5-1 et seq., provides a right of appeal of a final workers' compensation judgment. See Ala. Code 1975, § 25-5-81. Those appeals are governed by the Alabama Rules of Appellate Procedure. See Committee Comment to Amendment to Rule 3(d)(1), Ala. R. App. P., Effective September 1, 2000. Rule 10(b) of the Alabama Rules of Appellate Procedure gives the parties to a workers' compensation case the right to designate as part of the record on appeal a transcript of the evidence. However, the Act still requires circuit courts to enter written determinations containing findings of fact and conclusions of law. See Ala. Code 1975, § 25-5-88. Accordingly, appellate courts still rely on the judgment of the trial court as the primary record on appeal, using the transcript mainly to determine whether

substantial evidence supports the findings of fact in the judgment. See 2 Terry A. Moore, Alabama Workers' Compensation § 26:24 (1st ed. 1998).

Under current law, when a party fails to order the transcript, or to substitute a statement of the evidence under Rule 10(d), Ala. R. App. P., this court must presume that the evidence is sufficient to sustain the findings of fact made by the trial court. See Tinney & Assocs., Inc. v. Parham, 588 So. 2d 490, 491 (Ala. Civ. App. 1991). The only issue remaining would be, as under certiorari review, whether the trial court correctly applied the law to the facts as found. See Pow v. Southern Constr. Co., 235 Ala. 580, 583, 180 So. 288, 290 (1938).

In this case, the Jefferson Circuit Court ("the trial court") conducted a hearing to determine whether Richard Purser ("the employee") had sustained an injury to his left knee caused by an accident arising out of and in the course of his employment with the employer and whether the employer was liable for certain medical benefits and temporary-total-disability benefits for that injury. See Ex parte Publix Super Markets, Inc., 963 So. 2d 654 (Ala. Civ. App. 2007).

Following that hearing, the trial court entered a judgment containing findings of fact and conclusions of law. The employer transmitted the clerk's record to this court, which contains the judgment; thus, this court has a limited record to review on appeal.

In its findings of facts, the trial court sets out that only one witness testified at the hearing -- the employee. Summarizing the testimony of the employee, the trial court states that the employee began working for the employer in 2007 or 2008 as a stocker, but was soon transferred to working as a "bagger," which job is described in an exhibit that is also part of the appellate record. The employee had no physical limitations in regard to his left leg and could fully perform the duties of his job. According to the judgment, the employee testified that, on April 6, 2012, he was at work when his manager requested that the employee assist a coworker with assembling a barbecue grill for display. The two employees sat down in an aisle assembling the grill. After finishing assembling the leg portion of the grill, and in the act of standing up, the employee heard his left leg or knee pop and felt sudden and immediate pain. Over the next several days,

his left-knee condition worsened, and, on April 10, 2012, he informed his manager that he needed to see a doctor. The manager agreed but told the employee to use his own health insurance because he did not believe that workers' compensation would cover the claim.

The trial court found that the employee visited Brookwood Hospital that day, reporting his symptoms and how they began. The employer reported the claim to its workers' compensation insurance carrier, who directed the employee to see a doctor at St. Vincent's Occupational Health, who, in turn, referred the employee to Dr. Keith Weaver, an orthopedic surgeon. Dr. Weaver ordered X-rays of the employee's knee and determined that his problem was not work related but, rather, caused by preexisting arthritis resulting from trauma from a motor-vehicle accident. On April 30, 2012, Dr. Weaver advised the employee that he would need arthroscopic knee surgery to remove loose particles in the knee but that the surgery should not be covered by workers' compensation. According to the trial court, the employee had had a motor-vehicle accident in 1988, but he did not injure his knee in that accident; moreover, the trial court did not receive, and Dr. Weaver had

not reviewed, any evidence of a previous injury to the employee's left knee to substantiate Dr. Weaver's conclusion. The employer's workers' compensation insurance carrier denied the employee's claim on April 30, 2012.

Following the denial of the claim, the employee sought the care of Dr. Perry Savage, who performed arthroscopic surgery on the employee's left knee on May 15, 2012. The employee was off work from April 30, 2012, to July 19, 2012, after which he returned to work on a reduced schedule. According to the judgment, the employee testified to continuing pain, disruption of sleep, and a tendency of his left knee to give out.

Presuming, as we must, that the missing transcript contains testimony fully supporting the foregoing findings of fact, this court must determine whether the trial court correctly applied the law to those facts. Pow, supra. This court reviews questions of law de novo, without a presumption of correctness. See Ala. Code 1975, § 25-5-81(e)(1).

The preliminary question for our review is whether the employer proved legal causation. For an injury to be compensable, it must be caused by an accident arising out of

and in the course of the employment. See Ala. Code 1975, § 25-5-51. The phrase "arising out of" refers to a causal connection between the injury and the employment. Ex parte Patton, 77 So. 3d 591, 593 (Ala. 2011). It is not enough that an accidental injury occur in the course of the employment; rather, the employment must be the source and cause of the accident. Slimfold Mfg. Co. v. Martin, 417 So. 2d 199, 202 (Ala. Civ. App.), writ quashed, 417 So. 2d 203 (Ala. 1981). To prove legal causation, the employee must prove more than that the injury would not have happened "but for" the employment. Ex parte Patton, 77 So. 3d at 595. In other words, the mere fact that the employment placed the employee at the time and place where the injury occurred does not mean that the employment legally caused the accident. See id. "'The rational mind must be able to trace the resultant personal injury to a proximate cause set in motion by the employment, and not by some other agency.'" Garrett v. Gadsden Cooperage Co., 209 Ala. 223, 225, 96 So. 188, 190 (1923) (quoting In re Madden, 222 Mass. 487, 495, 111 N.E. 379, 383 (1916)). An employee must prove that the performance of the employment duties exposed him or her to a danger or

risk of injury materially in excess of that to which people are normally exposed in merely living. Ex parte Trinity Indus., Inc., 680 So. 2d 262, 267 (Ala. 1996).

In this case, the trial court found that the employee injured his knee when, while rising from the floor where his job duties required him to be, the employee's knee "popped." Thus, the duties of the job, and not some other factor, "set in motion" the proximate cause of the injury. The employer notes that, in the act of standing up, the employee was not lifting, pushing, or pulling anything and, further, that he did not slip, fall, or strike anything and nothing struck him. The employer maintains that, in their everyday lives, people commonly stand up from a seated position, so, it asserts, the employment did not increase the employee's risk of injury. However, the trial court found that the employee was not merely standing up from a chair or a seated position, but was rising up from the floor, which places extra stress on the knees. Even so, an employee "does not have to show any 'unusual strain or overexertion' in order to [establish legal causation]." Ex parte Trinity Indus., 680 So. 2d at 267 (quoting Southern Cotton Oil Co. v. Wynn, 266 Ala. 327, 333,

96 So. 2d 159, 163-64 (1957)). An injury can be compensable even if the employment conditions do not exert some external force on the employee. Id. In numerous cases, our supreme court has decided that an employee is entitled to compensation when he or she receives an injury while performing routine physical tasks in the course of the employment on the theory that the exertion that causes an injury constitutes an accident arising out of the employment. See, e.g., Massey v. U.S. Steel Corp., 264 Ala. 227, 86 So. 2d 375 (1955); Davis Lumber Co. v. Self, 263 Ala. 276, 82 So. 2d 291 (1955); Dorsey Trailers, Inc. v. Weaver, 263 Ala. 229, 82 So. 2d 261 (1955); and Alabama Textile Prods. Corp. v. Grantham, 263 Ala. 179, 184, 82 So. 2d 204, 208 (1955) ("There was no finding by the trial court that the injury was caused by a blow, slip, fall or that it resulted from any unusual strain or exertion. But such findings are not necessary to support the conclusion that an injury of the kind which this plaintiff sustained was caused 'by an accident' within the meaning of our workmen's compensation law."). Based on those cases, this court has held that, when an employee aggravates a preexisting arthritic condition through physical exertion required by the job, the

injury is compensable as an accident arising out of the employment even though the injury results from completely internal forces acting on the body of the employee. See, e.g., Hellums v. Hager, 360 So. 2d 721 (Ala. Civ. App. 1978); and Martin Indus., Inc. v. Dement, 435 So. 2d 85 (Ala. Civ. App. 1983). Hence, if the stress from rising from the floor caused the employee to aggravate a preexisting arthritic condition in his left knee, that aggravation would be compensable as the result of an accident arising out of the employment.

On that point, the employer argues that the employee failed to prove medical causation because, it says, the only evidence supporting the theory that the employee aggravated his left-knee condition consists solely of the testimony of the employee, which, it asserts, is not alone sufficient to prove medical causation under Ex parte Southern Energy Homes, Inc., 873 So. 2d 1116 (Ala. 2003). Assuming that that case remains good law, see SouthernCare, Inc. v. Cowart, [Ms. 2120387, Dec. 20, 2013] ___ So. 3d ___, ___ (Ala. Civ. App. 2013) (Moore, J., concurring in part and concurring in the result in part), Ex parte Southern Energy Homes does not stand

for the broad proposition that an employee's subjective testimony will never be sufficient to prove medical causation. Rather, our supreme court seemed to hold in that case that an employee's testimony alone will not be sufficient if all the other evidence in the case casts serious doubt upon the employee's version of events and the employee's testimony is not corroborated by the circumstances following an alleged accident. See Bruno v. Harbert Int'l, Inc., 593 So. 2d 357, 360-61 (La. 1992) (collecting Louisiana cases applying similar rationale).

In this case, unlike in Ex parte Southern Energy Homes, according to the findings of the trial court, the employee immediately notified the employer of his accident and consistently reported to his treating physicians from the outset that the accident had caused an injury to his left knee. Moreover, the circumstances showed that, before his injury, the employee was able to work normally without any symptoms or limitations associated with arthritis in his left knee but that, immediately following the accident, he experienced pain and other symptoms in his left knee that have persisted in some degree ever since. See Waters Bros.

Contractors, Inc. v. Wimberley, 20 So. 3d 125, 134 (Ala. Civ. App. 2009) (holding that trial court can infer medical causation from such evidence). Based on the lay and circumstantial evidence, the trial court could have reasonably determined that the employment accident caused the employee to aggravate his preexisting arthritic condition in his knee. The fact that the employee did not present an expert medical opinion to bolster his case does not mean that the employee failed to rebut the opinion of Dr. Weaver that the knee injury resulted purely from preexisting arthritis without any employment contribution. See Ex parte Price, 555 So. 2d 1060 (Ala. 1989); Hokes Bluff Welding & Fabrication v. Cox, 33 So. 3d 592, 595 (Ala. Civ. App. 2008) ("[A] trial court may make a finding of medical causation without the benefit of any direct expert medical testimony, so long as the other evidence is sufficient to sustain its finding."); Wimberley, 20 So. 3d at 133 ("Although Dr. Meyer was the only expert witness to testify regarding medical causation, the trial court was not bound to accept his testimony."); General Elec. Co. v. Allred, 599 So. 2d 45 (Ala. Civ. App. 1992) (trial court awarded benefits although expert testimony stated that nonoccupational

factors more than likely caused injury); Daniels Constr. Co. v. Phillips, 241 Ala. 537, 3 So. 2d 304 (1941) (hearing loss was attributed to work-related accident although family doctor denied causal connection); 1 Terry A. Moore, Alabama Workers' Compensation § 7:13 (2d ed. 2013) ("As long as sufficient evidence exists to support the trial court's conclusion, the appellate courts will uphold a finding contrary to a medical opinion. Accordingly, in appropriate cases, expert opinion may be overcome by lay and circumstantial evidence or the trial court's observations and assessment of the claimant's credibility." (footnotes citing multiple cases omitted)).

The employer next argues that the trial court erred in awarding the employee medical benefits. The employer first maintains that the medical records, including those relating to the medical charges, were not admissible because, it says, they amount to hearsay and were not properly authenticated in accordance with Ala. Code 1975, § 25-5-81(f)(4). Before the trial date, the employer filed two motions in limine raising the foregoing objections; however, the record contains no order indicating that the trial court took any pretrial action on those motions. Therefore, in order to preserve its

objections, the employer had to renew the motions during the trial. See Owens-Corning Fiberglass Corp. v. James, 646 So. 2d 669, 673 (Ala. 1994) (explaining the necessity of renewing during trial a motion in limine that has either not been ruled on or has been denied, unless the trial court has expressly stated that no renewal of the motion in limine is required). Because we have no transcript of the trial, we do not have any record that the employer renewed its objections or that the trial court made an adverse ruling against the employer from which an appeal would lie. See Williams v. Seamon, 532 So. 2d 1028, 1029 (Ala. Civ. App. 1988) ("In the absence of an adverse ruling by the trial court, evidentiary issues will not be considered upon appeal.").

The employer secondly argues that the employee did not prove that the medical treatment for which he sought payment was reasonably necessary for his work-related left-knee injury. See Ala. Code 1975, § 25-5-77(a) ("[T]he employer ... shall pay an amount ... of reasonably necessary medical and surgical treatment and attention ... as the result of an accident arising out of and in the course of the employment, as may be obtained by the injured employee ...."). The

employee introduced medical bills from Brookwood Medical Center, Dr. Perry Savage, St. Vincent's East Hospital, and Anesthesia Group East, P.C. The Brookwood bill indicates a date of service of April 10, 2012. The medical records show that, on that date, the employee received treatment for his left-knee injury. Dr. Savage's bills arise from his treatment of the employee's left-knee injury from May 8, 2012, through September 19, 2012, during which period he performed arthroscopic surgery. The surgery took place on May 15, 2012, at St. Vincent's East Hospital, and an anesthesiologist from Anesthesia Group East, P.C., attended that surgery. The bills from those providers reflect charges arising from the surgery. In its findings of fact, the trial court specifically found that the arthroscopic surgery the employee underwent was reasonably necessary for the work-related injury. Because reasonable necessity and relatedness may be proven by circumstantial evidence, see 2 Terry A. Moore, Alabama Workers' Compensation § 17:5 (2d ed. 2013), I believe that the medical records themselves sufficiently prove that the bills arose from reasonably necessary medical treatment, especially considering, as the trial court did, that Dr. Weaver

recommended arthroscopic surgery to repair the employee's left-knee condition. However, even if the records do not amount to substantial evidence, due to the absence of the trial transcript this court must presume that the trial court received sufficient testimony from the employee to support its findings. See Parham, supra.

The employer thirdly maintains that, because it did not authorize the treatment provided, it bears no liability for the charges. Generally speaking, an employer must pre-authorize nonemergency medical treatment in order for that treatment to be covered at the employer's expense. See United States v. Bear Bros., Inc., 355 So. 2d 1133, 1137 (Ala. Civ. App. 1978). However, when an employer refuses to provide care or when a request for care would be futile, the employee may obtain medical treatment for the work-related injury at the expense of the employer without its authorization. See, e.g., Lipscomb v. City of Gadsden, 794 So. 2d 395, 397 (Ala. Civ. App. 2000). The trial court found that the employee originally had visited the employer's authorized treating providers but that the employer's workers' compensation insurance carrier denied the employee's claim on April 30,

2012, based on Dr. Weaver's opinion that the employee's knee problem was not work related. It is clear that the employer would no longer provide authorized treatment after that date, and it would have been futile for the employee to request it. Hence, as the trial court concluded, the lack of authorization did not relieve the employer of liability for the charges. The employer maintains that the employee had to first seek a panel of four physicians before seeking his own treatment; however, besides generally citing Ala. Code 1975, § 25-5-77, the employer has not cited any legal authority to support that position, and, thus, we may not consider that argument. See Rule 28(a)(10), Ala. R. App. P.; Maxim Healthcare Servs., Inc. v. Freeman, 93 So. 3d 974, 982 (Ala. Civ. App. 2012).

As its last point on this issue, the employer argues that the employee failed to prove that the amount of the bills fell within the limitations established in the Act. The employer contends that the employee had the burden of proving that the charges were reasonable in amount and that they did not "exceed the prevailing rate or maximum schedule of fees." § 25-5-77(a). The first part of the argument fails because the 1992 amendments to the Act eliminated the reasonableness

standard. See G.A. West & Co. v. Johnston, 92 So. 3d 74, 89 (Ala. Civ. App. 2012). As for the second part of the argument, the employer cites no legal authority for the proposition that the employee had to prove that the charges fell within the limitations established in the Act, as amended. It appears, however, that the matter is one of first impression. The Act does not specify who has the burden of proof on the issue of the excessiveness of medical charges; however, the Act does give employers the right to screen bills issued by authorized treating physicians to assure compliance with the limitations set out in the Act. See Ala. Code 1975, § 25-5-293(g). Given further that employers, through their workers' compensation insurers and administrators, have greater access to the fee schedules and prevailing-rate information, see Steward Mach. Co. v. Board of Trs. of Univ. of Alabama, 36 So. 3d 67, 70 (Ala. Civ. App. 2009), it would be fair to place the burden of proving excessive charges on employers. See Ceres Marine Terminals v. Armstrong, 59 Va. App. 694, 722 S.E.2d 301 (2012); Washington Twp. Fire Dep't v. Beltway Surgery Ctr., 911 N.E.2d 590, 596-97 (Ind. Ct. App. 2009) (accord). Most pointedly, because the limitations are

intended to, and do, benefit the employer, it would be consistent with general Alabama law to place the burden of proving their applicability on the employer as a matter of avoidance of or reduction in liability. See Fike v. Stratton, 174 Ala. 541, 557, 56 So. 929, 935 (1911) (where contractual provision benefited contractor, burden of proving that provision applied was placed on contractor). Thus, in my opinion, if the employer contended that the charges exceeded the maximum amounts recoverable under the Act, it bore the burden of proving that defense.[7] The employer has failed to prove that the trial court committed reversible error on this point.

Finally, the employer asserts that the trial court erred in its award of temporary-total-disability benefits to the employee. The record discloses that, on October 23, 2012, the employee filed a "motion for compensability hearing" in which

[7]In the judgment, the trial court ordered the employer to pay the charges to the medical providers, but it reserved to the employer the right to contest the rates. Thus, the judgment actually benefits the employer by allowing it an opportunity to reduce the charges, if allowable, before payment, even though the employer did not prove the excessiveness of the charges at trial. Because that provision does not harm the substantial rights of the employer, its inclusion is harmless error. See Rule 45, Ala. R. App. P.

the employee, among other things, informed the trial court that he had not received any temporary-total-disability benefits for his recovery period after his May 15, 2012, surgery. The employee requested that the trial court conduct a hearing to decide the compensability of his injury "and order such relief as [the employee] may be entitled under the Act." The trial court granted that motion on November 1, 2012. In its final judgment, the trial court awarded the employee temporary-total-disability benefits "at the appropriate compensation rate subject to the maximum and minimums of § 25-5-68, [Ala. Code 1975,] for time he was off work under the care of treating physician Dr. Savage during recovery process." Those findings imply that the trial court determined that the employee was temporarily totally disabled while healing from his surgery, which finding presumably was supported by the employee's testimony at trial. See Parham, supra. However, the employer complains that the judgment leaves for its determination the weekly amount to be paid and the duration of the payments due. The employer contends, as it did in its postjudgment motion, that the trial court should

have decided those issues when making its findings of fact and conclusions of law pursuant to Ala. Code 1975, § 25-5-88.

In its judgment, the trial court found that the employee was "off work under the Doctor's care from on or about April 30, 2012, until his release by Dr. Savage on July 19, 2012." That finding established that the recovery process lasted for 10 weeks and 4 days, or 10.57 weeks. The employee also conceded in his response to the postjudgment motion that the employer had established his average weekly earnings as being $230.02 through one of its exhibits. Section 25-5-57(a)(1), Ala. Code 1975, establishes that the compensation rate shall be 66⅔ percent of the average weekly earnings, which, in this case, would be $153.35. Section 25-5-57(a)(1) further provides that the minimums set out in § 25-5-68 apply when calculating the temporary-total-disability rate. Section 25-5-68(a) provides that the compensation rate shall not be less than 27½ percent of the state's average weekly wage, which, on the date of the employee's injury was $755.46, making the employee's minimum weekly compensation rate $208.00.[8]

[8]See Memorandum Regarding "State's Average Weekly Wage," issued by Scottie Spates, Director, Workers' Compensation Division of the Alabama Department of Labor (June 5, 2013).

Multiplying the compensation rate of $208 by 10.57 weeks produces an award of $2,198.56, an amount to which the employee agrees and which the employer does not contest. Thus, although the trial court did not, in its conclusions of law, express the amount of temporary-total-disability benefits awarded, the judgment contains findings and the record contains undisputed evidence from which this court can easily compute that award.

In the past, a majority of this court has determined that a judgment in a workers' compensation case that fails to specify the dollar amount of compensation awarded is not sufficiently final for appellate review. See, e.g., Coosa Valley Health Care v. Johnson, 961 So. 2d 903 (Ala. Civ. App. 2007); Norment Sec. Grp. v. Chaney, 938 So. 2d 424 (Ala. Civ. App. 2006); Homes of Legend, Inc. v. O'Neal, 855 So. 2d 536 (Ala. Civ. App. 2003); and International Paper Co. v. Dempsey, 844 So. 2d 1236 (Ala. Civ. App. 2002). However, in Equity Group-Alabama Division v. Harris, 55 So. 3d 299, 303 (Ala.

On the date this opinion was released, this memorandum could be found at http://labor.alabama.gov/docs/guides/wc_weeklywage.pdf; a copy of this memorandum is available in the case file of the clerk of the Alabama Court of Civil Appeals.

Civ. App. 2010), this court determined that a judgment is final when it awards temporary-total-disability benefits "at the compensation rate" without calculating the exact amount due. Because the judgment in this case contains similar language, and because this court can ascertain from the record the undisputed amount awarded, I believe that the judgment is final under Harris and is sufficient for the purposes of § 25-5-88.

Alternatively, the record does not contain any indication that, before or during the trial, the parties disputed the amount of temporary-total-disability benefits due or that the parties submitted that controversy to the trial court. The employee did make a general plea for an award of temporary-total-disability benefits in his "motion for compensability hearing"; however, both parties filed pretrial briefs, and neither mentioned any controversy regarding the amount or duration of the temporary-total-disability benefits due. Because we have no record of the trial proceedings, we have no indication that any controversy over the temporary-total-disability benefits had arisen and had been submitted to the trial court for resolution. In its postjudgment motion, the

employer raised the issue to the trial court that it had failed to specify the dollar amount of the compensation awarded, but it did not assert a controversy as to that point, and the employee conceded the amount due in his response to the postjudgment motion. On appeal, the employer has not pointed to any part of the record showing that it litigated during the trial any issues regarding the amount of temporary-total-disability benefits due. In my special writing in SCI Alabama Funeral Services, Inc. v. Hester, 984 So. 2d 1207, 1211-16 (Ala. Civ. App. 2007) (Moore, J., concurring in the result), I argued that the failure of a trial court to ascertain the amount of compensation due does not violate Ala. Code 1975, § 25-5-88, or affect the finality of its judgment under Ala. Code 1975, § 25-5-81, when the parties did not submit any controversy over that matter to the trial court for determination. I maintain that position. See Ex parte Cowabunga, Inc., 67 So. 3d 136, 144 (Ala. Civ. App. 2011) (Moore, J., concurring in part and dissenting in part). Thus, I find no merit in the employer's contention that the trial court erred in failing to more specifically award temporary-total-disability benefits.