

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F100938

BARRY WHITE, EMPLOYEE	CLAIMANT
BAKER ENGINEERING, EMPLOYER	RESPONDENT
AMERICAN INTERSTATE INSURANCE COMPANY, INSURANCE CARRIER	RESPONDENT

**OPINION FILED AUGUST 14, 2003**

Hearing conducted before Administrative Law Judge C. MICHAEL WHITE in Batesville, Independence County, Arkansas.

The claimant was represented by M. Scott Wilhite, Attorney at Law, Jonesboro, Arkansas.

The respondents were represented by Michael E. Ryburn, Attorney at Law, Little Rock, Arkansas.

**OPINION AND ORDER**

A hearing was held in this matter on May 16, 2003. A prehearing conference was conducted on January 9, 2003, and a prehearing order was filed on that same date. 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 employee-employer-carrier relationship existed on January 16, 2001;
2. The claimant sustained a compensable injury on January 16, 2001;
3. The claimant was earning sufficient wages to entitle him to

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a temporary total disability compensation rate in the amount of \$339.00 and a partial disability compensation rate of \$254.00.

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

1. Whether the claimant is entitled to temporary total disability compensation for the period extending from January 19, 2001, through February 27, 2001, and from July 26, 2001, through August 9, 2001;
2. Whether the claimant is entitled to compensation for a permanent physical impairment;
3. Whether the claimant sustained any impairment to his wage earning capacity in excess of any permanent physical impairment established by the medical records;
4. Whether an independent intervening incident occurred which relieves the respondents of liability;
5. Whether the respondents are entitled to a credit for unemployment benefits paid to the claimant.

From a review of the record as a whole, to include the testimony of the claimant and his spouse, Kari White, 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

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jurisdiction over this claim;

2. The stipulations agreed to by the parties and set forth above are hereby accepted as fact;
3. The claimant failed to prove by a preponderance of the evidence that he is entitled to additional temporary disability compensation;
4. The claimant failed to prove by a preponderance of the evidence that he is entitled to compensation for a permanent physical impairment;
5. The claimant failed to prove by a preponderance of the evidence that he is entitled to any wage loss compensation;
6. The respondents are entitled to a credit for unemployment benefits paid to the claimant;
7. The respondents controverted liability for any additional benefits.

**DISCUSSION**

The claimant was employed by the respondent employer as a meter reader. He was involved in a motor vehicle accident on January 16, 2001, which resulted in the truck he was driving over-turning. A witness at the scene indicated that the claimant apparently lost consciousness. He was transported to the hospital by his spouse, who testified that he demonstrated delusional behavior. At the emergency room, a cervical strain and closed head injury were diagnosed, and he was released. He ultimately came under the care of Dr. Terry Green, an orthopedic surgeon, for complaints of pain in his neck and

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back and headaches. Dr. Green determined that MRI's of the claimant's cervical spine and lumbar spine were normal. On March 13, 2001, he was evaluated by Dr. Peggy Brown. Dr. Brown reached the following impressions:

No neurologic deficits  
Possible soft tissue injury in January  
Hypertension  
Substance abuse, alcohol and cocaine.

The claimant also sought treatment from Dr. Larry Six, a chiropractor, on his own initiative. Dr. Six has opined that the claimant sustained a ten percent (10%) permanent physical impairment to the body as a whole, with three percent (3%) attributable to the thoracic spine, three percent (3%) attributable to the cervical spine, and four percent (4%) attributable to the lumbar spine. Dr. Six has stated that his rating is assigned in accord with the AMA Guidelines.

The claimant testified that he continues to experience severe pain, which he has rated at ten on a scale of one to ten with ten being the worst pain imaginable, and he testified that his continued complaints drastically limit his ability to function in day-to-day activities. In addition, his spouse, Kari White testified that his ability to function has been severely limited since the accident. The claimant was also involved in another motor vehicle accident in September of 2001, when he was struck from behind by another vehicle. He

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testified that he suffered "whiplash" as a result of that accident. A law suit was filed, which was settled by the time of the hearing in the current matter.

Before addressing the issues directly involved in this claim, I note that the claimant admitted to being a cocaine addict before and after the accident, an issue in this claim, and he admitted to being a cocaine addict at the time of the hearing conducted in this matter. In addition, the evidence establishes that he admitted to Dr. Brown that he drank at least thirty (30) beers each week. In this regard, I note that the claimant was discharged from the Navy because he tested positive for marijuana. In addition, he has a misdemeanor conviction for possession of drug paraphernalia, and he has felony convictions for domestic abuse. I find that this evidence raises serious questions about the claimant's credibility and that the weight of his testimony and statements are entitled to receive is drastically diminished.

Since the claimant's injury occurred after July 1, 1993, the provisions of Act 796 of 1993 are applicable to this claim. However, Act 796 did not change the basic law regarding temporary total disability compensation. In this regard, 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

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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 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.

In the present claim, the claimant and his spouse have testified that he was unable to work during the time in question. However, as discussed above, the claimant admitted to a cocaine addiction during this time that was severe enough that he required rehabilitation. Moreover, he conceded that he continued to use the drug. Moreover, as discussed above, I find that the claimant's testimony is entitled to little weight, and I also find that the testimony of his spouse in this regard is entitled to little weight, since her testimony is

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based on the statements and actions of the claimant. Furthermore, the medical records do not support the claimant's contention that he was unable to work or in his healing period beyond the time that the respondent's paid temporary disability compensation. Consequently, I find that the claimant failed to prove by a preponderance of the evidence that he is entitled to additional temporary disability compensation.

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

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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, as discussed above, Dr. Six has assigned a ten percent (10%) permanent physical impairment rating, and he has indicated that his rating is based in part on his observations of spasms. However, the medical reports of Dr. Green and Dr. Brown are not consistent with Dr. Six's opinion. Their reports indicate that their examinations as well as the diagnostic studies do not reveal an objective basis for the claimant's problems. I find that the reports of Dr. Green and Dr. Brown are entitled to more weight,

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and I find that the claimant failed to prove by a preponderance of the evidence that he is entitled to compensation for a permanent physical impairment.

Since he has failed to establish entitlement to compensation for a permanent physical impairment, I also find that he has failed to prove by a preponderance of the evidence that he is entitled to any wage loss compensation.

**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.

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C. Michael White  
Administrative Law Judge