Zigman #3

IN THE MATTER OF ARBITRATION BETWEEN:

Employer

AND

Union

Introduction

This matter was heard before Louis M. Zigman, Esq., neutral arbitrator, on February 9, 1993. Both parties were afforded an opportunity to present evidence and to examine witnesses. At the conclusion of the hearing both parties made oral closing argument.

Based upon the evidence and contentions of the parties I issue the following decision and award.

Issue

Was the Employee terminated for just cause? If not, what is the appropriate remedy?

Material Facts

The Employee injured his back on November 17, 1991, while loading baggage in an aircraft. He sought emergency medical care at Hospital 1and after being examined and having x-rays taken, the Employee was sent home.

On November 22, 1991 the Employee sought treatment at the Urgent Care Clinic where he was seen by Doctor 1, a doctor-of osteopathic medicine.

After evaluating the Employee, Doctor 1 concluded that the Employee was suffering from pain in his lower back and Doctor 1 prescribed medication and physical therapy. The Employee was immediately seen by the physical therapist at the clinic and treated.

Before leaving the clinic, Doctor 1 and the Employee discussed continued physical therapy treatment and when the Employee told Doctor 1 that he lived in City 1 and that it would be inconvenient for him to come to City 2 three times a week for physical therapy, Doctor 1 told the Employee that he could do his physical therapy in City 1. Doctor 1 suggested that the Employee find a physical therapist either at Hospital 1 or by looking through the Yellow Pages. Before the Employee left the clinic that day, Doctor 1 gave him a written prescription for medication and a separate prescription for physical therapy treatment three times a week. The prescription also indicated that the therapy was to be done by a "RPT" (a Registered Physical Therapist). The Employee was told to report back in one week for a re-check.

The Employee acknowledged in his testimony that he did not seek treatment by a registered physical therapist.

Instead, he spoke with his uncle and his uncle showed him how he could apply heat pads and how he could use a Tens Unit which he had received from his grandfather. His uncle helped him with the heat treatments on two occasions and thereafter the Employee purportedly began self-treatment.

The Employee did return to the Urgent Care Clinic on a weekly basis between November 29, and January 21. During these visits he was examined by Doctor 1 and while he reported slight improvement, nevertheless he continued to report pain symptoms. Because the Employee was reporting continued pain, Doctor 1 did not return him to work during this time.

Doctor 1 testified that he routinely inquired of the Employee if he was doing his physical therapy and, according to Doctor 1, the Employee acknowledged that he was seeing a physical therapist. On several occasions the Employee indicated that he had either canceled appointments and/or had not been going three times a week as recommended and according to Doctor 1's testimony,

he continually reminded the Employee that physical therapy was important and that he should go three times a week.

According to the Employee, he misunderstood Doctor 1's instructions as to seeing a "registered/licensed" physical therapist and he thought that because he was self-administering physical therapy, i.e. doing deep heat treatments himself, that he was complying with Doctor 1's instructions.

Doctor 1 indicated that he accepted the Employee's statements to the effect that he was undergoing physical therapy and that it wasn't for him to police and to insure that the Employee was complying with his instructions.

As the time went by Doctor 1 was becoming somewhat concerned that the Employee's condition was not progressing quickly enough. As he testified, this type of injury usually resolves itself within a week or two and by the fourth week he began seeking other explanations. Doctor 1 scheduled the Employee for a CAT scan and the results proved negative.

As the time progressed, Doctor 1 became suspicious of the Employee's condition.

On January 2, 1992 the Employee expressed his frustration with the lack of progress through physical therapy and he asked Doctor 1 to be allowed to seek massage therapy. Doctor 1 was not too enthusiastic about this therapy but in view of the Employee's statements and request, Doctor 1 agreed that he would allow the Employee to try this therapy for a couple of weeks and he wrote out a prescription for massage therapy three times a week.

The evidence was undisputed that the Employee did not ever begin that therapy.

On January 9, when the Employee saw Doctor 1, he was still complaining of pain. At that point Doctor 1 was becoming even more suspicious of the Employee's condition and he was annoyed because the Employee had indicated that he was not doing physical therapy on a consistent basis

three times a week. As a result, Doctor 1 told the Employee once again that he needed to have physical therapy three times a week and Doctor 1 decided to schedule the Employee for another exam, a B-200, in order to check for other possible abnormalities in his lower back. The exam was scheduled for January 17 and the Employee was to return to see Doctor 1 on January 20. The Employee called and postponed the B-200 test until January 23 and the Employee failed to appear at Doctor 1's clinic on January 20. When he telephoned Doctor 1' office and spoke with one of the staff on January 21, he indicated that he had been going hunting and fishing as a form of self-therapy.

When Doctor 1 was told that the Employee had been out hunting and fishing, Doctor 1 concluded that he would no longer treat the Employee inasmuch as the Employee was not complying with his treatment recommendations. More particularly, Doctor 1 testified that the Employee was not going to physical therapy on a regular basis, three times a week; despite continued reminders and that he understood that the Employee was now engaging in his own form of therapy which Doctor 1 felt could exacerbate his condition. As Doctor 1 explained, he felt that hunting and fishing could aggravate the Employee's condition and inasmuch as he was already suspicious of the Employee's reports of pain, he was no longer prepared to continue treatment with him.

In this regard Doctor 1 again noted that the type of soft tissue injury that the Employee was suffering from usually resolves itself in a rather short period of time, and the fact that the Employee had continued to complain of pain during examinations was somewhat suspicious to him. When confirming that the Employee was not complying with the physical therapy treatments, and when noting that the Employee had not begun massage therapy as he himself had requested, and when he discovered that the Employee had canceled the B-200 test, and when he

learned that the Employee had failed to show up for his January 20 appointment, Doctor 1 decided that he would no longer treat the Employee.

As such, Doctor 1 called the Manager of Safety at the Employer's offices and he explained the problems which he was experiencing and of his decision.

The Manager of Safety, Person 1, questioned Doctor 1 to ensure that the Employee had been clearly instructed as to the physical therapy treatments and that he understood them. .Doctor 1 explained that he had done so and Person 1 then sent him a letter asking for specific information regarding these areas.

Person 1 immediately called the Station Manager, Person 2, and told him that there was a problem concerning the Employee's situation and that he would get back to him after he learned more information.

Person 1 also called the Employer's insurance carrier and advised them of Doctor 1's concerns.

On the following day, January 22, 1992, the insurance carrier notified the Employee by letter that it was intending to terminate his benefits because of his failure to have followed Doctor 1's prescribed treatment plan.

The Employee was also notified that he would be sent for an independent medical examination.

Thereafter the Employee was then examined, on February 13, by orthopedic surgeon, Doctor 2. Doctor 2 found that the Employee had recovered from his lumbosacral strain and that he could return to full duty without any limitations.

The Employee however was not allowed to return to work.

In this respect Person 2 testified that when he was advised by Person 1, on January 21, that there was a possible problem with the Employee's situation, he decided to wait to see what information

Person 1 gathered. Person 2 reviewed Doctor 1's letter to Person 1 of February 4, 1992 in which Doctor 1 was responding to Person 1's request for written verification of Doctor 1's statements. After Person 2 reviewed Doctor 1's letter he concluded that the Employee had failed to comply with his responsibilities in following Doctor 1's treatment for his lower back condition.

According to Person 2, each employee owes a responsibility not only to himself but to the Employer to follow the medical treatment as provided by the doctor. In this respect Person 2 noted that the Employee was receiving workers' compensation benefits while he was off work and that the Employer was incurring medical expenses for treatment on behalf of the Employee. The fact that the Employee had not complied with the physical therapy treatment from the beginning represented irresponsible behavior on his part.

Here again, according to Person 2, his behavior was aggravated by the fact that he did not seek physical therapy even after being continually reminded by Doctor 1 over the next two months. And finally, when the Employee indicated that he was hunting and fishing as a form of self-therapy, Person 2 believed that his conduct was so egregious as to warrant termination.

As such, Person 2 made a decision to terminate the Employee.

After having been notified of his termination the Employee contacted his union and he filed a grievance protesting his discharge. The grievance was appealed through the grievance procedure and ultimately to the undersigned for resolution.

Positions of the Parties

Employer's Position

The employer asserted that just cause did exist for the termination in that the Employee essentially refused to follow the course of treatment prescribed to him. Moreover, instead of

protesting or disagreeing with the course of treatment as outlined by Doctor 1, the Employee essentially told Doctor 1 that he was undergoing physical therapy in City 1. While the Employee indicated that he was not going regularly three times a week, nevertheless the Employee never told Doctor 1 that he was self-administering his physical therapy with the assistance of his wife.

Again, according to the Employer, the failure by the Employee to have adhered to his responsibilities, in following a medical course of treatment for his condition, constituted serious misconduct on his part.

The employer also maintained that the Employee's conduct was aggravated by the fact that when he sought to change the treatment from physical therapy to massage therapy, and when Doctor 1 agreed to do so, the Employee failed to follow that prescription too.

Instead, the Employee took it upon himself and went hunting and fishing and snorkel diving. Each of these activities was inconsistent with his lower back condition, and according to Doctor 1 these activities were hazardous and could have easily aggravated his condition.

In noting that an employee on temporary total disability is receiving monetary benefits through the workers' compensation system and incurring additional medical expenses on behalf of the Employer, the employer maintained that the Employee's conduct in not following the course of treatment constituted irresponsible conduct and grounds for termination.

As further corroboration of its position, the employer noted that after the Employee appealed the decision to terminate his TTD benefits that his appeal was denied by the Department of Labor for non-compliance with Doctor 1's instructions.

In view of the foregoing, the employer maintained that the evidence demonstrated sufficient cause for termination and that the undersigned should so find.

Union's Position

The union denied that just cause existed for the termination and the union noted that there was no contention that the injury was not in fact valid. In point of fact all of the witnesses agreed that the Employee did injure his lower back while at work on November 17, 1991.

The union also pointed out that there has been no assertion by either the Employer or by the insurance carrier that the Employee's claim for workers' compensation benefits was fraudulent in any manner.

As such, the union noted that the Employee was indeed injured on November 17, 1991; that he was evaluated for his condition and that treatment was recommended.

The Employee then underwent physical therapy treatment and his condition eventually resolved and by February 13, 1992 he was capable of returning to work. According to the union, he should have been reinstated at that time but instead he was unjustly terminated.

In view of the fact that the medical opinions by Doctor 1 and Doctor 2 were in agreement that the Employee did suffer from a lower back injury and inasmuch as they both agreed that his condition had resolved itself, the union maintained that the Employee had done nothing wrong, and that he should have been reinstated following his course of treatment.

While acknowledging that the Employee did not specifically follow Doctor 1's recommendation to have seen a "registered/licensed" physical therapist, nevertheless the union pointed to the Employee's testimony that he was confused and misunderstood Doctor 1's instructions. In this respect, the union pointed to the Employee's testimony that the Employee believed that he could seek physical therapy from his uncle and that he could self-administer his own physical therapy. Here again, in pointing to the Employee's testimony, the Employee explained that he had been dissatisfied with the physical therapy that he underwent two years earlier involving another back

condition. Inasmuch as the Employee was shown how to administer deep heat treatments by his uncle and inasmuch as his grandfather had given him his Tens Unit to use, the Employee felt that he could administer this treatment with the assistance of his wife.

Here again, according to the union, the fact that the Employee did undergo self-administered physical therapy on a regular basis for these many weeks and the fact that he was never specifically told the his therapy was improper, the union maintained that he should not have been terminated. According to the union the Employee could have been advised by Doctor 1 or by Person 1 that home therapy was not allowed. Instead of advising him, the Employer simply terminated him even though his condition had resolved itself and he was now capable of returning to work.

Again, according to the union, this was not a situation of an individual who was continuing to insist that he was injured and who was seeking to continue receiving disability benefits ad nauseum.

With respect to the accusation that the Employee was engaging in conduct contrary to his physical condition by hunting, fishing and/or snorkeling, the union again pointed to the Employee's testimony wherein he noted that these activities were not physically strenuous. The hunting was limited to bird hunting which essentially entailed walking activities and shooting with a rifle of less than six pounds. The snorkeling was in five feet of water and actually gave the Employee added relief as swimming was a good activity.

As such, the union maintained that both Doctor 1 and the Employer over-reacted when they heard that the Employee was "hunting and diving."

While again acknowledging that the Employee did not follow the specific course of treatment as Doctor 1 was recommending, nevertheless the union maintained that the Employee's conduct

was at most a result of a miscommunication between them and that he should certainly not be terminated for his innocent mistake.

For all of these reasons, the union maintained that the Employee should be reinstated to his former position of employment with the appropriate back pay and benefits.

Analysis and Conclusion

After considering the arguments and contentions of the parties, I found considerable difficulty in accepting the Employee's testimony to the effect that he was confused as to the course of treatment as given to him by Doctor 1, especially when the Employee testified that he did not understand Doctor 1's instruction for physical therapy to require a registered/licensed physical therapist.

I found that testimony as rather difficult to credit in view of the following reasons.

Initially, I note that the Employee could not be considered as a novice or an unsophisticated person with respect to physical therapy inasmuch as he had undergone physical therapy two years ago for another back condition. Indeed the evidence demonstrated that he underwent physical therapy for approximately two months for that condition. Therefore one must assume that he knew what physical therapy means, especially when being treated for a back condition. As such, when the Employee injured his lower back and experienced pain and when Doctor 1 prescribed physical therapy, it certainly appears that the Employee would have known exactly what Doctor 1 was prescribing. As indicated above, the Employee had undergone physical therapy just two years earlier.

This presumption that the Employee knew what was being recommended was enhanced by the discussion between these two individuals as the Employee asked to undergo physical therapy in

City 1 rather than having to come to City 2 three times a week for his therapy. Certainly in trying to avoid constant trips to the clinic in City 2, the Employee must have been well aware that the treatment was by a registered physical therapist inasmuch as the treatment was to be done at Doctor 1's clinic. That presumption is underscored by the fact that the Employee was given physical therapy at this clinic on the very same day as his initial evaluation by Doctor 1.

If the Employee had considering self-administered therapy when talking to Doctor 1 he certainly should have told him, especially when Doctor 1 was telling the Employee that he could find a physical therapist either at the Hospital 1or by looking one up in the Yellow Pages. Here again, while noting that the Employee acknowledged that Doctor 1 did suggest finding a physical therapist at Hospital 1, one must again presume and assume that the Employee was well aware that Doctor 1 was recommending a registered/licensed physical therapist.

This presumption and assumption was even further reinforced by the fact that Doctor 1 admittedly questioned the Employee each time he saw him at his clinic as to whether he was getting physical therapy. This presumption was further enhanced by the fact that each time the Employee came to the clinic for reexamination, Doctor 1 had him then undergo therapy by the physical therapist at the clinic.

While the union argued that the Employee somehow misunderstood what Doctor 1 was recommending in terms of a registered/licensed physical therapist, that argument is rather difficult to accept given the Employee's prior history involving physical therapy, and given Doctor 1's discussions with the Employee, and with the fact that the Employee was undergoing physical therapy by a registered physical therapist while at Doctor 1's clinic.

This presumption that Doctor 1 was referring the Employee for physical therapy by a registered physical therapist was further underscored by the fact that he gave the Employee a written prescription for physical therapy and that his prescription included that term "per RPT."

To be quite candid, I found the Employee's testimony that he was somehow confused as to his obligation in seeking physical therapy as rather difficult to accept.

Moreover, in considering his explanation as to the treatment he sought, i.e. asking his uncle, a lay person, to show him how to self-administer treatment which his grandfather had used, was itself somewhat difficult to accept. One does not need much imagination to understand that there could be a wide range of difference between the Employee, a rather youthful individual and his grandfather in terms of the conditions of their respective backs. Furthermore, other than having gone to his uncle on two occasions, the Employee testified that he essentially self-administered his own treatment. This too appears rather curious when he was given a prescription for physical therapy presumably to have been performed by someone else.

To have had physical therapy administered by his wife, another lay person, without any expertise in this area, again appears as rather difficult to accept in terms of Doctor 1's recommendations.

Compounding these actions, I also found the Employee's explanation as to having requested massage therapy and then in not having sought such therapy after Doctor 1 gave him a prescription, as again somewhat difficult to understand. In this respect, I note that the Employee himself acknowledged that he was the one who asked Doctor 1 to be allowed to have massage therapy because his frustration with his pain. His decision not to have followed through with that prescription was again difficult to understand; except that it was consistent with his other actions in not really paying much attention to the prescribed recommendations of his doctor.

I also note the "coincidence" of the Employee's lower back condition having resolved itself almost "immediately" after being released by Doctor 1 as somewhat curious. Indeed, the Employee was placed on notice that Doctor 1 was unhappy with him because he was purportedly not following the course of treatment and that he didn't want to treat him any longer. The Employee did not seek any further medical attention on his own and when he was sent for an independent medical examination he was "coincidentally" found to be fully capable of returning to work. Indeed Doctor 2's conclusion seemed consistent with Doctor 1's suspicions that the Employee was not really experiencing pain when Doctor 1 would place pressure on his lower back area.

While I acknowledge that the employer did not assert any fraudulent action by the Employee, nevertheless the fact that the Employee coincidentally was no longer complaining of pain when examined by Doctor 2 leaves some open question and certainly is another curious event in this entire scenario.

Indeed, one cannot ignore the possibility, though not clearly established, that the Employee did not follow Doctor 1's recommendations for physical therapy because he was not experiencing pain and he was therefore taking the time off and hunting and snorkeling while accepting workers' compensation benefits.

One does not have to reach that nefarious conclusion in this case because the evidence demonstrates persuasively that the Employee did fail to follow the course of treatment as outlined by Doctor 1 from the beginning. As noted above, I found the evidence persuasive to have established that the Employee knew and understood Doctor 1's recommended course of treatment to have included physical therapy by a professional, registered, licensed physical therapist and that he was to undergo physical therapy on a regular basis three times a week.

The evidence is uncontested and undisputed that the Employee failed to follow that course of treatment. Had the Employee followed that course of treatment the weight of the evidence indicates that his condition would have resolved itself in a much timelier manner and that he would have been back at work and that the worker's compensation payments and the Employer's medical payments would have been considerably reduced. It was only because of the Employee's conscious decision not to follow the prescribed course of treatment, even after reminders by Doctor 1 that his conduct led to his termination.

For the reasons noted above, I found Person 2's decision substantiated by persuasive evidence to have established that the Employee's conduct constituted misconduct and therefore just cause for termination.

Accordingly, the grievance is denied.