

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F507964

PAMELA JAMES, EMPLOYEE	CLAIMANT
MAYTAG MANUFACTURING LLC, EMPLOYER	RESPONDENT
FIDELITY & GUARANTY INS. CO., INSURANCE CARRIER	RESPONDENT

**OPINION FILED AUGUST 10, 2006**

Hearing conducted before ADMINISTRATIVE LAW JUDGE MARK CHURCHWELL, in Searcy, White County, Arkansas.

The claimant was represented by HONORABLE JAMES A. MCCLARTY, III, Attorney at Law, Newport, Arkansas.

The respondents were represented by HONORABLE WILLIAM C. FRYE, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

A hearing was held in the above-styled claim on May 23, 2006 in Searcy, Arkansas. A prehearing order was entered in this case on March 23, 2006. A copy of this prehearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. A copy of this prehearing order was made Commission's Exhibit No. 1 to the hearing record.

The following stipulations were submitted by the parties either in the prehearing order or during the hearing and are hereby accepted:

1. The employee-employer-carrier relationship existed on July 26, 200[5], and at all times pertinent hereto.
2. The respondents have controverted the claim in its entirety, therefore no benefits have been paid at this time.
3. The claimant's average weekly wage on the date of her alleged injury was \$499.20.
4. Well Mark Blue Cross/Blue Shield is group health insurance within the meaning of Arkansas Code Annotated § 11-9-411.
5. The claimant has received group insurance for short-term and long-term disability within the meaning of Arkansas Code Annotated § 11-9-411.
6. If called to testify, the claimant's husband, Levi James, would testify that the steps on which the claimant asserts she sustained a compensable injury had just been put in place, and had not yet been secured.

By agreement of the parties, the issues to be litigated and resolved at the present time were limited to the following:

1. Compensability.

2. TTD from date of injury to a date yet to be determined.
3. Attorney's fees.
4. Medical paid by Well Mark Blue Cross/Blue Shield of Iowa.

The record consists of the May 23, 2006 hearing transcript and the exhibits contained therein, except to the extent that certain proffered testimony has been excluded from consideration, as discussed herein.

#### **DISCUSSION**

##### **1. Evidentiary Objections**

On page 39 of the hearing transcript, the respondents' attorney objected to the claimant testifying as to anything Dr. McCoy said to her. I note that the claimant's testimony at issue at the top of page 39 is not responsive to her attorney's specific question; the testimony is hearsay, and the testimony will not be considered further in deciding the issues presented in this case.

On page 68 of the hearing transcript, the claimant's attorney objected to Mr. Osteen testifying regarding the content of a statement filled out by Mr. Springsteen. Mr. Osteen's answer on the top of page 68 consists of hearsay,

and will not be considered further in deciding the issues presented in this case.

## **2. Compensability of Hip Fracture Injury**

The claimant contends that she sustained a compensable hip fracture injury in the course and scope of her employment for Maytag on July 26, 2005. The claimant contends that she fell while attempting to cross an assembly line through a raised crossing, and that she fractured her left hip as a result of the fall.

The respondents contend that the claimant's hip problem is not a work related injury. The respondents contend that the claimant was injured at the end of the work day and had completed all of her work duties. In addition, the respondents contend that the claimant has had long-standing hip and leg problems. The respondents contend that the claimant reported that her hip popped while she was walking causing her to fall (an idiopathic injury). The respondents contend that the claimant indicated that she had leg weakness which led to her fall as well.

To prove the occurrence of a compensable injury as a result of a specific incident which is identifiable by time and place of occurrence, the claimant must establish by a preponderance of the evidence: (1) that an injury occurred

arising out of and in the scope of employment; (2) that the injury caused internal or external harm to the body which required medical services or resulted in disability or death; (3) that the injury is established by medical evidence supported by objective findings, as defined in Ark. Code Ann. § 11-9-102(16); and (4) that the injury was caused by a specific incident and is identifiable by time and place of occurrence. Mikel v. Engineered Specialty Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

In the present case, the claimant's left hip fracture at issue, which required medical treatment and caused at least temporary disability, is established by medical evidence supported by objective findings, including diagnostic x-rays and a bone scan. In addition, I find that a preponderance of the credible evidence establishes that the fracture in fact occurred while the claimant was crossing steps at work at the end of her shift on July 26, 2005. In reaching this conclusion, I note that some discrepancy exists between the history contained in the injury report that the claimant signed on July 26, 2005, the history contained in her subsequent medical records, and in the claimant's testimony. I accord greater weight to the contemporaneous injury report that the claimant signed on

July 26, 2005 than the weight that I accord the history obtained by her subsequent treating physicians thereafter. Accord Geraldine Wyers v. Securitas Security Services USA, Full Workers' Compensation Commission, Opinion filed January 30, 2006 [finding more credible evidence of contemporaneous statements made to co-workers].

The contemporaneous July 26, 2005 injury report establishes by a preponderance of the evidence that as Ms. James was going up the steps of the crossover, she got to the second or third step and fell up the steps. That July 26, 2005 report also establishes that Ms. James had experienced some degree of hip/leg pain for a couple of days before the fall. To the extent that the respondents contend that the fracture pre-existed the fall, I note that the claimant had previously negotiated these same steps on approximately seven prior occasions on July 26, 2005 going to work, to and from breaks, and to and from lunch. Furthermore, I note that Dr. McCoy, the claimant's treating orthopedic surgeon, rendered written medical opinions on October 6, 2005 and on November 3, 2005 indicating within a reasonable degree of medical certainty that Ms. James' broken hip occurred at work on July 26, 2005. I note that Dr. McCoy's November 3, 2005 written opinion does not appear

to be based on any material mistake of fact, and I note that the respondents have failed to present any expert medical opinion from another physician to rebut Dr. McCoy's opinion that the fracture in fact occurred on July 26, 2005.

Because I accord great weight to the medical opinion of the claimant's treating orthopedic surgeon, and since that opinion is neither rebutted or based on any material mistake of fact, I find that the claimant has established by a preponderance of the evidence that her broken hip occurred at work on July 26, 2005 while attempting to negotiate stairs over her assembly line.

To the extent that the respondents note that the claimant has had some degree of longstanding hip pain, I point out that the claimant's hip fracture was caused by a specific incident, and a worker is not required to also prove that the compensable injury was the major cause of her disability or need for medical treatment to establish the compensability of an injury caused by a specific incident and identifiable by time and place of occurrence. See Farmland Ins. Co. v. Dubois, 54 Ark. App. 141, 923 S.W.2d 883 (1996).

To the extent that the respondents contend that the claimant was injured at the end of the work day, and had

completed all of her duties, the claimant's testimony establishes that at the time of her fall, the claimant had in fact completed her tasks on the assembly line for that day. However, the claimant's testimony also establishes that she was wearing an apron with at least one tool in the apron, and that prior to leaving the building, she intended in the normal course of events to go to a locker in which to place her apron and tool, to retrieve her purse, and then proceed to the time clock.

\_\_\_\_\_ In Privett v. Excel Specialty Products, 76 Ark. App. 527, 69 S.W.3d 445 (2002), the claimant was a meat trimmer required to wear safety and sanitary gear while working with meat. In that case, the claimant had clocked in, gone to a locker room to get the appropriate equipment, went to the laundry room to get dressed, and entered the production room of the plant. When she realized that she had left her knife scabbard in the laundry room, she went back toward the laundry room in order to retrieve the scabbard, but slipped and fell exiting the production room. The Arkansas Court of Appeals held that the claimant was performing employment services when she fell. In this regard, the Court concluded that by getting the necessary equipment, Ms. Privett was

manifestly advancing the employer's interest because she needed the equipment in order to perform her job.

In Wal-Mart Stores, Inc. v. Sands, 80 Ark. App. 51, 91 S.W.3d 93 (2002), the claimant was employed by Wal-Mart as a cashier. Wal-Mart required all personal items to be kept in an employee locker. On the day in question, the claimant clocked out for a scheduled break, went to her locker to retrieve her cigarettes, lighter, and money and went on break. At the end of her break, she returned to the locker to secure her personal items and was struck in the back by the corner of a cart pushed by a co-worker as she was squatting to put her personal items in the locker. The Arkansas Court of Appeals held that Ms. Sands was performing employment services by attempting to place her personal items in her locker as required by Wal-Mart's loss-prevention program.

In Wal-Mart Stores, Inc. v. King, \_\_\_ Ark. App. \_\_\_, \_\_\_ S.W.3d \_\_\_ (Op. Del. November 9, 2005), the Arkansas Court of Appeals held that an employee is performing employment services while injured going on a break, where employees were generally required by the employer to go to the employee lounge during a break, and the claimant was

required to assist customers during a break if assistance was requested.

In Foster v. Express Personnel Services, \_\_\_ Ark. App. \_\_\_, \_\_\_ S.W.3d \_\_\_ (Op. Del. January 4, 2006), the Arkansas Court of Appeals held that a claimant performed employment services as soon as she entered the employer's premises where the evidence established that she could be questioned by the service manager or the warranty clerk as soon as she entered the service bay area at the start of the work day.

In Wallace v. West Fraser South, Inc., \_\_\_ Ark. \_\_\_, \_\_\_ S.W.3d \_\_\_ (Op. Del. January 26, 2006), the Arkansas Supreme Court held that an employee returning to work from a break was performing employment services where (1) he was walking back to his forklift and was ten feet from the work site when he fell and twisted his knee (2) the break was an authorized rest period (3) in the past, he had been asked to return to work while on break and (4) he remained on the clock and was not able to leave his work place during break.

In the present case, as in Wallace, the claimant's injury occurred on a piece of equipment installed to facilitate employees getting to and from the work site. In the present case, as in Privett, the claimant was wearing an apron with at least one tool necessary to perform her job

when the fall occurred. As in Sands, the claimant was proceeding to a locker, to stow her apron and tool and to retrieve her personal items (her purse), when the fall occurred. Consistent with the Court's reasoning in these cases, I find that the claimant was manifestly advancing her employer's interests by taking the direct and only route from her work area to the locker where she was to stow the tools of her work and retrieve her personal items prior to clocking out for the day.

Finally, to the extent that the respondents seem to contend that the claimant sustained a spontaneous hip fracture while walking, I respectfully point out that, as discussed above, the preponderance of the evidence indicates that both the fracture and the fall occurred while the claimant was attempting to negotiate temporary steps, and not while she was simply walking. I note that the Arkansas Court of Appeals has previously recognized that the act of negotiating steps is a work related contribution to a fall and injury, absent credible evidence that the fall and/or injury were instead induced by conditions personal to the claimant. See generally Crawford v. Single Source Transportation, 87 Ark. App. 216, \_\_\_ S.W.3d \_\_\_ (2004) [finding that a driver with pre-existing knee

treatment sustained a work related fall, not an idiopathic fall, when he attempted to exit his employer's vehicle from an elevated position and fell while attempting to negotiate two steps to the ground]. Accord Swaim v. Wal-Mart Associates, Inc., \_\_\_ Ark, App. \_\_\_, S.W.3d \_\_\_ (Op. Del. May 25, 2005) [where a diabetic employee hears a "pop" in his foot while pulling a pallet of produce, and where the record contains no record that diabetes predisposed the employee to a foot fracture, a foot fracture sustained while pulling a pallet of produce is work related and neither idiopathic or unexplained]; but see Whitten v. Edward Trucking/Corporate Solutions, 87 Ark. App. 112, \_\_\_ S.W.3 \_\_\_ (2004) [finding that a fall sustained on stairs was idiopathic, rather than work related, where a preponderance of the evidence established that the fall was caused by either a stroke or cerebral vascular accident, a herniated disc at L3-4 or a compressive lesion in the thoracic spinal cord].

In the present case, the record does not contain credible evidence to support the respondents' position that the claimant's hip fracture would have occurred had the claimant simply had been walking, and was therefore due to a condition personal to the claimant. To the contrary, the record establishes that the claimant's fall and hip fracture

occurred while she was attempting to negotiate steps. While the claimant in the present case, similar to the claimant in Crawford, had pre-existing problems in her joint at issue, I note that in the present case, as in Crawford and Swaim, the circumstances under which the injury and fall occurred establish a work related contribution to cause the injury.

For all of the reasons discussed herein, I find that the claimant has established by a preponderance of the evidence each of the requirements necessary to establish that she sustained a compensable hip fracture on July 26, 2005 as a result of a specific incident identifiable by time and place of occurrence.

### **3. Temporary Total Disability Compensation**

Temporary total disability for unscheduled injuries is that period within the healing period in which a claimant suffers a total incapacity to earn wages. Ark. State Highway & Transportation Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period ends when the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition. Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982).

In the present case, Dr. McCoy's November 3, 2005 office report indicates that as of that date, the claimant's hip fracture had not yet healed, and he intended to keep the claimant in off work status for that injury for approximately four more weeks if subsequent x-rays indicated that the injury had healed. Dr. McCoy's office visit for December 12, 2005 (dated only in the respondent's index to Respondent Exh. 1) indicates that x-rays revealed the hip "to be almost completely healed" and stable, and neither Dr. McCoy's December 12, 2005 report or any subsequent report make any additional reference to the claimant being off work as a result of her compensable hip fracture. (See R. Exh. 1, page 94) On this record, I find that the claimant proved by a preponderance of the evidence that she remained both in her healing period and incapacitated because of her compensable hip fracture through December 12, 2005, and that the claimant failed to prove that she remained either within her healing period or incapacitated as a result of her compensable hip fracture after that date.

**4. Offset and Set Aside Pursuant to Arkansas Code Annotated § 11-9-411**

There appears to be no dispute that at least some of the claimant's medical expenses, as well as periods of

disability were paid by group insurance, including Well Mark Blue Cross Blue Shield of Iowa. These payments are subject to the provisions of Ark. Code Ann. § 11-9-411. The medical benefits and temporary disability benefits payable by the respondents as a result of the findings herein shall be reduced in an amount equal to, dollar-for-dollar, the amount that the claimant has previously received for the same benefits. The respondent carrier is also directed to hold in reserve for a period of five years a sum equal to the potential subrogation claims of Well Mark Blue Cross Blue Shield of Iowa. See generally Calvin D. Dooley v. Automated Conveyor Systems, Inc., Full Workers' Compensation Commission, Opinion filed January 8, 2003 (F100282).

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The employee-employer-carrier relationship existed on July 26, 2005, and at all times pertinent hereto.
2. The respondents have controverted this claim in its entirety, therefore no benefits have been paid at this time.
3. The claimant's average weekly wage on the date of her alleged injury was \$499.20.
4. Well Mark Blue Cross/Blue Shield is group health

insurance within the meaning of Arkansas Code Annotated § 11-9-411.

5. The claimant has received group insurance for short-term and long-term disability within the meaning of Arkansas Code Annotated § 11-9-411.

6. If called to testify, the claimant's husband, Levi James, would testify that the steps on which the claimant asserts she sustained a compensable injury had just been put in place, and had not yet been secured.

7. The claimant has established by a preponderance of the evidence that she sustained a compensable hip fracture on July 26, 2005. Specifically, the preponderance of the evidence establishes that the injury was caused by a specific incident, is identifiable by time and place of occurrence, is established by medical evidence supported by objective findings, occurred at a time when employment services were being performed, and was work related, not idiopathic.

8. The preponderance of the evidence establishes that the claimant is entitled to temporary total disability compensation benefits from July 26, 2005 through December 12, 2005.

9. The provisions of Ark. Code Ann. § 11-9-411 apply

to the temporary disability benefits awarded herein and to payments of any medical treatment for which the respondents are liable as a result of the findings herein.

**AWARD**

The respondents are directed to pay benefits in accordance with the findings of fact set forth herein. All accrued sums shall be paid in a lump sum without discount and this award shall earn interest at the legal rate until paid, pursuant to A.C.A. §11-9-809, and Couch v. First State Bank of Newport, 49 Ark. App. 102, 898 S.W.2d 57 (1995), and Burlington Industries, et al v. Pickett, 64 Ark. App 67, 983 S.W.2d 126 (1998); reversed on other grounds 336 Ark. 515, 988 S.W.2d 3 (1999).

The claimant's attorney is entitled to a 25% attorney's fee on the indemnity benefits awarded herein, one-half of which is to be paid by the claimant and one-half to be paid by the respondents in accordance with Ark. Code Ann. § 11-9-715 and Death & Permanent Total Disability Trust Fund v. Brewer, 76 Ark. App. 348, 65 S.W.3d 463 (2002).

IT IS SO ORDERED.

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MARK CHURCHWELL  
Administrative Law Judge