

**NOT DESIGNATED FOR PUBLICATION**

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. D903406 & F308865

DONNIE FAWVER, EMPLOYEE	CLAIMANT
LOCKHEED MARTIN CORP., EMPLOYER	RESPONDENT NO. 1
BANKERS STANDARD INS. CO., CARRIER	RESPONDENT NO. 1
ACE, USA, TPA	RESPONDENT NO. 1
NATIONAL UNION FIRE INS. CO., CARRIER	RESPONDENT NO. 2
CRAWFORD & COMPANY, TPA	RESPONDENT NO. 2

**OPINION FILED OCTOBER 5, 2005**

Upon review before the FULL COMMISSION, Little Rock, Pulaski County, Arkansas.

Claimant represented by HONORABLE STEVEN R. McNEELY,  
Attorney at Law, Little Rock, Arkansas.

Respondent No. 1 represented by HONORABLE MICHAEL MAYTON,  
Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by HONORABLE CAROL WORLEY,  
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

**OPINION AND ORDER**

The claimant appeals from a decision of the  
Administrative Law Judge filed November 24, 2004.

The Administrative Law Judge entered the following  
findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The stipulations agreed to by the parties are reasonable and are hereby accepted as fact.
3. A preponderance of the evidence shows the claimant's June 24, 2003, injury was a recurrence of his 1988 compensable injury and not an aggravation or new injury.
4. A preponderance of the evidence shows that no compensation was paid to the claimant between September 17, 1993, and August 30, 1995.
5. The statute of limitations ran on this claim on September 17, 1994.
6. The claimant filed his claim for compensation on August 22, 2003.
7. This claim is therefore barred by the statute of limitations.
8. The respondents have controverted all benefits sought herein.

We have carefully conducted a de novo review of the entire record herein and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies

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the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings of fact made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

Thus, we affirm and adopt the decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal.

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

\_\_\_\_\_I respectfully dissent from the majority opinion, which affirms the decision of the Administrative Law Judge, finding that his June 24, 2003 injury was a recurrence of his 1988 compensable injury and not an aggravation or a new

injury and that the statute of limitations bars his claim that he filed on August 22, 2003. The majority has affirmed the ALJ's findings. I find that Claimant's injury was an aggravation or a new injury and would reverse the decision of the ALJ.

On August 15, 1988, the Claimant sustained a compensable injury to his back while working for the Respondent. The injury was a right and left disc herniation at L5-S1, which required the Claimant to undergo two surgeries. The Claimant was released by his treating physician, Dr. P.B. Simpson, in November 1991 and given a total impairment rating of 20% to the body as a whole, which the Respondents accepted and paid. At the time of that injury, insurance coverage was provided by Respondent No. 2, National Union Fire Insurance Company.

Over the next ten years, the Claimant regularly returned to Dr. Simpson for treatment to his back. From 1992 to 2002, he was treated for minor back problems, including soreness and aching in his back. In April of 2002, Dr. Simpson noted that the Claimant, "states that if he

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stands for any period of time he has back pain. He has had to miss work because of this. He does not know how he is going to hold on to this type of job."

The Claimant's condition worsened through 2002 and 2003. An MRI of June 4, 2003 revealed laminotomy changes, degenerative changes and a right paracentral recurrent disc herniation at L5-S-1. On June 24, 2003, the Claimant was working for the Respondent and reinjured his back when he felt a "pop" while hooking up a trailer. At that time, insurance coverage was provided by Respondent No. 1, Bankers Standard Insurance Company. The Claimant testified that his pain intensified after the June 24<sup>th</sup> injury and that he "could tell it was really pinching that nerve bad, my sciatic nerve." On the day of that injury, the Claimant saw Dr. Crump who diagnosed him with "chronic low back pain - worse with activity; left back and left leg pain." The Claimant has not returned to work since that injury and his employment was terminated on October 16, 2004.

The ALJ found that Claimant's June 24, 2003 injury was merely a recurrence of his 1988 compensable injury and

not an aggravation or a new injury. The ALJ based this finding on the fact that Claimant was already being treated for chronic back pain.

### **Argument**

In Maverick Transp. V. Buzzard, 69 Ark. App. 128, 10 S.W.3d 467 (2000), the Arkansas Court of Appeals discussed the difference between an aggravation and a recurrence as it relates to workers' compensation law. The Court stated:

An aggravation is a new injury resulting from an independent incident. Farmland Ins. Co. v. DuBois, 54 Ark. App. 141, 923 S.W.2d 883 (1996). A recurrence is not a new injury but merely another period of incapacitation resulting from a previous injury. Atkins Nursing Home v. Gray, 54 Ark. App. 125, 923 S.W.2d 897 (1996). A recurrence exists when the second complication is a natural and probable consequence of a prior injury. Weldon v. Pierce Bros. Constr., 54 Ark. App. 344, 925 S.W.2d 179 (1996). Only where it is found that a second episode has resulted from an independent intervening cause is liability imposed upon the second carrier.

Id. at 130, 10 S.W.3d at 468. An aggravation is a new injury with an independent cause and, therefore, must meet the

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requirements for a compensable injury. Crudup v. Regal Ware, Inc., 341 Ark. 804, 20 s.W.3d 900 (2000); Ford v. Chemipulp Process, Inc., 63 Ark. App. 260, 977 S.W.2d 5 (1998).

The test to determine whether a subsequent episode is a recurrence or an aggravation is whether the subsequent episode was a natural and probable result of the first injury or if it was precipitated by an independent intervening cause. Bearden Lumber Co. v. Bond, 7 Ark. App. 65, 644 S.W.2d 321 (1983). If there is a causal connection between the primary and the subsequent disability, there is no independent intervening cause unless the subsequent disability is triggered by activity on the part of the claimant which is unreasonable under the circumstances. Guidry v. J & R Eads Const. Co., 11 Ark. App. 219, 669 S.W.2d 483 (1984), Georgia-Pacific Corp. v. Carter, 62 Ark. App. 162, 969 S.W.2d 677 (1998), Davis v. Old Dominion Freight Line, Inc. 341 Ark. 751, 20 S.W.3d 326 (2000). When an accidental injury aggravates a prior injury, the one in whose employ the second injury occurs is liable for all of the consequences naturally flowing from that incident. Hope

Livestock Auction Co. v. Knighton, 67 Ark. App. 165, 992  
S.W.2d 826 (1999).

I find that the Claimant has established an aggravation of his previous injury and not a recurrence. The ALJ noted that Claimant's pain complaints were similar before and after his June 2003 incident and that his "pain only intensified." Simply because a complaint of pain is similar to pain that the Claimant previously experienced does not necessarily establish that the injury that is causing the pain is merely a recurrence of the previous injury. The Claimant had reached maximum medical improvement with regard to his back on September 25, 2002 and had been released to work full duty. The June 2003 incident resulted in his being taken off work completely. Therefore, Claimant's current injury is worse than the previous injury from which he recovered and should be classified as an aggravation.

The evidence preponderates in favor of an aggravation since Claimant performed all of his job duties without complaint until he felt the "pop" in his back. It

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was not until this incident that Claimant could no longer perform his duties. Respondent No. 1, therefore, should be liable for the payment of benefits. Accordingly, I would reverse the ALJ's opinion and award Claimant the benefits to which he is entitled.

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SHELBY W. TURNER, Commissioner