

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E306806

JOHN O'HARA, EMPLOYEE	CLAIMANT
J. CHRISTY CONSTRUCTION COMPANY, EMPLOYER	RESPONDENT NO. 1
AETNA, INSURANCE CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2

OPINION FILED JANUARY 13, 2005

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

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

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

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

Decision of the Administrative Law Judge: Reversed.

OPINION AND ORDER

Respondent No. 1 appeals an administrative law judge's opinion filed August 15, 2003. The administrative law judge found, "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." After reviewing the entire record *de novo*, the Full Commission reverses the opinion of the administrative law judge. The Full Commission finds that the claimant's

entitlement to permanent disability is *res judicata*, and that the evidence does not demonstrate a change of physical condition to warrant an increase in the claimant's wage-loss award.

I. HISTORY

John Wesley O'Hara, age 57, underwent a right inguinal hernia repair in 1990. Mr. O'Hara was assessed with "recurrent inguinal hernia" in March 1993 and subsequently underwent an "inguinal herniorrhaphy." The claimant began treating with Dr. Jorge Martinez, whose impression in July 1993 was "right femoral neuropathy, possible entrapment." Dr. Martinez performed "1. Exploration of the right femoral nerve at the pelvis and groin, extraparitoneal. 2. Neurlysis of the right femoral nerve."

In an opinion filed December 28, 1993, an administrative law judge (ALJ) found that the claimant sustained a compensable hernia on March 13, 1993. The ALJ found that the claimant remained "totally disabled until released to return to work by Dr. Jorge Martinez," and found that the respondent-employer was liable for reasonably necessary medical treatment. There was no appeal of the ALJ's December 28, 1993 opinion.

It was stipulated that the claimant's healing period ended on July 13, 1994. Dr. Martinez informed the claimant's attorney on July 20, 1994, "As you can tell, the patient has reached the maximum medical improvement. The patient's entrapment of the femoral nerve has improved significantly. The prognosis is very good." Dr. Jay M. Lipke stated in March 1995, "Mr. O'Hara's impairment to the body as a whole would be twenty percent."

Mr. O'Hara claimed entitlement to additional worker's compensation, and a pre-hearing conference was held in April 1996. The claimant contended that he had sustained wage-loss disability "in addition to the 20% impairment rating up to and including permanent total disability." Respondent No. 1 contended that the claimant was entitled to only 26 weeks of disability, pursuant to Ark. Code Ann. §11-9-523. Respondent No. 1 contended that the 20% impairment rating was the result of an independent intervening cause; Respondent No. 1 alternatively contended that if the 20% rating was a compensable consequence, then Respondent No. 2, Second Injury Fund, was responsible for the claimant's wage-loss disability.

Respondent No. 2 contended that the claimant was limited to 26 weeks of disability, and that the 20%

impairment rating was not a compensable consequence of the hernia injury. Respondent No. 2 alternately contended that if the 20% impairment was compensable, then the claimant's disability resulted solely from the compensable injury.

The claimant's attorney queried Dr. Martinez at a deposition taken September 11, 1996:

Q. In your opinion to a reasonable degree of medical certainty, the problems he is having now with his right leg, are they going to be permanent?

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A. On the last office visit on October 18, 1995 as compared with the previous neurological examination there was significant improvement in terms of the motor function of the right leg. He still has some problems, some weakness, still has some pain and sensory changes. I mean he still has some changes in the reflexes. I would say that this is, we had talked about from the surgery which was July 22, 1993 to October 18, 1995 so we were talking about close to two years so I would think that whatever he has left, it most likely will be permanent....

Q. Doctor, can you tell me anatomically where the, exactly where on Mr. O'Hara's body or indicate to me on your body about where this compromise of the nerves that you found was located anatomically?

A. It was located in the right groin primarily but extended also into the, I would say abdominal space into the abdomen and extended slightly below in the groin as well.

An administrative law judge filed another opinion on July 14, 1997. The ALJ found, among other things, "The

claimant has proved by a preponderance of the evidence that in addition to the 20% impairment to the body as a whole he has sustained an additional wage-loss disability of 30% to the body as a whole. His total permanent partial disability is 50% to the body as a whole." The ALJ found, "the claimant's disability resulted solely from the March 13, 1993 injury and his wage-loss disability is therefore the responsibility of respondent #1."

Respondent No. 1 appealed the wage-loss award to the Full Commission. The claimant cross-appealed, stating that he was entitled to wage-loss disability "in excess of 30%. In fact, the Claimant is entitled to an award of permanent and total disability."

The Full Commission filed an opinion on February 2, 1998, affirming in part and modifying in part the decision of the administrative law judge. The Full Commission affirmed the ALJ's determination that the Second Injury Fund had no liability in the case. The Full Commission found that "the claimant's prior injuries in no way contributed to his current disability." The Full Commission found that the claimant "has not established that he is permanently and totally disabled." Finally, the Full Commission concluded:

[T]he claimant is somewhat exaggerating the disabling effects of his injury, and is also poorly motivated to return to the work force....

We find that the claimant has suffered an anatomical impairment in an amount of 20% to the body as a whole and is entitled to wage loss disability benefits in an amount equal to an additional 20% to the body as a whole for a total disability rating of 40% to the body as a whole. We also find that the preponderance of the evidence establishes that the claimant's current disability was caused solely by his most recent injury and complications while employed by respondent No. 1. Accordingly, respondent No. 2, Second Injury Fund, has no liability for payment of any benefits to the claimant.

The claimant appealed to the Arkansas Court of Appeals. Respondent No. 1 cross-appealed. The Court of Appeals affirmed the Full Commission in an unpublished opinion delivered March 3, 1999. O'Hara v. J. Christy Constr., CA98-599 (Ark. App. March 3, 1999). The Court noted the claimant's contention that he was permanently and totally disabled, but held, "We affirm the Commission's decision on all points."

The record indicates that the claimant began receiving pain medication prescriptions from Dr. Arthur L. Neal in July 1999. Dr. Neal noted in April 2000 that the claimant "has chronic pain in the rt leg due to peripheral neuropathy."

The claimant's attorney referred the claimant to Bob White for a Vocational Assessment. Mr. White concluded the following on August 16, 2001:

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 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.

A radiograph was taken on or about March 20, 2002:

AP AND FROG LEG VIEWS OF THE PELVIS ARE OBTAINED. SURGICAL CLIPS ARE SEEN OVER THE RIGHT ILIAC BONE AND OVERLYING THE AREA OF THE RIGHT HIP. THESE WERE ALSO PRESENT IN THE PRIOR EXAM OF 04-14-98. THE ARTICULAR SURFACES AND THE JOINT SPACE AT BOTH HIPS APPEAR UNREMARKABLE. THE REMAINDER OF THE VISUALIZED BONY STRUCTURES ARE ALSO UNREMARKABLE AND UNCHANGED.

Impression:

STABLE FINDINGS AS DESCRIBED WITHOUT ACUTE ABNORMALITIES OR INTERVAL CHANGE NOTED.

The impression of Dr. John Frino on April 2, 2002 was "ischial tuberosity, bursitis" and "sciatic nerve weakness."

Another pre-hearing order was filed on January 21, 2003. The claimant contended that he had "suffered an increase in physical symptoms and objective signs of disability since the last hearing and increased wage loss disability."

Respondent No. 1 contended that the claimant had been paid all appropriate benefits to which he was entitled. Respondent No. 1 contended, "The issue of the extent of claimant's anatomical and wage loss disability was litigated previously and claimant's claim for additional anatomical and wage loss disability is barred by the doctrine of *res judicata*. Therefore, Respondents No. 1 assert that the claimant is not entitled to the additional benefits sought." Respondent No. 1 alternatively contended that if *res judicata* did not bar the claim for additional benefits, then "the claimant has not suffered an increase or change in his condition which would warrant awarding additional wage loss or permanent partial disability benefits." Respondent No. 1 also contended that, if it was found that the claimant had sustained an increase in wage-loss disability, then "it is due to a combination of a number of health conditions which would be the responsibility of the Second Injury Fund."

Respondent No. 2, Second Injury Fund, contended that it "was previously found to have no liability. This finding is *res judicata*. No change in the status of the claimant's condition can reopen the issue of Second Injury Fund liability. The Second Injury Fund requests to be dismissed from all further proceedings of the matter."

Another hearing was held before the Commission on April 17, 2003. The claimant testified:

Q. Can you tell me how your condition today compares to what it was in 1997?

A. 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.

Q. As you appear here in the Commission today, you have a brace on your right leg, is that correct, that is actually made into and is a part of your knee?

A. Yes.

Q. And where does that brace extend?

A. Just below the knee.

Q. What does it do for your foot?

A. My foot flops over (indicating) and that causes me to trip and fall. That's why the VA put it on there....

Q. And has this been a progression of the peripheral neuropathy that you suffered as a result of the surgical repair of the hernia?

A. Yes, it is....

Q. Can you describe what kind of symptoms you are currently having in just your right leg?

A. It is the same as it has always been. It is like needles sticking in your leg, and your leg burns like it is on fire.

The claimant agreed on cross-examination that he had been taking Amitriptyline for 10 years, that he had experienced burning in his leg since 1993, and that he had experienced "falling spells" since 1993.

The administrative law judge found, "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." Respondent No. 1 appeals to the Full Commission.

## II. ADJUDICATION

After reviewing the entire record *de novo*, the Full Commission reverses the administrative law judge and dismisses this claim. First, the Full Commission finds that the claimant's entitlement to permanent total disability is *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 which might have been litigated. Beliew v. Stuttgart Rice Mill, 64 Ark. App. 334, 980 S.W.2d 270 (1998). The doctrine of *res judicata* applies to decisions of the Commission. Harvest Foods v. Washam, 52 Ark. App. 72, 914 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 Co., 69 Ark. App. 359, 13 S.W.3d 211 (2000), citing Cariker v. Ozark Opportunities, 65 Ark. App. 60, 987 S.W.2d 736 (1999).

In the present matter, the claimant previously contended that he was permanently and totally disabled before an administrative law judge, before the Full Commission, and before the Court of Appeals in 1998. None of these adjudicative entities found that the claimant was permanently and totally disabled. The Court of Appeals expressly affirmed the Full Commission's finding that the claimant had sustained wage-loss disability of 20% in addition to the claimant's 20% anatomical impairment. The claimant again contends that he is permanently and totally disabled, but this issue has been decided and is *res judicata*.

Even if the claimant's entitlement to permanent total disability was not *res judicata* based on an alleged change of physical condition, the Full Commission finds from the evidence that the claimant has not shown a change in physical condition. The claimant underwent hernia surgery in 1990 and 1993, and he underwent femoral nerve surgery in 1994. The claimant reached maximum medical healing in July 1994. Dr. Martinez opined in a 1996 deposition that the claimant's femoral nerve condition was permanent. There are no diagnostic studies indicating any objective physical change in the claimant's condition after he reached maximum medical improvement. The claimant correctly points out to the Commission that the provisions of Act 796 of 1993 do not apply to the present case, and the Full Commission is expressly not relying on Act 796. In order to qualify for an increased disability pursuant to Ark. Code Ann. §11-9-701(a), however, even before enactment of Act 796, the claimant must show an objective change. See, Wood v. ABF Freight System, Workers' Compensation Commission E610689 (Oct. 28, 1999); Lewis v. Worth James Construction, Workers' Compensation Commission E019648 (July 6, 1998); Webster v. Hoffinger Industries, Workers' Compensation Commission E104032 (Jan. 7, 1997). In the present matter, each of the

new diagnostic studies submitted by the claimant have been essentially normal, except to show that the claimant had previously undergone surgery. For instance, the radiograph taken in March 2002 showed stable findings "without acute abnormalities or interval change noted."

The administrative law judge in the present matter relied on International Paper Co. v. Tuberville, 302 Ark. 22, 786 S.W.2d 830 (1990), where the Supreme Court reversed the Commission and found that an increase in the claimant's permanent disability rating was justified. But Tuberville is plainly distinguishable, however, in that the claimant in that case had sustained a documented increased in physical impairment. There is no such condition in the present matter, in fact there has been no change in the claimant's documented physical condition after he reached maximum healing. Nor does the record support the ALJ's conclusion in the present matter that the claimant has sustained a "progression of the peripheral neuropathy suffered as a result of the surgical repair of the March 13, 1993 hernia." The medical evidence simply does not support the ALJ's conclusion in this regard. Finally, in light of our findings regarding *res judicata* and the lack of a documented objective change in the claimant's physical condition, the

findings of Bob White in August 2001 are entitled to no probative weight.

Based on our *de novo* review of the entire record, the Full Commission reverses the administrative law judge's finding, "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." This claim is denied and dismissed.

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 must respectfully dissent from the opinion of the majority finding that claimant failed to prove by a preponderance of the evidence that he is entitled to a modification of the prior award of benefits for permanent disability based on a change in physical condition pursuant to Ark. Code Ann. § 11-9-713 (Repl. 2002). Since I find that there is a change in claimant's physical condition, I likewise

find that the doctrine of res judicata does not bar modification of the prior award.

I disagree with the explicit finding by the majority that a change in physical condition warranting a modification of a prior award must be supported by objective findings. First, there is no such requirement contained in Ark. Code Ann. § 11-9-713 (Repl. 2002). Second, the three Full Commission cases cited by the majority for this proposition did not specifically hold that a change in physical condition must always be supported by objective findings. Finally, and much more important, there are objective findings documenting a change in claimant's physical condition since the last hearing. Claimant suffers from a progression of his peripheral neuropathy. This progression is documented by the absence of knee jerk, ankle jerk, and deep tendon reflexes on the right side. Claimant now suffers from "osteoarthritis of his hips secondary to weakness in his legs." This weakness in his right lower extremity is in addition to the above-noted reflex abnormalities, a central nervous system loss of power on right leg extension. Further, claimant lacks dorsi flexion in this extremity. These abnormalities have resulted in an objectively documented case of foot drop, which claimant did not suffer at the time of the last hearing. Claimant now

wears a brace on his right lower extremity and needs the assistance of a cane and crutches to ambulate. Therefore, in my opinion, even if objective findings are necessary to document the change in physical condition, claimant has met his burden of proof in this regard.

Concerning the extent of claimant's permanent disability, the opinions of Bob White, a vocational specialist, and Dr. William E. Ackerman, a pain management specialist, clearly support a finding that the compensable injury has rendered claimant permanently and totally disabled. At a bare minimum, since this injury pre-dated Act 796 of 1993, claimant has certainly proven by a preponderance of the evidence that he falls within the odd lot doctrine. The compensable injury restricts claimant to "services that are so limited in quality, dependability, or quantity that a reasonably stale market for them does not exist." Hyman v. Farmland Feed Meal, 22 Ark. App. 63, 748 S.W.2d 151 (1988). Since claimant has presented a prima facie case of total disability, and respondents have offered insufficient evidence that suitable work is regularly and continuously available to claimant, I find that claimant is permanently and totally disabled. Lewis v. Camelot Hotel, 35 Ark. App. 212, 816 S.W.2d 632 (1991).

For the foregoing reasons, I must respectfully dissent. The opinion of the Administrative Law Judge should be affirmed in its entirety.

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SHELBY W. TURNER, Commissioner