BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

METSO MINERALS, INC.

and

PACE INTERNATIONAL LOCAL 7-0889

Case 1
No. 60334
A-5952

(Douglas S. Gee Discharge)

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by **Ms. Marianne Goldstein Robbins**, and **Mr. Mark W. Floyd**, on behalf of the Union.

Godfrey & Kahn, S.C., by **Mr. John Haase**, on behalf of the Company.

ARBITRATION AWARD

The above-captioned parties, herein "Company" and "Union", are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in Clintonville, Wisconsin, on December 14, 2001, at which time the parties agreed I should retain jurisdiction if the grievance is sustained. The hearing was transcribed and the parties filed briefs and reply briefs that were received by March 27, 2002.

Based upon the entire record and arguments of the parties, I issue the following Award.

ISSUE

Since the parties were unable to jointly agree on the issue, I have framed it as follows:

Did the Company have cause to terminate grievant Douglas J. Gee pursuant to Article XI, Section 1, of the contract and, if not, what is the appropriate remedy?

BACKGROUND

The Company manufactures and fabricates heavy construction-type equipment at its Clintonville, Wisconsin, facility.

Grievant Gee, a material handler who spent most of his time operating a crane, worked for the Company for 29 years. During his employment, Gee was disciplined over various matters which included leaving the Company property without punching out; improperly shooting nails from a high-powered nail gun; and being absent or late for work for which he was suspended on several occasions (Company Exhibit 17). As related below, Gee was terminated on July 23, 2001 (unless otherwise stated, all dates herein refer to 2001) for allegedly defrauding the Company by not working and receiving worker's compensation benefits when he was fit to return to work on and after June 28.

Gee was injured on February 14 when a 300 pound or so piece of catwalk grating fell on his head and shoulders. Gee suffered neck damage and missed work until July 19 when he was released by his doctor to return to work with restrictions. Throughout his time-off, Gee received worker's compensation benefits and he saw several doctors regarding his injury including Dr. Robert Zoeller, an independent medical examiner; Dr. David C. Ritzow, Gee's treating physician; and Dr. Brian H. Harrison, a board-certified specialist in occupational medicine.

Dr. Zoeller, who specializes in physical medicine, rehabilitation and pain medicine, testified telephonically that he examined Gee on May 15 and that he then determined Gee "was suffering from post-traumatic headaches" that were "primarily musculoligament in origin." Dr. Zoeller that day prepared a letter to the Company's insurance carrier, Gallagher Bassett Services, listing certain work restrictions that Gee had to follow if he returned to work on light duty (Union Exhibit 6). He also said that Gee's activities on a June 28 video were "inconsistent" with those restrictions because he was seen carrying weights in excess of 20 to 40 pounds; because he was seen pushing and pulling a trailer full of firewood; and because "He demonstrated full range of motion. . ." in "excess of 50 degrees." After seeing the video, Dr. Zoeller prepared a July 18 written report for Gallagher Bassett Services (Company Exhibit 15) where he stated that Gee was fit to return to his full work duties "without specific restrictions".

On cross-examination, Dr. Zoeller said that Gee on May 15 had shown "myofascial cervical pain"; that he then "was in quite a bit of pain, which is why he recommended trigger point injections; that "there's different definitions to repetitive"; and that he never saw a videotape of Gee's duties as a crane operator. He also said that one or two trigger injections should bring about "Diminished pain and improved function"; and that he would expect progressive improvement in such a patient.

Dr. Harrison testified telephonically and said that he examined Gee for the first time on May 30, at which time he found that Gee had "myofascial pain syndrome"; that he on May 30 "embarked on a series of treatments using trigger point injections as well as physical therapy" not tried before; that such treatment seeks to "restore normal range of motion and second is to reduce pain"; and that he on that day wrote a note stating that Gee could only perform "Sedentary duty without reaching or repetitive neck movement". (Company Exhibit 10). Dr. Harrison explained:

> "The injections are to treat areas that are referred to as myofascial trigger points. These are dysfunctional areas within a muscle that had previously been injured. The areas are characterized by an area of muscle tightness or induration or contracture to the length of muscle. Within this contracted band there are tender areas which create a pain pattern that is typical for the specific muscle involved. When these are found on exam, they're considered as being impediments to full recovery or impediments to returning to normal use of the body part. If a muscle has dysfunctional areas in it that are tight and contracted, the muscle can't relax in order to move to the opposite direction, and it can't contract normally to do a dynamic motion."

Dr. Harrison also saw Gee on June 14 and 25 at which time he administered trigger point injections, and he said that there was an improvement in Gee's condition between June 14 and 25. Dr. Harrison on June 14 wrote a note stating that Gee could perform "Sedentary duty without reaching or repetitive neck movement" (Company Exhibit 11). His subsequent June 25 note stated that Gee had to "Avoid repetitive neck movements" (Company Exhibit 12). He again examined Gee on July 5, at which time he again saw that Gee's facial muscles were tight, which is why he gave him another injection. He then wrote that Gee could return to work on light duty starting July 19 (Union Exhibit 3, p. 4). He also examined Gee on August 9 and September 6 and he released Gee for full duty on September 6.

Dr. Harrison also reviewed the June 28 video and said that Gee's "activities were within the restrictions" he had listed; that, "I didn't see anything on the videotape which I felt exceeded the restrictions I had written on June 25"; and that based on his June 25 examination, he did not believe Gee was capable of performing all of his crane operator duties. Dr. Harrison by letter dated August 3 (Union Exhibit 5) informed insurance carrier Gallagher

Bassett Services that he was not certain Gee could return to work without any restrictions and that, "Nothing on the videotape changes my opinion" that he can return to work only with certain restrictions.

After reviewing a second video showing Gee's crane duties, Dr. Harrison informed Gallagher Bassett Services on September 24 that the video confirmed his opinion that Gee was not fit to return to work until after July 5 and that Gee should have returned to work on light duty on July 19.

On cross-examination, Dr. Harrison testified Gee on May 30 told him that his difficulty with neck motions made it impossible to perform his usual duties as a crane operator; that Gee told him on June 14 and 25 that his neck was still stiff; and that Gee's neck rotation increased from 20 degrees to 32 degrees after he received an injection (60 degrees is normal). Dr. Harrison also said that he did not see any signs of overt pain when Gee moved about on the June 28 video; that that was consistent with his earlier findings because "the activities he was doing were not exceeding what I wrote"; that up until July 5 he had written notes stating that Gee was unable to operate a crane; and that driving a car is different from operating a crane because: "Upward gaze and visual tracking is much more extreme when operating a boom crane. . ." He added that Gee's complaints about his neck were "consistent with what I was finding on examination"; and that Gee on June 28 "was moving his neck apparently at will."

Donald Prazuch, a licensed private investigator and polygraph examiner, was hired by Gallagher Bassett Services to conduct a surveillance on Gee, which he did by videotaping Gee's activities on June 28 (Company Exhibit 14). He testified that Gee that day loaded his pickup truck at home; drove to a physical therapist's office; drove to a Farm and Fleet sale; and then drove to a Lake of the Woods campground just south of Wautoma, where he unloaded the truck and set up his tent.

Operations Manager James D. Grzeca testified that because of the medical restrictions placed by various doctors on Gee's return to work, the Company determined that Gee could not return to work operating a crane because that involved "repetitive neck movement." He explained: "The concern was, you know, could he operate the crane and have no repetitive neck motion?" We determined that was not possible." He said that Gee returned to work on July 19; that there was no light duty work for him before that date; that he and others viewed the June 28 videotape on July 19; that he by that date had received a letter from Dr. Zoeller stating that Gee was fit to return to work (Company Exhibit 15); and that after checking with corporate offices in Milwaukee, "I then made the determination that termination was in order because the Company was being defrauded."

Grzeca added that since Gee was able to operate his truck on June 28, he could have operated a crane because "The truck driving and crane driving are not significantly different" and because "Repetitive neck motion was our concern, and we saw him bending his neck many different times and in extreme fashions in this videotape so we saw no evidence that there was an inability to drive the crane." He also said that he handed the termination letter to Gee on July 23 (Company Exhibit 16) in the presence of a Union representative and that it had not been the past practice to call in the Union before a decision had been made to terminate an employee.

On cross-examination, Grzeca testified that Gee had provided the Company with earlier Return To Work slips prepared by Dr. Harrison which stated that Gee was not yet fit to return to work (Union Exhibit 3, pp. 1- 3), and that he knew at the time of Gee's termination that Dr. Harrison had written that Gee could return to work on July 19 with certain restrictions (Union Exhibit 3, p. 4).

Grzeca added that Gee did not engage in any misconduct before June 28 and that Gee engaged in misconduct on that day and on the following days because "he demonstrated that he in fact had the ability to move and use, repetitive neck motion. . ." and that, "What he did wrong was continue to stay off work and not suggest to the doctor or suggest to the Company that he was capable of driving the crane."

Chief Union Steward Bob Kohel testified that the Company in the past "In most cases, yes", had called in the Union before it decided to terminate certain individuals, i.e. Marvin Goddake, someone named "Wrong Way", the Wilson brothers, and Radtke. He also said that, based upon his prior experience in operating the crane, driving a car is different from operating a crane because:

> "Because in a car I can relax and drive, and I watch ahead of me and it's a clear road. I have no loads. I have no other people to watch except for regular driving habits, and they come natural after years of doing it.
>
> In the crane, everything you're doing is different. You are constantly moving a different load. You're moving it in a different direction. You're doing it from different positions. So you are looking around, watching what you're doing. You better be real conscious of what you're doing or somebody is going to get hurt."

On cross-examination, Kohel acknowledged that he was uncertain as to whether the Company called in the Union before terminating certain employees.

Gee, who spent about 75 percent of his time operating a crane, testified that when he operated a crane "Your head is more in the upward position than it is in the downward position. . ." He testified about his February 14 injury when a piece of catwalk grating hit him on his head and shoulders and his subsequent medical treatment which included a trip to the hospital on February 14. He said that his condition improved when Dr. Harrison gave him the injections "which relieved the pain and let me extend my movement for three to four days after I got the injections." He added: "As the shots wore off, the pain would gradually start to come back again" and I would be back to where I was. Each time it was getting better."

Addressing what was seen on the June 28 video, he said that the tent canopy he erected that day weighed about 9½ pounds; that pushing the trailer involved 15 to 20 pounds "of pushing pressure against it"; that he was still taking pain pills at that time; and that he did not believe he was violating his doctor's work restrictions. He explained the difference in driving a car and operating the crane as follows: "In the crane you're constantly sitting there with your head up moving from side to side repetitively all day long, where in the film I was moving my head side to side but it wasn't all day long and it wasn't for long periods of time." He also said that he was terminated on July 23 without first being given the chance to say anything and that he continued to see Dr. Harrison after his termination. He filed a grievance over his termination on July 25 (Joint Exhibit 2), hence leading to the instant proceeding.

On cross-examination, Gee testified that he did not tell Dr. Harrison or anyone at the Company that he felt well enough to return to work on and after June 28; that Dr. Harrison's June 25 Return To Work note (Union Exhibit 3, p. 3) did not contain a return to work date; that he could not return to work on June 28 "Because of my neck movement"; and that while he could drive on June 28, he could not operate a crane, "Because that was repetitive and doing it more often I did it that day." He acknowledged that he on June 28 did some climbing, some reaching, some twisting, and some turning of his neck "For a short period of time. . ."

Union Steward Gary Schuelke testified that the Company on July 23 did not tell him ahead of time that Gee was about to be fired and that the Company did not conduct any investigation before it fired Gee.

Operations Manager Grzeca was recalled as a witness and testified that employees Marty Marotz, Demasky and Radtke were all terminated without first contacting the Union.

POSITIONS OF THE PARTIES

The Union contends that the Company lacked just cause to terminate Gee because it failed to meet its burden of proving that Gee intended to defraud the Company; because Gee was unable to return to work on June 28 as attested to by Dr. Harrison; because no one from the Company ever ordered Gee to return to work before July 19; and because Dr. Zoeller's

claim that Gee was fit to return to work on June 28 should not be credited because he is not "board certified in occupational medicine and had not seen Gee for two months." The Union also claims that the Company violated Article XI, Section 2, of the contract when it failed to tell the Union ahead of time that it intended to fire Gee and that Gee's long tenure and good work record in any event must be considered before he can be summarily fired without any prior investigation. The Union seeks a traditional make whole remedy that includes Gee's reinstatement and a back pay award.

The Company claims that it had cause to terminate Gee because he "was fit to return to work as early as June 28, 2001"; because Gee "lacks credibility concerning his claimed inability to work until July 19, 2001"; and because Gee received worker's compensation benefits "when he was fit for duty." It also contends that it has met its burden of proving that Gee intended to defraud the Company; that its "failure to interview the grievant before terminating his employment does not provide the Grievant a basis for relief"; and that Gee does not have a good work record.

DISCUSSION

Standing alone, Dr. Zoeller's testimony that Gee was fit to return to work on and after June 28 certainly supports the Company's position.

His testimony, however, does not stand alone. It must be considered alongside the testimony of Dr. Harrison, Gee's treating physician at the time, who, unlike Dr. Zoeller, is board-certified in occupational medicine. By virtue of that board certification and continued treatment, his medical opinion is entitled to at least, if not more, weight than Dr. Zoeller's opinion.

I therefore credit all of Dr. Harrison's testimony to the effect that Gee's June 28 videotaped activities all fell within the scope of his earlier work restrictions and that he did not believe Gee was capable of performing all of his crane operator duties on June 28. Dr. Harrison testified about Gee's crane duties after he had seen video of some of these crane duties (Company Exhibit 18). Since Dr. Zoeller admitted on cross-examination that he had never seen that video, it is difficult to give his medical opinion as much weight as Dr. Harrison's medical opinion which was based on his observation of Gee's actual crane duties.

Moreover, the sequence of events here is fully consistent with Gee's testimony that the injections "relieved the pain and let me extend my movement for three to four days after I got the injections" and that, "As the shots wore off, the pain would gradually start to come back again." Dr. Harrison corroborated this part of Gee's testimony by stating that Gee's facial muscles were still tight on July 5, which is why he gave him an injection on July 5. The fact

that he did so is clear proof that Gee after June 28 was still suffering pain and that he needed continuing treatment.

Dr. Harrison was also on the mark in pointing out that driving a car is very different from operating a crane because: "Upward gaze and visual tracking is much more extreme when operating a boom crane. . ." Dr. Harrison was in a position to make that judgment because he, unlike Dr. Zoeller, had actually seen how a crane works and what a crane operator must do in order to make it work. In addition, I credit Koehl and Gee's composite testimony to the effect that operating a crane encompasses much more neck movement than driving a car.

The Company tries to discredit Dr. Harrison by claiming that he, "as the Grievant's treating physician, has a natural bias to provide testimony favorable to the Grievant" and that such bias is reflected by his claim that Gee had not violated his restrictions while Gee himself admitted to violating some of those restrictions.

In fact, there is not one iota of evidence showing that Dr. Harrison was biased in favor of Gee, just as there is not one iota of evidence showing that Dr. Zoeller was biased against him. Instead, what we have here is a simple disagreement between two doctors regarding Gee's ability to return to work, which is hardly novel in these kinds of matters. In addition, Gee on direct examination stated that he on June 28 did not violate any of Dr. Harrison's restrictions and he added on cross-examination that he then did climb, reach, twist, and turn his neck "For a short period of time, yes." That "short period of time. . ." is a far cry from the restrictions Dr. Harrison imposed for the entire eight-hour work day which entailed far greater neck turning. Gee's statements on cross-examination thus hardly constitute a sufficient basis for discrediting Dr. Harrison.

Hence, when faced with the conflicting medical opinions offered by Dr. Zoeller and Dr. Harrison, the Company chose the former even though Dr. Harrison was still treating Gee and thus was in a better position to know about his then-current health status; even though Dr. Harrison is board-certified in occupational medicine and Dr. Zoeller is not; and even though Dr. Harrison, unlike Dr. Zoeller, had seen a video depicting Gee's crane duties, thereby enabling Dr. Harrison to make a more informed medical judgment than Dr. Zoeller.

Given those conflicting medical opinions, the Company knew or should have known that there was a reasonable disagreement between two doctors over whether Gee was fit to work on June 28 and that, as a result, Gee reasonably relied on Dr. Harrison's June 25 note that he was not fit to return to work before July 19. Given that reasonable reliance and the Company's own failure to ever tell Gee that he had to report to work before July 19, it must be concluded that the Company under Article XI, Section 1, lacked cause to discipline Gee, let alone terminate him.

That reasonable reliance distinguishes this case from the various arbitration cases cited by the Company where arbitrators sustained the discipline of employees who had no such reliance and/or who acted in bad faith in taking time off. Moreover, since the Company lacked just cause to fire Gee, it is unnecessary to decide whether the Company acted improperly when it failed to inform the Union ahead of time that it intended to fire Gee.

To rectify its violation of Article XI, Section 1, and pursuant to Article XI, Section 2, of the contract which mandates that a make whole remedy must be issued in these kinds of situations, the Company shall immediately offer to reinstate Gee to his former position and it shall make him whole by paying to him all wages and benefits, including seniority, that he lost from the time of his July 23, 2001, termination to the time of his reinstatement, minus any offset of monies Gee received, or could have received, that he would not have received but for his termination. In addition, and in accord with the parties' wishes, I shall retain my jurisdiction for at least sixty (60) days to resolve any questions that may arise over application of the remedy.

In light of the above, it is my

AWARD

1. That the Company lacked cause under Article XI, Section 1, to terminate grievant Douglas S. Gee.

2. That to rectify that contractual violation, the Company shall immediately take the remedial action related above.

3. That to resolve any remedial questions, I shall retain my jurisdiction for at least sixty (60) days.

Dated at Madison, Wisconsin, this 17th day of May, 2002.

Amedeo Greco /s/
Amedeo Greco, Arbitrator

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