ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JUDGE DAVID M. GLOVER

DIVISION IV

CA06-13

September 13, 2006

DONNIE FAWVER
APPELLANT
V.

LOCKHEED MARTIN; NATIONAL BANKERS STANDARD INS. CO.,ACE, USA (TPA), NATIONAL UNION FIRE INSURANCE CO.; CRAWFORD &COMPANY (TPA)
APPELLEES

APPEAL FROM THE ARKANSAS WORKERS' COMPENSATION COMMISSION [D903406, F308865]

AFFIRMED

In this workers' compensation case, an administrative law judge determined that appellant Donnie Fawver's 2003 back injury was a recurrence of his 1988 back injury; however, the ALJ determined that Fawver's 2003 claim for benefits was barred by the statute of limitations. This determination was affirmed and adopted by the Workers' Compensation Commission, and Fawver now appeals that determination to this court. On appeal, Fawver does not challenge the determination that his 2003 back injury is a recurrence of his 1988 injury; rather, his sole issue on appeal is whether there is substantial evidence to support the ALJ's and Commission's decision that his claim is barred by the statute of limitations. We affirm the Commission's decision.

The running of the statute of limitations is largely a question of fact. *Cromwell v. University of Arkansas*, 76 Ark. App. 5, 61 S.W.3d 864 (2001). In workers' compensation cases, this court views the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings and affirms the decision if it is supported by substantial evidence. *Geo Specialty Chem. v. Clingan*, 69 Ark. App. 369, 13 S.W.3d 218 (2000). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Air Compressor Equip. v. Sword*, 69 Ark. App. 162, 11 S.W.3d 1 (2000). The issue is not whether we might have reached a different result or whether the evidence would have supported a contrary finding; if reasonable minds could reach the Commission's conclusion, we must affirm its decision. *Geo Specialty, supra*. It is the Commission's province to determine witness credibility and the weight to be given to each witness's testimony. *Johnson v. Riceland Foods*, 47 Ark. App. 71, 884 S.W.2d 626 (1994).

The parties stipulated that Fawver sustained a compensable back injury on August 15, 1988, while employed by appellee Lockheed Martin (formerly known as Vought), and that he was paid permanent-partial disability benefits for a twenty-percent anatomical impairment rating to the body as a whole for that injury. At the hearing, Fawver testified that his 1988 back injury resulted in two surgeries --- one in 1989 and one in 1991. Fawver said that after each surgery, he was given a ten-percent disability rating to the body as a whole. He further stated that he had continued to see his physician, Dr. P.B. Simpson; that he had seen Dr. Simpson every year since he had injured his back; that he

had never paid Dr. Simpson for any treatment; and that Dr. Simpson had never requested any money from him. Fawver said that after his surgery in 1991, he was in "pretty good shape," but that in 2001, his back really began to bother him again, and it "just kept getting worse and worse." He testified that an MRI was performed in May 2003, which showed another ruptured disc. He said that although his back pain "got really bad in May," on June 24, 2003, he heard a pop in his back while at work and said that he "couldn't stand it [any] more after that, after that pop."

Fawver explained that he was a dispatcher for Lockheed Martin; that his job required him to drive a forklift; that he delivered parts to the floor and moved parts; that he hooked up trailers and loaded and unloaded trailers all day long; and that he was required to get on and off the forklift all day, an average of thirty or forty times per day. He said that on June 24, 2003, he was hooking up a loaded trailer; that the tongue of the trailer would hardly turn; that he was "snatching on it" trying to hook the trailer up with the forklift to move it; and that he felt the pop in his back. Fawver said that he was given cortisone pills for the pain, but that he could not sleep so he was given Lorcet, muscle relaxers, and Valium. Fawver said that he did not return to work after the June 24, 2003 injury; that Lockheed Martin terminated him as of October 16, 2003; and that he had not looked for work because he would be scared to work while taking pain pills.

An independent medical examination was performed by Dr. Barry D. Baskin on April 15, 2004. In his report, Dr. Baskin noted Fawver's prior injury and the two surgeries performed as a result of that injury. He noted that after Dr. Simpson released

Fawver on November 11, 1991, to return to work after his second back surgery, Fawver returned to see Dr. Simpson as follows: on October 2, 1992; in September 1993; on September 6, 1994; on August 30, 1995; on November 12, 1996; in November 1997 and 1998; in October 1999 and 2001; on September 9, 2001; on April 5, 2002; on September 25, 2002; and in June and July 2003. After seeing Fawver in his office, evaluating his current complaints of back pain, and reviewing all of his medical history, Dr. Baskin wrote:

> It would be my opinion, based on the evaluation of this patient today in the office, as well as review of his extensive medical records, that Mr. Fawver's back problems were the direct result of his original injury with probable scar tissue and possibly some mild gradual recurrent disc extrusion or herniation. This, based on his complaints of back and leg pain, would likely have occurred prior to June of 2003. Based on the record, this opinion is stated within a reasonable degree of medical certainty. ... Again, it is my impression that this gentleman's injuries leading up to June 4, 2003 at the time of his most recent MRI scan were the result of the previous back injuries happening back in 1988 and 1989.

Relying upon Dr. Baskin's findings and conclusions in the IME, the ALJ determined that Fawver's 2003 back problems were a recurrence of his 1988 back injury. A recurrence is not a new injury; rather, it is "another period of incapacitation resulting from a previous injury," and it occurs "when the second complication is a natural and probable consequence of a prior injury." *Crudup v. Regal Ware, Inc.,* 341 Ark. 804, 809, 20 S.W.3d 900, 903 (2000). Appellant does not dispute the ALJ's determination that his 2003 back problems are a recurrence of his 1988 back injury rather than an aggravation, which is a new injury with an independent cause. *Id*.

However, the ALJ determined that even though Fawver's 2003 back problems were a recurrence of his 1988 back injury, the claim must be denied because it is barred by the statute of limitations. Arkansas Code Annotated section 11-9-702(b) (1987), the applicable statutory provision in force at the time of appellant's original injury, provides:

> (b) TIME FOR FILING FOR ADDITIONAL COMPENSATION. In cases where compensation for disability has been paid on account of an injury, a claim for additional compensation shall be barred unless filed with the commission within one (1) year from the date of the last payment of compensation, or two (2) years from the date of the injury, whichever is greater. The time limitations of this subsection shall not apply to claims for replacement of medicine, crutches, artificial limbs, and other apparatus permanently or indefinitely required as the result of a compensable injury, where the employer or carrier previously furnished such medical supplies.

In *Plante v. Tyson Food, Inc.*, 319 Ark. 126, 129, 890 S.W.2d 253, 255 (1994) (citations omitted), our supreme court held:

> It is well-settled that the furnishing of medical services constitutes "payment of compensation" within the meaning of the limitations statute and that such payment of compensation or furnishing of medical services tolls the running of the time for filing a claim for additional compensation. The one-year limitations period begins to run from the last payment of compensation, which this court has held means from the date of the last furnishing of medical services.

In determining that Fawver's claim is barred by the statute of limitations, the ALJ looked to the medical notes of Dr. Simpson from 1993 to 1995. On September 17, 1993, Dr. Simpson wrote:

> **RETURN OFFICE VISIT:**
> Mr. Fawver is postop for an L5, S1 disk on the right side in 1989 and the second time in 1991 on the left side. He has done well from surgery. He still has soreness and aching in the back. He also has mild aching in his hips. SLR is negative. He has no motor deficit and no sensory deficit. Reflexes are symmetrical and +2 bilaterally except for the Achilles which was essentially absent bilaterally.

PLAN: I will see him back on as needed basis.

ESTIMATED RETURN TO WORK DATE: He was returned to regular duties without restrictions effective Monday, November 11, 1991.

The next office visit indicated in Dr. Simpson's notes was September 6, 1994, in which he

wrote:

RETURN OFFICE VISIT/PRESENT COMPLAINT: I have operated on Mr. Fawver twice. Once for a L5, S1 disk on the right side initially, and then on L5, S1 on the left side. He comes in today with a four-week history that he has had some pain at the bottom of his heel on the right side. He has to jump on and off trucks that he works on and he has noticed a little bit of discomfort. He has been limping and thought that this might be due to his back. His range of motion of his back is actually very good. Straight leg raising test is negative to 90º bilaterally. He has a +1 or better Achilles reflex on the right side and a +1 on the left. His extensor hallicus longus is normal, as is his anterior tibial. His patella reflexes are +2 and his quadriceps function is normal. He has a little bit of pain with pressure over the bottom of the heel on the outside on the inferior aspect of the heel. I think that this may be more of a stone bruise than anything else.

PLAN/TREATMENT: I will ask him to see one of the orthopedists if he doesn't get better. Today is a little bit better than it has been. If he starts limping again, then I think that he should see one of the orthopedic surgeons about his heel. I have given him some Daypro, I want him to get a heel cup for his shoe, and I will see back on an as needed basis.

Fawver next saw Dr. Simpson on August 30, 1995, at which time Dr. Simpson wrote:

RETURN OFFICE VISIT/PRESENT COMPLAINT: Mr. Fawver is postop from bilateral laminotomies for HNP. The first was on the left and the last one was on the right. He has done extremely well other than he states that if he sits for any length of time, has to bend or stoop, or has to work on his feet a lot, it really gives him some problems. Nothing to suggest that he has any severe problems with his back at this time. He has trace Achilles bilaterally. His patella reflexes are +1 bilaterally. He has good anterior tibial, extensor hallicus, plantar flexors, and quadriceps.

PLAN/TREATMENT: I will see him back in the office on an as needed basis.

ESTIMATED RETURN TO WORK: He may return to his regular duties.

Based upon these medical notes, the ALJ determined that the last payment of compensation for purposes of the statute of limitations was September 17, 1993; that more than one year passed before further compensation was paid; that the date was more than two years after the original injury; and that the statute of limitations ran on Fawver's claim on September 17, 1994.

When Fawver saw Dr. Simpson on September 6, 1994, the ALJ determined that the medical notes from that visit made clear that the purpose of that specific visit was for treatment of Fawver's foot, not his compensable back injury, and that treatment of this unrelated condition did not toll the statute of limitations. The ALJ recognized that the appellees had continued to furnish additional medical treatment after the statute of limitations had run; however, the ALJ noted, citing *Evans v. Northwest Tire Serv.*, 23 Ark. App. 11, 740 S.W.2d 151 (1987), *aff'd on other grounds, Northwest Tire Serv. v. Evans*, 295 Ark. 246, 748 S.W.2d 134 (1988), that a claim cannot be revived by the provision of additional treatment once the statute of limitations has run.

Fawver argues on appeal that the statute of limitations has not run on his claim because the medical notes reflect that he told Dr. Simpson during the September 6, 1994 visit that he had been limping and that he thought his heel pain might be due to his back, but that Dr. Simpson examined his back and determined that the main problem was with his heel. Fawver also notes that he never paid for any of Dr. Simpson's treatment,

including the September 6, 1994 visit. Fawver argues that the pay records of Crawford & Company, the third-party administrator for Lockheed Martin's workers' compensation insurance, indicate that payments were made to Dr. Simpson on November 11, 1993, and March 16, 1995; and to him personally on December 24, 1993, and on December 21, 1994. He argues that those continued payments are probative that appellees had paid benefits during the entire length of the claim.

We fail to find any of Fawver's arguments persuasive. The ALJ determined that Dr. Simpson's September 6, 1994 medical note clearly indicated that Fawver sought treatment for his heel, not his back, even though Fawver mentioned his back to Dr. Simpson as a possible cause for his heel pain. The ALJ's characterization of that medical visit as being for treatment of Fawver's heel and not his back is reasonable. As appellees point out, if merely mentioning a preexisting compensable injury during a visit for an unrelated problem tolled the statute of limitations, then the statute of limitations would never expire on any compensable injury. Furthermore, even though Fawver testified that he did not pay for his September 1994 visit to Dr. Simpson, Crawford & Company's records do not indicate that it paid for that visit either. Fawver also points to the fact that there was never a one-year period in which Crawford & Company did not make a payment to someone on his behalf; however, the timing of the payment of medical bills and expenses is not relevant. As set forth in the holding of *Plante, supra*, the one-year limitation period begins running from the last date medical services are furnished, not when they are paid.

Fawver also argues that the ALJ relied upon dicta in *Evans, supra*, when he held that a claim could not be revived by the provision of additional medical treatment once the statute of limitations has run. Even if the statement in *Evans* could be construed as being dicta, this court had previously made the same holding in *Woodard v. ITT Higbie Manufacturing Co.*, 271 Ark. 498, 609 S.W.2d 115 (Ark. App. 1980).

Fawver also asks this court to award him temporary-total disability benefits from October 16, 2003, to a date to be determined. Due to our disposition of this case, it is not necessary to address this issue; however, we could not have entertained this request anyway because that issue was never ruled upon by the either the ALJ or the Commission. Affirmed.

PITTMAN, C.J., and GLADWIN, J., agree.