

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NOS. F207379 & F308089

BECKY MULDOON, EMPLOYEE	CLAIMANT
TYSON POULTRY, INC., EMPLOYER	RESPONDENT
TYNET CORPORATION, INC., CARRIER	RESPONDENT

OPINION FILED NOVEMBER 14, 2007

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

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

Respondent represented by HONORABLE MELISSA LEE, Attorney at Law, Springdale, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The respondents appeal a decision by the Administrative Law Judge finding that the claimant proved by a preponderance of the evidence that she was entitled to additional temporary total disability benefits for the period March 15, 2006, through May 16, 2006, and the finding that claimant proved by a preponderance of the evidence that she was entitled to benefits pursuant to Ark. Code Ann. §11-9-505(a). Based upon our de novo review of the record, we find that the claimant has failed to meet her burden of

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proof. Accordingly, we hereby reverse the decision of the Administrative Law Judge.

The claimant sustained an admittedly compensable injury to her right knee on January 11, 2002, and on May 1, 2003. In an opinion dated March 10, 2004, it was found that the claimant was entitled to additional medical treatment in the form of surgery that had been recommended by Dr. Martimbeau.

The claimant testified that following her surgery on her right knee, she was given a sit down only restriction by Dr. Martimbeau, and the respondent employer provided work within these restrictions. The claimant was terminated by the respondent employer on March 15, 2006. The claimant explained that she had gone into work on a Friday morning in March and when she got there her boss, Darrell Watts, took her to see Eddie Lindsey who informed her that she was being placed on suspension due to her points. The claimant testified that she was told to come back in at 8:00 on Wednesday, March 15, 2006, and meet with Mr. Lindsey and Betty Killough. The claimant testified that when she came in

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on Wednesday, March 15, 2006, she was shown her attendance records. The claimant testified that she told Mr. Lindsey and Ms. Killough that she had doctor's notes for the time missed but she was told that she had too many points and at that time she was terminated. The claimant testified that she asked Darrell Watts if he knew how many points she had and he said no he had no idea.

The claimant agreed that during the month of February 2006 she missed several days from work when her knee was swollen and that her doctor had given her a note taking her off work. The claimant identified a note from Dr. Martimbeau's office indicating that she was to be off work from February 9, 2006, until February 28, 2006, due to her inability to get an appointment since he was out of town. The claimant testified that she hand delivered this note to Jesse Key who handles workers' compensation insurance for the respondent employer. The claimant testified that she gave this note to Ms. Key either on February 28 or February 29, 2006. The claimant testified that on Tuesday prior to the Friday that she was suspended,

she had gone into Ms. Key's office, and Ms. Key told her that she had 7.5 points, therefore she was not concerned. The claimant testified that the only notification that she had of being over her points was when she was suspended on March 10, 2006. The claimant testified that her work schedule was four ten hour days and that she worked Monday through Thursday. The claimant testified that it was her understanding of the respondents's policy that consecutive days missed up to three days were counted as one absence and that individual absences were counted on a daily basis. The claimant agreed that she had received an attendance notice on July 26, 2005, because of some absences which had accumulated by that date. The claimant testified that the next and only other notification she had received was on March 10, 2006, when she met with Mr. Lindsey and Mr. Watts. The claimant refused to sign this particular attendance notification.

The claimant testified that she thinks that when she got home after working on the February 8, 2006, her knee was swollen double and she had extreme heat in it. She did

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not work on February 9 but did remember that when she got home on February 8 from work she contacted her workers' compensation case worker to try and get an appointment with Dr. Martimbeau to see about her knee. The claimant already had an appointment scheduled with Dr. Martimbeau for February 28 but she was hoping to get in to see him earlier. The claimant testified that all of her appointments with Dr. Martimbeau were made through the nurse's station and her case worker, and that she had asked that her appointments be moved up so she could see the doctor earlier.

The claimant testified that she recalled that on February 8 she had called Dr. Martimbeau's office to get a refill on her pain medication and also to see if he was going to be in so she could see him. The claimant testified that she last saw Dr. Martimbeau on July 25, 2005, however, she was shown a medical record from Dr. Martimbeau's indicating that she was seen on January 24, 2006, which she could not disagree with.

The claimant testified that she does not recall Dr. Martimbeau giving her the instructions to alternate

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standing and sitting for short periods of time. The claimant had been on leave of absence from August 2005 through January 2006 due to a stress fracture in her left foot and she returned to work for the respondent employer on January 9, 2006, at a sit down job on the line stamping boxes. The claimant testified that she has applied for work since she was terminated.

The claimant again testified that she had only received two attendance notifications, and that it was her impression that the respondent employer's attendance policy had changed while she was on leave of absence between August 2005 and January 2006. The claimant was asked if she ever looked at the bulletin board in the break room, and she said no not usually. The claimant testified that during the period of time she was off due to her knee between February 9 and February 28 she called in everyday to the respondent employer. Sometimes she would get to talk to the nurse or sometimes she would get the answering machine. She would call in about an hour before she was suppose to report to work because this is what she was instructed to do when

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she was hired back in 1996. The claimant testified that she had been told by Barbara that if she was going to be off a few days just to let them know, and she would not have to call in everyday. The claimant testified that Mary Koch told her the same thing.

The claimant testified that when she signed the attendance notification on July 26, 2005, she understood what her points were for and she thought that she understood the attendance policy. The claimant stated that from the date of her termination on March 15, 2006, until she was released on maximum medical improvement on May 16, 2006, she did not work anywhere.

Betty Jane Killough testified that she has been working for the respondents since 1981, and that she currently is the complex human resource manager. She has been in that position for over four years. Ms. Killough stated that the last time the respondents's attendance policy was changed was on June 27, 2003, and that individuals throughout the plant are advised through their supervisors at the safety meetings as to policy changes.

The attendance policy is also posted in the break room at the respondents employer's plant. Ms. Killough testified that the claimant was terminated due to unacceptable attendance indicating that she had acquired seventeen points and that normally a person would have to accrue only fourteen points to be subject to termination.

Ms. Killough explained the respondent employer's attendance policy. She testified that an individual can receive three points for missing an entire day without properly notifying the respondent employer. This witness testified that an employee can get one point for missing an entire day with proper notification which was made within thirty minutes before their start time. If an individual has an excused absence due to some sort of medical problem they would get zero points assessed for the day missed. If someone missed longer than three days they would have to get documentation from a health care provider and at five days they would have to go on leave of absence. Ms. Killough was asked about the claimant's attendance record indicating that she was assessed half a point for February 9, 2006. She

explained that a half a point would be assessed if someone called in late, but not two hours late or arriving to work before two hours in to their shift. Ms. Killough also agreed that if the claimant had left early on the 9th of February she also would have been assessed half a point.

On cross examination, Ms. Killough testified that the consecutive days missed had to be consecutive work days. Ms. Killough testified that after the three consecutive work days missed for which one point can be assessed, the next two days require medical documentation that would excuse you or put you on leave of absence. The claimant was not placed on leave of absence because they had not received documentation to put her into that status. This witness testified that each day that the claimant called in that she would not be able to come into work she would have been told that she needed to get an off work slip. According to the respondent employer's records, the claimant did call in everyday for the period between February 9, 2006, and February 28, 2006. Ms. Killough testified that an employee would get an attendance notification after they had received

three points, a second notification after they had reached six points, and a final notification when they had reached ten points. Points were counted for a one year period of time and that the maximum number of points a person can acquire is fourteen.

Ms. Killough testified that the claimant was given her first attendance notification on July 26, 2005, and that because she was not present at the time she acquired six points, the respondent employer was unable to give her an attendance notification, therefore her final attendance notification was given to her on March 10, 2006.

Ms. Killough testified that although the respondent employer has the claimant's address, she was not sent her second notification because their policy does not require it.

Ms. Killough was asked the question about the claimant calling in everyday, and nobody bothering to tell her that she was in danger of violating the respondents's attendance policy. Ms. Killough responded, "I cannot answer that; I did not speak with her everyday." Ms. Killough agreed that the

claimant has been treated for her knee for at least a two year period of time.

Ms. Killough testified that she was unaware that the doctors had given the claimant a permanent impairment and had placed her with permanent restrictions because of her knee condition. She also testified that the claimant had FMLA leave available to her at the time she was terminated, and to her knowledge no one ever advised her that she was eligible for FMLA leave. Ms. Killough acknowledged that if the claimant had a chronic health condition at the time she was missing days in February under the respondent employer's policy, the claimant would have been eligible for FMLA leave if she had requested it. Ms. Killough agreed that if the claimant had been missing work because of her job related injury, she would not have been accumulating points.

Ms. Killough testified that she had never seen the note taking the claimant off work from February 9, 2006, before the hearing or before it was faxed to her a week before the hearing. She was present at the meeting with the claimant when she was terminated on March 15, 2006, and at

that time the claimant did not indicate that she had medical documentation to justify her absences.

Mary Koch, a nurse manager for the respondent employer for approximately thirteen years, also testified. Ms. Koch stated that she was familiar with the claimant and had reviewed the claimant's medical records as well as the call in logs. Ms. Koch testified that the claimant's last job was working in the pack up department stamping boxes with different codes and this job allowed the claimant to sit or stand as needed. Ms. Koch acknowledged that the note from Dr. Martimbeau's nurse that took the claimant off work from February 9 through February 27, 2006, was not in the respondent employer's records and she does not remember ever receiving this note.

Ms. Koch was asked about call ins when a person is not going to report to work and she stated that if a person calls in and reports that they are sick, not work related, the nurse or person taking the call is not permitted to ask questions. However, if a person calls in to report an

illness due to work, the nurse is allowed to question the medical.

Ms. Koch stated that the claimant has a case manager assigned to her and has had this case manager since February 2005. The case manager would set up the appointments as well as attend the doctor's appointments with the claimant. The claimant's file did not reflect the case manager requesting an appointment with Dr. Martimbeau anytime after February 9, 2006, but did note that the claimant had an appointment already scheduled with the doctor on February 27, 2006. Ms. Koch testified that this February appointment was set at the claimant's last appointment with Dr. Martimbeau on January 24, 2006. Ms. Koch testified that the claimant had asked to see the doctor earlier than January 16 but the doctor was unable to see her earlier than the January 24 appointment. When Ms. Koch contacted Dr. Martimbeau's office to try and get a copy of the off work slip, the doctor's office told her that they did not have one in their file. The claimant came back into the plant on February 27, 2006, and presented a

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referral note to Barbara Moore who stamped it at the nurse's station. Ms. Koch was asked if the claimant had been very good about bringing doctor's notes in when she was off to see the doctor and this witness responded, "Yes."

Mr. Darrell Watts testified that he had been employed by the respondent employer for sixteen years and that for the past eleven years he has been a production supervisor. Mr. Watts was the claimant's supervisor for approximately a year and a half prior to her termination and that her last job was sit down job stamping boxes as they went through a scale and tape machine. Mr. Watts testified that this job was still available.

Mr. Watts was present at the meeting when the claimant was terminated and he does not remember her offering any medical documentation to support her absences. He stated that when the claimant missed work in February he assumed that she was on leave of absence because she had been on leave of absence before. Mr. Watts testified that whichever nurse is on duty would normally contact him and notify him that the claimant was not going to be at work,

but this did not happen every day. Mr. Watts indicated that he was surprised when the claimant got suspended because he expected her to have a medical note. He recalled one instance when the claimant left work early because of her knee.

The claimant testified that on February 28, 2006, she delivered to the respondent employer the paperwork from Dr. Martimbeau's office taking her off work. When she was suspended, she thought that she had already provided all of the medical information which the respondent employer would need in support for her reason for being off work. The claimant testified that at the meeting on March 10 she told the supervisors that she had already turned in everything that she had like all the other times she had turned in the paperwork when she returned from the doctor. On questioning from the Court, the claimant testified that she gave the original of the note to the respondent employer and kept a copy noting that she always has the respondent employer make a copy of what she turns in.

Temporary total disability is that period within the healing period in which an employee suffers a total incapacity to earn wages. K II Constr. Co. v. Crabtree, 78 Ark. App. 222, 79 S.W.3d 414 (2002). In order to be entitled to temporary total disability compensation for a scheduled injury, the employee must prove: (1) that she remains within her healing period; and (2) that she has not returned to work. Wheeler Construction Co. v. Armstrong, 73 Ark. App. 146, 41 S.W.3d 822 (2001). The healing period is statutorily defined as that period for healing of an injury resulting from an accident. Dallas County Hosp. V. Daniels, 74 Ark. App. 177, 47 S.W.3d 283 (2001). The healing period continues until the employee is as far restored as the permanent character of his injury will permit, and if the underlying condition has become stable and nothing further in the way of treatment will improve that condition, the healing period has ended. Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982). The determination of when the healing period ends is a factual determination to be made by the

Commission. Arkansas Highway & Transp. Dept. v. McWilliams,
41 Ark. App. 1, 846 S.W.2d 670 (1993); Mad Butcher, Supra.

Recurring symptoms may give rise to a subsequent healing period, after the original one has ended. Elk Roofing Co. v. Pinson, 22 Ark. App. 191, 737 S.W.2d 661 (1987). Where a second complication is found to be a natural and probable result of the first injury, the employer remains liable. Id. This liability includes liability for additional temporary benefits when the employee undergoes a second, distinct healing period. Id.

A review of the evidence demonstrates that the claimant failed to prove by a preponderance of the evidence that she is entitled to temporary total disability benefits for the period March 15, 2006, through May 16, 2006. The claimant was terminated by the respondent employer for cause. She never presented the respondent employer with the note taking her off of work. When Ms. Koch contacted Dr. Martimbeau's office to obtain a copy, his office did not have a copy of it. Accordingly, we find that the claimant has failed to prove by a preponderance of the evidence that

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she remains within her healing period and has not returned to work. The claimant returned to work and was dismissed for cause. Therefore, we reverse the decision of the Administrative Law Judge awarding temporary total disability benefits for the period March 15, 2006, through May 16, 2006.

The claimant also contended that she was entitled to benefits pursuant to Ark. Code Ann. § 11-9-505(a)(1) which 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 the employee the difference between benefits received and the average weekly wage lost during the period of such refusal, or for a period not exceeding one (1) year.

In order to establish her claim for additional benefits under this section, the claimant has the burden of proving that the following four requirements are met:

- (1) That she sustained a compensable injury;
- (2) That suitable employment within the claimant's physical and mental limitations was available with her employer;
- (3) That the employer refused to return her to work;
- (4) That the employer's refusal to return the claimant to work was without reasonable cause.

See Torrey v. City of Ft. Smith, 55 Ark. App. 226, 934 S.W.2d 237 (1996). In Torrey, supra the Courts stated that:

At a minimum Ark. Code Ann. § 11-9-505(a) requires that when an employee who has suffered a compensable injury attempts to re-enter the work force the employer must attempt to facilitate the re-entry into the work force by offering additional training to the employee, if needed, and reclassification of positions, if necessary.

The evidence demonstrates that the respondent employer had done more than enough to accommodate the claimant's work restrictions. The claimant was terminated for cause. She had too many points and was in violation of the respondent employer's attendance policy. The respondent

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employer's refusal to return the claimant to work was with reasonable cause. Accordingly, she is not entitled to benefits pursuant to Ark. Code Ann. §11-9-505.

Therefore, after conducting a de novo review of the record, we find that the claimant has failed to prove by a preponderance of the evidence that she is entitled to temporary total disability benefits for the period of March 15, 2006, through May 16, 2006, and failed to prove by a preponderance of the evidence that she is entitled to benefits pursuant to Ark. Code Ann. §11-9-505.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

I must respectfully dissent from the Majority's opinion that the claimant did not prove that she is entitled

to temporary total disability benefits from March 15, 2006 until May 16, 2006. Additionally, I find that the Majority erred in finding that the claimant failed to prove by a preponderance of the evidence that she is entitled to benefits pursuant to Ark. Code Ann. § 11-9-505. Based upon a de novo review of the record in its entirety, I find the claimant did prove by a preponderance of the evidence that she is entitled to temporary total disability benefits from March 15, 2006 until May 16, 2006, and that she is entitled to benefits pursuant to Ark. Code Ann. § 11-9-505. I further find that the Administrative Law Judge's opinion should have been affirmed. As such, I must respectfully dissent.

_____ It has previously been stipulated by the parties that the claimant sustained a compensable injury to her right knee on January 11, 2002, and on May 1, 2003. In an opinion dated March 10, 2004, it was found that the claimant was entitled to additional medical treatment in the form of surgery which had been recommended by Dr. Martimbeau.

_____ The claimant was on a leave of absence from August 2005 through January 2006 due to a stress fracture in her

left foot. The claimant testified that she returned to work for the respondent on January 9, 2006, at a sit down job on the line stamping boxes. On February 8, 2006, the claimant's previously injured knee became severely swollen. The claimant testified that she did not work February 9, 2006 through February 28, 2006, but that she followed all the required protocol for missing work. The claimant was subsequently fired on March 15, 2006 for failure to comply with required protocol for days the employee was absent from work. It is evident that the claimant suffered a scheduled injury to her knee is entitled to benefits for temporary total disability for the time in which she was unable to work. In the present case, the claimant is entitled to temporary total disability benefits from March 15, 2006 until the end of her healing period on May 16, 2006.

_____A claimant "who has suffered a scheduled injury is entitled to benefits for temporary total disability during his healing period or until he returns to work." Ark. Code Ann. § 11-9-521(a) (Repl. 2002); Wheeler Constr. Co. v. Armstrong, 73 Ark. App. 146, 41 S.W.3d 822 (2001). The

healing period ends when the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition. Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982).

Ark. Code Ann. § 11-9-505(a) states:

(1) 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 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 such refusal, for a period not exceeding one (1) year.

(2) In determining the availability of employment, the continuance in business of the employer shall be considered, and any written rules promulgated by the employer with respect to seniority or the provisions of any collective bargaining agreement with respect to seniority shall control.

The Majority found that the claimant failed to meet her burden of proof. In my opinion, the Majority's opinion simply not consistent with the testimony provided. The claimant testified that following her surgery on her

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right knee, she was given a sit down only restriction by Dr. Martimbeau. The claimant testified that the respondent did provide work within these restrictions.

The claimant testified that she thinks that when she got home after working on the February 8, 2006, her knee was swollen double and she had extreme heat in it. The claimant testified that she did not work on February 9, 2006, but does remember that when she got home from work on February 8, 2006, because she contacted her workers' comp case worker to try and get an appointment with Dr. Martimbeau to see about her knee. The claimant testified that she already had an appointment scheduled with Dr. Martimbeau for February 28, 2006, but she was in hopes of getting in to see him earlier. The claimant testified that all of her appointments with Dr. Martimbeau are made through the nurse's station and her case worker, and that she had asked that her appointments be moved up so she could see the doctor earlier. The claimant testified that on February 8, 2006, she had called Dr. Martimbeau's office to

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get a refill on her pain medication and also to see if he was going to be in so she could see him.

The claimant testified that during the period of time she was off due to her knee between February 9 and February 28 she called in everyday to the respondent. The claimant testified that when she called in sometimes she would get to talk to the nurse or sometimes she would get the answering machine. The claimant testified that she would call in about an hour before she was suppose to report to work because this is what she was instructed to do when she was hired back in 1996. The claimant testified that she had been told by Barbara that if she was going to be off a few days just to let them know, and she would not have to call in everyday. The claimant testified that Mary Koch told her the same thing.

The claimant testified that during this period of time (from February 9 until February 28) her knee had become very swollen and she was trying to advance an appointment with her doctor, but was unable to do so. The claimant testified that she hand delivered Dr. Martimbeau's off-work

note to Jesse Key who handles workers' comp insurance for the respondent. The claimant testified that she gave this note to Ms. Key either on February 28 or February 29, 2006.

The claimant testified that the respondent terminated her on March 15, 2006. The claimant explained that she had gone into work on a Friday morning in March and when she got there her boss, Darrell Watts, took her to see Eddie Lindsey who informed her that she was being placed on suspension due to her points. The claimant testified that she was told to come back in at 8:00 on Wednesday, March 15, 2006, and meet with Mr. Lindsey and Betty Killough.

The claimant testified that when she came in on Wednesday, March 15, 2006, she was shown her attendance records. The claimant testified that she told Mr. Lindsey and Ms. Killough that she had doctor's notes for the time missed but she was told that she had too many points and at that time she was terminated. The claimant testified that she asked Darrell Watts if he knew how many points she had and he said no he had no idea and then he apologized to her. The claimant agreed that during the month of February 2006

she missed several days from work when her knee was swollen and that her doctor had given her a note taking her off work. The claimant identified a note from Dr. Martimbeau's office indicating that she was to be off work from February 9, 2006, until February 28, 2006, due to her inability to get an appointment since he was out of town.

The claimant testified that on Tuesday prior to the Friday that she was suspended, she had gone into Jesse Keys' office, and Ms. Keys told her that she had 7.5 points, therefore she was not concerned. The claimant testified that the only notification that she had of being over her points was when she was suspended on March 10, 2006. The claimant testified that her work schedule was four ten hour days and that she worked Monday through Thursday. The claimant testified that it was her understanding of the respondent's policy that consecutive days missed up to three days were counted as one absence and that individual absences were counted on a daily basis. The claimant agreed that she had received an attendance notice on July 26, 2005, because of some absences which had accumulated by that date. The

claimant testified that the next and only other notification she had received was on March 10, 2006, when she met with Mr. Lindsey and Mr. Watts.

The claimant testified that she last saw Dr. Martimbeau on May 16, 2006, and she was released at maximum medical improvement. The claimant testified that she is still under permanent restrictions of sit down work only.

Betty Jane Killough, the human resource manager for the respondents, testified on the respondents behalf. However, her testimony not only corroborates the claimant's testimony, but it also revealed that the respondent's record keeping was in complete shambles. Ms. Killough agreed that according to their records the claimant did call in everyday for the period between February 9, 2006, and February 28, 2006. However, Ms. Killough testified that the claimant was terminated due to unacceptable attendance. Ms. Killough testified that the claimant was not placed on leave of absence because they had not received documentation to put her into that status. Ms. Killough testified that each day that the claimant called in that she would not be able to

come into work she would have been told that she needed to get an off work slip.

Ms. Killough testified that the claimant had FMLA leave available to her at the time she was terminated, and to her knowledge no one ever advised her that she was eligible for FMLA leave. Ms. Killough testified that if the claimant had a chronic health condition at the time she was missing days in February under the Respondent's policy, she would have been eligible for FMLA leave if she had requested it. Ms. Killough was shown the claimant's off-work note from Dr. Martimbeau, and without being asked she responded, "I have never seen this." Ms. Killough agreed that if the claimant had been missing work because of her job related injury, she would not have been fired.

The dates and points of the claimant during her employment with the respondent was discussed at length and Ms. Killough could not explain why her records are different from several of the respondent's exhibits. When asked which one of the documents was correct the witness responded that she could not tell why they are different. Ms. Killough was

asked if the respondent would have continued to provide work within the claimant's medial restrictions if she had not been terminated for absences. This witness responded, "Yes." It is therefore evident from Ms. Killough's testimony that she was not provided all of the claimant's medical notes prior to her firing the claimant. Had Jessie Keys put the claimant's off-work slip from Dr. Martimbeau in the correct file, Ms. Killough would not have fired the claimant. Additionally, Ms. Killough corroborated the claimant's testimony that she called in every day to let them know that she would not be at work. As such, not only are the respondent's records in shambles, but Ms. Killough's testimony furthers the claimant's credibility, thus establishing by a preponderance of the evidence that the claimant was unjustly fired.

Mary Koch, a nurse manager for the respondent, testified on the respondent's behalf. However, Ms. Koch's testimony also reflects that the respondent's records were not accurate. Ms. Koch testified that there is one record missing from the respondents' file that is included in the

claimant's file. Ms. Koch testified that the medical record in the claimant's file which is not in the respondents' file is a note from Dr. Martimbeau's nurse that took the claimant off work from February 9, 2006, through February 27, 2006. Ms. Koch testified that she does not remember ever receiving a note from Dr. Martimbeau's office taking the claimant off work from February 9, 2006, through February 27, 2006, nor does she recall having received a note from anyone else in the plant concerning the claimant. Ms. Koch testified that when she contacted Dr. Martimbeau's office to try and get a copy of the off work slip, the doctor's office told her that they did not have one in their file. However, Ms. Koch acknowledged that the claimant came back into the plant on the February 27, 2006, and presented a referral note to Barbara Moore who stamped it at the nurse's station. Ms. Koch was asked if the claimant had been very good about bringing doctor's notes in when she was off to see the doctor and this witness responded, "Yes."

Mr. Darrell Watts, a production supervisor for the respondents, also testified on the respondent's behalf.

Mr. Watt's testimony reflects that he was genuinely surprised to find out that the claimant was being fired. Mr. Watts testified that he knew that the claimant was ill and not at work because a nurse at the health center had informed him that the claimant was ill. Mr. Watts indicated that he was surprised when the claimant got suspended because he expected her to have a medical note. Mr. Watts testified that he could recall one time when the claimant left work early because of her knee. Mr. Watts testified that the only input that he had into the claimant's termination was that he provided his daily attendance records on the claimant. Mr. Watts also testified that the claimant indicated that she had already turned all of the medical notes in to the respondents prior to her suspension.

The testimony of the claimant, Ms. Killough, Ms. Koch, and Mr. Watts all reflect that the respondents had all of the required documentation that the claimant had a medical excuse for not being at work. The respondents however, failed to keep accurate records as shown by the testimony of all of the respondents witnesses. Even the

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Administrative Law Judge opined that "the accuracy of the respondent's records were in question." Furthermore, the actual note from Dr. Martimbeau which excused the claimant from work in February 2006 is an Exhibit to the record. As such, but for the termination of the claimant, work was available to her and she would still be working. Therefore, the claimant has proven by a preponderance of the evidence that she is entitled to temporary total disability benefits from March 15, 2006 until May 16, 2006. It is further apparent that the claimant's termination was not justified. Therefore, the claimant has proven by a preponderance of the evidence that the respondents should pay her benefits according to Ark. Code Ann. § 11-9-505(a).

For the aforementioned reasons, I respectfully dissent.

PHILIP A. HOOD, Commissioner