

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F606305

BRYAN POWELL	CLAIMANT
ADVANCED ENVIRONMENTAL	RESPONDENT
INSURANCE COMPANY-STATE OF PENNSYLVANIA, INSURANCE CARRIER	RESPONDENT

OPINION FILED MARCH 16, 2007

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

Claimant represented by EVELYN BROOKS, Attorney, Fayetteville, Arkansas.

Respondents represented by JARROD PARRISH, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held on December 18, 2006, in Springdale, Arkansas.

A pre-hearing order was entered in this case on August 29, 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. 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. The Arkansas workers' Compensation Commission has jurisdiction of this claim.
2. On June 2, 2006, the relationship of employee-employer-carrier-TPA existed between the parties.

3. The appropriate weekly compensation benefits are \$368.00 for total disability and \$258.00 for permanent partial disability.

4. On June 2, 2006, the claimant sustained injuries to the index and middle finger of his left hand.

5. There is no dispute over the payment of medical expenses.

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's injuries to the index and middle finger of his left hand represent compensable injuries under the Act.

2. The claimant's entitlement to the payment of medical expenses, and permanent disability benefits.

In regard to these issues, the claimant contends:

"Claimant was injured on June 2, 2006. His left index and middle fingers were amputated above the knuckle on both fingers as a result of an accident at work involving a machine."

In regard to these issues, the respondents contend that the injuries to the claimant's fingers do not represent "compensable injuries" under Ark. Code Ann. §11-9-102(4)(B)(iv)(a).

DISCUSSION

_____ There is no doubt that on June 2, 2006, during regular working hours and on the employer's premises and while the claimant was performing his assigned employment position, the claimant suffered an accidental injury to the first and second fingers of his left hand. This injury resulted in the traumatic amputation of the

distal phalanges of these two fingers. The dispute centers over whether these injuries are expressly excluded from the category of “compensable injuries” by Ark. Code Ann. §11-9-102(4)(B)(iv).

This subdivision provides that when there is a showing by the respondent of the presence of alcohol, illegal drugs, or prescription drugs used in contravention of a physician’s orders in the claimant’s system, a rebuttable presumption is created that the injury or accident was substantially occasioned by the use of such alcohol, illegal drugs, or prescription drugs in contravention of a physician’s orders. The claimant must then rebut this presumption by proving by a preponderance of the evidence that his injury was not substantially occasioned by the presence of these substances, or excluded from the category of “compensable injuries”.

In the present case, the respondents have offered medical records to show that, on the claimant’s arrival at the Northwest Medical Center emergency room on June 2, 2006, a urine sample was taken. This urine sample was subsequently tested and revealed the presence of cocaine metabolites in the claimant’s system.

The laboratory report, dated June 4, 2006, also appears to indicate that a positive test was obtained for the specific opiate morphine. However, after review of all of the evidence, especially test documents, it appears that the positive result for the opiate morphine is in error. On the laboratory report itself (Respondents’ Exhibit No. 1, page 4) no initial positive findings for opiates, including both codeine and morphine is noted. On the supposed

“follow up” testing a value of 2000 ng/mL is recorded for both the opiates codeine and morphine. However, such this test result is indicated to be “negative” for codeine, but “positive” for morphine. More importantly, I would note that when the results of these tests were medically reviewed, the only test that was determined to be positive was the test for cocaine. The test for all opiates, including morphine, was indicated to be negative (Respondents’ Exhibit No. 1, page 3).

Therefore, I find that the respondents have proven by the greater weight of the credible evidence that, at the time of his accident and injury on June 2, 2006, the claimant had the metabolites of the illegal drug, cocaine, in his system, but did not have morphine present in his system. The presence of these cocaine metabolites is sufficient, in and of itself, to raise the presumption of Ark. Code Ann. §11-9-102(4)(B)(iv)(b). Thus, the burden shifts to the claimant to rebut this presumption.

From the claimant’s testimony, which appears credible, the claimant’s accidental injuries occurred when the hopper on the machine he was operating appeared to be stopped up. He testified that this occasionally happened when the pieces of plastic formed clumps that would not readily pass through the grate or screen over the blender. When he stuck his hand down into the plastic to force the clumps through the grate, he found that the grate had been previously removed and the absence of this grate or screen allowed his fingers to penetrate down into the area of the mixing blades. The claimant conceded that proper procedure dictated that the

machine be turned off and locked out before reaching into the hopper. However, he testified that he had observed other employees unstop the hoppers in the manner he attempted and without locking out the machinery. It was his further testimony that he was relying on the grate to protect his fingers. The record shows that immediately following the claimant's accident, all of the grates on the hoppers were welded down over the blades, so that they could not be removed. Clearly, had the grate been in place, at the time of the claimant's actions, his injury would not have occurred.

In his testimony, the claimant admitted that he had used the illegal drug cocaine approximately 30 hours prior to the accident. However, he further testified that at the time he began work, on June 2, 2006, and at the time of his accident, some 6 hours later, he was not feeling any effects from the cocaine.

Larry Carl Harris, the claimant's immediate supervisor and the lead man for the claimant's department, testified that he had observed and spoken to the claimant on more than 3 occasions, during the claimant's shift on June 2, 2006 and prior to the accident. He stated that, at these times, the claimant did not appear to be under the influence of any drugs or alcohol. He further testified that following the claimant's accident, he performed the required accident investigation. During this investigation, he was told by Hoby Brown (a co-employee) that he had removed the grate or screen from the hopper, prior to the accident. Based upon this investigation, Mr. Harris recommended

that the grates or screens be fastened down and that a lock out tag on the machine be required, in the future.

Josh Hinchliffe, the assistant plant manager for the respondent, testified that he, too, saw and talked to the claimant on several occasions during the claimant's shift, on June 2, 2006 and prior to the accident. He stated that the last of these occasions was approximately 15 to 20 minutes prior to the accident and that he talked to the claimant for approximately 30 minutes on this particular occasion. He stated that, although he was not familiar with the signs of cocaine intoxication, he noticed no abnormalities in the claimant's speech, balance, or logic during any of these various conversations.

The respondents have offered the report of Dr. Harry F. Simmons, dated October 14, 2006. In his report, Dr. Simmons indicates that the presence of cocaine metabolites in the claimant's urine could be compatible with the actual narcotic or "parent" compounds being present and in active circulation in the claimant's bloodstream at that time. However, he further stated that the presence of these cocaine metabolites would be equally compatible with the use of cocaine some 24 to 48 hours prior and after the effects of the actual drug or narcotic in the claimant's system had dissipated.

After consideration of all the evidence presented, it is my opinion that the claimant has presented sufficient evidence to rebut the presumption of Ark. Code Ann. §11-9-102(4)(B)(iv)(b). He has proven by the greater weight of the evidence that his accident

and injury was not substantially occasioned by his use of illegal drugs. In reaching this decision, I have considered that the drug testing performed on the claimant was erroneous, in regard to the existence of opiates in the form of morphine in the claimant's system at the time of his accident and injury. I am convinced that the evidence presented is not sufficient to establish the presence of this drug or narcotic in the claimant's system at the time of his employment related accident and injury. Although I find the evidence sufficient to raise the presumption of Ark. Code Ann. §11-9-102(4)(B)(iv)(b) in regard to the drug cocaine, the actual extent and even the presence of the intoxicating component of the drug cocaine in the claimant's system at the time of his employment related accident and injury, is questionable. Further, both the claimant's immediate supervisor and the assistant plant manager had ample opportunity to evaluate the claimant's level of mental and physical functioning on June 2, 2006, and neither of these individuals observed any indications of drug intoxication or impaired mental or physical functioning prior to the claimant's accident and injury. Although the claimant's injury was clearly in part partially due to the claimant's own negligence (in failing to lock out the machine prior to reaching into the hopper) such negligence or carelessness is not so reckless, as to, in and of itself, demonstrate impaired cognitive function due to the presence of drugs. The claimant could have reasonably relied on the protection of the grate or screen, when he placed his hand into the hopper.

Therefore, I find that the claimant's accidental injuries are not expressly excluded from the category of "compensable injuries" by the provisions of Ark. Code Ann. §11-9-102(4)(B)(iv)(a). I further find that the record shows that the employment related injuries to the claimant's first and second fingers meet all of the other criteria for a "compensable injury" set out in the Act, specifically, the requirements of Ark. Code Ann. §11-9-102(4)(A)(i) and (D). As a result, the claimant would be entitled to appropriate benefits under the Act for these "compensable injuries".

First, the claimant would be entitled to reasonably necessary medical services for these injuries, under Ark. Code Ann. §11-9-508. The record reveals that the medical services provided the claimant by and at the direction of the physicians at the Northwest Medical Center of Washington County and by and at the direction of Dr. Peter Tang were all necessitated by or connected with the claimant's compensable injuries and were medically appropriate. Thus, such medical services represent "reasonably necessary medical services" under Ark. Code Ann. §11-9-508. Thus, respondents are liable for the expense of these services, subject to the medical fee schedule established by this Commission.

The evidence further reveals that the claimant's healing period has ended and that the claimant has sustained a permanent physical impairment, due to the partial amputation of his first and second fingers. The evidence reveals that this amputation involved the entire distal or first phalange of both fingers (Claimant's

Exhibit No. 1, page 53). Therefore, pursuant to Ark. Code Ann. §11-9-521(b)(1) and Rule 099.12 of this Commission, the claimant would be entitled to one-half the value of the loss of the first and second fingers or 40 weeks of permanent partial disability benefits.

FINDINGS OF FACT & CONCLUSIONS OF LAW

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

2. On June 2, 2006, the relationship of employee-employer-carrier-TPA existed between the parties.

3. On June 2, 2006, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$368.00 for total disability and \$258.00 for permanent partial disability.

4. On June 2, 2006, the claimant sustained compensable injuries to the first and second fingers of his left hand. Specifically, the claimant has established the existence of these injuries by medical evidence, which is supported by objective findings. He has further proven by the greater weight of the credible evidence that these injuries arose out of and occurred in the course of his employment, were caused by a specific incident, are identifiable by time and place of occurrence, caused internal physical harm to his body, required medical services, and resulted in disability.

5. Although the respondents have presented sufficient evidence to raise the rebuttable presumption that the injuries to the claimant's fingers were substantially occasioned by the

presence of illegal drugs in the claimant's system, the claimant has rebutted this presumption by proving by the greater weight of the credible evidence that the employment related injuries to his fingers were not substantially occasioned by the presence of illegal drugs in his system at the time of the accident.

6. The medical services rendered to the claimant by and at the direction of physicians at the Northwest Medical Center of Washington County and by and at the direction of Dr. Peter Tang represent reasonably necessary medical services for the claimant's compensable injuries, under Ark. Code Ann. §11-9-508. Pursuant to the provisions of this subsection, the respondents are liable for the expense of these services, subject to the medical fee schedule.

7. The claimant has sustained a permanent physical impairment of 50% to the first finger and 50% to the second finger, as a result of his compensable injuries. He is entitled to permanent partial disability benefits for this impairment.

8. The respondents have denied the occurrence of any compensable injuries to the claimant's fingers on June 2, 2006, and have controverted this claim in its entirety.

9. A reasonable fee for the claimant's attorney is the maximum statutory attorney's fee on the controverted permanent partial disability benefits herein awarded.

ORDER

The respondents shall pay to the claimant permanent partial disability benefits for a permanent physical impairment of 50% to

the first finger and 50% to the second finger of his left hand or 40 weeks.

The respondents shall be liable for the expense of the reasonably necessary medical services provided to the claimant for his compensable injuries by and at the direction of the physicians at the Northwest Medical Center of Washington County and by and at the direction of Dr. Peter Tang. Such liability shall be limited by the Commission's medical fee schedule.

The respondents shall pay to the claimant's attorney the maximum statutory attorney's fee on the permanent partial disability benefits herein awarded. One-half of this fee is the obligation of the respondents in addition to such benefits. The remaining one-half of this fee is to be withheld by the respondents from such benefits.

All benefits herein awarded have heretofore accrued and are payable in a lump sum without discount.

This award shall bear the maximum legal rate of interest until paid.

IT IS SO ORDERED.

MICHAEL L. ELLIG
ADMINISTRATIVE LAW JUDGE