Williams #1

IN THE MATTER OF ARBITRATION BETWEEN:

Employer

AND

Union

BACKGROUND

This case arose under the collective bargaining agreement. The Employee was discharged on May 5, 1995 for failing to provide medical documentation to cover his absence from work from March 27, 1995 to the date of his discharge as the result of an alleged at home injury. The Employee protested this action, filed his written grievance on May 8, 1995 and processed it to this arbitration in accordance with the Agreement. An arbitration hearing was held on August 1, 1996. The issue presented at the hearing was whether the Employee was discharged for just cause and, if not, what shall be the remedy. A transcript of the proceedings was taken and prepared. The parties presented their oral arguments at the end of the hearing. Under the Agreement the Board has until August 27, 1996 to issue an opinion and award.

FINDINGS

The Employee in this case was a Utility man in the Maintenance Department. As a result of his prior unsatisfactory attendance, the Employee was given a PE-1 Final Warning for violating the Employer's attendance policy. This disciplinary action was grieved on January 11, 1995. At the First (1st) Step verbal decision, the supervisor agreed as follows:

> Agree to reduce PE-1 to a verbal warning. Emp. must furnish Dr's certification of sick days for a period of 1 year from this date.1/18/95

This settlement remained controlling throughout 1995.

This case arose out of-an at home injury which occurred on March 26, 1995. The Employee fell over his son and injured his knee. He called the Carrier on March 27th and asked whether he should see the Employer's Workmen's Compensation doctor or his personal physician. He was told to see his personal physician. His physician then referred the Employee to an orthopedic surgical specialist. This specialist examined the Employee on April 7, 1995.

The Employee remained out of work from March 26, 1995. On April 13th the Maintenance Manager called the Employee and left a message on his answering machine. The Employee returned the call about 4:14 p.m. According to the Maintenance Manager, he told the Employee medical documentation was needed. The Employee then said he would obtain it that afternoon at his appointment with his doctor and send it on the 14th. No medical certificate was received.

On April 25, 1995 the Maintenance Manager sent a letter to the Employee by regular mail and by certified mail. It stated, in part:

> Should I not receive a letter describing your condition from your doctor by May 4, 1995, you will be considered as abandoning your job and your employment with Employer will be terminated.

The certified mailing of this letter was returned to the Employer as undelivered or unpicked up. The Employee had moved, but he received the letter by regular mail on May 2, 1995. No medical documentation was received by May 4th. The Carrier, through its Maintenance Manager, discharged the Employee-by a letter dated May 5, 1995.

According to the Employee he attempted to obtain medical documentation for his absence almost on a daily basis following his telephone discussion with his Maintenance Manager. The Employee went to his orthopedic doctor on the 13th. He gave the Employee a shot and drained his knee. Before the Employee obtained a certification, the doctor left his office, while the

Employee was resting with his knee up. According to the Employee, he was told the doctor would call him, but he didn't. The Employee said he called again on the 19th and 20th, but received no response. On April 24, 1995 the Employee learned he was to be scheduled for a MRI. It was scheduled for May 8, 1995.

The Employee acknowledged receiving the Maintenance Manager's April 25th letter on May 2, 1995. On May 4th the Employee called the Carrier and said he would have the doctor's office fax medical documentation. Following his discharge of May 5th, the Employee testified he picked up a medical certificate from the doctor's office on May 8, 1995. It stated:

> OUT OF WORK CERTIFICATE
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> This is to inform you that the Employee (handwritten) is under my care and is to remain out of work from this date until 5/10/95 (handwritten). The patient will be seen again on p MRI Scan
> (handwritten) and will be further evaluated at that time.
>
> Date: 5/8/95 (handwritten)
>
> Signed by doctor

The Employee testified he picked up this note from his doctor's office on May 8, 1995. He did not say he delivered this certificate to the Carrier at that time.

A special hearing for the Employee was scheduled for May 31, 1995. According to the Employee, he picked up "everything" on his way to his special hearing. These documents were presented at the hearing. One document dated 11/29/94 related to his prior condition. A second document dated April 7, 1995 was a letter from the orthopedic surgeon to the Employee's primary care physician. It stated in part:

> ....There is a prior history of having knee problems but he states that this is an injury along the medical joint line where he had associated onset of significant swelling which he iced down. He has been out of work and is desirous to return to work at this time.

PLAN:
1. The patient is instructed in home exercises which he knows as reinforced to work with at least two pounds of weight to start.
2. Patient is going to be utilizing a cartilage knee support with horse shoe pad.
3. Patient will be allowed to return to work.
4. Follow up will be on a PRN basis.

This letter along with the Out of Work Certificate dated May 8th was submitted at the Employee's Special Hearing on May 31, 1995. During his cross examination the Employee testified about his April 7th appointment with his doctor:

Q. Now when you were examined by Doctor 1 on April 7th, did he discuss his findings with you?

A. On April 7th?

Q. Yes.

A. No. Not at that time, no

Q. I would like to direct your attention to page 2 under the section that says "Plan." It's paragraph 3.

A. Yes.

Q. "Patient will be allowed to return to work.

A. Yes, he did say that if the swelling did not go down. That’s what he told me.

Q. I thought you said he didn't discuss this with you.

A. No, he told me I could go back to work. I wanted to go back to work. And he told me I could go back to work as long as the swelling went down. And the swelling never went down...

Q. So now he's discussed this with you.

A. Uh-huh

Q. Okay. But it doesn't say here. "Patient allowed to return to work if swelling goes down."

A. I know it doesn't say that that's why I went back to him on the 13th. (T. pp 58-59)

Based on this record the Carrier discharged the Employee on May 5, 1995. The Employee protested this action, filed his grievance on May 8, 1995 and processed his case to this arbitration in accordance with the Agreement.

POSITIONS OF PARTIES

The Employer contends that the Employee was discharged for just cause. He spoke with the Maintenance Manager on April 13, 1995 and was told medical documentation was needed. The Employee already had been seen by his orthopedist on April 7th. He again saw his doctor on April 13th, but failed to obtain a certificate. He knew from the Maintenance Manager's April 25th letter he admittedly received on May 2nd that medical documentation had to be provided on or before May 4th or face termination. The Employee's failure to provide documentation should not be attributed to his doctor's neglect. The Employee did not submit the documentation because he knew it would not support his absence. He instead tried to explain away his failure to provide the documentation. The grievance, therefore, should be denied.

The Union, on the other hand, contends the Employee was not discharged for just cause. The Maintenance Manager did not set a deadline in his telephone conversation of April 13th. The only deadline was May 5th. The documentation was picked up and provided at his third step hearing. The Employee did not know about the doctor's April 7th letter until his third step hearing. The Employee tried to provide what the Carrier asked for. Not once did the Carrier say it would assist the Employee in getting the requested information. It has an obligation to do everything it can to verify an employee's problems and sicknesses before discharging him. The grievance should be sustained and the Employee made whole.

DISCUSSION

Several provisions of the collective bargaining agreement are relevant to this case:

> ARTICLE 10
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> LEAVES OF ABSENCE
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> (D) Any employee who has exhausted all sick leave, and continues to be absent due to sickness or non-occupational injury in excess of thirty (30) work days, must apply for a medical leave of absence on the standard leave of absence form, and must present proper medical documentation detailing reason(s), physical limitation, time limits, etc.
>
> (Emphasis Added)
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> ARTICLE 12
>
> SICK LEAVE, PREMIUMS AND BONUSES
>
> (F) The employees covered by this Agreement and the Union recognize their obligation of being truthful and honest in preventing unnecessary absences or other abuses of sick leave privileges. Employees may be required to present confirmation of illness and the Employer reserves the right to require, when in doubt of a bona fide claim, a physician's certificate to confirm such sick claim. Employees who abuse sick leave privileges may be subject to disciplinary action by the Employer.
>
> (Emphasis Added)

These provisions are controlling in this case.

Under the just cause doctrine an employer alleging an employee's unsatisfactory performance has the burden of proof. In these cases management must show: (1) The employment standards adopted are within management's discretion to establish offenses and discipline; (2) The Employee knew beforehand that his contemplated conduct was an offense that could result in the discipline administered; (3) The Employee actually engaged in the alleged misconduct and; (4) The discipline administered complied with the steps of progressive discipline or the offense warranted severe discipline including immediate discharge. Management cannot prevail in such cases unless it meets its burden of proof under the just cause doctrine.

The parties have developed a system for addressing attendance problems. Part of that system is management's right to require medical documentation to verify alleged sickness or injury under the leave of absence and sick leave provisions of the Agreement. No doubt management has the right to insist on such medical documentation under its attendance control system. This right includes the discretion to establish deadlines for submitting requested medical documentation. Otherwise, its right would be meaningless. The system is unclear, however, about what happens when an employee is dilatory or intentionally fails to provide such documentation within time limits. The just cause doctrine has long recognized that the intentional fabrication of sick leave claims is a serious offense warranting severe discipline including immediate discharge. On the other hand, short term absences warrant progressive discipline under the just cause doctrine. In the same manner dilatory presentation of required medical documentation as the result of carelessness or disability warrants progressive discipline. Of course, such medical documentation should establish the alleged illness or injury. Such offenses and discipline are recognized under the just cause doctrine. The Carrier has proven it had the discretion to establish such offenses and discipline.

What did the Employee know about his conduct and possible discipline? The "Posted Rules of Conduct" make no mention of such offenses or discipline. They only mention an employee's duty to maintain regular attendance. The evidence shows that the Employee was told in the Maintenance Manager's April 25th letter that a failure to provide the documentation by May 4th would result in his discharge. This letter gave him two (2) days to submit the required information. The Employee testified he had been trying to obtain the requested information almost on a daily basis since April 13th, but his doctor essentially was uncooperative. If true, the failure to provide the information within two (2) days would be dilatory, if a few days late,

warranting progressive discipline. Ultimately, of course, the Employee might have to discharge an uncooperative doctor. In any event the Employee knew he was obligated to provide medical documentation or face discipline up to and including discharge. Finally, he knew as an employee that fabricating claims for absences was a serious offense.

What was the Employee's misconduct, if any? A witness is presumed competent and credible unless proven otherwise. No doubt the Employee was competent in that he understood he was to produce medical documentation as a result of his earlier settlement. He knew he could face discharge at least as of May 2nd. According to the Employee his doctor was uncooperative so he could not provide the documentation in a timely manner. Is this explanation credible? To prove someone's version of an incident is not credible one must prove their testimony is inconsistent with known facts. It may be internally inconsistent, that is an incident could not have occurred as it was described; or, the explanation given conflicts with known external facts. The Employee testified he had an appointment with his doctor on April 7th. Initially, he denied discussing his findings with him. When confronted with the letter dated April 7th that he said he picked up on May 31st, the Employee said he was to return to work "if the swelling went down." When confronted by counsel:

> Q. But, it doesn't say here, "Patient allowed to return to work if swelling goes down." (T. p. 59) The Employee answered:
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> A. I know it doesn't say that. That's why I went back to him on the 13th. (T. p. 59)

In other words the Employee said he saw the April 7th letter for the first time on May 31st, but said it was a basis for him seeing his doctor over a month earlier on April 13th. The only way he could use that letter as a basis for making his April 13th appointment would be for him to see or

obtain a copy before the 13th and not on May 31st as he testified. Such testimony is internally inconsistent. The incident could not have happened the way he described it.

The Employee also testified his doctor told him to return to work "if the swelling went down," yet, the doctor's letter made no mention of any "swelling going down" as a condition precedent to returning to work. The doctor orally could have made such a statement on April 7th, but the Employee initially said the doctor did not discuss his findings on April 7th. A witness who gives one version of an incident and then another of the same incident is not credible in that instance. Stated bluntly, the Employee has not given an honest explanation of why he was late in providing medical documentation.

Finally, even if the medical documentation was timely presented, it does not support the Employee's absence. His orthopedic surgeon said on April 7th that the Employee was able to return to work. A reading of his entire letter shows his view was consistent with the doctor's other findings. The doctor is presumed competent and credible even though he did not testify at the hearing. A competent and credible doctor would not tell a primary care physician one condition and a patient another. The Employee's fabricated explanation is not credible as evidence to rebut this presumption under burden of proof principles. His doctor's April 7th letter remains as uncontested competent and credible evidence.

In summary the Employee fabricated his excuses for not providing medical documentation because he knew the medical records did not support his absences. The evidence proves this theory to the exclusion of the Employee's version. The Carrier has proven the Employee intentionally fabricated his excuses for not providing medical documentation.

What is the appropriate discipline for such an offense? Dishonesty is a serious offense under the just cause doctrine. Knowingly asserting a false defense is such intentional misconduct. Severe

discipline up to and including discharge has been proven as the appropriate discipline for this offense under the just cause doctrine. The Carrier has met its burden of proof. The grievance must be denied.

AWARD

Grievance No. 95-8005 is hereby denied in accordance with the reasoning in the opinion.