

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

BRIEF OF APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record 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 disqualifications or recusals.

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Respectfully Submitted,

BEVERLY HEALTHCARE AND AMERICAN
HOME ASSURANCE COMPANY, EMPLOYER
AND CARRIER

BY:



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STATEMENT OF THE ISSUES

Whether the Mississippi Workers' Compensation Commission's [herein after "Commission"] finding that Irene Hare [herein after "Claimant"] did not sustain a compensable work injury as defined by the Mississippi Workers' Compensation Act was supported by substantial evidence and by the applicable law.

Whether the Circuit Court erred by re-weighing the evidence and substituting its own findings of fact for those of the Commission.

1. STATEMENT OF THE CASE

A. Nature of the case and the course of the proceedings and its disposition in the Court below.

This matter is before the Court pursuant to the jurisdiction conferred upon the Circuit Court and the Mississippi Supreme Court by Miss. Code Ann. § 71-3-51 (1972) to hear appeals of decisions of the Full Commission.

On May 26, 2005, Claimant filed a Petition to Controvert, seeking benefits for a left femoral fracture that occurred on April 25, 2005. Commission's Original File [hereinafter "F"] at p. 1. Beverly Healthcare and American Home Assurance Company [hereinafter "Employer and Carrier"] filed their Answer on June 17, 2005, denying compensability of the claim, taking the position that no untoward event occurred and Claimant's injury was not causally related to her employment. F at p.4.

A hearing on the merits was held on April 18, 2007, with Administrative Judge Tammy Harthcock presiding. The sole issue presented to Judge Harthcock for consideration was whether Claimant had a work accident on April 25, 2005, and injured her left lower extremity. On June 29, 2007, the Administrative Judge issued an Order finding that Claimant met her burden of proof that her left femoral fracture on April 25, 2005, was work related. F at pp. 37-43, Appellants' Record Excerpts [hereinafter "RE"] at pp. 28-34. The Administrative Judge ruled that even if Claimant's fracture occurred spontaneously, she was still injured while performing her normal work duties. Employer and Carrier were ordered to provide Claimant with indemnity and medical benefits.

On July 12, 2007, Employer and Carrier filed their Petition for Review before the Full Commission, appealing the Order of the Administrative Judge. F at p. 44. Claimant subsequently filed her Response to Employer and Carrier's Petition for Review. F at p. 47. The Full Commission entered an Order on February 15, 2008, reversing the Order of the Administrative Judge. F at pp.

54-67, RE at pp. 12-27. The Full Commission found that the Administrative Judge erred in finding that Claimant sustained a compensable work injury as defined by the Mississippi Workers' Compensation Act as there was a lack of proof that Claimant's employment caused or contributed to her femoral fracture in a significant manner or that her employment increased her risk of such an injury. Claimant subsequently filed her Notice of Appeal to the Circuit Court of Prentiss County on March 4, 2008. F at p. 70. She then filed her Amended Notice of Appeal to the Tippah County Circuit Court on March 6, 2008. F at p. 72.

Circuit Court Judge Andrew K. Howorth, heard oral arguments on September 19, 2008, and entered an Order dated February 4, 2009, reversing the decision of the Commission. RE at pp. 5-11, Record [hereinafter "R"] at pp. 83-89. The Circuit Court stated, "This Court finds there exists clear evidence the [Claimant] suffered an injury arising out of and in the course of her employment and the employment clearly contributed to said injury." R at p. 89. The Court ruled that the Commission's order was "not based on substantial evidence and was based on an erroneous interpretation of the Act." Employer and Carrier subsequently filed their appeal to this Honorable Court. R at pp. 90-91.

B. Facts relevant to the issues presented for review.

LAY TESTIMONY

Claimant testified that she was 71 years of age and resided in Booneville, Mississippi. Transcript of Full Commission hearing [hereinafter "T"] at p. 5. Claimant's work history includes driving a truck, packing shoes, working as a beautician and working as an LPN. T at pp. 5-6. She received her LPN training in 1984, and subsequently worked for Timber Hills Nursing Home, Whitfield Nursing Home in Corinth and Beverly Healthcare in Iuka and Ripley. T at p. 6.

Claimant was hired by Beverly Healthcare [hereinafter "Beverly"] in Iuka in 1985. T at p. 6. She was off work from approximately 1988 until 1991, following a slip and fall on ice, which resulted in a broken left femur. T at p. 7. Claimant testified that she drew social security disability benefits during that time. *Id.* Claimant returned to work for Beverly in Ripley in 1991, where she was employed as a LPN until April 25, 2005. *Id.* Claimant testified that her job duties included distributing pills to residents, assisting CNAs with patient care and completing medical charts. T at pp. 7-8. She typically worked the second shift, which was 2:45 p.m. until 11:15 p.m. T at p. 8. She was responsible for the B wing, which had a maximum of 28 patients, residing in 16 rooms. T at pp. 9-10. She testified that she typically had two CNAs to assist her on B wing. T at p. 10. She further testified that her job required her to be on her feet for quite a bit but not for the full eight hour shift. *Id.*

Claimant testified that on April 25, 2005, she reported to work as usual. T at p. 11. This was her sixth day of work in a row. T at p. 9. She recalled that Megan Pannell, Mr. South (the Administrator), Neda Kirk and Cherry Smith were also working on that date. T at p. 13. After clocking in, she counted pills, filled her ice and water buckets and then went outside for a smoke break. T at p.14. After returning from her break, she passed out medications, did her weekly summaries, completed her medical charts and checked minor wounds. *Id.* She then clocked out at approximately 5:00 p.m., for her 30 minute lunch break. T at p. 15. Afterwards, she returned to her computer and completed additional charts. *Id.* At approximately 7:00 p.m., she completed a resident feeding. T at p. 16. She then began distributing the night medications to residents, working her way from the end of the hall toward the nurses' station, located between A and B wings. *Id.* Claimant testified that when she reached Room 9, she took the resident's medications from the medicine cart, poured a cup of water and picked up the medicine to give to the resident. T at p. 17. When she

pivoted around to pick up the water, she felt a pop in her left leg. T at p. 17. She stated that she did not fall to the floor but caught herself on the medicine cart. T at p. 20.

Claimant testified that she saw Neda Kirk across the hall from the nurses' station working on a computer, and called for Neda to get Megan Pannell, the other LPN on duty. T at p. 20. Claimant testified that she could not walk and recalled someone moving a chair under her. *Id.* An ambulance arrived at approximately 7:45 p.m., and transported her to Tippah County Hospital. T at p. 21. She was subsequently taken to St. Francis Hospital, in Memphis, Tennessee. T at p. 21. Upon reaching St. Francis, she requested that Dr. Charles Taylor be contacted, as he had previously treated her for numerous other injuries to her left leg, foot and ankle. *Id.*

Claimant testified that prior to this incident, she had never experienced any problems with her left thigh, although she did admit having numerous prior injuries of her left leg, foot and ankle. T at pp. 23-25. She also admitted that she had problems with her left knee dating back to 1964, and that she had walked with a limp since that time. T at p. 28. She further admitted that during her shift on April 25, 2005, she told other nurses that her left knee was hurting and that she planned to stop by the emergency room on her way home. T at p. 26. Claimant testified that the Employer and Carrier never provided any workers' compensation benefits for her April 25, 2005 accident. T at p. 18. However, she testified that the Employer paid her for a total of 18 sick days and two weeks of vacation pay. T at pp. 18-19.

On cross-examination, Claimant was questioned about her prior injuries to her left lower extremity. In 1964, she was in a car wreck and was hit head on by a drunk driver. T at p. 23. Claimant sustained crush injuries of her left knee and ankle and both bones in her left lower leg were broken. *Id.* In 1987, she again sustained crush injuries of the left knee and ankle as a result of another motor vehicle accident. *Id.* Dr. Ennis removed her left kneecap following the 1987 accident.

It was also following the 1987 accident that she began treating with Dr. Charles Taylor. *Id.* Claimant further stated that she broke her left femur in 1988 when she slipped and fell on ice, and broke her pelvis in 2000, when she stepped off of a curb. T at p. 24. Claimant testified that Dr. Taylor inserted a rod and screws in her left femur following the 1988¹ incident. *Id.* When the rod subsequently began working itself out above the ball and joint, Dr. Taylor removed the rod and screws. T at p. 25. Claimant was unable to recall the exact date of this procedure but confirmed it was prior to her April 25, 2005 incident. *Id.*

Claimant admitted that when she presented to work on April 25, 2005, she was having problems with her left knee, but denied any pain in the thigh area. T at p. 25. She recalled wearing an Ace bandage, but testified that it was wrapped around her left knee and not around her left thigh. T at p. 26. She denied having the Ace bandage rewrapped by another LPN during her shift. *Id.* Claimant acknowledged that she had walked with a limp since 1964, and that she sometimes used a cane to ambulate. T at p. 28. However, she denied using a cane or any other device to assist her walking on April 25, 2005. *Id.* Claimant further admitted that in her deposition that she had not mentioned anything about pivoting to pick up water when the incident occurred. T at pp. 29-30. Her prior testimony was that she was simply walking into a patient's room. *Id.* Claimant also acknowledged that she has smoked since age 14 and that she currently smokes one-half pack of cigarettes per day. T at p. 27.

On re-direct examination, Claimant indicated that she has consistently passed her yearly physical as required by Beverly Healthcare. T at p. 35. She recalled her last physical prior to the incident was in November 2004. T at p. 36. Claimant did admit that she had previously sustained

¹ Claimant testified her left femoral fracture occurred in 1988 but the medical evidence is consistent with it occurring in 1998.

a spontaneous stress fracture of her left foot while walking down the hall at Beverly. T at p. 39. She treated with Dr. Taylor for this injury as well. T at p. 38. Claimant stated that she did not file a workers' compensation claim for this injury and was able to continue working while in a cast. *Id.*

Megan Pannell was called by Employer and Carrier to testify at the hearing. Ms. Pannell testified she is an LPN for Beverly and was working with the Claimant on the date of the incident. T at p. 42. Ms. Pannell worked on A wing, while Claimant was assigned to B wing. T at pp. 43-44. Ms. Pannell shared a nurses' station with the Claimant. T at p. 44. She was aware that Claimant had several prior injuries involving her left knee and leg, which caused her to walk with a limp. *Id.*

Ms. Pannell testified that the Claimant presented to work on April 25, 2005, with a more pronounced limp than usual. T at p. 45. Claimant was also wearing an Ace bandage on the left upper thigh and asked her to rewrap it prior to their lunch break. *Id.* Ms. Pannell also recalled the Claimant coming out to the smoking area, using a walker to ambulate. T at p. 47. She had never seen the Claimant use a walker prior to this date and acknowledged that she did not see the Claimant using the walker while performing her nursing duties. T at p. 48. At approximately 8:00 p.m., Ms. Pannell was distributing the night medications on A wing when Neda Kirk yelled to her that Claimant needed help. T at p. 49. She found Claimant sitting in a chair with her left leg extended. She recalled a bulge in the Claimant's pants in the left thigh area. *Id.* She testified that when she had previously rewrapped the Ace bandage on the Claimant's leg prior in the evening, she had not seen a bulge. *Id.* She remembered Neda Kirk cutting the Claimant's pants leg above the knee and cutting through an Ace bandage that was wrapped around the Claimant's thigh. T at p. 50. Afterwards, she left Claimant and Neda Kirk to call an ambulance. *Id.*

Neda Kirk was also called as a witness for Employer and Carrier. Ms. Kirk testified she has worked for Beverly as a CNA for 21 years. T at p. 55. She obtained her CNA license from Northeast

Community College. T at p. 56. She has worked with the Claimant on numerous occasions. T at p. 57. On the date of the incident, she was working B wing with the Claimant. T at p. 57. She testified the Claimant had always walked with a limp but she noticed that Claimant was having more difficulty walking on that particular day. T at p. 59. She also recalled seeing the Claimant using a walker to ambulate while going to the smoking area at approximately 5:00 p.m. *Id.* Later in the evening, she was in Room B14 changing a resident when she heard the Claimant scream. T at p. 60. She came into the hall and found the Claimant sitting in a chair. *Id.* She did not know how the Claimant got into the chair. T at p. 61. Claimant instructed her to get Megan Pannell, the LPN working A wing. T at pp. 60-61. She also recalled the Claimant asking her to cut off her pants leg and an Ace bandage, which was wrapped around her left upper thigh. T at p. 62. She recalled the ambulance coming to the nursing home and transporting the Claimant to the hospital. T at p. 64. Ms. Kirk did not see the incident herself, and Claimant never told her what happened. T at pp. 61 and 64. She believed that there was another CNA working that night as well, but could not recall who that person was. T at p. 69.

MEDICAL TESTIMONY

Dr. Guy Vise (Commission's Original File, General Exhibit 1 [hereinafter "GE1"])

Dr. Guy Vise is a board certified orthopedic surgeon, who was retained by the Employer and Carrier to evaluate the Claimant's injury. GE1 at p. 4. Dr. Vise acknowledged that he had not personally evaluated Claimant but indicated that he had reviewed the Claimant's deposition, and numerous medical records and diagnostic testing from various physicians that had treated Claimant over the years, including Dr. Charles Taylor, Dr. Cappleman, The Pain Clinic of Memphis, Tippah County Hospital, St. Francis Hospital, Baptist Memorial, and Memphis Orthopaedic Associates. GE1 at pp. 4-5.

Dr. Vise noted that Claimant had suffered many prior injuries of her left lower extremity, including the following: fractures of the left ankle and left knee due to a motor vehicle accident in April 1964, which required open reduction, internal fixation of the knee and ankle; crush injuries of the left knee and left ankle as a result of a second motor vehicle accident in 1987, with Dr. Ennis performing a patellectomy; broken left distal femur above the knee due to a fall on ice in 1998, which was treated with a T-condylar plate and screws and eventually a locking nail and multiple bone grafts due to a non-union of the shaft above the left knee; and a pubic fracture in May 2000, when Claimant stepped off a curb. GE1 at pp. 8-17. Dr. Vise further testified that Claimant also had other pre-existing diseases/conditions that were significant for her April 25, 2005 fracture. GE1 at p. 17. These included osteoporosis requiring treatment with a bisphosphonate, long-term nicotine addiction, significant arthritis of the left knee with absent patella and severe weakness of quadriceps and hamstrings, and numerous fractures to the pelvis (x 2), femur shaft(x 2), patella (x 2), ankle (x2) and a stress fracture of the left foot. GE1 at pp. 17-22.

With regards to Claimant's left femur, Claimant had previously treated with Dr. Buchanan in Tupelo, Mississippi, following a slip and fall accident in 1998, wherein Claimant sustained a broken left femur. GE1 at pp. 10-11. Claimant had complications with the femur bone healing and was transferred to Memphis for additional treatment by Dr. Charles Taylor. *Id.* Multiple bone grafts were necessary, and Claimant ultimately had screws inserted into the femur bone. GE1 at p. 11. Dr. Vise testified that Claimant's 1998 fracture never completely healed. GE1 at p. 27.

Dr. Vise described Claimant's April 25, 2005 injury as a "spontaneous or fragility fracture of the left femur." GE1 at p. 43. He testified that Claimant's loss of blood supply to the area as a result of her previous injuries, along with the complications of her smoking habit, osteoporosis and bone loss and the removal of the hardware in December, 2004, were all significant factors relating

to her April 25, 2005 spontaneous femur fracture. GE1 at pp. 23-31. He found no indication that the Claimant was doing anything out of the ordinary or that there was any type of fall or event that caused her femoral fracture. His opinion was that the Claimant was in the “global post-operative” period of 180 days following the hardware removal in December, 2005, performed by Dr. Taylor, and that her April 25, 2005 incident involved a continuation fracture of the femur. GE1 at pp. 23 and 29. He concluded that the fracture occurred at one of the nail holes that was left vacant as a result of the hardware removal. GE1 at pp. 30-32.

In summary, Dr. Vise opined that Claimant had significant weakness from her numerous surgeries, especially the removal of her kneecap, which cause her to be susceptible to a spontaneous fragility fracture. He further explained that Claimant had hardware disease as a result of all the metal devices that had been inserted into her left lower extremity over the previous 40 years. He described her femur bone as being “sick.” It was Dr. Vise’s expert medical opinion that her April 25, 2005 fracture was a fragility or spontaneous fracture that was due to a daily living activities and not the result of any specific event or trauma.

Dr. Charles Taylor (Commission’s Original File, General Exhibit 2 [hereinafter “GE2”])

Dr. Charles Taylor is an orthopedic surgeon that began treating the Claimant in the late 1980s or early 1990s. GE2 at p. 6. Dr. Taylor recalled having initially treated the Claimant for a patellar fracture. *Id.* He also recalled that his partner, Dr. Richard Ennis, had performed a patellectomy or removal of the kneecap. GE2 at p. 10. In the late 1990s, he again treated Claimant for a severe fracture of her distal left femur, which required the insertion of a super condylar screw and plate. GE2 at pp. 6-7. Claimant subsequently returned to him because of a nonunion and plate failure. GE2 at p. 8. He proceeded to remove the plate and screws and packed the empty cavity of the distal femur

with either bone graft or bone substitute. GE2 at pp. 6-7. He also inserted a locking nail in her femur. *Id.*

Dr. Taylor acknowledged that in October, 2004, Claimant was having pain around the area where the screws had initially been inserted following her 1998 femoral fracture. GE2 at p.30. It was his initial recommendation to use anti-inflammatory medications in an effort to calm Claimant's symptoms. *Id.* However, Claimant indicated no relief, so out-patient surgery was scheduled for December 2004, to remove the femoral rod and screws. GE2 at p. 31. Dr. Taylor did not see the Claimant again until after her April 25, 2005 incident. *Id.* at pp. 30-31.

Dr. Taylor testified that he saw the Claimant again in April 2005, at St. Francis Hospital, for a second left femoral fracture. GE2 at pp. 11-12. Dr. Taylor thought he recalled the Claimant telling him that she fell in a hall while at work, but was not certain of how the Claimant was injured. GE2 at p. 12. He inserted a femoral rod in the marrow space of the femur bone and screws near the hip and knee to prevent the bone from rotating around the rod. GE2 at p. 13. Following the April 2005 surgery, Dr. Taylor noted that Claimant's fracture was not healing, so he recommended an electrical stimulator, which was worn on the outside of the leg. GE2 at p. 18. He also proceeded with a bone allograft in an effort to stimulate bone formation. GE2 at p. 22. He encouraged the Claimant to stop smoking as the habit was detrimental to her bone healing rate. GE2 at p. 20. Claimant also had complications with one of the screws trying to back out of the bone. GE2 at pp. 20-21. Therefore, Dr. Taylor felt it necessary to proceed with a screw revision in February 2006. GE2 at p. 22. The same screw continued to try to back out again, so Dr. Taylor decided to remove it in March 2006. GE2 at p. 23. He continued to follow her through January 2007, noting slow healing.

Dr. Taylor testified that of all his patients, Claimant had one of the hardest femurs to heal. GE2 at pp. 25-26. He thought a lot of this was due to her heavy smoking. GE2 at pp. 26-27. As of

January 23, 2007, Dr. Taylor opined that Claimant had not yet reached maximum medical improvement, and that he could not yet assign a permanent impairment rating. GE2 at p. 27. He concluded that she could return to work at desk duty but should limit her walking, lifting, carrying and pushing. *Id.* He did think she was capable of driving but did not think she could return to any type of employment which involved standing or weight bearing. GE2 at p. 28.

When Dr. Taylor initially evaluated Claimant at St. Francis Hospital, he characterized her April 25, 2005 injury as a “spontaneous fracture”, which he explained to mean that she was not struck by an object or knocked over. GE2 at pp. 35-37. He opined that this fracture was at a different level than her original femoral fracture. GE2 at p. 39. However, Dr. Taylor testified that Claimant’s femur fractures were related in the sense that they involved the same bone. GE2 at p. 42. He testified that the original bone grafts had decreased the Claimant’s blood supply to that area, which ultimately resulted in weakness of the bone. *Id.* Dr. Taylor also acknowledged that Claimant’s April 25, 2005 fracture could have occurred through a screw hole that was used for the plate inserted following her initial femur fracture. GE2 at pp. 16 and 38. Dr. Taylor stated that Claimant’s 1998 femur fracture did not contribute to the April 25, 2005 fracture but that her age, smoking habits and prior femur injuries were all complicating factors of her April 25, 2005 femur fracture. GE2 at p. 40. He concluded that her April 25, 2005 fracture was a “new injury but it was through a bone that had obviously suffered damage because of previous fractures and surgeries.”GE2 at p. 42. Dr. Taylor never related this new injury to Claimant’s work at Beverly.

Tippah County Hospital (Commission’s Original File, General Exhibit 5 - pages of Exhibit unnumbered)

An ambulance arrived at the Employer on April 25, 2005, and found Claimant sitting in a chair complaining of left upper thigh pain. Claimant reported that she was standing up passing out

medications and her left leg popped. A deformity was noted in the left thigh. Claimant was transported to Tippah County Hospital by ambulance. X-rays revealed a fracture of the distal one-third of the femoral shaft and a previously healed femoral fracture, with a metallic foreign body adjacent to the current fracture site. It was noted that Claimant had a rod removed from the femur in December 2004. Claimant was transferred to St. Francis Hospital for further treatment.

St. Francis Hospital (Commission's Original File, General Exhibit 3 [hereinafter "GE3"])

Claimant was transferred to St. Francis Hospital on April 25, 2005, for surgical repair of a spontaneous fracture of the left femur. GE3 at p. 234. She reported that she had twisted her left leg and walked over to a chair to sit down because of pain. *Id.* She was initially taken to the emergency room in Ripley, Mississippi, and found to have a left femur fracture. *Id.* It was noted that Claimant had a history of multiple hip fractures, knee fractures, ankle fractures, rib fractures and a shoulder fracture. *Id.* X-rays revealed chronic deformity of the femoral shaft distal to the acute fracture site. GE3 at p. 228. Dr. Charles Taylor performed surgical repair of the injury on April 26, 2005, and Claimant was discharged on April 28, 2005. GE3 at p. 230.

Claimant was again admitted to St. Francis Hospital on January 31, 2006, due to a delayed union of the left femur with symptomatic screw and hardware. GE3 at pp. 246-247. Dr. Charles Taylor proceeded with removal of a proximal locking screw, exchange of one of the two distal locking screws, removal of an old nut and washer at the nonunion site and a bone graft. GE3 at p. 266. A culture was performed on February 2, 2006, revealing no bone growth in the two day period. GE3 at p. 263. Claimant was also admitted to St. Francis Hospital again on March 28, 2007, with Dr. Charles Taylor removing a distal locking screw of the left femur.

Primary Care Clinic of Ripley (Commission's Original File, General Exhibit 4 - pages of Exhibit unnumbered)

Claimant presented to Dr. Troy Cappleman on March 7, 1994, with complaints of left leg, knee and hip pain. Claimant reported that she had been in two severe motor vehicle accidents with multiple fractures. Claimant was seen again by Dr. Cappleman on July 21, 1994, for complaints of arthritis in her left knee. It was noted that Claimant had been in a motor vehicle accident and walked with a marked limp. On October 20, 1994, Dr. Cappleman noted that Claimant was having left knee pain and was using a knee immobilizer. Dr. Cappleman also evaluated Claimant on January 18, 1995, noting that she was scheduled to have a total left knee replacement in two weeks. On June 29, 1995, Claimant reported to Dr. Cappleman, indicating that she was unable to work due to hip and knee pain. She was concerned about circulation of the left leg and was having pain, tingling and numbness in her toes. Claimant continued to see Dr. Cappleman throughout 1996, noting low back pain, bilateral knee and leg pain on multiple occasions. Specifically on July 11, 1996, Claimant noted that she had twisted and injured her left knee. She indicated that she had previously had a rod placed in her left femur and had her left patella removed.

In 1997, Claimant reported to Dr. Cappleman, noting that she was seeing Dr. Engleberg for spinal stenosis. On June 9, 1998, Claimant reported to Dr. Cappleman indicating that she had struck her left knee approximately three weeks prior to the evaluation. It was noted that she had no kneecap on that left side, and she was having marked swelling and pain. She was seeing an orthopedist at the time. Claimant saw Dr. Cappelman in May, 1999, for possible early cellulitis and venous stasis changes of the left leg. Claimant was having pain with weight bearing. It was noted that Claimant had some erythematous measuring about six centimeters in diameter in the area of her left calf.

Claimant returned to Dr. Cappleman on June 9, 1999, with increased edema of the left lower extremity. She was given medications and told to return as needed. Claimant was again seen on April 7, 2000, by Dr. Cappleman for swelling, redness and tenderness in both lower legs. She noted having bumped her leg a few weeks prior, causing swelling and pain. Claimant's Lasix was increased. Claimant was seen on May 17, 2000, after falling the night before while walking on the sidewalk. She was diagnosed with a pelvic fracture and was admitted for further treatment. Dr. Cappleman released claimant to return to work on July 24, 2000, following that injury. An x-ray of Claimant's pelvis was taken on August 18, 2000, revealing a pelvic fracture with minimal callous formation. Claimant continued to see Dr. Cappleman for a slow recovery from her pelvis fracture.

Claimant was seen by Dr. Cappleman in June, 2001, noting continued back and pelvic pain. In May, 2002, Claimant was seen for cellulitis of the left lower leg. Claimant was seen by Dr. Cappleman on October 19, 2004, with complaints of severe left hip and knee pain. X-rays revealed arthritis of the left hip and osteoporosis. Also, the femoral rod was protruding through the top of the hip joint about one and one half inches. On December 13, 2004, Claimant reported to Dr. Cappleman that she had been seeing Dr. Charles Taylor and was going to have femoral rod removed in a couple of weeks. On November 29, 2005, Claimant reported that she was having poor circulation of the left leg. She noted that the fracture of her left femur was not healing and that she was possibly going to have a bone graft done at the end of the month. She was instructed to return to her orthopedic surgeon for followup.

II. SUMMARY OF THE ARGUMENT

The Commission denied Claimant's request for workers' compensation benefits relating to her femoral fracture of April 25, 2005, finding that the evidence failed to show that any untoward event, unusual occurrence, accident or injury incident to Claimant's employment occurred and that

there was no medical proof of causal connection between Claimant's work and her femoral fracture. The Circuit Court erroneously reversed the Order of the Commission, substituting its own findings of fact and failing to give the Commission's findings deferential review. Employer and Carrier appeal to this Court, asking that the Commission's denial of benefits be reinstated as said finding was supported by substantial evidence and the applicable law.

III. ARGUMENT

The Circuit Court erred in reversing the Order of the Mississippi Workers' Compensation Commission as the Commission's denial of benefits was supported by substantial evidence and the applicable law.

The standard of review to be utilized by this Court when considering an appeal of a decision of the Workers' Compensation Commission is well established. The Mississippi Supreme Court has stated that "the findings and order of the Workers' Compensation Commission are binding on the Court so long as they are supported by substantial evidence." *Vance v. Twin River Homes, Inc.*, 641 So.2d 1176, 1180 (Miss. 1994) (quoting *Fought v. Stuart C. Irby Co.*, 523 So.2d 314,317 (Miss. 1988)). The Circuit Court, as well as this Court, should not review the facts on appeal to determine how it would resolve the factual issues if it was the ultimate trier of fact, but instead, 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). Further, in cases where the issue is whether there has been an abuse of discretion, this Court is to review the opinion of the Commission and not the decision rendered by the reviewing Circuit Court. *Ameristar Casino-Vicksburg v. Rawls*, 2 So.2d, 675, (Miss. Ct. App. 2008), citing *Bradley and Thompson, Mississippi Worker's Compensation* §8:6 (Thompson - West 2006).

The erroneous standard of review utilized by the Circuit Court is the primary basis for the appeal filed by the Employer and Carrier to this Honorable Court. Rather than limiting its review

to determining whether the Commission's order was supported by substantial evidence, the Circuit Court re-weighed the evidence presented to the Commission and substituted its own findings of fact for those of the Commission. After reviewing the lay and medical evidence presented at the hearing on the merits regarding Claimant's April 25, 2005 femoral fracture, the Commission found that there was "no evidence in the record which discloses any untoward event, unusual occurrence, accident or injury incident to Claimant's employment" (F at p. 64, RE at p. 22); that Claimant "failed to present substantial and credible evidence of any accidental injury arising out of her employment" (F. at 65, RE at p. 23); that "Claimant failed to present any substantial and credible evidence that her employment [] placed her in a position of increased risk of injury" (F at 66, RE at p. 24); and that there was "no evidence that Claimant's employment caused or contributed to her left femoral fracture which occurred on April 25, 2005." (F at 67, RE at p. 25) However, the Circuit Court reversed, stating "there exists clear evidence the [Claimant] suffered an injury arising out of and in the course of her employment and the employment clearly contributed to said injury." R at p. 88, RE at p. 10. Employer and Carrier contend that in light of the highly deferential standard of review in workers' compensation cases, the Circuit Court erred in reversing the Commission.

The Circuit Court failed to provide any explanation as to why it found the Commission's order to be unsupported by substantial evidence. The Court stated that it was "uncontroverted" and "unrefuted" that Claimant suffered a new injury, citing only the testimony of Dr. Charles Taylor that Claimant's fracture was at a different level than her previous fracture. R at pp. 87-88, RE at pp. 9-10. However, the Court fails to note that Dr. Taylor never said that Claimant's "new injury" was in any way causally connected to Claimant's employment. Also, it is apparent the Circuit Court failed to consider Dr. Vise's testimony, who specifically stated Claimant's injury was not causally related to Claimant's work. The Commission, on the other hand, based its denial of benefits largely

in part on the testimony of Dr. Vise, who stated Claimant's fracture was a continuation fracture as opposed to a "new injury." Employer and Carrier would reiterate that the Commission is the ultimate judge as to the credibility of witnesses and has the authority to accept or reject testimony based on its degree of trustworthiness or credibility. *White v. Superior Products, Inc.*, 515 So. 2d 924, 927 (Miss. 1987). Likewise, negative testimony concerning the cause of an injury, such as was the opinion of Dr. Vise in this case, may be substantial evidence upon which compensability of a claim is denied. *Id.* This finding of fact by the Circuit Court specifically shows that the Court chose to re-weigh the evidence presented to the Commission, as the Commission had alternatively found Dr. Vise's testimony more convincing.

Because of the requisite deferential standard of review in workers' compensation cases, this Court should review the Commission's decision to determine if it was supported by substantial credible evidence, without deference to the decision of the Circuit Court. *Posey v. United Methodist Senior Servs.*, 773 So.2d 976, 978 (Miss. Ct. App. 2000). Substantial evidence has been defined by this Court as something more than a "mere scintilla" of evidence but not rising to the level of a "preponderance of the evidence." *Delta CMI v. Speck*, 586 So. 2d 768, 772-73 (Miss. 1991). It simply means such relevant evidence as reasonable minds might accept as being adequate to support a conclusion. *Id.* In this case, the Commission found that Claimant did not sustain a work related injury. Thus, the question before this Court is whether the Commission's fact finding that no work related injury occurred is supported by substantial evidence.

Employer and Carrier would show that the Commission rendered a fourteen page opinion in which it found Claimant did not sustain a work related injury. Contrary to the Circuit Court's order, Employer and Carrier have never disputed that Claimant was at work on April 25, 2005, when her femoral fracture occurred. The basis for Employer and Carrier's denial of the claim was that no

untoward event occurred, which is a requisite finding for an injury to be work-related and thus compensable, and further, that there was no medical proof supporting a causal connection between Claimant's work and her femoral fracture.

"Injury" is defined by Miss. Code Ann. §71-3-3(b) (1972) as amended, as an accidental injury or accidental death arising out of and in the course of employment without regard to fault which results from an untoward event or events, if contributed to or aggravated or accelerated by the employment in a significant manner. An untoward event or events shall not be presumed to have arisen out of and in the course of employment, except in the case of an employee found dead in the course of employment. *Id.* By definition, an injury must result from "an untoward event" causing unexpected results. Therefore, there are two requisites for an injury to be compensable under the Mississippi Workers' Compensation Act: (1) the injury must arise out of the employment, i.e. causal connection, and (2) the injury must have occurred in the course and scope of the employment. Specifically, there must be evidence supporting a nexus between the work activity and the incident that produced the injury. It is the Employer and Carrier's position that simply being at work when an injury occurs does not meet this nexus.

The Commission found "no evidence in the record which discloses any untoward event, unusual occurrence, accident or injury incident to Claimant's employment." F at p. 64, RE at p.22. This finding is supported by substantial evidence and should be upheld. Claimant gave different versions in her testimony at hearing, in her deposition and in the history in her medical records of what she was doing when she had her femoral fracture. However, claimant acknowledged that her injury did not occur because of a specific employment hazard. She did not trip, fall or even stumble when her fracture occurred. Further, her leg was not struck by any object. In fact, the evidence shows that Claimant's leg was bothering her before she came to work on April 25, 2005. Megan

Pannell and Neda Kirk both testified that the Claimant's thigh was wrapped with an Ace bandage and that her pre-existing limp was more pronounced on that particular day. Both witnesses recalled Claimant using a walker prior to her fracture occurring.

The medical testimony likewise fails to show that Claimant's fracture was causally related to her employment. The medical opinion offered by Dr. Charles Taylor, and substantiated by Dr. Guy Vise, shows that the Claimant had numerous pre-existing injuries and/or conditions of her left lower extremity that caused substantial weakness of Claimant's left femoral bone. Dr. Taylor and Dr. Vise concurred that Claimant's injury was a spontaneous fracture and was not due to any acute trauma or event involving her left leg, i.e. no untoward event having occurred. Both doctors further agreed that Claimant's fracture on April 25, 2005, most likely occurred at the empty screw site where the plate had been removed from Claimant's left femur in December 2004. It was Dr. Vise's expert medical opinion that Claimant's femoral bone had not completely healed following that procedure, and that her April 25, 2005 femoral fracture was a continuation fracture through the vacant screw hole. Dr. Vise further testified that Claimant's injury was due to daily living activities and not the result of any specific event or trauma. Dr. Vise's testimony was uncontroverted as Dr. Taylor did not state to a reasonable degree of medical probability that Claimant's work had in any way contributed to her left femoral fracture. Dr. Vise's opinions are further supported by Claimant's own testimony that her leg had been bothering her before the fracture occurred and that she was planning to go to the emergency room at the end of her shift. Claimant failed to offer any medical proof that her femoral fracture was causally related to her employment.

The Commission thoroughly reviewed the lay and medical evidence and concluded that Claimant failed to present substantial and credible evidence of any accidental injury causally related to her employment. Instead, the Commission ruled that the evidence showed a lack of any causal

connection to Claimant's employment and that Claimant's femoral fracture was a natural progression of her 40 year history of numerous injuries and surgeries of her left leg. It just so happened that she was at work when it occurred. The Commission held that this alone was insufficient to be a causal connection for which benefits should be awarded. The only explanation given by the Circuit Court for its reversal of the Commission's decision was that Claimant's leg was not broken when she came to work and that an unexpected event with an unexpected result occurred while she was at work. Thus, the Circuit Court seems to suggest that any unexpected illness occurring while a worker is on the time clock should be compensable as a matter of law, regardless of any proof of causal connection to his or her employment. This would be analogous to saying that an appendix rupture occurring while one is at work should be compensable. This has never been the intention of the Mississippi Workers' Compensation Act.

After re-weighting the evidence presented to the Commission and making a finding that Claimant sustained a new injury causally related to her employment, the Circuit Court went on to state that the Commission incorrectly applied the law when it concluded that the "injury would have occurred had she been at home." F at p. 67, RE at p. 25. Employer and Carrier would suggest that said finding made by the Commission was not a conclusion of law but rather a finding of fact - i.e. that there was no causal connection between the Claimant's employment and the spontaneous burst fracture, or alternatively, that Claimant was not placed in a position of increased risk of injury at her work place. Employer and Carrier contend that the Commission appropriately applied the law, holding that there must be proof that the injury arose out of and in the course and scope of one's employment. The Commission stated Claimant's job as a CNA must have caused or contributed to her femoral fracture on April 25, 2005, or alternatively, her employment must have placed her in a position of increased risk of injury, for her injury to be compensable. This is an appropriate statement

of the law. However, the Circuit Court hinged its reversal of the Commission upon the “second prong” of the definition of accidental injury, i.e., “an accidental injury occurs when the harm to a worker is the unexpected result of performing the usual work in the usual way.” Citing *Bradley and Thompson, Mississippi Workers’ Compensation Commission* §3:1 (2008). R at p. 88, RE at p. 10. However, the definition of injury, as defined in Miss. Code Ann. §71-3-3(b) (1972) as amended, requires a degree of work-connectedness, either by contribution, aggravation or acceleration by the employment. Again, simply being at work, unless placed in a position of increased risk, does not establish such a nexus. Nonetheless, the Circuit Court held that an “unexpected event coupled with an unexpected result” satisfies the definition of injury, regardless of any proof of causal relation to one’s employment. R at pp. 88-89, RE at pp. 10-11. Employer and Carrier contend that this is a misstatement of the applicable law.

Employer and Carrier appeal to this Court, asking that the Commission’s denial of benefits be reinstated. The Commission held that Claimant failed to prove that her femoral fracture of April 25, 2005, was causally related to her employment as a CNA. This finding was supported by substantial evidence and should have been affirmed by the Circuit Court. However, the Circuit Court failed to give deference to the Commission’s findings and erroneously reversed the Commission’s Order. Because of the Circuit Court’s misapplication of the standard of review when it is sitting as an Appellate Court, Employer and Carrier request that this Court reinstate the Order of the Commission, as the Commission’s denial of benefits was supported by substantial evidence and the applicable law.

V. CONCLUSION

If the Circuit Court were given the discretion to review the evidence on a *de novo* basis, then yes, it might have concluded that the evidence presented, supported a finding of compensability.

However, that is the incorrect standard of review for a workers' compensation case on appeal. The findings of the Commission are binding if supported by substantial evidence and the applicable law. The Circuit Court cannot pick and chose facts to support a differing conclusion when the Commission's findings are not arbitrary and capricious and are supported by substantial evidence, even if the Circuit Judge would have weighed the evidence otherwise. Clearly, this is what happened in this case. The Circuit Judge stated during oral arguments that he felt the findings of the Commission "were so contrary to just logic and the purpose of the Act that it caused [him] to question what was motivating [the Commissioners] to rule in the way that they did. It just seems entirely inconsistent with the remedial goals of the Act." Transcript of Circuit Court oral argument [hereinafter "CCT"] at p. 19. The Circuit Court inappropriately applied a de novo standard of review while it was sitting as an Appellate Court and reversed the Commission. Employer and Carrier respectfully request that this Court reinstate the Order of the Commission as its denial of benefits was supported by substantial evidence and the applicable law.

Respectfully submitted,

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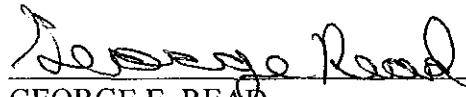
I, George E. Read, of counsel for the employer and carrier herein, do hereby certify that I have this day mailed via United States mail, postage prepaid, a true and correct copy of the above and foregoing pleading to:

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THIS, the 31st day of Aug., 2009.



GEORGE E. READ

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