Kasher #1

IN THE MATTER OF ARBITRATION BETWEEN:

Employer

AND

Union

System Board of Adjustment

In accordance with the customary rules of procedure of the Board, representatives were afforded a full opportunity to present evidence through the testimony of witnesses and in documentary proofs, a broad range of cross-examination was permitted and representatives raised points and contentions in support of their respective positions in closing arguments.

Background Facts

The Employee began her employment as a Utility Worker with the Employer in 1983 and was terminated by the Employer effective March 2, 1992. The Employee died on April 7, 1993. The evidentiary record in this case is comprised exclusively of documentation essentially regarding the Employee's physical ability to return to work at various times between 1983 and 1992, and the testimony of Person 1, the Employer's Manager of Housing Programs and Procedures for the Support Shops who was the Employee's immediate supervisor at the Employer's facility.

Person 1 testified that due to an injury the Employee suffered "on-the-job" on December 23, 1983, that she was restricted to "light duty" for a substantial period of time during her employment up and until her termination.

Person 1 testified that the Employee's duties involved the "cleaning up the restroom facilities", and were "limited to cleaning the sinks, replenishing tissues and cleaning the mirrors in all the restrooms and also doing some light dusting in the shops."

Person 1 sponsored documentation, primarily consisting of notes from doctors, which he testified he received from the Employee, which documents the Employer accepted as establishing that the Employee was either (1) disabled from any work or (2) permitted to return to work in a light duty status.

Person 1 testified and the documentation supports a finding that the Employee's physician was Doctor 1. Doctor 1 regularly provided the Employee with a note of excuse from work similar to the one dated January 16, 1992, which was entered in evidence as Union Exhibit No. 3 and which reads "Pt (patient) is unable to work for four weeks due to sciatica; will reevaluate at that time."

At various times throughout her employment, subsequent to her on-the-job injury, the Employee was "cleared" to return to work in a light duty status by a number of physicians. The record reflects that she would frequently return to work for a very short period of time and then present the Employer with a note from Doctor 1 stating that she was not able to work at all.

Person 1 testified that he conferred with the Employee in order to "adjust her duties to accommodate her"; and that he "made sure that she didn't empty rubbish cans, trash cans, do any bending and didn't have to reach." Person 1 testified that although the Employee was permitted to lift objects of twenty pounds or less he "personally talked to the Employee about not lifting anything and getting other utility people to lift if she had anything to lift."

There were differences of medical opinion over several years between doctors who had concluded that the Employee was fully capable of returning to the light duty position established

for her by the Employer and the Employee's physician, Doctor 1, regarding the Employee's ability to return to work.

On December 13, 1991 Doctor 2, the Medical Director of a facility, wrote to the Employer's Worker's Compensation Manager regarding her examination of the Employee on that date. Doctor 2 concluded, inter alia, that the Employee was approved for "full time modified utility duty" and that she was "not a candidate for any therapy at this time".

Person 1 testified that the Employee did not return to work as a result of her release by Doctor 2, but instead she wrote to the Employer on December 20, 1991 as follows:

> I'm requesting to be seen by a third doctor for a third opinion. Since Doctor 1 has said I'm unable to work full time and Doctor 2 has said that I am.

Person 1 testified that the Employer responded to the Employee's request on January 9, 1992 and suggested that she might choose from a list of three physicians who would be considered "neutral evaluators".

On January 15, 1992 Person 1 wrote to the Employee as follows:

> On 1-06-92, you submitted a doctor’s slip from Doctor 1 dated 1-06-92, releasing you from work from 1-06-92 to 1-22-92.
>
> It has come to the Employer's attention that you were not examined by Doctor 1 when his office provided you with that doctor's slip. Therefore, the Employer considers the examination completed by Doctor 2 on 11-18-91, which released you to light duty, as the most recent evaluation of your condition.
>
> Based on this information and your continued claim of disability, you are requested to submit to an examination by a third doctor to determine your condition. You have previously been provided with a list of three doctors who are qualified to perform this evaluation. Advise me no later than Monday, 1-20-92, 1500 hours, of your selection so that I can schedule an appointment for you.
>
> Failure to respond to and comply with this request will subject you to disciplinary action, up to and including termination.

The record reflects that the Employee conferred with Person 2, the Employer's Foreman in charge of the Employee's work area, on January 22, 1992, and that the Employee rejected the three "neutral evaluators" suggested by the Employer and requested that she be permitted to be examined by a Doctor 3; and that the Employer agreed. An examination appointment was arranged with Doctor 3 for January 30, 1992.

Doctor 3 examined the Employee on January 30, 1992 and concluded, after finding that the Employee "has been intermittently on and off work on light duty restriction since December, 1983", relevantly, as follows:

> IMPRESSION: Mechanical back pain.
>
> PLAN: Patient has had intermittent problems with her back pain on several occasions in the past several years. She states that the pain is worse when she works as a custodial aide with forward bending. She is not working at the present time.
>
> We recommended that she continue some physical therapy and that she could probably perform light duties with the exception of repeated forward bending.
>
> She will be seen on a pm basis. She could return to work, with light duty, no heavy lifting or repeated forward flexion.

A copy of Doctor 3's evaluation was sent to the Employer.

Person 1 testified that after he received Doctor 3's evaluation and reviewed it he telephoned the Employee and "proceeded to read the report to her"; which he characterized as being "consistent with Doctor 2's report of November 18, 1991, both documenting that she was able to return to work with some restrictions." Person 1 testified that the Employee "became very vocal, accusing the Employer of setting her up, and Doctor 3's office was acting on the behalf of the Employer, and he was not being totally honest."

Person 1 further testified that the Employee accused him of "not being honest" and that she was "very rude"; and that as he had known "the Employee for many years" he attempted to "calm her

down". Person 1 testified that the Employee was "kind of incoherent", and that he "finally ... did get her to calm down." Person 1 testified that he told the Employee that he was "giving her a direct order to return to work and (that) failure to do so would result in termination."

Person 1 testified that the Employee "was ranting and raving at that point in time, and (that he) repeated the direct order several times". Person 1 testified that the Employee "Finally ... calmed down again long enough for me to say, did you understand my direct order?", and that the Employee's response was "yes", however, she stated "I'm still not returning to work" and "she slammed the phone down".

Person 1 testified that the Employee was scheduled to return to work on February 28, 1992, but that she failed to do so. As a result, Person 1 testified that he issued a termination letter/report on March 2, 1992 which stated, inter alia, that the Employee had "failed to report for [her] regularly scheduled shift, as directed" and that "Due to [her] failure to comply with a direct order, [she was] charged with insubordination and [her] employment with the Employer [was] terminated, effective this date."

On cross-examination, Person 1 testified regarding supervisors' responsibilities in matters concerning occupational injuries and the manner in which the "GS-2" form, the work release form the Employer requires before an injured or ill employee may return to work, is to be handled. Person 1 also testified regarding the Employee's prior absences from work which had been "excused" by her physician. Person 1 stated that he could not recall a specific instance in October, 1988 when the Employee allegedly did not return to work after she had been released to do so because "she was in and out so many times, [I] started to lose track of her."

Person 1 testified regarding Doctor 3's evaluation and the date upon which he released the Employee to return to light duty, and Doctor 1's January 16, 1992 "medical excuse" which stated

that the Employee was unable to work for four weeks "due to sciatica". Person 1 testified regarding Union Exhibit No. 4, a February 10, 1992 note from Doctor 1 in which he stated "pt [patient] is totally disabled from her current work status due to chronic sciatica".

Person 1 testified that at some point in time, and he could not recall with specificity whether it was after he received Union Exhibit No. 4, the February 10, 1992 note from Doctor 1, he called Doctor 1's office and "they had told me she [the Employee] was not examined"; and that Doctor 1 "wouldn't give us a letter". Person 1 testified that the Employer had asked Doctor 1 "for a letter ... saying he did not examine her [the Employee], and he refused to give us that letter, downright refused." Person 1 testified that he "also had a conversation with the Employee, and the Employee admitted to me that she was not evaluated by him [Doctor 1], [and] did not have the physical."

Issue

The issue before the Board is whether the Employer had just cause to terminate the Employee, and, if not, what would be the appropriate remedy.

Position of the Employer

The Employer submits that this case involves a simple matter of insubordination, as the Employee was directed to return to work subsequent to her release to do so by the independent medical examiner she had chosen and that she knowingly refused that order.

The Employer points out that the Employee rejected the panel of doctors suggested by the Employer, and that the Employer acquiesced to her request regarding who should serve as the

independent medical examiner. The Employer submits that the Employee's refusal to return to work was because of her dissatisfaction with the results of the independent medical exam.

The Employer contends that the Employee was aware of the probable consequences if she refused to return to work as instructed by her supervisor.

The Employer maintains that it acted reasonably when it required the Employee to return to work, and points out that Employer personnel consistently worked with the Employee in an effort to accommodate her during the entire period when she had certain work restrictions.

The Employer contends that the Employee's termination was fully justified under the circumstances in the instant case, and submits that the grievance should be denied.

The Employer points out that, while a minimal amount of back pay, if any, would be due if the grievance was sustained, the remedy being sought is found in Article 22 of the collective bargaining agreement, which would provide life insurance benefits to the Employee's estate.

The Employer argues that the grievance should be denied because the Employee freely and knowingly chose to disregard the finding in the GS-2 form which established that she was fit to return to duty.

Position of the Union

The Union contends that the Employer did not comply with the rules and regulations found in its General Maintenance Manual, specifically Section 114-1-1, by the manner in which it treated the Employee in the instant case. The Union points out that whenever the Employee had been previously released to return to work she would see her treating physician and obtain a doctor's excuse which was then accepted by the Employer.

The Union submits that in the instant case the Employee followed the same procedure; that she saw Doctor 1, and that he provided her with a medical excuse, Union Exhibit No. 4, dated February 10, 1992, which concluded that she was "totally disabled from her current work".

The Union contends that the Employer did not challenge the verity of this doctor's note, as it had a previous doctor's note, and there is no showing that the Employee was not physically examined by Doctor 1 on or about February 10, 1992 when he concluded that she should not return to work.

The Union submits that the Employee presented the Employer with a "bona fide claim" on February 10, 1992, and that she justifiably believed that she was in strict compliance with the labor agreement when she did not report to work.

Additionally, the Union submits that the Employee was in compliance with Article 12, the Sick Leave provisions of the agreement, as she properly reported "off work".

The Union maintains that the Employee complied with Section 114-1-1 of the General Maintenance Manual, the applicable provisions of the collective bargaining agreement and the instructions she received from her treating physician.

Accordingly, the Union argues that the Employee was not insubordinate, and therefore requests that the grievance be sustained and that her estate be made whole for all lost wages and benefits including life insurance and flight privileges.

Findings and Opinion of the Board

As noted above, the evidence before this Board consists exclusively of documentation, most of which addresses the Employee's medical condition during various times of her career with the Employer, and the testimony of Person 1. Had the Employee not died prior to the arbitration

hearing it is likely that the Board would have had the benefit of her testimony to help us determine the two critical fact questions in this case.

(1) What was the Employee's medical condition on about February 28, 1992 when she refused to return to work?

(2) What was the Employee's understanding of her obligation to return to work in the context of Person 1's testimony that he had given her a direct order to do so on February 27, 1992?

Several relevant facts in this case are undisputed. There is no question that the Employee suffered a new or exacerbated an old injury while on the job, which disabled her from performing the full range of duties associated with the Utility Position.

The evidence further supports a finding that the Employer made every effort to accommodate the Employee's restricted physical ability to perform the ordinary duties of the job. This Board was impressed by the credible testimony of Person 1 regarding his concern for the Employee's well-being, and it is clear that he and others made considerable effort to ensure that the Employee would not be required to perform any work beyond the physical restrictions recommended by the various physicians who examined her.

The evidence further establishes that the Employee was approved to return to light duty work by various physicians who conducted full-range, orthopedic examinations in order to determine the extent to which her back injury would permit her to perform some work within the Utility classification. For example, Doctor 4concluded on June 2, 1984 that the Employee could return to work, that she was not "completely disabled" and could return to a "light duty position"; Doctor 5, who examined the Employee on October 28, 1987, concluded that the Employee was "able to work within the limits outlined on the enclosed Job Capabilities form"; Doctor 6, a

Board Diplomat of the American Board of Orthopedic Surgery, concluded on January 24, 1990 that the Employee "could return to light duty work", and he also observed that he found "no objective evidence to substantiate her subjective complaint" and that the "low back strain has long since healed"; and, as noted in the Background Facts section above, Doctors 2 and 3 likewise concluded in the 1991-1992 period that the Employee was capable of returning to a light duty assignment.

Each of these doctors who examined the Employee and concluded that she could perform some work for the Employer performed reasonably extensive examinations and their conclusions were based on those examinations.

On the other hand, the medical excuses provided by Doctor 1 do not establish anything other than his naked assertion that the Employee was "totally disabled" or was not able to return to perform "any work"; and Person 1's testimony regarding Doctor 1's refusal to provide a letter regarding the nature of his examination(s) of the Employee raises serious doubt as to whether Doctor 1 did anything more than write a medical excuse after listening to the Employee's subjective claim of total disability.

The Employer's skepticism regarding the reliability of Doctor 1's opinion is understandable. Yet, the record reflects that the Employer did not act precipitously or harshly when it ultimately directed the Employee to return to work. Rather, the

Employer continued to seek to have the Employee return to work in a position that would not stress the physical limitations prescribed by Doctors 2, 3, 4, 5, and 6.

As the Employer correctly points out, Doctor 3 was the Employee's choice as a "third neutral medical evaluator". More significantly, it was the Employee who suggested that a "third" opinion regarding her medical condition be obtained in order to put to rest the ongoing difference of

opinion between her physician, Doctor 1, and the five other physicians who had concluded that she was orthopedically capable of returning to some type of light duty work.

Person 1's testimony regarding his telephone conversation with the Employee on February 27, 1992 is fully credited and accepted by the Board. We find, as the Employer has suggested, that the Employee was distressed and upset by Doctor 3's finding that she could return to work in a light duty status; and so she refused a direct order, knowing full well that her refusal would likely subject her to discipline up to and including discharge.

The "black letter law" of the shop regarding insubordination recognizes that an employee, who has a reasonable concern that following a direct order of management will jeopardize his/her health or safety, may refuse to follow such an order. The critical concept is that the concern for one's health or safety must be "reasonable".

In light of the numerous medical evaluations, of which the Employee had knowledge, which concluded that she was able to return to service and perform non-strenuous work, this Board finds that the Employee's refusal to obey the direct order of Person 1 was unreasonable and thus constituted an act of insubordination.

The Employer's long-term patience and its efforts to accommodate the Employee over a period of nearly nine years contributes to this Board's finding that the Employer’s ultimate determination to terminate the Employee's employment did not constitute an overly severe penalty. Thus, the grievance will be denied.

Award:

The grievance is denied. The Employer had just cause to terminate the Employee's employment.

This Award was signed this 30th day of November, 1995.