

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

BEVERLY HEALTHCARE
AND
AMERICAN HOME ASSURANCE COMPANY

APPELLANTS

VS.

IRENE HARE

APPELLEE

REPLY BRIEF OF APPELLANTS

GEORGE E. READ - BAR # [REDACTED]
GINGER M. ROBEY - BAR # [REDACTED]
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ORAL ARGUMENT REQUESTED

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ARGUMENT

Irene Hare (herein after “Claimant”) states in her brief that the only issue before this Court was “Whether the Circuit Court of Tippah County correctly decided that the Mississippi Workers’ Compensation Commission’s (hereinafter “Full Commission”) 2-1 Opinion was supported by substantial evidence.” On this issue, Beverly Healthcare (hereinafter “Employer”) and American Home Assurance Company (hereinafter “Carrier”) agree.

Employer and Carrier contend that the Circuit Court applied an erroneous standard of review in this case. In Workers’ Compensation cases, the Full Commission is the ultimate fact finder and their opinions should be affirmed if there is substantial evidence to support their findings. The Mississippi Supreme Court has repeatedly stated that “The findings and orders of the Workers’ Compensation Commission are binding on the Court so long as they are supported by substantial evidence.” *Vance v. Twin Rivers Homes, Inc.* 641 So. 2d 1176, 1180 (Miss. 1994) (quoting *Fought v. Stuart C. Irby Co.*, 523 So. 2d 314, 317 (Miss. 1988)). Employer and Carrier contend that there was substantial evidence to affirm the findings of the Full Commission. Employer and Carrier also contend that the Circuit Court erroneously re-weighed the evidence in this matter, instead of deciding whether or not there was substantial evidence to support the findings of the Full Commission. It is well established law that the Circuit Court should not review the facts on appeal to determine how it would have resolved the factual issues if it was the ultimate fact finder, but should only determine whether the Commission’s factual determinations were supported by substantial credible evidence. *South Central Bell Tel. Co. v. Aden*, 474 So.2d 584, 589 (Miss. 1985). Claimant does not cite anything in her brief to contradict this.

Because the Circuit Court misapplied the standard of review for workers’ compensation appeals, Employer and Carrier contend that oral argument would be beneficial to this Court. Oral

argument would allow the parties to resolve any questions the Court has concerning whether or not there was a misapplication of the standard of review in this case, as well as address any specific questions concerning the facts and their application to this case.

Claimant contends that Dr. Taylor testified that she had suffered a “new” injury. Claimant has failed to identify anywhere in the record that there was any testimony by any medical provider that the claimant’s “new” injury was causally related to her employment. Instead, the Claimant seeks to identify parts of the record that support her position in this matter. However, the entire record from the Commission is on review by this Court. After reviewing that entire record, it is clear that there was substantial evidence to support the findings of the Full Commission that the Claimant did not suffer a compensable work related injury. As such, the Claimant is not entitled to any workers’ compensation benefits and her claim must be denied.

Claimant tries to make the same argument as the Circuit Court that simply being at work is sufficient basis for finding that any injury or condition that develops at work is a work related condition. If this was the standard for workers’ compensation, we would not have the litany of cases from this Court, and the Supreme Court, concerning heart attack cases, deviation cases, idiopathic falls cases, coming and going cases, “arising out of” cases and “course and scope” cases. The Workers’ Compensation Act was never intended as a catchall to cover any injury or condition that developed while an employee was at work. Instead, the Act requires some proof of causal connection between the Claimant’s alleged injury and their employment. Miss. Code Ann. §71-3-3(b) as amended.

Claimant attacks the opinions of Dr. Guy Vise, a board certified orthopaedic surgeon, because he did not examine the Claimant. Since the Claimant’s injury had occurred and she had already had surgery before Dr. Vise was involved in this matter, there was no point in him examining

her. Instead, as allowed under the rules of the Commission, Employer and Carrier were entitled to retain an expert to address the issue of causation, and offer expert opinions concerning that issue. It is also the obligation of the Full Commission to review all the evidence in a case, weigh that evidence and decide which of the evidence is most persuasive. *White v. Superior Products, Inc.*, 515 So. 2d 924, 927 (Miss. 1987). The Full Commission in this matter chose to rely on the opinions of Dr. Guy Vise. However, they did not ignore the opinions of Dr. Charles Taylor, also a board certified orthopaedic surgeon. The reason for this is that Dr. Taylor never causally related the Claimant's "new" injury to her employment. He simply noted that she had suffered a femoral fracture, which by definition would be a new injury. That has never been disputed in this case. Employer and Carrier have always acknowledged that the Claimant suffered a left femoral fracture. However, Employer and Carrier have always contended that the Claimant has never shown a causal connection between her work and her left femoral fracture. Employer and Carrier contend that Dr. Taylor never addressed this issue and no medical proof of causal connection was ever offered by the Claimant.

Claimant and the Circuit Court contend that there is no issue concerning the way the Claimant was injured. However, as noted in the Full Commission's Order, there were different versions of the Claimant's injury. According to the medical records of Tippah County Hospital, the Claimant was standing when her leg popped. GE5. According to her deposition testimony, the Claimant was walking into a patient's room to hand out medicine when her leg popped. T. at pp. 29-30. It was not until two years after the Claimant's left femoral fracture that she testified for the first time at a hearing on the merits that she was pivoting at the time of her injury. T. at p. 17. Because there was a conflict in the Claimant's testimony, the Full Commission had to weigh all of the evidence and determine which evidence it found to be the most credible. In this case, the

Commission accepted the Claimant's earlier testimony that she was either standing or walking when her femoral fracture occurred. The Full Commission did not accept her later testimony that she was pivoting at the time of this accident. Employer and Carrier contend that regardless of what the Claimant was doing at the precise moment that her femoral fracture occurred, there is no evidence of a causal connection between that femoral fracture and the Claimant's work.

Dr. Taylor and Dr. Vise agree that the Claimant's femoral fracture occurred at the site of an empty screw hole. The Claimant had a multi-year history of numerous problems with her left lower extremity going from her hip down to her foot. As noted by the Full Commission, Claimant had previously had a spontaneous fracture of her left foot. T. at p. 39. This is the same spontaneity that she had when her left femoral fracture occurred on April 5, 2005 and noted in the Full Commission Order. Four months prior to the Claimant's spontaneous left femoral fracture, Dr. Taylor had removed a plate and screws from her leg. It was the testimony of both Dr. Taylor and Dr. Vise that the Claimant's fracture probably began at the site of this empty screw hole. This is the "new" injury identified by Dr. Taylor. However, Dr. Taylor did not address whether or not the Claimant's work caused and/or contributed to this new femoral fracture. Dr. Guy Vise specifically testified that he did not see any causal connection between the Claimant's work and her left femoral fracture. He described this injury as a "spontaneous or fragility fracture of the left femur." GE1 at p 43.

The Full Commission weighed all of the evidence in this matter. It chose to accept the Claimant's testimony that she was standing or walking at the time of her injury. They were unable to identify anything related to the Claimant's work that had caused her left femoral fracture. They also weighed all of the medical evidence in this matter. The Full Commission agreed with Dr. Vise that this was a spontaneous fracture of the Claimant's left femur and was not causally related to her

employment. In other words, the Commission's opinion is based on substantial evidence from the record in this matter.

Employer and Carrier contend that the Circuit Court re-weighed the evidence in this matter and substituted its fact findings. The Circuit Court and the Claimant have failed to identify any misapplication of the law to the facts in this matter by the Full Commission. The Circuit Court applied the wrong standard of review for an appeal from the Full Commission. Therefore, Employer and Carrier would move this Court to reverse the findings of the Circuit Court and reinstate the findings of the Full Commission that the Claimant did not suffer a work related injury and therefore is not entitled to any benefits under the Mississippi Workers' Compensation Act.

Respectfully submitted,

BEVERLY HEALTHCARE AND AMERICAN
HOME ASSURANCE COMPANY, EMPLOYER
AND CARRIER

BY: George Read
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CERTIFICATE OF SERVICE

I, George E. Read, of counsel for the employer and carrier herein, do hereby certify that I have this day mailed via United States mail, postage prepaid, a true and correct copy of the above and foregoing pleading to:

Greg Beard, Esq.
P. O. Box 285
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Honorable Andrew K. Howorth
Circuit Court Judge
1 Courthouse Square, Suite 201
Oxford, MS 38655

Mississippi Workers' Compensation Commission
1428 Lakeland Drive
Post Office Box 5300
Jackson, MS 39296-5300

THIS, the 13th day of Oct., 2009.



GEORGE E. READ

File No.: I52-113499