IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NORTH MISSISSIPPI MEDICAL CENTER — APPELLANT

VS. — CAUSE NO.: 2008-WC-00040-COA

SUSAN STEVENSON — APPELLEE

APPEAL FROM THE CIRCUIT COURT OF LEE COUNTY, MISSISSIPPI

REPLY BRIEF OF APPELLANT

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I. MANY OF THE PURPORTED "FACTS" SET FORTH BY THE CLAIMANT ARE DISPUTED.

On pages one through five of her brief, claimant sets forth purported "facts", to which North Mississippi Medical Center ("NMMC") responds as follows:

1. Claimant contends that she suffered an "admitted" work related injury on July 13, 2003 to her neck, back and right shoulder. [Appellee Brief, p. 1]. The petition to controvert only references a back injury [Record ("R.") 00006], which is the only injury admitted by NMMC. [R. 00009].

2. Claimant references opinions of Dr. Barry Jones on December 18, 2003 regarding causation and referrals. [Appellee Brief, pp. 1-2]. This medical report was not considered by the Commission or Lee County Circuit Court and is not included in the record on appeal. Section 71-3-51 of the Mississippi Code expressly provides that worker's compensation appeals "shall be considered only upon the record as made before the commission." (Emphasis Added); see also Federated Mutual Implement & Hardware Ins. Co. v. Spencer, 67 So.2d 878, 879 (Miss. 1953) (holding that circuit court properly overruled motion to include in record on appeal a doctor's report which post-dated the hearing before the Workers' Compensation Commission on the basis that appellate courts "must consider appeals on the record as made before the [lower tribunal]"). Pursuant to Mississippi law, the December 18, 2003 record from Dr. Jones and any references thereto by the claimant in her brief should not be considered by this Court.

3. Claimant argues that on February 24, 2004, Dr. Bobo "clearly" indicates that claimant's low back problem is a worker's compensation injury. [Appellee Brief, p.2]. However, in the history of said office note, it is clear that it was the claimant who related her symptoms to the work injury. [Appellant's Record Excerpts ("R.E."), Tab G., p. 00119]. There is no definitive opinion from Dr. Bobo on the causal connection issue. Further, in the February 24, 2004 office

note, Dr. Bobo stated that he "does not anticipate any surgery until [claimant] develops spinal stenosis with age" (Emphasis Added) and that "as arthritis progresses, [claimant] will probably develop spinal stenosis and need a laminectomy." (Emphasis Added). [Id. at 00120]. Dr. Bobo further stated that "No surgery anticipated for [claimant's] current problem and from any of the work related lifting injuries or physical therapy injuries." (Emphasis Added) [Id.].

4. Claimant then argues that NMMC admitted that "all treatment rendered, other than the treatment by Dr. James White, was related to the admitted back injury, authorized, and paid for all said medical treatment, including Dr. Hunt Bobo." [Appellee Brief, p. 2]. To the contrary, prior to the settlement, NMMC specifically denied that claimant's treating physicians were of the opinion that her "present" physical impairment was work related. [R. 00016]. This position is supported by Dr. Bobo's pre-settlement opinions regarding the progressive nature of claimant's pre-existing degenerative conditions as referenced above. In addition, Dr. Mark Harriman, an orthopedic surgeon, testified prior to the settlement that the work injury was only a "temporary" aggravation, and that future restrictions were necessary due to claimant's pre-existing surgeries. [Appellant's R.E., Tab C, p. 00064].

Claimant cites a page from the petition for settlement [Appellee's R.E., p. 00055] to support her contention that there was some admission by the employer. However, this part of the petition simply states, "The employer has paid all medical expenses for which it is liable under Section 7 of the Act." NMMC expressly denied it was liable for certain medical expenses. [R. 00016]. In fact, NMMC never authorized or paid for any treatment by Dr. Bobo. [R. 00159-00160]. There is simply no evidence to the contrary.

5. Claimant then argues that in the petition for approval of settlement, "both the Employer/Carrier and the Claimant agreed and represented to the Commission that surgery was not

indicated or recommended by any treating physicians for the Claimant's low back injury and that all treating physicians were of the opinion that the Claimant could perform the job duties of a medical records clerk." [Appellee's Brief, p. 2]. This is simply an inaccurate statement. The petition merely states that "claimant avers that she has sustained neither aggravation nor exacerbation of the subject injuries and has been advised by no physician that future surgery is anticipated or will be required." (Emphasis Added) [Appellee's R.E., p. 00055]. On February 24, 2004, Dr. Bobo stated surgery was probable with regard to the pre-existing, unrelated condition. [Appellant's R.E., Tab G, p. 0120]. However, Dr. Bobo said that surgery was not anticipated with regard to the work related injury. [Id.]. It was the progression of the unrelated stenosis that ultimately required surgery in 2006.

Further, only Dr. Harriman opined prior to the settlement that claimant could perform a medical records clerk position. [Appellant's R.E., Tab B, p. 00054]. Dr. Jones restricted claimant on January 9, 2004 from any lifting, repetitive bending, stooping, or twisting, to move around as needed, and to alternate sitting and standing. [Id. at 00052]. On February 24, 2004, Dr. Bobo stated that claimant should not perform manual labor. [Id. at 00052-00053]. Also prior to the settlement, Dr. White testified that claimant should not do house cleaning or manual labor and would need a job with limited lifting and no lifting above shoulder level. [Id. at 00053].

6. Claimant then states that on August 9, 2005, she presented for "followup visit" with Dr. Bobo for her "work related low back injury." [Appellee's Brief, p.3]. However, a review of Dr. Bobo's August 9, 2005 office note shows a complete absence of any mention whatsoever as to

whether claimant's symptoms on that date were related to the work injury. [Appellant's R.E., Tab G, p. 00121].[1]

7. Claimant then argues that Dr. Bobo's opinion changed "radically" after the standing myelogram and CT scan. [Appellee's Brief, pp. 3-4]. In Dr. Bobo's January 13, 2006 office note regarding his interpretation of the myelogram, he noted "high-grade stenosis" at L4-5, which, as he mentioned back in February 2004, claimant would develop due to her arthritis. [Compare Appellant's R.E., Tab G, pp. 00120 & 00123]. In short, Dr. Bobo's opinion did not change "radically" in 2006 as he stated back in February 2004 that claimant would likely have worsening stenosis that may require surgery. [Id. at 00120].

8. Claimant then states as a "fact" that the only back problem Dr. Bobo ever treated the claimant for was the work related back injury he noted in his February 24, 2004 record. [Appellee's Brief, p.4]. As set forth above, there is simply no medical opinion or evidence to support this argument. In fact, in February 2004, Dr. Bobo stated, **"No surgery anticipated for [claimant's] current problem and from any of the work related lifting injuries or physical therapy injuries."** (Emphasis Added). [Appellant's R.E., Tab G, p. 00120]. On the other hand, Dr. Bobo did anticipate surgery being necessitated by the development of stenosis due to age and the progression of claimant's pre-existing and unrelated arthritis. [Id]. Thus, it is apparent on the face of the records provided to the Commission prior to settlement that the February 2006 surgery was necessitated by factors completely unrelated to the work injury.

II. STANDARD OF REVIEW

Claimant half-heartedly contends that this Court should apply a de novo standard of review for this appeal since the Commission issued a "conclusory" order. In support of this argument,

[1] Similarly, claimant contends that on September 27, 2005, she presented for a follow-up visit with Dr. Bobo for "her work related low back injury." [Appellee's Brief, p. 3] Again, there is no opinion offered by Dr. Bobo in his September

claimant cites Broadway v. International Paper, Inc., 982 So. 2d 1010 (Miss. App. 2008). In Broadway, the claimant filed a motion to reopen the record. However, at the hearing before the administrative judge, neither claimant nor the employer presented any evidence. The administrative judge found that the motion was not well taken, but did not make any specific findings of fact or conclusions of law. On appeal to the Commission, again neither party presented any evidence, and the Commission's order did not state any specific findings of fact or conclusions of law. The Mississippi Court of Appeals expressly noted that no evidence was presented or argument heard at either hearing, and the Court of Appeals did not have a transcript of either hearing in the record. Broadway, 982 So. 2d at 1011. Under these circumstances, the Broadway Court stated that administrative agencies "may" lose their deferential standard of review "if it does not disclose the reasons upon which its decision is based..." Id. at 1012.

Unlike the complete void of specific findings and conclusions in Broadway, however, the administrative judge in the case sub judice did set forth very specific reasons why claimant's motion should be denied. [Appellant's R.E., Tab E, pp. 00090-00091]. It was this motion order by the administrative judge that was affirmed by the Commission, and is contained in the record on appeal to this Court.

Claimant alternatively cites Broadway for the argument that a de novo standard should be applied because the instant issues are "questions of law" since "the facts are not in dispute." [Appellee's Brief, p.8]. Indeed, questions of law are more likely presented when the facts are undisputed. University of Miss. Medical Ctr. v. Smith, 909 So. 2d 1209, 1218 (Miss. App. 2005). Obviously, however, the facts in the case sub judice are in dispute, as reflected in Section I, supra.

Further, the issues in Broadway involved a statute of limitations interpretation, which is obviously a question of law. Broadway, 982 So. 2d at 1012. The second issue in Broadway was

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2005 office note as to whether it was related to the work accident. [Appellant's R.E., Tab G, p. 00122].

whether a change in conditions under Section 71-3-53 was restricted to physical or mental changes. Id. In the case sub judice, there is no statute of limitations issue. Further, NMMC is not contending that Section 71-3-53 is limited in such a fashion.[2]

Instead, the sole issue in the case at hand is whether claimant's work related condition prior to the settlement changed after the settlement under Section 71-3-53. This is a question of fact, and the deferential standard of review clearly applies to this case. See Davis v. Scotch Plywood Co., 505 So. 2d 1192, 1197-1198 (Miss. 1987) (it is "discretionary" with the Commission whether or not it will reopen a case; the standard of review is abuse of discretion with regard to motions to reopen on the basis of a change in conditions); Henton v. North Miss. Med. Ctr, 317 So. 2d 373, 375 (Miss. 1975) ("Decisions and awards of the Mississippi Workman's Compensation Commission may be reviewed by the Commission within its sound discretion pursuant to Mississippi Code Annotated Section 71-3-53 (1972). Upon proper proof of 'change of conditions' or 'mistake in the determination' of facts, the Commission must not abuse its discretion or arbitrarily refuse to reopen and review a case pursuant to that statute...") (Emphasis Added); Armstrong Tire & Rubber Co. v. Franks, 137 So. 2d 141, 144 (Miss. 1962) (standard of review for reopening a case is abuse of discretion).

III. MISTAKE IN DETERMINATION OF FACT

Claimant argues that the following "mistakes" warrant reopening her claim: (1) "all parties" and "all the doctors" thought no surgery was necessary at the time of settlement; and (2) they thought claimant could perform all job duties other than manual labor. [Appellee's Brief, pp. 9-10]. Both contentions by claimant are totally inconsistent with the record on appeal.

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[2] Claimant also cited Smith, supra, to support her position. However, Smith did not involve a motion to reopen. In addition, Smith involved a misapplication of a "controlling legal principle", which is not an issue in the case sub judice. Smith, 909 So. 2d at 1218.

First of all, Dr. Bobo himself forecasted the need for surgery in February 2004 (almost one and a half years before the settlement). To reiterate, Dr. Bobo opined on February 24, 2004, that surgery would be necessary when claimant developed spinal stenosis with age. [Appellant's R.E., Tab G, p. 0120]. Dr. Bobo further stated well before the settlement that "as arthritis progresses", claimant would "probably" develop stenosis and need a laminectomy. [Id.]. It was this unrelated stenosis that ultimately necessitated surgery in 2006.

Further, the record on appeal shows quite clearly that claimant was significantly restricted prior to the settlement. Dr. Harriman opined prior to the settlement that claimant needed restrictions of 15-20 pounds with no repetitive bending or crawling. [Appellant's R.E., Tab B, p. 00054]. Dr. Jones restricted claimant on January 9, 2004 from any lifting, repetitive bending, stooping, or twisting, to be able to move around as needed, and to alternate sitting and standing every 15 minutes. [Id. at 00052]. On February 24, 2004, Dr. Bobo opined that he did not think claimant "will ever be able to return back to housekeeping or manual labor." [Appellant's R.E., Tab G, p. 00119]. Dr. Bobo offered no opinion at that time as to what, if any, other work claimant might be able to do. Also, prior to the settlement, Dr. White opined that claimant should not perform house cleaning or manual labor, and she would need a job with limited lifting and no lifting above shoulder level. [Appellant's R.E., Tab B, p. 00053].

Claimant's reliance on Bailey Lumber Co. v. Mason, 401 So. 2d 696 (Miss. 1991) for the proposition that there was a mistake of fact because there were some "hidden compensable conditions" at the time of settlement is completely misplaced. As stated earlier, Dr. Bobo knew, and in fact stated on the record a year and a half before settlement, that claimant would develop stenosis that would ultimately require surgery. The post-settlement testing proved Dr. Bobo correct as claimant had in fact developed "high-grade stenosis" in January 2006. [Appellant's R.E., Tab G,

p. 00123]. The stenosis was not a "compensable" condition, nor was it "hidden" from Dr. Bobo at the time of settlement.

In addition, Mason is distinguishable in that it involved an unrepresented claimant who could not read and who reached a settlement with a sophisticated employer/carrier. It was clear that claimant did not understand the settlement terms, and the Court found that the medical facts were "misrepresented" to the Commission. Mason, 401 So. 2d at 700. The Court allowed the claim to be reopened because of said misrepresentation and the unfair advantage taken of claimant. Id. at 707-708. In the case sub judice, claimant has been well represented from the beginning by counsel, and there is not even an allegation of misrepresentation. See J.R. Logging v. Halford, 765 So. 2d. 580, 585 (Miss. App. 2000) (finding no such misconduct (as in Mason) or failure of the Commission to consider a full and detailed account of claimant's physical and occupational capabilities whereby it could make an educated decision regarding the settlement).

The law requires claimant to show "misconduct or failure of the Commission to consider a full and detailed account" regarding the claimant's physical capacity at his occupation. Halford, 765 So. 2d at 585. All relevant evidence regarding claimant's physical ability and health was presented to the Commission before the settlement, and NMMC exhibited no misconduct in supplying the Commission with all relevant evidence before settlement approval. Therefore, there was no "mistake of fact" which would justify reopening this claim.

IV. CHANGE IN CONDITION

Claimant initially argues that there was a change in condition because Dr. Bobo allegedly changed his opinion about surgery and ability to work after the settlement. As set forth in detail in Section III, supra, this argument is meritless.

Claimant then cites Henton, supra, for the proposition that a change in condition "can also be a change in the claimant's ability to work." [Appellee's Brief, p. 13]. First of all, there really is no significant proof that claimant's functional capacity (and hence her ability to work) changed after the settlement as set forth in Section III, supra.

Secondly, Henton really does not stand for the argument claimant tries to make. In Henton, the Court's holding was expressly limited to acknowledging a change in condition where the claimant had been "refused employment because of her disability". The Court specifically stated, "Without substantial proof to establish that the claimant was rejected for employment or refused employment because of her disability, we are unable to say the Commission abused its discretion when it denied the petition to reopen due to a change in conditions..." Henton, 317 So. 2d at 376. In the case sub judice, claimant has put on absolutely no evidence of a refusal of employment.

It should also be noted that Dr. Bobo's comment on January 13, 2006 that claimant is "100% disabled" does not really reflect a "change in condition". Certainly, Dr. Bobo does not mean claimant was bed-bound with zero level of function, as there is no such evidence. More likely, this merely serves as documentation for Social Security purposes about claimant's functional ability (which was already extremely low prior to settlement) combined with her low qualifications for employment.

Finally, Claimant attempts to distinguish Davis, supra on the basis that the Davis Court allegedly held that the thermogram results did not change the doctors' opinions. [Appellee's Brief, p. 10]. The Davis Court held that the thermogram results were simply corroboration of the doctor's findings. Davis, 505 So. 2d at 1198. Thus, it was not evidence of a change in condition, but merely "new evidence." Id. That is exactly the situation in the case sub judice. As pointed out previously, Dr. Bobo predicted surgery prior to the settlement, and then the surgery occurred following the

settlement. Thus, the post-settlement opinions by Dr. Bobo are nothing more than "new evidence" that corroborates his pre-settlement opinion.

In sum, claimant herein has offered nothing to prove a change of condition under the Act.

V. CAUSAL CONNECTION

Claimant initially argues that Dr. Jones opined shortly after the accident that "some if not all of her back problems were related to the work accident." [Appellee's Brief, p. 14]. This is an apparent reference to the December 18, 2003 medical report which is not in the record on appeal and obviously cannot be considered by this Court for the reasons set forth in Section I, supra.

Secondly, claimant argues that Dr. Bobo only treated claimant for the work related back injury "per his February 24, 2004 note." Again, however, when this office note is actually read, it reveals that Dr. Bobo was forecasting future problems due to claimant's stenosis and arthritis, which are clearly unrelated conditions. [Appellant's R.E., Tab G, p. 0120].

Third, claimant contends that NMMC "admitted" that Dr. Bobo's treatment in 2004 was work related in the petition for settlement, and that NMMC "authorized and paid for" said treatment. As set forth in Section I, supra, these allegations are simply false. [3]

Claimant then argues that Dr. Bobo's statements in his August 2005 and September 2005 records that he was "following up" with claimant are somehow indicative of causal connection. However, it is now clear that the conditions Dr. Bobo last treated in February 2004 for which he later followed up on after the settlement were the pre-existing conditions; namely, the progressing arthritis and stenosis.

[3] Claimant also argues that the causal connection of Dr. Bobo's treatment is admitted by the employer's actions of "listing, and relying upon this treatment in the settlement of this claim." [Appellee's Brief, p. 15]. Apparently, claimant is referring to NMMC's counsel drafting the settlement petition. However, all the petition does is set forth a summary of all medical treatment, whether paid for or not by the employer. Claimant cites no authority for the proposition that merely listing medical treatment in a petition for settlement constitutes an "admission".

Claimant's attempt to shift her burden of proof to NMMC by relying on Marshall Durbin Co. v. Warren, 644 So. 2d 1006 (Miss. 1994) is unavailing as well. Warren did not involve a motion to reopen, in which cases the burden of proof is clearly on the party attempting to reopen. See Halford, 765 So. 2d at 584; Henton, 317 So. 2d at 375-76. Further, the annotation to Section 166 of Dunn (cited in Warren) cites M.T. Reid Construction Co. v. Garrett, 164 So. 2d 476 (Miss. 1964). In Garrett, the Court stated,

> A corollary rule stated is that when the effects of the injury have subsided, and the injury no longer combines with the disease or infirmity to produce disability, any subsequent disability attributable solely to the [pre-existing] disease or infirmity is not compensable.

Garrett, 164 So. 2d at 477. This is what happened in the case sub judice. Dr. Harriman opined in his pre-settlement deposition that the work injury was a "temporary aggravation," and that future restrictions were necessary due to claimant's pre-existing surgeries. [Appellant's R.E., Tab B, p. 00059]. Further, Dr. Bobo's pre-settlement records clearly show that claimant had pre-existing conditions which ultimately required surgery.[4] Conversely, Dr. Bobo expressly stated in February 2004 that the work related condition would not require surgery. [Appellant's R.E., Tab G, p. 00120].

It is well settled under Mississippi law that the burden of proof on causal connection rests squarely on the shoulders of the claimant. Vardaman S. Dunn, Mississippi Workmen's Compensation, §268 (3rd ed. 1982). This is especially true with regard to motions to reopen, and the burden is not satisfied by simply making bald assertions that the back condition for which claimant was treated three years after the work accident is related.

[4] NMMC raised pre-existing conditions as an affirmative defense in its Answer to the Petition to Controvert. [R. 00010-00011].

Finally, claimant contends that NMMC made an "inconsistent argument" by stating that the myelogram and CT scan only show evidence of a continued worsening of claimant's condition since the worsening would allegedly be the result of an admitted work related injury. [Appellee's Brief, pp. 15-16]. To the contrary, as shown clearly by the records, on February 24, 2004, Dr. Bobo opined that claimant would "probably" develop spinal stenosis and need a laminectomy as arthritis progresses and that she would need surgery when she developed spinal stenosis with age. [Appellant's R.E., Tab G, p. 00120]. However, he also stated on the same date, "No surgery anticipated for [claimant's] current problem and from any of the work-related lifting injuries or physical therapy injuries." (Emphasis Added) [Id.]. **The CT/myelogram following the settlement simply confirmed the worsening of claimant's pre-existing conditions, not her work-related condition.**

VI. ACCORD AND SATISFACTION

Claimant correctly points out Mississippi law which states that a claim can be reopened even if a release has been signed. However, as pointed out in NMMC's initial brief, Mississippi courts are very reluctant to reopen claims that have been settled under Section 9(i) of the Act.[5]

Further, when the claimant's promises not to reopen and her agreement that the settlement proceeds include future claims and conditions as reflected in the settlement documents[6] are combined with the aforementioned void of any substantial evidence of a mistake of fact or change in condition, it is apparent that this claim should not be reopened.

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[5] This is evidenced even in the cases cited by claimant. See, eg. Franks, 137 So. 2d at 145-146.

[6] In the release documents, claimant expressly stated that the settlement applied to "unknown and unanticipated injuries" and that she would not attempt to reopen the claim in any manner and "do hereby waive and relinquish any right I might have to reopen". [Appellant's R.E., Tab D, p. 00087]. Further, the Order Approving Settlement states that the settlement applies to all "future" claims for compensation benefits. [Appellant's R.E., Tab C, p. 00062].

VII. DEPOSITION OF DR. HUNT BOBO

Claimant argues that Dr. Bobo's deposition would resolve three issues: (1) whether he ever discussed surgery with claimant prior to settlement; (2) whether the abnormalities reflected in the standing myelogram CT scan were congenital, degenerative, or a result of claimant's 2003 work injury; and (3) whether claimant's back problem is indicative of her "total and permanent disability from a compensation perspective." [Appellee's Brief, p.18].

Claimant fails to acknowledge that all three of these questions were already answered based on the record alone prior to settlement. First, on February 24, 2004 (well before the settlement), Dr. Bobo stated that he "does not anticipate any surgery until [claimant] develops spinal stenosis with age" and that "as arthritis progresses, she will probably develop spinal stenosis and need a laminectomy. (Emphasis Added). [Appellant's RE Tab G, p. 00120].

Secondly, regarding the congenital/degenerative issue, Dr. Bobo clearly stated prior to the settlement that claimant would develop stenosis "with age" and that as her "arthritis" progresses, she will probably develop spinal stenosis. [Id.]. In fact, it was "high-grade stenosis" that was found on the CT scan by Dr. Bobo following the settlement on January 13, 2006. [Id. at 00123]. Dr. Bobo clearly opined that the stenosis was unrelated prior to the settlement. [Id. at 00120]. He further opined prior to the settlement that the MRI scan showed "a congenitally" narrow spinal canal from L3-5 with an L4-5 lateral disc protrusion and scar tissue. [Id. at 00119]. Finally, Dr. Harriman, an orthopedic surgeon, testified prior to the settlement that the work injury was only a "temporary" aggravation, and that future restrictions were necessary due to claimant's pre-existing surgeries. [Appellant's R.E., Tab C, pp. 00063-64].

Third, regarding the disability issue, claimant was already severely restricted by all of her doctors prior to the settlement, as set forth in detail in Section III, supra.

In short, the questions claimant wants to depose Dr. Bobo on were already answered prior to the settlement.

The case relied on by claimant, Pike County Bd. of Supervisors v. Varnado, 912 So. 2d 477 (Miss. App. 2005) has absolutely no application to whether the Commission erred in refusing to allow claimant to take the deposition of Dr. Bobo. The Varnado Court simply affirmed the Commission's ruling of permanent total disability benefits; it did not involve a motion to reopen or introduce additional evidence.

Claimant also cites Smith v. Container General Corp., 559 So. 2d. 1019 (Miss. 1978). In Smith, the employee's attorney failed to put on evidence to substantiate his client's claim for lost wages at the hearing on the merits. The Court remanded the case to the Commission with instructions to reopen the case to allow submission of this additional proof. However, in the case sub judice, there was no attorney error. All of the evidence on hand was presented to the Commission before settlement, including Dr. Bobo's records. Smith is further distinguished because it did not involve a request to set aside a compromise settlement.

It is clear that claimant is simply hoping to "create" evidence to show a mistake in fact or change in condition by deposing Dr. Bobo.[7] The Commission in the case at hand correctly refused claimant's request for a fishing expedition.

CONCLUSION

The record on appeal shows that claimant underwent a surgical post-settlement procedure for a pre-existing and unrelated back condition that was clearly detected by Dr. Bobo prior to the settlement. Claimant should not be allowed to reopen her claim under the guise that her surgery is somehow related to the 2003 work accident.

[7] This request by claimant is basically a concession that there was no "mistake of fact" since the Commission clearly did not have the deposition of Dr. Bobo at the time of settlement approval.

CERTIFICATE OF SERVICE

I, William G. Armistead, Sr., one of the attorneys for the Appellant, do hereby certify that I have this day served a true and correct copy of the above and foregoing *Reply Brief of Appellant*, on the following, by placing said copy in the United States Mail, postage prepaid, addressed as follows:

Gregory W. Harbison, Esq.
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Hon. Paul S. Funderburk
Circuit Court Judge
Post Office Drawer 1100
Tupelo, MS 38802-1100

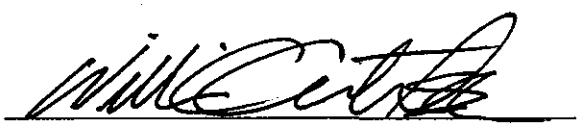
DATED, this the 25th day of August, 2008.

WILLIAM G. ARMISTEAD, SR.

CERTIFICATE OF FILING

I, William G. Armistead, Sr., one of the attorneys for the Appellant, do hereby certify that I have this date deposited in the United States Mail addressed to the clerk the original and three (3) copies of the Reply Brief of Appellant pursuant to Rule 25(a) of the Mississippi Rules of Appellate Procedure. Pursuant thereto, the Reply Brief is being filed by First Class Mail with postage pre-paid.

Dated, this the 25th day of August, 2008.



WILLIAM G. ARMISTEAD, SR.