

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F701258

SAMUEL MORRIS	CLAIMANT
SAM'S CLUB	RESPONDENT
CLAIMS MANAGEMENT, INC. INSURANCE CARRIER	RESPONDENT

OPINION FILED JUNE 22, 2007

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH DANIELSON in Springdale, Washington County, Arkansas.

Claimant represented by KENNETH OSBORNE, Attorney, Fayetteville, Arkansas.

Respondents represented by CURTIS NEBBEN, Attorney, Fayetteville, Arkansas.

STATEMENT OF THE CASE

A hearing was held on May 8, 2007, in Springdale, Arkansas.

A pre-hearing conference was held in this claim, and as a result a pre-hearing order was entered in the claim on March 9, 2007. This pre-hearing order set forth the stipulations offered by the parties, the issues to litigate and the contentions thereto.

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

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

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

3. The claimant sustained a compensable injury to his right knee on December 2, 2006.

4. The claimant is entitled to a weekly compensation rate of \$130.00 for temporary total disability and permanent partial disability.

5. Medical expenses have been paid.

6. The claimant is entitled to a weekly compensation rate for both temporary total and permanent partial disability in the amount of \$130.00 per week.

By agreement of the parties the issues to litigate are limited to the following:

1. Temporary total disability from December 15, 2006, to a date to be determined.

2. Attorney's fees.

In regard to the foregoing issues the claimant contends that he injured his knee while working for the respondent, Sam's Club. The claimant was diagnosed with a meniscus tear and received surgery on January 11, 2007, on his knee. That the claimant was fired on December 15, 2006, for inability to perform his job duties following the injury. That the claimant contends he is entitled to TTD from December 15, 2006, and ongoing due to being unable to work and under restrictions. The respondents have denied this claim. Claimant also contends he is entitled to ongoing medical treatment and attorney's fees.

In regard to the foregoing issues the respondents contend that they accepted this claim as compensable and have paid all medical expenses. The claimant was released to restricted duty work which was offered to him but was refused by the claimant. Therefore, the

respondents contend the claimant is not entitled to TTD benefits pursuant to Ark. Code Ann. §11-9-526.

The documentary evidence submitted in this matter consists of the Commission's pre-hearing order marked Commission's Exhibit No. 1. The claimant submitted documentary evidence marked Claimant's Exhibit No. 1 and a return to work note marked Claimant's Exhibit No. 2. The respondents submitted documentary evidence marked Respondents' Exhibit No. 1. All these exhibits were admitted without objection.

#### DISCUSSION

The claimant testified that he began working for the respondent in November 2006 as a stock person in the freezer department. It has been stipulated and the claimant testified that he sustained a compensable injury to his right knee on December 2, 2006. The claimant testified that he was stocking in the freezer helping another employee when he jumped off the rack and injured his right knee. The claimant testified that the respondent send him to a doctor that gave him restrictions of no squatting, bending, and climbing. The claimant testified that following his accident he returned to work on December 6 and reported to the managers and Rhonda, a lady in human resources, that he was not able to work because his leg was swollen due to his injury. The claimant testified that when he returned to work on December 6 he was not offered any different kind of work other than his regular stocking job.

The claimant explained that stocking the freezers required him to reach up high as well as reach low and to bend. The claimant testified that he had to stack the freezer from top to bottom with food products. The claimant testified that the food products are delivered on a pallet which sets on the floor. The claimant testified that there was no way to restock the freezers without bending and squatting.

The claimant testified that the next doctor he saw was Dr. Tomlinson and that Dr. Tomlinson prescribed physical therapy. The claimant testified that Dr. Tomlinson eventually did surgery on his knee on January 11, 2007. The claimant testified that Dr. Tomlinson gave him the restriction of sit down work only. The claimant agreed that he attempted to return to work with these restrictions but that on December 15, 2006, the respondent fired him.

The claimant testified that he believes he had his MRI after he had been fired by the respondent. The claimant testified that when he was released to return to work with sit down duty only after his surgery, the respondent did not put him back to work. The claimant testified that he called the respondent as well as went and talked to the people in personnel but was not rehired or called back to work. The claimant testified that he currently is under restrictions but was to see Dr. Tomlinson the day after this hearing. The claimant testified that he could not perform the job of stocking the freezer with his restrictions because of the bending and squatting. The claimant testified that when he re-

contacted the respondent for employment he asked for work which would require him to sit but nothing was offered.

On cross examination, the claimant agreed that the month of December is a very busy month for the respondent. The claimant was asked if he was supposed to be climbing in the freezer and jumping in the freezer and the claimant responded, "No." The claimant testified that he went back personally to the respondent after his surgery with Dr. Tomlinson and asked for his job back.

Eddie Vallez testified that he had been working for the respondent for seven and a half years but at the Springdale location for the past eight months. Mr. Vallez testified that he was the co-manager of the respondent's store. Mr. Vallez testified that he was casually familiar with the claimant. Mr. Vallez testified that the claimant held the position of freezer/cooler associate. This witness explained that a freezer/cooler associate does many different jobs. One of these jobs is to zone the product explaining that as a product is running out the boxes are pulled out and put in a box bin and the product is presented forward so the members can reach in and purchase the product easily. Mr. Vallez testified that on December 6, 2006, the claimant filled out a form requesting medical care due to an injury to his right knee. This witness was asked if the respondent had modified work available and Mr. Vallez responded, "Yes, we do." This witness explained that based on the release that the doctor will give the respondent will find a job that fits the doctor's restrictions. Mr. Vallez testified that from the date of the accident up until

December 6 they had not heard anything from the claimant and that he, Mr. Vallez, called the claimant and the claimant brought in the doctor's note. Mr. Vallez testified that none of the associates are scheduled to be off work for three days in a row particularly during the Christmas rush. Mr. Vallez testified that when the claimant came back in with his work restrictions, the claimant was told that he could go back to work because there would not be a lot of squatting and that the respondent would work with him. Mr. Vallez testified that the claimant told the respondent that his doctor had told him that he had to have sit down work. Mr. Vallez testified that the report which they got from the doctor indicated that the claimant was to do no squatting or ladder work. This witness testified that he offered the claimant his same job because his job did not require him to go on a ladder and the squatting is minimal to not necessary. Mr. Vallez then began to explain the different heights the claimant would have to work with indicating that the doors of the freezer cases are approximately eight to ten inches off the floor and basically the product would start with the first box at about three feet. Mr. Vallez testified that there was no discussion with the claimant about the job requirements because the claimant basically said he could not perform the job and that his doctor told him that he had to sit down. Mr. Vallez testified that he told the claimant that the doctor's documentation does not set that out and that he needed to come back to work. This witness testified that the claimant said, "I'm not going to do it." Mr. Vallez testified that he then told the claimant he would have to go

back to the doctor and get a letter which set forth that he was to do sit down work only. Mr. Vallez testified that this conversation was in person with the claimant. Mr. Vallez testified that he did not hear from the claimant for several days so he called the claimant and the claimant told him that he was going to bring in the documentation. Mr. Vallez testified that the claimant did not come in and that he called the claimant the following day and again was told that the claimant was going to bring documentation in but again he did not show up. Mr. Vallez testified that he called the claimant again and that the claimant told him that he had lost the documentation or something had happened to it. This witness stated again that he told the claimant that before they could accommodate a sit down restriction they would have to have documentation from a doctor. Again the claimant testified that he was going to come in but did not show the following day so the claimant was called again and told that he needed to come in so that decisions could be made. Mr. Vallez testified that the claimant showed up, he believes, on December 12 or 13 with paperwork and presented it to the respondent. Mr. Vallez testified that he told the claimant that he had waited for several days for this paperwork and that he could not work like that, therefore he was being terminated because he was not responsible. Mr. Vallez testified that the claimant was told that his medical would continue to be paid. Mr. Vallez testified that the claimant pretty much agreed to everything and signed his exit at interview. Mr. Vallez testified that to his knowledge the claimant has never come back in after the day that he

was terminated. Mr. Vallez was asked if the claimant ever attempted to do his job between December 6 and December 15 and Mr. Vallez responded, "No. We never even went to that stage..." Mr. Vallez testified that as to the claimant's restrictions they had plenty of help in the freezer not that they had extra help but they had basically a system going where everything was well stocked and there had to be a very minimal of restocking. This witness testified that he told the claimant that he could perform his job duties and he said he had to sit down. Mr. Vallez stated that he told the claimant that his restrictions set forth no squatting and no climbing and he was reminded that he would not have to do any climbing and that there really was not that much squatting and the respondent would not expect him to do that. Mr. Vallez testified that the claimant's job basically was to make sure that the product was presented well not restocking. This witness explained that the product is already stocked and so basically he would be required to remove empty boxes and to bring the product forward. Mr. Vallez testified that there was really very little discussion with the claimant about how the respondent would accommodate him doing his regular job because the claimant was insistent that he needed a sit down job.

On cross examination, Mr. Vallez testified that the claimant was terminated before any or very little documentation was turned in when in fact documentation should have been in several days earlier. This witness testified that the only restriction he ever saw given the claimant was no climbing and no squatting. Mr.

Vallez was asked about a letter sent to the respondent around January 12, 2007, addressed to Freddy which inquired if the respondent would rehire the claimant now that they know he has a meniscus tear. Mr. Vallez testified that the only documentation he was aware of limited the claimant to no climbing and no squatting and that was the only documentation presented to him. Mr. Vallez testified that after he terminated the claimant and did not have any knowledge of any of his medical conditions no he did not allow the claimant to return to work. This witness testified that he does recall receiving a letter dated January 30 with all the claimant's documentation attached which he read. Mr. Vallez testified that he remembers seeing these documents but at no time did the claimant contact the respondent about coming back to work. Mr. Vallez testified that the claimant was terminated because he could not provide the respondent with the documentation that was asked for the first three times from his doctor's visit and he never reported or came back to give the respondent additional updates on his medical status. Mr. Vallez testified that the letter indicated that the claimant would contact the respondent so he waited to hear from the claimant and never received a call and never heard from the claimant in any way. Mr. Vallez was asked if the claimant made a phone call to him to ask to come back to work and Mr. Vallez responded, "No. To my knowledge, no." Mr. Vallez testified that after the claimant was terminated he never came back to work, that the respondents never received an update on him and that he had never received an update on medicals or anything after

he was terminated. Mr. Vallez testified that the reason the claimant was not offered a sit down job was because the paperwork he turned in only restricted him to no squatting and no climbing. This witness agreed that on or after January 30 he was aware that the claimant was to have a sit down job only.

The claimant testified on rebuttal that he had had two doctor's visits prior to his termination and those were both with the respondents' physician. The claimant testified that the job which he had done for the respondent he could not do without squatting. The claimant testified that he was the only person working in his area but that another associate may have been working but he did not see him. The claimant testified that there was no one available to help him to stock the lower shelves which would require him squatting. The claimant testified that he made attempts to go back to work and remembers that he called Rhonda in Human Resources and asked to come back to work. The claimant testified that Rhonda told him that Eddie had fired him so he then went and talked to Eddie when he went in to pick up his last check and asked if he could get his job back. The claimant testified that he has had surgery on his knee and that he is still having therapy. The claimant testified that his knee still swells and he has problems standing on it for very long. The claimant testified that he has looked for work but to date has not been successful.

On cross examination, the claimant agreed that when he returned to work Eddie told him to return to his regular job and he refused to do so. The claimant testified that between December 2,

the date of his injury, and the date he was terminated he is unaware of any medical report that sets out that he is to do sit down work only.

On redirect examination, the claimant agreed that he did not have an MRI of his knee until after he had been fired.

Mr. Eddie Vallez was called in response to the claimant's rebuttal. Mr. Vallez testified that the respondent has two shifts each consisting of three people. Mr. Vallez testified that there would be times when the claimant would be alone but that did not mean that he was the only person in the department all week long.

The medical reports set forth out that the claimant was seen at the Arkansas Occupational Health Clinic by Dr. Constantin Berestnev on December 6, 2006, due to a work related injury occurring on December 2, 2006. Dr. Berestnev notes that the claimant has decreased range of motion in the knee secondary to pain noting that his pain is in the medial and lateral aspect of his knee. The doctor notes that there is no significant knee effusion and he has no bruising or discoloration of the knee. Dr. Berestnev notes that there are no fractures or dislocations as revealed on the x-rays. The claimant was diagnosed with having a right knee sprain for which he was given a knee immobilizer, medications were prescribed, an MRI was ordered, a return visit was scheduled for one week, and the claimant was to avoid climbing or squatting. A Form AR-3 dated December 6, 2006, indicates that the claimant can return to work on December 6, 2006, with the restrictions of no climbing or squatting. The claimant underwent

an MRI of his right knee on December 12, 2006, which revealed a small tear extending to the inferior articular surface of the posterior horn of the lateral meniscus. It is noted that there is a small amount of fluid in the right knee joint but no Baker's cyst was demonstrated. It is also noted that there appears to be mild degenerative changes involving the lateral aspect of the patellofemoral joint. Dr. Berestnev writes on December 13, 2006, to the respondent's third party administrator, Laura Winesburg, concerning the claimant's right knee injury. Dr. Berestnev sets forth that the claimant's MRI suggests a small tear extending to the inferior articular surface of the posterior horn of the lateral meniscus noting that his pain is localized over this area. The doctor recommended that the claimant be referred to an orthopedist, prescribed medications and recommended that the claimant avoid climbing, twisting, or squatting. Again a Commission AR-3 was signed on December 13, 2006, by Dr. Berestnev indicating that the claimant can return to work on December 13, 2006, with the restrictions of no climbing, twisting, or squatting. Dr. Robert Tomlinson writes on December 20 that he has seen the claimant for his complaints of right knee pain and after taking the claimant's history, reviewing his MRI, and physically examining the claimant, Dr. Tomlinson diagnosed the claimant with having a lateral meniscus tear of the right knee and recommended an arthroscopy evaluation as treatment for his right knee. Dr. Tomlinson sets forth that the claimant may return to work with sit down work only. Dr. Tomlinson operated on the claimant's right knee on January 11, 2007. The

claimant was released following his surgery with instructions to keep his leg elevated and to apply ice for twenty-five minutes three times a day. Medications were also prescribed and the claimant was encouraged to keep the wound clean. On follow up with Dr. Tomlinson on January 15, 2007, it is noted that the claimant is four days out from his right knee surgery and is doing ok. Dr. Tomlinson notes that the claimant's wound is healing well and it was recommended that he attend therapy and ice his knee daily. Dr. Tomlinson returned the claimant to work with sit down work only. The claimant was again seen by Dr. Tomlinson on January 24, 2007, and his restriction of sit down work only was recommended. Dr. Tomlinson released the claimant to return to work on April 9, 2007, with the limitation of no lifting or carrying greater than ten pounds and no squatting.

After a complete review of this entire record, I find that the claimant has failed to prove by a preponderance of the evidence that he is entitled to temporary total disability from the date of his termination on December 15, 2006, to a date to be determined. The claimant clearly refused to even attempt to work at his job when requested by the respondent to do so. The claimant insisted on accommodations which were not provided or set out in the medical instructions from the treating physician at that time. I do find, however, that the claimant is entitled to temporary total disability from December 20, 2006, to a date to be determined which is the date that Dr. Tomlinson returned the claimant to work at a sit down job only. Even though the claimant had been terminated

previously, an injured employee has a unique status and a respondent has an obligation to make every effort to try to return them to work within their restrictions. Mr. Vallez testified that sit down work would have been made available to the claimant if, at the time of his termination, his medical reports would have indicated that was his restriction. It is noted that the claimant did not act responsibly and made very little effort personally to return to work which is the reason Mr. Vallez terminated him. Ark. Code Ann. §11-9-521(a) expressly provides that for scheduled injuries the injured employee is to receive compensation for temporary total disability during the healing period or until the employee returns to work, whichever occurs first. In Wheeler Construction Company v. Armstrong, 73 Ark. App. 146, 41 S.W.3d 822(2001) the Court of Appeals set forth that an employee who has suffered a scheduled injury is to receive temporary total disability benefits during his healing period or until he returns to work regardless of whether he has demonstrated that he is actually incapacitated from earning wages. Therefore, the respondents should pay temporary total disability to this claimant from December 20, 2006, to a date to be determined. This was an accepted compensable injury and it has been stipulated that medical treatment for the claimant's compensable injury have been paid.

#### FINDINGS & CONCLUSIONS

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

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

3. The claimant sustained a compensable injury to his right knee on December 2, 2006.

4. The claimant is entitled to a weekly compensation rate of \$130.00 for temporary total disability and permanent partial disability.

5. Medical expenses have been paid.

6. The claimant is entitled to a weekly compensation rate for both temporary total and permanent partial disability in the amount of \$130.00 per week.

7. The claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability from December 20, 2006, to a date to be determined. See discussion above.

8. The respondents have controverted this claimant's entitlement to additional benefits.

9. The claimant's attorney is entitled to the maximum statutory attorney's fee based on the benefits awarded herein.

#### ORDER

The claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability from December 20, 2006, to a date to be determined. Therefore, the respondents should pay temporary total disability to this claimant from December 20, 2006, to a date to be determined.

The respondents shall pay to the claimant's attorney the maximum statutory attorney's fee on the additional benefits awarded

herein, with one half of said attorney's fee to be paid by the respondents in addition to such benefits and one half of said attorney's fee to be withheld by the respondents from such benefits.

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

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

IT IS SO ORDERED.

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ELIZABETH DANIELSON  
ADMINISTRATIVE LAW JUDGE