IN THE SUPREME COURT OF MISSISSIPPI

NO. 2007-WC-00786

EVELYN KAY MANNING

Appellant

VERSUS

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

Appellee

BRIEF FOR THE APPELLANT:

ORAL ARGUMENT REQUESTED

ON APPEAL FROM THE CIRCUIT COURT OF FORREST COUNTY

LESTER CLARK, JR.
MS BAR NO. [redacted]
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MS BAR NO. [redacted]

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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 23rd day of August 2007.

LESTER CLARK, JR.

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IN THE SUPREME COURT OF MISSISSIPPI

NO. 2007-WC-00788

EVELYN KAY MANNING

Appellant

VERSUS

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

Appellee

STATEMENT OF THE ISSUES

1. Whether substantial evidence supported the decision that Claimant's work-related physical injury of October 14, 1995 did not cause or significantly contribute to her current physical and/or mental impairment.

2. Was the Administrative Law Judge (ALJ) correct in finding that Claimant suffered no work-related physical and/or mental injury that justified compensation or "liability for her future medical services and supplies . . ."

3. Whether the ALJ's application of proof by clear and convincing or by a preponderance of the evidence was the proper burden of proof in evaluating Claimant's claim.

4. Whether in weighing conflicting medical evidence, the ALJ placed greater weight on the opinions of non-treating physicians over the opinions of treating physicians and the Claimant's testimony.

STATEMENT OF THE CASE

I. Nature of the Case

This action arises from a Mississippi Workers' Compensation Commission (MWCC) claim. The case is submitted to the Supreme Court of Mississippi to determine whether the ALJ, the Commission, and the Circuit Court in review, erred in their decisions.

II. Course of the Proceedings

Claimant's claim began under the normal course of claims submitted to the MWCC, her Petition to Controvert was filed on December 6, 1995 and she collected all of her 450 weeks of temporary total disability before her case came on for hearing before the ALJ on October 13, 2004. Her claim was thereafter denied by the ALJ.

Claimant appealed that adverse decision and upon a hearing before the full MWCC on February 7, 2006 it summarily affirmed the decision of the ALJ. Claimant then properly pursued her appeal through the Forrest County Circuit Court, which also affirmed the prior decisions. Claimant now brings her case to the Mississippi Supreme Court.

III. Statement of the Facts

Claimant, Kay Manning, injured her lower back while lifting a "tote" on the Employer's assembly line. While her claim was initially denied, the Employer/Carrier agreed to provide medical benefits and temporary total disability payments some months after her work related injury.

Two of Claimant's first examining physicians, (Dr. Williams and Dr. Blanchard) suggested conservative treatment and further diagnostic tests, with Dr. Williams suggesting steroid injections with the possibility of eventual back surgery. [Med. Rec. (MR) 7, p. 2]. However, the Employer/Carrier refused to authorize the suggested testing and/or treatment by those doctors and immediately sent Claimant for Independent Medical Examinations (IMEs) to

two doctors on the coast. [MR 10; MR 15]. At that juncture the Claimant was not claiming psychological injury, but the Employer/Carrier raised the issue at that early stage. Certainly, the first (of several) IME reports by psychiatrist Harry Maggio, M.D. [MR 15] indicated Kay was psychologically impaired, but he stated in the conclusion of his initial report ..."[s]he is not disabled from a psychiatric point of view and could return to work while taking the medication Zoloft." [MR 15, p. 4].

Dr. Maggio refused to associate her psychological problems in any way to her on-the-job injury and seemed to relate those "problems" to her "hard" pre-work-related-injury life experiences. The fact remains that until her work-related accident at Sunbeam-Oster, there is no record that Kay Manning ever sought treatment for any psychological problems. According to the testimony of Claimant, her mother, and her sister at trial, she was, before this accident, a fairly well adjusted and functioning person, although they did acknowledge some corporal punishment and/or sexual abuse of the Claimant in her childhood. [Trial Transcript (TT), p. 35, 63, 69]. The fact remains, Claimant was <u>never</u> treated for mental health issues nor did same ever affect her being able to do her job for the Employer/Carrier or otherwise.

The IME report of Robert Manolakas, M.D., a physician specializing in physical medicine and rehabilitation dated September 30, 1996 indicated that she had reached MMI and could return to work. While he stated; "I believe that this patient may have at the time of her claimed injury exacerbated an underlying disc problem, although more likely than not, this disc protrusion is merely an incidental finding." [MR 10, p. 6]. We know now that later medical evidence proved him to be incorrect in that opinion.

Claimant saw Neurosurgeon Michael Fromke on a consultation from her OB/GYN on July 15, 1997. In his report of that date Dr. Fromke stated:

> ...Furthermore, I believe she is suffering from discogenic back pain and this has been clearly demonstrated on the progression of degenerative disc disease at

> L4 and also at L5 on follow-up MRI examination. Here the disc has undergone degenerative changes with loss of intradiscal water with disc bulging. These are degenerative changes that one can appreciate in the spine and is probably related to her pain. **Since her pain syndrome did not precede the on the job injury even though (sic) accident, it appears to be that her current pain problem presents a persistent and continued problem from her on the job injury even though the spondylosis at L4 may have been existing prior to the on the job injury. Clearly the pain which is coming from that degenerative disc was aggravated by the on the job injury and has not been treated maximally with medication or therapy.** To further elucidate the nature of her discogenic pain, one would need to proceed with discograms at L4 and L5 to see if that correlates with the degree of back pain that she is experiencing. I am most certain that the leg pain she is experiencing is due to the inflammation associated with lumbar spondylosis which as (sic) untreated and she is now experiencing sciatica with that. [MR 22, p. 4, Emphasis added].

During the seven (7) months after this initial visit, Kay had delivered and cared for her new baby. Upon seeing Dr. Fromke for the final time on May 19, 1998 he determined that she had reached MMI ..."with no permanent medical impairment or permanent work restrictions related to any work-connected injury." [TT, p. 337; ALJ Order, p. 9]. This statement indicates an abrupt change in Dr. Fromke's opinion from when he had seen her on July 15, 1997. When she first returned to see Dr. Fromke on February 10, 1998 it was apparent from his notes that he was offended in some way by Kay having not returned to see him sooner; "...and she literally disappeared until she returns today." [MR 35]. Dr. Fromke seems to have been thereafter totally prejudiced against her. His May 19, 1998 report releases her at MMI, without mention of why he changed his mind from his earlier strong opinion for a work-related injury.

Note that Dr. Fromke had initially suggested a discogram, but that test was refused by the Employer/Carrier and was not performed until much later. We also know that Claimant had not had the discogram that Dr. Fromke suggested at the time he made his final report. [MR 22, p. 4]. This abrupt and unfounded change is totally suspect, yet the ALJ relied heavily on this latter opinion of Dr. Fromke.

On October 20, 1998, three years after her work related injury, Kay Manning underwent a Functional Capacities Evaluation at the Physical Therapy Center in Ocean Springs, as ordered by one of the Employer/Carrier's numerous IMEs, John Wyatt, MD. That test indicated that she had "...put forth good effort with the FCE. Currently her functional abilities do not match the demands of her occupation of assembly line worker." [MR 61].

Furthermore, we can now see clearly from the reports of Dr. Lee and Dr. Ruffin that Dr. Fromke and the other doctors who said Kay had no physical or mental impairment were simply wrong. Dr. Lee and Dr. Ruffin, Claimant's treating physicians, certainly indicate she is totally disabled, as does the Social Security Administration, which granted her SSI Benefits in 2005.

Dr. Lee relied on the much later performed discogram and previous testing to determine that lower back surgery and fusion were required, regardless of the opinions of the numerous other doctors, mostly Employer/Carrier hired IMEs. Further, we should point out that had some of the earlier physicians' suggestions for additional testing been followed, Claimant may have had a much earlier resolution of her case. Unfortunately, and directly attributable to the Employer/Carrier's delay and obstructive behavior in preventing their employee from getting the help she needed, she might not have had to wait seven years to obtain surgery. We also contend that it is during these unnecessary delays that Claimant developed severe psychological problems relating to this on the job injury. As noted by her treating psychiatrist, Dr. Glen B. Ruffin; "...[s]he gave a history of severe back pain, depression and anxiety since her job related accident. She denied that she had depression or back pain prior to her injury" [MR 134]. Dr. Maggio, an IME, stated early on that Claimant had psychological problems, which stemmed from pre-work-related events, such as her "hard life." Unfortunately he did not give any evidence credible or otherwise to support that assertion. In fact, he and Dr. Manolakas did not even think Claimant was disabled and could return to work. Their reports should have been

given less credibility as they were merely boilerplate opinions from Employer/Carrier hired IMEs that were ultimately found incorrect. [MR 10, 15].

Dr. Claude Williams, Claimant's initial choice of physicians, suggested epidural injections and if that did not work he said a laminectomy might be in order. These treatments were denied by the Employer/Carrier, but it follows that when epidurals were finally administered, some years later (to no avail), that based on his records, Dr. Williams would have most probably suggested surgery. [MR 7]. Of course, he never had that opportunity, as any suggestions that he may have made after his initial evaluation were refused by the Employer/Carrier.

Remember also, that early on Dr. Blanchard wanted to do a myelogram and an EMG but the Employer/Carrier also refused those tests and Claimant was promptly sent for IMEs with Dr. Maggio and Dr. Manolakas. As Kay testified at the hearing, Dr. Maggio told her "it was all in her head." [TT, p. 13]. He also told her, according to Kay's trial testimony "...that I was crazy and for me to go home and tell myself that my back don't hurt." [TT, p. 23-24]. Dr. Maggio also stated in his earlier report that Kay could return to work on Zoloft. As we now know, it was not all in her head and this IME's suggested treatment not only would have been wrong, but also could have put Claimant back in a dangerous work environment on psychoactive drugs.

The Employer/Carrier's own IME, Dr. Victor Bazzone, did a thorough examination and determined that Kay had ruptured disc(s). He was even authorized to finally perform the myelogram, which Dr. Blanchard had suggested several years earlier. Dr. Bazzone specifically explained that an inconclusive MRI did not necessarily mean there was no herniated disc. [MR 70]. He then recommend surgery, but his suggestion of surgery was denied by the Employer/Carrier. In response, the Employer/Carrier simply produced more IMEs to refute his findings. When his opinion was not to their liking, they merely sent the records (not Kay

Manning) to Dr. William F. Russell in Jackson for his review. From those records and films, but without the benefit of actually seeing the Claimant, Dr. Russell concluded contrary to Dr. Bazzone that Kay Manning "would not benefit...from decompressive surgery." [MR 71, p. 2].

It becomes clear from our recitation of the facts that Claimant has had a long history of medical help, which may be better classified as medical run around at the Employer/Carrier's instigation. Rather than getting the help initially suggested by Dr. Williams, Dr. Blanchard, and/or Dr. Bazzone, Claimant was forced by the Employer/Carrier to continue seeing and having her file(s) reviewed by numerous IMEs who continued to tell her nothing was wrong until they had built up what they determined was a sufficient weight of evidence against her claim.

STANDARD OF REVEIW

> ¶10. The Commission sits as the finder of fact and its findings are entitled to substantial deference. *Raytheon Aero. Support Servs. v. Miller*, 861 So.2d 330 (¶11) (Miss. 2003). As a reviewing court, we may only interfere with the Commission's findings if they are arbitrary and capricious. *Id.* at (¶9). Where the decision of the Commission is supported by substantial evidence, there can be no finding of arbitrariness and caprice. *Id.* Additionally, "the Commission is also the ultimate judge of the credibility of witnesses." *Barber Seafood, Inc. v. Smith*, 911 So.2d 454 (¶27) (Miss. 2005). "Further, neither this Court nor the Mississippi Supreme Court is empowered to determine where the preponderance of the evidence lies when the evidence is conflicting. Instead, this Court must affirm the decision of the Commission where substantial credible evidence supports the Commission's order." *Id.* [citations omitted]. 2007 MSCA 2006-WC-01598 - 080707; *Richardson v. Johnson Electric Automotive, Inc.*

SUMMARY OF THE ARGUMENT

As shown herein, the decisions of the ALJ, the full Commission, and the Circuit Court were in error and Claimant requests this Court reverse and enter a decision in her favor.

The determination that Claimant's work-related physical injury did not cause or significantly contribute to her current physical and/or mental impairment was made in error.

The finding that Claimant suffered no work-related physical and/or mental injury that justified compensation for future benefits was also made in error.

The application of proof by clear and convincing evidence or by a preponderance of the evidence, as acknowledged by the ALJ, was the improper burden of proof. Upon review by the full Commission, this improper application of the burden of proof should have been recognized, however they summarily affirmed. Had the proper standard been applied, had the appropriate weight been given the testimony at trial, and the medical evidence and opinions been weighed properly, then Claimant would not be here today asking for relief.

In weighing conflicting medical evidence the ALJ applied greater weight to the opinions of Employer/Carrier paid, non-treating, IMEs over the opinions of treating physicians and Claimant's own testimony. This was done in error and Claimant seeks relief.

ARGUMENT

I. Pertinent Mississippi Caselaw

At the full hearing before the MWCC we presented the line of reasoning that *S. Cent. Bell Tel. Co. v. Aden*, 474 So.2d 584 (Miss. 1985) is still good law and should have been followed with respect to weighing and evaluating conflicting medical testimony. Employer/Carrier on the other hand put forth the contention that *Aden* was contrary to *Hardaway Co. v. Bradley*, 887 So.2d 793 (Miss. 2004). Employer/Carrier suggested that *Aden* makes the deference to treating physicians prong the only one. This is an oversimplification of the case and nothing could be further from the truth. In fact, giving deference to a treating physician is merely an additional factor, when trying to make a determination on conflicting credible medical testimony. As such, we assert that *Aden* is not contrary to *Hardaway* and should continue to be followed.

We concur with Employer/Carrier's belief that 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*. Certainly the competency of the doctors should be an initial factor. If the doctor is not credible or competent, their findings should not be

considered at all. Thereafter, the Commission must weigh the credibility of medical evidence the doctors have put forth. *Aden* instructs the Commission to consider an additional factor that gives deference to the treating physician when all else seems credible and equal.

Even as recently as August 7, 2007 the Mississippi Court of Appeals handed down the decision in *Richardson* (2007 MSCA 2006-WC-01598 – 080707). This case is directly on point with the very same workers compensation issues present here. In *Richardson* the court does not believe, as Employer/Carrier contended on appeal to the MWCC, that *Aden* attempts to make deference to the treating physician the only factor. In fact the *Richardson* decision does a great job of framing the discussion we are having here today and squaring all the potentially conflicting caselaw. They ultimately held that:

> ¶16. In light of *Aden*, *Upton*, *Stewart* and *Bradley*, it is clear that, while a treating physician's opinion is without question of great import, the Commission is not required to abide by it or required to give it any greater weight than other physicians' opinions. It is the sole responsibility of the Commission to determine the credibility of the witnesses before it and, **when conflicts in credible evidence arise, to determine where the preponderance of the evidence lies.** 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.* [Emphasis added].

Claimant has never contended that the treating physicians should be given the ultimate or final word. We do believe however that when there is as much conflicting medical testimony presented to the MWCC as in this case, that the ALJ has a duty to not only weigh that evidence under the proper method, but to also explain how and why they came to the decision they did. In the Evaluation of Evidence [ALJ Order pp.2-8], the ALJ places a great deal of emphasis on doctors Blanchard, Williams, Buckley, and Manolakas. Dr. Blanchard, a Neurologist and treating physician, was contradicted by Manolakas, a Physical Rehabilitation Specialist hired by the Employer/Carrier. Dr. Blanchard did not agree with Manolakas's findings, so to indicate these two as being in agreement was in error. Also, Dr. Williams did recommend surgery as an

alternative after epidurals, but Employer/Carrier denied both upon Manolakas's subsequent contradictory findings.

We feel that it is extremely unfair to lump these four doctors together as agreeing in the ALJ's Evaluation of the Evidence [ALJ Opinion pp. 7-8]. Furthermore, the ALJ stops shortly thereafter, not discussing any of the other treating physicians as well as the Employer/Carrier paid IMEs who did feel that the Claimant had serious problems and was in need of further medical treatment. We contend that the ALJ's subsequent Findings of Facts and Conclusions of Law are not based on a fair or accurate depiction of the evidence nor that it was supported by substantial evidence.

In the ALJ's Findings of Facts and Conclusions of Law [ALJ Order pp. 9-10], she mentions and bases her decision on four IMEs; plus "numerous other physicians", (certainly the IMEs); one non-treating physician; and the two treating physicians who are mentioned are misstated as not recommending surgery when in fact one had stated surgery would be an alternative, while the other never got to that point. No mention is given to any of the other five treating physicians or their determinations. As such, we believe that the ALJ did not properly weigh the conflicting medical evidence, credible or otherwise.

II. Generally

Claimant's case presents to this Court the question of weight of testimony given the "treating physician" as opposed to that of a "non-treating physician." It also collaterally raises the question of "apportionment" of benefits, as discussed in *Stuart's, Inc. v. Brown,* 543 So.2d 649 (Miss. 1989).

While *Stuart's, Inc.,* zeros in on the question of apportionment and comes to the conclusion that only a pre-existing, **work related injury,** where some degree of disability was previously awarded, can be considered for apportionment in a new work related injury case.

Here we have no evidence of any pre-work related injury to Kay Manning of any kind, much less any old work-related injury for which apportionment might lie. However, the AJL, the full Commission and the Circuit Court, apparently, "apportioned" all of her injuries to her pre-work related condition.

Did the Employer/Carrier ever claim Claimant did not sustain a work-related injury? No, while, in fact, some of their IMEs did, Employer/Carrier paid her all 450 weeks of benefits under temporary total disability and most of her medical expenses before this case ever came to trial. Citing *Stuart's, supra, it* strains conceivability that the ALJ could find that Kay Manning suffered absolutely no work-related injury. "...(1) close questions of compensability should be resolved in favor of the worker, e.g. *Big "2" Engine Rebuilders v. Freeman,* 379 So. 2d 888, 889 (Miss. 1980), and (2) the act should be liberally construed to carry out its beneficent remedial purpose. *Pontotoc Wire Products Co. v. Ferguson,* 384 So. 2d 601 (Miss. 1980)." *Stuart's, Inc.,* 543 So.2d *at* 652.

Here, there is no question that Claimant is totally disabled, as per the opinions of her treating neurosurgeon, Dr. David Lee [MR 131], and her treating psychiatrist, Dr. Glenn Ruffin, [MR 134]. Claimant has also been adjudicated totally disabled by the Social Security Administration and has been drawing SSI disability payments since 2005. Remember also that Dr. Summers said in his report that he would defer to her treating surgeon and psychiatrist with regard to the assignment of any permanent disability in those areas. [MR 137, p. 7].

In *Johnson v. Ferguson,* 435 So.2d 1191, (Miss. 1983), Ferguson sent Johnson, at his request, to see a Dr. Enger. Dr. Enger hospitalized him for ten days, then released him, refusing to do a myelogram, while admitting that (at that time) it was the only diagnostic test that would confirm or rule out a ruptured disc. *Id.* at 1193.

By Commission Order, Dr. Buckley did the myelogram, saw ruptured disc(s), operated and repaired them. Still, the Administrative Judge chose Dr. Enger's diagnosis and opinion, and on that basis denied compensability. This is the exact same error made by the ALJ in Claimant's claim. In *Johnson,* the ALJ's opinion was affirmed by the Commission and by the Circuit Court, but was overturned by the Supreme Court, which granted disability.

After noting that, while the Commission is the trier of fact and that the Mississippi Supreme Court will not generally disturb rulings unless against the overwhelming weight of the evidence, it said it also will not hesitate to reverse if it feels that opinion is manifestly wrong. *Id.* at 1194-1195.

The Mississippi Supreme Court in *Johnson* went on to say that while Dr. Enger's testimony was the most supportive of the ALJ's and the Commission's decision, it pointed out that Dr. Enger's findings were based on "personal subjective examinations of Johnson and a series of x-rays he ordered." They also noted that Dr. Enger had continued to refuse to perform a myelogram even in the face of Johnson's continued complaints. *Id.* at 1195.

This court found Dr. Buckley's testimony, (who did the myelogram and surgery and found and corrected ruptured disc(s)), to be more, or in fact, the only credible testimony. The Mississippi Supreme Court in *Johnson* added;

> Further, there was no testimony offered by the appellee as to any other injury to appellant that would have explained the continued back problems being suffered by the appellant from the date of the injury up to the time of the discovery of the ruptured disc.
>
> 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. The subjective examinations of Dr. Enger and the x-rays conducted were little more than estimates when viewed in the light of the fact that Dr. Enger admitted that the ultimate diagnostic tool for discovering an unusual presentation of a ruptured disc would be a myelogram. *Id.* at 1195.

We believe the exact same parallel can be made with Claimant's case, and feel that the

question of subjective examination versus actual clinical examination, findings, and treatment by attending physicians is the paramount issue today.

In the case *sub judice*, 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 said Kay Manning did not have a work-related injury, or if she did, it did not merit surgery or psychological disability. We submit they based those views on mainly their own subjective analysis and an inclusive early MRI (that initially showed only several bulging discs without impingement and degenerative disc disease).

Citing *Clements v. Welling Truck Service Inc.*, 739 So.2d 476, fn1:

Footnotes:

1. *See also, Johnson v. Ferguson,* 435 So.2d 1191 (Miss.1983), in which the supreme court held the Commissions' decision was against the overwhelming weight of the evidence when it disregarded testimony by the claimant's treating physician that a myelogram and surgery were necessary to correct a ruptured disk, and instead relied upon the employer's expert who opined that no myelogram was necessary and the claimant's back pain resulted from a psychiatric condition. *Id.* at 1193--95. LARSON'S WORKERS COMPENSATION LAW notes that ***Ferguson, supra,*** **is one of many cases standing for two "self-evident propositions" that treating physicians' opinions carry more weight than those of physicians who examine a claimant solely for purposes of testifying and opinions of treating specialists carry more weight than those of general practitioners.** A. Larson, LARSON'S WORKERS COMPENSATION LAW, § 80.24(b) n. 83.1. *Accord, South Central Bell Telephone Co. v. Aden,* 474 So.2d 584 (Miss.1985), in which the supreme court upheld the Commission's finding of a disability when it based it's decision upon the testimony of the claimant's treating physician even though more specialized physicians testified for the employer that there was no disability. *Id.* at 593. *But see, Sibley v. Unifirst Bank for Savings,* 699 So.2d 1214 (Miss.1997)(stating "the burden of proof is heightened in cases concerning mental or psychological injury.") *Id.* at 482 [Emphasis added]

Most of the IMEs reviewed records and recited the findings of prior IMEs, using the subjective findings of those prior IMEs to support their own subjective findings! Is it really creditable evidence that IMEs seeing a Claimant more than eight years after the fact can say unequivocally that her admitted disabilities are in no way "work-related." We say, as in

Ferguson, that this form of IME opinion is not nearly as credible as the opinions of the treating physicians. Yet, the IMEs in Claimant's case were considered to have the greater weight of credible evidence, maybe because the Employer/Carrier produced so many of them. The greater weight of evidence does not necessarily equal the greater weight of credible evidence.

III. Burden of Proof

According to the ALJ, "[c]laimant did not prove by clear and convincing evidence or even by a preponderance of the evidence that her mental condition is attributable to her work-related injury." [TT V III, p. 336; ALJ Order p. 11]. Claimant submits that neither of these was the proper burden of proof to be applied by the ALJ in her MWCC claim.

In 2005 So.2d (2003-WC-01639-COA); *McElveen v. Croft Metals, Inc.* we see that for mental or psychological injury without physical trauma, the claimant has "the burden of proof by clear and convincing evidence the connection between the employment and the injury." Here, we do have the physical trauma required to trigger the "substantial evidence" rule.

Therefore, substantial evidence should have been the burden of proof applied to both the psychological as well as the physical aspects of Claimant's claim. As set out in 2005 So.2d (2003-WC-02535-COA); *Sanderson Farms, Inc. v. Derring* substantial evidence is defined as:

> The Commission is the ultimate finder of fact, and we must defer to its findings when they are supported by **substantial evidence**. *Financial Institute Ins. Service v. Hoy*, 770 So.2d 994, 997 (Miss. Ct. App. 2000). To reverse the Commission's decision, we must conclude that the "decision is erroneous and contrary to the weight of the evidence." *Id.* **"Substantial evidence, though not easily defined, means something more than just a 'mere scintilla' of evidence, [yet] it does not rise to the level of a 'preponderance of the evidence.' Substantial evidence can further be said to be evidence 'affording a substantial basis of fact from which the fact in issue can be reasonably inferred'."** *Id.* (quoting *Delta CMI v. Speck*, 586 So.2d 768, 773 (Miss.1991)[other citations omitted]). We apply the *de novo* standard of review to matters of law. *Spann v. Wal-Mart Stores, Inc.*, 700 So.2d 308. (Miss.1997). *Id.* [Emphasis added].

In *Marshall Durbin Companies v. Warren,* 633 So. 2d 1006, (Miss. 1994); a case much on point with the case *sub judice* it is stated:

> There does not exist substantial evidence in the record to support the Commission's findings. Clearly, the physical evidence in this case revealed that two ruptured discs were surgically removed. None of the specialists, who concluded that Warren had no ruptured discs, later examined him after the discovery of the ruptured discs were made. Their opinions in no way discount the opinions of Dr. McFadden and Dr. Hunter, the two who examined Warren once the finding was made. The contrary opinions are therefore not sufficient to establish a substantial conflict in the evidence. *Id.* at 1010.

Marshall Durbin continues:

> 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. [Citations omitted]. We conclude that the testimony of Warren, Dr. McFadden and Dr. Hunter, together with the physical findings of these doctors culminating in the surgical removal of the two ruptured discs, established sufficient causal connection between the history of the employment injury and the ruptured discs. Such substantial evidence highlights the Commissions errors. The decision of the full Commission is manifestly wrong. *Id.* at 1011.

In *Fought v. Stuart C. Irby Co.,* 523 So. 2d 314, (Miss. 1988), another case cited for the correct standard of review, we find the following:

> For a disability to be compensable, it must have arisen out of and in the course of employment. [Citation omitted]. We shorthand this test by asking whether the disability is "work connected." The words formerly used in the statute: "arising out of and in the course of" have been held to present an inquiry whether the risk which has given rise to the injury is "reasonably incident to the employment," *Big "2" Engine Rebuilders v. Freemen,* 379 So. 2d 888, 890 (Miss. 1980), not whether the work was the proximate cause of the injury. **The injury arises out of and in the course of the employment if the employment aggravates, accelerates, or contributes to the disability as opposed to being the sole or principal cause.** *See* Dunn, *Mississippi Workers' Compensation* Sec. 164 (3rd ed. 1982). *Id.* at 317, 318 [Emphasis added].

In the case *sub judice* the medical opinions of Employer/Carrier paid IMEs conflicted with the opinions, the actual findings, and the results from Claimant's treating physicians. Yes, there was conflicting medical testimony, but there was more than substantial evidence to rule in

favor of Claimant, which according to *Marshall Durbin* and *Fought* should have been the outcome.

Uncontroverted proof shows that Dr. Lee performed lower back fusion and placed two steel rods in Claimant's failed back. [MR 119, p. 3]. The Employer/Carrier presented no medical proof whatsoever to meet any burden that the Claimant had either a "pre-existing" injury, an "independent" or "intervening" cause of her injury, just opinions of Employer/Carrier paid IMEs.

Dr. Summers and Dr. Vohra, each only saw Kay for one short visit on the same day over eight years after the fact of her injury. They concluded there was no causal connection between her work related injury and her current physical and mental disabilities. If that was a correct medical determination, to what did they contribute those conditions? We do not know, as they never said. It is also important to remind this Court that all the IMEs were hired solely for purposes of testifying. Yet, by the decision of the ALJ, summarily affirmed by the Commission and the Circuit Court Judge, it is apparent they gave more weight to the opinions of these latecomers than they deserved.

On the other hand, did the Employer/Carrier prove by either substantial evidence that the Claimant was not hurt on the job? No, in fact, they must have agreed that the Claimant was hurt on the job, otherwise they would not have paid her the total amount of temporary total disability due her and much of her medical expenses for the maximum period of 450 weeks.

Certainly, as taken full advantage of and exploited here, the Employer/Carrier can always produce multiple IMEs who support their position. We see the same doctors time after time cited in MWCC opinions. Many follow the "company line" as Dr. Enger did in *Ferguson, supra,* which stands as a perfect example for this Court. Dr. Enger refused to order a myelogram, which turned out that when done it revealed ruptured discs, which were repaired by Dr. Buckley. Here

Maggio, Manolakas, Vohora, Summers, and all the other IMEs followed the "company line" as well. All these IME were certain that there was nothing wrong with Claimant, but in fact, as latter surgery showed there were indeed serious problems. Of all the Employer/Carrier paid IMEs that examined Claimant, Dr. Bazzone made findings and suggestions that were Claimant friendly. However, the Employer/Carrier refused his suggestions for surgery and were so determined to negate his opinion that they called for additional IMEs to refute his findings and suggestions.

We contend Employer/Carriers' general position has become: "We get an IME but if he does not say what we like, we will just find others who will support our view." We submit that, as seen here, such opinions are not that hard to find.

That is why the "deference to the treating physician" idea merely levels the playing field just a bit. Especially when, as in this case, Dr. Lee and Dr. Ruffin made real and objective findings confirming disability. Their opinions should have been given more weight when weighing the conflicting medical evidence. When deference is given to a mass of non-treating (and sometimes non-examining) physicians, justice has not been done.

Remember, the legal maxim from *Stuarts, Inc.*, *supra*, "close questions of compensability should be resolved in favor of the worker". This rule does not seem to have been followed in the instant case.

CONCLUSION

What you had in *Johnson, supra,* and *Marshall Durbin, supra*, is exactly the question this Court has before it today. You may have IMEs saying Kay Manning did not need surgery and that any mental problems she had were not work-related or were pre-existing, but none gave any specific findings to substantiate those opinions, so they are really just assertions. How does all that "subjective medical evidence" stack up against the objective findings of Dr. Lee, who

5) We respect the need for IMEs, but when they are used by Employer/Carriers to shop for the opinion they want it becomes a matter of abuse. Furthermore, it sets a bad precedent for Employer/Carriers to know all they have to do is produce enough IMEs concurring with their view to tip the scale in their favor. The greater weight of evidence is not necessarily the more credible evidence.

Finally, we ask this Court to reverse the Circuit Court's ruling and enter a decision in Kay Manning's favor.

Respectfully submitted,

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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 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 (without the accompanying Medical Records Notebook) 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 23rd day of August 2007.

LESTER CLARK, JR.