BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**LAKEVIEW EMPLOYEES LOCAL 1403,
WCCME, AFSCME, AFL-CIO**

and

LaCROSSE COUNTY

Case 173
No. 57154
MA-10532

Appearances:

Mr. Daniel R. Pfeifer, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Mr. Robert B. Taunt, Personnel Director, LaCrosse County, appearing on behalf of the County.

ARBITRATION AWARD

Lakeview Employees Local 1403, WCCME, AFSCME, AFL-CIO, herein the Union, requested the Wisconsin Employment Relations Commission to designate a member of its staff as an arbitrator to hear and to decide a dispute between the parties. LaCrosse County, herein the County, concurred with said request and the undersigned was designated as the arbitrator. Hearing was held in LaCrosse, Wisconsin, on April 6. 1999. No transcript was made of the hearing. Post-hearing briefs were exchanged on June 29, 1999. On July 12, 1999, the undersigned was informed that the parties had agreed not to file reply briefs.

ISSUES

The Union framed the issues as follows:

> Did the County violate Section 11.04 of the collective bargaining agreement between the parties by the manner in which it calculated the commencement of the first ten (10) calendar days? If so, what is the appropriate remedy?

The County framed the issues as follows:

> Has the County violated Section 11.04 of the collective bargaining agreement by incorrectly counting 10 calendar days from the date of injury when known? Has a past practice been established? If there is a violation, what remedy is appropriate?

The parties stipulated that the undersigned would frame the issues in his award. The undersigned believes the following to be an accurate statement of the issues:

> Is there a past practice for the interpretation of Section 11.04 of the collective bargaining agreement? Did the County violate Section 11.04 by its calculation of the compensation due to Wiemerslage for the work time she missed due to her injury on May 1, 1997? If so, what is the appropriate remedy?

BACKGROUND

The grievant, Jane Wiemerslage, incurred a back injury while at work on May 1, 1997, which injury she reported to the charge nurse. Wiemerslage continued to work as scheduled until May 13, 1997, when she went to a doctor. From May 1 to May 13, she received her regular rate of pay for the hours she worked. The doctor put Wiemerslage on an injury leave of absence and she received worker compensation payments from the County's insurance company beginning on May 13 at two thirds her regular wage rate. Wiemerslage filed a grievance in which she contended that she should have received her regular rate of pay for the seven days of work when she was on injury leave.

The County has had a policy for interpreting Section 11.04 for at least 9 years and the policy has been in writing since 1995. Said policy reads as follows:

> The date the employe was first seen by the doctor will be used for the start date to count the 10 days if there is no lost time and (1) there is no known date of injury or (2) the injury is cumulative in nature.
>
> In all other cases where there is a known date of injury, the 10 calendar days will run from the date of injury. This date is most commonly reported by the employe on the WC-12 Report of Injury form.

Wiemerslage was injured at work on July 31, 1995, and was sent to the doctor on the same date. The doctor excused her from work until August 6, 1995, and she returned to light duty on August 7, 1995. Wiemerslage reported an injury at work on June 8, 1996, and went to the doctor on June 10, 1996. The doctor excused her from work until June 13, 1996, on which date she returned to work.

Karen Hauser, who works in the County's Personnel Office, processes all worker compensation claims. It was Hauser's uncontradicted testimony that worker compensation benefits for other employes, who are covered by the same contract as Wiemerslage, have been calculated by the same interpretation of Section 11.04 as was used for Wiemerslage.

Darcy Eckland, a County employe who is covered by the same contract as Wiemerslage and who has been a local union officer for approximately the past 10 years, testified, without contradiction, that she had never either seen, or heard of, the County's policy for administering Section 11.04.

POSITION OF THE UNION

The Union contends that the 10 calendar days start on the employe's first day of absence from work because of the injury. Neither of the injuries suffered by Wiemerslage on July 31, 1995, and June 8, 1996, caused her to miss work beyond the 10 calendar days following the respective injury. Thus, those injuries fail to support the past practice alleged by the County.

There is no evidence to show that the County ever informed the Union of the alleged policy for interpreting the 10-day period contained in Section 11.04 of the contract. A practice must be clearly enunciated and accepted by both parties before it can constitute a past practice.

It would be unreasonable to punish the grievant for attempting to continue to work after suffering an injury. The grievant did not become disabled until the doctor ordered her to stop working.

POSITION OF THE COUNTY

The County argues that the language of Section 11.04 is ambiguous as to the start date of the 10-day period, since said provision does not specify that the injury date is the start date. Further, both when there is no known date of injury and when the injury is cumulative in nature, e.g., carpal tunnel syndrome, the contract is silent as to the start of the 10-day period. For at least the past 9 years, the County has uniformly interpreted Section 11.04 in accordance with its policy. Said policy has existed in written form since 1995, but existed in an informal manner prior to 1995. The County's policy is reasonable and fair. The policy covers the three-day waiting period for Worker's Compensation payments. If the Union's interpretation is adopted, then employes will be encouraged to take their time in seeking medical attention and the County would not know if the employe has gone to a doctor or when the 10-day period would start. The County has an interest in encouraging employes to seek medical attention as soon after an injury as possible.

If under the Union's proposed interpretation the 10 calendar day income continuation period runs from the date of the doctor visit, then an employe would receive no pay for any lost time prior to the doctor visit. The County's policy works to the benefit of the employes under the usual injury and lost time situations. Although the policy occasionally, as in the Wiemerslage case, may not work to the employe's benefit, it is not logical to void a policy which works to the benefit of the majority of the employes because of an unusual exception.

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE XI

ACCIDENTS AND INJURIES

. . .

11.04 Any employee incurring a bona fide work-connected injury shall suffer no loss in pay during the first ten (10) calendar days, provided that any compensation received shall be returned to the County for the first ten (10) days of disability. Any time lost under this Section must be substantiated by a doctor's certification.

. . .

DISCUSSION

The undersigned agrees with the County's assertion that Section 11.04 is ambiguous since it fails to define the term "the first ten (10) calendar days." However, the undersigned does not agree with the County's conclusion that its interpretation of said phrase is more reasonable than the Union's interpretation. The reference to a work-connected injury serves to limit the coverage of Section 11.04 to absences for that reason only. The sentence, which specifies that an employe will not lose any pay during the first 10 calendar days, goes on to state that the employe must return to the County any compensation received for the first 10 days of disability. If the employe continues to work after reporting an injury before going to see a doctor, then the employe would not be considered to be disabled until the employe misses scheduled work due to the injury. Nowhere does the provision state that the compensation from the County is limited to time lost during the first 10 days following the injury. Thus, the undersigned concludes that the 10 calendar day period refers to the first 10 days of lost work time, commencing with the first day of absence caused by the work-related injury, without being limited to the first 10 days after the injury is reported.

The County argues that it has a consistent and long-standing practice of administering Section 11.04 in accord with its interpretation of the language. The evidence fails to provide any specific examples to support that argument. The only work time Wiemerslage lost as a result of her two prior reported injuries, i.e., July 31, 1995, and June 8, 1996, in each case occurred during the first 10 calendar days following the date of injury. Those situations would result in the County paying for the lost work time in each case under either interpretation. Hauser did testify that Wiemerslage was treated the same as other employes have been treated under the same contract. However, no actual examples were presented to support that general assertion. Further, Darcy Eckland, a Union officer for the past 10 years, testified that she had never either seen, or heard of, the County's policy for interpreting Section 11.04. Neither is there any evidence that the Union was ever informed of the policy or given a copy of the policy after it was reduced to writing in 1995. The policy does not appear in the County's personnel manual. Such a background fails to establish that the Union was aware of the policy and agreed to a practice based on such a policy.

The undersigned does not believe that employes will suffer a loss of benefit pursuant to this decision. An injured employe will be covered by the 10-day income continuation whether the 10 days begin on the date following the injury or at a later date, if the employe continues to work as scheduled for a period of time prior to losing work time.

The remedy, as set forth in the following award, applies only to Wiemerslage and does not extend to any prior situations. This award does not require the County to search through its records to see if any other employe was affected in the past in a manner similar to Wiemerslage. If any employe had believed the County had incorrectly computed the compensation due said employe for lost work time resulting from a work-connected injury in the past, then that employe should have grieved the computation in a timely manner.

Based on the foregoing, the undersigned enters the following

AWARD

That the County failed to prove the existence of a past practice of interpreting the phrase "first ten calendar days" in Section 11.04 to mean only the initial 10-day period following the date of a reported injury; that the County did violate Section 11.04 of the contract by its calculation of the compensation due to Wiemerslage for the work time she missed due to her injury on May 1, 1997; and, that the County make Jane Wiemerslage whole for any wages lost as a result of its incorrect calculation. The undersigned will retain jurisdiction of this case for a period of thirty (30) calendar days, which period of time will commence on the day following the day on which this Award is issued, for the sole purpose of resolving any disputes over the remedy directed herein.

Dated at Madison, Wisconsin, this 5th day of October, 1999.

Douglas V. Knudson /s/
Douglas V. Knudson, Arbitrator