

BEFORE THE ARBITRATOR

 In the Matter of the Arbitration :
 of a Dispute Between :
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 FOND DU LAC COUNTY INSTITUTIONS, : Case 134
 LOCAL 1366-A, AFSCME, AFL-CIO : No. 49407
 : MA-7936
 and :
 :
 FOND DU LAC COUNTY :
 :

Appearances:

Mr. James L. Koch, Staff Representative, Wisconsin Council #40, AFSCME,
Mr. Richard J. Celichowski, Director of Administration, on behalf of

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ARBITRATION AWARD

Fond du Lac County Institutions, Local 1366-A, AFSCME, AFL-CIO, hereinafter the Union, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Union and the County of Fond du Lac, hereinafter the County, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The County subsequently concurred in the request and the undersigned, David E. Shaw, of the Commission's staff, was designated to arbitrate in the dispute. A hearing was held before the undersigned on September 14, 1993, in Fond du Lac, Wisconsin. There was no stenographic transcript made of the hearing and the parties submitted post-hearing briefs in the matter by October 26, 1993. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties stipulated to the following statement of the issues:

Did the Employer violate the Collective Bargaining Agreement when it denied Sally Anderson Sick Leave, and if so, what is the appropriate remedy?

CONTRACT PROVISIONS

The following provisions of the parties' Agreement are cited:

ARTICLE XIII. SICK LEAVE

. . .

13.06 Sick leave pay shall commence upon the first day of any period of absence from employment which is due to illness, bodily injury, pregnancy and post natal care, exposure to contagious disease, attendance upon members of the immediate family defined as husband, wife, and dependent children for the first five (5) periods of absence in the calendar year. Thereafter, sick leave pay shall be paid at the rate of fifty (50) per cent of the regular rate at which employed unless the Employer approves an Employee request for pay at one hundred (100) per cent. The approval or disapproval of an Employee request for full pay shall be at the sole discretion of the Employer and the decision of the Employer shall not be subject to

the grievance procedure. The employee must attempt to make other arrangements within a reason able [sic] time for the attendance upon members of the immediate family.

13.07 The employer shall require a medical certificate to justify the granting of sick leave of three (3) days duration. The Employer may also require any employee claiming sick leave to submit to an examination by a doctor designated by the employer at the employer's expense.

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ARTICLE XV. LEAVES OF ABSENCE WITHOUT PAY

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15.02 Extended Medical Leave: An employee who exhausts his sick leave account and is unable to return to work due to illness or injury, shall be granted a leave of absence of sufficient duration to recover from the illness or injury but not to exceed one year, but in no event to exceed the employee's length of service. The employee may be required to furnish periodic medical reports from a physician to justify the need for medical leave. An employee returning from an extended medical leave shall be required to furnish a physician's statement that the employee is fully able to assume all of the responsibilities of his/her position. When returning to work, an advance notice of four (4) days shall be given to the Employer to allow for efficient scheduling.

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ARTICLE XVII. INSURANCE

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17.04 Worker's Compensation Differential Pay

- a) An employee eligible for payment of worker's compensation benefits shall not be eligible also for payments of sick leave credits.

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BACKGROUND

The Grievant has been employed by the County as a Certified Nursing Assistant for approximately six and one-half years at the County's Rolling Meadows Nursing Home. The Grievant is in the collective bargaining unit represented by the Union.

Some time in July of 1992, the Grievant sustained a work-related injury and since that time has intermittently been on light duty or off work. She was on Worker's Compensation until April 18, 1993.

The Grievant was treated by a number of different doctors and from approximately the beginning of 1993 she was taken off work by recommendation of the physician treating her at the UW Hospital and Clinic. In early April of 1993, the County's Worker's Compensation carrier, Wausau Insurance, wanted the Grievant examined by a doctor of its choosing, Dr. Schaefer. On April 6, 1993, the Grievant was examined by Dr. Schaefer and his report of the evaluation stated, in part:

Only one diagnosis can be clearly established, and that is a right carpal tunnel syndrome as established by the nerve conduction studies which have been done twice. In the upper left extremity there is no clear diagnosis at this time. The patient perceives she is still in pain. The pain pattern does not fit any known orthopaedic condition or syndrome of the musculoskeletal system. Her symptoms clearly began according to the records in her left wrist and distal forearm. It was only months later that the patient began to experience left elbow pain, and there was no other history of repeated injury. The patient's records gave a history that she was off work more than she recalls at this evaluation.

Throughout the examination this patient appeared to be extremely sensitive to any type of touch, and I think she exaggerated her symptoms and her pain. There could well be some sources of pain in her upper left extremity. However, she certainly has had extensive evaluation and treatment by multiple physicians, physical therapists, and occupational therapists over the past several months but has made no response whatever.

A diagnosis of medial and lateral epicondylitis and tendonitis in her extensor tendons of her wrist can

be entertained, but it cannot be truly established since testing is in such direct conflict to any specific diagnosis. If any of these conditions are present objectively they should not be causing restricting or disabling pain. In my opinion most of the pain in this patient's upper left extremity is not truly on a physical basis. Since I am unable to establish any clear-cut orthopaedic diagnosis, I think other explanations should be pursued. I would consider the following diagnoses:

1. Conversion hysteria
2. Malingering
3. Psychophysiological reaction manifest by musculoskeletal pain, upper left extremity.

No doubt other psychological diagnoses could be evaluated. I would recommend that this patient undergo psychological evaluation, and treatment if indicated. If indeed this patient is experiencing some type of psychological problem, in my opinion it would be her own personal responsibility and not that of her employer. Based on my examination, I did find some increase in the size of the outcropping muscles of her left wrist, but this could well be a congenital anomaly; and I don't [sic] it has any significance in regard to her pain complaints whatever.

Dr. Schaefer concluded that the Grievant was capable of returning to her job without restrictions at that time, but suggested that it might better to prepare the Grievant for that by limiting her lifting to 50 pounds maximum and 25 pounds repeated for the first two weeks.

By letter of April 13, 1993, Wausau Insurance provided the Grievant with Dr. Schaefer's report and notified her that it would make no further payments to her for lost work time. By letter of April 15, 1993, the Grievant was notified by the Assistant Director of Nursing at Rolling Meadows that she was scheduled to resume her normal duties on April 19, 1993. The Grievant called in sick on April 19th and 22nd and returned to work on April 23rd. She worked approximately one hour before leaving due to what she felt was unbearable pain.

The Grievant was sent the following letter of April 28, 1993, from her employer:

Dear Ms. Anderson;

There appears to be a dispute regarding your current physical condition. Dr. Schaefer, the physician retained by Fond du Lac County's worker compensation carrier has stated that you are capable of returning to work without restrictions. If you do not return to work at this time you will be in an unpaid status as you are no longer considered to be absent due to a work related injury.

You indicated that you have a physician who will state that you are not capable of returning to work at this time. Pending the resolution of this dispute between the two physicians, the County is willing to allow you to use any accrued vacation time should you need to receive pay during this period.

Please contact me as soon as possible regarding your wishes in this regard.

Sincerely,

Ed Sajdak, Administrator
Rolling Meadows Nursing Home

On April 30, 1993, the Grievant was examined by Dr. Valtysson at the University of Wisconsin Hospital's Pain Clinic at her own initiative. Dr. Valtysson's report of his examination indicated it was his conclusion that the Grievant had "medial and lateral epicondylitis in the left forearm and possibly tendonitis and myofascial pain as well in the wrist and shoulder on the left." His report also indicated the following, in relevant part:

In view of the patient's mostly tendon and muscular related symptoms aggressive physical therapy is needed. In order to make this possible, we would recommend interscalene blocks to alleviate the pain and allow this aggressive therapy. We are arranging to have the patient stay in Madison while undergoing outpatient aggressive physical therapy and interscalene blocks to facilitate this.

It is understood that the patient has been denied workers' compensation due to a visit with another doctor. While I am not clear as to what was found on that exam, it is clear to both myself and Dr. Heiner, as well as Dr. Leonard, that this patient is indeed suffering from myofascial pain and tendonitis, which could be greatly helped by aggressive physical therapy; with the highly motivated patient that we have, there is a good chance she will be able to return to work with restrictions. We feel at this time if aggressive therapy is not started, the patient may develop a frozen shoulder and very severe loss of function in her entire upper left extremity. A copy of this will be sent to the patient's workplace and insurance.

The Grievant was still being treated by Dr. Valtysson at the time of the hearing.

The Grievant has not been allowed to use her accumulated sick leave of 36 1/2 days. She subsequently appealed the denial of Worker's Compensation and grieved the County's refusal to allow her to use her sick leave. The Grievant's Worker's Compensation appeal is currently pending in that forum. The parties were unable to resolve the grievance and proceeded to arbitrate the dispute before the undersigned.

POSITIONS OF THE PARTIES

Union:

The Union takes the position that the Grievant has met the requirements of Article XIII, Section 13.06 of the Agreement, and therefore was entitled to use her accumulated sick leave and thereafter was eligible for a Medical Leave under the Agreement.

Section 13.06 provides, in part:

13.06 Sick Leave pay shall commence upon the first day of any period of absence from employment which is due to illness, bodily injury.....

Dr. Valtysson's report describes the Grievant as having "medial and lateral epicondylitis in the left forearm and possible tendonitis and myofascial pain as well in the wrist and shoulder on the left." That diagnosis is restated a number of times in the report.

The Union asserts that the County's own witness, Nancy Birschbach, testified that the County never questions the decisions of the physician appointed by the County's insurance carrier. While Dr. Schaefer's examination of the Grievant was intended to disprove her Worker's Compensation claim, nowhere in his report does he indicate that the Grievant did not have a problem with her left arm. To the contrary, his report stated, in relevant part, as follows:

The patient had apparent extreme pain on the left side in her wrist and forearm. . .

. . .

In the upper left extremity there is no clear diagnosis at this time.

. . .

There could well be some sources of pain in her upper left extremity.

. . .

A diagnosis of medial and lateral epicondylitis and tendonitis in her extensor tendons of her wrist can be entertained,.....

. . .

To better prepare her for work one might consider some minimal restrictions initially such as limiting her lifting to 50 pounds maximum and 25 pounds repeated for the first 2 weeks.

There is nothing in the record to support the County's refusal to allow the Grievant to use her sick leave or its refusal to grant her a Medical Leave, nor is there anything in the record to support the County's claim that the Grievant did not have a valid medical condition that required continued medical attention. Even if the reports of the physicians as to the pain in the Grievant's left shoulder, arm and wrist are discounted, and Dr. Schaefer's suggestion that her problem is psychological is accepted, such a condition is covered by the sick leave provision and the County's health insurance. This is true whether or not the condition is work-related. However, Dr. Schaefer's report contains comments that clearly support the diagnosis contained in Dr. Valtysson's report, as well as the conclusion that the Grievant is entitled to use her earned sick leave and thereafter to be placed on a Medical Leave under Article XV, Section 15.02 of the Agreement.

Lastly, the Union cites the following from the Grievance Guide:

Arbitrators generally view sick leave as an earned right. This means that an employer can't establish conditions for eligibility other than those prescribed

by the contract or past practice.
(Emphasis added) 1/

There is nothing in the Agreement that invalidates the use of sick leave due to a second opinion or even if a medical condition is psychosomatic in origin. The fact that the County relies upon Dr. Schaefer's evaluation to dispute the Grievant's entitlement to Worker's Compensation, does not relieve the County of its obligation to comply with the sick leave and medical leave provisions in the Agreement.

County:

The County takes the position that this is primarily a Worker's Compensation issue and that, therefore, the Arbitrator has no jurisdiction to decide that issue. In support of that position the County cites a prior arbitration award in another County bargaining unit wherein the arbitrator concluded in a similar fact situation that there was no provision in the agreement for an arbitrator to resolve such disputes. The County notes that similar to the prior case, the Grievant is proceeding in the Worker's Compensation forum. If the Grievant prevails in that forum, Section 17.04 of the Agreement provides that she would not be eligible for the sick leave benefits she has requested.

With regard to the use of sick leave, the County cites Section 13.07 of the Agreement as giving it the right to require a medical certificate to justify granting sick leave for three days or more and to require the employe to submit to an examination by a doctor designated by the County at its expense. In this case, the Grievant was examined by a doctor designated by the County, Dr. Schaefer, and he determined that she could return to work without restrictions. Dr. Schaefer's report, in stating the Grievant's history, indicates that the same diagnosis was made by Dr. Peters, Dr. Meress, Dr. Welsch and Dr. Wubben. Dr. Welsch and Dr. Wubben also had released the Grievant to return to work without restrictions. The County cites the possible explanations offered by Dr. Schaefer of conversion hysteria, malingering or psychophysiological reaction manifested by musculoskeletal pain in the upper left extremity and the Grievant's lack of effort on the dynamometer test. Of the nine doctors listed by the Grievant on her Worker's Compensation appeal as having treated her, only Dr. Valtysson supports her claim. The Grievant did not testify and did not attempt to refute the statement in Dr. Schaefer's report. Thus, based upon the preponderance of the evidence, the Grievant was not entitled to sick leave. The County also asserts that there is no provision in the Agreement authorizing the Arbitrator to resolve a dispute in medical opinions if it occurs.

DISCUSSION

It is initially noted that the County is correct in its assertion that the Arbitrator does not have jurisdiction to decide the issue of the Grievant's entitlement to Worker's Compensation and the undersigned does not understand the Union to be asserting otherwise.

As to the issue of whether the Grievant was entitled to use her accumulated sick leave in the instant situation, it must be determined whether the Grievant has been absent from employment "due to illness, bodily injury....." within the meaning of Section 13.06 of the Agreement. The County notes its rights under Section 13.07 to require a medical certificate to justify the granting of three or more days of sick leave and to have the employe examined by a doctor of its choosing. In this case the Grievant has been examined by her own physicians and by the physician designated by the

1/ Seventh Edition, BNA, at page 168.

County's Worker's Compensation carrier. 2/

Dr. Schaefer's report of his examination states his conclusion that the Grievant could return to work without restrictions. He also indicated that he concludes that the pain the Grievant was experiencing in her upper left extremity was likely psychological in nature, rather than due to a continued physical problem. He went on to indicate that while a diagnosis of medial and lateral epicondylitis and tendonitis in her wrist could be entertained, he did not feel it could be truly established due to the directly conflicting test results. Dr. Valtysson's report, on the other hand, stated that it was "clear to both myself and Dr. Heiner, as well as Dr. Leonard, that this patient is indeed suffering from myofascial pain and tendonitis" in her upper left extremity.

It appears from their respective reports that Dr. Schaefer and Dr. Valtysson only agree that the Grievant was experiencing pain in her upper left extremity, but disagree as to its cause and the Grievant's ability to return to work. 3/ Essentially, the Arbitrator is faced with conflicting medical opinions and is left to choose between the opinions of two physicians who have examined the Grievant. Dr. Schaefer's report indicates that of the physicians who had examined and treated the Grievant for her injury prior to his examining her, Dr. Peters, Dr. Welsch and Dr. Wubben had diagnosed the problem as tendonitis and eventually the latter two physicians returned her to work without restrictions, while Dr. Heiner's diagnosis was as stated in Dr. Valtysson's report. Discounting Dr. Schaefer's report for the moment, that leaves two physicians not associated with the County that felt she could go back to work without restriction. A factual determination in this regard is necessary to decide this case and the Union has the burden of proving the violation. Based on the findings of those physicians and Dr. Schaefer, balanced against the findings of Dr. Valtysson, Heiner and Leonard, it is concluded that the Grievant was capable of returning to work. Thus, she was not entitled to use her earned sick leave and the County did not violate Section 13.06 by denying her the use of sick leave.

Based upon the foregoing, the evidence and the arguments of the parties, the undersigned makes the following

2/ Contrary to the County's assertion that the Arbitrator has no authority to resolve a dispute involving the medical opinions of the physicians, that resolution is required in this case in making a factual determination necessary to resolving the contractual issue of whether the Grievant is entitled to use her sick leave.

3/ The quotes cited from Dr. Schaefer's report by the Union, are taken out of context.

AWARD

The grievance is denied.

Dated at Madison, Wisconsin this 21st day of January, 1994.

By David E. Shaw /s/
David E. Shaw, Arbitrator