

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F601376

STEPHEN DICKEY	CLAIMANT
SUPERIOR INDUSTRIES	RESPONDENT
CROCKETT ADJUSTMENT, INSURANCE CARRIER	RESPONDENT

OPINION FILED SEPTEMBER 22, 2006

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

Claimant represented by EDDIE WALKER, JR., Attorney, Fort Smith, Arkansas.

Respondents represented by CURTIS NEBBEN, Attorney, Fayetteville, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on July 10, 2006, in Springdale, Arkansas. A pre-hearing order was entered in this case on April 25, 2006. This pre-hearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. Immediately prior to the commencement of the hearing, the parties agreed that they had now arrived at the appropriate weekly compensation rates. A copy of the pre-hearing order, with that clarification 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 January 31, 2006, the relationship of employee-self insured employer-third party carrier existed between the parties.
2. The appropriate weekly compensation rates are \$488.00 for

total disability and \$366.00 for permanent partial disability.

3. The claimant is controverted in its entirety.
4. The claimant was involved in an accident or incident on January 31, 2006.

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

1. whether the claimant sustained "compensable injuries" to his head, back, and right lower extremity in the accident of January 31, 2006.
2. The claimant's entitlement to the payment of medical expenses, temporary total disability from February 1, 2005 through a date yet to be determined, and attorney's fees.
3. The effect of Ark. Code Ann. §11-9-102(4)(B)(iv) on compensability of the claim.

In regard to these issues, the claimant contends:

- a. The claimant contends that he sustained compensable injuries on January 31, 2006 involving his head, back and right lower extremity.
- b. The claimant contends that he is entitled to temporary total disability benefits from February 1, 2006 until a date yet to be determined and reasonably necessary medical treatment. Further, the claimant contends that although the respondents ultimately controverted this claim, they authorized surgery that he underwent regarding his right ankle and that the respondents therefore should be liable for payment of that surgery regardless of whether the claim is held to be compensable.

c. The claimant contends that his attorney is entitled to an appropriate attorney's fee.

In regard to these issues, the respondents contend:

"The respondents admit that on or about January 31, 2006, a conveyor which the claimant was working on fell upon him. The claimant testified positive for methamphetamine. The respondents contend the accident was substantially occasioned by the use of illegal drugs and therefore the claimant did not sustain a compensable injury pursuant to Ark. Code Ann. §11-9-102(4)(b)(iv)."

DISCUSSION

_____The parties have stipulated that the claimant was involved in a specific employment related accident or incident on January 31, 2006. It is also obvious that the claimant sustained physical injuries to various portions of his body in this accident or incident. The actual dispute arises over whether these injuries are specifically excluded from the category of "compensable injuries" by the provisions of Ark. Code Ann. §11-9-102(4)(B)(iv), which states:

"(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 a 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 a physician's orders.

(c) Every employee is deemed by his or her performance of services to have implicitly 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 a physician's orders did not substantially occasion the injury or accident."

After consideration of the evidence presented, it is my opinion that the respondent's have proven, by the greater weight of the credible evidence, the presence of the illegal drug methamphetamine in the claimant's body, at the time of his accident and injury. The evidence presented shows that a urine sample was collected for drug testing by medical personnel at St. Mary's Hospital at 3:15 a.m. on January 31, 2006. This would have been approximately two hours after his arrival at that facility and three hours after the accident. Testing performed on this specimen was positive for both opiate derivatives and amphetamines. The opiate derivatives in the claimant's system is adequately explained by the pain medication that he had been given by ambulance and emergency room personnel. However, no medication was given the claimant after his injury that would explain the presence of amphetamines particular methamphetamine, in the claimant's system.

At the hearing, the claimant acknowledged that he had taken illicitly obtained methamphetamine prior to his accident and injury. However, it was his testimony that he last took this substance approximately three days prior to the accident and injury. He also indicated that he took a "Sudafed" that he had

obtained from a friend approximately two days prior to the accident and injury. Although the claimant testified that he did not believe himself to have a problem with methamphetamine, he clearly has difficulties with substance abuse. In his testimony, he conceded that he had three prior DWI arrests, two prior public drunk arrests, and two marijuana arrests. He acknowledged that, when he was fired, he may have told the respondent's HR Director that he had had a problem with methamphetamine, in the past.

As the respondent has met its burden of proving the presence of illegal drugs in the claimant's body, at the time of his accident and injury, the burden now shifts to the claimant. The claimant must prove by a preponderance of the evidence that his accident and injury, on January 31, 2006, was not "substantially occasioned" by the presence of the illegal drug in his system.

It is not disputed that the claimant's injuries occurred when a moving chain came off a sprocket allowing a conveyor mechanism to fall, striking the claimant and causing his injuries. There is no evidence that the claimant's actions played any part in causing the chain to come off the sprocket or the conveyor mechanism to fall. The claimant's supervisor, Allen Jensen, testified that a plate had now been placed by the sprocket to prevent the chain from coming off.

However, the evidence presented clearly proves that the claimant could have prevented the chain from coming off the sprocket and the conveyor mechanism falling at the time that he was actually located underneath the conveyor mechanism.

In his testimony, the claimant describes his activities and the events leading up to the accident on January 31, 2006. He testified that he had been assigned to correct a problem that had arisen with the assembly line which resulted from one moveable conveyor assembly failing to properly align with an adjoining series of three conveyors. He concluded, at that time, that this problem could be solved by adjusting an alignment switch located under this conveyor system. He stated that there was a protective "cage" built underneath the moveable conveyor and the three adjoining conveyors to prevent individuals from being under this machinery. Access to the adjustment switch could only be obtained by going through a locked gate into this "cage." When he first attempted to adjust this switch, the claimant testified that he removed the lock from the gate and either placed this lock or another lock that he had been assigned for this purpose on what he believed to be the "lock out" mechanism of the conveyor assemblies. However, he was not able to properly reach and adjust this switch with the conveyor assemblies in their current positions. He then got out from other these assemblies, closed the gate, and took the lock off the "lock out" mechanism for the conveyors. He had the operator raise the moveable or "elevator" conveyor line, in hopes of obtaining better access to adjust the automatic switch. Once this line was raised to its top position, he re-entered the cage to see if this switch was now in position to allow him to work on it. However, when he got underneath the conveyors this second time, he did not move the safety shut off to

the "lock out" position and replace the lock. While he was checking on the position of the automatic switch, the chain operating the moveable conveyor continued to turn, until it came off the sprocket. This allowed the conveyor assembly to fall on the claimant and caused his injuries.

It is the general consensus of all the witnesses (including the claimant), that maintenance employees, such as the claimant, are not to work on any machinery unless it has been "locked out" or rendered totally inoperable. Individual locks are even assigned to maintenance personnel for this express purpose. The greater weight of the credible evidence further shows that the January 31, 2006 accident and injuries would not have occurred had the claimant "locked out" the conveyor components prior to going back underneath them.

Clearly, the claimant could have prevented the accident and his resulting injuries by the use of reasonable caution and by the following standard procedures. To that context, the accident and his resulting injuries were substantially occasioned by his own actions in failing to "lock out" the machinery before placing himself in an obviously dangerous position underneath this machinery. The danger of this area is emphasized by the fact that this area was not only restricted, but enclosed in a cage. Whether his failure to do so is the result of his judgement being impaired by the methamphetamine in his system or was merely carelessness is a difficult question.

The respondent has presented expert evidence in the form of

the reports of Dr. Harry F. Simmons. Dr. Simmons is not only a medical doctor, but is also an expert in a toxicology. Unfortunately, Dr. Simmons has no clear cut opinion on whether the claimant was impaired by the methamphetamine in his system at the time of the employment-related accident. In his report he states:

“The analytical finding (the presence of methamphetamine in the claimant’s system at a level of 585 nanograms per millimeter) is supportive of methamphetamine related impairment at the time of the accident but by itself is insufficient to prove the point.”

Dr. Simmons goes on to state that the methamphetamine could remain in the claimant’s urine at these levels for several days after the impairing effects of the drug had “dissipated.” It was essentially his opinion that he could not really tell from the information he had been given whether the methamphetamine in the claimant’s system did or did not play a role in the claimant’s accident.

On the other hand, the claimant has presented in his own testimony to the effect that he had not taken any methamphetamine for three days prior to the accident and was not experiencing any effects from the drug at the time of the accident. Not only would the claimant’s testimony be somewhat suspect, since he is clearly an interested party, but a drug or alcohol impaired individual is usually the last person to recognize and appreciate any impairment.

The claimant has also offered the testimony of his supervisor, Allen Jensen. Mr. Jensen testified that almost immediately prior to the accident, on January 31, 2006, he performed a 90 day evaluation and interview with the claimant. It was his testimony that during this interview the claimant appeared alert and attentive. He

further testified that the claimant appeared and acted no differently than he had during his entire 90 day period of employment. Although he conceded that he was not familiar with the effects of methamphetamine impairment, he clearly noted no obvious symptoms of physical or mental dysfunction, such as slurred speech, instability of gait, unresponsive or nonsensical statements, etc. However, the judgmental error which resulted in the claimant failing to "lock out" the machinery the second time he placed himself in a position of risk, would not require severe mental impairment or dysfunction.

After consideration of all the evidence presented, I find myself in the same position as Dr. Simmons. I cannot say with any degree of certainty from the evidence presented that the methamphetamine found in the claimant's body at the time of his accident did or did not substantially occasion the accident and injuries on January 31, 2006. However, under the provisions of Ark. Code Ann. §11-9-102(4)(B)(iv)(d), the burden rests upon the claimant to prove by a preponderance of the evidence that this illegal drug in his system did not substantially occasion the accident or injury. This he has failed to do.

Therefore, I have no alternative but to find that the claimant's injuries on January 31, 2006, are expressly excluded from the category of "compensable injuries," by the provisions to Ark. Code Ann. §11-9-102(4)(B)(iv). No benefits can be awarded to the claimant, under the Arkansas Workers' Compensation Act, for these injuries, and this claim for such benefits must be denied.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On January 31, 2006, the relationship of employee-self insured employer-third party administrator existed between the parties.
3. On January 31, 2006, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$488.00 for total disability and \$366.00 for permanent partial disability, should such benefits have been appropriate.
4. On January 31, 2006, the claimant sustained physical injuries to various portions of his body when he was struck by a falling conveyor assembly at the respondent's plant.
5. At the time of this accident and the claimant's resulting injuries, there was present in the claimant's body the illegal drug methamphetamine. The presence of this drug in the claimant's system could have reasonably played a substantial role in causing the claimant's accident and resulting injuries. A preponderance of the evidence fails to show that this illegal drug did not substantially occasion the claimant's accident and resulting injuries. Therefore, under Ark. Code Ann. §11-9-102(4)(B)(iv)(d), the claimant can not be awarded to benefits or compensation for his injuries.

6. The respondent has denied that any injuries sustained by the claimant, in the accident on January 31, 2006, represent "compensable injuries" under the Act and have controverted the claimant's entitlement to any benefits.

ORDER

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

IT IS SO ORDERED.

MICHAEL L. ELLIG
Administrative Law Judge

