**Zumas #1**

IN THE MATTER OF ARBITRATION BETWEEN:

Employer

AND

Union

**BACKGROUND**

This is an arbitration proceeding pursuant to the grievance and arbitration provisions of Articles 14 and 15 of the collective bargaining agreement (hereinafter "Agreement") currently in effect between the Union and the Employer. A hearing was held on June 5, 1996, during which time sworn testimony was taken, exhibits were offered and made part of the record and oral argument was heard. The hearing was stenographically reported and a transcript was provided. Post Hearing Briefs were filed by the parties on July 31, 1996, and the parties subsequently agreed to extend the date for issuance of this Award.

**STATEMENT OF THE CASE**

This case involves the termination of the Employee, a utility worker, for alleged insubordination, when he failed and refused to return to work from an occupational injury leave when ordered to do so by the Employer.

The Union contends that the Employer did not have just cause to terminate the Employee, since he was unable to comply with the Employer's order pursuant to the advice and direction of his personal chiropractor.

The Employer contends that the Employee had been given a medical release by an Employer-authorized physician to return for light duty work, and had disobeyed a direct order from the Employer to report to work.

**ISSUE TO BE DECIDED**

The issue to be decided is whether the Employee was terminated for just cause; and, if not, what shall the remedy be?

**APPLICABLE RULES AND REGULATIONS**

Employer Maintenance Policies and Procedures

INJURY OR ILLNESS ON EMPLOYER PREMISES & WORKMEN'S COMPENSATION

* * * * * * * * *

4. EMPLOYEE'S RESPONSIBILITIES
A. Report all accidents/injuries to your supervisor immediately and assist in completing the 0I-1 Form (Report of Occupational Injury).

B. Obtain medical treatment, if necessary.

(1) If a Panel of Physicians is available, the employee must select from that Panel, except in cases of emergency. Once the emergency has been taken care of and if follow-up medical care is needed, that employee must get treatment from an approved Panel Physician.
(2) Personally return the 01-2 Form (Medical Report) to your supervisor after each doctor's appointment.
(3) Contact supervisor on a minimum weekly basis to keep him informed of your status.

* * * * * * * * *

(6) When medically released to return to work, do so immediately.
(7) Upon returning to work on a limited or regular work status, schedule any required physical therapy appointments around your normal working hours.
(8) Work any limited duty assignment that you are qualified and physically able to perform.

NOTE: Failure to comply with the above mentioned requirements will jeopardize your benefits and may lead to disciplinary action.

## STATEMENT OF FACTS

The Employee had been employed by the Employer since April 4, 1988 and, during the time of the events in question in this dispute, was assigned as a third shift utility worker at the Employer's City 1 hangar facility.

On March 16, 1995, he injured his back while performing his duties, and was referred for treatment to Doctor 1, an orthopedic surgeon on the Panel of Physicians authorized to treat occupational injuries incurred by employees.

On May 10, 1995, after treating the Employee for a period of time, Doctor 1 cleared the Employee to return to light duty work, with the following report:

> SUBJECTIVE: The Employee is a young man that I have been following for difficulties with his back and right leg. He continues to complain at this time, especially in his back. He also has some pain radiating down the posterior aspect of the right leg to about the knee. It really does not radiate past the knee. Because of his continuing difficulties, we went ahead and obtained an MRI of his lumbosacral spine. I have reviewed the MRI at this time and on the sagittal axial views, he does have an L6-S I bulge and some degenerative change at L5-S 1 on the sagittals. On the axials, he does have an L5-S1 bulge, central and slightly to the right. However he at this time basically has negative straight leg raising with just some leg pain with straight leg raising, pretty well localized going down to his knee and really not past his knee with any significance.
>
> IMPRESSION: My impression at this time is degenerative disc L5-S1 with a little bulge. I do not feel that there are any surgical indications at this time.
>
> PLAN: We need to continue to follow him conservatively with physical therapy and light duties. I do feel that he will improve without any more aggressive intervention.

The Employer eventually received a copy of Doctor 1's medical release on May 26, 1995, and, on June 9, 1995, Shift Manager Person 1 sent the Employee the following letter instructing him to return to work:

> On May 10, 1995, Doctor 1, the doctor of record regarding your occupational injury, released you to return to work in a light duty capacity. Since that date, you have failed to return to work as released.

> This letter is to advise you again that the Employer has Light Duty Work available that will- comply with the restrictions delineated by Doctor 1. You are being given a direct order to report to work, in a light duty status, on June 11, (Sunday night) at 2300. Failure to report to work as directed will be considered as an act of insubordination which will result in the termination of your employment.

On June 11, the Employee telephoned Foreman Person 2 shortly before his scheduled starting time and informed him that, notwithstanding Person 1's letter, he would not be reporting for duty since his personal chiropractor had not given him a release to return to work.

Person 1 testified that he had been unable to find any records indicating that the Employee had ever filed any of the periodic medical reports (01-2 Forms) required by Employer rules for persons on an occupational injury leave, and that the Employee's immediate supervisor, Person 3 informed him, and Person 3 so testified at the hearing, that the Employee had never contacted him about his status since the date of the original injury.

Person 1 then testified that he waited an additional five days after June 11, and when no further communication had been received from the Employee, instructed Person 3 to terminate him for insubordination. Person 3 did so by letter of June 16, 1995, which read in pertinent part:

> In a letter dated June 9, 1995, you were given a direct order to return to work on June 11, Sunday night, at 2300. This direct order was based on the return to light duty release issued by Doctor 1 regarding your occupational injury. On the evening of June 11th, you spoke to Foreman Person 2 who advised you of the letter and, along with Union Representative Person 4, told to report to work as directed. The June 9th letter was received by your wife on Monday, June 12th.
>
> On several occasions, the Employer has advised you that light duty work, within the restrictions placed by Doctor 1, was available. You have failed to return to work and have failed to comply with a direct order which is an act of insubordination.
> Based on your act of insubordination and your refusal to return to work, your employment with Employer is terminated effective immediately...

The Employee testified to his belief that his injury on March 16, 1995 was related to a 1991 back injury, for which he was authorized to receive symptomatic treatment from a doctor of his choice

by the New York Workers' Compensation Board in a 1992 award, and that he had been under continuous treatment by a Doctor 2 since he moved to State 1.

He testified that he was not satisfied with the treatment he received from Doctor 1, and had been unable to persuade the Employer's workers' compensation carrier to provide him with a different doctor.

He then decided to seek treatment from Doctor 3, a chiropractor. Since Doctor 3 had advised him to stay out of work until at least June 30, 1995, the Employee decided that he should rely on this advice and not report to work as instructed by the Employer. He also testified about other medical advice he had sought and received, both before and after his termination, which he felt buttressed his decision not to report for duty.

The Employee testified that, contrary to the testimony of Person 3, his supervisor, that either he or his wife had called one of the Employer foremen at least twice each week since the date of his injury to advise the Employer of his status.

He also testified that he, or his wife in some cases, had personally dropped off a doctor's statement to Employer secretary Person 5 after each of his visits to Doctor 3. He testified that he was later advised by Person 5 that these statements were insufficient, and he requested Doctor 3's office to complete the required 01-2 Forms for each doctor's visit. He then furnished eleven of these completed forms to the Employer, each of which was dated June 9, 1995. It is not clear from the record when or how these forms were eventually furnished to the Employer.

Subsequent to the Employee's termination, the Union filed a grievance on his behalf, and the case was eventually progressed to this System Board for resolution.

**POSITION OF THE UNION**

The Union contends that, although this case should present a clear and simple issue of insubordination, the Employer has tried to confuse matters by adding additional issues: (1) failure to comply with rules and regulations for filing occupational injury claims, (2) failure to select a workers' compensation doctor approved by the insurance company and (3) reporting sick when ordered by the Employer to return from an occupational injury leave.

According to the June 16 termination letter sent by the Employer, the Union asserts, the Employee was only terminated for insubordination. However, because the Employer has decided to inject other issues into the case, the Union states that it will address those issues in its arguments.

If the Employee had not complied with the requirements for submitting 01-2 forms to the Employer, the Union maintains, the Employer had sufficient time to contact him and request that he do so. While Employer witnesses testified that they never called or wrote the Employee with such a request, the Employee testified that he personally or through his wife provided a doctor's statement to the Employer's secretary after each of his visits to his doctor.

The Employer claimed at the hearing that the Employee's medical file was empty, but it is hard to believe that any Employer would allow an employee not to submit verification of his illness for months and not require some documentation as to why he was absent. The Union believes that the Employee provided the documentation, but that it was misplaced by someone at the company.

As to the issue raised by the Employer of the Employee's failure to select a doctor on the Employer's approved list, the Union asserts that Employer witnesses explained how the selection

process works, but none of them provided testimony that would substantiate termination for such an offense.

All the Employer had to do was to refuse payment for Doctor 3's services, and they did. The Employee was not receiving sick pay, so the Employer was not providing him with any compensation. The State 1 Workers' Compensation Board never provided money for Doctor 3, nor did Employer Medical. The fact is that the Employee's pain was so severe that he elected to pay Doctor 3 from his own pocket rather than to seek additional treatment from Doctor 1.

In addition, the Union maintains, the 1992 award from the State 2 Workers' Compensation Board for his original back injury allowed the Employee the option of selecting a doctor of his own choice for treatment. The Employee chose to be treated by Doctor 2, and the State 2 Workers' Compensation Board provided payment. The Employer, however, refused the Employee's request to receive treatment from Doctor 2 and Doctor 3, and also refused the Employee's numerous requests to replace Doctor 1. Doctor 4 finally replaced Doctor 1, after the Employee's termination, and the Union asserts that Doctor 4 agreed with the diagnoses of Doctor 2 and Doctor 3 of the Employee's back pain, which was that the back problems were a continuation of the original injury he sustained in State 2.

The third argument raised by the Employer, the Union continues, concerns the Employer's letter of June 9 ordering the Employee to report for work on June 11 or else face termination. The Union argues that several questions must be addressed: Can the Employer issue a direct order to come to work if an employee is under a doctor's care, any doctor? Does that doctor have to be a medical doctor? Does that doctor have to be approved by the Employer? Does the doctor have to be on the approved list for a State Workers' Compensation Board?

The Union's answer to these questions is a clear and unambiguous "NO". If an employee fails to comply with Employer and Workers' Compensation procedures his compensation can be withheld. If the insurance company believes the claim is not an occupational injury, then the insurance company can withhold benefits. If an employee is unable to work according to the treating physician, and has no sick bank time, the employee receives no sick leave pay.
Under the State 2 Board's ruling, the Employee was to receive treatment from a doctor of his own choosing, and he chose Doctor 2. The Employer does not dispute this and has never disputed his injury, only his choice of doctors.

The Union provided testimony by the Employee that he did in fact tell Person 2 that he was under his doctor's care and could not and would not return to work until his scheduled release on June 30. The Employer did not provide any testimony by Person 2 to dispute the Employee's claim. Whether or not the Employer had Doctor 3's note releasing the Employee from work until June 30 doesn't matter at this point. The Employer was in fact advised of the Employee's medical condition.
The Union contends further that all companies have an obligation to employees injured while working on the job. Medical treatment and pay are just a part of that obligation. Employees have an obligation to their Employer as well. Returning to work as soon as possible is part of that commitment; working in pain is not. If either an Employer or an employee fails to meet those responsibilities there is a method of resolving the dispute. The Employer's solution in this case was to issue a direct order to return to work, and to threaten termination if there was no compliance.

In conclusion the Union argues that the Employer clearly did not have just cause to discharge the employee. Not having every 01-2 Form complete and up to date was not a reason for termination, and the Employee admittedly should have communicated with a foreman and not a secretary. The Employee thus may have made some errors in judgment in making some decisions, but to receive the maximum penalty of termination is far too severe a punishment. The Union therefore requests that the grievance be sustained.

**POSITION OF THE EMPLOYER**

The Employer contends that the Employee received a release from his treating physician to return to work for limited duty on May 10, 1995, but neither reported for duty nor advised the Employer of his status as required by established policies and procedures. After the passage of four weeks with no contact from the Employee, the Employer ordered him by letter of June 9 to report for light duty on June 11, advising him that failure to do so would result in his termination. Although he did not receive the letter until June 12, he had knowledge of the contents of the letter on June 11.

As Person 4, the Union's local grievance committee member testified he called the grievant at home that Sunday evening "to see he had got the letter and see that he was going to report back to work." Specifically, Person 4 testified that he "informed [the Employee] of the letter demanding he needed to go back to work or at least report into work" and advised him that if he failed to report for work, he would be terminated.

Fully aware of the consequences should he fail to report for work as directed, the Employee did not report for work on June 11. He was subsequently terminated for insubordination, as well as his continuing refusal to return to work despite his release effective May 10 to light duty.

The Employer maintains that, with the exception of a factual dispute regarding whether the Employee complied with policies and procedures governing occupational injury leaves, there is no dispute regarding the operative facts of this case. Simply put, the Employee was given a direct order to return to limited duty on June 11. The order was consistent with the medical release returning the Employee to light duty effective May 10.

The Employee did not agree with the release. However, rather than pursue established procedures to obtain a second medical opinion from a physician authorized to treat occupational injuries, the Employee chose to disregard the release and defy the direct work order by persisting in his unwarranted refusal to return to work.

Under the provisions of the Agreement, the Employer is required to take disciplinary action within five days of an incident warranting discipline. Thus, on the fifth day following the Employee's failure to return to work as directed, the Employer terminated the Employee's employment.

The Employer contends that, contrary to the Employee's assertions at the hearing, he did not provide the Employer with any medical documentation prior to his termination to indicate that he was not fit for limited duty. Had he done so, he certainly would have reminded the Employer of that documentation on June 11 when he advised the Employer that he would not be reporting to work. There is only one plausible explanation for his silence at that time - he had not submitted any medical documentation to the Employer at that point to justify his refusal to report for work.

In light of the foregoing, the Employer submits that there is only one conclusion that is supported by the evidence in this case, namely, that the Employee was justly terminated for insubordination

in light of his unwarranted refusal to comply with the direct order to report for light duty work. Accordingly, the Employer requests that the grievance be denied in its entirety.

**FINDINGS AND CONCLUSIONS**

After a review of the entire record, and having had an opportunity to weigh - and evaluate the testimony and credibility of the witnesses, a majority of the Board finds that the Employee was discharged for just cause.

It is well-established in arbitral precedent that an Employer has the right to establish such rules as are required to reasonably direct its work force, provided that the rules are not applied in an arbitrary, capricious or discriminatory manner.

With reference to the rules governing employees with occupational injuries, cited earlier in this opinion, an employee is required to "get treatment from an approved Panel Physician," "personally return the 01-2 Form (Medical Report) to your supervisor after each doctor's appointment," "contact your supervisor on a minimum weekly basis to keep him informed of your status," "when medically released to return to work, do so immediately," "schedule any required physical therapy appointments around your normal working hours," and "work any limited duty assignment that you are qualified and physically unable to perform."

The Employee's claim that either he or his wife provided the required status reports by contacting unspecified foremen twice each week was not credible, nor was his testimony concerning his manner of furnishing the required 01-2 Forms to the Employer. It is thus clear from the record that the Employee ignored all of the rules cited above.

The question then is whether the Employee subsequently had the right to rely on the advice of an unapproved chiropractor in defying a direct order from the Employer to comply with the medical release issued by an orthopedic surgeon on the Employer's Panel of Physicians.

The Employee was specifically put on notice that he would be terminated by the Employer if he failed to report for work as ordered. Since there is no credible evidence that the Employee was so incapacitated that he was unable to at least come in and report for duty, it cannot be said that the Employer applied its rules in an arbitrary, capricious or discriminatory manner in his case. It is the bedrock of arbitral precedent that an employee has a duty to "Obey now, and grieve later," and the Employee's claimed reliance on the advice of his chiropractor cannot serve to insulate him from the consequences of his actions. We thus conclude that the Employee was guilty of insubordination as charged by the Employer, and that the penalty assessed by the Employer was commensurate with the nature of the offense in this case.

**AWARD**

The grievance is denied.