IN THE SUPREME COURT OF MISSISSIPPI

NO. 2007-WC-00780

EVELYN KAY MANNING

Appellant

VERSUS

SUNBEAM-OSTER HOUSEHOLD PRODUCTS
NATIONAL-UNION FIRE INSURANCE COMPANY
OF PITTSBURGH, PA

Appellee

REPLY BRIEF FOR THE APPELLANT:

ORAL ARGUMENT REQUESTED

ON APPEAL FROM THE CIRCUIT COURT OF FORREST COUNTY

LESTER CLARK, JR.
MS BAR NO. [redacted]
NATHAN L. CLARK, III
MS BAR NO. [redacted]

Clark and Clark Attorneys, PLLC
P.O. Drawer 270
912 West Pine Street
Hattiesburg, MS 39403-0270
601-582-1977
601-582-9639 (fax)

Attorneys for Appellant

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2007-WC-00768

EVELYN KAY MANNING

Appellant

VERSUS

SUNBEAM-OSTER HOUSEHOLD PRODUCTS
NATIONAL-UNION FIRE INSURANCE COMPANY
OF PITTSBURGH, PA

Appellee

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record for the Appellant 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 (Appellant)
2. Lester Clark, Jr. and Nathan L. Clark, III; Clark and Clark, PLLC – Counsel for the Claimant (Appellant)
3. Sunbeam Corporation – Employer
4. National Union Fire Ins. Co. of Pittsburgh, PA – Carrier
5. William D. Blakeslee; Kara L. Lind and M. Jason Sumrall; Byant, Dukes & Blakeslee, P.L.L.C. – Counsel for the Employer/Carrier (Appellees).

THIS the 24th day of September 2007.

LESTER CLARK, JR.

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STATEMENT OF THE ISSUES

The issues that Appellant takes with Appelles' Brief are:

1. Appellees' characterization that Dr. Bazzone's consultation and treatment of the Appellant was at the request of her Attorney.

2. Whether the ALJ applied the required diligence in order to properly identify which evidence/testimony is more credible, such that greater weight may be placed thereon.

STATEMENT OF THE CASE

I. Dr. Bazzone

Appellee specifically alleges in the last paragraph of page 8 of their Brief that Appellant saw Dr. Bazzone "at the request of Manning's attorney." The record itself is unclear whether or not Dr. Bazzone was an IME procured by Appellee or suggested by the Appellant's Attorney. The fact of the matter is that Dr. Bazzone was unknown to the Appellant or her Attorney before

the Appellees' attorney informed Appellant's Attorney that the Appellant was being sent to Dr. Bazzone for an IME.

The significance of this seemingly misstated fact is that it shows the attitude of Appellee toward any opinion in favor of Appellant. Here, because Dr. Bazzone made recommendations that Appellee did not agree with they sent Appellant to more IMEs that summarily refuted Dr. Bazzone. Furthermore, now Appellees want to say that the good doctor was one of our choices. He was not, but he did become one of our touchstones in this whole mess, to show Appellees' systemic abuse of our Workers' Compensation system that already limits a Claimant's ability to recover.

When an Employer/Carrier sends a Claimant for an IME in a Workers' Compensation claim, if an IME physician makes recommendations supporting the Claimant and adverse to the Employer/Carrier, that they often "doctor shop" for as many additional IME's as necessary to amass enough medical opinion contrary to that of the Claimant- pro IME. As we have seen first hand in this case, Appellees are able to obtain more opinions to sufficiently discount any such recommendations by the sheer weight of that additional Employer/Carrier-pro IME opinion.

A strong signal needs to be sent to Employer/Carriers like Appellees that they have no right to "doctor shop" to the extent that they can simply overwhelm the other side. More evidence is not more credible evidence. Suffice it to say, that if Dr. Bazzone's findings and suggestions for treatment of the Claimant had been followed by the Employer/Carriers who suggested him, Appellant might have had a much earlier and more positive outcome in her long-term Workers' Compensation claim.

II. Whether the evidence was properly weighed

Appellant assert that the 11-12 pages of Appellees' brief regarding the "Factual and Medical Background" of this case just shows how involved this record is. Not that we agree

with their assertions therefrom, but it does show just how many IMEs they were able to get to come to bat for their cause.

Richardson v. Johnson Elec. Auto., Inc., (2007 MSCA 2006-WC-01598 –080707) is current caselaw that does a good job of framing the issues present in this case, as well as settling the possible conflicts arising between the decisions in *S. Cent. Bell Tel. Co. v. Aden*, 474 So.2d 584 (Miss. 1985) and *Hardaway Co. v. Bradley*, 887 So.2d 793 (Miss. 2004). Unlike Appellees, we interpret *Alexander v. Forest Hill Nursing Center, Inc.*, MWCC No. 02 06438-H-9709 (Sept. 21, 2005), and *Cook v. Perry County general Hosp. & Nursing Center*, MWCC No. 1455-H-7414 (Oct. 4, 2005), as giving deference to a treating physician only when there is a conflict in credible evidence, not to do away with the second step of assessing the weight and credibility of evidence/testimony as Appellee's assert.

This distinction is at the very heart of Appellant's claim herein, that the ALJ did not properly weigh the credibility of conflicting testimony. The greater weight of evidence is not necessarily the same as the more credible evidence. Furthermore, that allowing the Appellee to systemically shop around until their evidence reached a critical mass is likewise in error.

The Appellee likes to assert that they won because the "overwhelming weight of credible medical testimony" was in their favor. Although that is what the ALJ determined, it is simply not true. Yes, there was a great body of evidence/testimony from which the ALJ could support their decision, but it is with the ALJ's position as the ultimate judge of the credibility of witnesses and the medical testimony that we find error.

In Appellees' there were too many inconsistencies as well as incorrect summarizations of the myriad medical opinions in this case. The question to this Court is therefore whether it is appropriate for the MWCC to allow themselves to be overwhelmed by Employer/Carrier IMEs as Appellees did here, such that it is simply easier for the ALJ to go with the numbers rather that

perform due diligence in actually determining where conflicts arise in medical testimony and then determining where the preponderance of the evidence lies.

The Appellees do a good job of identifying the necessary factors in assessing medical opinions in their brief Section II.B. – Factors for Assessing Medical Opinions. They however do not weigh in as to whether they feel like the ALJ complied with same. Our contention herein is that the ALJ did not comply with these well-established principles. That if the ALJ had, then she would not have made such a terse and incorrect summary of the evidence/testimony.

CONCLUSION

You may have many IMEs saying Appellant did not need surgery and that any mental problems she had were not work-related or were pre-existing, but none made any specific findings to clarify those opinions. How does all that "medical evidence" stack up against the objective findings of Dr. Lee, who actually did the surgery and found serious back problems? Or Dr. Ruffin who, by the time his deposition was taken had seen Kay at least twenty-six times. [Dr. Ruffin's deposition, p. 6]. "I would think that chronic pain and being able to be told that she is a fraud or that she didn't have any problem is very upsetting and can cause anxiety and depression" [Dr. Ruffin's deposition, p. 15].

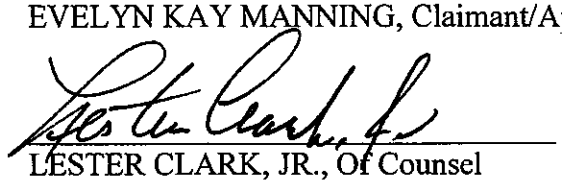
1) Dr. Bazzone was an Employer/Carrier IME whose findings favored the Claimant, as such Appellees immediately found other IMEs to refute his opinion. This court cannot continue to allow Employer/Carriers, sitting as Appellee, to keep looking until they find what they want.

2) As to whether the ALJ weighed the evidence properly, it is not enough to equate credible evidence with the greater weight of evidence.

Finally, we ask that the Court reverse the Circuit Court's ruling and enter a decision in Kay Manning's favor, as it is the long-standing rule of this Court that doubtful cases must be resolved in favor of compensation, so as to fulfill the beneficent purposes of the Statute.

Respectfully submitted,

EVELYN KAY MANNING, Claimant/Appellant

By: 
LESTER CLARK, JR., Of Counsel
for the Claimant/Appellant

LESTER CLARK, JR.
MS BAR NO. [redacted]
NATHAN L. CLARK, III
MS BAR NO. [redacted]

Clark and Clark Attorneys, PLLC
P.O. Drawer 270
912 West Pine Street
Hattiesburg, MS 39403-0270
601-582-1977
601-582-9639 (fax)

Attorneys for Appellant

CERTIFICATE OF SERVICE

I, the undersigned hereby certify that I this day delivered by U.S. Mail and/or by FedEx, postage prepaid the original and three (3) true copies of the foregoing Claimant's/Appellant's Appeal Reply Brief with a disk of same in Word Perfect format to the Hon. Betty W. Sephton, Clerk of the Mississippi Supreme Court, at her regular mailing address, P. O. Box 249, Jackson, MS 39205-0249; and also one (1) true copy to the Hon. William D. Blakeslee; Hon. Kara L. Lind; and Hon. M. Jason Sumrall; Co-counsel for the Employer/Carrier (Appellees), at their regular mailing address, P.O. Box 10, Gulfport, MS 39501.

This, the 24th day of September 2007.

LESTER CLARK, JR.