

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F608166

RAFAEL BALLESTEROS, Employee	CLAIMANT
TYSON FOODS, INC., Self-Insured Employer	RESPONDENT
TYNET, Carrier	RESPONDENT

OPINION FILED JULY 2, 2007

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

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

Respondents represented by M. MELISSA LEE, Attorney, Springdale, Arkansas.

STATEMENT OF THE CASE

On May 23, 2007, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on March 28, 2007, and a pre-hearing order was filed on March 29, 2007. A copy of the pre-hearing order has been marked Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The employee-employer relationship existed between the parties at all relevant times.
3. The claimant sustained a compensable injury to his left knee on June 25, 2006.
4. The claimant was earning sufficient wages to entitle him to compensation at the weekly rates of \$419.00 for total disability benefits and \$314.00 for permanent partial disability benefits.
5. Respondent is accepting and paying permanent partial disability benefits based on a 2% rating assigned by Dr. Coker.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Claimant's entitlement to A.C.A. §11-9-505(a) benefits.
2. Temporary total disability benefits from July 5, 2006 through a date yet to be determined.
3. Attorney fee.

At the time of the hearing claimant modified his request for temporary total disability benefits to include the period of July 5, 2006 through August 16, 2006. In addition, claimant also contended that his request for benefits pursuant to A.C.A. §11-9-505(a) would begin to run from the date he last worked for the respondent through February 27, 2007, the date of his surgery. Finally, it should be noted that claimant has reserved his entitlement to any issues relating to benefits subsequent to the surgery in February 2007.

The claimant contends he was injured on June 25, 2006, and that he is entitled to A.C.A. §11-9-505(a) benefits, temporary total disability benefits, and an attorney fee.

The respondents contend that it has accepted the left knee claim as compensable, that all appropriate medical benefits have been paid to date, and that permanent partial disability payments will be made at the rate of \$314.00 per week. Respondents further contend claimant is not entitled to A.C.A. §11-9-505(a) benefits as the claimant was terminated for cause due to his altering the number of refills on a prescription pain medication. Respondent contends that the claimant is not entitled to temporary total disability payments from July 5, 2006 to a date yet to be determined as light duty work was available at the respondent's location but for the claimant's termination due to misconduct regarding altering his prescription.

From a review of the record as a whole, to include medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witnesses and to observe their demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

### FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on March 28, 2007, and contained in a pre-hearing order filed March 29, 2007, are hereby accepted as fact.

2. Claimant has failed to prove by a preponderance of the evidence that he is entitled to benefits pursuant to A.C.A. §11-9-505(a).

3. Claimant has failed to prove by a preponderance of the evidence that he is entitled to temporary total disability benefits from July 5, 2006 through August 16, 2006.

### FACTUAL BACKGROUND

The claimant is a 42-year-old man who began working for the respondent in July 1998 and over the years he has performed various jobs. On June 25, 2006, the claimant saw a water leak in a boiler room. After claimant and a supervisor closed the water valves, he pushed a button to start a pump to remove the water and felt a shock "all over" his body. Claimant testified that he momentarily lost consciousness and also struck his left knee against something in the boiler room. After regaining consciousness claimant could not move his leg. Claimant was provided ice for his knee but according to his testimony was not offered any additional medical treatment at that time.

Claimant went home and was not scheduled to work the next day; however, claimant went to the respondent to see the plant nurse. As a result, an appointment was made for claimant to be evaluated by Dr. Moffitt on June 27, 2006. Dr. Moffitt noted that claimant's knee was swollen and indicated that claimant might have a displaced fracture of the distal femur. Because it was difficult to interpret the x-ray, Dr. Moffitt ordered a CAT scan of the claimant's knee. Claimant was given crutches, medication, and advised to avoid weight bearing on his left extremity. Dr. Moffitt also indicated that claimant could return to work with respondent with no weight bearing on his left leg. Claimant returned

to work for the respondent sitting in a chair in a control room monitoring temperatures on a computer.

A CT scan performed on July 5, 2006 revealed a small amount of swelling, tripartite patella, and no acute fracture. Following that CT scan claimant was evaluated by Dr. Berestnev on July 12, 2006 and diagnosed with a left medial collateral ligament strain. Exercises were recommended and claimant was advised to begin some weight bearing on the leg. Claimant was also given a short knee immobilizer. Most importantly, claimant was provided with a prescription for pain medication by Dr. Berestnev. At the time of claimant's visit with Dr. Berestnev on July 12, he was accompanied by his daughter, Jasmine Ballesteros. According to the testimony of both claimant and his daughter claimant handed the prescription to his daughter and they drove to Walgreen's to get the prescription filled. Claimant testified that he turned in the prescription to the pharmacist at Walgreen's and waited more than one hour without the prescription being filled. Claimant testified that he was notified that a problem existed with the prescription and he was to contact his employer.

Apparently the pharmacist at Walgreen's suspected that the prescription had been altered and contacted Dr. Berestnev's office. The prescription form contains a space next to the notation "Refills". A "0" has a "X" marked through and the numeral "3" written in. Dr. Berestnev's office indicated that the prescription had been altered and notified the respondent of the situation. When claimant went to the respondent plant on July 12, 2006, he was given a three day suspension per policy for the purpose of allowing him the opportunity to clear up the discrepancy with the prescription. After three days had passed, claimant was terminated by the respondent for gross misconduct for falsifying records. Claimant did not work again until August 16, 2006 when he went to work for Heritage Park Nursing Center.

Claimant continued to receive medical treatment from Dr. Berestnev who ordered

physical therapy and an MRI of the claimant's left knee. On August 24, 2006, Dr. Berestnev released claimant to full duty without restrictions. When claimant was evaluated by Dr. Moffitt on September 14, 2006, Dr. Moffitt indicated that claimant continued to have pain despite treatment with physical therapy and medication. Dr. Moffitt referred claimant to Dr. Pleimann, an orthopaedist. Dr. Pleimann treated claimant for a period of time before referring claimant to Dr. Tom Coker for the purpose of determining whether further intervention was warranted. Dr. Coker subsequently recommended an arthroscopic procedure of the claimant's left knee which was performed on February 27, 2007.

The respondent accepted claimant's injury as compensable and paid some compensation benefits including medical treatment. In addition, the respondent also began paying temporary total disability benefits at some point around the time of claimant's surgery in February 2007. Claimant has reserved for consideration any issues with regard to compensation benefits beginning with the date of his surgical procedure. Claimant has filed this claim contending that he is entitled to benefits pursuant to A.C.A. §11-9-505(a). Claimant also contends that he is entitled to temporary total disability benefits beginning July 5, 2006, and continuing through August 16, 2006, the date he returned to work for another employer.

### ADJUDICATION

The initial issue for consideration involves claimant's contention that he is entitled to benefits pursuant to A.C.A. §11-9-505(a) beginning from the date he was terminated by the respondent and continuing through February 27, 2007, the date of his left knee surgery.

A.C.A. §11-9-505(a)(1) provides:

Any employer who without reasonable cause refuses to

return an employee who is injured in the course of employment to work, where suitable employment is available within the employee's physical and mental limitations, upon order of the Workers' Compensation Commission, and in addition to other benefits, shall be liable to pay to the employee the difference between benefits received and the average weekly wages lost during the period of the refusal, for a period not exceeding one (1) year.

In *Torrey v. City of Fort Smith*, 55 Ark. App. 226, 934 S.W. 2d 237 (1996), the Court found that in order to prevail on a claim pursuant to A.C.A. §11-9-505(a)(1), a claimant must prove the following by a preponderance of the evidence: (1) that he sustained a compensable injury; (2) that suitable employment which is within his physical and mental limitations is available with the employer; (3) that the employer has refused to return him to work; and (4) that the employer's refusal to return him to work is without reasonable cause.

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant has failed to satisfy all four elements. First, there is no doubt that claimant suffered a compensable injury. Second, suitable work within claimant's physical and mental limitations was available with the employer. Here, claimant returned to work for the respondent following his initial medical evaluation by Dr. Moffitt in a control room where he was allowed to sit and monitor temperatures on a computer. However, an employer's termination of an employee for violation of its workplace rules does not constitute a refusal to return an employee to work. See, *Roark v. Pocahontas Nursing & Rehabilitation*, \_\_\_\_ Ark. App. \_\_\_\_, \_\_\_\_ S.W. 3d \_\_\_\_ (May 10, 2006). Furthermore, even if respondent's action was considered a refusal, I do not find that the refusal was without reasonable cause.

As previously noted, claimant was evaluated by Dr. Berestnev on July 12, 2006. At that time, the claimant was given a prescription for pain medication. Claimant subsequently took the prescription to Walgreen's but was unable to obtain the medication.

According to Jessica Fowler, a registered nurse who works at the Arkansas Occupational Health Clinic with Dr. Berestnev, she received a telephone call from the pharmacist at Walgreen's on July 12. She then received a faxed copy of the prescription from Walgreen's. Fowler subsequently faxed a copy of the altered prescription to the respondent.

Claimant contends that neither he nor his daughter altered the prescription which was given to him by Dr. Berestnev. Testifying at the hearing on behalf of respondent was Mary King, an accounts manager in Dr. Berestnev's office. King testified that she has worked at that particular clinic for 18 years. King testified that if a prescription needed to be changed by a physician, the physician would get the original prescription back, tear it up, and write a new one or call the prescription in to the pharmacy. King testified that she was not aware of any physician in the clinic crossing a refill out and writing in another number. Also testifying was Jessica Fowler, a registered nurse at the clinic. Fowler testified that the procedure for altering a written prescription is to put the original in the shredder and then write out another prescription. Fowler testified that she has never seen Dr. Moffitt or Dr. Berestnev cross out something on a prescription, change it, and then give the prescription to a patient.

Following Dr. Berestnev's receipt of a phone call from a pharmacist at Walgreen's, Fowler subsequently contacted the respondent and provided it a copy of the altered prescription. Based upon this altered prescription, the respondent per its policy suspended claimant for three days in order to allow him the opportunity to resolve it. After the three days had passed and the issue had not been resolved, respondent terminated claimant for gross misconduct. Testifying on behalf of respondent was Frankie Henry, the plant human resources manager for the respondent. Henry testified that respondent's policy for altered documents is to notify the employee of the situation, give a three-day suspension in order to give the employee the opportunity to get the situation corrected if

they can, and if the situation is not corrected the employee is terminated for gross misconduct.

Also testifying at the hearing was Glenn Carter, a refrigeration supervisor for the respondent. Carter testified that the respondent's policy is that falsification of records is a termination offense. Carter testified that he was not aware of anyone having falsified records and not being terminated. On the other hand, he has known of three or four people who were terminated for falsifying records. Although the record allegedly altered in this case was not a work production type of record, it nevertheless was considered a work record by the respondent because the claimant was on workers' compensation and respondent was liable for payment of all reasonable and necessary medical treatment, including medication. Changing the number of refills would clearly be falsifying records which are relevant to claimant's employment with the respondent.

Based upon the foregoing evidence I find that respondent did not refuse to return claimant to work when he was terminated in July 2006. Therefore, he is not entitled to A.C.A. §11-9-505(a) benefits.

Furthermore, even if respondent's actions constituted a refusal to return claimant to work, I do not find that the refusal was without reasonable cause. In connection with this factor, I note that a question was raised as to what steps the respondent took to determine who and how the prescription was altered. I do not believe that A.C.A. §11-9-505(a) requires this type of investigation. Instead, the question is whether a refusal is without reasonable cause. In this particular case, respondent was presented with information from a pharmacy and from Dr. Berestnev's office indicating that the prescription was altered after it was given by Dr. Berestnev to the claimant. Respondent's belief that claimant had altered this prescription was reasonable under the circumstances; therefore, even if I found that respondent had refused to return claimant to work, I find that claimant has failed to prove that the respondent's refusal subsequent to July 12 was without

reasonable cause.

Claimant also contends that he is entitled to temporary total disability benefits beginning July 5, 2006, and continuing through August 16, 2006, the date he went to work for another employer. Claimant's injury is a scheduled injury and he is entitled to receive temporary total disability benefits during his healing period or until he returns to work, whichever occurs first. *Wheeler Construction Company v. Armstrong*, 73 Ark. App. 146, 41 S.W. 3d 822 (2001). In this particular case, there is no question that claimant remained within his healing period. However, claimant was never taken off work by his treating physicians during this period of time. After his initial medical treatment with Dr. Moffitt on June 27, 2006, claimant was released to return to work with restrictions of no weight bearing on his left leg. Claimant returned to work for the respondent working in a control room monitoring temperatures on a computer. Claimant continued to perform that job for the respondent until he was suspended on July 12 and eventually terminated three days later. While claimant did not work after his termination until after he became employed by another employer on August 16, 2006, claimant was not off work because of his work related injury but rather because he was terminated by the respondent for altering a prescription. I do not believe by claimant's actions which led to his termination he can create an entitlement to temporary total disability benefits. Accordingly, I find that claimant has failed to prove by a preponderance of the evidence that he is entitled to temporary total disability benefits beginning July 5, 2006 and continuing through August 16, 2006.

#### ORDER

Claimant has failed to prove by a preponderance of the evidence that he is entitled to benefits pursuant to A.C.A. §11-9-505(a)(1) or temporary total disability benefits beginning July 5, 2006 and continuing through August 16, 2006. Therefore, his claim for compensation benefits is hereby denied and dismissed.

The respondent is liable for payment of the court reporter's fee for preparing the hearing transcript in the amount of \$586.50.

IT IS SO ORDERED.

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GREGORY K. STEWART  
ADMINISTRATIVE LAW JUDGE