Wittenberg #4

IN THE MATTER OF ARBITRATION BETWEEN:

Employer

AND

Union

The undersigned, having been designated by the parties pursuant to the collective bargaining agreement, was selected to serve as impartial chair of the dispute described below. The parties had a full opportunity to examine and cross-examine witnesses, to submit documentation and to make oral argument in support of their respective positions. The hearing was declared closed on August 4, 1993.

ISSUE:

The issue before the Board, as agreed upon by the parties, is as follows:

Did the Employer violate Article XIV, Paragraph D, of the 1986-1989 Mechanics' Agreement? If so, what shall the remedy be?

RELEVANT CONTRACT LANGUAGE:

> ARTICLE XIV
>
> D. Employees will accrue one (1) day of occupational illness or injury leave for each month of continuous service to a maximum of one hundred (100) days. This accrual will be in addition to non-occupational sick leave and may be used for absence resulting from occupational illness or injury only. After exhausting his occupational illness or injury leave, the employee may use his non-occupational sick leave credits. He may not, however, use occupational illness or injury under any circumstances. When an employee on occupational illness or injury exhausts his occupational leave, his ensuring accrual of

> occupational injury leave shall be credited to his non-occupational sick leave until such time as he has replaced all non-occupational sick leave which was used for his occupational illness or injury. The provisions of Paragraph E of this Article will apply to Workmen's Compensation paid to an employee while he is receiving occupational illness or injury leave.

BACKGROUND

The Employee was employed by the Employer as a Building and Maintenance Mechanic from March 20, 1967 until May 19, 1991 when he was separated from the Employer after an absence which commenced on April 9, 1988. At the time the Employee last worked for the Employer, he was assigned to AIRPORT 1.

Commencing on April 9, 1988, the Employee was placed on non-occupational sick leave despite his claim that his absence was due to "accumulated stress and strain, both physically and emotionally over 21 years of employment with the Employer. The Employee remained on non-occupational sick leave until his sick leave balance was depleted on October 11, 1988. As of April 9, 1988 the Employee had 620 hours of non-occupational and 800 hours of occupational sick leave. Effective October 27, 1988, the Employee was placed on extended unpaid sick leave until May 19, 1991 when he was separated from the Employer.

Person 1, Manager of Plant and Equipment Maintenance at AIRPORT 1 testified that he first became aware of the Employee's absence through a routine check of attendance rosters. Soon thereafter, Person 1 received a telephone call from the Employee advising him that a letter would be forthcoming from a doctor explaining his absence. In the meantime, Person 1 heard scuttlebutt that the Employee had an "occupational problem". He also heard that the Employee's house was for sale and that he was not expected to return to work. On June 17, 1988 the Employee

submitted a personal status change form to the Employer changing his permanent address to City 1, State 1.

After receiving the Employee's claim for sick leave, Person 1 forwarded it to the Employer's workers' compensation staff for investigation. On the basis of the Employee's medical documentation, however, Person 1 approved non-occupational sick leave for the Employee. Person 1 continued the Employee's sick leave based upon a document from the Employer's Medical Department approving Employee's absence from work due to illness.

On June 23, 1988 the Union filed a second step grievance protesting the Employer's refusal to treat the Employee's absence as an occupational injury. The grievance was held in abeyance pending a ruling from the Workers' Compensation Appeals Board (hereinafter WCAB) as per a local agreement between the Employer and the Union.

As a matter of practice, the parties have used the outcome of the State 2 WCAB ruling to resolve disputes regarding occupational versus non-occupational sick leave claims. This practice was formalized in a 1987 letter from Industrial Relations Representative Person 2 to Assistant General Chairman Person 3. The letter states:

> In order to more effectively manage the grievance procedure, we agreed that, in the future, grievances addressing the issue of occupational vs. non-occupational injury pay (otherwise known as "I. vs. N" cases) will be held in abeyance at the Second Step pending a decision by the State of State 2 Workers' Compensation Appeals Board (WCAB). If the issue is not resolved by the WCAB's decision, the case will be heard promptly at the second step.

The Employee appealed his claim to the WCAB on May 12, 1988. Workers' Compensation Board Judge Person 4 heard two cases. Case No. 88 ANA 202358 dealt with an injury the Employee sustained to his back on May 13, 1980. The Judge denied the claim, finding it barred by the statute of limitations. Case No. 88 ANA 202359 dealt with the Employee's absence

commencing April 9, 1988. The case was heard on June 13, 1990, and Judge Person 4 issued his Findings and Award on August 8, 1990.

Person 5, Ph. D., the Employee's psychologist submitted a report to the Employee's attorney dated August 3, 1988 for purposes of supporting his workers' compensation claim, entitled Permanent and Stationary Evaluation. The report followed a psycho-diagnostic evaluation on June 9, 1988 including an interview and mental status examination.

Dr. Person 5 found the Employee's condition to be permanent and stationary. He concluded that the Employee was "partially disabled from a psychiatric point of view with a residual permanent disability which is slight to moderate in degree." Dr. Person 5 did not recommend vocational rehabilitation. He did recommend that the Employee continue to receive psychotherapeutic treatment noting in his prognosis that the Employee "has had a favorable response to therapy."

The Employee's orthopedist, Person 6, M.D. found that the Employee "has had trouble with his back and right knee on a cumulative basis over a long period of time while on the job for the Employer", neither of which would be amenable to surgery. Dr. Person 6 recommended ongoing medical care. He found that the Employee's condition precluded him from performing "very heavy work" including "walking on uneven surfaces, repetitive climbing, stooping or squatting." The doctor stated that since the Employee's condition prevented him from returning to his regular job, that vocational rehabilitation would be necessary.

Judge Person 4 found that the Employee sustained an injury "arising out of and occurring in the course of (his) employment to his low back and psyche." He found that the injury caused the Employee's temporary total disability from April 13, 1988 to June 9, 1988, and awarded weekly indemnity for this period of time less reimbursement to EDD for state disability benefits paid

during the same period of time. The Judge also found that the injury incurred caused a permanent disability of "20 3/4% after apportionment", for which the Employee was awarded $10,395 beginning June 13, 1988, payable at the rate of $140 per week. The Judge found "no need for further medical treatment to cure or relieve from the effects of said injury."

At the arbitration hearing, both sides called workers' compensation experts to interpret Judge Person 4's decision. The Union's expert, Attorney Person 7, testified as follows: The Judge found that the Employee sustained an injury on the job, qualifying him for temporary total disability from April 13, 1988 to June 9, 1988. During a period of temporary total disability, an employee is deemed unable to engage in any gainful employment.

The Judge ruled that the Employee was entitled to the maximum benefit. Under Workers' Compensation Law, employees are entitled to receive two thirds of their average weekly income. The maximum weekly benefit at the time was $224 per week.

The Judge also found that the Employee's injury caused a permanent disability of 20 3/4% after apportionment. The Judge apportioned the Employee's permanent disability as follows: 16% psychiatric and 4 3/4% back. According to Person 7, the Judge adjusted for the portion of the Employee's disability not covered due to the statute of limitations. The Judge awarded the Employee $10,395 for the residual effects of his work related injury. The Employer's expert Person 8, Technical Manager for Company 1 Risk Management, who handles the Employer's workers' compensation claims, testified that the $10,395 award was the means of compensating the Employee for his disability over the course of his lifetime.

Both experts agreed that the Judge did not rule on whether the Employee's permanent and stationary disability would preclude him from returning to his occupation. It is not within the Judge's jurisdiction to make such a finding.

According to Person 8, the Employee's disability would not preclude him from working in his job classification as a Building and Maintenance Mechanic. The only job at the Employer for which the Employee's 20 3/4% disability disqualifies him is as a ramp serviceman. Person 8 testified that he is aware of mechanics at the Employer working with disability ratings similar to that of the Employee.

Aside from receiving workers' compensation, employees who are unable to return to their normal occupation are also entitled to apply for vocational rehabilitation. According to Person 8, the Employee initially applied for vocational rehabilitation, but dropped his application when his medical documentation indicated no need for the benefit.

Employees injured on the job are also entitled to apply for state disability benefits. State disability compensates an employee beyond the point of being permanent and stationary if he is unable to work. An employee who receives state disability while his Workers' Compensation case is pending will have his lien resolved when the WCAB decision is issued.

During the pendency of the Employee's Workers' Compensation case, he received disability payments from State 2. The lien against the Employee's state disability claim was resolved when Judge Person 4 issued his WCAB decision and award.

Following the issuance of the WCAB award, and after the parties were unable to agree on its interpretation, the second step grievance was heard on January 15, 1991. Hearing Officer Person 1 sustained the grievance in part on February 1, 1991, granting the Employee 39 days of occupational sick leave for the period of time he was found to be temporarily disabled. The Employee's occupational sick leave benefit was valued $6037.20, and he received a check in that amount.

The Employer refused, however, to pay the Employee out of his occupational sick leave bank for the period after June 9, 1988. The Employer also issued the Employee two additional checks in the amounts of $294.12 and $1060 from its insurance carrier, paid in cases of non-occupational illness or injury for a maximum of 26 weeks. The Employee received these payments covering 182 days of absence, from April 16, 1988 to October 14, 1988.

Prior to the expiration of the Employee's unpaid sick leave, the Employer sent him two certified letters requesting that he contact its Medical Department for an appointment to evaluate his condition to determine whether he could return to work. When the Employee failed to comply, he was separated from the Employer effective May 19, 1991.

Following the Employee's separation, the Union submitted three letters from Dr. Person 5 dated August 13, 1991, August 29, 1991 and September 6, 1991 in support of the Employee's claim for occupational sick leave after June 9, 1988. The August 13th letter notified the Employer that the Employee was "psychologically unable to return to his former occupation with the Employer at the time he was released. The August 29th letter provided more detail with regard to the Employee's condition. Dr. Person 5 concluded that, "After a prolonged build-up of stress, Employee developed sufficient physical and psychological symptoms that he was no longer able to perform his usual and customary duties."

In his final letter to the Employer dated September 6, 1991, Dr. Person 5 reported on the Employee's current condition based upon "an extensive telephone conversation with the Employee this date to assess his current psychological condition." Dr. Person 5 reported that Employee "...stated vehemently that he would never be able to return to work at the Employer. To do so would mean constantly looking over his shoulder, as he is convinced management

would be trying some devious means to emotionally destroy him so that he would either quit or be unable to perform his job up to standard."

At the hearing, the Union submitted a System Board Award concerning employee Person 9 issued by Chairman Person 10on September 15, 1971. The facts of the Person 9 case, stated briefly, are: Person 9 suffered pain after assisting another employee in lifting a brake assembly. Person 9 was eventually operated on for a herniated disk and was out of work for approximately four months.

Originally the Employer paid Person 9 sick leave from his occupational injury accrual. However, upon advice from the Employer's Workmen's' Compensation Insurance Carrier, it denied Person 9 occupational sick leave on the grounds that the injury was not compensable under the Workmen's' Compensation Law.

The System Board found that the payment of occupational injury under the contract is not limited to those injuries covered by Workers' Compensation Laws of the various states. Moreover, the Board commented on its unwillingness to accept the insurance carrier's judgment as definitive, since it was not totally unbiased. The Board stated further:

> Thus, it is a fair conclusion that neither the judgment nor a finding of a Workmen's Compensation Commission that an injury is covered under the applicable Workmen's' Compensation statute is a sine qua non for permitting the use of occupational injury or illness leave.

It should be apparent from the foregoing that the term 'occupational illness or injury' should be considered as covering an injury within the meaning of 'occupational' in the ordinary sense. ... Accordingly, he was entitled to have used his occupational injury leave while he was unable to work as a result of his injury.

CONTENTIONS OF THE UNION

The Union contends that Judge Person 4's WCAB award and decision is clear in stating that the Employee was injured on the job and that the occupational injury caused a permanent disability. In accepting that the Employee's disability was "permanent and stationary", the Judge acknowledged that the Employee's condition was unlikely to change over time.

The Union's interpretation of the WCAB award is supported by the testimony of its expert witness Person 7. The Union argues that Person 7's interpretation should be accepted over that of the Employer's expert since Person 7 is not in the Union's employ. It argues, therefore, that his testimony is unbiased.

The Union points to the clear and unambiguous language in Article XIV, Paragraph D which states that if an employee is injured on the job, he is entitled to occupational sick time or "I" time. On the basis of the WCAB decision that the Employee suffered an on-the-job injury, the Union claims that he is entitled to receive the "I" time in his sick bank.

The Union notes that it never made a claim that the Employee was unable to work after June 9, 1988, merely that he was unable to return to work for the Employer due to the anxiety and depression associated with his residual disability. The Union points out that the Employer approved the Employee's non-occupational sick leave for "anxiety disorder", based upon medical reports from the Employee's psychologist Dr. Person 5. The Union contends that there is no proof that this sick leave was paid for anything other than anxiety and depression.

In support of its position, the Union relies upon the arbitration award in the Person 9 case in which the Employer's position that it would not grant sick leave for any time not recognized by the WCAB was not upheld. The arbitrator in the Person 9 case independently found the

employee's injury to be job related and awarded him occupational sick leave for the period of his disability when he was unable to work.

CONTENTIONS OF THE EMPLOYER

The Employer contends that once the parties disagree as to the interpretation of a WCAB decision, or challenge its results, the case must be fully heard. In this case, the Employer argues that the Union must prove through competent medical evidence that the Employee was unable to return to work after the period of his temporary disability ending June 9, 1988. The Employer asserts that the Person 2 letter, together with her testimony, is clear in this regard, and establishes that the Employer never intended to be bound automatically by a decision of the WCAB. The Employer claims it has never agreed that the Judge's decision would be dispositive of the issue of whether an employee qualifies for occupational sick leave under the Agreement.

The Employer asserts further that the Judge did not deal with the issue before the System Board, namely, whether the Employee was able to return to work for the Employer after June 9, 1988. This decision was beyond the scope of the Judge's authority. The Employer contends, therefore, that it complied fully with the WCAB decision in granting the Employee occupational sick leave for the period of his temporary disability from April 13, 1988 through June 9, 1988, for a total of 39 days. Thereafter, the Employer paid the Employee his non-occupational sick leave until his bank was exhausted. The Employer accepted the Employee's non-occupational illness at face value.

The Employer contends that the Union has failed to meet its burden of proof in this case, citing the lack of persuasive medical evidence concerning the Employee's ongoing occupational disability after June 9, 1988. The Employer notes that the Employee never attempted to return to

work after June 9, 1988. Instead, he relocated to State 1 where he engaged in other employment. Nor did the Employee seek vocational-rehabilitation in order to train for an alternative occupation.

Finally, the Employer contends that the award in the Person 9 case supports its assertion that the Union is required to present a complete case during the grievance procedure, including arbitration. The arbitrator in the Person 9 case stated specifically that the grievance procedure is a separate forum and decided not to be bound by a-WCAB decision denying Person 9 benefits because the injury he sustained was not compensable under the Workmen's' Compensation Laws.

OPINION

The crux of the matter before the Arbitrator is whether the record establishes the Employee's inability to return to work due to occupational injury after June 9, 1988 and for the period extending through the expiration of his occupational sick leave or "I" time. Upon careful review of the record in this case, while the Arbitrator finds that the medical evidence establishes the Employee's inability to return to work due to an occupational injury through June 17, 1988, it does not prove his inability to return to the Employer thereafter. My reasons follow.

The burden of proof in a sick leave case rests initially with the employee, who is responsible for submitting competent medical evidence to support his disability claim. The Employer must act in good faith thereafter to assess the employee's fitness for duty on the basis of available medical documentation. The Employer may ask to have the employee examined by its medical expert in an effort to assist in the determination as to whether the employee is able to work.

In the instant case, the Union relies primarily on the medical evidence submitted by the Employee's doctors, orthopedist Person 6, M.D. and psychotherapist Person 5, Ph.D. The doctors' reports were prepared for and submitted to the WCAB in support of the Employee's compensation claim.

That evidence established to the satisfaction of Judge Person 4 that the Employee was totally disabled from April 13, 1988 to June 9, 1988, and was permanently partially disabled thereafter, with a 20 3/4% disability representing 16% for his psychological condition and 4 3/4% for his back after apportionment for his original back injury in 1980.

The Employer accepted the Judge's determination that the Employee was totally incapacitated from work until June 9, 1988, and granted Employee 39 days of "I" time to cover the period of his temporary total disability. What is in dispute is the Employee's eligibility for "I" time after June 9, 1988.

The WCAB decision made no finding with regard to the Employee's ability to return to work after June 9, 1988. The parties agree that it was not within the Judge's authority to do so.

The Union acknowledges that the Employee's disability due to his back injury did not leave him incapable of returning to his job. Therefore, the Arbitrator must decide whether the Employee's permanent and stationary psychological disability, based upon Dr. Person 5' report of anxiety and depression related to his job, established the Employee's inability to return to the Employer after June 9, 1988.

Dr. Person 5's report establishes the following: The Employee was treated for stress from April, 1988 until June 9, 1988, the date on which Person 5 conducted a psycho-diagnostic re-evaluation of the Employee. Person 5 found that Employee had a permanent and stationary psychiatric disability, characterized by anxiety and depression.

While Person 5 found that "A return to a stressful environment would most likely precipitate some regression..." the doctor did not provide any guidance as to when and under what conditions Employee could return to work at the Employer. Person 5 recommended, however, that the Employee continue to receive psychotherapeutic treatment.

The Arbitrator finds that while Person 5's report supports a finding that the Employee was unable to return to the Employer immediately after June 9, 1988 due to his anxiety and depression resulting from his response to a "stressful environment", the doctor noted that the Employee responded positively to therapy, and recommended that he continue treatment. Despite Person 5's recommendation, the record is devoid of any evidence that the Employee sought psychotherapy after June 9, 1988 despite his obligation to follow the advice of his doctor, as well as his obligation as an employee to seek rehabilitation for an eventual return to work. Though the Employee relocated to State 1 on June 17, 1988, he could have sought therapy in his new environment. Instead, the Employee took no action to rehabilitate himself, nor did he submit competent medical evidence of his inability to return to the Employer after June, 1988. Furthermore, the Employee was on notice immediately upon the commencement of his absence that the Employer challenged his claim for "I" time. The Arbitrator finds that the Employee knew or should have known of his obligation to support his claim for "I" time with medical documentation after June 9, 1988.

The Union points to the short term disability claim signed by Dr. Person 5 on July 3, 1989, in support of the Employee's state disability claim, as proof of his continued disability. The note lists doctor's visits after June 9, 1988 despite the Employee's testimony at his worker's compensation hearing that he did not visit Person 5 after that date. In the absence of testimony from Dr. Person 5, the Arbitrator give little weight to the state disability claim listing treatment

dates of October 26, 1988, March 9, 1989 and June 22, 1989. There is no indication of the nature of the contact Person 5 had with the Employee on those dates. The Employee also submitted three letters from Dr. Person 5 dated August 13, 1991, August 29, 1991 and September 6, 1991 in support of his claim for occupational leave after June 9, 1988. None of these notes is particularly enlightening or persuasive with regard to the Employee's ability to return to work at the Employer.

Particularly disturbing is Dr. Person 5's letter of September 6, 1991 in which he assesses the Employee's current psychological condition on the basis of a "lengthy telephone conversation" with the Employee. Person 5's opinion concerning the Employee's psychological state written years after his last in-person evaluation, and based solely upon a telephone conversation, cannot be relied upon to support the Employee's claim for occupation sick leave after June, 1988. Furthermore, nowhere in his letters does Dr. Person 5 state with any certainty that the Employee was unable to return to his job at the Employer after June, 1988 with or without the recommended therapy.

The Union has made an additional argument which must be answered. The Union asserts that the Employer continued to pay the Employee his non-occupational sick leave after June 9, 1988 based upon the same documentation from Dr. Person 5 that supports the Employee's occupational sick leave claim. The Union argues that if the Employer challenged the Employee's medical documentation, it should have called him in for an examination to assess his ability to return to work.

While it is true that the Employer should have requested the Employee to report for a fitness for duty examination to establish his condition, the fact that the Employer failed to do so does not constitute a waiver of its challenge to the Employee's injury status. Nor does the fact that the

Employer did not contest the Employee's right to receive non-occupational sick leave establish Employee's right to receive "I" time. The Employee's right to occupational sick leave must rest on the medical evidence which he submitted in support of his claim.

In sum, the Arbitrator finds that the letter from Dr. Person 5 declared the Employee to be permanent and stationary as of June 9, 1988. He recommended continued therapy. Had that therapy continued, the Employee might have been able to sustain his burden of proving continued occupational disability. However, when he relocated to State 1 on June 17, 1988, he severed his ties with his doctor. From that date forward, since he sought no further psychological treatment in State 1, his entitlement to "I" benefits ceased on that date.

In conclusion, the Arbitrator is persuaded by the medical evidence of the Employee's inability to return to work from June 9, 1988 to June 17, 1988 for which he shall receive "I" time. The Employee's occupational sick leave balance shall be adjusted accordingly. The Employee is not entitled to "I" time thereafter, due to his failure to seek or obtain psychotherapy pursuant to his doctor's recommendation after his relocation to State 1, or his submission of competent medical evidence of his inability, to return to the Employer thereafter. At the request of the parties, the Arbitrator shall retain jurisdiction on the remedy, in the event the parties are unable to resolve the matter.

Finally, the Arbitrator notes that the judgments contained in the opinion are hers, and are not necessarily the opinions of the System Board Members, regardless of their concurrence or dissent from the award.

Therefore, on the basis of the record before her, the Arbitrator makes the following award:

AWARD

The grievance is sustained in part and denied in part, in accordance with the opinion herein.

The Employer violated the Agreement by failing to grant the Employee "I" time from June 9, 1988 to June 17, 1988 which he shall be granted.