

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
CAUSE NO.: 2009-TS-00344

BEVERLY HEALTH CARE/
AMERICAN HOME ASSURANCE CO.

APPELLANTS

VS.


IRENE HARE

APPELLEE

ON APPEAL FROM
TIPPAH COUNTY CIRCUIT COURT
CAUSE NO. T-08-077

BRIEF OF APPELLEE, IRENE HARE

ORAL ARGUMENT IS NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSON

That Greg E. Beard certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Irene Hare, Booneville, Mississippi, Claimant/Appellee;
2. Beverly Health Care, Tippah County, Mississippi, Appellant/Employer;
3. American Home Assurance Co., Appellant/Carrier;
4. Honorable Liles Williams, Chairman
Mississippi Workers' Compensation Commission
P.O. Box 5300
Jackson, MS 39296-5300
5. Honorable Augustus L. Collins, Commissioner
Mississippi Workers' Compensation Commission
P.O. Box 5300
Jackson, MS 39296-5300
6. Honorable John R. Junkin, II, Commissioner
Mississippi Workers' Compensation Commission
P.O. Box 5300
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7. Honorable Tammy Harthcock, Administrative Judge
Mississippi Workers' Compensation Commission
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8. Honorable Andrew Howorth
Circuit Court Judge District Three
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9. Greg E. Beard, Esquire
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STATEMENT OF THE ISSUES

Whether the Circuit Court of Tippah County correctly decided that the Mississippi Workers' Compensation Commissions 2-1 Opinion was not supported by substantial evidence.

I. STATEMENT OF THE CASE

A. Identification of Claimant

Claimant is currently a 71 year old widowed mother of three adult children. The Claimant has resided in Booneville, Mississippi most of her life and has worked for Beverly Healthcare, the Employer herein, in Ripley, Tippah County, Mississippi since 1985.

B. Summary of Case and Course of Proceedings.

The Appellant, Irene Hare, hereinafter "Claimant," filed a Petition to Controvert stating that she injured her left leg on April 25, 2005, during the course of her employment as an LPN with Beverly Healthcare. The Employer and Carrier took the position that no untoward event occurred which would have caused the Claimant's injury and have refused to provide medical treatment or benefits to the Claimant.

That on June 29, 2007, the Administrative Law Judge found that the Claimant met her burden of proof and the left femur fracture of April 25, 2005 was work related. The Administrative Law Judge ruled that even if Claimant's fracture occurred spontaneously, she was still injured while performing her normal work duties. (Commission's Original File [hereinafter "F"] pages 37-43; Appellants' Record Excerpts [hereafter "RD"] pages 28-34).

That on July 12, 2007, Beverly Healthcare and American Home Assurance Company, the Employer/Carrier, hereinafter "Employer/Carrier" filed a Petition for Review before the Full Commission. (F pages 44-46). A Full Commission Hearing was held on November 19, 2007, in Jackson, Mississippi. That on February 15, 2008, the Full Commission entered an Order reversing the Order of the Administrative Law Judge with Commissioner Collins dissenting. (F pages 54-69; RE pages 12-27). Commissioner Collins found that the "claimant sustained a compensable injury when she broke her left femur while conducting the duties of her job as a Licensed Practical Nurse."

(F page 68). Commissioner Collins further opines that the “claimant sustained a compensable injury due to an untoward event that resulted out of and in the course of her employment.” (F page 69).

That on March 6, 2008, the Claimant incorrectly filed her Notice of Appeal to the Prentiss County Circuit Court. (F pages 70-71), then on March 10, 2008, the Claimant properly filed her Amended Notice of Appeal to the Tippah County Circuit Court. (F pages 72-73).

The Honorable Andrew K. Howorth, Circuit Court Judge, heard oral arguments on September 19, 2008 and entered an Order, dated February 4, 2009, reversing the decision of the Full Commission. RE at pages 5-11; Record [hereinafter “R”] at pages 83-89. The Circuit Court found that “there exists clear evidence that the Appellant [Claimant Irene Hare] suffered an injury arising out of and in the course of her employment and the employment clearly contributed to said injury.” (R at page 89). The Circuit Court further ruled that the “Commission’s Order was not supported by substantial evidence and that it was based upon an erroneous interpretation of the Mississippi Workers’ Compensation Act” thereby reversing the majority opinion of the Full Commission and reinstating the Order of the Administrative Law Judge. (R at page 89). The Employer and Carrier subsequently filed their appeal to this Honorable Court on February 24, 2009. (R at pages 90-91).

C. Statement of Relevant Facts.

That Claimant began her employment with Beverly Healthcare in 1985 as a Licensed Practical Nurse (LPN), working almost without interruption until she injured her left leg on April 25, 2005, during the scope and course of her employment.

The Claimant had a willingness to work and often times worked more than 40 hours per week, in fact April 25, 2005, was her sixth day in a row to work. (F page 55). The Claimant reported to work on April 25, 2005 without a broken leg, was working when the incident occurred,

performing her duties as an LPN, and had been at working and performing said duties for approximately five (5) hours prior to the incident.

Claimant testified during the hearing that while she was handing out medication she “pivoted around” on her left leg to pick up a glass of water and she heard her left leg pop like a “shotgun.” (Transcript of Hearing [hereinafter “T” page 17). Claimant acknowledged during the hearing that she had been having problems with her left knee that day and had planned on going to the emergency room after her shift to get a shot for her arthritis. (T pages 12-13).

The Administrative Law Judge found and stated on page 6 of her opinion that the Claimant has met her burden of proof that her left femur fracture on April 25, 2005, was work related. She was working that night for the Employer, performing her normal job duties when she suffered the injury. The testimony was consistent that Claimant was handling her work duties that night when she was injured. Although Claimant had prior surgeries and osteoporosis, she had been working regular duty for the Employer for years without assistance. Her treating specialist, Dr. Charles Taylor, characterized her fracture as “new.” Even if the fracture occurred spontaneously, Claimant was still injured while performing her normal work duties. Therefore, I find that Claimant’s left femur fracture was work related in accordance with the Mississippi Workers’ Compensation Law.

(F page 42).

In a 2-1 decision the Full Commission reversed the Administrative Law Judge’s decision. Commissioner Collins in dissenting the decision of the Full Commission opined that the “Claimant sustained a compensable injury due to an untoward event that resulted out of and in the course of her employment.” (F page 69).

D. Medical History

Claimant went to the emergency room at the Tippah County Hospital on April 25, 2005, then to St. Francis Hospital where an x-ray was conducted which showed a transverse fracture to her left femur. Claimant underwent an open reduction and internal fixation on April 25, 2005 and was followed by Dr. Charles Taylor for treatment. Dr. Taylor performed a removal of screw from left

leg with revision and bone graft on January 30, 2006 and removed a screw on March 28, 2006. Claimant continued to see Dr. Taylor for follow-up treatment.

E. Medical Testimony

The Claimant was transported to the Tippah County Hospital - Emergency Room and then on to St. Francis Hospital in Memphis, Tennessee, where she was treated by Dr. Charles Taylor, who had treated her in the past for a patellar fracture and for distal fracture in her left femur. **Dr. Taylor testified that the femoral shaft had been completely healed for 10-12 years.** (General Exhibit [hereinafter "GE"] #2, Deposition of Charles Taylor, M.D. pages 10-11). He further testified that the fracture which occurred in April, 2005, which is the subject matter of this litigation was to a **different level that was not her original fracture level.** (GE #2, Deposition of Charles Taylor, M.D. pages 10-11) He opined that the April 25, 2005, fracture was approximately 5 cm or 2 inches away from the previous injury and that it occurred on a screw hole that was used on a plate applied in Tupelo on a previous procedure. (GE #2, Deposition of Charles Taylor, M.D. page 15). When asked if the earlier injury had anything to do with or in anyway contributed to the April 25, 2005 injury, Dr. Taylor indicated that **it did not.** (GE #2, Deposition of Charles Taylor, M.D. page 16). He later stated that the Claimant had a complete fracture of her femur and that **"[t]here is no way that you, (referring to Mr. Pearson), or I or Ms. Hare could take a step with a complete fracture to the femur."** (GE #2, Deposition of Charles Taylor, M.D. page 36 referring to Ms. Hare's injury). In further describing the fracture that the Claimant had, Dr. Taylor testified that he had "no way of knowing whether she had a torsional fracture through this screw hole or whether she had a stress fracture, gradual stress fracture through this screw hole." (GE #2, Deposition of Charles Taylor, M.D. page 38). However, he did state that it could have been a gradual stress fracture but it is new to her. It was not there ten (10) years ago. **"This is a new fracture level."** (GE #2, Deposition of

Charles Taylor, M.D. pages 38-39). Dr. Taylor did state that the fracture was twisting injury (GE #2, Deposition of Charles Taylor, M.D. page 16) which collaborates Mrs. Hare's testimony that she was pivoting around when she heard a pop. (T page 17).

Dr. Taylor was then asked to give an opinion as to whether the Claimant's level of activity could have contributed to the fracture. Dr. Taylor responded as follows: "Her femur had been healed for a long time. I would think that whatever level of activity she had for the past few years I would expect her to have been able to continue. But you could create a stress fracture by increasing your activity faster than your bone can make new bone to respond to it." (GE #2, Deposition of Charles Taylor, M.D. page 43).

The Employer/Carrier called Dr. Guy T. Vise, Jr., M.D., he is an orthopedic surgeon who no longer conducts surgery and was hired by the Employer/Carrier to review the Claimant's medical records to give an opinion as to the causation of the Claimant's fracture and recuperation. Dr. Vise opined that the Claimant had a spontaneous fracture and that she was predisposed to this fracture because her bone had been weakened by previous injuries and surgical intervention.

II. SUMMARY OF THE ARGUMENT

The Circuit Court of Tippah County, the Honorable Andrew Howorth presiding reversed the decision of the Mississippi Workers' Compensation Full Commission, for the first time in his tenure, finding that their opinion was not supported by substantial evidence. Judge Howorth had extensively reviewed the medical records and depositions and considered that Ms. Hare had been a faithful employee working more than full time and that Dr. Taylor had found that there had been a complete recovery prior to the injury which is at issue. Judge Howorth then went on to find that the Commission's opinion was not supported by substantial evidence and correctly overturned that

decision. This Court should uphold Judge Howorth's findings that the Full Commission's, 2 Commissioners to 1 Commissioners Decision, was not supported by substantial evidence.

III. ARGUMENT

Whether the Circuit Court of Tippah County correctly decided that the Full Commissions 2-1 Opinion was not supported by substantial evidence.

The Opinion of the Circuit Court of Tippah County, Judge Andrew Howorth presiding, that the Commissions 2-1 opinion was not supported by substantial evidence was correct and should be upheld. Substantial evidence has long been defined as "more than a mere scintilla of evidence and "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Cent. Elec. Power Ass'n v. Hicks, 236 Miss. 378, 110 So.2d 351, 356 (1959). Substantial evidence encompasses evidentiary facts and the application of law to those facts or rather ultimate facts. Evidentiary facts are not in issue at the case at hand. It is the application of the law to the facts where the Circuit Court of Tippah County found that the Workers' Compensation Commission's opinion is not supported by substantial evidence. More straight forward, this Court has stated that "this court will reverse the Commission's order only if it finds that order clearly erroneous and contrary to the overwhelming weight of the evidence. A finding is clearly erroneous when, although there is some slight evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made by the Commission in its finding of fact and its application of the Act." Barber Seafood Inc. v. Smith, 2003-CT-01343-SCT, page 461 (Miss.2005) quoting Hardaway Company v. Bradley, 887 So.2d 793, 795 (Miss.2004) (citations omitted).

The un-refuted evidence is that the Claimant herein had a substantial work history with this employer and that the employer was familiar with the Claimant's abilities and disabilities. The

Claimant was expected to and did work a full work week. On the date of accident the Claimant was on her sixth day of work and had just completed five hours of her shift when she became injured.

The Employer/Carrier rely heavily upon their hired expert Dr. Guy Vise's opinions. While highly praised by the Employer/Carrier, Dr. Vise had not examined Mrs. Hare in the past nor had he examined anything other than the medical records prior to giving his expert opinion. Dr. Charles Taylor, a well known and well respected physician who is an orthopedic specialist made several findings which are more compelling than the opinion of Dr. Vise. For instance, Dr. Vise rendered an opinion that the Claimant's femoral bone had not completely healed following the removal of plates and screws performed in December, 2004. However, Dr. Taylor testified that the femoral shaft had been completely healed for 10-12 years and that the fracture which occurred in April, 2005, was to a different level that was not her original fracture level. (GE # 2, Deposition of Charles Taylor M.D., pages 10-11). When asked if the earlier injury had anything to do with or had contributed to the April 5, 2005 injury, Dr. Taylor indicated that it did not (GE #2, Deposition of Charles Taylor M.D., page 16).

Employer/Carrier seem to place some emphasis on the fact that the Claimant's leg was injured or was hurting her on the date of the injury prior to the injury actually occurring. Dr. Taylor has earlier identified the femoral fracture as a complete fracture. One in which there is "no way that you or I or Ms Hare could take a step with a complete fracture of the femur" such as suffered by Ms. Hare. (GE #2, Deposition of Charles Taylor, M.D., page 36 referring to Ms. Hare's injury). Therefore the facts are un-refuted that Ms. Hare had been on the job for approximately 5 hours before she suffered a complete fracture of the femoral shaft.

The Employer/Carrier also rely upon Dr. Vise's opinion that the injury was due to daily living activities and not the result of any specific event or trauma and that it was going to occur

eventually. In the 2-1 decision of the Full Commission, the Commissioner actually stated that this could have arisen if the Claimant was in her home. However, it cannot be ignored that the Claimant was working her sixth day which added additional physical stress.

When Dr. Taylor stated he would have expected the Claimant to continue whatever level of activity she had been doing for the past few years. However, increasing activity could create a stress fracture if the increased activity was such that the bone could not make new bone to respond to said activity. (GE #2, Deposition of Charles Taylor, M.D, page 43).

The Workers' Compensation Act should cover the Claimant's fracture femur just as it covers injuries which are the result grandmal seizures or injuries which are the result of alcohol withdrawal seizures. Chapman, Dependants of v. Hanson Scale Co, 495 So.2d 1357 (Miss. 1986) and Smith v. Container General Corp, 559 So. 2d 1019 (Miss. 1990). Other such instances where the Act has been found to provide compensability would be a ruptured disc or injured spinal column. A ruptured disc can occur from any number of activities such as bending, stooping, turning, twisting, etc. and are recognized as compensable because the work activity has placed a greater amount of stress upon that part of your body.


The Claimant's case is similar. The Employer/Carrier argue under our theory that a ruptured kidney would be compensable event. However, the Claimant's own testimony is that she had retrieved a patient's pills and had turned to go into the room when she suffered the injury. That injury is compensable because it was from the activity related to the employment and the Claimant's duties as a nurse. The Claimant was not going about daily living activities, she was working for the employer. Therefore, the Circuit Court of Tippah County, Judge Howorth was entirely correct when he made a finding that majority opinion of the Full Commission the evidence was not supported by substantial evidence and his opinion should be upheld.

IV. CONCLUSION

Ms. Hare should be compensated for the injury which occurred in April, 2005 because the injury occurred when, after being at work for more than five hours performing her duties, and on her sixth straight day of work, she pivoted to go into a patient's room, clearly arising out of and in the course and scope of her employment with the Employer. If there is any doubt as to whether she should be compensated then to fulfill the purpose of the Mississippi Workers' Compensation Act she should be made whole as far as the Mississippi Workers' Compensation Act allows. Claimant would request that this Court uphold the decision of Tippah County Circuit Court.

Respectfully submitted, this the 29th day of September, 2009.

GREG E. BEARD, P.A.



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CERTIFICATE OF SERVICE

I, Greg E. Beard, attorney for Plaintiff, do hereby certify that I have on this date _____ hand-delivered, _____ faxed, and/or X placed in the United States Mail, postage prepaid, a true and correct copy of the above and foregoing to the following:

George Read, Esquire
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This the 29th day of September, 2009.



GREG E. BEARD