

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F307879

PAUL McHENRY

CLAIMANT

ADVANCED ENVIRONMENTAL RECYCLING TECH, INC.

RESPONDENT

GREAT AMERICAN INSURANCE,  
INSURANCE CARRIER

RESPONDENT

OPINION FILED JANUARY 27, 2004

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in Springdale, Washington County, Arkansas.

Claimant represented by KENNETH OSBORNE, Attorney, Fayetteville, Arkansas.

Respondents represented by CAROL WORLEY, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled case on December 22, 2003, in Springdale, Arkansas. A pre-hearing order was entered in this case on October 29, 2003. This pre-hearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the forthcoming hearing. Immediately prior to the hearing, the parties agreed on the appropriate weekly compensation rates and the issue of the claimant's entitlement to temporary total disability benefits was withdrawn. A copy of this pre-hearing order with those amendments noted thereon, was made Commission's Exhibit No. 1 to the hearing.

The following stipulations were offered by the parties and are hereby accepted:

1. On June 1, 2003, the relationship of employee-employer-carrier existed between the parties.
2. On June 1, 2003, the claimant sustained an injury to his left thumb.
3. The claim is controverted in its entirety.
4. On June 1, 2003, the appropriate compensation rates were \$281.00 for total disability and \$211.00 for permanent partial disability.

By agreement of the parties, the issues to be litigated and resolved at the present time were limited to the following:

1. Whether the injury to his left thumb represents a “compensable injury,” within the meaning of the Act, specifically Ark. Code Ann. §11-9-102(4)(B)(iv)(a).
2. The claimant’s entitlement to the payment of medical expenses, attorney’s fees.
3. Whether the claimant’s difficulties after June 25, 2003 were the result of an independent intervening cause, so as to relieve the respondents of liability for benefits accruing after that date.

In regard to these issues, the claimant contends:

“The claimant contends the end of his left thumb was cut off. Due to his injury he cannot work.”

In regard to these issues, the respondents contend:

“Respondents contend that in light of the positive drug test done subsequent to the accident in this matter, he has not suffered a compensable injury under the Arkansas Workers’ Compensation Act. It is respondents’ contentions that the evidence and testimony will show the claimant was not using proper judgment at the time of his injury such to establish him being under the influence of drugs, Alternatively, in the event compensability is found, it is respondents’ position that the claimant’s activities subsequent to June 25, 2003, equates to an independent intervening cause to support his need for additional medical treatment.”

## DISCUSSION

\_\_\_\_\_The central issue in this claim is the matter of “compensability”. There is no doubt that the claimant sustained a physical injury to his left thumb, while he was at work and during his regular working hours on June 1, 2003. This injury was in the form of a soft tissue amputation of the tip of his left thumb by a piece of machinery that he had been assigned to operate.

However, a drug screen performed on the claimant, immediately following this injury,

revealed that the claimant tested positive for marijuana metabolites (15 ng/mL). The presence of these marijuana metabolites is sufficient to prove the presence of the illegal drug, marijuana, and to raise the rebuttable presumption created by Ark. Code Ann. §11-9-102(4)(B)(iv)(b), Wood v. West Tree Service, 70 Ark. App. 29, 14 S.W. 3<sup>rd</sup> 883 (2000).

Thus, pursuant to the provisions of the foregoing subsection, the injury to the claimant's thumb is presumed to be substantially occasioned by his use of an illegal drug (marijuana). The burden rests upon the claimant to present sufficient evidence to rebut this statutory presumption.

The evidence shows that the claimant was familiar with the machine that produced his injury, having operated this machine for approximately six months. The claimant testified that on the day of his injury a guard was absent from the machine. He further testified that on several occasions he advised his supervisor, Connie Armbruster, of the absence of the guard and was told by Ms. Armbruster that she would have someone replace the guard. In her testimony, Ms Armbruster denies that such conversations occurred or that she was aware that the guard was absent, until after the claimant's injury.

Regardless, the claimant operated the machine with knowledge not only that the guard was absent, but also that its function was to prevent any operator from placing their hand where it could come in contact with the moving blade on the machine. However, for some reason, which was not satisfactorily explained, the claimant placed his hand in a position of peril and the injury resulted.

Although the presence of the guard would have likely prevented the claimant's injury, its absence did not create a hidden peril or expose the claimant to a risk of which he was unaware. From his knowledge and experience with the operation of the machine and presence and purpose of the missing guard, the claimant should have reasonably recognized the risk of placing his hand on the blade box, with knowledge that the protective guard was absent. In fact, the greater weight of the evidence shows that it was

unnecessary for the claimant to place his hand on the blade box to perform his regular employment duties, and the claimant gives no adequate explanation for his doing so. The evidence shows that this was simply a careless act on the part of the claimant.

Carelessness or negligence on the part of the claimant is generally not to be considered in determining whether or not an employment related injury is “compensable”. However, in the present case, the presence of the illegal drug, marijuana, could reasonably have played a causal role in contributing to his behavior.

After consideration of all the evidence presented, it is simply my opinion that the claimant has presented sufficient evidence to rebut the presumption created by Ark. Code Ann. §11-9-102(4)(B)(iv). Thus, I am constrained to find that the claimant’s injury, on June 1, 2003, was substantially occasioned by his use of the illegal drug, marijuana, and does not constitute a “compensable injury”, within the meaning of the Act. His claim for benefits attributable to this injury must be denied and dismissed in its entirety. \_\_\_

#### FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers’ Compensation Commission has jurisdiction of this claim.
2. On June 1, 2003, the relationship of employee-employer-carrier existed between the parties.
3. On June 1, 2003, the claimant earned wages sufficient to entitle him to weekly compensation rates of \$281.00 for total disability and \$211.00 for permanent partial disability, should such benefits have been appropriate.
4. On June 1, 2003, the claimant sustained an injury to his left thumb, in the form of a soft tissue amputation of the distal end of the thumb. This injury occurred on the respondent employer’s premises and during the claimant’s regular working hours.
5. The greater weight of the credible evidence presented establishes that at the

time of this injury, there was present in the claimant's body the illegal drug, marijuana. This raises the statutory presumption that the claimant's accident and injury were substantially occasioned by the use of this illegal drug.

6. The claimant has presented insufficient evidence to rebut the presumption that his accident and resulting injury were substantially occasioned by the use of the illegal drug, marijuana. Thus, this injury is expressly excluded from the category of "compensable injuries" by the provisions of Ark. Code Ann. §11-9-102(4)(B)(iv).
7. The respondents have denied the occurrence of a compensable injury to the claimant's left thumb and have controverted this claim in its entirety.

ORDER

Based upon my foregoing findings and conclusions, I have no alternative but to deny and dismiss this claim in its entirety.

IT IS SO ORDERED.

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MICHAEL L. ELLIG  
Administrative Law Judge