BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRONSHIPBUILDERS, BLACKSMITHS, FORGERS AND HELPERS, LOCAL LODGE NO. 177	Case 2 No. 44327 A-4668
and	
GREEN BAY STRUCTURAL STEEL, INC.	

Appearances:
Mr. Howard Cole, International Representative, International Brotherhood of Boilermakers, appearing on behalf of the Union.
Mr. Gerald Ravet, Secretary/Treasurer, Green Bay Structural Steel, Inc., appear

ARBITRATION AWARD

The above captioned parties, hereinafter the Union and Company respectively, are signatories to a collective bargaining agreement providing for final and binding arbitration of grievances. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed the undersigned to hear a grievance. A hearing was held on September 18, 1990 in Green Bay, Wisconsin. The hearing was not transcribed and the parties did not file briefs. Based on the entire record, I issue the following award.

ISSUES

The parties could not agree upon the issues so they requested the arbitrator frame them in his award. The arbitrator hereby frames the issues as follows:

1. Did the Employer violate the contract by deducting 9.5 hours pay from the grievant's February 18, 1989 paycheck? If so, what is the appropriate remedy?

2. Did the Employer violate the contract by failing to pay the grievant 1.2 hours overtime on February 23, 1989? If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISION

The parties' 1990-1992 collective bargaining agreement contains the following pertinent provision:

ARTICLE VIII - WAGES

. . .

Section 6: In case any employee is injured while at work and is compelled by the seriousness of such injury to lose time, he shall be paid at his straight time rate for all unworked but scheduled hours on the day the injury occurred, plus any shift differential that he would have received if he worked the full scheduled hours, providing the regularly licensed doctor treating or examining the injury certifies in writing that the employee is incapacitated from performing his duties or that returning to work may be injurious to the employee as a result of such injury. The term "doctor" is to include physician, surgeon, dentist or oculist.

If the employee has no lost time, but additional appointments are requested by the doctor, and these appointments are during the scheduled work day, and the employee is working, he shall be paid for reasonable time lost on the same basis as the day of injury.

FACTS

The facts are essentially undisputed. On June 14, 1988, grievant Robert Shaha, an employe with 25-years seniority, was injured in an on-the-job accident when he hurt his back unloading steel from a semi-truck. Following the accident Shaha was treated extensively by a chiropractor for back pain. When this treatment failed to relieve the pain Shaha sought medical treatment from a succession of doctors and was eventually diagnosed as having a hernia.

He later filed a worker's compensation claim alleging that his hernia was incurred on June 14, 1988 in the on-the-job accident.

The treatment of this hernia involved numerous medical exams, five of which were held during Shaha's work hours in late 1988. On these five occasions the Company paid Shaha for his lost work time. This payment was based on the Employer's assumption that the hernia being treated was incurred in the June 14, 1988 on-the-job accident and thus was compensable pursuant to Article VIII, Section 6.

This assumption changed on February 10, 1989 when the Employer's worker's compensation insurance carrier took the position that there was "no relationship" between Shaha's hernia and his June 14, 1988 accident so it would not extend worker's compensation benefits to him for the hernia. After the insurance carrier took this position, the Company relied on same and decided to recoup the wages already paid to Shaha for the five occasions he had received medical treatment during work hours for his hernia. The Company determined that these five medical exams involved 9.5 work hours and deducted that amount in pay ($92.62) in one lump sum from Shaha's February 18, 1989 paycheck. Neither Shaha nor the Union was advised in advance that the deduction would be made. When Shaha received his paycheck with the deduction made he complained to Company Secretary/Treasurer Jerald Ravet about it, who informed him that the matter would be put on hold pending the outcome of his (Shaha's) worker's compensation case.

The state Worker's Compensation Division made a preliminary determination that Shaha's hernia was not work related. This determination was appealed but was voluntarily settled in May, 1990 prior to the formal worker's compensation hearing. Under that settlement agreement, the Company's worker's compensation insurance carrier agreed to make certain payments to Shaha without admitting any liability and Shaha agreed to give up his right to seek further benefits associated with this claim. The settlement agreement was silent on the question of whether the hernia was or was not work related and a subsequent letter to Ravet from the lawyer representing the worker's compensation insurance company confirmed this. The instant grievance was filed shortly thereafter and was processed to arbitration.

Shaha testified without contradiction that on February 23, 1989 he was working scheduled overtime when he left work for 1.2 hours to go to a medical exam for his hernia. Shaha was not paid overtime for that 1.2 hours.

POSITIONS OF THE PARTIES

It is the Union's position that the Company violated the contract by recouping 9.5 hours pay from the grievant's February 18, 1989 paycheck. According to the Union, that money was properly paid initially to the grievant because it covered five medical exams that occurred during work hours for treatment of the hernia which arose from the June 14, 1988 on-the-job injury. Thus, in its view, those 9.5 hours were compensable pursuant to Article VIII, Section 6 and the Company erred in recouping that money. The Union also asserts that in making the deduction from the grievant's paycheck the Company did not give advance notice to either the grievant or the Union that such would occur as it should have pursuant to a past practice concerning such deductions. The Union also notes in this regard that the grievant was not given the option of having money deducted in installments; instead it was deducted in one lump sum causing him financial hardship. Next, the Union contends the grievant was also improperly denied 1.2 hours overtime on February 23, 1989 when he interrupted scheduled overtime to go to a doctor appointment for his hernia. As a remedy for these alleged contractual violations, the Union requests that the grievant be paid for the 9.5 hours of pay recouped from his February 18, 1989 paycheck and that he also receive 1.2 hours of overtime for February 23, 1989.

The Company's position is that it did not violate the contract by recouping 9.5 hours pay from the grievant's February 18, 1989 paycheck. The Company notes in this regard that it originally paid the grievant his wages for the five medical exams which occurred during work hours based on the assumption that the grievant's hernia (which was being treated in those medical exams) arose from his on-the-job accident. According to the Company, this assumption changed when its worker's compensation insurance carrier determined in February, 1989 that the grievant's hernia was not a work related injury. It relies on this determination for the proposition that the grievant's hernia was not work related. Thus, in its view, the grievant was not entitled to be paid for the five medical exams held during work hours in late 1988 that dealt with his hernia because the hernia was a non-work related injury. It therefore contends the medical exams for the hernia were not covered by Article VIII, Section 6. Accordingly, the Company asserts the grievant was not entitled to the 9.5 hours pay so it was entitled to correct the over-payment. With regard to the method in which the money was deducted, the Company submits it followed its standard operating procedure regarding payroll adjustments. The Company therefore requests that the grievance be denied.

DISCUSSION

Article VIII, Section 6 provides that employes who are injured while at work and lose work time as a result will be paid their lost wages for the date of the accident and when they receive subsequent medical treatment. This provision though applies only to work related injuries; it does not apply to non-work related injuries. Thus, this provision does not obligate the Company to pay an employe's lost wages for missing work due to a non-work related injury.

The threshold question here centers on whether the grievant's hernia was or was not work related. If it was work related, then the grievant would be entitled by the above-noted contract provision to be paid for receiving medical treatment for it during work hours. On the other hand, if the hernia was not work related, then the grievant would not be contractually entitled to be paid for receiving medical treatment for it during work hours.

Since the grievant seeks payment for doctor visits concerning his hernia, it was incumbent upon him to show that his hernia was work related. Admittedly, this task is complicated by the fact that no final determination was made or ever will be made by the state Worker's Compensation Division on this question. The parties' voluntary settlement of Shaha's worker's compensation claim precluded such a finding and their settlement agreement is silent on the question of whether Shaha's hernia was or was not work related. The parties could obviously not agree on that point and decided to agree to disagree concerning same. Be that as it may, the grievant could have offered either direct medical testimony or medical records to support his contention that his hernia was work related. Had this happened, the Employer would have had to disprove same.

Here, though, no such testimony or evidence was offered. Instead, all that was offered was the grievant's oral assertion that his hernia was work related. This assertion was not supported by any medical evidence whatsoever. Inasmuch as the crux of this matter involves whether the grievant's hernia was or was not work related, the grievant's assertion that it was work related is insufficient, in and of itself, to prove same. Simply put, more proof was required. In order to receive payment for lost work time under Article VIII, Section 6, a doctor must certify in writing that the employe is incapacitated (due to a work related injury). If that ever happened here it is not part of the instant record. Consequently, it is held that the grievant has not proved his hernia was a work related injury and the undersigned is unwilling to simply infer it. It follows from this decision that the grievant was not contractually entitled to be paid for those five occasions in late 1988 where he received medical treatment during work hours for his hernia. Since the Company was not contractually obligated to pay the grievant for those five doctor visits but mistakenly did, it could recoup that money paid to the grievant in error.

As a practical matter, this holding also disposes of the overtime contention. This is because the question of whether the grievant is contractually entitled to overtime for February 23, 1989 for missing scheduled overtime on that date due to a medical exam depends on whether this exam involved a work related or a non-work related injury. If, as previously noted, the medical exam was for a work related injury, then the Company would be obligated to pay the grievant for the lost overtime. Conversely, if the medical exam was for a non-work related injury, then the Company would not be obligated to pay the grievant for the lost overtime. Had the undersigned found that the grievant's hernia was work related, it would follow that the grievant would likewise be entitled to overtime lost due to a medical exam for same. However, having found that no proof was presented that the hernia was work related, it follows that the grievant is not entitled to overtime lost due to a medical exam for that injury. Therefore, the grievant is not entitled to 1.2 hours overtime for a lost overtime opportunity on February 23, 1989.

Attention is now turned to the disputed method by which the Company recouped the 9.5 hours pay from the grievant's February 18, 1989 paycheck, namely in one lump sum and without any advance notice. The contract is silent on the method by which deductions are made from paychecks. Thus, the parties have not included language in their present agreement concerning how deductions are made. The Union nevertheless contends that the instant deduction in one lump sum and without any advance notice violated a past practice of the parties that deductions such as this are made in installments and further that advance notice is given before deductions are made. I find though that no binding practice concerning same was shown to exist. That being the case, the Company's method of deduction (i.e. in one lump sum and without any advance notice) has not been shown to constitute a contractual violation.

Based on the foregoing and the record as a whole, the undersigned enters the following

AWARD

1. That the Employer did not violate the contract by deducting 9.5 hours pay from the grievant's February 18, 1989 paycheck; and

2. That the Employer did not violate the contract by failing to pay the

grievant 1.2 hours overtime on February 23, 1989. Therefore, the grievance is denied.

Dated at Madison, Wisconsin 7th day of November, 1990.

By _____
Raleigh Jones, Arbitrator

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