

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E810917

GARRY HOLLIMAN,
EMPLOYEE

CLAIMANT

ABF FREIGHT SYSTEM, INC.,
SELF-INSURED EMPLOYER

RESPONDENT

OPINION FILED MARCH 14, 2008

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

Claimant represented by the HONORABLE ROBERT M. ABNEY,
Attorney at Law, Des Arc, Arkansas.

Respondent represented by the HONORABLE JOHN D. DAVIS,
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The respondents appeal an administrative law judge's order and opinion filed May 21, 2007. The administrative law judge found that the statute of limitations did not bar the claim for benefits. After reviewing the entire record *de novo*, the Full Commission reverses the opinion of the administrative law judge. We find that the statute of limitations bars the claim.

I. HISTORY

Garry Wayne Holliman, who was a credible witness, testified that he had been employed with ABF Freight System

for 30 years. The parties stipulated that there was an employment relationship on August 26, 1998 and the respondents agreed that there was a compensable injury. Mr. Holliman testified that he fell from a truck. The claimant received emergency treatment on August 26, 1998 and was assessed with acute lumbosacral contusion and right hip pain.

The claimant treated with Dr. Steven L. Cathey at various times, including November 11, 1999, December 5, 2000, November 12, 2001, July 22, 2002, September 30, 2003, and September 14, 2004. Dr. Cathey saw the claimant on September 12, 2005 and planned to arrange an MRI of the claimant's lumbar spine. The claimant's testimony indicated that the respondent-carrier would not pay for Dr. Cathey's September 12, 2005 office visit.

On November 30, 2005, the claimant filed a handwritten request for additional benefits: "I request a hearing before a judge for additional medical treatment and any other additional benefits I may be entitled to."

A pre-hearing order was filed on January 16, 2007. The claimant contended that he was entitled to "additional medical benefits pertaining to his low back injury." The

respondents contended that the statute of limitations barred the claim.

A hearing was held on April 10, 2007. Rogger Osburn, an adjuster for the respondent-employer, testified regarding a printed "Check Inquiry By Claim Number" submitted into the record by both parties. Mr. Osburn agreed that there were two 1-year periods where the claimant was not treated by a physician. The two periods were November 11, 1999 to December 5, 2000, and July 22, 2002 to September 30, 2003.

The administrative law judge found that the statute of limitations did not bar the claim and that the claimant proved additional medical benefits were reasonably necessary. The respondents appeal to the Full Commission.

II. ADJUDICATION

Ark. Code Ann. §11-9-702(b) provides:

(1) In cases where any compensation, including disability or medical, has been paid on account of 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.

(2) The time limitations of this subsection shall not apply to claims for the replacement of medicine, crutches, ambulatory devices, artificial limbs, eyeglasses, contact lenses, hearing aids, and other apparatus permanently or indefinitely required as the result of a compensable injury, where the employer or carrier previously furnished

such medical supplies, but replacement of such items shall not constitute payment of compensation so as to toll the running of the statute of limitations.

The administrative law judge found in the present matter that the statute of limitations did not bar the claim. The Full Commission reverses this finding. The record supports the respondents' assertion that there were two time periods in which the claimant did not receive benefits constituting the payment of compensation. Those two periods were November 11, 1999 to December 5, 2000, and July 22, 2002 to September 30, 2003. Because the claimant did not receive compensation for treatment after November 11, 1999 until December 5, 2000, the one-year statute of limitations expired no later than November 11, 2000. See, Ark. Code Ann. §11-9-702(b)(1). The claimant did not file a claim for additional benefits until November 30, 2005. The claimant's receipt of benefits after November 11, 2000 did not revive the claim. See, *Woodard v. ITT Higbie Mfg. Co.*, 271 Ark. 498, 609 S.W.2d 115 (Ark. App. 1980). Nor did replacement medicine or payments for the claimant's TENS unit toll the running of the statute of limitations. Ark. Code Ann. §11-9-702(b)(2).

The case of *Alred v. Jackson Atlantic, Inc.*, 268 Ark. 695, 595 S.W.2d 249 (Ark. App. 1980), cited in the dissenting opinion, does not change the result of the instant matter. The Court of Appeals in *Alred* interpreted the statute of limitations as found in Ark. Stat. Ann. §81-1318(b). Ark. Stat. Ann. §81-1318(b) did not contain the relevant statutory language in the present matter, to wit: "replacement of such items *shall not constitute payment of compensation so as to toll the running of the statute of limitations* [emphasis supplied]." See, Ark. Code Ann. §11-9-702(b)(2), *supra*.

The case of *Northwest Tire Serv. v. Evans*, 295 Ark. 246, 748 S.W.2d 134 (1988), cited by the dissenting opinion, is not on point in the present matter. The Supreme Court in *Evans* relied on Ark. Code Ann. §11-9-702(b)(1987). The statute as comprised in *Evans* did not contain the controlling language, to wit: "replacement of such items shall not constitute payment of compensation so as to toll the running of the statute of limitations."

Cooper Tire & Rubber Co. v. Angell, 75 Ark. App. 325, 58 S.W.3d 396 (2001), cited by the dissenting opinion, does not change the result in the present matter. The Court of

Appeals in *Angell* affirmed the Commission's finding that the statute of limitations did not bar the claim. The Court held that the statute of limitations was tolled as a result of the respondent's refusal to provide treatment from one physician and the claimant's receipt of treatment by another physician during the relevant time period. In the present matter, the record plainly shows that the claimant did not receive treatment from Dr. Cathey from November 11, 1999 to December 5, 2000. We again state that because the claimant did not receive compensation for treatment after November 11, 1999 until December 5, 2000, the one-year statute of limitations expired no later than November 11, 2000. See, Ark. Code Ann. §11-9-702(b)(1).

Based on our *de novo* review of the entire record, the Full Commission finds that the statute of limitations bars the instant claim for additional benefits. We therefore reverse the decision of the administrative law judge, and this claim is denied and dismissed.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

I must respectfully dissent from the majority's opinion. The majority, by reversing the Administrative Law Judge, finds that the statute of limitations bars the claimant's entitlement to additional benefits. Based upon a de novo review of the record, I find that the statute of limitations does not bar the claimant's entitlement to additional benefits, and therefore, I must respectfully dissent.

The statute of limitations for filing workers' compensation claims is set out in Ark. Code Ann. §11-9-702. That section provides, in essence, that in order to obtain additional benefits, a claimant must file a claim for those benefits within two years from the date of the injury or within one year from the last time he was provided compensation by the respondent. In this case, a claim for additional benefits was filed on November 30, 2005. That is more than two years from the claimant's injury in 1998, but within one year from December 17, 2004, the date the respondent last provided the claimant medical treatment. However, the respondent

asserts that the statute of limitations had already expired prior to the medical services in December 2004, in that, there were two periods in which more than one year had passed in which the claimant did not receive "compensation" as that term is used in the statute. The two periods referred to by the respondent are between November 11, 1999 through December 5, 2000 and July 22, 2002 through September 30, 2003.

The respondent concedes that during each of those periods, they furnished the claimant either prescription medication or provided him medical accessories such as a TENS unit. However, the respondent contends that furnishing those services are not "compensation" and therefore do not extend the running of the statute of limitations. Their conclusion, which was accepted by the majority, is that since payment for the medication and medical apparatus needed by the claimant is not compensation, then the statute of limitations was not extended and the medical treatment they furnished him from his authorized treating physician occurred after the statute of limitations had already expired. As a subsequent

voluntary payment of medical expenses would not revive a claim already barred, the majority found that the claimant is not entitled to any additional benefits.

Almost 28 years ago, the Arkansas Court of Appeals dealt with exactly the same issue presented here. In Alred v. Jackson Atlantic Inc., 268 Ark. 695, 595 S. W. 2d 294 (Ark. App. 1980), the claimant had been injured in 1970, but filed a claim for additional benefits when the respondent refused for him to see a doctor in 1978. As noted by the Court, it was undisputed that the claimant's filing had been more than one year since the last time the respondent had paid for him to see a doctor. However, it was also noted that it was undisputed that the respondent had paid for medication within one year of the filing of her claim. The respondent in that case had made the same argument as in the present case. That is, they argued that the furnishing of medication was not "compensation" as that term is used in the statute and, therefore, did not extend the time for the claimant to file a claim for additional benefits. In fact, the Court of Appeals stated that the issue before it was as follows:

The issue before this Court is whether payment for medicine by a respondent are considered "payment of compensation" for the purposes of tolling the statute of limitation.

In analyzing this issue, the Court noted that the Workers' Compensation Act defines compensation not only as including money allowances payable to the employee, but included medical treatment otherwise defined in the statute. The Court concluded that since medicine was part of a respondent's obligation to furnish medical treatment, it was therefore compensation within the meaning of the Workers' Compensation Act. The Court then considered the effect of a recent amendment to the Workers' Compensation Act which was then codified in Ark. Stat. Ann. §1318(b). That section read as follows:

The time limitation of the subsection shall not apply to claims for the replacement of medicine, crutches, ambulatory devices, artificial limbs, eyeglasses, contact lenses, hearing aids, and other apparatus permanently or indefinitely required as a result of a compensable injury, when the employer or carrier previously furnished such medical supplies.

The Court stated that they did not see how this section altered the existing rule of payment for medicine which was considered "compensation" under the Act.

The Arkansas Supreme Court considered this same question in Northwest Tire Service v. Evans, 295 Ark. 246, 784 S. W. 2d 134 (1988). In that case, which had a nearly identical fact situation as the case in Alred, the Supreme Court specifically upheld the Court of Appeals rationale in their prior decision and held that the furnishing of medical treatment in the form of medication was compensation for purposes of tolling the statute of limitations.

The relevant statutory section was amended in 1993. Ark. Code Ann. §11-9-702 (b) (2) now reads as follows:

(2) The time limitations of this subsection shall not apply to claims for the replacement of medicine, crutches, ambulatory devices, artificial limbs, eyeglasses, contact lenses, hearing aids, and other apparatus permanently or indefinitely required as

the result of a compensable injury, when the employer or carrier previously furnished such medical supplies, *but replacement of such items shall not constitute payment of compensation so as to toll the running of the statute of limitations.* (emphasis added)

The italicized section was inserted in the 1993 amendments. Apparently, the majority is relying upon the italicized section as a basis for denying this claim. However, I find that the majority's application of the statute is not only contrary to the intent of the Workers' Compensation Act, but is contrary to prior established case law.

The obvious intent of Ark. Code Ann. §11-9-702 (b) (2) is so that the statute of limitations would not prevent claimants who might indefinitely need a medical device or apparatus, such as an artificial limb, from having this device replaced whenever necessary and that the respondent would remain liable for such replacement. However, the legislature has limited that right to the devices indefinitely needed so that furnishing them would not reopen the statute of limitation or allow a

claimant to obtain disability benefits based upon the replacement of such a device.

However, that is clearly not the situation here. In this case, the claimant was receiving regular medical treatment from his treating physician. That physician was Dr. Steven Cathey of the Central Arkansas Neurosurgery Clinic. During the years following the claimant's compensable injury, he saw the claimant regularly and frequently changed his medication and prescribed him various medical apparatus, including a TENS unit. However, nothing prescribed by Dr. Cathey was an "apparatus permanently or indefinitely required. . . ." To the contrary, the medications and other items which Dr. Cathey directed the claimant to try were attempts at conservative treatment so as to avoid additional back surgery or more radical steps to alleviate the claimant's condition. Clearly, this type of ongoing treatment is not what was contemplated by the legislature in creating Ark. Code Ann. §11-9-702 (b) (2). The intent of the statute was to protect claimants who might have long-term medical needs, not to allow the

respondents to avoid paying otherwise required medical expenses.

I find that the Evans and Alred decisions establish the precedent that the furnishing of medications is compensation under the statute. Consequently, I find that the medication the claimant received during the course of his treatment prevented the statute of limitation from expiring. I simply cannot find that the legislature intended the Workers' Compensation Act to allow an employer to avoid their obligations under the statute. Rather, I find that this statutory section was intended to apply to a situation where a claimant had a need for a specific device that would extend on into the future indefinitely, and where the claimant would not be receiving regular replenishment or supply.

The majority's application of the statute results in a severe unfairness to not only this claimant, but to all others in a similar situation. The claimant could not have known that the statute of limitations was running out on his case. The claimant was under a continuous course of treatment which was

being provided by his employer. The treatment not only included visits with his doctor but also diagnostic tests and medication changes and other attempts at conservative treatment such as the use of a TENS unit. In fact, it was just this type of unfairness that led to the decision of the Arkansas Court of Appeals in Cooper Tire and Rubber Company v. Angell, 75 Ark. App. 325, 58 S. W. 3d 396 (2001). In that case, a claimant had been receiving ongoing medical treatment through February 10, 1998. However, the claim for additional benefits was not filed until October 1999, more than one year following the furnishing of medical treatment and more than two years from the date of the claimant's injury. However, the Court held that the statute of limitations period began running in May 1999, when the claimant was notified of the respondent's refusal to provide the claimant further medical treatment. Consequently, the October 1999 filing was within the applicable statute of limitations, which would not run out until May 2000.

Here, the claimant had absolutely no inkling that the respondent would not continue furnishing him medical treatment. They had not only been furnishing

his medication and TENS unit, but additional medical treatment from Dr. Cathey. However, when the claimant presented himself to Dr. Cathey for a follow-up examination in September 2005, within one year from when the respondent last provided him treatment with Dr. Cathey in December 2004, he learned that they would not continue providing him medical treatment. On the basis of the Angell decision, I find that the instant claim for additional benefits in November 2005 was timely.

In conclusion, I find that the 1993 amendment to Ark. Code Ann. §11-9-702 (b) (2), upon which the majority is apparently relying, was not intended to deny benefits in a case such as this. I find that the intent of the legislature was to provide the respondent some protection in cases where they might replace an artificial limb or some other permanently needed device in the future without exposing them to future liability for additional disability or medical benefits, not to provide the respondent with a tool to use to avoid their liabilities under the Act. Here, the medication and the TENS unit prescribed by Dr. Cathey were clearly not "apparatus permanently or indefinitely required...."

Rather, they were ongoing attempts to provide the claimant conservative treatment so as to avoid more expensive surgery. The temporary nature of this treatment is evidenced by the change in medication prescribed by Dr. Cathey and the eventual discontinuance of the claimant's use of the TENS unit.

Furthermore, to avoid inequitable application of the statute of limitations and in accordance with the Court of Appeals' decision in Cooper Tire and Rubber Company v. Angell, Supra, I find that the statute of limitations ran from the date the claimant was notified that the respondent would not provide him further medical treatment.

For the aforementioned reasons, I must respectfully dissent.

PHILIP A. HOOD, Commissioner