

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F200892

DONALD W. LEWIS, EMPLOYEE	CLAIMANT
LAND O' FROST, EMPLOYER	RESPONDENT
SELF INSURED EMPLOYER, INSURANCE CARRIER	RESPONDENT

OPINION FILED OCTOBER 17, 2003

Hearing conducted before Administrative Law Judge C. MICHAEL WHITE in Searcy, White County, Arkansas.

The claimant was represented by Keith Wren, Attorney at Law, Little Rock, Arkansas.

The respondents were represented by John D. David, Attorney at Law, Little Rock, Arkansas.

OPINION AND ORDER

A hearing was held in this matter on July 21, 2003. A prehearing conference was conducted on April 15, 2003, and a prehearing order was filed on April 15, 2003. A copy of the prehearing order has been marked as Commission Exhibit No. 1 and made a part of the record without objection.

During the prehearing conference, the parties agreed to the following stipulations:

1. The employer/employee/carrier relationship existed between the parties on January 16, 2002
2. The claimant sustained a compensable injury on January 16, 2002.
3. The claimant was earning an average weekly wage of \$344.00.

During the prehearing conference, the parties also agreed that the issues to be litigated at the hearing were limited to the following:

1. Whether claimant is entitled to additional temporary total disability compensation.
2. Whether the claimant is entitled to compensation for a 9% permanent physical impairment.

From a review of the record as a whole, to include the testimony of the claimant, Mr. Donald W. Lewis, and witnesses, Julie Baker, Kimberly Gann and William Kunneke, as well as the medical records and other documentary evidence, the following findings of fact and conclusions of law are made in accordance with Ark. Code Ann. § 11-9-704 (Cumm. Supp. 1997):

FINDINGS AND CONCLUSIONS

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations agreed to by the parties and set forth above are hereby accepted as fact.
3. The claimant has failed to prove by a preponderance of the evidence that he is entitled to any additional temporary total disability compensation.
4. The claimant failed to prove by a preponderance of the evidence that he is entitled to any compensation for a permanent physical impairment.
5. The respondents controverted the claimant's entitlement to additional temporary total disability compensation and to compensation for a permanent physical impairment.

DISCUSSION

_____The claimant was employed by the respondent as a freezer attendant. On approximately January 16, 2002, he was stacking boxes from one pile to another when he slipped on a pencil and fell across the forks on a forklift. As a result of his fall he injured his head, his shoulder, and his legs. He was initially provided treatment at the emergency room for complaints of pain in his head, shoulder and back. At the direction of the emergency room physician a CT of the claimant's left chest, left shoulder and head was performed but these studies did not reveal any abnormalities. Later that same day the claimant was also examined by Dr. G. Scott Dicus, the respondents' workers' compensation physician, and Dr. Dicus' report indicates that the claimant's primary complaints involved pain in his low back, left shoulder and left hand, with numbness on the tips of his fingers. Dr. Dicus treated the claimant with medication and he indicated that the claimant should remain off work for two days but then return to light duty work.

The respondents did make light duty work available and the claimant did return to that work for a period of time. Initially the claimant was provided light duty on a shift other than the one on which he initially worked. However, this caused problems with the claimant providing child care, so light duty was then furnished during the same shift for which he was hired. In this regard, Ms.

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Kimberly Gann, a supervisor for the respondent-employer testified that the light duty provided to the claimant required him to dust machines in the packaging department. She also testified that this duty did not require him to use his left shoulder and that she specifically advised the claimant not to use his left shoulder. She testified that she did observe him at one point assisting a janitor in pulling trash and that she again reminded the claimant that he was not to use his left shoulder. The claimant did attempt to perform the light duty assigned; however, he testified that the medication that he was taking made him drowsy and affected his ability to perform these duties. He also testified that he advised Julie Baker, a benefits specialist in the respondent-employer's Human Resources Department that he was unable to continue working and that he needed to leave. The claimant testified that he understood from Ms. Baker that his employment would be terminated if he left. On the other hand, Ms. Baker testified that she did not in any way tell him that his employment would be terminated if he left. Ms. Baker did testify that she had talked to Dr. Dicus' office prior to February 4th, and had been advised that the claimant should not take his medications while he was working if it affected his ability to do his job and she testified that she reminded the claimant of this on February 4, 2002. In any event, the claimant did not return to work after February 4, 2002, and he did not call the respondent to advise that he was not

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coming to work. According to his testimony, he did not call in because it was his understanding that his employment had already been terminated. Consequently, pursuant to the respondents' no show/no call policy the claimant's employment was, in fact, terminated when he did not show up for work or call in to advise that he would not be working for four consecutive days.

Dr. Dicus referred the claimant to Dr. James McCoy, an orthopedic specialist. Dr. McCoy first saw the claimant on January 25, 2002. Dr. McCoy had the following to say about the claimant's pain behavior.

"On the left arm, he grimaces and groans and will not move his arm either actively and even when I try to move it passively he resists movement and grimaces and groans as if it is a severely painful thing for me to gently passively move his arm at the shoulder. He has normal radial and ulnar pulses. Full range of motion in his cervical spine with negative foraminal compression test."

Clearly Dr. McCoy felt that the claimant demonstrated pain behavior that was exaggerated in relation to the nature of the injury that he sustained. In addition, Dr. McCoy indicated that the claimant's complaint of numbness in his left hand did "not follow a normal anatomic pathway." Consequently, Dr. McCoy referred the claimant to a neurologist for evaluation of those nerve complaints. However, there are no medical documents in the record indicating that the claimant did, in fact, see a neurologist. However, on January 29,

2002, Dr. McCoy performed a MRI arthrography which revealed a "[c]omplete tear of the super supraspinatus with extravasation of the the subacromial subdeltoid bursa region." The medical reports indicate that Dr. McCoy recommended a left rotator cuff repair; however, the records indicate that Dr. McCoy also wanted the claimant to be evaluated by a neurologist prior to the surgery. Moreover, there is no indication in the medical records indicating that the claimant was in fact evaluated by the neurologist, or that the surgery was performed, although the claimant did suggest in his testimony that the surgery was, in fact, performed.

Temporary disability is determined by the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. An injured employee is entitled to temporary total disability compensation during the period of time that he is within his healing period and totally incapacitated to earn wages. Arkansas State Highway and Transportation Department v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). An injured employee is entitled to temporary partial disability compensation during the period that he is within his healing period and suffers only a decrease in his capacity to earn the wages that he was receiving at the time of the injury. Id. The "healing period" is defined as the period necessary for the healing of an injury resulting from an accident. Ark. Code Ann. § 11-9-102(6) (Cumm. Supp. 1997). The

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healing period continues until the employee is as far restored as the permanent character of his injury will permit. When the underlying condition causing the disability becomes stable and when nothing further will improve that condition, the healing period has ended, and the claimant is no longer entitled to receive temporary total disability compensation or temporary partial disability compensation, regardless of his physical capabilities

I find that the claimant failed to prove by a preponderance of the evidence that he is entitled to temporary total disability compensation beyond January 28, 2002, when the respondents last paid. Temporary disability compensation in this regard although the diagnostic test indicated a problem for which medical treatment was needed. The evidence also establishes that the respondents provided light duty work and that they remained willing to provide light duty work to the claimant. Consequently I find that the claimant failed to prove by a preponderance of the evidence that he was unable to earn wages subsequent to January 28, 2002. While the claimant's employment with the respondent was terminated subsequent to that date the evidence establishes that the claimant's employment was terminated due to his failure to show up for work, or call and advise the respondent that he was not going to be available to work those night. I recognize that the claimant testified that he was under the impression that his employment had been terminated when

he left work on February 4. However, his testimony was contradicted by Ms. Baker. In this regard I note that the claimant indicated on his employment application that he had never been convicted of any misdemeanors or crimes; however, he acknowledged at the hearing that he had previously been convicted of the crime of fraudulent practices and for bank robbery. Consequently, I find that the claimant's credibility is adversely affected and that the weight that his testimony is entitled to receive is diminished.

An injured worker must prove by a preponderance of the evidence that he is entitled to an award for a permanent physical impairment. Act 796 of 1993, as codified at Ark. Code Ann. § 11-9-102(4)(F)(ii)(a) (Supp. 1999), provides that "Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment." "Major cause" means more than fifty percent (50%) of the cause, and a finding of major cause must be established according to the preponderance of the evidence." Ark. Code Ann. § 11-9-102(14). Ark. Code Ann. § 11-9-522(g) directed the Commission to adopt an impairment rating guide to be used in assessing anatomical impairment, which guide could not include complaints of pain as a basis for impairment. The Commission thus established Rule 34 as an impairment rating guide:

To accomplish this purpose, the Arkansas Workers' Compensation Commission hereby adopts *Guides to the*

Evaluation of Permanent Impairment (4th ed. 1993) published by the American Medical Association exclusive of any sections which refer to pain and exclusive of straight leg raising tests or range of motion tests when making physical or anatomical impairment ratings to the spine.

To the extent that the *Guides* allow the use of subjective criteria for establishing an impairment rating, the *Guides* must yield to the statutory definition of anatomical impairment as defined by the Arkansas General Assembly. Rizzi v. Sam's Wholesale Club, Arkansas Workers' Compensation Commission, opinion filed April 1, 1999 (W.C.C. E515370 & E112991). In addition, Act 796 of 1993 provides that any determination of the existence or extent of physical impairment shall be supported by objective and measurable physical or mental findings. Ark. Code Ann. § 11-9-704(c)(1) (Supp. 1999). Ark. Code Ann. § 11-9-102(16) provides: (A)(i)"Objective findings" are those findings which cannot come under the voluntary control of the patient.

In the present claim Dr. McCoy opined in a report dated July 11, 2002 that the claimant sustained a 9% permanent physical impairment to the body as a whole as a result of the objectively documented injury to his shoulder. Dr. McCoy also indicated that this rating was based on the *A.M.A. Guides to the Evaluation of Permanent Impairment, Fourth Edition*, as required. However, his report also indicates that he based his rating on the active range of motion revealed during his clinical findings. In cases where the claimant

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demonstrates that findings based on active range of motion were conducted in such a manner that the test did not come under the voluntary control of the claimant ***Hayes v. WalMart Stores, 71 Ark. App. 207, 29 S.W.3d 751, (2000)***, however, in the present claim no such showing was made.

Consequently, I find that the claimant failed to prove by a preponderance of the evidence that Dr. McCoy's rating is based on objective findings as required by the Arkansas Workers' Compensation Law.

ORDER

Accordingly, based on my review of the entire record and for the reasons discussed herein, I find that this claim must be, and hereby is, denied and dismissed

IT IS SO ORDERED.

HON. C. MICHAEL WHITE
Administrative Law Judge