

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F609619

JUAN CARDONA

CLAIMANT

TEC, THE EMPLOYMENT COMPANY

RESPONDENT

LIBERTY MUTUAL INSURANCE COMPANY
INSURANCE CARRIER

RESPONDENT

OPINION FILED SEPTEMBER 28, 2007

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in Fort Smith, Sebastian County, Arkansas.

Claimant represented by JOHN VERKAMP, Attorney, Charleston, Arkansas.

Respondents represented by JEFFREY RICKARD, Attorney, Fort Smith, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on August 14, 2007, in Fort Smith, Arkansas. A pre-hearing order was entered in this case on April 25, 2007. 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. A copy of this pre-hearing order was made Commission's Exhibit No. 1 to the hearing.

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

1. On August 16, 2006, the relationship of employee-employer-carrier existed between the parties.
2. The appropriate weekly compensation benefits are \$187.00 for total disability and \$154.00 for permanent partial disability.
3. The claim is now controverted in its entirety.

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 left fingers and thumb on August 16, 2006.
2. whether the claimant's injuries are expressly excluded from the statutory definition of compensable injuries by Ark. Code Ann. §11-9-102(4)(B)(iv).
3. The claimant's entitlement to the payment of medical expenses, temporary total disability benefits from August 17, 2006 through a date yet to be determined, and attorney's fees.

In regard to these issues, the claimant contends:

"The claim is compensable and all reasonable necessary related medicals and compensation should be paid. The claim has been controverted in its entirety."

In regard to these issues, the respondents contend:

"The respondents will contend that the claimant's injury does not meet the definition of a compensable injury under the Arkansas Workers' Compensation Act. Specifically, without waiving other defenses, the respondents contend that the claimant's injury was substantially occasioned by the use of illegal drugs."

DISCUSSION

_____ On August 16, 2006, the claimant unquestionably sustained crush injuries to his left thumb and index finger. These fingers are clearly "established" by medical evidence, which is supported by "objective findings". Further, these injuries occurred on the

employer's premises, during the claimant's regular working hours, and while the claimant was performing his assigned employment duties. These injuries were the result of a specific incident, are identifiable by time and place of occurrence, caused both internal and external physical harm to the affected portion of the claimant's body, required immediate medical services, and resulted in disability. Thus, unless this injury is expressly excluded from the category of "compensable injuries", by Ark. Code Ann. §11-9-102(4)(B)(iv), it would otherwise satisfy all of the statutory requirements for a "compensable injury" that are imposed by the Act. This is where the real controversy lies in this claim.

A drug test, which was performed upon the claimant immediately following his injury, was interpreted as revealing the presence of marijuana metabolites in his system. This test was also positive for opiates (expressly morphine). The presence of these drugs would raise the rebuttable presumption that they substantially occasioned the injury to the claimant's thumb and index finger. Thus, the burden would be shifted to the claimant to prove by a preponderance of the evidence that his injury was not occasioned by the presence of these drugs in his system.

While it is possible that the opiates-morphine may have been given the claimant after the injury, but before the drug screen test, there is no medical evidence presented to so indicate. Clearly, the claimant would not have been given marijuana between the time of the accident and the time of the drug screen.

To rebut the presumption that his injury was not substantially caused by the presence of illegal drugs in his system, the claimant testified that 4 days prior to his injury, he took 2 hits off a joint of marijuana. However, the presence of marijuana metabolites in excess of 500 nanograms per milliliter would clearly contradict this testimony. Such a level of marijuana metabolites would require significantly more than 2 “hits” 4 days prior to testing.

The claimant also offers the testimony of Anthony Hubbard, one of his supervisors at the time of the accident. Mr. Hubbard testified that on the date of the accident, he observed the claimant for approximately 15 minutes earlier that morning and that the claimant “seemed totally normal”. He also testified that he specifically directed the claimant not to place the parts into the rolling machine, because the parts were small and the claimant was new, both of which would have increased the risk of injury to the claimant.

The mere fact that the claimant may not have appeared visibly intoxicated or impaired, while certainly some evidence to rebut the presumption that the injury was not occasioned by the presence of drugs in the claimant’s system, is not conclusive. Physical and mental impairment can result well below the level of obvious intoxication.

The fact that the activity being performed is inherently dangerous and that the employee is unskilled in performing such activity, would also fail to refute the presumption that the presence of illegal drugs in the employee’s system was not a

substantial cause of the injury. In fact, such factors would only contribute to the likelihood that an injury would result with only minor drug induced impairment.

After consideration of all the evidence presented, it is my opinion that the claimant has failed to rebut the presumption that his injuries to his left thumb and index finger, on August 16, 2006, were substantially occasioned by the presence of illegal drugs in his system, at the time of these injuries. Thus, under the provisions of Ark. Code Ann. §11-9-102(4)(B)(iv), the claimant's injuries to his left thumb and index finger are expressly excluded from the category of "compensable injuries" by the provisions of this subsection.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas workers' Compensation Commission has jurisdiction of this claim.

2. On August 16, 2006, the relationship of employee-employer-carrier existed between the parties.

3. On August 16, 2006, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$187.00 for total disability and \$154.00 for permanent partial disability.

4. The respondents have proven by the greater weight of the credible evidence that the claimant had illegal drugs in his system at the time of the injuries to his left thumb and index finger on August 16, 2006. The claimant has failed to prove by the greater weight of the credible evidence that the presence of these illegal drugs did not substantially occasion his injuries. Therefore, under

the provisions of Ark. Code Ann. §11-9-102(4)(B)(iv), these injuries would not be “compensable injuries” within the meaning of the Act.

5. The respondents have denied that the injuries sustained by the claimant on August 16, 2006, represent “compensable injuries” 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.

MICHAEL L. ELLIG
ADMINISTRATIVE LAW JUDGE