IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2009-WC-00344-COA

BEVERLY HEALTHCARE AND AMERICAN HOME ASSURANCE COMPANY — **APPELLANTS**

v.

IRENE HARE — **APPELLEE**

DATE OF JUDGMENT:	02/04/2009
TRIAL JUDGE:	HON. ANDREW K. HOWORTH
COURT FROM WHICH APPEALED:	TIPPAH COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	GEORGE E. READ
ATTORNEY FOR APPELLEE:	GREG E. BEARD
NATURE OF THE CASE:	CIVIL - WORKERS' COMPENSATION
TRIAL COURT DISPOSITION:	REVERSED THE DECISION OF THE WORKERS' COMPENSATION COMMISSION AND REINSTATED THE ORDER OF THE ADMINISTRATIVE JUDGE AWARDING BENEFITS TO HARE
DISPOSITION:	AFFIRMED AND REMANDED: 06/29/2010
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

KING, C.J., FOR THE COURT:

¶1. A long-time employee who was injured at her place of employment as a nurse at a nursing home in Ripley, Mississippi, was denied workers' compensation benefits by the Mississippi Workers' Compensation Commission in a split decision. However on appeal, the circuit court reversed the Commission's decision and reinstated the decision of the administrative judge (AJ) awarding Irene Hare temporary total benefits until she reaches

maximum medical improvement. The employer and carrier appeal raising two issues, which we combine as one: whether the circuit court erred by re-weighing the evidence and substituting its own findings of fact for those of the Commission by finding that the employee sustained a compensable work injury. We find that the circuit court was correct in reversing the decision of the Commission. Accordingly, we affirm the judgment of the circuit court to reverse the Commission's decision as unsupported by substantial evidence. We remand this case to the Commission to determine Hare's benefits.

FACTS

¶2. Hare, who was seventy-four years old, had suffered several accidental injuries to her left leg.

1. Work History

¶3. After being widowed, Hare went back to school at age forty-eight to become a licensed practical nurse. Prior to her nursing career, Hare had worked as a truck driver, a painter, a shoe packer at Brown Shoes, and a beautician. After becoming an LPN, she worked for Timber Hills Nursing Home and also part time on weekends at Whitfield Nursing Home in Carthage, Mississippi, some 160 miles from her home in Booneville, Mississippi. She began working for Beverly Enterprises in Iuka, Mississippi, in 1985 and later transferred to a Beverly owned nursing home in Ripley where she has worked since. She was off from work 1988-1991, recovering from a broken left leg she received as the result of slipping on ice. Her average weekly wage at the time of her injury was $710.40.

¶4. At Beverly Healthcare, Hare always worked the second shift from 2:45 p.m. until 11:15 p.m. with a thirty-minute lunch break. The facility had two wings, A and B, with a

nurses' station in the middle. Hare was responsible for Wing B, which had sixteen rooms and twenty-eight patients. Her duties included passing out medications twice during her shift, charting information, refilling ice and water containers in patient rooms, and helping the certified nursing aides when needed. Hare testified that she willingly worked extra hours when other workers were out. She testified that she was supposed to work four days a week, but if anyone was out, she would come in and work. On April 25, 2005, the day of the accident, which is at the heart of her workers' compensation claim, Hare was working her sixth consecutive day.

2. Left-Leg Injuries

¶5. Hare's trouble with her left leg began in 1964 when she and her mother were involved in an automobile collision in which their vehicle was hit head on by a drunk driver. Her mother perished in the accident, and Hare's left ankle and knee were crushed along with other serious injuries. Hare testified that after the accident, she consistently walked with a limp.

¶6. In 1987, Hare was involved in another serious automobile accident in which her left knee and ankle sustained crush injuries. At some point her leg injuries required that a super condylar screw and side plate be implanted into her left femur. This was done at a hospital in Tupelo, Mississippi. Still having severe pain, Hare went to an orthopedic surgeon in Memphis, Tennessee, who removed her kneecap. It was at this time that she began being seen by Dr. Charles Taylor, an orthopedic surgeon, in Memphis.

¶7. According to Hare, at some point prior to 1987, she had suffered a stress fracture of her foot while walking down the hall at the nursing home. She said Dr. Taylor placed her

leg in a cast, which she wore for six weeks at work. While this injury occurred on the job, Hare never filed a claim for workers' compensation benefits. In 1993, Dr. Taylor surgically removed the implanted devise in Hare's leg, which had failed. After removing the device, Dr. Taylor inserted a locked nail in her left femur and grafted bone in the area. Dr. Taylor testified that she made a full recovery from this surgery. The next year, Hare slipped on some ice and broke her femur above the knee. In 2000, she stepped awkwardly off a curb and fell breaking her pelvis. Despite these previous injuries, the testimony is uncontradicted that Hare had passed Beverly's physical examination every year. It is uncontradicted that on the date of the injury Hare had been cleared by her doctors to return to work.

3. The April 25, 2005, Injury to the Left-Leg

¶8. According to Hare, on April 25, 2005, her knee was hurting more than usual, and she told her fellow employees that she planned to go to the emergency room after her shift had ended and get a shot for the arthritis pain in her left leg.

¶9. After clocking in, Hare sorted the medications for the patients on her wing and got ice and water for them to take with their medications. Hare gave medications twice, first at the beginning of her shift and again at 8:00 p.m. After assembling the medications, Hare who had been a smoker since age fourteen took a smoke break. According to Hare, Dr. Taylor had warned her that one of the hazards of smoking is that it impedes the healing of fractures. After her smoke break, Hare gave the medications to the patients; this took approximately two and a half hours. She then went back up to the nurse's station and did her charting and weekly summaries. She said she also performed a treatment or two on patients, by which she meant dressing a small cut or re-bandaging a cut. Hare took her lunch break at

approximately 5:00 p.m., and when she returned, she went to the computer to do charting. After that she began giving the second round of medications. The giving of the medications involved taking the medication from a cart and giving it to the patient along with a glass of water. Starting at the end away from the nurse's station, she rotated from side to side giving the medications. Hare had worked her way up to room number nine. She said she retrieved the medication for the patient and poured out a glass of water and headed into the room. When she reached the end of the cart she remembered that she had forgotten to get the glass of water off the cart, so she "pivoted around" on her left leg to pick up the glass. She said that as she pivoted, her leg just "popped just like a shotgun," and immediately, she was in terrific pain. She realized that her leg was broken and called for the aide to go get the LPN in Wing A. Unable to walk, she held herself up on the medicine cart until one of the aides put a chair underneath her and the other LPN called for an ambulance.

¶10. The aide, Neda Kirk, who had worked with Hare for more than fifteen years, said that she was in a patient's room when she heard Hare screaming in pain. Hare instructed her to go get the LPN on Wing A, Megan Pannell, which she did. Kirk testified that Hare was "pretty much screaming" most of the time from the time of the injury to the time the ambulance came. Pannell was called by the employer and carrier to testify. She remembered that Hare was walking with a more pronounced limp on the day of the injury. She testified that on that day she rewrapped Hare's Ace bandage but that it was located on her left thigh and not her left knee, and there was nothing wrong with the leg. Hare said that she did not recall anyone adjusting her bandage. Pannell said that she observed Hare using a walker to go outside for her smoke break; a fact that Hare also denied. Pannell was also taking a

smoke break, and she said she asked Hare if she was going to be able to make it through her shift; Hare replied that she was fine. Pannell said she had never seen Hare using a walker before. Pannell said after being summoned to help Hare, she found her in the hallway in a chair with her leg extended, and she could see a bulge in Hare's left thigh area that she thought was a fracture.

¶11. Hare was taken by ambulance to the emergency room at Tippah County Hospital, but she was then transferred to St. Francis Hospital in Memphis. An x-ray showed that she suffered a transverse fracture to her left femur. Hare underwent an open reduction and internal fixation of the fracture on April 25, 2005. In January 2006, Dr. Taylor removed the screws from the left leg with revision and bone grafting and removed a screw on March 28, 2006. Hare has continued seeing Dr. Taylor for followup care.

4. Testimony of Dr. Charles Taylor, the Treating Physician

¶12. Dr. Taylor, an orthopedic surgeon, had been seeing Hare since 1993. Dr. Taylor testified that Hare had completely healed from a past patellar fracture and distal fracture in her left femur by the time of the April 25 event. Additionally, Dr. Taylor testified that the April 25, 2005, injury was to a different level of her thigh than her original fracture level, approximately two inches away from the previous injury, and it occurred in a screw hole that was used on a plate applied in Tupelo during a previous surgery. He testified that her 2005 fracture "was at a level further up the shaft . . . well away from her original fracture." Dr. Taylor was asked if the earlier injuries had anything to do with or in any way contributed to the April 25, 2005, injury; and he responded that it did not. Dr. Taylor testified that the fracture was the result of a twisting injury.

5. Testimony of Expert Witness for Employer and Carrier, Dr. Guy T. Vise Jr.

¶13. The employer and carrier hired Dr. Guy T. Vise Jr., an orthopedic surgeon from Jackson, Mississippi, to review Hare's medical records and give an opinion. Dr. Vise did not examine Hare; he arrived at his opinions by only examining her medical file. Dr. Vise said he no longer performs surgery but spends about half of his time as a professional expert witness. He testified at his April 4, 2007, deposition that his hourly rate was $600 an hour for a consultation and $750 an hour if he had to testify in court, and he charges a separate fee for depositions of $900 with a two-hour guaranteed minimum. His conclusion was that Hare's fracture was caused from diseased bone that had been hurt again. Dr. Vise testified that he thought that Hare had significant weakness from her numerous surgeries that caused her to be susceptible to what he called a "spontaneous fragility fracture." He said it takes 150 days for normal bone to heal and nine months or so for the normal bone to heal in a smoker. He said that the fracture could have occurred at any time when she was doing so-called "normal activities of life," but it just happened to occur while she was performing her job at the nursing home. Dr. Vise was asked if he agreed with Hare's doctor, Dr. Taylor, that the injury Hare sustained on April 25 was a torsion fracture caused from the twisting of the bone. Dr. Vise agreed that the medical records were consistent with Hare's injury being caused by a twisting or torsion of the bone.

6. AJ's Order

¶14. The AJ on June 29, 2007, found that Hare had met her burden of proving that her fracture to the left femur on April 25, 2005, was work related. The AJ found:

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 physician, Dr. Charles Taylor, characterized her fracture as "new." Even if the fracture occurred spontaneously, Claimant was still injured while performing her work duties. Therefore, I find that Claimant's left femur fracture was work related in accord with the Mississippi Workers' Compensation Law.

¶15. The AJ awarded Hare temporary total benefits until she reaches maximum medical improvement, which the parties agreed would be calculated once the compensability issue was resolved.

7. The Commission's Decision

¶16. The employer and carrier appealed to the Commission, which on a vote of 2-1 found that the AJ's order was contrary to the overwhelming weight of the evidence and was not supported by substantial evidence. The Commission held that while it is undisputed that Hare suffered a left-femur fracture while at work on April 25, 2005, Hare had failed to establish that her injury arose out of her employment. The Commission ruled that Hare had failed to establish any causal nexus between her work activities and her left-femoral fracture. "[S]imply being at work when an injury occurs does not meet this nexus. . . . There is no evidence in the record which discloses any untoward event, unusual occurrence, accident or injury incident to Claimant's employment. It is the Claimant's testimony that she was simply walking or pivoting to enter a patient's room when she felt her left leg pop." The Commission reversed the order of the AJ. However, one commissioner dissented finding that Hare had sustained a compensable injury "when she broke her left femur while conducting the duties of her job as a Licensed Practical Nurse."

¶17. Hare appealed the Commission's decision to the Circuit Court of Tippah County. After hearing oral argument, the circuit judge ruled from the bench that the Commission's order was not supported by substantial evidence. The circuit judge noted that his usual practice was to review the record again after argument and then issue his decision. However, he said this appeal was the exception. The circuit judge acknowledged that he was obligated to apply a limited standard of review to workers' compensation decisions and noted that he had never reversed a decision before. Expressing bewilderment with the Commission's decision, the circuit judge stated:

> I am not only of the opinion that the relevant findings of the two Commissioners are not supported by substantial evidence, I am quite surprised at the finding[s] of the Commission, quite frankly. I mean I understand how they came up with the result they came up with. I understand how they used words to achieve a result. I find this to completely contravene[] the purpose and intent of the [A]ct."

ANALYSIS

¶18. We begin our analysis by noting our limited standard of review in workers' compensation appeals. The Commission is the trier and finder of facts in a compensation case. *Walker Mfg. Co. v. Cantrell*, 577 So. 2d 1243, 1245-47 (Miss. 1991). This Court will overturn the Commission's decision only for an error of law or an unsupported finding of fact. *Georgia Pac. Corp. v. Taplin*, 586 So. 2d 823, 826 (Miss. 1991). Reversal is proper only when a Commission's decision is not based on substantial evidence, is arbitrary or capricious, or is based on an erroneous application of the law. *Smith v. Jackson Constr. Co.*, 607 So. 2d 1119, 1124 (Miss. 1992). "We will reverse when the findings of the Commission are based on a mere scintilla of evidence that goes against the overwhelming weight of

evidence." *DiGrazia v. Park Place Entm't*, 914 So. 2d 1232, 1236 (¶8) (Miss. Ct. App. 2005) (citing *Johnson v. Ferguson*, 435 So. 2d 1191, 1194-95 (Miss. 1983)). In *Myles v. Rockwell*, *Int'l* 445 So. 2d 528, 536 (Miss. 1983), the supreme court found that when the decision of the Commission is clearly erroneous and adverse to the overwhelming weight of the evidence so that the Commission's decision fails to carry out the beneficent intent and purpose of the Workers' Compensation Act, this Court must reverse the decision of the Commission.

¶19. In their appellate brief, the employer and carrier claim that an erroneous standard of review was used by the circuit court. They claim that rather than limiting its review to a determination of whether there was substantial evidence to support the Commission's decision, the circuit court reweighed the evidence presented to the Commission and then substituted its findings for those of the Commission. The employer and carrier then devote several pages of their appellants' brief pointing out how the circuit court was wrong in its conclusions.

¶20. In our decision in *Ameristar Casino-Vicksburg v. Rawls*, 2 So. 3d 675, 680 (¶17) (Miss. Ct. App. 2008) (citing *Posey v. United Methodist Senior Servs*., 773 So. 2d 976, 978 (¶5) (Miss. Ct. App. 2000)), we said that even though the appeal is technically from the circuit court, our task upon appeal is to review the Commission's decision for validity. That we shall do.

¶21. The employer and carrier argue that the Commission was correct when it decided that Hare's April 25, 2005, femoral fracture was not the result of any untoward event, unusual occurrence, accident, or injury incident to her employment; and they further argue that there

was no medical proof of causation between her work and her fracture.

¶22. The Commission found that Hare's injury failed to meet the statutory definition of injury as found in Mississippi Code Annotated section 71-3-3(b) (Rev. 2000). That statute provides in pertinent part:

> "Injury" means 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. Untoward event includes events causing unexpected results. An untoward event or events shall not be presumed to have arisen out of and in the course of employment. . . .

Miss. Code Ann. § 71-3-3(b). Specifically, the split Commission decision found that Hare had failed to prove that any "untoward event or events" occurred during her work that would give the degree of causation necessary to find there was a causal connection between her work and the injury. Instead, the Commission relied heavily on the opinion of the employer and carrier's expert witness, Dr. Vise, who characterized Hare's injury as a "spontaneous fracture." The Commission found that Hare had failed to present substantial and credible evidence of any accidental injury arising out of her employment, stating:

> "Instead, the evidence shows that Claimant's femur fracture was a natural progression of her 40-year history of injuries and surgeries on her left leg, and merely occurred during the course of her employment."

Further, the Commission found that Hare could not benefit from the "increased-risk doctrine" which provides that an injury is compensable if the conditions of employment increase the risk of injury, even though the primary cause of injury has no causal connection with the work. The Commission found there was no testimony that Hare was placed by the employer in a position of increased risk.

¶23. The dissenting commissioner found that Hare sustained a compensable injury when she broke her left femur while conducting the duties of her job as an LPN. The dissenter found that an untoward event occurred at work. In making this finding, the dissent said the following factors had a bearing on his decision: (1) Hare reported to work without a broken leg; (2) Hare was at work when the injury occurred; (3) Hare was performing her duties as an LPN at the time her femur was broken; and (4) her treating physician, Dr. Taylor, described her injury as a torsion injury suggesting that it was the result of a twisting or turning motion. This would be in agreement with Hare's testimony that she experienced the injury when she pivoted back to her cart to retrieve water for dispensing medication to a patient of the nursing home. The dissenter further found that Hare's pivot on her leg, which resulted in the transverse fracture, was an untoward event which was accelerated by her employment and caused the unexpected event.

¶24. Just as did the circuit court, this Court finds the Commission was mistaken when it denied Hare compensation because that decision was not supported by substantial evidence, and the applicable law was not applied.

¶25. In order to establish a prima facie case of disability, a claimant must show by a fair preponderance of the evidence (1) an accidental injury; (2) arising out of and in the course of employment; and (3) a causal connection between the injury and the claimed disability. *Hedge v. Leggett & Platt, Inc.*, 641 So. 2d 9, 13 (Miss. 1994) (quoting *Harbin's Bakeries v. Dependants of Harrell*, 566 So. 2d 1261, 1264 (Miss. 1990)). An injury arises out of the employment when there is some causal connection between the employment and the injury. *Id.* at 14. "Injury or death arises out of and in the course of employment even when the

employment merely aggravates, accelerates, or contributes to the injury." *Id.* at 13-14 (quoting *Dependents of Chapman v. Hanson Scale Co.*, 495 So. 2d 1357, 1360 (Miss. 1986)). Thus, a claimant is entitled to benefits if the employment acts upon the claimant's pre-existing condition to produce disability. *Id.* Once a claimant establishes a prima facie case of disability, the burden of proof shifts to the employer to rebut or refute claimant's evidence. *Thompson v. Wells-Lamont Corp.*, 362 So. 2d 638, 641 (Miss. 1978).

¶26. Turning to an evaluation of the requirement for compensation of an accidental injury that arose out of her employment, we find the evidence is undisputed that Hare's fractured femur was accidental within the statutory meaning of that term. When Hare reported to work on the day of the injury she was limping; however, she was by no means injured. The testimony was that since her grievous car accident in 1964, Hare has walked with a limp, including the seventeen years she had worked for Beverly. Though the limp was more pronounced on the day of the accident and Hare wore an Ace bandage on her leg, there was no testimony that she suffered the injury away from the workplace. In fact the employer and carrier's own witness, Pannell, the other LPN on duty on Wing A, testified that Hare's limp was more pronounced on the date of the injury and that Hare had an Ace bandage on her left upper thigh.

¶27. It is undisputed that the fracture of Hare's leg occurred while she was performing her assigned duties as an LPN at the nursing home. Hare testified that she was delivering medications to the patients when she stopped in front of room nine. As usual she poured out a glass of water, picked up the medication, and headed for the room only to discover that she had forgotten the glass of water. According to Hare, she pivoted around on her left leg to

retrieve the water; at which point, her leg popped making a sound like a shotgun, putting her down. Her treating physician of several years, Dr. Taylor, an orthopedic surgeon, testified that the fracture occurred from a twisting injury. He stated that the 2005 fracture "was at a level further up the shaft . . . well away from her original fracture." When he was asked if the earlier injuries to her left leg contributed to the 2005 fracture, he replied that they did not. Likewise, the employer and carrier's expert witness, Dr. Vise, confirmed that Hare's injury was consistent with a twisting or torsion fracture. Dr. Vise's testimony was that Hare's fracture was a "spontaneous fragility fracture," which could have occurred at any time when she was doing so-called "normal daily activities" because of her past history of numerous surgeries to the left leg. The record is clear and without contradiction that Hare was in the process of performing the normal daily activity of working at her long-held job as an LPN when she suffered a severe femur fracture.

¶28. The final requirement for compensation is a causal connection between the injury and the job. One noted treatise has aptly described the concept as follows:

> A worker sustains an accidental injury if, when looking through the eyes of the worker, there is harm to the worker from work-connected activity that either: (a) was from an unexpected event; or (b) was an unexpected result. The unexpectedness of either the event or the result is accidental.

John R. Bradley and Linda R. Thompson, Mississippi Workers' Compensation § 3:1 (Thompson-West 2008).

¶29. When applying this definition to the facts of this case, it is readily seen that looking through the eyes of Hare, her fractured femur was an unexpected result of dispensing medications to her patients. Hare testified that this portion of her job involved twice a day

placing medications, water, and glasses on a cart and starting at the end of the hallway working her way toward the desk dispensing the prescribed medication along with a glass of water to each patient. She was doing this job in the usual way when she pivoted to get a water glass and her femur fractured making an unexpected sound like a shotgun blast.

¶30. Thus, we find that the Commission did not have substantial evidence to support its denial of compensation to Hare. In fact, we find that she sustained her burden of proving compensability by substantial evidence.

¶31. Two other points of law were not applied by the Commission in arriving at its decision. The first is that the employer takes the worker as the worker is found, that is, with all the physical strengths and weaknesses the worker brings to the job. *Hanson Scale Co.*, 495 So. 2d at 1360. Two examples used in *Hanson Scale* in applying this rule are on point with the case at hand:

> If a lame worker suffers an employment fall and is injured, the injury is said to arise out of and in the course of employment under the same test applied for workers not lame. By the same token, if an awkward worker stumbles and falls, the rule is the same as if the worker were agile.

Id.

¶32. Hare has worked her entire adult life and has suffered more injuries than most to her left leg. Only once when she fell on ice did the injuries keep her out of the workforce. After one fall and injury she worked for six weeks in a cast for Beverly and did not file for workers' compensation benefits. Her continued injuries did not stop her from working, nor did they stop the employer Beverly, from benefitting from her work and loyalty. On the day of the accident, Hare was working the sixth day in a row. She testified that she was supposed

to work four days a week, but she would work if anyone was out. Thus, Beverly accepted Hare with her weakened bone structure along with her undoubted strengths as an LPN in its facility. The Commission erred by not considering this point of law in connection with Hare's claim.

¶33. The second point of law not considered by the Commission is the remedial nature of the workers' compensation statutes and the broad interpretation it is to be given. In *Big "2" Engine Rebuilders v. Freeman*, 379 So. 2d 888, 889-890 (Miss. 1980), the Mississippi Supreme Court summarized:

> The singular purpose pervading the Workmen's Compensation Act is to promote the welfare of laborers within the state. Miss. Code Ann. § 71-3-1 (1972); *Nowlin v. Lee,* 203 So. 2d 493 (Miss. 1967). As remedial legislation to compensate and make whole, *McCluskey v. Thompson*, 363 So. 2d 256 (Miss. 1978) [receded from on another issue], it should be construed fairly to further its humanitarian aims. *Speed Mechanical, Inc. v. Taylor*, 342 So. 2d 317 (Miss. 1977); *L.B. Priester & Son, Inc. v. Dependents of Bynum*, 244 Miss. 185, 197-98, 142 So. 2d 30 (1962). Doubtful cases must be compensated. *Evans v. Continental Grain Co.*, 372 So. 2d 265 (Miss. 1979); *King v. Westinghouse Electric Corp.*, 229 Miss. 830, 92 So. 2d 209 (1957); *Lindsey v. Ingalls Shipbuilding Corp.*, 219 Miss. 437, 68 So. 2d 872 (1954); *National Surety Corp. v. Kemp*, 217 Miss. 537, 64 So. 2d 723 (1953), *Deemer Lumber Co. v. Hamilton*, 211 Miss. 673, 52 So. 2d 634 (1951); *see also* Dunn, Mississippi Workmen's Compensation §§ 31-32 (2d Ed. 1967).

In no way do we find that Hare's is a doubtful case. However, the Commission erred by not fairly construing the humanitarian aims of the statute and its remedial nature to compensate and make the injured worker whole.

¶34. In conclusion, we find that the Commission's decision is clearly erroneous and in contradiction to the overwhelming weight of the evidence which supports compensation to Hare. Further, the Commission failed to correctly apply the law. Therefore, we affirm the

judgment of the circuit court, which reversed the Commission's decision and reinstated the AJ's order. We remand to the Commission to determine Hare's benefits.

¶35. THE JUDGMENT OF THE CIRCUIT COURT OF TIPPAH COUNTY IS AFFIRMED, AND THIS CASE IS REMANDED TO THE MISSISSIPPI WORKERS' COMPENSATION COMMISSION TO DETERMINE IRENE HARE'S BENEFITS. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANTS.

LEE AND MYERS, P.JJ., BARNES, ISHEE AND CARLTON, JJ., CONCUR. ROBERTS, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY GRIFFIS, J. IRVING AND MAXWELL, JJ., NOT PARTICIPATING.

ROBERTS, J., DISSENTING:

¶36. Although I am empathetic to Irene Hare's plight, I must dissent as I find that we cannot reverse the decision of the Mississippi Worker's Compensation Commission.

¶37. In 1985, Beverly Healthcare hired Hare as a licenced practical nurse (LPN). She worked in that capacity until the date of the accident, except for approximately three years during 1988 though 1991 while she recovered from a broken femur, which resulted from a slip and fall. As an LPN, Hare's duties included distributing medication to residents, assisting certified nursing assistants (CNA) with their duties, and completing and updating medical charts. Hare typically worked from 2:45 p.m. until 11:45 p.m. and was responsible for the B wing, which included approximately twenty-eight residents. Hare testified that although her job required her to be on her feet for extended periods of time, it was not for the full eight-hour shift.

¶38. Hare reported for work at Beverly on April 25, 2005, which was her sixth day of work in a row. She was sixty-nine years old, approximately five-foot-four-inches tall, and she weighed approximately 160 pounds at this time. Once Hare clocked in, she began her

customary duties. During this period of time Hare went to the smoking area at the back of the building and took a cigarette break with the nurses who were getting off the floor. At approximately 5:00 p.m., Hare clocked out for her thirty-minute lunch break. At the conclusion of her break, Hare returned and completed additional charts. At 7:00 p.m., she conducted a resident feeding at the end of the B wing. At the conclusion of the feeding, Hare began distributing the night's medication from a cart as she worked her way from the end of the hall to the nurses' station between the B wing and A wing. When she reached room nine, Hare's left femur broke. She testified as follows: "I picked up my medicine. I got to the end of the cart and I didn't get [my] water and I pivoted around on my leg to pick up my glass of water and my leg popped just like a shotgun." The record shows that in a deposition taken prior to the hearing in front of the administrative judge (AJ), Hare stated that when she began to go in the patient's room her "leg just popped." There was no mention of pivoting or turning.

¶39. Hare testified that after the break, she fell on her medicine cart and held herself up as she called to Neda Kirk, who was a CNA on the floor. Hare never fell to the floor but was able to hold herself up long enough to be provided a chair. At the request of Hare, Kirk retrieved Megan Pannell, who was an LPN working on the A wing. She was soon after transported to Tippah County Hospital and later to Saint Francis Hospital in Memphis, Tennessee, where she was treated by Dr. Charles Taylor.

¶40. During cross-examination, Hare testified that prior to the April 25, 2005, fracture she had suffered numerous prior injuries to her left leg, left knee, left ankle, and left foot dating back to 1964, including a fracture of her left femur in 1998, which required the insertion of

screws and a rod. Hare testified that the screws and rod were later taken out after she began to have problems with them. While she could not recall the exact date, Hare stated that the screws and rod were removed prior to the April 25, 2005, injury.

¶41. Hare testified that during her shift on April 25, 2005, her left knee was bothering her, and she told other employees that she planned to visit the emergency room after her shift was over. But she testified that she was ambulatory without the use of a walker or other device to assist her during her shift. Hare stated that because of the pain she had wrapped an Ace bandage around her knee prior to arriving at work. She claimed that no one re-wrapped the Ace bandage during her shift.

¶42. Pannell testified that Hare had walked with a limp as long as she had known her, but Hare's limp was more pronounced than she had ever seen it during Hare's shift on April 25, 2005. Pannell recalled that prior to their lunch break that night, Hare asked her to remove and re-wrap the Ace bandage. She testified that the bandage was on Hare's upper left leg. Additionally, Pannell testified that she saw Hare using a walker as she made her way outside to go to the smoking area that night. This was the first time Pannell had seen Hare using a walker, and she did not see Hare using a walker at any other point that night.

¶43. Kirk worked for Beverly for twenty-one years and had worked with Hare for most of that time. She stated that Hare had always walked with a limp, but on April 25, 2005, Hare was having more problems walking than normal. Kirk testified that she saw Hare using a walker to go outside to the smoking area. Kirk heard Hare scream when the accident occurred and found her sitting in a chair. At Hare's request, she informed Pannell that Hare was hurt. Kirk testified that when she returned, Hare asked her to cut away Hare's pants

around the fracture and the underlying bandage. Kirk stated that the bandage was approximately four inches above Hare's knee.

¶44. Hare filed a petition to controvert claiming that she injured her leg on April 25, 2005, while in the course and scope of her employment at Beverly. After a hearing on the matter with the sole issue being whether Hare had a work-related accident, the AJ ruled that Hare met her burden of proof that her injury was work related in accordance with the Workers' Compensation Act. Subsequently, Beverly filed a petition for review before the Commission. After a hearing, the Commission, in a majority decision of two to one, found that the AJ had erred in finding that Hare sustained a compensable injury on April 25, 2005. As such, the Commission reversed the AJ's order and denied Hare's claim for benefits.

¶45. Hare appealed the Commission's decision to the Circuit Court of Tippah County. After hearing argument from both parties, the circuit court reversed the order of the Commission. In its subsequent order, the circuit court found that "there exists clear evidence that [Hare] suffered an injury arising out of and in the course of her employment[,] and the employment clearly contributed to said injury." Further, the circuit court held that the Commission's decision was not supported by substantial evidence and was based upon an erroneous application of the Act.

¶46. Hare's injury is compensable if it arose "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." Miss. Code Ann. § 71-3-3(b) (Rev. 2000). Therefore, to present a prima facie case of compensability, Hare had to prove, by a fair preponderance of the evidence, the follow elements: (1) she sustained

an accidental injury, (2) that arose out of and in the course of her employment, and (3) a causal connection exists between her injury and her claimed disability. *Adams v. Lemuria, Inc*., 738 So. 2d 295, 297 (¶9) (Miss. Ct. App. 1999). If Hare presented a prima facie case of disability, the burden to disprove disability shifted to Beverly. *Id.*

¶47. After reviewing the lay and expert testimony, the Commission found that Hare had "failed to present substantial and credible evidence of any accidental injury arising out of her employment. Instead, the evidence shows that [Hare's] femur fracture was a natural progression of her 40[-]year history of injuries and surgeries of her left leg, and [it] merely occurred during the course of her employment." In reversing the Commission's denial of benefits, the circuit court focused mainly on what it viewed as a misapplication of the law on what constitutes an "accidental injury" as envisioned by the Act. The circuit court further found, without additional discussion, that "clear evidence [exists] that [Hare] suffered an injury arising out of and in the course of employment and the employment clearly contributed to said injury. Therefore, the Commission's order, a majority opinion, is not based on substantial evidence."

¶48. As stated above, the elements that Hare was charged with proving to the Commission were that: (1) she sustained an accidental injury, (2) which arose out of and in the course of her employment, and (3) the existence of a causal connection between her injury and her claimed disability. She carried the burden to prove each element by a preponderance of the evidence. Based upon the record before the Commission, and the standard of review this Court must follow, it is my opinion that the circuit court erred in reversing the Commission as there is substantial evidence in the record that supports the Commission's finding that

Hare failed to prove that her injury "arose out of" her employment.

¶49. Although Hare was the only witness to the events that led to the injury she sustained, the testimony of Pannell and Kirk does shed some light on Hare's condition on the evening of April 25, 2005. In addition to the credibility issues these conflicting testimonies raise, it also adds to the evidence that Hare was experiencing significant discomfort in the area around the site of her left leg that fractured later that night – discomfort she was experiencing prior to arriving at work on April 25, 2005. While it is apparent that Hare's left femur fractured while she was at work, it is less clear that her employment with Beverly contributed to, or was the causal connection of, it.

¶50. Testimony concerning the causal connection between Hare's injury and her employment was presented by the parties' experts. The two medical experts in the case testified by deposition and medical records. Dr. Taylor was the first to be deposed. He stated that he began treating Hare in the late 1980s or early 1990s. Dr. Taylor acknowledged that in the late 1990s he treated Hare for a fracture of her distal left femur by inserting a super condylar screw and plate. Hare later returned to Dr. Taylor as a result of a nonunion and plate failure. Dr. Taylor removed the plate and screws, filled the resulting empty spaces with bone graft or a bone substitute, and inserted a locking nail in the affected femur. Hare returned to Dr. Taylor in October 2004, complaining of pain surrounding the area where the screws had initially been inserted following her previous femoral fractures. Initial nonsurgical treatment had no beneficial effect so out-patient surgery was scheduled in December 2004, to remove the femoral rod and screws.

¶51. In his opinion, Hare's previous femoral injuries had completely healed prior to the

April 25, 2005, accident. When asked if the April 25, 2005, fracture was related to Hare's previous injuries to her left leg Dr. Taylor stated:

> I mean, it's related. It is the same bone. The surgeries, especially the bone grafts that had to be done to get her to heal her original fracture are invasive in that they go in and you decrease the blood supply to that area. I mean, it is unavoidable to put the bone graft in.
>
> So to that extent her bone is kind of forever weaker from what she has been through with her previous surgery, but, like I say, her next fracture was at a level further up the shaft, you know, well away from her original fracture.
>
> . . . .
>
> [Hare's] most recent fracture is at a different level, so it is a new injury. But it is through a bone that has obviously suffered because of the previous fractures and surgery to it.

Dr. Taylor stated that the April 25, 2005, fracture was approximately two inches and five centimeters away from her previous fracture and occurred through a screw hole that was left after the screws were taken out of her femur in December 2004. When asked if the screw hole was a contributing factor, Dr. Taylor stated that with a torsion or twisting injury it was not uncommon for the bone to find a weak spot to run through, and in this case, the fracture ran through the hole.

¶52. Dr. Taylor stated that Hare's April 25, 2005, fracture could be characterized as a spontaneous fracture, which he defined as a fracture without obvious trauma. He testified that he had no way of knowing whether she had a torsional fracture through the screw hole or a stress fracture through the screw hole, and he stated that Hare's April 25, 2005, fracture may have been a gradual stress fracture. However, when asked if working six to seven days a week as an LPN in a nursing home could have been a contributing factor in Hare's fracture,

Dr. Taylor stated: "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."

¶53. Dr. Guy Vise, a board certified orthopedic surgeon, was Beverly's medical expert. The majority notes that at the time of his deposition, Dr. Vise spent half of his time as a professional expert witness and lists Dr. Vise's rate schedule for the benefit of the opinion. Dr. Vise testified that at the time of the deposition he actually had three medical jobs. First, he saw existing and new patients. Second, he performed medical consultation with various groups. And, third, he was the chairman of the board for two major orthopedic journals.

¶54. But while Dr. Vise's focus of practice of the medical profession had shifted over the years, his extensive credentials and experience qualified him to give an expert opinion based upon only reviewing Hare's medical records. Hare's attorney obviously knew of Dr. Vise's medical expertise and chose not to voir dire him during his deposition. As evidence of his vast experience, Dr. Vise submitted his curriculum vitae during his deposition. The following is a summary of its contents: graduated as a medical doctor from Tulane University School of Medicine in 1965; was a resident in hospitals in Louisiana, Georgia, and California from 1966-1970 while also serving in the United States Army Reserve; obtained his license to practice medicine in Mississippi in 1971; held numerous hospital and administrative positions; held numerous teaching positions and received several honors and awards as a result; held several positions on the boards of numerous professional societies; conducted various research and wrote several books and papers in the field of orthopedics; and, among other qualifications, examined the medical records of countless individuals in connection

with his role as a medical expert.

¶55. Dr. Vise did not treat Hare, but he reviewed her medical records from Dr. Taylor, The Pain Clinic, Tippah County Hospital, St. Francis Hospital, Baptist Memorial Hospital, and Memphis Orthopedic Associates, as well as the depositions of Hare and Dr. Taylor and other miscellaneous documents. Dr. Vise opined that Hare had a spontaneous fracture of her femur on April 25, 2005. Dr. Vise then detailed previous injuries Hare had received to her left leg. These included: a fracture of the left ankle and left knee in 1964, which required open reduction/internal fixation of both the ankle and knee; crushing injuries of her left knee and ankle in 1987, which were treated by Dr. Taylor; a fracture of the left distal femur and intra articular fracture of her left knee from a slip and fall in 1998, which resulted in a total patellectomy; and pubic rami fractures without significant displacement when Hare stepped off a curb in 2000. In total, Dr. Vise summarized Hare's injuries as two pelvic fractures, two fractures of the shaft of the femur, T/condylar fracture of the distal femoral metaphysis, two fractures of the patella from crushing injuries, two fractures of ankle, and a fracture of the foot. Additionally, Dr. Vise listed several ailments he described as "significant pre[-]existing conditions/diseases." These included: osteoporosis, long-term addiction to nicotine, significant arthritis of the knee, and sever weakness of the leg muscles.

¶56. Dr. Vise labeled Hare's injury as a spontaneous fracture, a fragility fracture, and a stress fracture, but he explained that there was overlap in the use of those terms. In an accompanying report, he defined spontaneous fracture, quoting from Dr. Taylor's deposition, as "a fracture that occurs without trauma or without a direct cause." He testified that Hare was susceptible to this type of fracture for several reasons. The first reason was that the

blood supply to that area and to the bone had been depleted as a result of the multiple surgeries she had received. Additionally, the numerous foreign bodies, or hardware, introduced into her leg, i.e. various plates, nails, and screws, disturbed the blood supply. Further, he stated that Hare's arthritis, lack of strength in her left leg, and long history of smoking contributed to the April 25, 2005, fracture. Dr. Vise explained that smoking dramatically reduces a bone's ability to heal. Furthermore, Dr. Vise stated that the nail hole represented a stress riser, which he defined as a defect in the bone or hole in the bone that causes stress to concentrate in one area.

¶57. Dr. Vise stated that the proximate cause of Hare's April 25, 2005, fracture was a weakened bone as a result of the December 2004, surgery to remove the nail from Hare's left femur. Specifically, Dr. Vise stated that the removal of several nails and screws from Hare's leg created additional stress on the bone. Although he did agree with Dr. Taylor that the April 25, 2005, injury was a new fracture, Dr. Vise qualified his agreement by stating that it was also a continuation or fragility fracture of a "diseased bone." He explained that it takes a normal bone approximately 150 days to heal from a new fracture, the healing time almost doubles in individuals who smoke. He stated that given Hare's medical history, "[her left femur] was an accident waiting to happen." When asked if there was an untoward event that caused the fracture, he testified to a reasonable degree of medical certainty that Hare's break was not caused by a specific event or trauma but was the result of the "activity of daily living." He further explained during cross-examination that it was possible that working eight-to-twelve-hour shifts as an LPN could have had an effect on her left femur, but he explained that other activities of daily living would make the injury just as possible.

¶58. "[W]hen examining conflicting opinions by medical experts, we will not determine where the preponderance of the evidence lies . . . the assumption being that the Commission as trier of fact, has previously determined which evidence is credible, has weight, and which is not." *Ameristar Casino-Vicksburg v. Rawls*, 2 So. 3d 675, 679 (¶16) (Miss. Ct. App. 2008) (citations omitted). The Commission considered the expert testimonies of Dr. Vise and Dr. Taylor in making its finding that Hare's April 25, 2005, fracture was not an accidental injury and did not arise out of her employment with Beverly. An injury is deemed to have arisen out of employment "if it contributed to or aggravated or [was] accelerated by the employment in a significant manner." Miss. Code Ann. § 71-3-3(b). The supreme court has held that "arising out of" employment requires that a causal connection between employment and the injury be shown. *Big "2" Engine Rebuilders v. Freeman*, 379 So. 2d 888, 890 (Miss. 1980). Further speaking to the requirement of proof of a causal connection between the employment and the injury, the supreme court has stated:

> Prior to [the 1988] amendment, proof of the requisite causal connection was met by substantial evidence showing the injury to have arisen "out of and in the course of employment." The phrase "arising out of" does not require that employment be the sole cause of the injury. "Reasonable relation of employment and injury may involve minimal causation, less than needed for liability in the field of Torts." *See Big "2" Engine Rebuilders*[,] 379 So. 2d [at] 890. To be even minimally causative, Professor Bradley points out that conditions of employment must be some substantial or significant factor in bringing about the injury. J. Bradley, [Two Workers' Compensation Law Amendments: Definition of "Injury" and Method of Stating Maximum Benefits 31 (May 13, 1988) (Paper published by Third Annual Mississippi Workers' Compensation Educational Conference, Mississippi Workers' Compensation Commission], at 31 citing *Sonford Products Corp. v. Freels*, 495 So. 2d 468 (Miss. 1986); *Dependents of Barrett v. Leake County Coop (A.A.L.)*, 249 So. 2d 387, 388 (Miss. 1971).
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> We hold that the addition of the phrase "in a significant manner" to

> section 71-3-3(b) states what was already implicit in the workers' compensation law as interpreted by this court. Requiring the work and injury to be causally connected in a significant manner is nothing more than a requirement that the work connection be supported by substantial evidence as minimally causative of the injury.

KLLM, Inc. v. Fowler, 589 So. 2d 670, 676 (Miss. 1991).

¶59. The majority states that "the record is clear and without contradiction that Hare was in the process of performing the normal daily activity of working . . . when she suffered a severe femur fracture." However, the singular fact that an injury occurs while an employee is on the job does not create a compensable injury. *Malone & Hyde of Tupelo, Inc. v. Hall*, 183 So. 2d 626, 630 (Miss. 1966). There must be something related to the employment that at least minimally contributes to the injury. The Commission's finding that Hare's employment did not contribute to, aggravate, or accelerate her injury is substantially supported by the testimony of Dr. Vise and, to a lesser extent, Dr. Taylor. Dr. Vise explicitly stated that the proximate cause of Hare's fracture was a weakened bone coupled with the activities of daily life. He further opined that other complications which contributed to her fracture included: osteoporosis, long-term addiction to nicotine, significant arthritis of the knee, severe weakness of the leg muscles, and a long history of trauma to her left leg. Dr. Taylor agreed with the fact that Hare's left femur was weaker as a result of her medical history, but he maintained that the April 25, 2005, fracture was a new injury. However, Dr. Taylor never stated that any activity connected with Hare's employment contributed to her injury and agreed that it may have been a gradual stress fracture.

¶60. To be clear, I do not argue that there is a complete lack of evidence in the record to support the majority's position, and had the Commission found for Hare my position would

certainly be different. However, my stance is that there is substantial evidence to support the decision of the Commission that Hare's employment did not cause or contribute to the fracture of her left femur. Further, I certainly acknowledge, as the majority points out, that the worker is taken as she is found and that the Act is generally remedial in nature. However, neither of those considerations require the Commission to ignore relevant and reliable testimony showing that Hare's employment did not contribute to her injury. I fear that the majority's conclusion is tantamount to transforming Beverly, or any other employer, into an insurer or guarantor for all injuries to any of its employees who suffer an "untoward" event while on the job. I submit that this is not the intent of the Mississippi Workers' Compensation Act. I would reverse the judgment of the circuit court and reinstate the Commission's decision denying benefits.

GRIFFIS, J., JOINS THIS OPINION.