

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F408828

SANDRA NORMAN, EMPLOYEE	CLAIMANT
NORTH HILLS SERVICE, INC., EMPLOYER	RESPONDENT
GREAT AMERICAN INS. CO., CARRIER	RESPONDENT

OPINION FILED NOVEMBER 21, 2005

Upon review before the FULL COMMISSION, Little Rock, Pulaski County, Arkansas.

Claimant represented by HONORABLE GARY DAVIS, Attorney at Law, Little Rock, Arkansas.

Respondent represented by HONORABLE CAROL LOCKARD WORLEY, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed as modified.

OPINION AND ORDER

The respondent appeals a decision of the Administrative Law Judge filed on February 16, 2005, finding the claimant had established that she sustained compensable injuries on July 15, 2004 and August 12, 2004 and that she became disabled as a result of those injuries on or about August 12, 2004 to a date yet to be determined. The Administrative Judge also found that the respondent did not establish that the payments the claimant received between August 13, 2004 through December 30, 2004 were an advance payment of

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compensation and that the respondent was not entitled to a credit of such payments against their obligation to pay the claimant temporary disability benefits during that period. Lastly, in addition to being ordered to pay the claimant's reasonable and necessary medical expenses and attorney's fees, they were ordered to reimburse all third party payors who had paid medical or disability benefits on behalf of the claimant relevant to her August 12, 2004 injury.

After conducting a de novo review of the record, we find that the Administrative Law Judge's opinion should be affirmed as modified.

At the time of her injuries, the claimant was employed as a preschool teacher in the respondent's day care. This day care provided education and supervision to a variety of children, many with physical or learning disabilities. The claimant had been employed with them for approximately 12 years and was working with children one to two years of age when her injuries were sustained. The first accident occurred on July 15, 2004, when the claimant was working with a child who was in a device called a therapy stander. The device was intended to assist the child in developing his leg and hip muscles. While standing next

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to the child, she noticed the stander had begun to tip over. The claimant caught the child as he was falling to the floor, but in doing so, dropped to her knees. The claimant promptly notified her employer of this accident and there does not appear to be any dispute that the incident occurred. However, the claimant stated that while her knees were bruised and somewhat painful, she did not believe that she needed any medical treatment and, consequently, did not ask to be sent to a doctor. Likewise, the claimant continued in her regular job duties following this accident with no disability.

The second incident occurred on August 12, 2004. Near the end of the day, the claimant was leading the children in a dance in which they sway their bodies and touched their eyes, nose, etc., as instructed by the song accompanying the dance. The claimant testified that she swayed to the right and then heard "this enormous crack" and then noticed the lower part of her leg was "dangling," causing her to drop to the floor. She was then transported to the hospital where she was diagnosed with a broken left femur.

The respondent has controverted the July 15, 2004

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accident because the claimant did not seek any medical treatment or become disabled following that accident. In contending that the August 12, 2004 accident is not compensable, they are relying primarily upon the opinion of Dr. Chris Cobb, a general practitioner who treated the claimant following her injury.

In a report dated September 14, 2004, he states that "most likely" the claimant experienced a stress fracture in the fall of July 15, 2004. Dr. Cobb goes on to comment that, in regard to the August 12, 2004 accident: "It was felt that the activity at that time was not significant enough to cause fractures and the most trauma that they could report was on the 15<sup>th</sup> of July 2004."

The respondent relies heavily on Dr. Cobb's comment that the August 12, 2004 incident was not severe enough to cause a fracture, but disregards his opinion about the July 15, 2004 accident. In our opinion, the respondent's interpretation of Dr. Cobb's report is inconsistent in that the doctor clearly connects the claimant's broken femur of August 12<sup>th</sup> with the incident on July 15<sup>th</sup>. To disregard part of his opinion and yet try to rely on the other part is a tortured application of what the

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doctor was trying to say.

However, regardless of the interpretation given to Dr. Cobb's opinions, we believe this case is resolved by reviewing the facts of the claimant's injury. There is no dispute in this case that, at the time the claimant was injured, she was performing a job related activity. Further, the evidence establishes that the injury occurred in conjunction with a movement while engaged in that activity. The respondent asserts that the injury was idiopathic and that the August 12, 2004 injury was therefore not compensable. However, an idiopathic injury is one in which the cause is personal in nature, or peculiar to the individual. Kuhn v. Majestic Hotel, 324 Ark. 21, 918 S.W.2d 1958 (1996). In this case, there is no evidence suggesting that the claimant's broken femur was caused by any condition peculiar to her. To the contrary, in July 2004, the claimant had undergone a complete physical. Part of that physical included a bone density scan to determine whether the claimant had osteoporosis or was likely to develop that condition. The bone density scan which was performed on July 26, 2004 indicated that the claimant had a normal bone density.

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The Court of Appeals has reviewed the question of possible idiopathic injuries in two recent decisions. In Crawford v. Single Source Transportation Company, \_\_\_ Ark. App. \_\_\_, \_\_\_ S.W.3d \_\_\_ (June 30, 2004), the claimant injured his knee while climbing out of a cement truck. The claimant in that case testified that he had stopped his truck at a construction site, opened the door, and climbed down the steps. He stated that when he stepped down to the ground, his knee gave way causing him to fall. Later medical examinations indicated the claimant had a torn medial meniscus. The Commission denied benefits holding that this injury was idiopathic probably due to the claimant's prior arthritic condition. However, the Court of Appeals reversed and held that the claimant's injury arose out of his employment and that there was no basis for finding that his injury was idiopathic.

In a subsequent decision, Swaim v. Wal-Mart Associates, Inc., \_\_\_ Ark. App. \_\_\_, \_\_\_ S.W.3d \_\_\_ (May 25, 2005), the Court of Appeals once again reversed the Commission's denial of benefits based on a finding of an idiopathic injury. The claimant in this case was injured while pulling a pallet of groceries, an activity which he

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routinely carried out at his job. He testified that he felt a "pop" in his right foot. He then removed his shoe and noticed a "little sticking up" on the top of his foot. The claimant continued to work but later sought medical treatment for his foot problem. X-rays revealed that he had suffered a broken toe. The Commission denied compensability of this claim holding that the injury was most likely due to the claimant's preexisting diabetes and therefore the broken toe was an idiopathic injury. The Court of Appeals held that the Commission erred in its decision in that the claimant was performing his employment duties and these duties caused the injury to occur. The Court concluded that, under the circumstances, there was no basis for finding that the injury was idiopathic. The case was then remanded for an award of benefits.

We believe that this case is controlled by the Court's decisions in Swaim and Crawford. In both of those cases, a claimant was performing job related duties when they suffered injuries. That situation is precisely in point with the present claim.

In this case, the claimant was leading her young students in a dance. This activity was clearly part of the

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claimant's job duties and the injury occurred while she was carrying out her employer's purpose. Regardless as to whether the claimant suffered some type of partial injury in the July 15<sup>th</sup> accident, the facts are incontrovertible that the claimant suffered an injury while engaged in an activity which arose out of her employment. No evidence has been offered to suggest that the claimant had any condition peculiar to herself that could have caused her injury or that there was any intervening cause other than her activities on August 12, 2004 that caused her to be injured. For that reason, we affirm the Administrative Law Judge's finding that the claimant suffered a compensable injury on August 12, 2004.

The remaining issue deals with the respondent's entitlement to a credit for vacation and sick leave the claimant used and for any medical or disability benefits she received from her group health insurance carrier. In asserting their entitlement to this credit, the respondent is relying upon Ark. Code Ann. §11-9-411.

The respondent is correct in asserting that they should be entitled to a credit to offset their liability for benefits based upon any proceeds the claimant has received

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from group health or medical insurance policies. However, the respondent ignored later sections of that statute which provide that the group disability carriers should be entitled to assert a claim for any such benefits that they have paid to a claimant as a result of a job related injury. Specifically, Ark. Code Ann. §11-9-411(c) provides that prior to any final disposition of a claim, the Commission shall determine the amount of any benefits paid by the group insurance carriers and shall direct the respondent to hold such amount in reserve until such time as the group carriers shall assert their subrogation claims. If no subrogation claim has been made for a period of five (5) years, then the respondent shall pay the sum to the Death and Permanent Disability Trust Fund.

The only evidence presented at the hearing as to any such payments was the claimant's testimony that she received a check for \$585.00 from Aetna, and two checks totaling \$275.00 which she received from American General. Apparently these are two of the group disability and health insurance carriers used in her employer's group insurance plan. However, testimony did not make it clear as to whether these payments were for disability insurance or were

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reimbursements for medical payments the claimant had made herself. However, the respondent would be entitled to an offset in the amount of \$860.00, and they should be ordered to hold that amount in reserve, pending claims by the group insurance carriers. In the event that neither of those carriers assert a subrogation claim for those proceeds within the next five (5) years then the respondent should be ordered to pay that amount to the Death and Permanent Disability Trust Fund.

The respondent also asserts a credit against monies the claimant received from her employer as the result of some type of a vacation and sick leave program. Once again, the respondent asserts that they are entitled to this credit based upon Ark. Code Ann. §11-9-411. However, that statute clearly only applies to group insurance proceeds. In this regard I note that Ark. Code Ann. §11-9-411 is titled, "Effect of Payment by Other **Insurers.**" (Emphasis added). Since the payment made by the respondent employer was not made by an insurer, we do not believe that this section is applicable to the benefits in question.

The testimony regarding the payments the claimant received from the respondent employer arose while she was

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being questioned about receiving group disability insurance.

When asked why the group insurance benefits had not started, the claimant testified as follows:

A. Right. Well, the main hold up was that I had what we call banked days that I had not used in the last 12 years that they, from my PTO time that I was receiving full pay from my employer up until December 30<sup>th</sup>. I ran out of those days.

Q. And what are banked days?

A. They're - we're given so many days per year for our personal leave time and I banked several of those days through the 12 years that I didn't use.

Q. Is that like sick leave or is it -

A. Yes.

Q. - vacation time or?

A. It was a combination of vacation and sick leave days.

Q. You actually received full salary from your employer to December 31<sup>st</sup>?

A. Yes. Well through December 30<sup>th</sup>, uh-huh.

The above quoted testimony is the only evidence presented in regard to the payments the claimant received

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between August 12, 2004 and December 30, 2004. Clearly, they were not made by a group insurance carrier and are, accordingly, not covered under Ark. Code Ann. §11-9-411. Since the payments were apparently made by the claimant's employer, the section which would apply to these payments would be Ark. Code Ann. §11-9-807. That section provides as follows:

- (a) If the employer has made advance payment for compensation, the employer shall be entitled to be reimbursed of any unpaid installments or installment of compensation due.
- (b) If the injured employee received full wages during disability, he or she shall not be entitled to compensation during this period.

The Courts of this State have considered what constitutes advanced payment of compensation so as to entitle the respondent to a credit for payments made to a claimant. A case with remarkably similar facts to this one is Southwestern Bell Telephone Company v. Siegler, 240 Ark. 132, 398 S.W.2d 531 (1966). In that case, the claimant suffered an injury to his knee and missed approximately 7 weeks of work. During this time of disability, he was paid his full salary by his employer through a company funded

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disability plan which was maintained by the employer for the benefits of its employees when they became disabled. The Courts cited Ark. Code Ann. §11-9-807 (which, at the time, was codified as Ark. Stat. Ann. §81-1319 (m), but otherwise unchanged) and held that under this statute, the respondent was not entitled to a credit for payments made to the claimant. The Court held the money which the claimant had received could be classified as the wages, gratuities, or advanced payment of compensation. The Court concluded unless the respondent could show that, under the plan, the payments could have been nothing except advanced payments of compensation, the respondent could not establish its entitlement to a credit or offset. The Court went on to hold that under the doctrine of Looney v. Sears Roebuck Company, 236 Ark. 868, 1371 S.W.2d 6 (1963), the burden was on the respondent to clearly establish the money received was an advanced payment of compensation. Only then could the respondent claim any offset, and in all other instances, the employee could recover disability benefits.

Another case in point with the situation here is Varnell v. Union Carbide, 29 Ark. App. 185, 779 S.W.2d 543 (1989). In that case, the employer had a non-occupational

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disability plan in which an injured worker would receive a partial payment from a group disability carrier and an additional payment from the employer so that, in total, a disabled worker would received 85% of his salary. Testimony at the hearing from an employee of the respondent was that the claimant's injury was treated as non-occupational and it was only later that it was decided that the claim was in fact a job related injury. In denying the respondent their requested offset, the Court noted that there was no evidence showing that both parties clearly intended the payments to be compensation paid in advance.

In the present case, the claimant testified that she was receiving money from her employer in the form of "banked leave" which was a form of sick leave or vacation pay which she had accumulated during her time while employed with the respondent employer. Since these were clearly not group disability insurance payments, the respondent is only entitled to a credit or offset of these payments if they can establish that it was an advanced payment of compensation or wages pursuant to Ark. Code Ann. §11-9-807. Under the holdings of Varnell and Siegler, as cited above, the respondent has clearly not met their burden of establishing

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their entitlement to the credit. In the first place, the claimant's testimony was that the payment she received was for leave time which she had accumulated. They clearly were not wages nor were they intended to be wages at the time she received them. Additionally, the respondent has not offered any evidence that, at the time the claimant received the benefits, they were intended to be advanced payments of compensation. In fact, such a proposition would be impossible to prove since the respondent had controverted the claimant's entitlement to any benefits at that time.

It could be argued that the passages of Ark. Code Ann. §11-9-411 which provides an offset, would have modified the holdings of the above cited cases regarding advance payments of compensation. We agree with that argument only to the extent that those cases dealt with benefits received under group disability insurance. However, in Siegler, the payments were not part of any type of insurance or group self-insured plan but rather were paid in the form of a leave plan similar to that in the present claim. Additionally, in Varnell, the bulk of the monies the claimant received was a supplement provided directly by the employer to augment group disability insurance. In our

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opinion, to the extent that payments from an employer are not in the form of some type of group insurance plan, they are not covered under Ark. Code Ann. §11-9-411 and can only be credited against disability benefits if the respondent can show that they are advance payments of compensation. In this case, the respondent has not offered evidence that clearly establishes that the parties intended the money the claimant received from her employer between August 12, 2004 and December 30, 2004 were advanced payments of compensation. Therefore, we find that they are not entitled to any credit or offset for those monies and that the respondent should be ordered to pay the claimant temporary total disability benefits from August 12, 2004 to a date yet to be determined. Therefore, the Administrative Law Judge's decision should be affirmed in this regard.

For the foregoing reasons, we affirm the Administrative Law Judge's finding that the claimant suffered a compensable injury on August 12, 2004. We modify the Administrative Law Judge's opinion to reflect that the respondent would be entitled to an offset, for benefits based upon any proceeds the claimant has received from group health or medical insurance policies, in the amount of

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\$860.00, and they are ordered to hold that amount in reserve, pending claims by the group insurance carriers. In the event that neither of those carriers assert a subrogation claim for those proceeds within the next five (5) years then the respondent is ordered to pay that amount to the Death and Permanent Disability Trust Fund. Finally, the respondent has not offered evidence that clearly establishes that the parties intended the money the claimant received from her employer between August 12, 2004 and December 30, 2004 were advanced payments of compensation. Therefore, we find that the respondent is not entitled to any credit or offset for those monies and that the respondent should be ordered to pay the claimant temporary total disability benefits from August 12, 2004 to a date yet to be determined.

All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. § 11-9-809 (Repl. 2002).

Since the claimant's injury occurred after July 1, 2001, the claimant's attorney's fee is governed by the

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provisions of Ark. Code Ann. § 11-9-715 as amended by Act 1281 of 2001. Compare Ark. Code Ann. § 11-9-715 (Repl. 1996) with Ark. Code Ann. § 11-9-715 (Repl. 2002). For prevailing on this appeal before the Full Commission, claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$500.00 in accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.