

**NOT DESIGNATED FOR PUBLICATION**

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F608166

RAFAEL BALLESTEROS, EMPLOYEE	CLAIMANT
TYSON FOODS, INC., SELF-INSURED EMPLOYER	RESPONDENT
TYNET, CARRIER	RESPONDENT

OPINION FILED SEPTEMBER 3, 2008

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

Claimant represented by HONORABLE EVELYN BROOKS, Attorney at Law, Fayetteville, Arkansas.

Respondent represented by HONORABLE E. DIANE GRAHAM, Attorney at Law, Fort Smith, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

The claimant appeals from a decision of the Administrative Law Judge filed July 2, 2007.

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

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.

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OLAN W. REEVES, Chairman

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KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

**DISSENTING OPINION**

I must respectfully dissent from the majority opinion finding that the claimant failed to prove entitlement to temporary total disability benefits from July 5, 2006 through August 16, 2006 and that he was not entitled to benefits pursuant to Ark. Code Ann. §11-9-505(a) from July 12, 2006 through February 27, 2007. From a de novo review of the record, I find that the claimant is entitled, as a matter of law, to temporary total disability benefits from July 12, 2006 through August 16, 2006. Further, I find that the claimant proved entitlement to the benefits requested in accordance with Ark. Code Ann. §11-9-505(a), by a preponderance of the evidence.

The opinion of the Administrative Law Judge was affirmed and adopted in its entirety by the majority without additional discussion. Therefore, the opinion of the Administrative Law Judge and all of the findings and conclusions contained in that decision are now the majority opinion. ITT/Higbie v. Gilliam, 34 Ark. App. 154, 807 S.W.2d 44 (1991).

The claimant is a forty-two-year-old man who worked for Tyson Foods for eight years at various jobs. On

June 25, 2006, he pushed a button on a water pump and received an electrical shock. He was thrown backwards, knocked unconscious, and hit his knee on a pipe. The accident resulted in a knee injury which was accepted as compensable by the respondent. The claimant received appropriate medical treatment, including surgery, and was released from medical care and rated at 2% to the extremity on March 6, 2007. Thereafter, the claimant returned to work with Tyson on light duty and continued to work until July 12, 2006, when he was suspended for three days for falsifying records. He was terminated three days later for this conduct. The claimant returned to work with another employer on August 16, 2006.

The facts surrounding the claimant's termination are as follows. On July 12, 2006, the claimant was examined by his treating physician and the company doctor, Dr. Konstantin V. Berestnev, and given a prescription for Vicodin. The claimant took his prescription to the pharmacy. After waiting for more than one hour, the pharmacy told the claimant that there was a problem with the prescription and that he needed to contact his employer. The prescription contains a space where the number of

refills is to be indicated. The prescription originally indicated "0" refills and had been changed to reflect "3" refills. The office of Dr. Berestnev was contacted by the pharmacy who, in turn, contacted Tyson. The claimant was suspended for three days to allow him an opportunity rectify the situation. The claimant adamantly denied altering the prescription and went to Dr. Berestnev's office in an attempt to determine how the prescription had come to be altered. The claimant was not allowed to speak with the doctor at that time or at any time thereafter. A letter from Mary King, the accounts manager with Dr. Berestnev's office, explained what transpired that day, as follows:

It was reported to Cheri Church the nurse at Tyson Chick N Quick and Mr. Ballesteros that the prescription presented to the pharmacy dated 7-12-06 was altered. At that time Dr. Berestnev would not issue another prescription and the patient was told to take an over the counter medication. Mr. Ballesteros then came to the clinic. He requested to see Dr. Berestnev. The front office staff told him that he would have to check with the plant nurse about an appointment. He told them that he wanted to talk to him

about his prescription. They asked him to have a seat, they called the nurse. The front office was told to tell him that Dr. Berestnev was with a patient, he would not talk to him about the prescription and that he would have to talk to the plant nurse. The patient was distressed with the response, I was asked to come out and speak to him. He was there with his children. I listened again to his request and repeated the response. He then told me he had no idea how the paper could have been altered, he did not do it, maybe the nurse made a mistake or possibly the pharmacist did it. I told him that between the clinic and the pharmacy that the prescription had been changed. He told me that he never had the paper that his daughter was the one who carried it and that she would never have changed the number. She appeared to be nine or ten years old. I told Mr. Ballesteros that this conversation was over if he had anything further to say he need to get in touch with his employer. I then called the nurse at Tyson Chick N Quick and reported the conversation.

Because the claimant was unable to rectify the situation in three days, he was terminated.

Tyson offered the testimony of the accounts manager in Dr. Berestnev's office, Mary King . She indicated that she had never seen a physician cross out a refill and write in another number and that this was not proper procedure. Jessica Fowler, a nurse from Dr. Berestnev's office, also testified on behalf of Tyson. She said that she had never known Dr. Berestnev to cross out something on a prescription, change it, and then give the prescription to the patient. She also confirmed that such action was not the proper way to handle changes in prescriptions. Dr. Berestnev did not testify or write a letter on the subject.

Tyson's human resources manager and a supervisor testified that the falsification of work records is conduct justifying termination. The human resources manager said that a prescription for medication would be considered a "work document" because the claimant was on workers' compensation and the employer would be responsible for paying for medication. He admitted that there was no investigation conducted to determine who altered the prescription and that it was assumed that since it was the

claimant's prescription that he was the one who altered it, as follows:

Q. So your testimony is today that you didn't do anything at all to try to investigate into this problem. You just received a prescription that appeared to be altered, and because it happened to be his prescription, you fired him; is that correct?

A. That's correct.

**TEMPORARY TOTAL DISABILITY**

On appeal, the claimant asserts entitlement to temporary total disability benefits from July 5, 2006 through August 16, 2006 in accordance with Ark. Code Ann. §11-9-521(a) and Wheeler Construction Company v. Armstrong, 73 Ar. App. 146, 41 S.W.3d 822 (2001). Ark. Code Ann. §11-9-521(a) provides:

An employee who sustains a permanent compensable injury scheduled in this section shall receive, in addition to compensation for temporary total and temporary partial benefits during the healing period or until the employee returns to work, whichever occurs first . . .

In Wheeler Construction Company v. Armstrong, supra, the Arkansas Court of Appeals interpreted Ark. Code Ann. §11-9-521(a) in a scheduled injury case. The employer, in Wheeler, argued that the claimant was not entitled to temporary total disability because he could not prove total incapacity to earn wages during the period of time disability benefits were requested. The claimant in Wheeler was incarcerated and obviously could not be gainfully employed. The Court held that language requiring an employee to show an incapacity to earn wages was "conspicuously absent" from the statute. The Court went on to say that the statute must be strictly construed and under the rules of strict construction, the statute could not be read to include a prerequisite not specifically contained in the statute, as follows:

The statute expressly provides that for scheduled permanent injuries the injured employee is to receive compensation for temporary total or temporary partial during the healing period or until the employee returns to work, which ever occurs first. Conspicuously absent from the statute is any indication that the injured employee show an incapacity to

earn wages as a requirement to receiving temporary benefits. This absence is key to any construction of the provision. We hold that the plain meaning of the language employed indicates that an employee who has suffered a scheduled injury is to receive temporary total or temporary partial 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.

....

Thus, appellant's argument continues, because Armstrong could not earn wages after August 30, 1996, due to his incarceration, his inability to earn income is directly attributable to his criminal conduct and not his injury.

....

As we have construed section 11-9-521, however, whether an injured employee is incarcerated is immaterial as long as that employee remains within his healing period and has not returned to work.

Therefore, the claimant must prove that he is in the healing period and that he is not working in order to be entitled to temporary total disability benefits for this

scheduled injury. It is not disputed that the claimant remained in the healing period and was not working from July 12, 2006 through August 16, 2006. Therefore, the claimant is entitled, as a matter of law, to temporary total disability benefits during this period of time.

In denying the claimant's entitlement to temporary total disability benefits, the Administrative Law Judge said that he did not qualify for these benefits under Wheeler because he was not off work because of his work related condition but rather because he was terminated by the respondent for altering a prescription. In Wheeler, the claimant was not employed because he was incarcerated. The Court said that incarceration was "immaterial" as long as the claimant remained in the healing period and had not returned to work. Clearly, if incarceration is immaterial then termination would be as well. The statute must be strictly construed and an additional prerequisite for entitlement to temporary total disability benefits can not be appended. Since the Administrative Law Judge imposed a requirement on the claimant which is not specifically contained in the statute, his decision should not have been affirmed and adopted by the majority.

**BENEFITS UNDER SECTION 505**

Claimant argues, on appeal, that he is entitled to benefits from July 12, 2006(date of suspension) through February 27, 2007(date of surgery), in accordance with Ark. Code Ann. §11-9-505(a) 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 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 under Ark .Code Ann. §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.

There is no dispute that the first two elements of proof have been satisfied. The issues are whether, during the period of time in question, the respondent refused to return the claimant to work, and if so, was that refusal reasonable.

With regard to whether Tyson fused to return the claimant to work, within the meaning of the statute, the law is clear that a termination of employment amounts to a refusal to return an employee to work unless the employee was terminated for reasonable cause connected with the work. Roark v. Pocahontas Nursing & Rehab., \_\_Ark. App.\_\_, 235 S.W.3d 527 (2006); Allen v. International Paper Co., 89 Ark. App. 266, 202 S.W.3d 13 (2005); Clayton Kidd Logging Co. v. McGee, 77 Ark. App. 226, 72 S.W.3d 557 (2002). Therefore, the only relevant inquiry is whether the claimant's termination was for reasonable cause connected with his work.

In Roark v. Pocahontas Nursing & Rehab., supra, the Arkansas Court of Appeals denied benefits under Ark. Code Ann. §11-9-505(a)(1) where the employee was terminated for violating the employer's "no call/no show" attendance policy. In that case, the Court considered the attendance

policy to be a legitimate part of the employer's rules for conducting its business, and a violation of that rule reasonable cause for dismissal. Because the employee was terminated for reasonable cause connected with his work, benefits were denied.

However, In Allen v. International Paper Co., supra, the Arkansas Court of Appeals reversed the Commission's decision denying benefits under Ark. Code Ann. §11-9-505(a)(1), in another termination case. In Allen, the employee was restricted to, and was working, light-duty because of his compensable injury. The employer had a company policy limiting light-duty to a period of ninety days. When the employee exceeded the ninety day period, he was terminated. The Court did not consider a violation of the company's self-imposed policy on light-duty to be a reasonable cause to refuse the claimant employment within the meaning of Ark. Code Ann. §11-9-505(a)(1). The Court made it clear that employers can not invoke violations of company policy, to prove reasonable cause for termination, when those policies frustrate the purposes of the Act. The Court pointed out that the Act is replete with statements indicating that the legislature intended that the Act be

construed to encourage the reentry of injured workers into the work force and that self-imposed policies that nullify that purpose will not be recognized as a defense to the payment of benefits under Ark. Code Ann. §11-9-505(a)(1).

Based on the precedents discussed above, I believe that the Administrative Law Judge's decision is erroneous on two counts. Firstly, the alteration of a prescription for medication would not constitute misconduct in connection with the claimant's work and would not, therefore, create reasonable cause for termination within the meaning of Ark. Code Ann. §11-9-505(a)(1). Secondly, even if the alteration of a prescription would be considered reasonable cause for termination, the evidence in this case is wholly insufficient to establish that the claimant actually altered the prescription.

Tyson's rule against falsifying "work documents" is certainly a legitimate company policy, the violation of which would justify termination. However, a prescription for medication is not a work document. At the hearing, the supervisor gave examples of work documents which had been falsified in the past and which had resulted in the termination of other employees. He said they were all

"production type records" involving such things as bacterial counts and inventory. While all of these documents are directly related to Tyson's business, the claimant's medical treatment had absolutely nothing to do with processing chicken. It is probable that Tyson has a "no call/no show" attendance policy like the employer in Roark v. Pocahontas Nursing & Rehab., supra,. If the claimant had failed to appear for a doctors appointment and had not called to cancel, then would he be subject to termination for violation of the "no call/no show" work attendance policy? Clearly, the conduct complained of by Tyson does not violate its policy of prohibiting falsification of company documents and would not amount to reasonable cause for termination connected with the work as set out in Roark. To allow an employer to apply its rules of the workplace to the claimant's off the job activities, in an effort to justify a termination, is an inappropriate extension of Roark. Such a holding would frustrate one of the Act's primary purposes, encouraging the reentry of injured workers into the workplace, in violation of the principles announced in Allen v. International Paper Co., supra.

And finally, the evidence of record is insufficient to establish that the claimant altered the prescription. The following evidentiary deficiencies should be noted. Mary King wrote a detailed letter and both she and Jessica Fowler appeared at the hearing to give testimony as to what is supposed to be done, and what is usually done, when prescriptions need to be changed. However, Dr. Berestnev never said what was actually done in this particular case. Dr. Berestnev refused to talk to the claimant, did not write a letter, and did not give testimony at the hearing or by deposition. This fact raises serious questions as to whether Dr. Berestnev may have hastily changed the prescription without adhering to normal operating procedures. If the claimant was guilty of modifying the prescription, why did he go straight to Dr. Berestnev's office and attempt to confront the one person who could have verified his guilt? In addition, the prescription was in the pharmacy and out of the claimant's hands for more than an hour before the alteration was called to the claimant's attention. The modification could have occurred there. There was absolutely no investigation on the part of Tyson to determine whether the claimant actually

altered the prescription. It was his prescription so they assumed he altered it and fired him for it. In short, the proof that the claimant altered the prescription was insubstantial and did not constitute reasonable cause for his termination.

For the reasons stated above, I find that the claimant proved entitlement to temporary total disability benefits from July 12, 2006 through August 16, 2006, as a matter of law. Further, I find that the claimant proved entitlement to benefits under Ark. Code Ann. §11-9-505(a)(1) from July 12, 2006 through February 27, 2007, by a preponderance of the evidence. Therefore, I must respectfully dissent from the majority opinion.

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PHILIP A. HOOD, Commissioner