

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E306806

JOHN O'HARA, EMPLOYEE

CLAIMANT

**J. CHRISTY CONSTRUCTION COMPANY,
EMPLOYER**

RESPONDENT NO. 1

AETNA, CARRIER

RESPONDENT NO. 1

SECOND INJURY FUND

RESPONDENT NO. 2

OPINION FILED AUGUST 15, 2003

Hearing before ADMINISTRATIVE LAW JUDGE ANDREW L. BLOOD, on April 17, 2003, at El Dorado, Union County, Arkansas.

Claimant represented by the HONORABLE FLOYD M. THOMAS, JR., Attorney at Law, El Dorado, Arkansas.

Respondents No. 1 represented by the HONORABLE BETTY J. DEMORY, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by the HONORABLE JUDY RUDD, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted in the above-styled claim to determine the claimant's entitlement to additional workers' compensation benefits.

On January 21, 2003, a prehearing conference was conducted in this claim from which a prehearing order of the same date was filed. The prehearing order reflects the stipulations entered by the parties, the issues to be addressed during the course of the hearing, and the parties' respective contentions relative to the issues. The prehearing order is herein designated a part of the record as the Commission's Exhibit No. 1.

The testimony of John O'Hara, the claimant, coupled with medical reports and other documents comprise the record in this claim.

DISCUSSION

John O'Hara, the claimant, with a date of birth of May 16, 1947, is a high school graduate. The claimant sustained a compensable injury, in the form of a hernia, arising out of and in the course of his employment with respondent on March 13, 1993. The claimant suffered a compensable consequence of the hernia repair surgery in the form of entrapment of the right femoral nerve.

Following the March, 1997, hearing on the issues of anatomical impairment and wage loss, a July 14, 1997 opinion was filed by the Administrative Law Judge which found that the claimant had sustained a 20% anatomical impairment and a 30% loss of earning capacity as a result of the compensable injury of March 13, 1993. Further, the July 14, 1997 opinion determined that the Second Injury Fund had no liability in the claim.

The claimant and respondents No. 1 appealed the July 14, 1997 opinion of the Administrative Law Judge to the Full Workers' Compensation Commission. On February 2, 1998, the Full Commission filed an opinion wherein it affirmed the ruling of the Administrative Law Judge with respect to the Second Injury Fund liability and anatomical impairment. The Full Commission modified the opinion of the Administrative Law Judge with respect to the claimant's wage loss disability award, reducing same from 30% to 20%. The claimant appealed the ruling of the Full Commission to the Arkansas Court of Appeals. On March 3, 1999, the Arkansas Court of Appeals delivered an opinion in the claim affirming the ruling of the Full Commission.

In the present claim before the Commission the claimant asserts that he has suffered an increase in physical symptoms and objective signs of disability since the last hearing and that the

same has resulted in an increase in wage loss disability. The claimant's testimony reflects that since his last hearing on March 19, 1997, his condition has progressively worsened. The claimant testified:

It's worse. I don't get to sleep at night. I am taking 50 milligrams of Amitriptyline and then I have to take a pain pill on top of that to go to sleep. I think since then I have had this club foot, as I would call it, with a brace on it, since, I don't know. (T. 12)

The claimant noted that he was prescribed a brace for his right leg by his treating physician at the VA. The brace is made into the claimant's boot and extends to just below his knee. The claimant explained that the brace provides some stability and assistance in preventing him from falling when he walks. The claimant added that he has no flexion in his right foot, which is a progression of the peripheral neuropathy that he suffered as a result of the surgical repair of the hernia. The claimant's testimony reflects that since the 1997 hearing he used a cane for a long period of time to assist in walking. The claimant testified he also has a pair of crutches that he keeps in his car or truck because he never knows when the leg complaint will flare-up to the extent that he is unable to walk.

The testimony of the claimant reflects that he has also been prescribed and utilizes a TENS unit to address his complaint of leg pain since the March 1997 hearing. The claimant testified that he uses the TENS unit regularly except when driving.

The claimant further provided testimony regarding instances of receiving injections of Demerol to address his complaints of severe pain. The claimant gets local or immediate treatment under the care of Dr. Daniels, in El Dorado, while the VA in Little Rock, furnishes his regular medical treatment. The claimant began receiving treatment at the VA during the time that the claim was in a controverted posture and respondent No. 1 refused to provide medical treatment relative to

same. The claimant observed that approximately two years earlier, 2001, he had to go into Dr. Daniels to get a Cortisone shot because he was unable to walk due to residuals of the compensable injury. The claimant's testimony reflects:

Right. And I was in there again, let's see, since then I was at the VA and I couldn't walk, I was on crutches, and I went in there and they gave me, I think, a shot of Demerol, and the Demerol just took the pain away, but I still couldn't walk for about four or five days. And then in October – no, November.

* * *

Of last year, 2002, I believe. I had to go in and get another shot, I believe, because I couldn't walk. (T. 14)

The claimant also observed that he is taking five to six different kinds of medication attributable to the March 13, 1993 compensable injury. Further, the claimant noted that he is not as active as he was prior to the 1997 hearing, in that he walks less and that he spends more time sitting. As a consequence of the afore, the claimant has gained at least twenty pounds. Further, the claimant noted that he has experienced complaints of pain attributable to spurs on his tail bone, for which he is taking medication. The claimant likewise testified regarding the irritation to his right leg brought on by the wearing of certain clothing. (T. 15)

The claimant continues to drive his vehicle to his farm. The claimant acknowledged that during the course of a day he may travel from his residence to the farm three to five times, and that the duration of the visits could range from one to four hours. The claimant noted that his travel to the farm aided in distracting him from his physical circumstances brought on by the compensable injury. The claimant also acknowledged that he continues to drive his tractor although not as much

as he did prior to 1997.

The claimant testified that he has attempted to work on one occasion since the 1997 hearing, however, was not physically able to perform the work. The claimant's brother has a painting business and claimant worked for his brother on one day less than an hour's duration. The painting entailed interior residential painting. The claimant testified that he was unable to remain on his feet to paint, although he was allowed to sit whenever he needed to. The claimant did not receive pay for the work performed in the employment of his brother.

On April 26, 2001, a supplemental deposition was obtained from the claimant by respondents regarding the claimant's activity since the March 1997 hearing. The claimant testified during the April 26, 2001 deposition that he was generally seen at the VA every three months by Dr. Neal, relative to complaints attributable to the compensable injury. The claimant testified during the deposition that he was in the process of getting rid of his cattle because it was getting harder for him to get up on the tractor and perform other activities on the farm. During the April 16, 2001 deposition the claimant testified that he experiences crying spells brought on because of an inability to perform his pre-injury activities. The claimant acknowledged that he had not received treatment for depression at the VA, however added that while he desires such treatment he did not want to receive it at the VA. (Respondent No. 2's Exhibit No. 1).

On August 16, 2001, the claimant underwent a vocational assessment under the care of Mr. Bob White, a vocational specialist. Mr. White's report of August 16, 2001, sets forth the fact that he had interviewed the claimant, reviewed pertinent past records, to include claimant's employment history and medical history, and concluded that in his opinion the claimant was not a candidate for job placement and return to the labor force due to the claimant's significant physical limitations.

(CX1, p. 45-50)

From all the evidence, I make the following:

FINDINGS

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On March 13, 1993 the relationship of employee-employer-carrier existed among the parties.
3. On March 13, 1993 the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$252.30/\$189.23 for temporary total disability benefits/permanent partial disability benefits.
4. On March 13, 1993 the claimant sustained an injury arising out of and in the course of his employment.
5. The respondent shall pay all reasonable hospital and medical expenses arising out of the injury of March 13, 1993.
6. The claimant's healing period ended July 13, 1994.
7. Once the Commission determined in its February 2, 1998 opinion that the Second Injury Fund had no liability in this claim, res judicata bars further consideration of this issue.
8. The claimant has sustained an increase in his permanent disability or loss of earning capacity in the amount of 30% above the previous award of 40% to the body as a whole.
9. This claim has been controverted in its entirety.

CONCLUSIONS

The compensability of the claimant's March 13, 1993 injury was adjudicated at a prior hearing, wherein the same was found to be compensable. The claim is governed by the statutory

provisions in place prior to the enactment of Act 796 of 1993.

As the result of a March 19, 1997 hearing before the Arkansas Workers' Compensation Commission the claimant was ultimately found to have sustained a permanent partial disability in the amount of 40% to the body as a whole, with 20% of the afore being attributable to the claimant's permanent physical impairment and 20% attributable to wage loss consideration. Further, while the Second Injury Fund was joined as a party to the March 19, 1997 hearing, by respondent No. 1, the Fund was found not to have any liability in the claim.

The claimant asserts that as a result of an increase in physical symptoms and objective signs of disability since the March 19, 1997 hearing, he has suffered an increase in wage loss disability, and is correspondingly entitled to the payment of benefits relative to same. Both respondents plead res judicata as a bar to the present claim, and alternatively that the claimant has not suffered an increase in permanent disability. Respondent No. 1 further asserts that if there is a finding of an increase in disability, the same would be the responsibility of respondent No. 2, the Second Injury Fund.

RES JUDICATA

Res judicata applies where there has been a final adjudication on the merits of the issue by a court of competent jurisdiction on all matters litigated and those matters necessarily within the issue that might have been litigated. Beliew v. Stuttgart Rice Mill, 64 Ark. App. 334, 980 S.W.2d 270 (1998). The doctrine of res judicata is applicable to decisions of the Arkansas Workers' Compensation Commission. Harvest Foods v. Washam, 52 Ark. App. 72, 941 S.W.2d 776 (1996).

Res judicata bars re-litigation of the Commission's determination, unless there is evidence of change following the previous order. Castleberry v. Elite Lamp Company, 69 Ark. App. 359, 13

S.W.3d 221 (2000), citing Cariker v. Ozark Opportunities, 65 Ark. App. 60, 987 S.W.2d 736 (1999).

In the instant claim, at the time of the March, 1997 hearing before the Arkansas Workers' Compensation Commission, the Second Injury Fund was made a party to the claim. There are three requirements which must be met in order for the Second Injury Fund to have liability in a claim; first, the employee must have suffered a compensable injury at the present place of employment; second, prior to the injury the employee must have had a permanent partial disability or impairment; and third, the disability or the impairment must have combined with the recent compensable injury to produce the current disability status. Second Injury Fund v. Stephens, 62 Ark. App. 255, 970 S.W.2d 331 (1998). The requirements for Second Injury Fund liability was found not to be in place at the time of the March 19, 1997 hearing in this claim. The claimant has not suffered a subsequent compensable injury since the March 13, 1993 injury in the employment of respondent. Any claim for additional wage loss disability benefits growing out of the March 13, 1993 compensable injury of the claimant is barred pursuant to the doctrine of res judicata as against the Second Injury Fund.

Arkansas Code Annotated §11-9-713(a) provides the mechanism for modification of awards. The claimant asserts that there has been a change in his condition since the March 19, 1997 hearing before the Commission and that the change warrants an increase in his overall permanent disability or loss of earning capacity. Because the present claim does not, on its face, seek an increase in permanent disability based upon the matters in place at the time of the prior hearing, but subsequent to the hearing, the same is not barred by res judicata.

WAGE LOSS DISABILITY BENEFITS

At the outset it is noted that the present claim is governed by the statutory provisions in place prior to the enactment of Act 796 of 1993. The credible evidence in the record reflects that since the

March 19, 1997 hearing before the Arkansas Workers' Compensation Commission, the claimant's condition has deteriorated or progressed to the point that he is taking increases in the amount of medication prescribed by his physician, to include Amitriptyline and other pain medications and anti-inflammatories. The claimant utilizes a TENS unit to address his complaints of pain brought on by the progression of the peripheral neuropathy suffered as a result of the surgical repair of the March 13, 1993 hernia.

Further, the evidence reflects that the claimant has been prescribed and has utilized devices to assist him in walking since the March 19, 1997 hearing. Specifically, the claimant used a cane for a substantial period of time to assist in walking and to keep him from falling. The peripheral neuropathy progressed with respect to the claimant's right lower extremity to the point that it adversely affected his ability to flex the toes on his right foot. The claimant was ultimately prescribed and furnished a brace by his treating physician at the VA for his club or drop foot condition. The evidence further discloses that the claimant continues to assert that he has access to crutches in his vehicles in the event that his right leg gives way and he is unable to walk.

The medical in the record reflects that on August 27, 1998, the claimant was evaluated by Dr. William E. Ackerman, III, a Little Rock pain management specialist. The August 27, 1998 report of Dr. Ackerman reflects in pertinent part:

ASSESSMENT: He has had electrodiagnostic studies compatible with a femoral nerve neuropathy. He furthermore demonstrates sympathetic nervous system changes in the right lower extremity.

It is my medical opinion that Mr. O'Hara's complaints are sufficient enough, and based on my examination, that he is not able to return to work. . . .

My consultation with Mr. O'Hara reveals that he would like to return back to some gainful employment. Because of the significant neuropathic pain that he exhibits, I do not feel that he could ever return back to steady employment. He has not had a trial of anticonvulsants or a trial of a membrane stabilizer medication. Since his pain has been present so long, I do not feel that these medications would give him complete pain relief. However, pharmacologic management may decrease his pain to a tolerable level. (R. #1, Exhibit No. 1, p. 43)

A vocational assessment was conducted relative to the claimant by Mr. Bob White, a vocational specialist. In his August 16, 2001 report, Mr. White noted that he had conducted an interview with the claimant and had reviewed the claimant's prior pertinent employment and medical history. The August 16, 2001 report of Mr. White concludes:

It is the opinion of this consultant that Mr. John O'Hara is not a candidate for job placement and return to work in the labor force.

John has significant limitations in regard to his ability to sit, stand, walk, lift and carry related to the damage of his femoral nerve. He has further limitations in sitting as well as reduced stamina and endurance related to his pain.

By his own admission, John has good and bad days – the issue, however, is his ability to maintain persistence and pace to complete the eight (8) hour work day and forty (40) hour work week over a period of weeks, months and years. It is the opinion of this specialist that John O'Hara is not able to work on a consistent basis and thus would be eliminated from the competitive work force. (CX1, p. 49)

The evidence in the record preponderates that the claimant's pain medication relative to his compensable March 13, 1993 compensable injury has been increased since the March 19, 1997

hearing before the Commission. Further, the claimant has utilized a TENS unit to address his pain since the March 19, 1997 hearing before the Commission. The evidence preponderates that the claimant's complaint of pain attributable to the March 13, 1993 compensable injury and subsequent surgery has materially changed since the March 19, 1997 hearing before the Commission. Second Injury Fund v. Exxon Tiger Mart, Inc., 70 Ark. App. 101, 15 S.W.3d 345 (2000).

The evidence in the record reflects that because the claimant continues to experience significant physical limitations relative to his compensable injury, his activity level is substantially diminished. As a consequence of the afore, the claimant has put on additional weight, twenty pounds. Further, the claimant spends a substantial amount of time sitting because of the residuals of his compensable injury and is currently experiencing pain in his hip area brought on by spurs of an arthritic nature, for which he is receiving treatment. The March 13, 1993 compensable injury of the claimant has combined with the aging process to result in the increase in the claimant's disability. International Paper Company v. Tuberville, 302 Ark. 22, 786 S.W.2d 830 (1990). The claimant has sustained his burden of proof by a preponderance of the evidence that when his age, education, permanent restrictions and limitations, to include increase and duration of pain, that he has suffered an increase in his permanent disability or loss of earning capacity since the March 19, 1997 hearing, in the amount of 30% to the body as a whole. The respondents have controverted this claim in its entirety.

AWARD

Respondent No. 1 is hereby ordered and directed to pay to the claimant permanent partial disability benefits at the weekly compensation benefit rate of \$189.23 to correspond with the claimant's increase in loss of earning capacity since the March 19, 1997 hearing, in the amount of

30% to the body as a whole in excess of the previous award. Said sums accrued shall be paid in a lump without discount.

Respondents are further ordered and directed to pay all reasonably related medical, hospital, nursing, and other apparatus expenses, growing out of claimant's compensable injury of March 13, 1993.

The maximum attorney's fees are herein awarded to claimant's attorney, the Honorable Floyd M. Thomas, on the controverted portions of this award, pursuant to Arkansas Code Annotated §11-9-715, and, in accordance with Holiday Inn-West v. Coleman, 31 Ark. App. 224, 792 S.W.2d 345 (1990).

This award shall bear interest at the legal rate pursuant to Arkansas Code Annotated §11-9-809, until paid.

Matters not addressed herein are expressly reserved.

IT IS SO ORDERED.

ANDREW L. BLOOD
Administrative Law Judge