

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E306806

JOHN O'HARA, EMPLOYEE	CLAIMANT
J. CHRISTY CONSTRUCTION CO., INC., EMPLOYER	RESPONDENT NO. 1
AETNA LIFE & CASUALTY INSURANCE, INSURANCE CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2

ORDER FILED MAY 2, 2007

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.
HARDY, Attorney at Law, Little Rock, Arkansas.

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

This matter is before the Full Commission on claimant's
Motion for Judgment. Respondent has filed a response to the
motion. Claimant asserts his permanent and total benefits
were not paid timely and that he is entitled to a penalty of
twenty percent (20%).

Claimant's date of injury is in 1993. Claimant
received surgery for a hernia. As a result of his surgery,

he suffered a compensable consequence which resulted in permanent impairment, wage loss, and ultimately, his permanent and totally disabled status. A hearing on these issues was held in 1997. Claimant was awarded a twenty percent (20%) anatomical impairment and a thirty percent (30%) wage loss by the Administrative Law Judge. This was reduced on appeal to this Commission from thirty percent (30%) wage loss to twenty percent (20%) wage loss. This was affirmed by the Court of Appeals on March 3, 1999.

Another hearing was held in 2003, where claimant alleged he was permanently and totally disabled. The Administrative Law Judge found that claimant was not permanently and totally disabled but was entitled to a wage loss of thirty percent (30%) over the previous award of forty percent (40%). This Commission reversed that award in an opinion filed January 13, 2005. We held that claimant's entitlement to permanent disability was res judicata and that he had not shown a change of physical condition to warrant an increase in his wage loss award. The Court of Appeals reversed and remanded that case.

Then in an opinion issued on May 10, 2006, this Commission found claimant proved under the odd-lot doctrine that he was permanently and totally disabled.

Claimant asserts that his benefits should have begun in 2000 when he filed his claim or in 2003 when his hearing was held. Benefits for permanent and total disability can only begin after the healing period has ended and when an award is made, not when a claim is filed nor when a hearing is held. When our May 10, 2006 Opinion and Order became final, the benefits in this case should have begun.

The facts of this case make this finding necessary in the present context and based on the status as it exists.

Claimant asserts his benefits should have begun earlier and thus, he is entitled to a twenty percent (20%) penalty. Penalty provisions are found in Ark. Code Ann. §11-9-801(c). That provision states:

(c) If any installment payable under the terms of an award is not paid within fifteen (15) days after it becomes due, there shall be added to such unpaid installment an amount equal to twenty percent (20%) thereof, which shall be paid at the same time as, but in addition to, the installment unless review of the compensation order making the award is had as provided in §§11-9-711 and 11-9-712.

Under the reading of this statute, until the award is made, it is not owed and thus, no penalty can arise in this case. Our May 10, 2006 Opinion and Order is the first and only award of permanent and total disability entered in this

case. The benefits shall not begin until after that date. Therefore, the motion is denied.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

This case comes before the Commission on the Claimant's Motion for Judgment. The claimant asserts that his permanent and total disability benefits were not paid in a timely manner and that he is entitled to a penalty in connection with those benefits. After reviewing the record, I must respectfully dissent from the Majority opinion finding that the claimant's permanent and total disability benefits are to commence as of May 10, 2006.

This case has a long and complicated procedural history. On March 13, 1993, the claimant sustained a compensable injury in the form of a hernia. The claimant had complications related to the hernia

surgery and had to undergo surgery to release an entrapped right femoral nerve. On December 28, 1993, an Administrative Law Judge issued an opinion finding that the claimant sustained a compensable injury, that the entrapped right femoral nerve was a compensable consequence, and awarding related medical and temporary total disability benefits. No appeal was taken from that decision.

The claimant's healing period ended on July 13, 1994, and the claimant requested permanent and total disability benefits. On July 14, 1997, an Administrative Law Judge issued an opinion finding the claimant was not permanently and totally disabled, but awarding a 20% anatomical rating and an additional 30% in wage loss, for a total of 50% permanent partial disability. The Commission modified the Administrative Law Judge's opinion and reduced the claimant's wage loss to 20%, for a total of 40% permanent partial disability. The decision was appealed but affirmed by the Court of Appeals on March 3, 1999.

The claimant subsequently filed another request for permanent and total disability benefits. A hearing was held in April 2003 at which time the

claimant indicated that his condition had worsened since 1997. On August 15, 2003, an Administrative Law Judge found the claimant was entitled to an additional 30% wage loss. On January 13, 2005, the Commission reversed that opinion and found the claimant was not entitled to any additional wage loss. On February 8, 2006, the Arkansas Court of Appeals reversed and remanded the case back to the Commission. On May 10, 2006, the Commission found that the claimant was entitled to permanent and total disability benefits. However, the Commission did not specify the date from which the claimant's permanent and total disability benefits began.

The claim is now back before the Commission to consider the claimant's motion. In his motion, the claimant contends that the date for commencement of permanent and total disability benefits should have begun on either September 29, 2000, the filing date of the claim for additional compensation or on April 17, 2003, the date of the last hearing. The claimant further argues he is entitled to a penalty because the benefits were paid untimely. The respondents contend the award for permanent and total disability benefits should commence as of the date the order awarding

permanent and total disability benefits, which would be on May 10, 2006. They further contend that they paid benefits within 45 days of that order and therefore are not required to pay a penalty.

This case is unusual in that there is apparently no past case addressing when the accrual of permanent total disability benefits would commence after a modification of wage loss benefits is made. While the accrual of permanent and total disability benefits would usually begin at the end of the healing period, there is apparently no precedence in this instance. I find that the most appropriate date for the commencement of benefits would be the point at which the claimant's condition stabilized or had deteriorated to the point that he became permanently and totally disabled. There are several reasons for making this finding.

The first is that the commencement of permanent benefits has traditionally not commenced at any of the times proposed by the parties. Rather, the commencement of permanent benefits has started at the end of the healing period. As noted by the Arkansas Court of Appeals in Death & Permanent Total Dis. v. Legacy Ins., (Ark.App. 5-10-2006)

There are two distinct forms of disability payments - temporary and permanent. See, Ark. Code Ann. § 11-9-101 (Repl. 1996) (" The primary purposes of the workers' compensation laws are to pay timely temporary and permanent disability benefits to all legitimately injured workers who suffer an injury or disease arising out of and in the course of their employment. . . ."). Temporary disability is that period within the healing period in which an employee suffers a total or partial incapacity to earn wages. Breakfield v. In & Out, Inc., 79 Ark. App. 402, 88 S.W.3d 861 (2002). The healing period is defined as that period for healing of an accidental injury that continues until the employee is as far restored as the permanent character of the injury will permit, and that ends when the underlying condition causing the disability has become stable and nothing in the way of treatment will improve that condition. See Poulan Weed Eater v. Marshall, 79 Ark. App. 129, 84 S.W.3d 878 (2002). When a claimant's healing period has ended so has his right to temporary disability. See Legacy Lodge v. McKellar, 26 Ark. App. 260, 763 S.W.2d 101 (1989). Until the healing period has ended, there is no way to determine whether there is permanent disability. See Sparks Reg'l Med. Ctr. v. Death & Permanent Total Disability Bank Fund, 22 Ark. App. 204, 737 S.W.3d 463 (1987) (where claimant's healing period ended on February 7, 1983, any payments made subsequently were for permanent-total disability and only those payments may be applied

toward the employer-carrier's maximum-liability limit).

The present case is different than the usual case in that the claimant's healing period was stipulated to end as of July 13, 1994. Yet, it is also clear that his condition deteriorated to such an extent that he has now been deemed to be permanently and totally disabled. In my opinion, the period during which his condition deteriorated, was in essence, similar to a second healing period in that the claimant continued to need more treatment in the form of both medication and use of walking devices. However, it was distinguishable in that the claimant's condition had already been treated to the extent that would be successful. Rather, his treatment was simply designed to treat the ongoing, unavoidable deterioration associated with his condition. However, what is clear is that despite the claimant's treatment, his condition deteriorated with regard to both objective and subjective components of the injury. This is similar to a healing period in that the claimant's condition had not yet stabilized or deteriorated to the point that he was permanently and totally disabled.

Seemingly, the purpose of awarding permanent disability benefits at the end of the healing period would be that it serves as a measure to award benefits from the time period that the claimant has stabilized and the true nature of his permanent impairment becomes aware. Likewise, in this instance, the only equitable solution would be to start the claimant's permanent and total disability benefits as of the date his condition progressed to the point he became permanently and totally disabled.

After considering the evidence, I find that the claimant's condition deteriorated to a permanent and total disability status as of August 27, 1998. That is the date the physicians first indicated the claimant was permanently and totally disabled. Dr. Ackerman indicated,

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. 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.

In making this finding, I note that in the May 2006, opinion, the Commission noted the findings entered on this date. As such, it is only consistent to find the claimant's permanent and total disability status would have begun at that time.

Alternatively, even if one does not find the claimant's permanent and total disability benefits should commence on August 27, 1998, I find they, at the latest, should have begun on August 16, 2001, the date that Bob White, Vocational Rehabilitation Specialist determined the claimant was unable to return to the workforce. I rely on this date, because, as with the opinion of Dr. Ackerman, the Commission has previously

explicitly relied on the findings by White in deeming the claimant permanently and totally disabled.

In conclusion, I find that it is simply not equitable to measure the claimant's permanent and total status with the entry of an opinion. It is apparent the Respondents have suggested this date simply because it would result in a delay in their own liability. This is an arbitrary date that has no legal or logical founding, as shown by the fact that the Majority provides absolutely no precedent or rationale for its decision to start benefits from the time of the award. Furthermore, it is contradictory to past precedent indicating that permanent benefits are to begin at the time the claimant's condition has stabilized and became permanent and to the Commission's own decision relying on the decisions of Dr. Ackerman and Bob White.

For the aforementioned reasons, I must respectfully dissent.

PHILIP A. HOOD, Commissioner