BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LOCAL 1925, WCCME, AFSCME, AFL-CIO

and

WALWORTH COUNTY
(HIGHWAY DEPARTMENT)

Case 148
No. 56579
MA-10335

(Grievance of John Markgraf)

Appearances:

Mr. Laurence S. Rodenstein, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, on behalf of Local 1925, WCCME, AFSCME, AFL-CIO.

vonBriesen, Purtell & Roper, S.C., Attorneys at Law, by **Mr. James R. Korom**, on behalf of Walworth County.

ARBITRATION AWARD

Local 1925, WCCME, 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 Walworth County, 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 15, 1998 in Elkhorn, Wisconsin. There was no stenographic transcript made of the hearing and the parties submitted post-hearing briefs in the matter by November 9, 1998. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties stipulated there are no procedural issues and to the following statement of the substantive issues:

Did the County violate the contract when it involuntarily transferred the Grievant to the Shop Maintenance position? and

Did the County violate the contract by refusing to grant the Grievant either the Section 4 or the Section 11 Patrolman position?

If so, what is the appropriate remedy?

CONTRACT PROVISIONS

The following provisions of the parties' 1994-1996 Agreement are cited:

ARTICLE II – MANAGEMENT RIGHTS

2.01 In General. The management of the Walworth County Highway Department and the direction of the employees in the bargaining unit, including, but not limited to, the right to hire, the right to assign employees to jobs and equipment in accordance with the provisions of this Agreement, the right to assign overtime work, the right to schedule work, the right to relieve employes from duty because of lack of work or for other legitimate reasons, except as otherwise provided in this Agreement, shall be vested exclusively in the County.

. . .

2.04 Work Rules. The Union recognizes the right of the County to establish reasonable work rules.

. . .

ARTICLE IV – GRIEVANCE PROCEDURE

. . .

4.02 Procedure. Grievances may be initiated by employee(s) covered by this Agreement or their union representative and shall be processed as follows:

. . .

The impartial arbitrator shall, after hearing both sides of the controversy, hand down his decision in writing within ninety (90) calendar days. Such decision shall be final and binding on both parties to this Agreement, providing such decision is within the scope of his authority. The arbitrator shall have no authority to add to, subtract from, amend or modify any provision of this Agreement. The cost of the impartial arbitrator shall be shared equally by the County and the Union.

. . .

4.03 Back Pay. If the arbitrator finds any action taken by the County to be in violation of this labor agreement, he shall be authorized to award any employee involved back pay and benefits, if any, but not more than the regular wages or benefits that would have been paid had the violation not occurred.

. . .

ARTICLE VII – SENIORITY

. . .

7.06 Application of Seniority. Seniority shall be followed in promotion, demotion, layoff, recall from layoff, shift preference, vacation and transfer where the employee is able to perform the work. If two or more employees are hired by the County on the same date, seniority of such employees shall be decided by tossing a coin.

. . .

ARTICLE VIII – JOB POSTING

8.01 Vacancies – Posting. Notices of vacancies due to retirement, quitting, new positions, or for whatever reason, shall, for the first five (5) working days, to overlap two (2) consecutive weeks, be posted in the Highway Department no later than one (1) day following said vacancy. If no qualified employees are available in the department, notice of

vacancies shall be posted on all designated bulletin boards throughout the County for a period of five (5) working days (to overlap two (2) consecutive weeks.) A copy of said posting shall be submitted to the Local Union.

. . .

8.03 Filling of Vacancy. In filling a vacancy, the employee signing with the greatest seniority shall be given the first consideration. Skill, ability, and efficiency shall be taken into consideration only when they substantially outweigh considerations of length of service.

. . .

8.07 Grievance Procedure – Qualifications. Questions of qualifications of an employee shall be subject to the grievance procedure.

. . .

ARTICLE X – OVERTIME

10.01 Outside of Work Schedule. Employees shall be paid one and one-half (1-1/2) times their regularly hourly rate of pay for all hours worked outside the standard workday.

. . .

ARTICLE XX – OTHER LEAVES

. . .

20.04 Return to Work. An employee shall be restored to the same position, or equivalent position, upon return from the following leaves: (1) a statutory leave, or (2) any other leave not exceeding four (4) months. For a personal or educational leave exceeding four (4) months, every effort will be made to restore the employee to the same position, or equivalent position. This paragraph shall not reduce the provisions of section 15.04.

. . .

ARTICLE XXIII – GENERAL PROVISIONS

. . .

23.05 Safety. The County shall make every effort to provide and maintain safe working conditions, and the Union will cooperate to that end and encourage employees to work in a safe manner.

. . .

23.06 No Discrimination. The parties to this Agreement agree that they shall not discriminate against any person because of race, creed, color, sex, national origin, ancestry, age, handicap, arrest or conviction record, marital status, or sexual orientation, and that such persons shall receive full protection of this Agreement.

. . .

Also cited is a Letter of Understanding "RE: ADA COMPLIANCE" dated June 25, 1994 and attached to the parties' 1994-1996 Agreement.

BACKGROUND

The Grievant, John Markgraf, has been employed in the County's Highway Department since March of 1989 and held the Section 11 Patrolman position since 1990. On May 2, 1995, the Grievant stepped in a hole while attempting to clear rocks in a water way and felt something "pop" in his left knee. Although his knee seemed to be okay, the Grievant reported the matter. The next day, the Grievant's knee became swollen. The Grievant was eventually referred to an orthopedic surgeon, Dr. Prchal. In July of 1995, Dr. Prchal performed surgery on the Grievant's left knee. The Grievant had been on light duty until then and was on Worker's Compensation leave from the time of his surgery to November of 1995.

Although he was still having problems with his knee, the Grievant returned to work on a part-time basis on November 6, 1995. He had physical therapy three days a week. The Grievant was unable to operate a manual transmission truck at that time due to his knee, so he was given shop maintenance duties to perform. He experienced pain and swelling in his knee, and was taking Ibuprofen for those symptoms. The Grievant saw Dr. Prchal on December 4, 1995 and was off work for three weeks. On December 28, 1995, he was seen by Dr. Prchal again for reevaluation who then recommended a work hardening program. The County

wanted a second opinion and sent the Grievant to Dr. Suster for an independent medical examination (IME). Dr. Suster examined the Grievant on December 29, 1995 and concluded that while he was not done healing, his injury "would result in permanency". Dr. Suster placed temporary restrictions on the Grievant of no running, repetitive squatting or lifting more than 50 pounds, and that he should not operate a manual transmission vehicle. The Grievant was ordered returned to work with Dr. Suster's restrictions. In February of 1996, the Grievant began a work hardening program and in March also began physical therapy. Due to range of motion problems and weakness in his left knee, the work hardening was discontinued. Physical therapy was also discontinued in early April and surgery to remove scar tissue was performed on the Grievant's knee by Dr. Prchal on April 18, 1996.

The Grievant was in physical therapy and off of work until July of 1996, when he returned to work part-time as a Patrolman with restrictions on lifting and walking and standing in place.

In late August of 1996, the Grievant began working full-time and during this time he drove automatic transmission vehicles at times, worked as a flagman some days, and did move some trucks with a manual transmission. The working restrictions were removed the end of September, 1996, except for a restriction on standing.

Dr. Prchal saw the Grievant on November 25, 1996, and issued the following report on that same date to the County's legal counsel in the Grievant's Worker's Compensation claim:

> Dear Mr. Wistrom:
>
> John Markgraf was seen in the office today. As I wrote you earlier this month, I thought that after today's appointment I might be able to give you more information regarding Mr. Markgraf's prognosis.
>
> Mr. Markgraf has made very little improvement over the last 2 months. He continues to have pain in his knee with certain activities such as sitting in place for a long period of time, standing in place for more than 30 minutes, and activities which require extending the knee with force such as pressing down the clutch of a truck. However, the lifting restriction which I gave him previously is no longer necessary. He continues to experience patellofemoral pain in his knee due to postoperative stiffness and adhesions.
>
> Based on the fact that he has not shown very much improvement over the past 2 months, I now believe that he has reached an end of healing. I have given him permanent restrictions of no driving a truck which requires the use of a clutch and no standing in one place for more than 30 minutes at a time. I have

> removed his lifting restriction. I believe that he has a 10% permanent partial disability of his left knee due to the ongoing pain which he experiences with some activities.
>
> As of today's examination, he does not have any disability due to restricted range of motion or instability. I have not set up a definite follow-up appointment for him although I do believe that he may occasionally require an intermittent office visit due to flare-ups of his knee pain in the future. I do not expect that he will require any further surgery on the knee for this work injury.
>
> Sincerely,
>
> Carol Prchal /s/
> Carol L. Prchal, M.D.
> Orthopedics

The Grievant was scheduled for another IME on December 10, 1996, but it was cancelled when the Grievant decided not to do it. On December 23, 1996, there was a meeting of the Highway Commissioner, Benjamin Coopman, the Grievant, and the Union Steward, Jack Delaney, to discuss what to do regarding the Grievant's employment with the County. Management proposed that the Grievant take a transfer to the Shop Maintenance position. The Grievant indicated he could not decide without first discussing it with Dr. Prchal. There was some indication from management, that Dr. Prchal had been contacted about the Shop Maintenance position and that she felt it was alright for the Grievant to work in that position. The Grievant attempted to telephone Dr. Prchal on December 24th, but she was on vacation and he was unable to speak to her before seeing her on January 6, 1997.

On January 3, 1997, Coopman sent the following letter to the Grievant regarding a transfer to the Shop Maintenance position:

> Dear John:
>
> This letter is being written because I have not heard from you by 3:30 P.M. today, as agreed, about you accepting a transfer to the Maintenance Worker position. You have signed up for vacation on January 6, 1997, the day the transfer was going to take effect.

I am assuming that you agree with the transfer. You will be assigned to those duties on Tuesday, January 7, 1997, when you return. Should you not agree with my assumption, we will have to talk further about any work assignment at this department.

If you have any questions, feel free to contact me.

Sincerely,

WALWORTH COUNTY HIGHWAY DEPARTMENT

Benjamin J. Coopman, Jr. /s/
Benjamin J. Coopman, Jr. P.E.
Commissioner

On January 6, 1997, Coopman had the following notice posted:

Effective Januarry 6, 1997, John Markgraf has been transferred to the Maintenance Worker position. Dan Dowell has been transferred temporarily to a Patrolman position. Section #11 will be posted for permanent assignment, as had been the practice. Once all the movement occurs on the posting(s), Dan should be assigned permanently to the remaining position.

After the assignment for Section #11 is completed, Section #4 will be posted for permanent assignment.

If there are any questions about these matters, please contact me.

Also on January 6, 1997, the Grievant was seen by Dr. Prchal, who then gave the Grievant the following note regarding the Maintenance position:

To Whom It May Concern:

John Markgraf has described the job duties of Maintenance Worker to me. Based on his description, he would not be able to do this job due to the requirement of standing and working on concrete floors. He has also informed me that he has been told that I have already approved of this job for him. I have not, and have not had any contact with his employer or worker's compensation carrier regarding this job specifically.

Carol Prchal, M.D. /s/
Carol Prchal, M.D.

Dr. Prchal also gave the Grievant the following return to work slip:

DATE: 01/06/97

TO: Whom it may concern

RE: John Markgraf

DATE OF BIRTH: 04/10/54

The above patient has been under my medical care. He/She may return to work/school on 1-07-97

WITH THE FOLLOWING RESTRICTIONS:

- No standing in one place for more than 30 minutes – permanent restriction.
- May try driving truck with a clutch.

Sincerely,

C. Prchal M.D. /s/

The Grievant was involuntarily transferred to the Shop Maintenance position on January 7, 1997. On January 8, 1997, the Grievant filed the first grievance over his removal from his Patrolman position and reassignment to the Maintenance position.

The City's Personnel Analyst, Kathy Lemkuhl Pedersen, subsequently sent Dr. Prchal the following letter along with a medical certification form and a series of questions for her to answer regarding the Grievant:

Dear Dr. Prchal:

On January 7th, 1997, Mr. Markgraf was laterally transferred to a Shop Maintenance position as a result of the permanent restrictions assigned to him by yourself on 11/25/96. Mr. Markgraf has now presented new medical

information dated 01/06/97. He has also presented to his supervisor verbal restrictions of no bending/stooping, and no walking on hard floors. Enclosed please find a medical certification form and short series of questions that I would ask you to address. This information will be used to clarify Mr. Markgraf's permanent physical restrictions with both Mr. Markgraf and the Highway Department and to determine Mr. Markgraf's employment status with Walworth County.

Your prompt attention is appreciated. Do not hesitate to call me with any questions.

Sincerely,

Kathy /s/
Kathy Lemkuhl Pedersen
Personnel Analyst

Dr. Prchal subsequently sent Pedersen the completed form indicating the Grievant can work with the following permanent work restrictions:

"Standing. . .30 minutes at a time

Other: May or may not be able to operate a clutch as described on additional page."

The "additional page" is the questions the County asked Dr. Prchal to answer with her responses. Those questions and Dr. Prchal's responses were as follows (Dr. Prchal's responses have been placed in parentheses):

John Markgraf D.O.B: 4/10/54

Dr. Prchal, we would appreciate your responses to the following questions:

1. Would specifically designed shoes and/or fatigue mats adequately address your concerns about working on hard floors? (yes) In your opinion would your concern apply to working on any hard surfaces (i.e. hard roadways)? (yes)

2. Can Mr. Markgraf be on his feet for more than 30 minutes if allowed to walk around periodically? (yes) How long would Mr. Markgraf need to be off his feet after a 30 minute period of standing before he can stand again for any period of time. (30 min.)

3. Many pieces of equipment at the Highway Department require the ability to operate a manual transmissions and/or foot controls. Does the stated clutch restriction apply to all pieces of manually operated equipment, or just manual transmission trucks. (Only equipment which requires force for pushing with the foot while extending the knee.)

4. You note that Mr. Markgraf "can" or "may" try to operate a clutch. Can you give us an idea of what this should involve? How many attempts should Mr. Markgraf be allowed to make at operating a clutch before abandoning his efforts? (He should operate a clutch while driving a truck for as long as he can on 3-4 separate days. If his ability to drive does not improve over that time, he should abandon attempt.)

5. Mr. Markgraf is a member of a township fire department. Would the work restrictions you noted for the Highway Department also apply to his ability to function as a fire fighter? (yes) Has this been discussed with Mr. Markgraf. (No)

Your prompt written response to our questions is appreciated.

1/11/97
C Prchal M.D.

On January 13, 1997, the Grievant met with management and discussed Dr. Prchal's response. Management agreed to give the Grievant a trial period of driving a manual transmission truck. The Grievant did drive a truck with a clutch that day and his next opportunity was the weekend of January 25-26, 1997, when he was called in twice to plow snow. According to the Grievant, he experienced some pain in his upper leg muscles, but no swelling in his left knee and the muscle pain went away after a few days. The Grievant did mention this when Coopman asked him how he was doing on Sunday night. On January 27, 1997, the Grievant was again seen by Dr. Prchal, who sent Pedersen the following letter of the same date:

Dear Ms. Pedersen:

John Markgraf has notified me that he is able to clutch his patrol truck comfortably now. He had a trial of driving the truck for several days over the past week and was able to do so without difficulty. He continues to have increased pain and stiffness in his knee when he is working on a hard surface such as working on the concrete floor of the shop.

As of today I am lifting his restriction against clutching. His current restriction is that he may not stand on a hard surface such as a concrete floor or a road for more than 30 minutes at a time. After that 30 minutes he is to be off his feet for at least 30 minutes before standing on a hard surface again. He does not have any specific restriction against walking on a hard surface. I expect this restriction to be permanent.

Sincerely,

Carol Prchal MD /s/
Carol L. Prchal, M.D.
Orthopedics

On February 13, 1997, vacancies in Section 4 Patrolman and Section 11 Patrolman were posted. The Grievant signed the postings, but was considered to be medically unqualified to fill a Patrolman position and the positions were awarded to less senior employes. Those postings listed the following requirements:

SKILLS REQ:
ABILITY TO DRIVE A 29,500# GVW TRUCK WITH MANUAL TRANSMISSION.
ABILITY TO OPERATE A TRACTOR FOR ROADSIDE MOWING AND PERFORM OTHER ROADSIDE MAINTENANCE.
WILLINGNESS TO WORK LONG HOURS, INCLUDING EVENINGS, WEEKENDS, AND HOLIDAYS.
KNOWLEDGE OF ROAD CONSTRUCTION AND MAINTENANCE.
KNOWLEDGE OF TRAFFIC LAWS, ORDINANCES, AND REGULATIONS GOVERNING EQUIPMENT OPERATION.

KNOWLEDGE OF DRIVER PREVENTATIVE MAINTENANCE OF EQUIPMENT (I.E., TRUCK TRACTOR, END-LOADER, BACK HOE, GRADER).
KNOWLEDGE OF OCCPATIONAL HAZARDS INVOLVED AND PRECAUTIONS NECESSARY FOR SAFE OPERATION OF MOTOR-DRIVEN EQUIPMENT, INCLUDING OPERATION OVER ROUGH, SLIPPERY, ICY, OR UNSTABLE SURFACES.
ABILITY TO UNDERSTAND, REMEMBER, AND FOLLOW ORAL AND WRITTEN INSTRUCTIONS.

PHYSICAL REQ: ABILITY TO PERFORM HEAVY PHYSICAL TASKS UNDER ALL WEATHER CONDITIONS FOR EXTENDED HOURS AS REQUIRED DURING A 24 HOUR PERIOD. ABILITY TO PERFORM HEAVY MANUAL LABOR. POST-OFFER PHYSICAL REQUIRED.

The County was not satisfied with Dr. Prchal's January 27, 1997 report and scheduled another IME with another doctor. The County was advised that it was not entitled to have a different doctor perform the IME if Dr. Suster was still available. The Grievant was subsequently examined by Dr. Suster on February 14, 1997, who then issued a report to the County's legal counsel which, in relevant part, stated:

PHYSICAL EXAMINATION

Height is 6'. Weight is 200 pounds.

His gait is heel/toe and reciprocating with the upper extremity. He is able to heel and toe walk unremarkably. He cannot perform a full squat on the left side due to range of motion limitations. His extension is not even bilateral; however, he lacks about 10 degrees of flexion in his left knee, more precisely by noniometric measurement. He has –15 degrees of flexion versus the right side. The right is 145 degrees and the left is 130 degrees. He has 170 degrees by –10 degrees of extension of the left knee and 180 or 0 degrees of extension in the right knee. The anterior knee wound is well healed. It is about 5 cm in diameter, and there is an intersecting scar laterally around the patella, also about 4 cm, that is well healed. The vastus medialis bulk bilateral is 42 cm. The gastroscoleus, 9 cm inferior to the tibial tuberosity bilaterally, is 39 cm. Hair distribution is normal throughout. Color is normal throughout. There is no allodynia or hyperpathia of the left knee.

Reflex testing is symmetric at the patella and Achilles bilaterally, 2+. No upper motion neuron signs in the lower extremities. Balance is good. Movements are fully coordinated.

IMPRESSION/DISCUSSION

This discussion is to the reasonable degree of medical probability with regard to the May 22, 1995, date of loss on John Markgraf with respect to the left knee.

My opinion rendered on December 29, 1995, with regards to the work-relatedness of the left knee injury has not changed: To wit, Mr. Markgraf sustained a work-related injury to the left knee on May 22, 1995. This resulted in the surgical necessity for left lateral knee meniscetomy, anterior cruciate ligament reconstruction and debridement of the medial femoral condyle. Today's examination is consistent with the residuals of this injury resulting in and out of the work place on May 22, 1995, date. According to the Wisconsin Administrative Code, Section InD 80.32(4) (June, 1994), effective July 1, 1994, 4.2, the revised rule for knee injuries, an excellent to good result for a total or partial meniscetomy is 5% and anterior cruciate ligament repair is a minimum rating of 10%. I would, therefore, rate Mr. Markgraf with a 15% permanent partial disability to the left knee resulting in and out of the work incident on May 22, 1995. As far as permanent work restrictions are concerned, put very simply, Mr. Markgraf's left knee is not normal although he has reached a healing plateau. Biomechanically his left knee is not normal. He has range of motion restrictions, both in extension and in flexion. Therefore, he will be subject to the left knee pain exacerbations/temporary aggravations. Depending on the frequency of use of the knee and weight bearing on the knee, it is my opinion that most of Mr. Markgraf's future difficulties with regard to the left knee would be secondary to time spent weight bearing through the left lower extremity, and the type of surface he will be walking on. His examination reveals that he has no problems moving the left knee throughout its restricted range of motion from –15 degrees of extension through the limited arc of flexion of 130 degrees. Operating a clutch will not demand that he operate the knee outside of this restriction. I, therefore, would not limit him to driving a truck with a clutch mechanism. However, with regard to standing and walking, if he is having pain, he should be allowed to rest. If he is not having any pain, he should be allowed to continue his duties in the usual fashion. Finally, with regard to future medical treatment, it is very possible Mr. Markgraf may suffer again temporary aggravations from time to time with increased pain and swelling of the left knee which may require any or all of the following: Prolonged rest, oral medications or arthrocentesis of the left

knee/corticosteroid injection. Unfortunately, the only way to know for sure how frequent these interventions or treatments may be required is to give Mr. Markgraf a return to work trial.

Sincerely,

Stuart M. Suster, M.D. /s/
Stuart M. Suster, M.D.
Medical Director

The County's legal counsel subsequently asked Dr. Suster for further clarification of the permanent work restrictions regarding the Grievant, and on February 25, 1997, Dr. Suster issued the following response:

Dear Mr. Wistrom:

I am in receipt of your request for further clarification of the permanent work restrictions with regards to John Markgraf and the 5/22/95 date of injury.

The following is my opinion to a reasonable degree of medical probabilities. It relates the above-named claimant and the 5/22/95 date of injury.

> There should be no standing nor ambulation more than 20 minutes at a time and he should avoid all uneven surfaces.

Thank you for bringing this matter to my attention.

Sincerely,

Stuart M. Suster, M.D. /s/
Stuart M. Suster, M.D.
Medical Director

On March 19, 1997, the Grievant filed the second and third grievances that are now before the Arbitrator based on the County's refusal to award him either the Section 4 or Section 11 Patrolman vacancy. Those grievances were also denied based on the County's conclusion that the Grievant was not medically qualified to perform the functions of the Patrolman position based on the existing medical documentation. The parties continued to attempt to resolve the grievances through the grievance arbitration procedure.

On June 2, 1997, Dr. Prchal sent Pedersen the following letter at the Grievant's request:

> Dear Ms. Pedersen:
>
> It has come to my attention that John Markgraf is still attempting to return to his job as a patrolman and that you have inquired as to whether or not I would perform a fitness for duty evaluation.
>
> Mr. Markgraf's knee is stable and his musculature is strong. The restrictions that I most recently gave him were given to him based only on his description to me of activities which caused him pain. Physical examination of his knee does not reveal anything which would cause any specific limitations. As far as his left knee is concerned he may work as a patrolman.
>
> Sincerely,
>
> Carol L. Prchal, M.D. /s/
> Carol L. Prchal, M.D.
> Orthopedics

The Grievant testified that he was then advised by management that unless he agreed to a "fitness for duty examination" by the County's doctor, it would be the end of his attempts to get back into a Patrolman position. The Grievant was thereafter seen on June 26, 1997, by Dr. Mayr, a physician certified in occupational medicine who the County has perform pre-hire physicals and who earlier had participated in developing job profiles for positions in the County's Highway Department. After reviewing the reports of Dr. Prchal and Dr. Suster and the Patrolman job profile, and examining the Grievant, Dr. Mayr issued a report of his examination of the Grievant which read, in relevant part, as follows:

> "PHYSICAL EXAMINATION:
>
> . . .
>
> The lower extremity is evaluated. The knees appear symmetric and without evidence of fluid or edema. There appears to be near full extension and flexion as noted on the maneuver of a deep knee bend. There does not appear to be any lateral or medial ligament laxity of either knee. The patella appears stable, again without evidence of laxity to digital pressure. There is no feeling of

crepitation with knee movement. Measurement of thigh circumference at 10 cm. cephalad to the upper margin of the patella measures at 50 cm. bilaterally. A neurologic evaluation of the lower extremity with light touch sensation and deep tendon reflexes is intact. A Romberg is intact, as is gait.

REVIEW OF JOB PROFILE – HIGHWAY PATROLMAN/WOMAN: I had the opportunity to review a job profile dated July of 1991 describing John's past position as a Highway Patrolman. This profile was created from the collective experience of 17 incumbents in the position. My major concern regarding this position is the one of knee stability in the face of uneven working surfaces. As an example, among typical tasks are included the requirements for shoveling dirt, sand or gravel; to carry or chip brush and trees; to pull and/or carry brush or tree parts to a chipper; to shovel from out of truck bed; to carry snow fence rolls/concrete pieces; drive fence posts for snow fence; pull brush up to ditch bank; to climb ditch or guardrails; to carry snow fence; to repair or replace roof of sheds; to stand on icy freeway ramp. Implicit in these descriptions is the requirement for the Highway Patrolman to work on a multiplicity of surfaces, including ground, fields, ditches, gravel, roofs, and ice and snow. Under environmental factors, item 5 notes occasional work on slippery surfaces, which of course is implicit in shoveling of snow.

John has noted difficulty with continued walking and standing on concrete surfaces and thus he has been given the requirement for no standing or ambulation more than 20 minutes at a time by Dr. Suster or 30 minutes at a time by the operating orthopaedic surgeon, Dr. Prchal. Dr. Suster further explicitly states, "He should avoid all uneven surfaces." In our discussion about this statement, John felt this meant ladders or stairs, and I also feel that repetitive ladder or stair climbing is not prudent with an individual having John's anterior cruciate ligament reconstruction with a later revisit operation.

RECOMMENDATION AS TO HIGHWAY PATROLMAN/WOMAN: I therefore feel that John is not physically qualified for the full dimension of required tasks for the position of Highway Patrolman in his requirement to avoid uneven work surfaces. Typical examples would include sloping surfaces of drainage ditches, gravel, field ground in forestry or other clearance operations, uneven or slippery even ice-covered road surfaces, or graveled margins, in addition, such tasks as roof repair or standing on icy freeway ramp.

It would now appear that John is quite capable of driving vehicles without a clutch requirement, and depending on the ergonomic design of trucks with standard shift and a clutch, I dare say he could probably drive most newer vehicles as well. John does describe some older vehicles which are now largely retired and out of use which required a straight down motion of the left foot. I could see this as being a source of pain, perhaps even swelling and later slippage, were this maintained on a frequent basis.

A possible accommodation would be the use of secure and slip-resistant footwear, but even here, because of the wide variety of potential work surfaces, and the risk of significant damage or even a recurrence of an ACL derangement, I feel the most prudent course would be to avoid uneven work surfaces. I would maintain an option for rest after 20-30 minutes of continued standing or walking, and minimize ladder or stair climbing.

COMMENT REGARDING MAINTENANCE/TIRE REPAIR PERSON: I have also had the opportunity to review a job profile dated February 1991 for the job title of Maintenance/Tire Repair Person. This was assembled from, "Attendees. . .of past incumbents and supervisors of the position." Noted were environmental factors of occasional wetness and occasional work on slippery surfaces. There is also a specific mention of climbing a ladder. Otherwise, most job tasks involved tire changing within a garage setting; that is, a concrete floor or other general or light maintenance tasks. In addition, a specific note was made of "Walk across wet shop floor or to work from ladder in plumbing, install ceiling tiles." Again, good footwear, secure ladders or prudent walking on a concrete surface even if wet, would seem to be reasonable and a predictable fact of the job which could be accommodated. I will maintain the rest option and minimize ladder or stair climbing.

COMMENT REGARDING LETTER OF DR. CAROL PRCHAL DATED JUNE 2, 1997: Dr. Prchal has written an opinion regarding John's attempt to return to the position as a patrolman and a personnel inquiry as to the performance of a Fitness for Duty Evaluation. Dr. Prchal comments: "Mr. Markgraf's knee is stable and his musculature is strong. The restrictions that I most recently gave him were given to him based only on his description to me of activities which caused him pain. Physical examination of his knee does not reveal anything which would cause any specific limitations. As far as his left knee is concerned he may work as a patrolman." I do compliment Dr. Prchal on her surgical correction of the torn anterior cruciate ligiment with a partial patellar tendon graft. However, I feel strongly that he is at considerable risk for a breakdown of the surgical repair by engaging in tasks similar to the actual cause of injury; that is, "He was walking along a waterway when he stepped into a hole with his left foot. He described the hole as being deep enough that his leg went in above the knee. He was pinched between some rocks. As he was trying to pull himself out he fell forward and felt a stinging sensation at the lateral aspect of the knee. Then he felt something pop. . ." Unfortunately, these unpredictable and quite variable walking surfaces are implicit in the position as a patrolman. I feel it is prudent to maintain John in a more stable work environment with predictable surfaces and appropriate footwear. In addition, I feel it is prudent that he remain with the present restriction of 30, perhaps 20 minutes of standing and walking activity interspersed with rest if needed. I think also, as a further recommendation, that John should minimize ladder or stair climbing. This does not seem to be a requirement of his present position.

It may be useful, as an additional preventative measure, to have John engaged in a closely monitored, physical therapy directed program of quadriceps strengthening, to provide the maximum benefit for knee stability, but yet controlled for avoidance of over-exertion or over-application of force.

. . .

James F. Mayr /s/
James F. Mayr, M.D., M.B.A.
Certified in Occupational Medicine

The Patrolman job profile reads, in relevant part, as follows:

JOB TITLE: HIGHWAY PATROL MAN/WOMAN Number of Incumbents - 17
ORGANIZATION: WALWORTH COUNTY

Physical Ability	TYPICAL TASKS	Environmental Factors
1. Stamina	- Black top asphalt; shovel dirt/sand/gravel; carry/chip brush/trees; operate asphalt router	1. EXPOSURE TO SUN – 50% - 100% outside
2. Extent Flexibility	- Pull/carry brush/tree parts to chipper; shovel from/out of truck bed; operate concrete saw	2. HIGH TEMPERATURE – hard labor 80 – 90 degrees
3. Dynamic Flexibility	- Cut brush/trees; operate concrete saw; use a pick; pick up concrete pieces after a "blow-up"*	3. WETNESS – occasional wetness
4. Static Strength	- Carry snow fence rolls/concrete pieces; shovel asphalt; operate concrete saw/asphalt router; load monuments**	4. NOISE – frequent loud noises
5. Explosive Strength	- Drive fence posts for snow fence; pull brush up ditch bank; cut trees with chain saw	5. SLIPPERY SURFACES – occasional work on slippery surfaces
6. Dynamic Strength	- Climb ditch/guard rails; road repair/patch; pick up trash; flag traffic	6. OIL – occasional contact with oil or grease
7. Trunk Movement	- Cut tree limbs with chain saw from basket truck; operate chain saw; lift/roll/stack snow fence	7. BODILY INJURIES – frequent possibility of bodily injury
8. Speed Limb Movement	- Drive/operate snowplows; drive under ice/snow conditions	
9. Gross Body Coordination	- Operate truck/snowplow/plow wings simultaneously; trim trees	
10. Gross Body Equilibrium	- Carry snow fence; repair/replace roof of sheds; stand on icy freeway ramp	

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------	------	14. IRREGULAR OR EXTENDED WORK HOURS – occasionally work beyond normal hours
		Present to Undetermined Degree 1. Work above floor level 2. Low temperature 3. Sudden temperature changes 4. Confirmed or cramped body position 5. Vibration 6. Dust
18. Mobility	- Flag traffic; dodge incoming traffic	
19. Effort	- Operate air hammer/jackhammer; blacktop; cut weeds by hand	

* "Blow-up" – indicates an area where heat expansion fragments road surface requiring clean out debris and patching.

* Monuments – large concrete markers used for surveying.

The Grievant continued in the Maintenance Worker position and the parties continued to attempt to resolve the matter. During that time, the Grievant considered it his work to cut and haul brush along the roadside across from the Highway Shop. When Coopman saw the Grievant doing this, he told him to "take it easy" and assigned other employes to help him. The Grievant was also required to inspect work being done on the Highway Shop roof and at times used a ladder or aerial lift to get on the roof.

In early December of 1997, the parties agreed that they would have Dr. Prchal perform a "fitness for duty examination" on the Grievant to determine whether, in her medical opinion, the Grievant was medically qualified to perform the essential functions of a Patrolman as listed on the position's job profile. By letter of December 3, 1997, Pedersen sent Dr. Prchal the

Grievant's medical information regarding his knee injury, including her own reports and those of Dr. Suster and Dr. Mayr, as well as the job profile for the Patrolman position.

Dr. Prchal examined the Grievant on December 8, 1997 and scheduled him for a Cybex test of his lower extremities. The Grievant had a Cybex test done on December 11, 1997 and Dr. Prchal's notes in that regard read as follows:

> CHART CHECK: John's Cybex test was done on 12-11-97 at SLT and the results were reviewed by me today. A comparison was made between his left involved knee and his right uninvolved knee with both being tested on 12-11-97. He has a 20% deficit in the left quads an actually has 34% greater strength in the left hamstring as compared to the right. Comparing his recent left results to his previous left results of 8-26-96, his peak torque of the quads has increased 51% and the peak torque of the hamstrings has increased 23%. Based on the fact that the weakest spot is his quadriceps and that only has a 20% deficit, I believe that he is not at any significantly increased risk or reinjurying his knee if he returns to the position of a patrolman. A form was sent to the Personnel Dept. at Walworth County advising them that he is medically capable of performing the essential functions of the patrolman job. C.L. Prchal, M.D./sba

The pay rate of the Maintenance Worker position is the same as that of the Patrolman position, however, there are more opportunities to work overtime in the Patrolman position. From December 1, 1996 to November 7, 1997, the Grievant worked 92.5 overtime hours, while the employe in the Section 4 Patrolman position, Gross, and the employe in the Section 11 Patrolman position, Abell, worked 154.5 overtime hours and 146.75 overtime hours, respectively, during that same period. From December 1, 1997 until August 14, 1998, the Grievant worked 58.25 overtime hours, while Gross and Abell worked 101.75 and 87.5 overtime hours, respectively.

The parties were ultimately unable to resolve the grievances and proceeded to arbitration before the undersigned.

POSITIONS OF THE PARTIES

Union

The Union first asserts that the County's refusal to acknowledge Dr. Prchal's and Dr. Suster's medical opinions was arbitrary and capricious. In that regard, the Union asserts that it is traditional in industrial relations that the physician's opinion in matters of medical certification is controlling. In this case, the County decided to repeatedly ignore Dr. Prchal's

advice about the unsuitability of the Shop Maintenance position, as well as her advice to allow the Grievant to drive a truck with a clutch and to work as a Patrolman. The County also ignored the advice of a second physician, Dr. Suster. The Union posits that the County ignored those physicians' advice because it was shopping for an opinion which matched management's uninformed medical conclusion, and in doing so, was acting in an arbitrary manner. The evidence establishes that Dr. Prchal made it clear that the essence of her first limitation opinion was based on the Grievant's pain and not on possible further injury to him. The Union asserts that arbitrators give great weight to competent medical advice, and have even overturned management decisions to ignore physician prognoses before an operation has been performed. WEYERHAEUSER PAPER COMPANY, 101 LA 457. Conversely, a review of arbitral awards fails to reveal a single case where an arbitrator supported an employer's decision to disregard competent medical advice as the County has done in this case.

Here, the County acted arbitrarily by repeatedly ignoring the competent medical advice of Drs. Prchal and Suster. The County would not have incurred any additional liability by accepting Dr. Prchal's advice. The County attempted to claim that Dr. Prchal was bullied by the Grievant into allowing him to operate a manual transmission, however, the County ignores the fact that it failed to accommodate the Grievant with an automatic transmission vehicle to perform his Patrolman duties or to make any meaningful attempt to accommodate his desire to be restored to Patrolman.

The County also violated the Grievant's rights by not awarding him the Patrolman Section 4 or 11 vacancies. The Agreement provides that personnel transactions be made through a posting procedure which awards vacant positions based on seniority. There is no dispute as to the Grievant's seniority or qualifications to do the work of Patrolman, a job he successfully performed for five years. Any question as to his fitness was answered by Drs. Prchal and Suster. Further, Dr. Prchal's evaluation that the Shop Maintenance job was inconsistent with his condition is also material. The County was arbitrary and capricious by ignoring her competent medical opinion, and nothing established the Grievant was not qualified or fit to be a Patrolman.

Lastly, the Union asserts that the County violated the Grievant's rights by reassigning him to the Shop Maintenance worker position. Nothing in the Agreement empowers the County to involuntarily reassign the Grievant to a lateral position which significantly reduces his overtime opportunities. The Agreement is silent as to reassignment and the only personnel transactions are voluntary moves into vacancies initiated by an employe pursuant to the job posting provision. The County's action violates not only the Agreement, but common sense, in light of Dr. Prchal's specific rejection of the Shop Maintenance position. In doing so, the County not only ignored the doctor's recommendation that the Grievant was able to work as a Patrolman, but forced the Grievant to work in a position inconsistent with his doctor's advice, thereby making the County susceptible to a liability claim in that regard. The assertion that

Dr. Prchal's medical advice was of little value is not supported by the evidence, and is belied by her medical background, her statements and judgments on the record and Dr. Suster's corroborative statements.

The Union concludes that the Grievant should have been classified as a Patrolman as of January 6, 1997 and thereafter, and that he is entitled to the difference in overtime pay between the Section 11 Patrolman position and the Shop Maintenance position for all times since that date to the date of the Award and that he should be immediately restored to the Patrolman classification.

County

The County first asserts that the grievances only cite three provisions of the Agreement, none of which conclusively disposes of this matter, and which beg the ultimate question of the Grievant's qualifications in light of his physical limitations. Section 8.03 of the Agreement only refers to filling a vacancy, and would not seem to apply to the issue raised in the first grievance, which is a question of a transfer out of an existing position. While Section 8.03 would seemingly apply to the two Patrolman positions for which the Grievant later bid, that provision permits the County to take "ability" into account in filling a vacancy and allows "ability" to outweigh seniority in that process. The second sentence of Section 8.01 provides that unqualified employes need not be considered for postings, and Section 8.03 does not establish whether or not the Grievant was qualified for the position.

Section 23.06 of the Agreement prohibits discrimination based on a number of protected categories. Presumably, the Union is claiming discrimination based on "handicap". While the Grievant certainly has some risk of future injury in certain types of work, he does not meet the definition of a handicapped individual under the law. To meet that definition, an individual must be permanently disabled, unable to perform "major life activities" and is only considered handicapped if he/she is excluded from a broad range of jobs, rather than a few narrow jobs. Further, if the Grievant is disabled to the extent that he falls within the non-discrimination clause found in Section 23.06, he is then likely too disabled to perform the requirements of the Patrolman's job without risk of future injury. Even if the Grievant's physical limitation meets the definition of a disability or handicap, it is an appropriate defense to a discrimination claim for an employer to remove an employe who is not qualified to perform the available work. The County had a legitimate basis to reach that conclusion in this case. Further, Section 2.01 of the Agreement gives the County the right to relieve employes from duty "for other legitimate reasons". Removing an employe from a position which places them at significant risk of future injury is such a "legitimate reason". Finally, to determine whether discrimination has occurred, the Union is obligated to present some comparative factual data concerning other similarly situated employes and has failed to present any such evidence in this case. Thus, the Arbitrator cannot conclude that the Grievant was treated any differently than any other employe.

The third contract provision cited in the grievances is the ADA Letter of Understanding. A review of the document shows that it contains only procedural protections, not substantive limits on the County's right or obligation to comply with the ADA. Nothing in the Letter of Understanding authorizes the Arbitrator to interpret, apply or enforce the provisions of the ADA against the County. The County cites an arbitral award wherein it was concluded that the arbitrator did not have the authority to interpret or enforce provisions of the ADA unless such statutory issues are expressly placed before the arbitrator. Even if the ADA is applied, it clearly does not require employers to place employes in positions for which they are unqualified. In determining whether someone is unqualified, it is appropriate to determine if placement in the position would create a significant risk of substantial harm to the health or safety of the individual based on a reasonable medical judgment. The County clearly complied with its obligations under the ADA by engaging in the exact type of balancing and investigation required by the regulations in coming to a good faith conclusion based on medical evidence. Thus, resolution of this dispute comes down to the question of whether the Grievant's medical condition rendered him unqualified to perform the duties of Patrolman.

The County asserts that its determination that the Grievant was not qualified for the Patrolman position based on a high risk of future reinjury is supported by arbitral and legal precedent. The County cites a number of arbitration cases in which it asserts an arbitrator has balanced the interests of the employer and its employes where an employe's medical condition poses a risk to his/her future health or safety if permitted to continue in the job. Those cases support an employer's right to refuse placement of an employe in a job where doing so places the employe at risk of injury, even where there was medical evidence that the employe was *able* to do the job, but doing so put the employe at risk of further future injury. In MUELLER COMPANY, 105 LA 919 (Bittel, 1996), the arbitrator upheld the employer's removal of an employe from his existing job and placing him in another for which he was qualified primarily on the basis that a doctor had advised the employe not to take a forklift job because of the risk for future injury. The arbitrator also went on to discuss the importance of a clause similar to Article 23.05 in the parties' Agreement which expresses their mutual intent to "provide and maintain safe working conditions." To permit employes to work in a job which exposes them to significant risk of future injury, would not comply with that provision of the Agreement.

The County asserts the record clearly supports the legitimacy of its judgment regarding the qualifications of the Grievant and its reliance upon the opinions of Dr. Mayr and Dr. Suster over those of Dr Prchal. Dr. Mayr carefully analyzed the specific duties of the Patrolman position and the Maintenance position and stated, "My major concern regarding this position is the one of knee stability in the face of uneven working surfaces." He then describes a long list of duties which the Grievant agreed were part of the job, and which would require walking on uneven surfaces. Dr. Mayr concluded: "I, therefore, feel that John is not physically qualified for the full dimension of required tasks for the position of Highway Patrolman in his requirement to avoid uneven work surfaces." He further concluded that: "He

is at a considerable risk for a breakdown of the surgical repair by engaging in tasks similar to the actual cause of injury." Dr. Mayr's opinions were supported by the conclusions of Dr. Suster that it was possible that the Grievant would suffer temporary aggravations from time to time as to his left knee and that "he should avoid all uneven surfaces." While the Union attempts to make much of Dr. Suster's use of the word "should", reading his entire medical opinion, especially in light of Dr. Mayr's opinion, leads to the conclusion that "should" is a limitation, rather than merely a suggestion.

With regard to Dr. Prchal's medical opinions in January of 1997, after recommending that the Grievant receive a trial period in driving a truck with a clutch, she lifted the clutching restrictions, but continued other limitations, advising that the Grievant may not stand on a hard surface such as a concrete floor or a road for more than 30 minutes at a time, and that if he did so, he had to be off his feet for an additional 30 minutes. She indicated no restrictions concerning walking on uneven surfaces. On June 2, 1997, she fully released the Grievant to perform the duties of a Patrolman, despite the fact that Dr. Mayr, three weeks later, completely rejected that opinion. The County questions who it was supposed to rely upon and asserts that the record is clear that Dr. Mayr's medical opinion, along with Dr. Suster's, is far more reliable than that of Dr. Prchal. Dr. Prchal's opinion flip-flops several times. After an assessment of permanency in late November of 1996, she declared that the Grievant would never again drive a truck with a clutch. Without any follow-up medical treatment or surgery, Dr. Prchal then changed her mind, apparently upon the request of the Grievant. After recommending a trial period, she then made a new finding of permanency concerning driving a truck with a clutch completely opposite from her finding only two months earlier. Dr. Mayr's opinion is also more reliable because of his unique and intimate knowledge of the jobs involved. No evidence was presented as to Dr. Prchal's knowledge of the job except those facts reported to her by the Grievant, while Dr. Mayr was earlier part of a detailed and extensive study of the job of Patrolman. Further, Dr. Mayr's opinion is in complete agreement with that of Dr. Suster, while Dr. Prchal's opinion stands alone.

Dr. Prchal's opinion of complete ability to perform the job is also inconsistent with the Worker's Compensation settlement reached with the Grievant based on a determination that he is 15% permanently disabled in his left knee. Having made an assessment of 15% permanent disability, Dr. Prchal's later opinion that the Grievant is fully capable of performing all of his former job duties in June of 1997, is problematic at best.

In assessing the credibility of the various medical opinions, the level of detail provided by the physician is also relevant. The carefully-analyzed and detail-oriented analyses of Drs. Mayr and Suster, as compared to the brief conclusory determination by Dr. Prchal, lends more credibility to their opinions. Also supporting their opinions is the Grievant's own behavior. In the early part of 1997, while working in the Maintenance position, the Grievant was frequently observed resting. If standing in one place or walking for over 30 minutes resulted

in such pain and soreness to his left knee that he was required to take a break, this would indicate that Dr. Suster's and Dr. Mayr's conclusions regarding his left knee were accurate.

Further, the County's legitimate interests must also be considered. The County is self-insured for Worker's Compensation injuries. Thus, there is a very direct cost to the County for future Worker's Compensation injuries. More importantly, the County does not want to place employes in jobs where they most likely will be injured, even without financial consequences. While every job has certain inherent risks which cannot be eliminated, to the extent risks can be controlled or reduced, the parties have mutually agreed through Section 23.05 to take appropriate action to reduce those risks. To permit the Grievant to continue working in the Patrolman position would have put him at risk of future injury and the County was not required to do so. The County carefully analyzed the medical documentation, considered other workplace alternatives that would put the Grievant in nearly the same position as if he had stayed in his old position, and made a reasonable judgment, having carefully balanced the interests of the employe and the County. Further, it remained open to receipt of additional medical documentation as it made its decision. The County concludes that it could not have been more fair or reasonable.

With regard to remedy, the Union requests a remedy that it cannot obtain under the Agreement. The Union claims that by moving the Grievant from one position to another, he received full regular pay and benefits, but lost some overtime. Section 4.03 of the contract clearly states that an arbitrator is authorized to award back pay and benefits, "but not more than the *regular* wages or benefits that would have been paid had the violation not occurred." (Emphasis added). This does not mean that the County would be able to violate the contract with impunity as long as the only harm to the employe is lost overtime, as Section 10.05 clearly indicates that overtime is to be distributed as evenly as possible among regular full-time employes. There is, however, no time frame as to when overtime must be distributed. Thus, even if it is determined that the Grievant should have been retained in the Patrolman's job, back pay for overtime, which would exceed "regular pay", under Section 4.03, should not be awarded. At most, future priority for overtime opportunities under Section 10.05 should be awarded until such time as the Grievant "catches up" to other similarly-situated employes. The County concludes that it has complied with its obligations under the Agreement and made a good faith determination based on competent medical evidence that the Grievant could not perform the central functions of the Patrolman job without risk of future reinjury to his knee. Thus, it requests that the grievance be denied.

DISCUSSION

The first issue is whether the County violated the Agreement when it transferred the Grievant from his Patrolman position to the Maintenance position in January of 1997. It is noted that the Grievant was injured in May of 1995 and was either off of work or on light duty

in the ensuing 18 months before he was transferred to the Maintenance position. Section 7.06 of the Agreement states that seniority will be followed in cases of transfer "where the employe is able to perform the work." Section 2.01 authorizes the County to relieve employes from duty for lack of work or "other legitimate reasons." The inability to perform the work without an unacceptable level of risk of further injury or reinjury constitutes a "legitimate reason."

Regarding the duties of a Patrolman, the Highway Commissioner, Coopman, testified that the duties of a Patrolman vary with the seasons and that one in that position might spend 80 percent of his/her time driving the truck during winter months depending on the amount of snow, and only 15 to 20 percent of the time driving during the other months. In those other months, Patrolmen would also be doing patching, crack filling, acting as a flagman, brushing along the roadway, picking up debris and dead animals from the roadway and ditches, clearing out vegetation, cleaning out culvert ends, etc. Driving the truck requires being able to use a clutch and in the winter months might also require sitting in one place for long periods of time. While there was testimony that the County has some trucks with an automatic transmission that can be used to plow snow, there was further testimony that they are not of adequate size to be used on the highways for plowing, and are generally used for plowing out parking lots and like jobs.

The Grievant has asserted he was able to perform the work of a Patrolman in January of 1997, when the County involuntarily transferred him to the Maintenance position then held by a less senior employe. The Grievant further claims that he should not have been placed in the Maintenance position due to Dr. Prchal's restrictions on his walking or standing on the concrete floors. The Union relies on Dr. Prchal's note of January 6, 1997, and the return to work certification for the Grievant she completed on that same date to support the Grievant's claims. Dr. Prchal's statement of January 6, 1997 that the Grievant can try driving a truck with a clutch follows her findings on November 25, 1996 by little more than a month. In those earlier findings, Dr. Prchal concluded that the Grievant continued to have pain in his knee due to activities such as "sitting in one place for a long period of time, standing in one place for more than 30 minutes, and activities which require extending the knee with force such as pressing down the clutch of a truck." She concluded he had reached an end to healing and placed permanent work restrictions on the Grievant of "no driving a truck which requires the use of a clutch and no standing in place for more than 30 minutes at a time."

Dr. Prchal's changes in the Grievant's work restrictions without explanation a little more than a month after placing those permanent restrictions on his work was a reasonable basis for the County's concern as to whether it could or should rely on her January 6, 1997 conclusions. Dr. Prchal's follow-up response of January 11, 1997 to the County's questions indicated she had the same concern about the Grievant working on a road surface as she did

about his working on a concrete floor. She also responded that it would help the Grievant if he could walk around periodically when he had to be on his feet longer than 30 minutes and that he should be off his feet for 30 minutes after standing 30 minutes before he stood again. Presumably, the Grievant could walk around periodically in the Shop and he was permitted to sit and rest when he felt the need to do so. Dr. Prchal also indicated the Grievant could attempt to drive a truck with a clutch, however, she did not explain why she had changed her mind in that regard until her letter of January 27, 1997, when she indicated her latest conclusions were based on what the Grievant had told her. While the Grievant did drive the manual transmission truck in mid-January and plowed snow on January 25 and 26, he did complain of soreness in the muscle of his upper left leg. Although not his knee, it is not clear whether that soreness was or was not related to his knee problems. It does not appear from Dr. Prchal's January 27, 1997 letter that he had advised her about the soreness in his upper leg from the plowing. Dr. Prchal's letter of January 27, 1997 indicates that she was lifting the restriction on the Grievant's driving a truck with a clutch based on his having told her that he had done so in the past week without difficulty, but continued to have increased pain and stiffness in the knee from working on the Shop's concrete floor. She placed a permanent restriction on the Grievant's standing on a hard surface, such as a concrete floor or road for more than 30 minutes at a time, and after doing so, he would have to be off his feet for at least 30 minutes before he could stand on a hard surface again. Unlike the Grievant, Dr. Prchal did not distinguish between standing on a concrete floor and a road surface as far as the restriction on the Grievant's standing on a hard surface. At this point, the County still had a reasonable basis for concern regarding the Grievant's ability to perform the functions of a Patrolman without exacerbating his knee problems. The Grievant's own willingness to live with the pain and risk further injury to his knee does not change that. Further, those restrictions were more readily accommodated in the more controlled environment of the Shop than out on the highway or work gangs. The record does indicate that the Grievant's maintenance duties have included changing tires out in the field, and at times, climbing a ladder in order to inspect roof work being done. Still, those duties do not generally occur on a daily basis, whereas as a Patrolman, the Grievant would have been required to work outside on hard surfaces and uneven surfaces as part of his regular duties. Therefore, the County was not acting unreasonably or arbitrarily at that point in removing the Grievant from his Patrolman position and placing him in the Maintenance position in order to avoid further injury to his knee.

Given the foregoing, when the vacancies were posted in the Section 4 and Section 11 Patrolman positions on February 13, 1997 and the Grievant applied for them, the County had a reasonable basis for having another doctor examine the Grievant. Dr. Suster had seen the Grievant for his knee in late 1995 and at the County's request saw the Grievant in mid-February of 1997. Dr. Suster gave a detailed report of his findings and concluded:

> As far as permanent work restrictions are concerned, put very simply, Mr. Markgraf's left knee is not normal although he has reached a healing plateau. Biomechanically his left knee is not normal. He has range of motion restrictions, both in extension and in flexion. Therefore, he will be subject to the left knee pain exacerbations/temporary aggravations. Depending on the frequency of use of the knee and weight bearing on the knee, it is my opinion that most of Mr. Markgraf's future difficulties with regard to the left knee would be secondary to time spent weight bearing through the left lower extremity, and the type of surface he will be walking on. His examination reveals that he has no problems moving the left knee throughout its restricted range of motion from –15 degrees of extension through the limited arc of flexion of 130 degrees. Operating a clutch will not demand that he operate the knee outside of this restriction. I, therefore, would not limit him to driving a truck with a clutch mechanism. However, with regard to standing and walking, if he is having pain, he should be allowed to rest. If he is not having any pain, he should be allowed to continue his duties in the usual fashion. Finally, with regard to future medical treatment, it is very possible Mr. Markgraf may suffer again temporary aggravations from time to time with increased pain and swelling of the left knee which may require any or all of the following: Prolonged rest, oral medications or arthrocentesis of the left knee/corticosteroid injection. Unfortunately, the only way to know for sure how frequent these interventions or treatments may be required is to give Mr. Markgraf a return to work trial.

Dr. Suster's report was hardly a ringing endorsement of the Grievant's ability to work as a Patrolman without aggravating his knee problem. While Dr. Suster's report seemingly removed the restriction on driving a truck with a clutch, the report states that the Grievant would be subject to pain exacerbation/temporary aggravation regarding his left knee and it noted future problems would depend on time spent weight bearing on the knee and the "type of surface" he would be walking on, and suggested that he should be allowed to rest if he was experiencing pain with standing and walking. The County asked Dr. Suster to clarify what permanent work restrictions should be placed on the Grievant, and he gave the following clarification by his letter of February 25, 1997,

> "There should be no standing nor ambulation more than 20 minutes at a time and he should avoid all uneven surfaces."

At that point, driving the truck with a clutch could not reasonably be considered a problem by the County, however, those Patrolman duties that require standing or walking on the road surface, shoulders, ditches, etc., were the type of duties the Grievant should avoid according to Dr. Suster. It was not unreasonable of the County, at that point, to continue to

view the Grievant as unable to perform those functions of a Patrolman that require walking or standing on hard surfaces and uneven surfaces without a higher than usual degree of risk of further injury to his knee, given Dr. Suster's permanent restrictions, as well as Dr. Prchal's permanent restriction on standing on a hard surface for more than 30 minutes at a time. Again, those restrictions were more readily accommodated in the more controlled environment of the Shop than out on the highway. Therefore, the County did not violate the Agreement when it refused to grant the Grievant the Section 4 or Section 11 Patrolman positions.

The parties continued to attempt to resolve the grievances and both parties have cited and relied upon subsequent medical opinions – the Union, Dr. Prchal's June 2, 1997 opinion, and the County, Dr. Mayr's June 26, 1997 opinion. A comparison of those reports reveals the different perceptions of those physicians. Beginning with her January 6, 1997 report, it is evident that Dr. Prchal's concern was with regard to what activities did nor did not cause the Grievant pain; those that did not, he could do; those that did, he should avoid or minimize. Her conclusions went to what the Grievant was physically able to do without pain or minimal discomfort. In reaching her conclusions in that regard, she understandably relied upon what the Grievant told her. On the other hand, Dr. Mayr, and earlier, Dr. Suster, were concerned more with what activities would or would not aggravate the Grievant's knee problem or possibly result in reinjuring the knee. It appears that these differing perspectives, which reflect the perspectives of the parties as well, are what is responsible for this dispute, i.e., the Grievant felt he could do the work of a Patrolman without pain in his knee or within tolerable limits, and was willing to take his chances on aggravating or reinjuring his knee, while the County's concern has been that working as a Patrolman would create an unreasonably high level of risk in those latter regards.

The Grievant's desire to return to his preferred job with more overtime opportunities is understandable, and it is obvious from the record that he was doing what he could to get his knee back into shape to where he could do his old job. From the County's perspective, however, the Grievant's knee injury in May of 1995 had resulted in two knee operations, his being off from work or on light duty for approximately 18 months, and a Worker's Compensation claim settled at 15 percent permanent partial disability. The County had a legitimate basis for concern in avoiding a situation where the Grievant would be likely to reinjure his knee. Dr. Prchal's reports, including her June 2, 1997 report, did not address that concern.

Dr. Prchal's report of June 2, 1997 is similar to her January 27, 1997 report in that it relies primarily on what the Grievant has told her and it does not address the likelihood of reinjury to the knee if he is placed back in the Patrolman position, other than the statement, "Physical examination of his knee does not reveal anything which would cause any specific limitations."" In light of Dr. Suster's detailed report several months earlier in which he

concluded the Grievant "will be subject to left knee pain exacerbations/temporary aggravations", with the time spent weight bearing on his knee and the type of surface he is walking on being the primary factors, it was not unreasonable for the County to seek a third opinion at that point.

While the Union would infer a darker motive for the County's seeking Dr. Mayr's opinion in June of 1997, there is nothing in the record to support such an inference. Rather, just as the record indicates that the Grievant did what he could to return to work, it also indicates that the County made a reasonable effort to accommodate his work restrictions and to place him in a position that would not reduce his rate of pay and would not place him at unreasonable risk of reinjury. Coopman testified he considers the Grievant to be a good employe, and there is no motive evident from the record for the County not wanting to return the Grievant to the Patrolman position other than avoiding the risk of reinjury to his knee.

Given his awareness of Patrolman position's functions based on his previous involvement in developing job profiles for the Highway Department, Dr. Mayr's medical opinion as to the Grievant's ability to perform those functions without undue risk of reinjury to his knee would appear to be quite relevant. It is also noted that Dr. Mayr is certified in "occupational medicine". After examining the Grievant, reviewing the reports of Dr. Prchal and Dr. Suster, and reviewing the job profile for the Patrolman position, Dr. Mayr stated that his major concern regarding the Grievant working in the Patrolman position was the knee's stability on uneven surfaces. Dr. Mayr concluded that the Grievant was not "physically qualified to perform the full dimension of required tasks" for the Patrolman position due to the requirement that he avoid uneven work surfaces. He further advised that, "I feel the most prudent course would be to avoid uneven work surfaces. I would maintain an option for rest after 20-30 minutes of continued standing or walking, and minimize ladder or stair climbing."

Having reviewed Dr. Mayr's report that concluded that the Grievant continued to be at risk of aggravating or reinjuring his knee if he performed the full range of Patrolman functions, it continued to be reasonable for the County to consider the Grievant physically unqualified for a Patrolman position. It is also noteworthy that the County remained open to the possibility that the Grievant's knee could, at some point, improve to the extent that he would be able to perform all of the functions of Patrolman without an unreasonably high risk of reinjuring his knee. It appears from the record that point did not come until December of 1997, after the parties agreed to have Dr. Prchal reexamine the Grievant and have a Cybex test performed on his knee.

In sum, it is concluded that the County could reasonably conclude from Dr. Suster's and Dr. Mayr's reports and the work restrictions they placed on the Grievant that he did not have the physical ability to perform all of the essential functions of a Patrolman in February, 1997 and thereafter, without an unreasonable degree of risk of reinjury or further injury to his

knee. As the County asserts, it should not be required to place an employe at risk of further injury or reinjury even if the employe is willing to live with that risk, as it is the County that is responsible for the well-being of its employes on the job and it is the County that is financially liable for injuries to its employes on the job. Thus, it is concluded that the County did not violate the Agreement when it did not grant the Grievant the Section 4 or Section 11 Patrolman positions.

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

AWARD

The grievances are denied.

Dated at Madison, Wisconsin this 8th day of March, 1999.

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

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