

CIRCUIT COURT OF FORREST COUNTY, MISSISSIPPI

CAUSE NO. 2007-WC-00786

EVELYN KAY MANNING

APPELLANT

VERSUS

**SUNBEAM CORPORATION (Employer) and
NATIONAL UNION FIRE INS. CO.
OF PITTSBURGH, PA (Carrier)**


APPELLEES

Brief

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

1. Evelyn Kay Manning - Claimant
2. Lester Clark, Jr. - Counsel for Claimant
3. Sunbeam Corporation - Employer
4. National Union Fire Ins. Co. of Pittsburgh, PA - Carrier
5. M. Jason Sumrall, Bryant, Dukes & Blakeslee, P.L.L.C. - Of Counsel for Employer and Carrier



M. JASON SUMRALL

TABLE OF CONTENTS

Certificate of Interested Persons	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF THE ISSUES	1
STATEMENT OF THE CASE	2
(i) Factual and Medical Background	2
(ii) Course of Proceedings and Disposition in the Tribunal Below	14
SUMMARY OF THE ARGUMENT	17
ARGUMENT	18
I. STANDARD OF REVIEW	18
II. WHEN PRESENTED WITH CONFLICTING MEDICAL OPINIONS, THE LEGAL OBLIGATION OF THE COMMISSION IS TO DETERMINE THEIR WEIGHT AND CREDIBILITY	18
A. History of Mississippi Law of Reasonableness and Necessity of Medical Treatment	21
B. Factors for Assessing Medical Opinions	23
C. The Commission's Decisions in <i>Alexander</i> and <i>Cook</i> Conflict With <u>Spann</u> and <u>Hardaway</u>	24
III. THE DECISIONS OF THE ADMINISTRATIVE JUDGE, AS AFFIRMED BY THE COMMISSION, ARE SUPPORTED BY SUBSTANTIAL EVIDENCE	26
A. The Surgery Performed By Dr. Lee Is Not Compensable Under The Mississippi Workers' Compensation Act	26
B. Manning's Mental Condition Is Unrelated To The Alleged October 14, 1995 Accident	28
CONCLUSION	30
ADDENDUM	

TABLE OF AUTHORITIES

CITATIONS

Mississippi Supreme Court:

<u>ABC Mfg. Corp. v. Doyle</u> , 749 So. 2d 43 (Miss. 1999)	18
<u>Bates v. Countrybrook Living Center</u> , 609 So.2d 1247 (Miss. 1992)	29
<u>Fought v. Stuart C. Irby Co.</u>	29
523 So.2d 314 (Miss. 1988)	
<u>Georgia Pacific Corp. v. Gregory</u> , 589 So. 2d 1250 (Miss. 1992)	18
<u>Hale v. Ruleville Health Care Ctr.</u> ,	19
687 So. 2d 1221(Miss. 1997)	
<u>Hardaway Co. v. Bradley</u> , 887 So. 2d 793 (Miss. 2004)	17, 19, 21, 22, 23, 25, 26
<u>Johnson v. Ferguson</u> , 435 So. 2d 1191 (Miss. 1983)	24, 28
<u>Oswalt v. Abernathy & Clark</u> , 625 So. 2d 770 (Miss. 1993)	23
<u>Raytheon Aerospace Support Services v. Miller</u> , 861 So. 2d 330 (Miss. 2003)	18, 19, 24
<u>South Central Bell Telephone Co. v. Aden</u> , 474 So. 2d 584 (Miss. 1985)	25
<u>Spann v. Wal-Mart Stores, Inc.</u> , 700 So. 2d 308 (Miss. 1997)	19, 20, 21, 22, 23, 24
<u>Walker v. Mfg. Co. v. Cantrell</u> , 577 So. 2d 1243 (Miss. 1991)	18
<u>White v. Hattiesburg Cable Co.</u> , 590 So. 2d 867 (Miss. 1991)	21

Mississippi Court of Appeals:

<u>Clements v. Welling Truck Service, Inc.</u> , 739 So. 2d 476 (Miss. Ct. App. 1999)	24
<u>DiGrazia v. Park Place Entertainment</u> , 814 So. 2d 1232 (Miss. Ct. App. 2005)	24

<u>Kirk v. K-Mart Corp.</u> , 838 So. 2d 1007 (Miss. Ct. App. 2003)	28
<u>Mabry v. Tunica County Sheriff's Dept.</u> , 911 So. 2d 1038 (Miss. Ct. App. 2005)	24
<u>Moore v. Independent Life and Accident Ins. Co.</u> , 788 So.2d 106 (Miss. Ct. App. 2001)	28
<u>Richardson v. Johnson Electric Automotive, Inc. and Zurich American Insurance Co.</u> , 2006-WC-01598-COA (Miss. Ct. App., Aug. 7, 2007)	23
<i>Mississippi Workers' Compensation Commission:</i>	
<i>Alexander v. Forest Hill Nursing Center, Inc.</i> , MWCC No. 02 06438-H-9709 (Sept. 21, 2005)	17, 19, 24, 25, 26
<i>Cook v. Perry County General Hosp. & Nursing Center</i> , MWCC No. 02 1455-H-7414 (Oct. 4, 2005)	17, 19, 24, 25, 26
STATUTES	
Miss. Code Ann. § 71-3-15	1, 14, 18, 21
MISCELLANEOUS	
Bogus Board Certifications, <u>Hippocrates Lantern</u> , Vol. 1, No. 3 (1992)	20

STATEMENT OF THE ISSUES

1. Whether substantial evidence supports the decision of the Administrative Judge, as affirmed by the Mississippi Workers' Compensation Commission, that medical treatment rendered to Appellant ["Manning"] by and at the direction of Dr. David Lee, neurosurgeon, as well as medical treatment rendered since that time, except for evaluations or treatment ordered by the Commission, was not required by the nature of Manning's injury or the process of her recovery, such that Appellees ["Employer/Carrier"] are not liable for said medical services or supplies under Miss. Code Ann. § 71-3-15, General Rule 9, and the Medical Fee Schedule.

2. Whether substantial evidence supports the decision of the Administrative Judge, as affirmed by the Mississippi Workers' Compensation Commission, that Manning's mental impairment is due to an underlying condition unrelated to her alleged October 14, 1995 work accident.

STATEMENT OF THE CASE

(i) Factual and Medical Background.

In her Brief, Manning presents an incomplete and partially inaccurate statement of facts relevant to the issues presented for review. So this Court can have a full understanding of the relevant factual background and medical history of Manning respecting this claim, the following is a comprehensive recitation of the facts based on the record before the Mississippi Workers' Compensation Commission.

The medical records and testimony reveal that Manning has had a hard life and she, in fact, admitted that she had significant emotional trauma in her life. (Tr., p. 31).¹ Manning was one of eight children. (Id., p. 60). Manning reported a history of sexual abuse by her father and physical abuse by her mother. (Id., pp. 31-32, 35). Manning's mother admitted during testimony that she and the father were physically abusive. (Id., p. 63). One of Manning's sisters also admitted during testimony that their parents "whipped" them. (Id., p. 69). Manning further reported that at the age of nine (9), she recalls a brother-in-law attempting to fondle her and engage in oral intercourse and this activity went on for two years. (Id., p. 35). At the age of 14, Manning was gang raped by her date and his friends, she thereafter became pregnant, and she was forced to marry the boy who was her date. (Id., pp. 32, 35). This marriage ended in divorce approximately two years later. (Id., pp. 35-36). A second marriage ended in divorce after Manning found out her husband was a drug dealer. (Id., p. 36). A third marriage ended in divorce because this husband was mean to Manning and tried to perform an exorcism on her because she was supposedly demonized. (Id., p. 36-38). Manning has a brother who is chemically dependent and a sister who is bi-polar. (Id., p. 38).

Manning completed the seventh grade and attained a GED at the age of 19. (Tr., p. 6).

¹ References to the October 13, 2004 hearing transcript are designated "Tr.," followed by the page number. References to the Exhibits are identified as "Ex.," followed by the page or by date of the report. References to the Commission's record are designated as "CR," followed by the Bates Stamped page number. References to the Circuit Court record are designated as "CC," followed by the Bates Stamped page number. References to the Brief of Appellant will be designated as "BA" followed by the page number.

Manning became a licensed cosmetologist and, at one point, owned her own beauty shop. (Id.). In August of 1995, Manning became employed by Sunbeam Corporation as an assembly line worker, and she testified that she worked 50 to 60 hours per week, seven days a week. (Id., p. 9).

Manning alleges that on or about October 14, 1995 she injured her back while lifting a "tote" that weighed approximately 25 pounds. (Tr., p. 9; Ex. 2, p. 29). Although Manning testified that she had no physical problems with her back before this alleged work accident (Tr., pp. 31-32), the medical records show Manning was seen by Dr. Kim A. Puckett, chiropractor, for neck, back, and leg pains on four separate occasions in March and May of 1995. (Ex. 4). Charles Phillips, a factory manager for Sunbeam Corporation, testified that he had no record of Manning reporting a back injury after lifting a tote. (Ex. 2, pp. 4, 42-43). Belinda Pinter, a team leader for Sunbeam, likewise testified that Manning never told her that she hurt herself on the job or that she injured her back after lifting a tote. (Ex. 1, pp. 3, 14, 17). Despite significant doubts regarding Manning's alleged accident at work, Employer/Carrier paid Manning indemnity and medical benefits.

Manning's course of medical treatment for her back is extremely complicated, convoluted, and confusing, as she has been treated by multiple physicians of differing specialities on numerous occasions throughout the nine (9) year period prior to the hearing on this matter. Her treatment can best be summarized as follows.²

On three occasions during the week following the alleged October 15, 1995 work accident in question, Manning went to Dr. Puckett, chiropractor, complaining that she fainted twice, was under a lot of stress, and had severe low back pain. Manning failed to mention to Dr. Puckett that she had supposedly injured her back while lifting a heavy tote at work. In fact, Manning did not tell Dr. Puckett about any alleged work accident until he called her a month or

² All references to medical treatment in this Brief are based on the relevant medical records of Manning found in Exhibit 4 to the Transcript Record. These relevant medical records and deposition testimony have been placed in chronological order.

so later after receiving requests for copies of his medical records.

On October 31, 1995, Manning presented to Hattiesburg Clinic, P.A. and complained of back pain and a two week history of right lower quadrant pain. A CT scan of Manning's abdomen and pelvis showed only small ovarian cysts. On November 2, 1995, Manning went to Dr. Bruce McCarthy, orthopaedic surgeon at Hattiesburg Clinic, P.A., with a two week history of back pain, but no history of any accident or injury. Dr. McCarthy stated Manning was "extremely hyperactive, crying, teary-eyed and anxious." He felt that she had a "bulging intervertebral disc", and recommended bed rest and anti-inflammatory medications as well as muscle relaxants. X-rays revealed no acute injury. A November 9, 1995 follow-up note revealed that Dr. McCarthy was concerned because Manning was asking for stronger medication and was "just as sad as ever." Manning underwent an MRI of her lumbar spine on November 12, 1995 which demonstrated mild degenerative changes with a central disc bulge at L4-5, but no evidence of nerve root or canal compromise was noted. Dr. McCarthy recommended conservative treatment consisting of medication and bed rest.

On November 29, 1995, at the request of Manning's attorney, a separate evaluation was conducted by Dr. Claude Williams, orthopaedic surgeon, in New Orleans, Louisiana. Dr. Williams noted that Manning demonstrated no abnormal neurological findings upon examination. Nevertheless, Dr. Williams recommended a trial of epidural steroid injections. Dr. Williams also stated that if her pain thereafter persisted, he felt this might "be an indication for lumbar laminectomy with discectomy."

On July 3, 1996, Manning underwent an Independent Medical Examination conducted by Dr. Richard E. Buckley, neurosurgeon. Dr. Buckley reviewed the November 1995 MRI and stated it showed dehydration of the L4-5 disc consistent with Manning's age. Dr. Buckley felt there was "pronounced symptom magnification and pronounced evidence to overreaction to touch on her lower back" with "no true objective abnormality" and "no neurological deficit." Dr. Buckley recommended a repeat lumbar MRI.

On September 12, 1996, Manning, after self-referral, was seen by Dr. Bertha Blanchard,

neurologist. (Ex. 3, p. 5). Dr. Blanchard felt that Manning had a possible left lumbosacral radiculopathy, and she recommended a myelogram, bone scan, and EMG/NCS testing. On September 30, 1996, Dr. Robert Manolakas, physical medicine specialist, conducted an evaluation of Manning at the request of Employer/Carrier. Dr. Manolakas felt Manning's neurological examination was intact and EMG tests conducted by him demonstrated no evidence of any pathological neurologic process "whatsoever." Dr. Manolakas stated that his testing did reveal multiple signs of exaggerations and inconsistencies. Dr. Manolakas felt that Manning's disc protrusion was "merely an incidental finding" and there was "no evidence of aggravation of the underlying disc problem nor is there any evidence that this patient suffers from radiculopathy, nerve root damage, or nerve root embarrassment." He felt Manning was at maximum medical improvement and that there was no basis for ordering further testing.

Manning continued to complain of pain and on October 21, 1996, Dr. Blanchard recommend a trial of epidural steroid injections and Zoloft. At the request of Employer/Carrier, Manning, on November 5, 1996, was seen by Dr. Henry Maggio, psychiatrist. He felt Manning had an adjustment disorder with chronic depression. He also felt Manning had "features of dependency and histrionic personality disorder." Dr. Maggio was of the opinion that Manning's "condition is not causally related to the reported work injury, which seems to be a minor incident resulting in symptom magnification and complaining and reacting out of proportion to what one would expect." Dr. Maggio felt that Manning was "not malingering" but was "unconsciously using this as a complaint not to be at work."

Despite the opinions of Dr. Manolakas and Dr. Maggio, Dr. Blanchard moved forward with diagnostic testing. She performed nerve conduction studies of Manning's left leg on January 6, 1997, which were normal. A bone scan was likewise normal. A second lumbar MRI performed on January 7, 1997 reported no interval changes since the previous scan. On January 21, 1997, Dr. Blanchard wanted to refer Manning to Dr. David McKellar, pain management specialist, for lumbar steroid injections.

Manning became pregnant, however, in late 1996/early 1997. Per recommendations of

her Ob-Gyn, beginning March 12, 1997, Manning was seen by Dr. James C. Brister, psychiatrist, with Pine Belt Mental Healthcare Resources. Dr. Brister diagnosed Manning with major depression, severe, and he restarted her on Zoloft.

Symptomatic treatment for Manning's alleged low back and left leg pain continued on July 15, 1997 when Manning, after referral by her Ob-Gyn, was seen by Dr. Michael Fromke, neurosurgeon with Hattiesburg Clinic, P.A. Dr. Fromke felt Manning had discogenic low back pain due to degenerative changes at L4-5. Dr. Fromke recommended that once Manning delivered the baby, she undergo physical therapy and continued pharmacological therapy, as well as discography.

At the request of Employer/Carrier, on October 6, 1997, Dr. William F. Russell, neuroradiologist with the University of Mississippi Medical Center, reviewed Manning's medical records and Manning's November 12, 1995 and January 7, 1997 lumbar MRI films. Dr. Russell stated there was degenerative disc disease at L4-5 and to a lesser degree at the L5-S1 level. Dr. Russell found no evidence of a herniated disc or compression of neural elements. Dr. Russell explained that the degenerative disc disease changes are not necessarily related to any trauma and can be just the result of the degenerative process that can occur in a 37 year old patient. His recommendation was that conservative treatment should be continued and that no decompressive surgical procedure would be warranted.

On October 28, 1997, Dr. Brister, psychiatrist, wrote a letter to Manning's attorney, stating he could not say whether Manning's depression was related to her alleged back injury.

Dr. Buckley, neurosurgeon, conducted a second evaluation of Manning on November 20, 1997. His impression was chronic mechanical back pain syndrome with mild sciatic discomfort secondary to L4-5 disc disease. Dr. Buckley stated that he did not believe surgical intervention was indicated. Dr. Buckley concurred with Dr. Fromke that pain management with epidural steroid injections and physical therapy was indicated. On November 24, 1997, Dr. John Wyatt, physical medicine specialist, conducted a medical examination of Manning at the request of Employer/Carrier. Dr. Wyatt recommended repeat films and a trial of physical therapy. He felt

Manning's assertion of pain was likely related to degenerative disc changes at L4-5 and L5-S1.

Manning's complaints of pain continued and on February 10, 1998, Dr. Fromke, treating neurosurgeon, recommended a Medrol dose pak, anti-inflammatories, and other pharmacological therapy. Physical therapy for Manning was initiated through Hattiesburg Clinic, P.A., but Manning did not report any significant improvement. Physical therapy continued with moist, heat, myofascial release, and soft tissue massage, but Manning continued to report no improvement to treatment. Manning also did not report significant improvement with electrical stimulation or other treatment modalities, including ultrasound, TENS, and mobilization.

Manning continued to complain and saw Dr. David McKellar, pain management specialist, on March 9, 1998 after referral by Dr. Fromke. Dr. McKellar recommend a trial of epidural steroid injections for complaints of continued back pain and left lower extremity sciatica. Although Manning underwent a series of three epidural steroid injections, she claimed none of the injections provided her with any significant benefit.

Manning returned to Dr. Fromke on April 21, 1998. Dr. Fromke found no evidence of any herniated discs or nerve root compression. His neurological examination of Manning was normal. Dr. Fromke noted Manning was depressed and had continued positive illness behavior and he was "strongly suspicious" that Manning was malingering. Dr. Fromke stated that he was "extremely weary that this patient is using the system for potential worker's compensation benefits." Dr. Fromke further stated that the findings on Manning's MRI films "are in no way related to an on the job injury. The findings of lumbar spondylosis at L4 and L5 are representative of chronic degenerative changes that occur with natural aging." Dr. Fromke recommended one more trial of conservative treatment with Daypro, Soma, and Ultram. Manning returned to Dr. Fromke on May 19, 1998 with continued complaints of pain despite the new medication. At that point, Dr. Fromke placed Manning at maximum medical improvement and gave her a permanent impairment rating of 0%. He noted that surgery would not give her "any significant change of potential improvement of her pain syndrome." Dr. Fromke stated that Manning's subjective complaints could not be corroborated with objective evidence, either on

physical examination or radiographic analysis. In his opinion, Manning could return to work. He recommended proceeding with a work hardening physical therapy program followed by a Functional Capacities Evaluation.

Instead, Manning returned to Dr. McKellar, pain management specialist, in June of 1998, and he felt Manning might benefit from facet nerve blocks and possible radio frequency neurotomy. Dr. John Wyatt, physical medicine and rehabilitationist specialist, conducted a second medical examination of Manning at the request of Employer/Carrier on September 22, 1998. He found no fundamental interval changes in Manning's presentation from his initial evaluation in November 1997. Dr. Wyatt recommended Manning continue with conservative treatment, and he opined that "surgical treatment should not be in the offering for this patient." Dr. Wyatt stated an FCE would be useful in evaluating Manning's work prospects. An FCE performed on November 20, 1998 indicated Manning could return to light duty work.

Dr. Maggio, psychiatrist, performed a second psychiatric evaluation at the request of Employer/Carrier on December 3, 1998. Dr. Maggio was specifically asked to determine whether Manning's emotional condition was related to the October 14, 1995 work accident. Dr. Maggio diagnosed Manning as having an adjustment disorder with mixed emotions of anxiety and depression, compensated on medication. He further diagnosed Manning with personality disorder with features of histrionic personality traits, dependent personality traits, and borderline personality traits. Dr. Maggio explained that Manning's diagnosis of adjustment disorder with mixed emotions is actually related to her personality disorder, which antedates her alleged accident on October 14, 1995. According to Dr. Maggio, Manning's personality traits operate unconsciously and cause her to have symptoms of anxiety, depression, pain, headaches, etc. Thus, in Dr. Maggio's opinion, Manning has no emotional condition related to the alleged October 14, 1995 accident. He again opined that Manning could return to work from a psychiatric point of view.

Manning was seen by Dr. Victor Bazzone, neurosurgeon, on June 4, 1999 at the request of Manning's attorney. Dr. Bazzone recommended laminectomy and discectomy. A lumbar

myelogram performed in August 1999 reported central disc protrusions at L4-5 and L5-S1 that did not impinge on the nerve roots. Despite these radiologic findings, Dr. Bazzone was of the opinion that Manning's subjective symptoms, neurologic findings, and disc protrusions all pointed to disc herniations as being the cause of her alleged symptomatology. At the request of Employer/Carrier, Dr. Russell, neuroradiologist, reviewed all the radiology films, including the most recent myelogram, and concluded that there was no evidence of a herniated disc, neural impingement, or instability. Moreover, Dr. Russell stated that the diffusely bulging disc at L4-5 would not be benefitted by decompressive surgery.

Manning then saw Dr. Robert McGuire, orthopaedic surgeon, for an independent medical evaluation on September 20, 1999. Dr. McGuire found no evidence of nerve root compromise or other significant pathology. He stated that the laminectomy and discectomy recommended by Dr. Bazzone "would be doomed to failure" and he would not recommend this surgery be performed. Dr. McGuire stated that if any surgery were to be contemplated, a fusion should be considered. Dr. McGuire recommended discography to determine if Manning had any discogenic pain generators as an indication for possible fusion. However, the chance of surgical success, in Dr. McGuire's opinion, would be very low, given Manning's self-limiting behavior.

Dr. Charles Aprill, radiologist, performed discography on February 8, 2000. Thereafter, on March 1, 2000, Dr. Aprill advised Manning's attorney that the discography demonstrated abnormalities at L4-5 and L5-S1. At each of these discs, there was a posterior annular fissure with a moderate size central disc protrusion at L5-S1 and a moderate size central/left paracentral protrusion at L4-5. Injection into each of these discs provoked disc pain. Dr. Aprill explained these are hallmark findings of discogenic pain associated with internal disc disruption. Dr. Aprill went on to state to Manning's attorney that Manning was fortunate that she did not undergo the laminectomy/discectomy suggested by Dr. Williams and Dr. Bazzone because the back pain of internal disc disruption syndrome is never effectively managed by laminectomy/discectomy. As such, Dr. Aprill stated he agreed with Dr. McGuire. If surgery were to be contemplated, Dr. Aprill states that interbody fusion would be the surgical

intervention of choice. Dr. Aprill further explained, however, that the problem with Manning is the chronicity of her severe back pain and what appeared to be superimposed illness behavior. Dr. Aprill stated this is often a significant confounder to effective treatment. As a result, Dr. Aprill suggested Manning undergo aggressive psychological treatment prior to considering any aggressive surgical treatment.

Based on Dr. Aprill's findings, Dr. McGuire concluded Manning to have "chronic illness behavior overlay." Despite the radiology films, discography results and opinions of Dr. Russell, Dr. Aprill, and Dr. McGuire, on March 6, 2000, Dr. Bazzone stated that he still believed Manning to have herniated discs at L4-5 and L5-S1 and he continued to recommend lumbar laminectomy and discectomy at these levels. On March 14, 2000, Dr. Aprill said he would not perform lumbar facet studies on Manning as he doubted that any procedure directed towards those joints would likely affect her primary discogenic pain complaints.

At the request of her attorney, on April 11, 2000, Manning was seen by Dr. Howard Katz, physical medicine specialist. Dr. Katz felt Manning had bilateral sacroiliac joint dysfunction, left greater than right, and bilateral trochanteric bursitis. Dr. Katz recommended a trial of Neurontin, physical therapy, and therapeutic injections into both the sacroiliac joints and trochanteric bursa. If none of that worked, Dr. Katz recommended consideration of an intrathecal Morphine pump. Dr. Katz agreed that Manning was at maximum medical improvement with an impairment rating of 5% to the body as a whole. Dr. Katz further agreed that Manning could return to work in a sedentary to light duty occupation with certain lifting restrictions.

Manning returned once again to Dr. McKellar, pain management specialist, in August of 2000. At that time, Dr. McKellar felt inclined to begin another trial of epidural steroid injections, even though the previous injections provided Manning with no benefit. The injections also reportedly did not help, so Dr. McKellar recommended an IDET procedure at L4-5 and L5-S1, which was performed on October 20, 2000. This procedure also did not help Manning's complaints of pain, but was complicated by what Dr. McKellar felt was "post

intradiscal electrothermal therapy neuritis.” Dr. McKellar recommended yet another trial of epidural steroid injections and began prescribing strong doses of narcotic medication. Manning continued to report back and lower extremity pain. Dr. McKellar performed repeat EMG/NCV testing on February 12, 2001. NCV examination of the left leg was reported as normal. EMG examination was reported as revealing mild/equivocal reduction of interference that could conceivably reflect L5 radiculopathy, but may also have been due to limited patient effort.

Dr. McKellar referred Manning to Dr. Mohammad Ahmed, neurologist, on February 28, 2001 for evaluation of her complaints of low back pain and left sided numbness. Dr. Ahmed felt Manning had a possible left L5 radiculopathy, but also hyperreflexia suggestive of myelopathy, and diffuse left sided numbness suggestive of either her bulging cervical disc or a possible stroke.

On March 20, 2001, Manning was admitted to Wesley Medical Center in Hattiesburg, Mississippi by Dr. McKellar because of increased back pain and a decreased ability to void her bladder. During this hospitalization, Dave Roberts, M.D., neurologist (a partner of Dr. Ahmed) was consulted. Dr. Robert’s impression was that Manning was over-sedated and over-medicated from Morphine PCA, Oxycontin, and Valium and that she was suffering from chronic low back and left leg pain of undetermined etiology. A March 21, 2001 MRI of Manning’s head was reported as being unremarkable. A March 22, 2001 MRI of Manning’s lumbar spine again was reported as showing only relatively mild degenerative changes of the lower lumbar spine with central left paracentral bulging of the disc at L4-5 and central disc bulging at L5-S1. No neural constriction was noted at either of these disc levels. Dr. Kerry Bernado, neurosurgeon, consulted Manning on March 23, 2001 at the request of Dr. McKellar. Dr. Bernado felt Manning had very minor degenerative disc changes that could not be helped by surgery. Dr. Bernado noted Manning had no significant structural problem accounting for her allegations of severe chronic pain and he recommended psychological testing and counseling. Manning told Dr. Bernado that other surgeons had offered her surgery in the past. Dr. Bernado responded that he did not feel an operation would likely help her.

On June 19, 2001, Manning requested that Dr. McKellar refer her to Dr. Lee, neurosurgeon, for surgical evaluation. After examination on August 13, 2001, Dr. Lee stated Manning had severe mechanical back pain with L4-5 and L5-S1 disc pathology and he recommended an L4-S1 posterior lumbar decompression and instrumentation. Dr. Lee sent Manning on December 11, 2001 to Dr. Ed Anderson, clinical psychologist with South Mississippi Psychiatric Group. Dr. Anderson diagnosed Manning with Axis I, major depressive episode, rule out somatization disorder, and Axis II, schizoid personality disorder with avoidant features. Dr. Anderson recommended continued psychotherapy and medication for Manning's depression. Dr. Anderson stated that if her somatoform diagnosis is borne out, Manning might be reluctant to consider the possibility that some of her alleged problems could have a psychological origin. Dr. Lee then sent Manning to Dr. Alexandria Polles, psychiatrist, who admitted Manning to Forrest General Hospital on January 21, 2002 for inpatient narcotic detoxification and stabilization. Upon admission for this detoxification, Manning was found to be on benzodiazepines, cannabinoids (marijuana), and opiates. Manning was diagnosed with opiate dependency, depressive disorder, and chronic pain issues.

After urging by both Manning and her attorney, Dr. Lee performed elective low back surgery on Manning on February 21, 2002. Dr. Lee's pre-operative diagnosis was L4-5 and L5-S1 discogenic disease. His post-operative diagnosis was the same. Post-surgery, Manning underwent a trial of physical therapy, but reported continued low back pain. In the meantime, Manning was being followed by Dr. Glenn Ruffin, psychiatrist with South Mississippi Psychiatric Group. Dr. Ruffin referred Manning to Dr. Scott Willoughby, clinical psychologist, who recommended cognitive-behavioral therapy and biofeedback.

Dr. Lee placed Manning at MMI on December 4, 2002. An FCE performed on December 11, 2002 indicated Manning was capable of performing light duty work, eight hours a day. In January 2003, Dr. Ruffin opined that Manning would likely require psychotherapy for the remainder of her life for chronic depression resulting from her chronic pain syndrome. Dr. Ruffin further opined that Manning is permanently and totally disabled to perform any type of

gainful employment. Dr. Lee then concurred with this opinion of Dr. Ruffin. Dr. Lee also felt Manning might need intermittent physical therapy or possibly injections from time to time. Dr. Willoughby also concluded that Manning needed continuing mental health services for the rest of her life in addition to medical treatment for her chronic pain condition. Dr. Willoughby also opined that Manning could not maintain any type of gainful employment.

Dr. Maggio conducted a third psychiatric evaluation of Manning on March 19, 2003. Dr. Maggio stated his prior diagnoses of Manning's psychiatric condition were unchanged and he again stated that Manning's diagnoses have no causal relationship to the alleged October 14, 1995 accident. Dr. Maggio explained that Manning's recurrent depression and personality disorder have been responsible for her symptomatology, but those conditions are not work related. Dr. Maggio agreed that Manning was receiving appropriate treatment in the form of antidepressant medications and psychological support. Dr. Maggio saw no impediment to Manning returning to work from a psychiatric point of view.

Because Manning reported continuing complaints of back pain, on June 8, 2003, Dr. Lee recommended Manning be seen by another pain management specialist. On February 23, 2004, Dr. Jeffrey T. Summers, pain management specialist, conducted an Independent Medical Evaluation which was ordered by the Commission. After examination, Dr. Summers stated the opinion that Manning had no neurologic deficit and she was manifesting gross illness behavior. Dr. Summers opined that any physical examination of Manning was unreliable because of multiple nonphysiologic and nonorganic signs. Dr. Summers stated that proceeding with invasive surgical treatment under these conditions was, as Dr. McGuire stated, "doomed to failure," because it reinforced Manning's illness behavior. Dr. Summers could think of nothing further to offer Manning, though he would defer to the psychiatric experts as to whether further psychological counseling was needed.

On February 23, 2004, Dr. Rahul Vohra, physical medicine specialist, conducted an Independent Medical Evaluation which was also ordered by the Commission. Dr. Vohra stated Manning has illness behavior caused by an underlying primary psychiatric problem. His overall

impression was that Manning has a somatoform disorder with preexisting depression and anxiety. In addition, Dr. Vohra felt that further medical intervention had absolutely no chance of providing any durable symptom relief given that Manning's alleged symptoms continued to be markedly out of proportion to her physical examinations. Dr. Vohra stated the opinion that Manning had no significant abnormalities, other than the presence of some minimal lumbar spasm. Dr. Vohra determined Manning to be at maximum medical improvement with a 20% permanent impairment rating to the body as a whole. Dr. Vohra felt Manning was capable of performing light to medium work. Dr. Vohra also expressed concern that at the time of his evaluation, Manning appeared to have an altered mental status secondary either to medications or controlled substances.

(ii) Course of the Proceedings Below.

The hearing of this matter was held on October 13, 2004. After evaluating all the testimony and medical evidence, the Administrative Judge concluded that the fusion surgery performed by Dr. David Lee on February 21, 2002, as well as all treatment rendered thereafter, was not required by the nature of Manning's alleged work injury or the process of her recovery and that Employer/Carrier are not liable for said medical services under Miss. Code Ann. § 71-3-15. (CR, BS 333-334).

The decision of the Administrative Judge included consideration of the following evidence: (1) The findings of Dr. Michael Fromke, neurosurgeon, Dr. Bruce McCarthy, orthopaedic surgeon, and Dr. Claude Williams, orthopaedic surgeon, that surgery at L4-5 was not recommended; (2) The finding of Dr. Richard Buckley, neurosurgeon, that Claimant had no true objective abnormality and no neurological deficit; (3) The findings of Dr. Robert Manolakas, physical medicine specialist, that Manning had very poor correlation between her subjective complaints, objective findings, and diagnostic studies, and that some of her complaints were inherently improbable; (4) Numerous physicians who examined and treated Manning, including Dr. Fromke, noted that Manning overreacted or over amplified her pain complaints, had significant illness behavior or illness behavior overlay, and/or was magnifying

her symptoms or malingering; (5) Manning's diagnostic tests showing that she did not have a surgical defect; (6) Dr. Kerry Bernado, neurosurgeon, stated that surgery could not help Manning because she had no significant structural problem accounting for her alleged severe chronic pain; and (7) The sentiments of Dr. Bernado were echoed and amplified by the subsequent Independent Medical Evaluations of Dr. Jeffrey Summers and Dr. Rahul Vohra. (CR, BS 334-336).

The Administrative Judge concluded that surgical treatment of Manning was contrary to the preponderance of the credible medical evidence and that Manning's continuing complaints are not the result of any pathology flowing from the alleged October 14, 1995 accident. (CR, BS 335). The Administrative Judge further concluded that Manning did not have a surgical lesion, or other need for surgery. (Id.). The Administrative Judge also noted that the evidence indicated that the surgery performed did not improve Manning's condition. (Id., BS 336). Indeed, the physician who performed the surgery later concluded Manning to be permanently and totally disabled.

The Administrative Judge further ruled that Manning does not have a mental condition arising out of or in the course of her alleged October 14, 1995 accident. (CR, BS 336). Rather, a preponderance of the evidence shows that Manning's mental impairment is due to underlying conditions unrelated to her alleged accident. (Id.). The decision of the Administrative Judge included consideration of the following evidence: (1) This same opinion was rendered by Dr. Henry Maggio, psychiatrist, who evaluated Manning on three separate occasions; (2) Dr. James Brister, psychiatrist, noting Manning's pre-existing history, stated that he could not say whether Manning's depression is related to her alleged back injury; and (3) Dr. Ed Anderson, clinical psychologist, diagnosed Manning with a somatization disorder and further stated that Manning's schizoid and avoidant personality features were fairly pronounced and probably exacerbating her depression and physical problems. (Id., BS 336-337).

The Administrative Judge did not lend much credence to the opinions of Dr. Glenn Ruffin, psychiatrist, and Dr. Scott Willoughby, clinical psychologist. The Administrative Judge

pointed out that both Dr. Ruffin and Dr. Willoughby did not begin treating Manning until almost seven years after the alleged October 14, 1995 accident. (CR, BS 337). The Administrative Judge also noted that the opinions of Dr. Ruffin and Dr. Willoughby ignored consideration of the information contained in Manning's prior medical records, which records are replete with references to the fact that Manning overreacted and overamplified her complaints of pain, had significant illness behavior or illness behavior overlay, and/or was magnifying her symptoms or malingering. (Id.).

On appeal to the Mississippi Workers' Compensation Commission, the decision of the Administrative Judge was affirmed. (CR, BS 341).

The Forrest County Circuit Court, sitting as an intermediate appeals Court, affirmed the Administrative Judge/Full Commission Order on April 11, 2007. (CC, BS 90). In affirming the Commission, the Circuit Court found that the substantial and credible evidence supported the finding that Manning's back complaints were not a result of her alleged injury and that Manning does not have a mental condition arising out of or in the course of her alleged October 14, 1995 accident. (Id.).

SUMMARY OF THE ARGUMENT

This case involves conflicting medical opinions on the issues of the reasonableness and necessity of medical treatment and causation. Employer/Carrier assert that if competent medical evidence on the issues of causation and/or reasonableness and necessity of medical treatment is in direct conflict, the Commission, as trier of fact, must determine which of the conflicting medical evidence has more credibility and weight. While Employer/Carrier assert the Commission correctly decided this case, Employer/Carrier are concerned about two recent decisions of the Commission preceding its decision in this case. The Commission, in two recent decisions preceding the decision in this case, stated that when faced with conflicting opinions of equally competent physicians on the issue of reasonableness and necessity of medical treatment, the Commission must defer to the treating physicians. These two recent decisions are: *Alexander v. Forest Hill Nursing Center, Inc.*, MWCC No. 02 06438-H-9709 (September 21, 2005) and *Verna Ball Cook v. Perry County General Hospital and Nursing Center*, MWCC No. 02 1455-H-7414 (October 4, 2005). Employer/Carrier assert that the Commission's rulings in these two recent cases are in direct contradiction to the ruling of the Mississippi Supreme Court in Hardaway Co. v. Bradley, 887 So. 2d 793 (Miss. 2004) and are therefore wrong as a matter of law. Employer/Carrier further assert that the rulings in these two recent Commission decisions notwithstanding, in this case the Commission applied the correct legal analysis of conflicting medical opinions in reaching its decision.

Employer/Carrier further assert that based on this correct standard of reviewing conflicting, competent medical evidence as applied to the facts of this case, this Court should find that the Administrative Judge, as affirmed by the Commission, correctly decided, based on the overwhelming weight of credible medical testimony, that the back surgery performed by Dr. Lee, and all medical treatment thereafter, is not compensable under the Mississippi Workers' Compensation Act. This Court should further find that the Administrative Judge, as affirmed by the Commission, correctly determined, based on the overwhelming weight of credible evidence, that Manning's mental problems are not the result of her alleged accident at work.

ARGUMENT

I. STANDARD OF REVIEW.

Appellate courts review fact findings of the Commission based on the standard of substantial evidence. Miss. Code Ann. § 71-3-15 (1972, as amended); Walker Mfg. Co. v. Cantrell, 577 So. 2d 1243, 1247 (Miss. 1991). Fact findings of the Commission can be reversed only if such findings are manifestly wrong, arbitrary and capricious, or not supported by substantial evidence. Raytheon Aerospace Support Services v. Miller, 861 So. 2d 330, 335 (Miss. 2003); Georgia Pacific Corp. v. Gregory, 589 So. 2d 1250 (Miss. 1992).

When considering questions of law, on the other hand, the Commission is accorded no deference and appellate review is *de novo*. ABC Mfg. Corp. v. Doyle, 749 So. 2d 43, 45 (Miss. 1999).

II. WHEN PRESENTED WITH CONFLICTING MEDICAL OPINIONS, THE LEGAL OBLIGATION OF THE COMMISSION IS TO DETERMINE THEIR WEIGHT AND CREDIBILITY.

As the overwhelming weight of the credible medical evidence demonstrates, Manning's back complaints were not the result of the alleged October 14, 1995 accident, but rather resulted from longstanding and preexisting degenerative, age-related conditions and/or from longstanding and preexisting psychological conditions. The Administrative Judge, as affirmed by the Commission, appropriately weighed the conflicting medical evidence in favor of the more credible and persuasive conclusion that Manning was not a candidate for surgery, and if performed, surgery was "doomed to failure." Likewise, the overwhelming weight of the credible medical evidence supports the Administrative Judge's decision, as affirmed by the Commission, that Manning's psychiatric condition is unrelated to the alleged October 14, 1995 accident. Rather, based on the overwhelming weight of the credible evidence, Manning's mental condition is the result of her pre-existing, underlying personality disorder.

This case raises an overarching legal issue that was presented to, but not decided by, the Full Commission: When faced with conflicting expert medical opinions on causation and reasonableness and necessity of medical treatment, is it appropriate for the Commission to find

the opinions and treatment recommendations of treating and examining physicians (both Employer Medical Examination and Independent Medical Examinations) to carry more weight and be more credible than conflicting opinions of a claimant's most recent treating physicians?

The Commission serves as the ultimate fact finder in addressing conflicts in medical testimony and opinion. Raytheon Aerospace Support Services v. Miller, 861 So. 2d 330, 336 (Miss. 2003). When there is a conflict of qualified and substantial medical testimony as to causation, or whether certain medical treatment is reasonable and necessary, the Commission, as the trier of fact, must determine which evidence is credible, has weight, and which is not. Id. at 335 (quoting Hale v. Ruleville Health Care Ctr., 687 So. 2d 1221, 1224-25 (Miss. 1997)). In the present case, the Administrative Judge appropriately weighed and assessed the credibility of the conflicting medical evidence. Although the Commission affirmed the decision of the Administrative Judge, in the present case, Employer/Carrier have concerns with recent decisions of the Commission noted above.

In deciding *Linda Alexander v. Forest Hill Nursing Center, Inc.*, MWCC No. 02 06438-H-9709 (September 21, 2005) and *Verna Ball Cook v. Perry County General Hospital and Nursing Center*, MWCC No. 02 1455-H-7414 (October 4, 2005), the Commission referred to the holdings of Spann v. Wal-Mart Stores, Inc., 700 So. 2d 308 (Miss. 1997) and Hardaway Co. v. Bradley, 887 So. 2d 793 (Miss. 2004) regarding conflicting medical opinions on the issue of the reasonableness and necessity of medical treatment. Particularly troublesome to Appellees is the Commission's statement:

We found that, when considering the opinions of **equally competent** physicians, we must defer to the treating physicians

Cook, * 10 (emphasis added). The Commission, however, set forth no criteria for determining what constitutes a "competent" physician or under what circumstances one physician may be found more "competent" than another. In *Cook*, for example, the Commission cites the fact that one physician was board certified in one subspecialty whereas another physician was board certified in another subspecialty. How does board certification in one subspecialty, as opposed

to another subspecialty, make one physician more (or less) competent than another? Moreover, in *Cook*, there is no indication whether the board certifications of the physicians with competing medical opinions were through the American Board of Medical Specialties (ABMS).

In *Spann*, the Mississippi Supreme Court pointed out that Dr. Frenz was board certified, not only by one organization, but by three organizations. The Court in *Spann*, however, failed to note that none of the three board certifications of Dr. Frenz were through the ABMS. In fact, the three board certifications of Dr. Frenz were through self-certifying organizations. *See Bogus Board Certifications, Hippocrates Lantern*, Vol. 1, No. 3 (1992).

In *Cook*, the Commission *concluded*, without stating any supporting *facts*, that Dr. Williams had “greater expertise” than did Dr. Kassen in the “diagnosis of syndromes such as CRPS” Employer/Carrier assert that attempting to resolve issues involving competing medical opinions by addressing the relative “competency” of physicians is embarking upon a slope which will prove to be excruciatingly slippery, if not impossible to scale with any degree of uniformity or cohesiveness of opinion. Indeed, efforts to assess the “competency” of various physicians involved in workers’ compensation cases will likely open Pandora’s box by creating a new class of considerations to be addressed in evaluating workers’ compensation claims (e.g., where was the physician educated; where did the physician perform his or her residency; how many years has the physician practiced; how many times has the physician been sued for malpractice; has the physician ever had his or her DEA license revoked and, if so, for what; what hospital privileges, if any, has the physician had revoked; is the physician board certified and, if so, is the board certification ABMS approved; has the physician ever undertaken but failed efforts to become board certified; etc., etc., etc.?) How else can the Commission really determine “competency” without such a detailed inquiry into sensitive areas of a physician’s professional history? It is suspected that such repeated inquiries in MWCC cases into the “competency” of physicians will do little to endear the Commission, or lawyers practicing before the Commission, to the medical community. Employer/Carrier believe that while “competency” of a physician should be a *consideration* in workers’ compensation cases, assessment of such a

nebulous, esoteric, and sensitive matter should not be the *controlling* consideration in evaluating competing medical opinions.

A. History of Mississippi Law Regarding Reasonableness and Necessity of Medical Treatment.

If an employee is injured while in the course and scope of employment, an employer has an obligation to “furnish such medical, surgical, and other attendance or treatment, nurse and hospital service . . . for such period as the nature of the injury or the process of recovery may require . . .” Miss. Code Ann. § 71-3-15(1). In determining whether medical treatment is required, the Commission should thoroughly investigate whether the requested treatment is necessary and reasonable. White v. Hattiesburg Cable Co., 590 So. 2d 867, 870 (Miss. 1991). But, what if there are conflicting medical opinions as to what treatment is reasonable or necessary? How should the Commission proceed?

In 1997, the Mississippi Supreme Court decided Spann v. Wal-Mart Stores, Inc., 700 So. 2d 308 (Miss. 1997). In Spann, three doctors offered testimony regarding whether the claimant was in need of surgery. Dr. Frenz concluded that the claimant needed surgery; Dr. Nix testified that surgery was not necessary; and Dr. Barrett concluded that there was a 50-50 chance that Dr. Frenz’s planned surgery would improve the claimant’s condition enough for the claimant to go back to work. Id. at 310. Dr. Nix’s testimony was not considered credible because (a) his answers on cross-examination were uncertain; (b) he examined the claimant only once; and (c) he admitted that he had not reviewed the claimant’s MRI. Id. The expert opinions of Drs. Frenz and Barrett were not in direct conflict. The only credible physician testimony was that the proposed medical treatment had a high rate of success; i.e., it would allow the claimant to resume heavy work duties. Id. at 314 n.2. The Court in Spann stated: “There is no dispute that Dr. Frenz is a competent physician as defined by the Act.” 700 So. 2d at 315. Employer/Carrier wonder where in the Act a “competent physician” is defined.

In 2004, the Mississippi Supreme Court decided Hardaway Co. v. Bradley, 887 So. 2d 793 (Miss. 2004), which clarified the Spann decision and set forth criteria for the Commission to

review when determining whether medical treatment is reasonable and necessary. In Hardaway, three doctors offered testimony regarding whether the claimant was at maximum medical recovery or was in need of further surgery. Dr. Frenz, treating physician, concluded neck surgery was needed; Dr. Lon Alexander conducted an independent medical examination and found no objective findings of cervical (neck) pathology; and, Dr. Howard Katz conducted four separate independent medical examinations and concluded there was no indication for surgery and that the claimant had reached maximum medical recovery. A functional capacity evaluation revealed the claimant did not give maximum effort and was magnifying his symptoms. Based on the totality of the evidence, the Administrative Judge and Commission concluded that the claimant did not need surgery and that the claimant had reached maximum medical improvement, despite the recommendations of the claimant's treating physician (Dr. Frenz) to the contrary.

Nevertheless, the claimant argued that the opinion of his treating physician (Dr. Frenz) should be given greater weight because he treated and examined the claimant on more occasions than the other two physicians. On appeal, the Court's of Appeals' majority interpreted Spann as saying that, "the case law and Act mandate that as long as a particular treatment is deemed necessary and reasonable by a competent treating physician, the employer and carrier are obligated to furnish such treatment."

The Mississippi Supreme Court rejected the Court of Appeals' interpretation of Spann because the claimant in that case was not given the surgery simply because the treating physician prescribed it, but because the Commission was not presented with any other credible evidence to the contrary of the treating physician's recommendations. Thus, Spann was inapplicable in Hardaway because there was credible evidence supporting the Commission's finding that the claimant did not need surgery.

The Mississippi Supreme Court in Hardaway also rejected the Court of Appeals' Spann application because it renders meaningless the Mississippi Workers' Compensation Law in providing for employer medical examinations and independent medical examinations ordered by

the Commission. See Miss. Code Ann. § 71-3-15(1) and (2). The Court explained that the Court of Appeals' interpretation of Spann would not give the employer a way to controvert whether medical treatment is reasonable or necessary. In the end, the Hardaway Court was of the opinion that "Spann stands for the proposition that if all physicians agree that a certain medical treatment would benefit the employee and there is no credible evidence to the contrary, the Commission is then obligated to authorize the treatment."

The Mississippi Supreme Court set forth the following standard in Hardaway: "[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.'" Hardaway, 887 So. 2d at 796 (quoting Oswalt v. Abernathy & Clark, 625 So. 2d 770, 772 (Miss. 1993)). The Court found that substantial evidence supported the Commission's order.

Most recently, this very Court decided the case Richardson v. Johnson Electric Automotive, Inc. and Zurich American Insurance Co., 2006-WC-01598-COA (Miss. Ct. App., Aug. 7, 2007). As cited in Appellant's Brief, this Court held in regards to the opinion of the treating physician that, "the Commission is not required to abide by it or required to give it any greater weight than other physicians' opinions." Id. Further, this Court went on to state that "regardless of whether the Commission makes the decision to rule in line with a treating physician's opinion, we must affirm its decision so long as it is supported by substantial evidence." Id.

Based on the Spann, Hardaway and Richardson decisions, if medical testimony and evidence on the issue of reasonableness and necessity of medical treatment is in direct conflict, the Commission, as trier of fact and as a matter of law, must determine which of the medical testimony and evidence has more credibility and weight.

B. Factors for Assessing Medical Opinions.

Assuming experts provide conflicting medical opinions, in assessing the conflicting medical evidence, the Commission may, in its discretion, discount a medical expert's testimony

if that expert did not examine the claimant or failed to review all of the pertinent medical records. Mabry v. Tunica County Sheriff's Dept., 911 So. 2d 1038, 1043 (Miss. Ct. App. 2005). "When an expert's opinion is based upon an inadequate or incomplete examination, that opinion does not carry as much weight and has little or no probative value when compared to the opinion of an expert that has made a thorough and adequate examination." Id. (citing Spann v. Wal-Mart Stores, 700 So. 2d 308, 312 (Miss. 1997) (quoting Johnson v. Ferguson, 435 So. 2d 1191, 1195 (Miss. 1983))). Challenges may also be made when an expert relies on an erroneous history provided by the claimant in forming his opinions. Raytheon Aerospace Support Services v. Miller, 861 So. 2d 330, 336 (Miss. 2003).

The Commission may also consider a treating physician's opinion to carry more weight than the opinions of physicians who examine a claimant solely for purposes of testifying. Clements v. Welling Truck Service, Inc., 739 So. 2d 476, 478 n.1 (Miss. Ct. App. 1999) (citing Larson's Workers Compensation Law § 80.24(b) n. 83.1). In other words, the Commission may find that the opinions of a treating physician who has examined the claimant on numerous occasions, are more credible than contrary opinions of medical experts who only saw the claimant for a short time on one occasion. DiGrazia v. Park Place Entertainment, 814 So. 2d 1232 (Miss. Ct. App. 2005). In addition, the Commission may consider that the opinion of a treating specialist to carry more weight than the opinion of a general practitioner. Clements, 739 So. 2d at 478 n.1.

C. The Commission's Decisions in *Alexander* and *Cook* Conflict With Spann and Hardaway.

In *Alexander* and *Cook*, the Commission stated certain factors it would address when faced with the question of conflicting opinions as to whether medical treatment is "reasonable and necessary." These factors are:

- (1) Questions of whether medical treatment is "reasonable and necessary" must be decided on a case-by-case basis and requires a weighing of credible evidence.
- (2) If the evidence presented is equivocal or equally credible (that is, two or more **competent** physicians simply disagree about the efficacy of the contemplated procedure) then deference must be provided to the claimant's treating physician.

Linda Alexander v. Forest Hill Nursing Center, Inc., MWCC No. 02 06438-H-9709 (Sept. 21, 2005) (emphasis added).

It is with the second “factor” above that Employer/Carrier are most troubled and take issue as a matter of law. The first “factor” is authorized by the Mississippi Supreme Court. Weighing the credibility of conflicting medical evidence is, and long has been, the analysis authorized by the Mississippi Supreme Court, both prior to and after its decision in Hardaway.

Nevertheless, the Commission has added a second, and what happens to be a new “factor” in deciding *Alexander* and *Cook*. In these decisions, the Commission is of the belief that if conflicting medical opinions are provided by “competent” physicians, then the opinion of the treating physician must be provided deference. Restated, if there are conflicting medical opinions as to the reasonableness and necessity of medical treatment, the opinion of the treating physician must be given deference unless that physician is proven to be not **competent**. Employer/Carrier believe this factor is contrary to the ruling of the Mississippi Supreme Court in Hardaway.

First, case law requires that before the Commission can even undertake its duty of weighing conflicting medical evidence to determine which is more credible, the Commission must first make a determination that the medical expert has demonstrated a “reasonable level of expertise” to give opinion testimony. South Central Bell Telephone Co. v. Aden, 474 So. 2d 584 (Miss. 1985). The Court in Aden said nothing about evaluating the relative competency of physicians, only that a “reasonable” level of competency be established. Thus, the appropriate analysis is first, to determine whether particular experts have a reasonable level of competency, and second, to assess the weight and credibility of the testimony of the various experts. However, in *Alexander* and *Cook*, the Commission is foregoing the second step altogether by deferring only to the opinions of a competent **treating physician** where opinions are conflicting. Based on *Alexander* and *Cook*, the Commission would have the issue of whether the physician is a treating physician be the only deciding factor to the exclusion of all other considerations as to whether medical treatment is compensable. The Commission has cited no authority for using

this standard.

Second, by deferring only to the opinions of competent **treating** physicians, when expert opinions conflict, the Commission's second "factor" amounts to nothing more than a circuitous way of resurrecting the already rejected proposition that "as long as a particular treatment is deemed necessary and reasonable by a competent physician, the employer and carrier are obligated to furnish such treatment." See Hardaway, 881 So. 2d at 797. The Mississippi Supreme Court flatly rejected this proposition in Hardaway because it is contrary to provisions of the Mississippi Workers' Compensation Act allowing employers the right to challenge particular medical treatment on the grounds that it is not reasonable or necessary. Even the Commission recognizes the Court's rejection of this proposition in Hardaway. See Cook, at *10.

For these reasons, Employer/Carrier respectfully request this Court reject any assertion that the Commission's analysis proposed in *Alexander* and *Cook* be applied to this appeal.

III. THE DECISIONS OF THE ADMINISTRATIVE JUDGE, AS AFFIRMED BY THE COMMISSION, ARE SUPPORTED BY SUBSTANTIAL EVIDENCE.

The Administrative Judge thoughtfully analyzed the testimony and medical evidence and, in the opinion of Employer/Carrier, reached the right decisions. The Commission agreed when it affirmed the decision of the Administrative Judge.

A. The Surgery Performed By Dr. Lee Is Not Compensable Under The Mississippi Workers' Compensation Act.

First, the weight and credibility of the expert evidence supports the Order of the Administrative Judge, as affirmed by the Commission, that back surgery performed on Manning, as well as all medical treatment thereafter, is not compensable under the Mississippi Workers' Compensation Act. Manning's surgery came almost six years after the alleged October 14, 1995 accident. The decision to perform surgery was in direct conflict to the opinions of numerous other specialists who previously treated Manning and conducted physical examinations and diagnostic studies of Manning. Specifically, the following physicians were all of the opinion that Manning did not need surgery: (1) Dr. Richard Buckley, neurosurgeon who conducted a medical examination, noted degenerative changes at L4-5 consistent with Manning's age, but

found no neurological defects and no objective abnormalities; (2) Dr. Michael Fromke, treating neurosurgeon, who also noted degenerative changes at L4-5, but found no evidence of herniated discs or nerve root compression, and his neurological examination of Manning was normal; (3) Dr. Kerry Bernado, consulting neurosurgeon, who found also minor degenerative changes at L4-5 and at L5-S1 with no significant structural problem; (4) Dr. William Russell, neuroradiologist at the University of Mississippi Medical Center, who reviewed records and films, noted degenerative disc disease at L4-5 and L5-S1, but found no evidence of a herniated disc or compression of neural elements; (5) Dr. Robert McGuire, orthopaedic surgeon who conducted an independent medical examination at the request of the Commission, found no nerve root compromise or other significant pathology and noted that surgery would be “doomed to failure” due to Manning’s chronic illness overlay; and, (6) Dr. John Wyatt, physical medicine specialist, who conducted a medical examination and found degenerative changes at L4-5 and L5-1, but nothing that warranted surgery. In addition, Dr. Bruce McCarthy, treating orthopaedic surgeon, noted mild degenerative changes with a disc bulge at L4-5, but no evidence of nerve root compromise. Dr. Claude Williams, orthopaedic surgeon, found no abnormal neurological findings. Dr. Robert Manolakas, physical medicine specialist, conducted a medical examination, but found no evidence of radiculopathy, nerve root damage or nerve root embarrassment. Numerous physicians, including, Dr. Buckley, Dr. Fromke, Dr. Bernado, Dr. McGuire, and Dr. Manolakas, noted indications of symptom magnification, suspected malingering, and/or positive illness behavior by Manning. Manning presented no credible evidence that any of the above physicians’ opinions were based on inadequate or incomplete examinations.

Moreover, the reports of Manning’s diagnostic tests do not justify surgical treatment. Several lumbar MRI’s showed no evidence of a herniated disc or compression of neural elements. Two nerve conduction studies were normal. A bone scan was also normal. A myelogram showed no evidence of nerve root impingement. A discography indicated chronic illness behavior. Based on the above medical evidence, the Administrative Judge, as affirmed by the Commission, appropriately ruled that the numerous medical opinions that Manning did not

need surgery were more credible and outweighed the medical opinion of the physician who started treating Manning six years after the alleged accident and later performed surgery.

In the Brief of Appellant, an attempt is made to parallel Manning's case with Johnson v. Ferguson. B.A. p. 12-13. In trying to compare these cases, Appellant states that "Dr. Lee stands in the shoes of Dr. Buckley, and standing in the shoes of Dr. Enger are the many other physicians, mostly IMEs, who say Kay Manning did not have a work-related injury, or if she did, it did not merit surgery or psychological disability." Id.

In Johnson, the Court's finding was based upon the fact that although Dr. Enger testified there was no way to rule out the Claimant's alleged condition except by one diagnostic procedure, he refused to perform such. Johnson, 435 So. 2d at 1195. In Manning's case, however, the Administrative Judge explicitly supported her ruling citing "Manning's diagnostic tests showing that she did not have a surgical defect" then naming various diagnostic tests performed. (CR, BS 334). There is no parallel between Manning's case and Johnson as numerous diagnostic tests were performed on Manning, countless examinations were performed and it cannot be said that the opinions of the doctors relied upon by the Administrative Judge were inadequate or incomplete. Claimant's assertions in this regard are simply without merit.

B. Manning's Mental Condition Is Unrelated To The Alleged October 14, 1995 Accident.

The decision of the Administrative Judge, as affirmed by the Commission, that Manning does not have a mental condition arising out of and in the course of the alleged October 14, 1995 accident is likewise supported by the overwhelming weight and credibility of the expert evidence. To recover for a mental injury, Manning is required to prove her mental condition was caused, contributed to, or aggravated by a work related injury. Kirk v. K-Mart Corp., 838 So. 2d 1007, 1010 (Miss. Ct. App. 2003). Manning has failed to meet her burden of proof.³

³ In the Brief of Appellant, there is obvious confusion between the Claimant's "burden of proof" and the "standard of review on appeal" as Manning asserts that "substantial evidence" should have been the burden applied by the Administrative Judge. B.A. p 14. However, the "burden of proof" in any workers' compensation case is "preponderance of the evidence." Moore v. Independent Life and Accident Ins. Co., 788 So.2d 106 (Miss. Ct. App. 2001). In addition, in

The medical evidence shows that Manning was seen by three psychiatrists and two clinical psychologists during the nine (9) year period prior to the hearing on this matter.⁴ Of those, only one psychiatrist, Dr. Glen Ruffin, and one clinical psychologist, Dr. Scott Willoughby, were of the opinion that Manning had chronic depression resulting from chronic pain syndrome related to the alleged October 14, 1995 accident. Neither Dr. Ruffin nor Dr. Willoughby began treating Manning until almost seven years after the alleged accident in question. Moreover, Dr. Ruffin admitted he did not review any of the voluminous medical records of Manning before his treatment of Manning commenced. Dr. Henry Maggio, on the other hand, reviewed the medical records, and conducted two medical examinations before the February 2002 surgery (November 5, 1996 and December 3, 1998) and another thereafter (March 19, 2003). Dr. Maggio opined throughout his examinations that Manning's psychiatric conditions are unrelated to her alleged accident, but rather, are due to her pre-existing personality disorders. Dr. James Brister, a treating psychiatrist of Manning in 1997, could not say that her depression was related to her back injury. And, like Dr. Maggio, Dr. Ed Anderson, treating clinical psychologist, also felt that Manning was depressed and had a schizoid personality disorder with avoidant features. The Administrative Judge determined, as affirmed by the Commission, that the medical opinions of Dr. Maggio, Dr. Brister, and Dr. Anderson were more credible than, and outweighed, the opinions of Dr. Ruffin and Dr. Willoughby, especially given the fact that these two medical providers did not begin treating Manning until almost seven years after the alleged accident and were unaware of the crucial and voluminous information regarding Manning's medical history and medical findings before their treatment

a case involving psychological injury the burden of proof is heightened to "clear and convincing evidence." See Bates v. Countrybrook Living Center, 609 So.2d 1247 (Miss. 1992); Fought v. Stuart C. Irby Co., 523 So.2d 314 (Miss. 1988).

⁴ A fourth psychiatrist, Dr. Alexandria Polles, saw Manning upon referral of Dr. Lee, and she diagnosed Manning as having opiate dependence, depressive disorder, and chronic pain issues. She admitted Manning for inpatient stabilization and detoxification. However, Dr. Polles did not address the issue of whether Manning's depressive disorder was causally related to the alleged October 14, 1995 accident.

commenced.

Based on the foregoing medical evidence, the decisions of the Administrative Judge, as affirmed by the Commission, that surgery performed on Manning, as well as other medical treatment thereafter, was not compensable, and that Manning's mental condition did not arise out of the alleged October 14, 1995 accident, are supported by the overwhelming weight and credibility of the expert testimony, and this Court should affirm the Order of the Commission regarding same.

CONCLUSION

Appellees respectfully request that Court find that the decision of the Administrative Judge, as affirmed by the Commission, correctly decided, based on substantial evidence, that the back surgery performed on Manning, and all medical treatment thereafter, was neither reasonable nor necessary. Appellees further request that this Court find that the decision of the Administrative Judge, as affirmed by the Commission, correctly determined, based on substantial evidence, that Manning's emotional problems are not the result of the alleged accident at work.

Respectfully submitted,

SUNBEAM CORPORATION and
NATIONAL UNION FIRE INS. CO.

BY: _____

COUNSEL OF RECORD

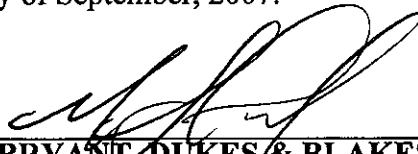
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CERTIFICATE OF SERVICE:

I, M. JASON SUMRALL, of the law firm of Bryant, Dukes & Blakeslee, P.L.L.C., do hereby certify that I have this date mailed, postage prepaid, a true and correct copy of the within and foregoing ***Brief of Appellees*** to Lester Clark, Jr., Esq., Counsel of record for the Claimant, at his regular and usual mailing address of Post Office Box 270, Hattiesburg, Mississippi 39403-0270.

Pursuant to Mississippi Rule of Appellate Procedure 25(b), a copy of the foregoing ***Brief of Appellees*** has this date been provided to the Mississippi Workers Compensation Commission, ATTN: Honorable Deneise Turner Lott, P.O. Box 5300, Jackson, MS 39296-5300.

SO CERTIFIED on this the 7th day of September, 2007.



BRYANT, DUKES & BLAKESLEE, P.L.L.C.,
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