

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F510339

KATHLEEN CHILDERS,
EMPLOYEE

CLAIMANT

EATON CORPORATION,
EMPLOYER

RESPONDENT

OLD REPUBLIC INSURANCE COMPANY,
INSURANCE CARRIER

RESPONDENT

OPINION FILED DECEMBER 19, 2006

Hearing conducted before ADMINISTRATIVE LAW JUDGE MARK CHURCHWELL, in Mountain Home, Baxter County, Arkansas.

The claimant was represented by HONORABLE FREDERICK S. SPENCER, Attorney at Law, Mountain Home, Arkansas.

The respondents were represented by HONORABLE WILLIAM C. FRYE, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above-styled claim on October 4, 2006 in Mountain Home, Arkansas. A prehearing order was entered in this case on July 21, 2006. This prehearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. A copy of this prehearing order was made Commission's Exhibit No. 1 to the hearing record.

The following stipulations were submitted by the parties in the prehearing order and are hereby accepted:

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.

2. The employee-employer-carrier relationship existed on September 15, 2005 and at all pertinent times hereto.
3. The respondents have controverted the claim in its entirety.
4. The claimant's average weekly wage of \$495.36 entitles her to a TTD rate of \$330 per week and a PPD rate of \$248 per week if this claim is found compensable.

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

1. Compensability.
2. Unpaid medical bills.
3. Controverted attorney fees.
4. TTD (September 15, 2005 until November 28, 2005).
5. PPD (Reserved).

The record consists of the October 4, 2006 hearing transcript and the exhibits contained therein.

DISCUSSION

The claimant sustained a partial finger amputation at work on September 15, 2005, while operating a wire winder machine. However, a post-accident urine sample tested

positive for the presence of marijuana metabolites. The respondents contend that the present claim for benefits is barred by the positive drug test.

In this regard, Arkansas Code Annotated § 11-9-102(4) states in relevant part:

(B) "Compensable injury" does not include:

(iv) (a) Injury where the accident was substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of physician's orders.

(b) The presence of alcohol, illegal drugs, or prescription drugs used in contravention of a physician's orders shall create a rebuttable presumption that the injury or accident was substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of physician's orders.

(c) Every employee is deemed by his or her performance of services to have impliedly consented to reasonable and responsible testing by properly trained medical or law enforcement personnel for the presence of any of the aforementioned substances in the employee's body.

(d) An employee shall not be entitled to compensation unless it is proved by a preponderance of the evidence that the alcohol, illegal drugs, or prescription drugs utilized in contravention of the physician's orders did not substantially occasion the injury or accident.

In the present case, the claimant was employed at Easton to run a bank of wire winder machines. These machines bring together and transfer individual strands of

wire from various spools onto a single bobbin. The bobbins of wire are then transferred to a braider machine where the individual strands are braided for use in hose.

The claimant amputated the end of her left ring finger while setting up a winder machine at approximately 8:30 p.m. on Thursday, September 15, 2005. (T. 7-8) Her shift began at 7:00 p.m., and this was her first day back at work after her scheduled days off (i.e. "weekend"). (T. 20) With regard to her positive drug test for marijuana after the injury, the claimant testified that she smoked marijuana at the lake a couple of days before. (T. 17-18) A former co-worker, Jennifer Wood, testified that she was at the lake with the claimant the Tuesday before the accident, and the claimant smoked marijuana that day (i.e., on Tuesday). (T. 49) Ms. Wood testified that Ms. Wood also met the claimant in the parking lot before work on the day of the accident, and the claimant did not seem intoxicated in any way. (T. 45)

The claimant described her accident as follows at the hearing:

Q. Okay. All right. And then what?

A. I was running the machine actually, I was getting ready to run the machine. I had to thread the wires through the bobbin on the front of the

machine. Since this machine that I was running was running 22 wires, I had to make sure that the wires were tight on the bobbin on the front of the machine before I started. Otherwise, it wouldn't run and the wires would fly out, and it would be a mess.

So, normally, there's this, there's the wheel on the left of the bobbin that you turn the wheel to tighten the wires on the bobbin. But since there was 22 wires on the back, I did not have the strength to turn that wheel. 'Cause you have to use one hand to turn the wheels, hold the wires with the other hand on the bobbin, so that they stay and they're taut when you start the machine. So since I could not physically pull, turn the wheel with my left hand, I was going to jog the machine, which, which starts it and then stops it. Just to catch the wires, and then, I'd check and make sure all the wires were in place, and then, I'd start the machine running.

Q. Okay. So when you say you jogged the machine, in other words, you're letting the electric motor do the strength pulling rather than-

A. Right.

Q. Because you didn't have the strength?

A. Right. Correct.

Q. Okay. All right. So you did that?

A. Yes, I did that.

Q. And what happened?

A. When I jogged the machine, because you, before you jog the machine, you have to, the wires have to be on the bobbin through this hole, but you have to hold them there so they won't spring out.

Q. Right.

A. So I was holding the wires with my left hand and jogging the machine with my right. And as soon as the machine started, the glove got caught in the wires, and it yanked my hand in. And I immediately hit the stop button, but the machine doesn't stop immediately when you hit that button. It still keeps going. So when I realized that my hand was in there, I jerked my hand out. And when I did, the end of my finger was gone.

Q. Okay. Are we talking about a millisecond all this happens?

A. Oh, yes. It was, I'm sorry, it happened really fast (snapping fingers together).

Q. Okay. For the record, you just snapped your fingers. It was just that fast?

A. Yes.

Q. Is that correct?

A. Yes. And I mean, I was watching, of course, what I was doing, and when I realized, I saw, you know, my hand go in there, I just jerked my hand out immediately as I was hitting the stop button. And I pulled my hand, when I pulled my hand out, it came out of the glove. The glove was still in the machine with the end of my finger. (T. 9 - 11)

Ms. Wood testified that she was hired at Eaton at the same time as the claimant, that Ms. Wood also operated the wire winder machines when she worked at Eaton, and that she last worked at Eaton in September of 2005. (T. 38 and 40)

Ms. Wood testified that the employees were told in training that the employees can "jog" the machines (rather than using the hand wheel) once the employees got familiar with the

machines. (T. 41) Ms. Wood's testimony appears consistent with the claimant's testimony that she was told in training not to jog the machines until she had worked there three or four days and had a little experience. (T. 15)

There appears to be no dispute that, depending on the individual wire winder machine, there are three possible methods in set-up for turning the bobbin a few turns in order to properly secure the wire ends placed through the whole in the center of the bobbin, and to generate appropriate tension on the individual wire strands coming off the various spools. First, all machines have available a hand wheel to turn the bobbin at a slow speed to create the wire tension appropriate to operate the winder at full speed. Second, some machines have a "jog" button for the same purpose. Third, for those machines without a "jog" button, a properly timed application of the "start" and "stop" buttons will also jog the machines in set-up, although the rate at which the machines come to speed by using the start button varies from machine to machine. The 22 wire machine which the claimant was operating did not have a jog button, and as described above in the claimant's quoted testimony, the claimant was attempting to jog the 22

wire machine with the start and stop buttons when her injury occurred.

Graham Sparks was the manufacturing manager at the Eaton facility in Mountain Home at the time of the claimant's accident and at the time of the hearing. Mr. Sparks testified that jogging (rather than using the hand wheel in start up) has never been an accepted safety practice at Eaton. (T. 57) However, Mr. Sparks also indicated that operators do unfortunately utilize the start button for jogging. (T. 58) With regard to potential risk from this technique, Mr. Sparks testified:

Q. Okay. If you're using the start button to jog as she was, how long would you have to get your hand off of the -

A. It depends, well, that's not a practice I've studied, so I really couldn't-all I can assume is, that if you press the start/stop button, the start button will start the machine. And if you're not quick enough to turn the machine off, or jerk the machine, then you have a potential risk. (T. 58)

Mr. Sparks testified that he did not dispute the testimony that the wire winder operators were told by their trainers and lead people that they could jog the machines. (T. 69) Mr. Sparks testified that he was not part of the investigation team after the accident, but that he was aware of the details after the investigation. (T. 73) Mr. Sparks

testified his understanding that the claimant's finger got caught between the wire and the bobbin, and that that severed her finger. (T. 73) While Mr. Sparks gave various testimony regarding placement of the hands using the "proper" (i.e., hand wheel) procedure, Mr. Sparks acknowledged from a "technical standpoint" that an operator would hold the wires on the bobbin with one hand during set up, whether using the hand wheel during set-up or whether instead jogging during set-up:

Q. Okay. And so, we're pulling, we're taking those 22 wires and we're pushing that into a hole out the other end; right?

A. Yes. And that's, basically, to get the start.

Q. Okay. And then, to get it started, you would say you've got to get on this left hand wheel and turn it, do you not?

A. That's to get a few-

Q. Okay. But don't you have to, if you're turning it with your left hand, won't you, with your right hand be still holding that wire to make sure it stays going through that hole? Isn't that a reasonable thing to do?

A. That's a, that's a reasonable thing, yes. But it's all to do with the manual pull.

Q. I understand. So if you're holding that wire through that two inch shaft, if you will, why isn't it reasonable--and I know you don't like jogging--why isn't it reasonable to put your hand through that, holding that wire through that shaft

when you jog it with your hand? Isn't it the same thing, except one you're doing it manually--

A. One--

Q. --the other you're doing it automatically?

A. Well, it is, from a technical standpoint, it's the same thing. But it's not the safety practice.

Q. Agreed. I'm not saying it's the safety practice.

A. If you're asking me the question whether it is a technical, the same technical--

Q. Yes.

A. --concept, then, yes.

Q. And so, it certainly would be understandable why, if she was told by her trainer as she testified she did, to hold the wire through that two inch shaft and make sure it'll stay there, and jog the machine either with her hand or whatever, it's understandable why her finger, her middle, her ring finger would be caught up into that could it not?

A. If that happened as you described it, that's feasible.

Q. And you can't say she was trained another way, other than what she's testified to, can you?

A. Not in detail. (T. 77-78)

The Arkansas Courts have held that the presence of drugs established by drug metabolites present in the body is sufficient to raise the rebuttable presumption and shift the burden of proof to the claimant to rebut the presumption.

Flowers v. Norman Oaks Construction Co., 341 Ark. 474, 17 S.W.3d 472 (2000); Brown v. Alabama Elec. Co., 60 Ark. App. 138, 959 S.W.2d 753 (1998) *petition for review denied*, 334 Ark. 35, 970 S.W.2d 807 (1998).

The Commission and the Courts have addressed this area of the law in several cases involving industrial manufacture accidents. In Rebecca L. Davis v. Your Employment Services, Inc., Full Workers' Compensation Commission, Opinion filed December 6, 1996 (E415603), the claimant severed her right ring finger when she placed her hand underneath a paint recycling machine to determine whether any paint was coming out. The claimant acknowledged at the hearing that her injury was not the result of any type of machine malfunction, but instead resulted from inattentativeness or distraction. The Full Commission determined that the claimant refused to provide a post-accident urine sample for drug testing. The Full Commission also concluded from the evidence that the claimant was not following customary procedure when she placed her hand under the machine, and that the claimant's disregard for her safety in placing her hand under the machine, her inattentativeness once she placed her hand under the machine, and her refusal to submit to a urine drug test later that morning, each indicated that

she was impaired. The majority found that the claimant failed to prove by a preponderance of the evidence that her injury was not substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of a physician's orders.

In Andre Jefferson v. Munsey Products, Full Workers' Compensation Commission, Opinion filed April 11, 1997 (E405575), the claimant amputated several fingers after placing his hand in a die-cast machine to retrieve a push-bar that was jamming the machine. A drug screen on a urine sample collected after the accident tested positive for metabolites of cocaine and marijuana. The claimant contended that he was following customary procedure when his injury occurred, and that the machine malfunctioned. However, after assessing the conflicting testimony, the Commission found that the claimant was not following customary procedure and that the machine had not malfunctioned. The majority found that the claimant failed to rebut the presumption that the accident or injury was substantially occasioned by the use of illegal drugs.

Likewise, in Georgia Shoe v. Custom-Pak, Inc., Full Workers' Compensation Commission, Opinion filed July 12, 2005 (F308394), the claimant sustained a wrist fracture when

she failed to shut down and lock out a molding machine before attempting to remove plastic flashing entangled in a conveyor belt. A drug test performed the same day as the accident was positive for marijuana metabolites. The claimant was the only person to testify first-hand regarding her drug use, or non-use, and the majority of the Commission did not find the claimant's testimony credible. The claimant acknowledged that what she was doing that evening was contrary to what she was trained to do. In addition, the claimant acknowledged that it was mandatory for her to lock-out of her machine before attempting to remove plastic flashing, and that failure to do so was grounds for termination. The majority concluded that the claimant's actions showed that her judgment was impaired at the time of her injury. The majority found that the claimant failed to overcome the rebuttable presumption that her accident was occasioned by the use of illegal drugs.

In Bice v. Waterloo Industries, Inc., 71 Ark. App. 1, 26 S.W.3d 129 (2000), the claimant broke the index, middle, and ring fingers of her right hand when her hand was caught in the press that she was operating. The testimony of the plant supervisor and the safety supervisor established that the press had a "double pinch point", that another person

had been injured within twenty-four hours running the same machine, that the claimant's accident was caused by the press's double pinch point, and that after the accident the company had put a double hand control button on the press. The Court concluded that any presumption created by the presence of codeine and methamphetamine in a drug test two days after the accident was rebutted.

Finally, in Barry Ward v. Hickory Springs Mfg. Co., Full Workers' Compensation Commission, Opinion filed March 22, 2006 (F301504), a majority of the Full Commission found that the claimant sustained a compensable degloving injury of his genitalia when his clothing became caught in an industrial machine as he attempted to adjust a "trailing bar" near the end of his shift. A post-accident drug test was positive for cannabinoids and opiates. Testimony at the hearing indicated that employees were supposed to turn off the machine before adjusting the tubes, but hardly anyone ever did so. The majority opinion also noted that a kill switch was located just two feet from the claimant at the moment the claimant's clothes became entangled. Nevertheless, the majority found that there was no evidence indicating that the claimant's failure to use the kill switch was in any way related to marijuana intoxication. Three witnesses,

including a co-worker, the claimant's lead man, and the plant manager, each testified that each never thought the claimant was under the influence. Under these circumstances the majority concluded that the claimant rebutted the presumption that his injury was substantially occasioned by the use of illegal drugs.

After reviewing the record in the present case in light of prior precedent, I find the circumstances in the present case similar to the circumstances involving the industrial injury at issue in Barry Ward v. Hickory Springs Mfg. Co., Full Workers' Compensation Commission, Opinion filed March 22, 2006 (F301504), and I find that the claimant in the present case has also established by a preponderance of the evidence in this record that her injury and accident were not substantially occasioned by the use of marijuana.

In this regard, the claimant in the present case testified that she smoked her marijuana two days before her accident, and as in Ward, the only co-worker testimony presented in this case regarding Ms. Childer's appearance on the night of the accident indicated that the claimant did not appear intoxicated in the parking lot before going in to work. In the present case, as in Ward, the claimant was engaged in a potentially unsafe procedure when her injury

occurred. However, the evidence also indicates that the claimant and at least one other wire winder operator used this same unsafe procedure routinely. Consequently, the record does not support a conclusion that the claimant's attempt to jog the machine with the start button, rather than using the hand wheel, was the result of impaired judgment.

In the present case, also as in Ward, the claimant had available a button to press when the accident occurred to stop the machine. However, as in Ward, there is no evidence in the record, either through the safety department's post-accident investigation mentioned by Mr. Sparks or otherwise, inconsistent with the claimant's explanation that she hit the stop button essentially immediately, but her finger tip was severed in the glove as she contemporaneously jerked her hand away.

I note that a photograph in the record identifies the type of gloves that the claimant testified she was requested to wear on the date of her accident, and I note Mr. Sparks' testimony that these do not appear to be the type of gloves used by wire winders. (T. 61) However, Ms. Wood's testimony corroborated the claimant's testimony regarding Ms. Woods also using the same gloves as requested, and Mr. Sparks

testified that he had no knowledge what the claimant was told about gloves (T. 67). To the extent that the respondents perhaps imply that the claimant picked up and wore the wrong type of gloves that night due to impaired judgement, I note that there is simply no evidence in the record to indicate that the claimant was wearing a different type of glove that night than the type of gloves she was wearing on other previous nights at work, or gloves different from what at least one other wire winder operator was wearing at work.

I have also considered Mr. Sparks' testimony that the claimant would have had between two and five seconds to clear her hand from the bobbin after hitting the start button before the wire winder reached full speed. (T. 58) In considering the potential significance of this testimony, I initially note that all witnesses agreed that the time to reach full speed varies from machine to machine. I also note that Mr. Sparks has never run this wire winder machine himself (T. 76), and that Mr. Sparks testified that he has never actually timed it (T. 58) In addition, I again note that Mr. Sparks was not part of the investigation team. (T. 73) Ms. Wood, who had actually run this machine, testified that this particular machine was a faster machine. (T. 41-

42) Finally, I note that the benefit of having two to five seconds to get the left hand fingers out of harm's way before the machine reaches full speed is obviously lost if the operator's glove becomes entrapped between the wires and the bobbin after hitting the start button. The claimant's testimony quoted above, the accident description in Eaton's Injury and Illness Report (C. Exh. 2), and Mr. Spark's understanding after the accident (T. 73) all indicate that the claimant's glove in fact became trapped between the wire and the bobbin, resulting in a severed left ring fingertip. Again, I see no relevant difference between the circumstances surrounding the industrial accident in Ward where the claimant's clothes became entangled in machinery and the circumstances in the present case where the claimant's glove became entangled in machinery and wire.

I also note that there appears to be no dispute that the claimant's fingertip amputation arose out of and in the course of her employment duties, was caused by a specific incident, and is identifiable by time and place of occurrence. In addition, the injury is established by medical evidence supported by objective medical findings, including but not limited to the emergency room objective assessment of amputation at Baxter Regional Medical Center

on September 15, 2005. Consequently, for all of the reasons discussed herein, I find that the claimant has established by a preponderance of the evidence in the record that she sustained a compensable left ring finger injury on September 15, 2005.

The claimant's work related injury at issue is a finger injury, therefore the claimant's injury is considered a scheduled injury. See Ark. Code Ann. §11-9-521(a). For a scheduled injury, a claimant is entitled to temporary total disability benefits until the healing period ends or until the claimant returns to work, whichever occurs first.

Wheeler Construction Co. v. Armstrong, 73 Ark. App. 146, 41 S.W.3d 822 (2002). The healing period continues until the injured employee is as far restored as the permanent character of the injury will permit. The healing period ends once the underlying condition has become stable and when nothing further in the way of medical treatment will improve the permanent character of the injury. Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982). The persistence of pain is not sufficient, by itself, to extend the healing period provided that the underlying condition has stabilized. Id.

The claimant seeks a closed period of temporary disability from September 15, 2005 through November 28, 2005. After treating in the emergency room on September 15, 2005, the claimant came under the care of physicians at Mountain View Specialty Clinic on September 16, 2005. Dr. Hegenbart put the claimant that day in off work status. (C. Exh. 1 p. 21) The claimant was officially terminated by Eaton on October 2, 2005. (R. Exh. 1 p. 5) Dr. Varela performed a full thickness skin graft on September 19, 2005. (C. Exh. 1 p. 19). Dr. Varela's November 28, 2005 examination indicated that the graft was slowly granulating, and Dr. Varela requested a follow-up in four to six weeks. (R. Exh. 1 p. 17) Dr. Varela also released the claimant to return to work with no restrictions on what I interpret from Dr. Varela's nearly illegible handwriting to be November 29, 2005. (C. Exh. 1 p. 22) I interpret the nearly illegible release date to be November 29 (not November 25), since the only other document from Dr. Varela in the record from November was his typed clinic note dated November 28, 2005. Therefore, for the reasons discussed herein, I find that the claimant has established that she is entitled to the period of temporary total disability that she seeks from September of 2005 through November 28, 2005, except that the Arkansas

Workers' Compensation Law excludes the date of injury from a temporary disability award. See Ark. Code Ann. § 11-9-501(a)(1) and (3). Consequently, I find that the claimant's appropriate award of temporary total disability compensation is September 16, 2005 through November 28, 2005.

In addition, after reviewing the entire record, I find that the medical treatment documented in the record from September 15, 2005 through November 28, 2005, was all reasonably necessary to treat the claimant's compensable fingertip amputation injury.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The employee-employer-carrier relationship existed on September 15, 2005 and at all pertinent times hereto.
3. The respondents have controverted the claim in its entirety.
4. The claimant's average weekly wage of \$495.36 entitles her to a TTD rate of \$330 per week and a PPD rate of \$248 per week if this claim is found compensable.

5. The claimant has established by a preponderance of the evidence that her accident and the injury that she sustained on September 15, 2005 were not substantially occasioned by the use of marijuana.
6. The claimant has established by a preponderance of the evidence that she sustained a compensable left ring finger injury on September 15, 2005.
7. The claimant has established by a preponderance of the evidence that she is entitled to a period of temporary total disability compensation for September 16, 2005 through November 28, 2005.
8. The claimant has established by a preponderance of the evidence that all of the medical treatment documented in the record between September 15, 2005 and November 28, 2005 was reasonably necessary for treatment of her compensable left ring finger injury.

AWARD

The respondents are directed to pay benefits in accordance with the findings of fact set forth herein. All accrued sums shall be paid in a lump sum without discount and this award shall earn interest at the legal rate until paid, pursuant to A.C.A. §11-9-809, and Couch v. First State

Bank of Newport, 49 Ark. App. 102, 898 S.W.2d 57 (1995), and Burlington Industries, et al v. Pickett, 64 Ark. App 67, 983 S.W.2d 126 (1998); reversed on other grounds 336 Ark. 515, 988 S.W.2d 3 (1999).

The claimant's attorney is entitled to a 25% attorney's fee on the indemnity benefits awarded herein, one-half of which is to be paid by the claimant and one-half to be paid by the respondents in accordance with Ark. Code Ann. § 11-9-715 and Death & Permanent Total Disability Trust Fund v. Brewer, 76 Ark. App. 348, 65 S.W.3d 463 (2002).

IT IS SO ORDERED.

MARK CHURCHWELL
Administrative Law Judge