

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E306806

JOHN O'HARA,
EMPLOYEE

CLAIMANT

J. CHRISTY CONSTRUCTION CO.,
EMPLOYER

RESPONDENT NO. 1

AETNA,
INSURANCE CARRIER

RESPONDENT NO. 1

SECOND INJURY FUND

RESPONDENT NO. 2

OPINION FILED MAY 10, 2006

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

OPINION AND ORDER

The Arkansas Court of Appeals has reversed the Full
Commission in the above-styled matter and has remanded for
further proceedings. *O'Hara v. J. Christy Constr. Co.*, CA
05-478 (Feb. 8, 2006). Pursuant to the Court's remand, the
Full Commission finds that the claimant demonstrated a

change in physical condition, and that the claimant proved he was permanently and totally disabled.

I. HISTORY

John Wesley O'Hara, age 58, 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 herniorraphy." 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."

An administrative law judge filed an opinion on December 28, 1993. The administrative law judge found, among other things, that the claimant sustained a compensable hernia on March 13, 1993.

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."

An administrative law judge filed an opinion on July 14, 1997. The administrative law judge found, among other things, that the claimant proved "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 record indicates that in January 1998 a physician requested a prosthesis for the claimant's right leg, related to a "femoral nerve injury."

The Full Commission filed an opinion on February 2, 1998. The Full Commission found, among other things, "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."

The claimant began treating with a pain manager, Dr. William E. Ackerman, III, on August 27, 1998:

His problems began when he was injured in the course of his employment. He has a right inguinal hernia, which was repaired. Apparently a suture was placed around the femoral nerve. He had two subsequent procedures. He relates that he emerged from anesthesia with significant pain in his right groin....He is limited severely in his activity....

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 back to work. Riding in a vehicle causes him significant pain and the wearing of certain clothes causes him significant pain. He must restrict activity frequently. His activities of daily living are significantly decreased. His quality of life will be impaired with respect to recreational activities, including hunting and fishing, and with respect to his ability to earn an income.

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....

Meanwhile, the Court of Appeals affirmed the Full Commission's February 1998 decision in an unpublished opinion, *O'Hara v. J. Christy Constr. Co.*, CA98-599 (March 3, 1999).

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 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 that the doctrine of *res judicata* barred the claim for additional anatomical impairment and wage-loss disability. 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."

A 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 boot?

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 then been a progression of the peripheral neuropathy that you suffered as a result of the surgical repair of the hernia?

A. Yes, it is.

An administrative law judge filed an opinion on August 15, 2003. The administrative law judge found, among other things, "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."

In an opinion filed January 13, 2005, the Full Commission reversed the administrative law judge's decision. The Full Commission found that the claimant's entitlement to permanent disability was *res judicata*, and that the evidence did not demonstrate a change of physical condition to warrant an increase in the claimant's wage-loss award. The Court of Appeals has reversed the Full Commission and has remanded "for the Commission to reconsider its decision because it made errors of law....We remand to the Commission for it to reconsider whether appellant demonstrated a change in physical condition that would support his claim for additional wage-loss disability, specifically including consideration of the fact that he aged six years between his claims and the effects of that aging. We also direct the Commission to consider, if appellant does not qualify for additional wage-loss disability under the proper analysis, whether appellant falls within the odd-lot doctrine, because it failed to render findings on that issue."

II. ADJUDICATION

The wage-loss factor is defined, in "contradistinction" to the functional or anatomical loss, as the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. *Grimes v. North Am. Foundry*, 316 Ark. 395, 872 S.W.2d 59 (1994), citing *Rooney & Travelers Insurance Co. v. Charles*, 262 Ark. 695, 560 S.W.2d 797 (1978). Ark. Code Ann. §11-9-522 (1987) provides:

(b) In considering claims for permanent partial disability benefits in excess of the employee's percentage of permanent physical impairment, the commission may take into account, in addition to the percentage of permanent physical impairment, such factors as the employee's age, education, work experience, and other matters reasonably expected to affect his future earning capacity....

(d) In accordance with this section, the commission may reconsider the question of functional disability and change a previously awarded disability rating based on facts occurring since the original disability determination, if any party makes application for reconsideration within one (1) year after the occurrence of the facts.

Under the odd-lot doctrine, where the claim is for permanent disability based on incapacity to earn, the Commission is required to consider all competent evidence relating to the disability, including the claimant's age, education, medical evidence, work experience, and other

matters reasonably expected to affect his earning power. *Patterson v. Arkansas Dep't of Health*, 343 Ark. 255, 33 S.W.3d 151 (2000), citing *Perry v. Mar-Bax Shirt Co.*, 16 Ark. App. 133, 698 S.W.2d 302 (1985). An employee who is injured to the extent that he can perform services that are so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist is classified as totally disabled, because he falls within the "odd-lot" category of disabled workers. *Ellison v. Therma-Tru*, 66 Ark. App. 286, 989 S.W.2d 987 (1989). The employee need not be totally helpless. *Moser v. Arkansas Lime Co.*, 40 Ark. App. 108, 842 S.W.2d 456 (1992), *supp. op.*, 40 Ark. App. 113, 846 S.W.2d 188 (1993). The odd-lot doctrine refers to employees who are able to work only a small amount; the fact that they can work some does not preclude them from being considered totally disabled if their overall job prospects are negligible. *M.M. Cohn Co. v. Haile*, 267 Ark. 734, 589 S.W.2d 600 (Ark. App. 1979).

An injured worker who relies upon the odd-lot doctrine has the burden of making a *prima facie* showing of being in the "odd-lot" category based upon the factors of permanent impairment, age, mental capacity, education, and training.

Nelson v. Timberline Int'l, Inc., 57 Ark. App. 34, 942 S.W.2d 260 (1997). If the worker does so, the employer then has the burden of showing that some kind of suitable work is regularly and continuously available to him. *Walker Logging v. Paschal*, 36 Ark. App. 247, 821 S.W.2d 786 (1992).

When a worker's primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent intervening cause attributable to claimant's own negligence or misconduct. *Home Insurance Co. v. Logan*, 255 Ark. 1036, 505 S.W.2d 25 (1974).

In the present matter, the Full Commission finds that the claimant proved he was permanently and totally disabled. The claimant is age 58 and sustained a compensable hernia in March 1993. In February 1998, the Full Commission found that the claimant had suffered an anatomical impairment in the amount of 20% to the body as a whole and additional wage-loss disability in the amount of 20%, for a 40% total disability rating. In August 1998, Dr. Ackerman reported sympathetic nervous system changes in the claimant's right lower extremity. Dr. Ackerman opined that the claimant

would not be able to return to work. Bob White, the vocational counselor, stated in August 2001 that the claimant could not return to the labor force. The claimant testified in April 2003 that his condition had worsened. The claimant testified that he wore a brace on his right leg in order to keep from falling.

Based on the claimant's demonstrated change in physical condition, and the claimant's age, lack of education, and inability to return to the work force, the Full Commission finds that the claimant made a *prima facie* showing that he was in the "odd-lot" category. The Full Commission finds that the respondent-employer did not meet its burden of showing that some kind of suitable work was regularly and continuously available to the claimant.

Based on our *de novo* review of the entire record, and the opinion of the Court of Appeals, the Full Commission therefore finds that the claimant proved he was permanently and totally disabled. Respondent No. 1 is solely liable for the claimant's permanent and total disability. The claimant's attorney is entitled to fees for legal services pursuant to Ark. Code Ann. §11-9-715(1987). For prevailing on appeal to the Full Commission, the claimant's attorney is

entitled to the sum of two hundred fifty dollars (\$250),
pursuant to Ark. Code Ann. §11-9-715(b) (2) (1987).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.