

Zumas #4

IN THE MATTER OF ARBITRATION BETWEEN:

Employer

AND

Union

BACKGROUND

This is an arbitration proceeding pursuant to the grievance and arbitration provisions of the collective bargaining agreement between the Union and the Employer. Hearing was held on October 15, 1996, at which time, sworn testimony was taken, exhibits were offered and made part of the record, and oral argument was heard.

The hearing was stenographically recorded and a transcript, numbering 76 pages, was made available. Post hearing briefs were filed with the Arbitrator and the record was closed on January 29th, 1997.

STATEMENT OF THE CASE

The Employee, a mechanic, exhausted his sick leave while being absent on account of pain and injury to his wrist. The Union, on behalf of the Employee, contends that the Employer violated the collective bargaining agreement, the "Agreement", by refusing to reinstate the Employee's sick leave following an injury, which it maintains he suffered in performance of his duties on the job. The Employer contends that the Employee did not suffer an "occupational injury" as defined in the Agreement, and therefore, it did not violate the Agreement by refusing to reinstate his sick leave.

ISSUE

The parties agreed at the hearing of this matter that the question to be resolved is whether Employee is entitled under Article 12 (13) of the Agreement to have sick leave reinstated for an injury was not deemed to be a compensable occupational injury under applicable state workers' compensation laws.

STATEMENT OF FACTS

The parties agreed that the facts were not complicated and, generally, were not in dispute. The Employee is an A & P mechanic at the Employer's heavy maintenance hanger in City 1, State 1. On June 14, L994, the Employee, in conjunction with two co workers, was raising an 800 pound landing gear. He testified that during that operation, his left hand began to go numb. Upon setting down the Landing gear, he noticed that his hand was swelling. The Employee testified that he also noticed a "knot" protruding three-quarters of inch out from the bottom portion of the wrist on the left hand, just below the thumb.

The Employee was examined and treated in the emergency room. He underwent a series of follow-up treatments by an orthopedist over the course of several months, including corrective surgery. During the course of his treatment, the Employee was assigned light duty.

The Employee filled out occupational injury forms in order to begin the claims process. He testified that the Employer's accident forms prohibit making incorrect statements on them. The Employee knew he could be disciplined if he made any incorrect statements. There is no dispute that the Employee has not been disciplined for incorrect statements on the accident form.

Company 1 is a private company that administers the worker's compensation program for the Employer. It makes determinations as to the compensability based on its own interpretations of the State 1 Law. Company 1 is not an agency of the STATE 1 INDUSTRIAL COMMISSION. It is, however, the entity to which the Employee made his initial filing for workers' compensation benefits. The Employer Counsel explained that Company 1 makes the initial determination regarding whether or not an injury is work related. She further explained that in the event of a dispute as to the determination by Company 1, an appeal is taken to the STATE 1 INDUSTRIAL COMMISSION.

By letter dated August 9, 1994, Company 1 advised the Employee that:

...your present medical condition is not the result of a compensable injury according to the Workers' Compensation Act. This is due to the fact that you did not sustain an injury by accident arising out of and in the course and scope of your employment. For this reason, we respectfully deny your claim for coverage under workers' compensation.

The letter further advised the Employee that if he disagreed with Company 1's determination, he had the right to appeal to the STATE 1 INDUSTRIAL COMMISSION, which received a copy of the determination.

At the hearing the Arbitrator noted that Company 1 based its denial of workers' compensation on the "careful evaluation of the facts" and "our findings" but that it did not specify those facts or findings in its August 1994 letter. The Employer later submitted eight pages of Company 1's "claims activity notes" which it asserted were the basis on which Company 1 made its determination of non-compensability.

Included in the August 1994 notes are references to the Employee's physician's analysis that his "symptoms were most consistent (with) carpal tunnel syndrome" for which the Employee was

treated with night splints and cortisone injection. The August 8, 1994 note lists the causal relationship as related to employment.

There is no further explanation of that conclusion in the notes.

The August 12, 1994 note, however, states that "injury was not result of an accident arising out of and in course of employment." Likewise, there is no further explanation of that conclusion.

Finally, the September 12, 1994 note indicates the claim was denied "as there was not 'an accident' as defined by the Workers Compensation Act."

The Employee testified that in the end of August 1994, following receipt of Company 1's determination, we consulted an attorney who practices in the field of workers' compensation. He testified that he told the attorney that he (the Employee) hoped to get back his sick days and vacation days apparently expended while he underwent treatment and/or recovery therefrom.

The Employee testified that his attorney suggested that he pursue his claim through the Union and the grievance process. The attorney also indicated that he was prepared to represent the Employee if he chose to sue in court instead of proceeding to the STATE 1 INDUSTRIAL COMMISSION.

On cross-examination, the Employee testified that the Union did not advise him not to proceed to the STATE 1 INDUSTRIAL COMMISSION. He conceded, however, that his attorney specifically advised him not to appeal the matter to the STATE 1 INDUSTRIAL COMMISSION. He testified that he did not show the attorney a copy of the parties' Agreement in the course of his consultation. There is no dispute that the Employee did not appeal Company 1's determination to the STATE 1 INDUSTRIAL COMMISSION. The Employee testified that the Employer never challenged that a bone jumped out of his hand on the job.

In the course of the treatment and surgery following the Employee's initial examination in June 1994, he exhausted his sick leave. The Employer did not reinstate his sick leave used during this period.

On January 13, 1995, by the appropriate Employer form, the Union filed a grievance on behalf of the Employee alleging a violation of Article 12(B) of the Agreement, which provides, in relevant part:

In the case of occupational sickness or injury, the employee will be paid the difference between the Employer paid insurance and/or compensation payments (i.e. Workmen's Compensation and/or Federal Social Security benefits) and that amount the employee would have received at his regular rate to the extent his sick leave balance would entitle him. The employee's sick leave balance for OJI purposes will be reinstated after returning to regular full time duty for a period of thirty (30) days.

Person 1, the Employer's Manager of Labor Relations for the Mechanical and Related work Group from 1980 to 1989, and Maintenance Administrator since 1989, testified that as far back as 1980, the parties agreed that the issue of compensability was the "final determining factor as to whether wage loss makeup was paid or if sick leave should be reinstated." Person 1 testified that the determination as to compensability was the guideline as to whether an injury was deemed an occupational injury under the Agreement.

The Arbitrator asked:

"Your practice and agreement with the Union is that if there is this appeal to the state (STATE 1 INDUSTRIAL COMMISSION), that both sides will be bound by the decision of the (STATE 1 INDUSTRIAL COMMISSION)?"

"(Person 1] That was the understanding that we had in my tenure as far as processing of grievances. In other words, we would agree to disagree until we get a decision from the state."

Person 1 further testified that if a state agency -- the STATE 1 INDUSTRIAL COMMISSION in this case -- deemed an injury to be compensable, the Employer's practice was to abide by that, and make the appropriate payments under the contract. This meant that the sick leave an employee had used would be converted to an on-the-job status, and the sick leave that had been paid would be reinstated.

Person 1 testified that he was not aware of any instances in which an occupational injury claim was denied, but sick leave was reinstated.

The provision regarding sick leave in the parties' 1987 contract was slightly different from that in the current Agreement.

It provided:

“in the case of actual sickness or injury (Emphasis supplied).”

Union Assistant General Chairman Person 2 testified that he could not recall the reason or circumstances surrounding the change from "actual sickness or injury" in the 1987 contract to "occupational sickness or injury" in the Agreement in 1990.

As to any agreement between the parties regarding the significance of the STATE 1 INDUSTRIAL COMMISSION determination, Person 2 testified that:

"(Answer)...if there was a dispute as to whether or not a person was injured on the job, we would wait for a determination from the judgment from the state award."

"Q. So the understanding was that if a claim that an injury had occurred on the job was in dispute, that the Union and the Employer would say neither one of us was there, we will abide by the compensation ruling on this disputed case? Is that your understanding?"

"A. That's exactly right, yes."

This matter was not resolved by the parties at the intermediate Steps of the grievance procedure established by the Agreement. This proceeding followed.

POSITION OF THE UNION

The Union contends that the Employer violated Article 12(B) of the Agreement by refusing to reinstate the Employee's sick leave which he took as a result of an on-the-job injury.

The Union maintains that the Employee was hurt while at work. In support, it cites the Employee's testimony, the substance of the accident report, the Employer foreman who saw him injured, and the Employer's failure to discipline the Employee for submission of a false report.

The Union also notes that there was no evidence presented that the Employee was not injured on the job.

Having established the existence of the Employee's injury on the job, the Union contends that reinstatement of sick leave flows from the plain meaning of the Agreement. It argues that "injury" means "harm," which is what the Employee sustained; and that "occupational" means "on the job," which is where he sustained the harm.

Therefore, the Union maintains, the Employee should receive reinstatement of the sick leave and to deny doing so is a violation of the Agreement.

The Union asserts that the Employer is wrongly attempting to add to the Agreement, without negotiation, a requirement that an injury be "compensable" as well as "occupational" in order to receive reinstatement of sick leave. In support of its position, it cites Grievance No. 57840-PHL (System Board found provision for restoration of sick leave to the extent that workers' compensation pay was granted did not render the Employer's insurance carrier's acceptance of coverage under Workmen's Compensation Act the criterion as to an employee's entitlement to

occupational sick leave. The System Board noted that the contract did not define occupational injuries as only those found compensable under state workmen's compensation laws.)

The Union point out that compensability under Workers' Compensation is not required by the Agreement in order to be deemed an occupational injury. It further argues that it did not agree to allow an interested third party insurer (i.e. Company 1) or the STATE 1 INDUSTRIAL COMMISSION to determine whether in injury was "occupational" under the Agreement. The Union argues that the STATE 1 INDUSTRIAL COMMISSION only determines whether or not an injury was accidental, not whether or not it was occupational.

The Union urges that the grievance be sustained and that Employee's sick leave be reinstated.

POSITION OF THE EMPLOYER

The Employer contends that it did not violate Article 12(B) of the Agreement in denying reinstatement of Employee's sick leave because he did not suffer an occupational injury.

The Employer asserts that it did not reinstate the Employee's sick leave because his injury did not satisfy the prerequisite established by Article 12(B) that it be "occupational." It argues that he failed to establish that he suffered an occupational injury by accepting Company 1's determination and failing to appeal that decision to the STATE 1 INDUSTRIAL COMMISSION. Having not appealed, the Employer argues that the Employee has no further right to make claims for occupational injury.

The Employer argues that in any dispute as to whether or not something is an occupational injury is determined by the STATE 1 INDUSTRIAL COMMISSION, not the Employer. It asserts that the determination of whether an injury is occupational is made by under the state's Workers'

Compensation laws, since it is those Laws that determine the standards for occupational illness or accidents state-wide. The Employer maintains that it simply follows the state law. It also cites the testimony of both Union and Employer witnesses as to their agreed practice of awaiting a determination from the STATE 1 INDUSTRIAL COMMISSION in disputed situations, apparently arguing that both sides accepted the STATE 1 INDUSTRIAL COMMISSION as making the final determination.

The Employer concedes that the Employee filled out a report claiming injury, but asserts that many employees do so. It also denies that it disciplines all employees who fill out reports of injuries who did not sustain them.

The Employer urges that the grievance be denied because the Employee's injury was not an occupational injury under State 1 Law, and therefore his is not entitled to reinstatement of sick leave.

FINDINGS AND CONCLUSIONS

After review of the entire record and after having had an opportunity to evaluate the testimony and weigh the credibility of the witnesses and the evidence of the arguments presented, a majority of this Board finds that the Employer did not violate Article 12(B) of the Agreement and that the Employee is not entitled to reinstatement of sick leave. This grievance must be denied.

The essential facts are not in dispute. The Employee was at work and noticed an unusual feeling in his hand and an abnormal knot on it. He was subsequently treated for sprain and carpal tunnel syndrome. Eventually, he underwent surgery. In sustaining this series of treatments, the Employee exhausted his sick leave. He sought reinstatement of the leave on the theory that he

suffered an occupational injury under Article 12(B), which provides for reinstatement of sick leave or occupational injuries. The Employer denied the reimbursement on the grounds that the Employee's injury was not found compensable under Workers' Compensation laws, and, therefore, was not occupational.

The Annotations to the Workers' Compensation Law that were placed in the record indicate that there is a three fold test for compensable injuries: (1) the injury must be suffered by accident; (2) the injury must arise in the course of employment; and (3) the injury must arise out of the employment. The Union argued that looking to evaluation under the Workers' Compensation law is not appropriate because it is geared to accidents. This objection, however, is not well founded in this case. There is no dispute that whatever happened to Employee – whether or not injury was compensable -- was accidental, not intentional. Therefore, whether the Workers' Compensation laws apply only to accidents or not is irrelevant because the situation before the Board involves an alleged accident. The other two elements of the test are appropriate insofar as establishing whether or not an injury is occupational. Therefore, the Employer's reliance on a determination under Workers' Compensation standards as to whether or not an alleged injury is "occupational" is reasonable.

In addition there is persuasive, credible evidence that the parties have routinely looked to the determination of the STATE 1 INDUSTRIAL COMMISSION to resolve disputed situations as to the "occupational-ness" of an injury. The Union attempts to carve out an exception by asserting that the STATE 1 INDUSTRIAL COMMISSION'S determination is dispositive as to compensation, but not the occupational character. As discussed above, that argument does not take into account the underlying bases for determining compensability found under the Workers' Compensation Laws.

Thus, that the Workers' Compensation standards are appropriate and accepted by the parties as determining the occupational character of an injury was established.

In this dispute, the Employee's qualification for compensation was not made by the STATE 1 INDUSTRIAL COMMISSION. That determination was made by Company 1, a private entity that administers the Workers' Compensation program for the Employer. Company 1's denial of the Employee's claim, however, stated that his "present medical condition is not the result of a compensable injury according to the Workers' Compensation Act."

This indicates that Company 1 was applying the same standard for determining compensability that was accepted by the parties. Thus, on the basis of that finding the Employer appropriately found that the Employee had not suffered an occupational injury.

The Union asserts that Company 1 is an interested party, apparently implying that its analysis of compensability might not be wholly forthright. There is no evidence of prejudice, fraud, or misconduct. The Board cannot rely on a bare assertion of partiality to overturn its finding or the Employer's decision pursuant to that finding.

Moreover, if the Employee had doubted the impartiality of Company 1, or disputed its conclusion for any reason, he had the obligation to appeal that determination to the STATE 1 INDUSTRIAL COMMISSION. On advice of counsel, the Employee elected not to do so. It is not appropriate to allow him a second opportunity to revisit Company 1's determination of compensability; he should have done that by timely appeal to the STATE 1 INDUSTRIAL COMMISSION.

The Employer's reliance on the compensability standards from the Workers' Compensation law in determining the occupational character of an injury is not an unlawful addition to the Agreement, as asserted by the Union. Rather, it is an accepted means by which the parties have

defined a term. The findings of the System Board in the other Award, cited by the Union, deal with a different collective bargaining agreement and a different Employer and are neither precedential nor persuasive in this matter.

The System Board does not understand there to be any assertion that the Employee was not entitled to take the sick leave or other leave that he had available; however, for a non-occupational on-the-job injury or an off-the-job injury, the Employee would have been entitled to use the leave he had available. There is no evidence in the record of fraud by the Employee and no charges filed for false reporting or misconduct of any kind. (As the Employer noted, not all reports that might not be correct are investigated as misconduct.)

In sum, the determination of compensability by Company 1 was made using the Workers' Compensation standards. These were the standards that the parties accepted for determining the occupational character of an injury. When applied, it was determined that the Employee's injury was not occupational in character. No appeal was taken from that determination. Under the provisions OE Article 12(B), an employee is not entitled to reinstatement of sick leave unless the injury for which it was taken was an occupational injury. Therefore, the Employer did not violate the Agreement by denying Employee reinstatement of sick leave.

AWARD

Grievance denied.