BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between ARANDELL-SCHMIDT CORP. and GRAPHIC COMMUNICATIONS INTERNATIONAL UNION, LOCAL 577-M	Case 1 No. 50264 A-5160 (Ed Huber Medical Disqualification)

Appearances:

Previant, Goldberg, Uelman, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 1555 North Rivercenter Drive, Suite 202, Milwaukee WI 53212 by Ms. Naomi E. Eisman, appearing on behalf of Local 577-M, Graphic Communications International Union.

Davis & Kuelthau, S. C., Attorneys at Law, 111 East Kilbourn, Suite 1400, Milwaukee, WI 53202-6613, by Mr. Mark F. Vetter and Victor A. Lazzaretti, appearing on behalf of Arandell-Schmidt Corporation.

ARBITRATION AWARD

Pursuant to the provisions of the collective bargaining agreement between the parties, Local 577-M, Graphic Communications International Union (hereinafter referred to as the Union) and the Arandell-Schmidt Corporation (hereinafter referred to as the Employer or the Company) jointly requested that the Wisconsin Employment Relations Commission designate Daniel Nielsen of its staff to act as arbitrator of a dispute concerning the medical disqualification of Ed Huber. The undersigned was so designated. A hearing was held on February 8, 1994 in Menomonee Falls, Wisconsin at which time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant to the dispute. A stenographic record was made of the proceedings and a transcript was received on February 29, 1994. The parties submitted post-hearing briefs and reply briefs which were received by the undersigned by April 20, 1994, whereupon the record was closed.

Now, having considered the evidence, the arguments of the parties, the contract language and the record as a whole, the undersigned makes the following Award.

PERTINENT CONTRACT PROVISIONS:

SECTION 2. RECOGNITION

. . .

2.4 The Employer retains the sole right to manage his business, to make all decisions and to take whatever action he deems necessary in connection therewith, except as limited by the provisions of this Agreement.

. . .

. . .

SECTION 12. EXTENDED LAYOFF AND DISCHARGE

12.1 An employee may be laid off, for an extended period of time, subject to recall in the normal course of the operation of the business as stated below. No employee may be disciplined or discharged except for just cause. In the event of any disciplinary action, the Employer agrees to notify the appropriate shop delegate. . . . In the event of a discharge of an employee, the Employer shall, no later than the second working day, furnish reason for such discharge in writing to the Union.

12.4 . . .

Recall rights of an employee shall be predicated upon seniority, with recall rights being a period of twenty-four months.

. . .

12.5 An employee's seniority shall terminate for any of the following reasons:

a. Voluntary quit.
b. Just cause discharge.
c. Failure to report for work after expiration date of approved leave of absence.
d. Failure to report for work within 48 hours after personally being notified of recall from layoff, except in cases of verified illness. . . .
e. Layoff beyond recall rights.
f. Absence for more than twenty-four months by reason of accident or illness.

. . .

BACKGROUND FACTS

The Company is in the printing business and operates a plant in Menomonee Falls, Wisconsin. The Union is the exclusive bargaining representative for employees performing lithographic production work at the Company's plant. The grievant, Ed Huber, has been employed by the Company since 1984. He started as a jogger, and in approximately 1989, he became a roll tender. He held that job until December of 1993, when he was placed on an extended layoff.

The roll tender is generally responsible for keeping the press operational during a run, including webbing the press by pulling the paper through, positioning new rolls of paper near the press, removing empty rolls, re-inking the press, and a variety of other duties. These tasks require bending, stooping and lifting.

In the Fall of 1993, the grievant noticed a stiffening of his back after playing in a baseball game. He later suffered back pain which did not respond to medication. A magnetic resonance exam disclosed a herniated disk. On November 2, 1993, he had a microdiscectomy performed by Dr. Lawrence Frazin, a Board certified neurological surgeon. After the surgery, Dr. Frazin examined the grievant and found him to be essentially assymptomatic. Based upon his examination and the grievant's description of his duties and the physical demands of the job, Dr. Frazin released him to return to work as of December 6th without any medical restrictions.

The grievant provided Dr. Frazin's release to the Company, and was directed by Diane Footland, the Company's Human Resources Coordinator, to report to Harwood Medical Associates for a back-to-work physical on December 3rd. Footland sent a fax to Dr. James Mayr at Harwood, notifying him of the grievant's appointment:

> Edward Huber, a Roll Tender in our Press Department, is scheduled for a "Return to Work" (Fitness for Duty) physical tomorrow at 10:30 a.m. Ed received a non-work related back injury in September while playing ball. I think he had back surgery as a result. He has been released by his physician to return to work on Monday, December 6, with no restrictions.
>
> The Pressroom Jogger/Feeder Job Profile should be used when evaluating his ability to perform the essential tasks of his job. If you have any questions, please contact Ernie, as I will not be in until 1:00 p.m. tomorrow.

Harwood is affiliated with Occu-Med of Wisconsin, which is contracted with the Company to provide pre-employment and back-to-work physicals. Occu-Med of Wisconsin is a franchise of the national Occu-Med system of occupational health consultants. The Occu-Med operations across the country are based upon a study in San Bernadino County, California in the late 1970's which was intended to identify valid medical hiring standards. The system involves a job profile compiled through sophisticated employee questionnaires, intended to identify job tasks, necessary physical abilities, levels of difficulty of each task and specific environmental factors in the work

place. The job profile questionnaires are sent to California for entry in Occu-Med's computer, which calculates a statistically valid mean level of physical difficulty on a scale of one to seven for each of 19 physical abilities required to perform the essential functions of the jobs being analyzed.

Once the physical demands of the job have been identified, the Occu-Med system calls for a comparison of the job profile with the results of an Occu-Med physician's assessment of the physical condition of an employee or prospective employee. The role of the physician is to first choose a medical standard which most closely reflects the subject's physical condition from a series of standards listed in Occu-Med materials. That standard, when cross-referenced with other Occu-Med provided materials, will show a numerical figure for levels of physical exertion in each of the 19 categories of physical ability used to evaluate jobs in the Occu-Med system. These levels of exertion are calculated by Occu-Med using panels of medical specialists who discuss the outcomes of various medical procedures within their specialty areas and arrive at a numerical figure reflecting that level at which an individual who has had that procedure performed does not risk reinjury. The physician then compares the number generated by applying the Occu-Med standards with the levels of physical exertion shown on the job profile. If any of the physical requirements of the job exceed the allowable levels set by the medical standards, the Occu-Med system requires that the employee be deemed disqualified from performing the job.

The grievant reported to Harwood on December 3rd. He completed a medical history questionnaire and received a general physical examination from Dr. James Mayr. Mayr had never before met or treated the grievant. The physical exam lasted perhaps ten minutes. Mayr examined the grievant's back and lower extremities. He noted some limited flexibility in forward bending and a weight gain of about 20 pounds since the original injury. On the whole, however, Mayr concluded that the grievant had achieved excellent surgical results. After the grievant left, Mayr consulted the Occu-Med materials, and selected the "best case" standard from the list of standards for those employees returning from spinal surgery -- "assymptomatic or mildly symptomatic". The comparison indicated that the demands of the Pressroom Jogger/Feeder exceeded the capabilities determined by Occu-Med for persons returning from spinal surgery in the area of "Extent Flexibility" (5.0 capability per medical standard vs. 5.9 demand per job profile), "Static Strength" (5.0 vs. 6.3), "Trunk Strength" (5.6 vs. 6.6), "Gross Body Coordination" (4.9 vs. 5.6) and "Gross Body Equilibrium" (5.0 vs. 5.1).

Mayr prepared a "MEDICAL DISQUALIFICATION REPORT" for Footland, reciting the grievant's medical history, the results of the examination, the medical standard and job information from the Occu-Med materials, and concluding with:

> DECISION: Since the Medical Standards cited indicate the job requirements exceed the allowable limits for this employee's condition, Edward Huber is considered disqualified for the position of Pressroom - Jogger/Feeder.

The employer must always consider reasonable accommodation for medical

disqualifications. This could be accomplished by removal of the above listed essential tasks from those expected for the position.

An interview and physical examination of Mr. Huber required 30 minutes. Record review and completion of this report required an additional 45 minutes.

Human Resource Director Ernest Haug, Director of Manufacturing David Knoff and Executive Vice-President James Giencke reviewed the Occu-Med report. They reviewed the Occu-Med job profiles and determined that the grievant was not physically qualified to perform any job in the Company. Haug sent a letter to the grievant on December 7th, informing him that he was medically disqualified from his job and was being placed on an extended layoff. An employee on extended layoff has recall rights for 24 months.

The instant grievance was thereafter filed, asserting that the grievant was discharged without just cause. The Company denied the grievance, and it was referred to arbitration. At the hearing, Dr. Frazin testified that the grievant had achieved an excellent recovery from surgery. He assessed the grievant as assymptomatic, and expressed the opinion that a person who has had his type of surgery might have a five percent greater risk of future injury than another who had not. Dr. Frazin acknowledged that he had no background in occupational medicine.

Additional facts, as necessary, will be set forth below.

POSITIONS OF THE PARTIES

The Position of the Company

The Company takes the position that the grievant was reasonably determined to be unable to safely perform his job, and that the Company had the right to place him on layoff. The Company stresses that this was not a discharge, since there was no intent to discipline the grievant. The grievant was a satisfactory employee and he retains his recall rights should a job become available within his limitations. Thus the Union's attempt to style this as a discharge case should be rejected. Instead, the case should be analyzed as an exercise of management rights, rather than by an application of the just cause standard in the contract.

The Company argues that the weight of arbitral authority favors the right of an employer to rely on the judgment of its medical professionals, so long as that judgment is not unreasonable, capricious of arbitrary. The right to make determinations regarding medical disqualification is the employer's in the first instance. The employer's doctors are generally more familiar with the demands of the workplace than other medical professionals, and the employer is ultimately responsible for the safety of the workplace. Thus deference should be shown to management decision based on qualified medical advice, even though there may be conflicting medical opinions offered by the employee's physician.

The Company maintains that applying the established arbitral standards to the undisputed medical evidence in this case must result in the denial of the grievance. While the Company does not question the competence or good faith of Dr. Frazin, it points out that he is not qualified in the area of occupational medicine and is not familiar with the physical demands of the job. Even Dr. Frazin admitted that the grievant had a 5% greater risk of back injury than would another employee who had never had back problems. There is simply no medical evidence to challenge the Company's determination that the grievant could not perform his job without an unreasonable risk of further injury.

The Company asserts that the record shows that the Occu-Med system is the result of an exhaustive study of the physical demands of the jobs in the pressroom and many years of research and refinement by experts in occupational risk management. It is an objective system developed by medical experts, and is widely accepted in both the public and private sectors. Dr. Mayr utilized this system to reach his conclusion. That conclusion cannot be termed arbitrary, capricious or unreasonable. It is consistent with Dr. Frazin's admission that the grievant posed a greater risk of back injury than would another who had never had a bad back. The fact that Dr. Frazin concluded that the grievant could return to work while Dr. Mayr did not is simply a difference of opinion between doctors. It does nothing to undercut the Company's right to make the ultimate decision. The decision is one of employability, and that issue is reserved to the management.

Granting that the grievant was a good employee who has lost his job, the Company argues that humanitarian concerns or feelings of sympathy cannot override the contractual right of the Company to medically disqualify him on the basis of objective medical evidence. For these reasons, the Company asks that the grievance be denied.

Position of the Union

The Union takes the position that the grievant was discharged without just cause and should be reinstated and made whole. Although the Company euphemistically refers to the grievant as being on an "extended layoff", it admits that there is no job for which this healthy thirty-one year old is qualified under the Occu-Med standards. Since he is permanently disqualified from all of the jobs in the plant and there is no prospect of him being recalled before his seniority rights are terminated, he has been discharged. Thus the Company bears the burden of proving that its decision meets the standard of just cause under the contract.

In evaluating conflicting medical evidence, arbitrators generally credit those doctors who are most familiar with the employee's physical condition. In this case, the Company is not only asking the arbitrator to ignore the opinion of the treating physician, an orthopedic specialist who released the grievant without limitations, but to proceed on the basis of no medical opinion whatsoever. The Company's decision was not based on a doctor's assessment of this employee.

Instead, it relies on a set of general standards generated by Occu-Med, standards which no witness could satisfactorily explain. These standards were promulgated by a committee which was unfamiliar with the grievant and the grievant's job, and applied by a physician, Dr. Mayr, who knew nothing of the specific reasons for the standards. Given that even the most favorable medical standard -- assymptomatic -- would bar the grievant from working at the Company, the Union asserts that Dr. Mayr's involvement in this whole process was immaterial.

While some arbitrators have expressed deference to the judgments of Company medical personnel, those judgments are subject to rebuttal. Here the specific medical opinion of the treating physician should outweigh the general standards of the Occu-Med system. The Union notes that the credibility of the Occu-Med standards is seriously undercut by the fact that another employee who underwent more serious back surgery than the grievant has worked without incident for nine years in the pressroom.

Given that there is no reliable medical basis for the decision to discharge the grievant, and substantial evidence that he is able to perform his job, the Union asks that the grievance be sustained.

Employer's Reply Brief

The Company notes that the record is replete with information explaining and supporting the validity of the Occu-Med system of evaluating fitness for duty. The system is well established nationally and is premised upon careful medical and occupational research. While the grievant's physician may disagree with the result of the Occu-Med analysis, he is not an expert in occupational health and knows little or nothing about the grievant's job. It is the risk of future injury which drives the Company's decision here, and Dr. Mayr, who is Board certified in occupational medicine is better able to make that judgment than is Dr. Frazin.

The Company disputes the Union's claim that its decision is undercut by the continued presence of other employees with back problems in the workforce. It was stipulated at the hearing that the Occu-Med system was introduced in 1990 on a prospective basis. Thus there is nothing discriminatory or irrational about the decision not to apply these standards to current employees unless they need a return to work physical.

The Company argues that the Union misreads arbitral thought on the issue of deference to Company medical personnel. Absent unusual and case-specific factors, the prevailing view is that the judgment of Company doctors, and the conclusions management draws from those judgments, should prevail so long as they are not unreasonable, arbitrary or capricious. In this case, the Company employed a nationally recognized system, applied by a Board certified specialist in occupational medicine who was familiar with the job, and reasonably concluded that the grievant was at risk of additional injury if he returned to his job. That decision, the Company asserts, should be affirmed.

Reply Brief of the Union

The Union argues that the Company bears the burden of proving that the grievant should not be returned to work, regardless of whether the "layoff" is viewed as discipline or a medical disqualification. It has not borne that burden, because it has not produced any evidence to validate the Occu-Med standards. The issue is not whether the Company's decision is reasonable, but whether the underlying medical justification offered in support of the decision is reasonable. Here there is no Company doctor expressing a judgment about the grievant's medical condition, simply a risk management system to which the Company subscribes. The Company was not able to produce any witness who knew anything about the rationale used to arrive at these specific standards, and thus they cannot be accepted as medical evidence of disability. The sole direct medical evidence in the record is that presented by the Union, and it establishes that the grievant is fit for work.

The Union points to a substantial body of arbitral opinion rejecting the use of generalized or across-the-board standards to medically disqualify employees. Arbitrators have recognized that speculation and generalizations would operate to permanently remove persons with ailments from the work force, and that companies cannot reasonably hope to eliminate all risk of injury from the work place. The application of the generalizations contained in the Occu-Med standards is, the Union asserts, callous and indifferent to the grievant, and contrary to the requirements of the contract.

DISCUSSION

Issue

The parties view the issue in this case very differently, and could not stipulate to a statement of the issue. Instead, they agreed that the arbitrator should frame the issue in the Award.

As detailed above, this case involves a permanent medical disqualification of the grievant from his position with the Company based upon management's belief that he cannot perform the job without risking reinjury to his back. Given the Company's evaluation of the grievant's capacity to work safely in the future, he is also permanently disqualified from every other existing job in the plant. The Company placed him on an extended layoff on December 7, 1993, and his recall rights expire after twenty-four months. The Union believes that there is virtually no prospect of a recall under these circumstances, and thus poses the issue as:

> "Was there just cause for discharge of the grievant; and, if not, what shall the remedy be?"

In so framing the issue, the Union asserts that the burden of proof lies with the Employer.

The Employer argues that there is no question of misconduct in this case, and that the layoff is neither disciplinary nor punitive in nature. Granting that there is no job currently available in the pressroom within what it believes to be the physical capabilities of the grievant, it asserts that such a job could conceivably be created during the period of his recall rights and that he would have the right to claim that job. Thus this is not a discipline case, and the Company frames the issue as:

> "Did the Employer have the right under Section 2.4 of the collective bargaining agreement between the parties to place the grievant on extended layoff due to his physical disqualification from the position of pressroom roll tender/feeder? If not, what is the appropriate remedy?"

Given the non-disciplinary nature of the case, the Employer argues that the Union bears the burden of proof to show that the decision to place the grievant on an extended layoff was unreasonable, arbitrary or capricious.

The Union's framing of the issue reflects the practical impact of the medical disqualification on this employee. He is permanently prevented from working at any job in the bargaining unit and there is no reason to believe that some light duty position will be created before his recall rights expire. However, the Company is correct in asserting that he has not been fired. His recall rights are not particularly useful, but an employee discharged for cause does not enjoy any such rights. Further, there is no stigma of misconduct involved here. While the specifics of this case make it analogous to a discharge, the exercise of management's right to medically disqualify an employee, whether it results in transfer, demotion or a layoff, is not susceptible to a traditional just cause analysis. Thus the issue may be fairly stated as:

> Did the Company violate the collective bargaining agreement when it medically disqualified the grievant from his job as a pressroom roll tender/feeder in December of 1993? If so, what is the appropriate remedy?

The fact that this is not a discipline case does not actually have much effect on the allocation of the burdens of production and persuasion. The Company is the party which is changing the status quo. The grievant is entitled to his job by seniority and training. He has produced medical clearance from his treating physician to return to work without restrictions, and the Company does not dispute his present fitness for duty. It has refused to reinstate him because it believes he will become incapable of performing the work at some point in the future. As with a job bidding case where an employer wishes to pass over the senior qualified applicant, the Company is claiming an exception to the contract's normal presumptions. In this instance, the case turns on whether the evidence supporting the Company's prediction of future disability is substantial enough to overcome the presumption in favor of a presently fit employee reclaiming his

job.

Merits

The cases cited by the Company stand for the proposition that the good faith medical opinion of the Company's medical personnel should be given deference when it is in conflict with the opinion offered by the grievant's physician. That is a valid principle, as far as it goes. Medicine is both an art and a science, and even where the science is not in dispute, two practitioners may come to different conclusions when asked to predict the future course of an injury or medical condition. Given a reasonable range of medical opinion, the Company's decision to rely on a more conservative outlook for the grievant's capacity to work safely is both understandable and contractually permissible. The Company has the responsibility to ensure safety in the plant and bears the liability for injuries occurring there. 1/ This responsibility does not, however, grant the Company carte blanche in its efforts to avoid potential workers' compensation costs, and deference cannot be confused with blind acceptance.

The cases relied upon by the Company involve a choice between two or more conflicting medical opinions. That is not the choice in this case. The record is devoid of any evidence that a doctor or any medical professional has judged this particular employee to be medically disqualified from this particular job. To be sure, Dr. Mayr wrote a report stating that he was disqualified, but that decision was not based upon Mayr's professional opinion or expertise. It was solely the result of consulting the reference materials and charts provided to him by Occu-Med. On cross-examination, Mayr admitted that he had no knowledge of the risks posed to the grievant by resuming his occupation, nor the basis for the Occu-Med standards:

> Q: Did you ever participate in the creation of the OCCU-MED what they call medical standards?
>
> A: No.
>
> Q: How many doctors participate in creating this standard?
>
> A: I don't have direct knowledge of that.

1/ See, for example, Arkatek Ceramic Co. 50 LA 111 (Seinsheimer, 1967) holding that a company has a right and an obligation to protect itself and its other employees from the increased costs of insurance incurred if it re-employs a worker who cannot do the job without causing additional deterioration in his health. See also Port Authority of Allegheny County, 78 LA 437 (Creo, 1982) holding that the arbitrator should defer to company physician, since the company has the right and duty to be cautious. Both cases recognize that controlling workers compensation costs is a legitimate management concern.

Q: You indicated earlier that the standards are premised on the fact that anyone that has had the surgery is at a particular level of risk; correct?

A: Yes.

Q: *What is that level of risk?*

A: *I can't really comment on that*. It's tied together with a whole system in a way of fitting people safely into a job setting.

Q: You don't really know what the level of risk is?

A: I could feel that certain tests could be significant in causing further reinjury but *I have to put my personal thoughts aside when I am using the OCCU-MED system. I am relying strictly on the standards*.

Q: I am talking about the OCCU-MED system. Are you saying that you don't know what level of risk the OCCU-MED system supposes an individual that has had that type of surgery is at?

A: The medical standards grouping of physicians have set a level that they feel an individual could safely function up to that point. And beyond that it would be considered significant and would place that individual at significant risk for harm.

Q: *What risk is that? Significant is a very vague term.*

A: *I can't give you a number*

Q: Is it possible that the person is at an increase of 5 percent risk?

A: A possibility, yes.

Q: You just don't know?

A: I feel it would be greater than that.

Q: *You don't know do you?*

A: No.

Q: *You believe it should be greater than that; don't you?*

A: *I place my faith in the judgment of the physicians who made up those standards.*

Q: You don't know them; do you?

A: No.

(Transcript, pages 146-148, emphasis added)

Dr. Mayr went on to testify that if he were not operating under the Occu-Med standards, he believed that he would place restrictions on an individual returning from this surgery, but could not say what those restrictions would be without a thorough examination and more information concerning the source of the injury and the demands of the job. (Transcript, pages 148-152). 2/

It was not complete hyperbole when counsel for the Union suggested that a lay person could have reached the same decision as Dr. Mayr. The Occu-Med system does not allow Dr. Mayr to exercise any individual medical judgment, except in the assessment of the patient's surgical result. Here that decision was immaterial to the verdict on the grievant's employability. Mayr essentially accepted Dr. Frazin's decision that the grievant had achieved the optimum surgical result, but the Occu-Med standards and charts dictate that any person who has had this type of surgery, regardless of the nature of their original injury, general physical condition, program of therapy, exercise habits, height, weight, age, strength, family medical history,

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2/ The testimony of Dr. Mayr regarding the strict adherence to the numbers in the Occu-Med manual is somewhat at odds with the following language in Chapter II of the MEDICAL STANDARDS PROJECT FINAL REPORT, entitled MEDICAL EXAMINATIONS FOR EMPLOYMENT:

> If the application of the standards seems to be a process bereft of thought, mechanical, and free from human concern, the reader should be disabused of such belief. As there is a range in the severity of the clinical disorders encountered on physical examination, there is a range in the standards which have been developed. *The system must permit flexibility and allow recognition of the variation among people and the residua of the disease or injury they present. Efforts have been made to avoid strict adherence to a cookbook approach. ... A strict, by the rules interpretation has no place in a system that is trying to provide significant employment to persons commonly denied renumerative work, and who already are anxious, depressed and dispirited at best about being hired. We should not compound the pain which had been experienced..."*

Company Exhibit No. 5, Chapter II, page 29 (emphasis added). This is the study which is the basis for the entire Occu-Med system.

personal medical history, or any other personal attribute be barred from ever working at any of the existing jobs in this plant. After a microdiscectomy, the couch potato and the body builder are treated by this system as presenting identical risks of future injury from working as a press feeder, although the degree of risk cannot be identified by the qualified occupational health professional administering the system.

The grievant is physically capable of performing his job. The basis of the disqualification is that he poses an unacceptable risk of future injury because of his back surgery. On the record of this case, it is not possible to say what degree of risk, if any, the grievant actually poses should he return to his job. The only evidence is that Occu-Med has generated a chart indicating that, on average across the population, it believes the risk is unacceptable. There is no medical evidence concerning the basis of that conclusion or, with respect to the degree of risk, the actual meaning of that conclusion for the population in general, 3/ much less for this individual. The marketing materials provided in the record describe the standards as having been produced by a panel of "nationally recognized" doctors. I have no particular basis for doubting the existence of this panel or the credentials of its members. However, none of these doctors appeared to testify at the hearing. The system was explained on the record by Elaina DiMiceli, Occu-Med's local marketing manager, and by Dr. Mayr, neither of whom really knew anything about the development and meaning of the medical standard applied to the grievant.

Employers frequently generalize standards and apply those generalizations to individual employees. No-fault attendance programs, for example, can impose sanctions on workers for absences without regard to the individual reasons for absence. In those cases, the employer is responding to actual conduct and to the already realized impact on the employer's operations. Irrespective of the reason for the absence, the impact is identical and the response is therefore identical. However, the generalized standards under an attendance control program do not attempt

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3/ Chapter II of the FINAL REPORT suggests that the maximum levels of effort listed on the medical standards represent a level of complete safety for the employee (See page 26). If accurate, this would mean that any degree of increased risk will justify the medical disqualification of an employee, a standard of caution that is arguably unrealistic when weighed against the practical impact of the decision on a senior worker who has a substantial investment in his job. See for example, Weatherhead Co., 42 LA 513 (1964) in which Arbitrator Kabaker determined that an employee who was physically fit and under no partial disability but posed a risk of reinjury to his back was entitled to reinstatement. Arbitrator Kabaker expressed the opinion that the chance of increased liability under workers' compensation was offset by the grievant's seniority rights. That Award appears to reflect a pragmatic balancing of the loss to the employee from a disqualification (transfer vs. discharge, for example) against the demonstrated risk to the employer if action is not taken. A review of the reported cases suggests that this balancing of interests may help shape many arbitrators' decisions on preemptive medical disqualifications, since employers are almost always upheld where an action less than discharge is taken, while the results are more mixed in medical discharge cases.

to predict future absences and dismiss an employee before he can be absent. By contrast, the Occu-Med system attempts to predict the future "injury conduct" of an employee and imposes a sanction, albeit for non-disciplinary reasons, based upon the estimated odds of reinjury. Given the rigid generalized standards of the Occu-Med system as applied by Dr. Mayr, an employee has no opportunity to take individual action to protect the bundle of economic rights and interests represented by his job. All medical opinions are predictive to some extent, and all medical disqualifications have an element of preemption. The question in these cases is the level of proof needed before the Company may take concrete action against an employee in order to avoid a speculative cost. Simply citing a generalized standard without showing that it is accepted by the medical community as valid -- or at least that it mirrors the considered and informed medical judgment of the Company's doctor as to this patient's condition -- constitutes no proof at all.

An employer certainly has the right to engage in self-defense on the workers' compensation front. The fact remains, however, that the justification for removing this worker from the plant is a medical disqualification. Before medically disqualifying an employee who is physically able to perform the work because he might be susceptible to future injury, there must be evidence to a reasonable degree of medical certainty that either all persons with that medical condition will pose a significantly greater risk of injury than those who have not experienced that medical condition, or that the particular employee, given his personal attributes and medical history, will pose such a risk. Beyond that, there must be evidence that the overall risk of injury is significant. 4/ It may be that the Occu-Med standards have validity as evidence of increased risk. It may be that the grievant poses a substantial risk to himself and to the Company's workers' compensation costs if he resumes his duties. With all due respect to Dr. Mayr and Ms. DiMiceli, neither Occu-Med witness in this proceeding was able to provide reliable evidence on those points. 5/ The only reliable medical evidence in the record is the testimony of Dr. Frazin, who judged the grievant to be fit for duty without reservations.

On the basis of the foregoing, and the record as a whole, I have made the following

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4/ An employee returning from back surgery may hypothetically pose a 5% greater risk of a back injury than another employee, but if the risk of injury on the particular job is insignificant, a 5% increase in the risk will not justify a medical disqualification. In the instant case, the job analysis shows this to be a physically demanding job, but says nothing about the general level of back injury risk involved in the position.

5/ This is in marked contrast to the record in the Honolulu Police case cited by the Company. In that case, the Union did not challenge the validity of the standards, and the arbitrator's acceptance of the Occu-Med standards over the testimony of the grievant's physicians was presumably influenced by that tactical decision. In addition, the President of Occu-Med was deposed for that case, and provided an explanation of the system that apparently satisfied Arbitrator Kenny (See page 46 of the Award).

AWARD

The Company violated the collective bargaining agreement when it medically disqualified the grievant from his job as a pressroom roll tender/feeder in December of 1993. The appropriate remedy is to reinstate him to his former position and make him whole for his losses.

Signed this 24th day of May, 1994 at Racine, Wisconsin:

By Daniel Nielsen /s/
Daniel Nielsen, Arbitrator