

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F604955

GERALD WARD	CLAIMANT
STRIBLING PACKAGING & DISPLAY	RESPONDENT
WESTPORT INSURANCE COMPANY, INSURANCE CARRIER	RESPONDENT

OPINION FILED JANUARY 19, 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 MICHAEL MAYTON, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on October 23, 2006, in Springdale, Arkansas.

A pre-hearing order was entered in the case on August 29, 2006. This pre-hearing order set out the stipulations offered by the parties and outlined the issues to 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 April 25, 2006, the relationship of employee-employer-carrier-TPA existed between the parties.
2. The appropriate weekly compensation benefits are \$321.00 for total disability and \$241.00 for permanent partial disability.

3. On April 25, 2006, the claimant sustained a compensable injury to his left ring finger.
4. There is no dispute over the payment of medical expenses or temporary disability benefits, at present.
5. The claimant's healing period ended on or about June 23, 2006.
6. The respondents have accepted liability for and have paid permanent partial disability benefits for a permanent physical impairment of 20 percent to the finger.

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

1. The claimant's entitlement to benefits under Ark. Code Ann. §11-9-505(a).
2. Attorney's fee.

In regard to these issues, the claimant contends that the claimant was injured on April 25, 2006. His left ring finger was injured when he was adjusting some trays and his finger was caught between the rollers.

In regard to these issues, the respondents contend:

1. All benefits to which the claimant is entitled have been paid and have not been controverted.
2. All temporary disability benefits to which the claimant is entitled have been paid and have not been controverted.
3. The related medical expenses have been paid and will continue to be paid.
4. The claimant has sustained a twenty percent (20%) anatomical impairment rating to his left ring finger which has been accepted by the respondents and is being paid.

### DISCUSSION

The sole issue for resolution by this Commission, at the present time, is whether the claimant is entitled to benefits provided by Ark. Code Ann. §11-9-505(a). This subsection provides for additional compensation whenever an employer refuses, without reasonable cause, to return an injured employee to work, where suitable employment is available within the claimant's physical and mental limitations. The burden rests upon the claimant to prove all of the requirements necessary to entitle him to benefits under Ark. Code Ann. §11-9-505(a).

First, the claimant must show that the respondent had an employment position "available" that was within his physical and mental limitations. This subsection does not require an employer to create an employment position or even to substantially change the requirements of a position in order to accommodate the claimant's physical and mental limitations.

The medical evidence shows that the claimant was initially released by his treating physician to return to light or limited duty, specifically one-handed work only. The claimant has offered no evidence that the employer had available a position within these rather extensive limitations. As previously stated, the Act does not require a respondent to create such an employment position.

However, the claimant was subsequently released, by his treating physician, to return to work with no physical restrictions or limitations, on June 23, 2006. Thus, at that time, the claimant was clearly physically and mentally capable of performing the same

employment position he held with the respondent at the time of his compensable injury. However, the claimant has offered no direct evidence to prove that at that time, the respondent's actually had any employment position open or available, including his old employment position. Although this is not the primary basis for my ruling in this case, the failure to prove this fact, alone, would be sufficient to deny an award of benefits under Ark. Code Ann. §11-9-505(a).

The record shows that prior to the claimant's full release to return to employment without restrictions, on June 23, 2006, his employment had already been terminated by the respondent. The evidence indicates that this decision was reached by the respondent, or about May 15, 2006. The respondent contends that the claimant was terminated because he was involved in three "avoidable" employment related accidents within the space of one year. The evidence presented supports this contention.

The first of the claimant's employment related accidents occurred on June 24, 2005. At that time, the claimant rear-ended a stopped vehicle while operating a company truck. The second employment related accident occurred on October 3, 2005. At that time, the claimant lost control of a tractor trailer truck (loaded with empty pallets) he was driving for the respondent. The truck and trailer ran off the road and overturned, causing extensive damage to the vehicle.

After the second motor vehicle accident, the respondent removed the claimant from his truck driving position. However, they

provided him with a production position as a machine operator. They also maintained his salary at a truck driver's rate. However, the claimant was expressly cautioned that, if he was involved in any more avoidable employment related accidents or accidents that were due to his own carelessness, within a one-year period, he would be terminated.

The third employment related accident occurred on April 25, 2006, and resulted in the compensable injury giving rise to this claim. The evidence shows that this accident and injury occurred when the claimant was attempting to clear cardboard that had become stuck in the machine that he was operating. With the machine still running, he reached into the machine and grabbed the piece of cardboard and lifted up on it. The piece of cardboard then caught the rollers of the machine and pulled his hand in between the rollers. This smashed or crushed the tip of his left ring finger, which required subsequent amputation.

The claimant conceded, in his testimony, that he could have turned the machine off to clear it, but didn't. The reason he gave for this action was that to turn the machine off sometimes messes up the machine's operation, causing delay and reducing production. He testified that this would cause his immediate supervisor, Lee Richmond, to become upset.

However, Mr. Richmond testified that he had specifically instructed the claimant to shut down the machine before attempting to clear it. He stated that this was standard operating procedure and that the shut off button was within one to one and a half feet

of the claimant's work station. He denied that he had ever gotten upset if the machine was shut down to clear it. He testified that following this procedure only takes a few seconds and would not substantially affect production.

After consideration of all the evidence presented, it is my opinion that the claimant has failed to prove by the greater weight of the credible evidence that his termination by the respondent or the respondent's refusal to return him to employment was "without reasonable cause." In fact, the greater weight of the credible evidence presented shows that the respondent did have reasonable cause for refusing to return the claimant to its employ. For this reason, Ark. Code Ann. §11-9-505 is not applicable to the facts in the present claim, and the claimant is not entitled to benefits provided by this subsection. His request for such benefits must be denied and dismissed.

#### FINDINGS OF FACT & CONCLUSIONS OF LAW

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

2. On April 25, 2006, the relationship of employee-employer-carrier-third party administrator existed between the parties.

3. On April 25, 2006, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$321.00 for total disability for \$241.00 for permanent partial disability. Such stipulated disability rates would yield an average weekly wage of \$481.50.

4. On April 25, 2006, the claimant sustained a compensable injury to his left ring or third finger.

5. There is no dispute at the present time, over the payment of medical expenses or temporary total disability benefits.

6. The claimant's healing period from the effects of this compensable injury ended on or about June 23, 2006.

7. The claimant has failed to prove by the greater weight of the credible evidence that he is entitled to any benefits under Ark. Code Ann. §11-9-505(a). Specifically, he has failed to prove that the respondent refused without reasonable cause to return him to employment, or even that the respondent had suitable employment available. The respondent's refusal to return the claimant to suitable employment was based upon reasonable cause.

8. The respondents have denied the claimant's entitlement to any benefit under Ark. Code Ann. §11-9-505(a).

ORDER

Based upon my foregoing findings and conclusions, I have no alternative but to deny and dismiss the claim for additional benefits, under Ark. Code Ann. §11-9-505(a).

The respondents remain liable for all appropriate benefits under the Act for the claimant's compensable injury of October 25, 2006.

IT IS SO ORDERED.

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MICHAEL L. ELLIG  
ADMINISTRATIVE LAW JUDGE