

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F601376

STEPHEN DICKEY, EMPLOYEE	CLAIMANT
SUPERIOR INDUSTRIES, EMPLOYER	RESPONDENT
CROCKETT ADJUSTMENT, CARRIER	RESPONDENT

OPINION FILED JUNE 18, 2007

Upon review before the FULL COMMISSION, Little Rock, Pulaski County, Arkansas.

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

Respondent represented by HONORABLE HONORABLE CURTIS NEBBEN, Attorney at Law, Fayetteville, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

The claimant appeals from a decision of the Administrative Law Judge filed September 22, 2006.

The Administrative Law Judge entered the following findings of fact and 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.

We have carefully conducted a de novo review of the entire record herein and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings of fact made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

Thus, we affirm and adopt the decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

In an opinion dated September 22, 2006, an Administrative Law Judge found that the claimant failed to establish a compensable injury. The Majority now affirms and adopts this decision as their own. Based on my de novo review of the record, I find the Majority errs and must now respectfully dissent.

The claimant was injured in an accident which occurred on January 31, 2006. At that time, the claimant was employed as a maintenance man for the respondent-employer in their manufacturing facility. In response to a complaint from a machinery operator, the claimant undertook to make adjustments to a conveyor belt system.

The machinery in question was a three-tiered conveyor belt system, with an elevator that would move different levels. Apparently, the elevator was not stopping at the correct spot for one of the conveyor belt tiers which was causing problems. After observing operation of the machine, the claimant determined that an adjustment to the

elevator needed to be made. Access to the controls to make this adjustment was in an area blocked off from normal access and was referred to by the witnesses as a cage. The claimant unlocked the gate which allowed access into the cage and then used a lock to lock out the machine so that it could not operate. After determining that the elevator was in a position which blocked access to the controls, the claimant left the cage and removed the lock on the machine so that it could once again operate. He then had the machine operator raise the elevator to a different level so that he would be able to have access to the adjustment controls. The claimant testified that he re-entered the cage to see if the elevator had been raised sufficiently so that he could make the necessary adjustments. However, he did not lock out the machine again because he stated he was not yet ready to work on it, but was merely observing to see the alignment of the machine. The testimony is not clear on whether the machinery was still running while the claimant was attempting to observe it or whether the machine operator turned it on while he was underneath the equipment. In

either event, a pulley belt on the conveyor came off, causing the conveyor system to fall on the claimant. This caused him to sustain minor injuries to his head and ribs and a severely broken ankle. The claimant was transported to a local hospital for emergency medical treatment and eventually underwent surgery to repair his ankle.

The dispute in this case arose when the respondent received a report detailing a post-injury drug test given to the claimant. According to that test, the claimant was positive for the presence of methamphetamine in his system. (The test also discovered morphine, but its presence was accounted for by the administration of that drug by medical personnel prior to the drug test). Upon receipt of the toxicology report, the respondent controverted this case relying upon Ark. Code Ann. §11-9-102 (4) (B) (iv). That section provides that the definition of a compensable injury does not include:

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

That section then goes on to provide that if such intoxicants are found in the claimant's body, then a rebuttable presumption is created that the injury or accident was substantially occasioned by the intoxicating compound.

There is no dispute that the urine sample the claimant provided at the hospital was positive for the presence of methamphetamine. The claimant admitted that he had consumed that drug three days prior to his compensable injury. For the purposes of this decision, it is, therefore, presumed that the methamphetamine in the claimant's system substantially occasioned his compensable injury. However, the presumption is rebuttable if the claimant can show that the intoxication did not, in fact, occasion the accident.

I believe that the facts presented in evidence in this case are sufficient to rebut the presumption of the claimant's intoxication. The facts of this case are almost identical to the recent Court of Appeals decision of Ward v. Hickory Springs Manufacturing Company, ___ Ark. App. ___,

___ S. W. 3d (January 31, 2007). In that decision, the Court of Appeals affirmed this Commission's award of benefits (See, Ward v. Hickory Springs Manufacturing Company, Full Commission Opinion, March 22, 2006, F310154). When that case was before us, we reversed an Administrative Law Judge who had found that a claimant had not rebutted the intoxication presumption raised by a positive drug screen. Just as is the case here, the claimant was attempting to repair a malfunctioning machine, but did not follow the lockout procedures in de-activating the equipment before he began working on it. His clothing became entangled in the machine and he was severely injured. During the hearing, the claimant frankly admitted that he had not used common sense. In finding that the claimant had rebutted the presumption, we noted that his co-workers had not thought that the claimant was impaired or displaying any unusual behavior during his work day prior to his injury. We then concluded that there was simply no evidence that any intoxication caused by the claimant's drug use was in any way related to his failure to either turn off the machine

prior to working on it or using an available kill switch after he became entangled in it.

In the present case, the evidence is very similar. This claimant was attempting to repair the malfunctioning conveyor belt elevator and did not follow the proper lockout procedures to disable the machine. However, the claimant testified that he did not use the lockout procedure because he was not prepared to actually work on the machine at the time the accident happened. He merely looked into the device to see if his co-worker had raised the elevator to the correct height so that he could reach the adjustment controls. The undisputed testimony was that the claimant had properly engaged the machine's lockout when he had attempted to adjust it earlier. There is simply no evidence presented that the claimant's error in not locking out the machine again was in any way associated with whatever intoxicants may have been in his system.

There was also testimony provided by Allen Jensen, who testified that he was the claimant's immediate supervisor on the date on his injury. According to

Mr. Jensen, immediately prior to the accident happening, he had had a face-to-face discussion with the claimant, lasting approximately 20 minutes. The discussion was a performance evaluation performed because the claimant had just completed his 90-day probationary period. According to Mr. Jensen, the claimant did not appear to be in any way impaired or intoxicated and was apparently in full possession of his faculties. Mr. Jensen reported that the claimant had been doing well and had recommended that he receive a raise as a result of his performance to date.

Also significant is the report from Dr. Henry Simmons, a toxicologist who has often provided testimony in other cases of this nature. In discussing whether the level of methamphetamine found in the claimant's urine would result in any actual impairment, Dr. Simmons stated as follows:

The more complex portion of the interpretation lies in determining the functional significance of the result since methamphetamine may remain in the urine for at readily measurable levels for several days after its effects have dissipated. Although there is no doubt that abuse of methamphetamine can impede

making safe decisions and precipitate some accidents, its presence in urine proves only that the donor absorbed the drug at some point and excreted it in urine at or above the cut off levels on the assays at the time of collection. Urine tests are not equivalent to those of blood that detect circulating drugs that actually are "in the system" exerting an effect. Thus, although the unambiguous presence of methamphetamine in Mr. Dickey's urine on the day of the accident certainly supports the conclusion that the drug played a role in the accident, alone it is insufficient to prove it. It is also not possible under such circumstances for him to prove scientifically that he was not under the influence of the drug at the time of the accident.

As Dr. Simmons stated, it simply cannot be said that the methamphetamine detected in the claimant's system caused any impairment. Furthermore, to rely on the outcome of the test is to hold the claimant to an impossible standard as Dr. Simmons has indicated that there is no scientific way to show that the claimant was not intoxicated in this instance. Further, the testimony of Mr. Jensen was very clear that the claimant did not appear to be in any way impaired during their lengthy conversation. Further, the

way in which the claimant was injured indicates more of a simple lapse in judgment and not any impairment. Especially when it is considered that the claimant had only been employed for 90 days and, according to Mr. Jensen, needed some additional training.

It is apparent that the claimant rebutted the presumption that the intoxicant found in his system played a role in his injury. While it is true that the claimant erred in not properly locking out the equipment he was working on, it appears to me that this was a simple error with unfortunate consequences. The claimant's immediate supervisor, in a face-to-face discussion with the claimant over an important matter, did not note any impairment or any unusual behavior from the claimant. Likewise, Dr. Simmons was of the opinion that the amount of methamphetamine discovered in his system was not sufficient to establish that he had any impairment. Additionally, considering the claimant's inexperience with his job, it is not surprising that he might have made the mistake of not locking the machine when he did not actually intend to work on it.

Since there is no evidence in the case that the claimant was actually impaired or that any impaired reflexes or judgment played a role in this injury, the Commission should have found that he rebutted the presumption of intoxication and awarded the claimant all requested benefits.

For the aforementioned reasons, I must respectfully dissent.

PHILIP A. HOOD, Commissioner