BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL UNION NO. 565

and

GREENHECK FAN CORPORATION OF SCHOFIELD, WISCONSIN

Case 31
No. 61881
A-6047

Appearances:

William Haus, Haus, Roman and Banks, L.L.P., Attorneys at Law, 148 East Wilson Street, Madison, Wisconsin 53703-3423, appearing on behalf of Sheet Metal Workers International Association, Local Union No. 565, which is referred to below as the Union.

Ronald J. Rutlin and Bryan Kleinmaier, Ruder, Ware & Michler, L.L.S.C., Attorneys at Law, 500 Third Street, Suite 700, P.O. Box 8050, Wausau, Wisconsin 54402-8050, appearing on behalf of Greenheck Fan Corporation of Schofield, Wisconsin, which is referred to below as the Company, or as the Employer.

ARBITRATION AWARD

The Union and the Company are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The Union and the Company jointly requested that the Wisconsin Employment Relations Commission appoint Richard B. McLaughlin, a member of its staff, to act as Arbitrator to resolve a grievance filed on behalf of Lisa Zywicki, who is referred to below as the Grievant. Hearing on the matter was conducted on December 20, 2002, in Wausau, Wisconsin. In a letter filed with the Commission on January 17, 2003, the Company submitted a document to be included in the record as a Company exhibit, and stated its willingness "to reopen the record to allow the Union to cross examine Mr. Pieczynski . . . who prepared the enclosed

letter." In a letter filed with the Commission on January 21, 2003, the Union formally opposed the submission of the letter, arguing that reopening the record would be pointless . . . (and) (a)ccepting the proffered letter into evidence would be unfair and prejudicial." I ruled on the evidentiary issue in a letter to the parties dated February 6, 2003, which states:

. . .

> Prior to stating my conclusion, I think it is necessary to narrow the focus of what is in issue. Mr. Haus has stated a series of forceful arguments on the propriety of the post-hearing submission. I do not, however, think this line of argument provides a basis to determine the issue posed in this case. Mr. Rutlin does not seek to sneak the exhibit in post-hearing to avoid the procedural checks available while the hearing was in process. Rather, he offers the evidence and a willingness to reopen the hearing. The issue is less a matter of propriety than of the wisdom of reopening the hearing. Policy concerns surrounding whether post-hearing submissions can subvert the integrity of the hearing process exist. However, as a general matter, the absence of discovery in grievance arbitration makes recourse to formal considerations concerning what should be considered "newly discovered evidence" something less than a definitive guide to the wisdom of reopening a hearing.
>
> More specifically, nothing in the litigation of the grievance indicates this matter demands a rote legal analysis of a formal evidentiary issue. On balance, I think the record is better served by accepting the letter into evidence as Employer Exhibit 2, than by rejecting it.
>
> This conclusion demands some elaboration. The record includes Union Exhibit 3, which is a series of documents that can be read to establish treatment for a work-related condition. I presume the Employer's submission of Employer Exhibit 2 is intended to rebut that reading. As I have already noted, I do not believe it is a persuasive contractual means of resolving the grievance to attempt to determine whether or not the underlying condition is work-related within the meaning of Chapter 102, Stats.
>
> Against this background, Union Exhibit 3 establishes at most that there may be a contractual basis to treat the condition as if it was a work-related condition. I do not like to rule on the merit of a potential line of argument through an evidentiary ruling and thus admitted Union Exhibit 3 at hearing. I suspected that the weight the exhibit can be expected to carry is dubious, but found it more desirable to entertain argument on its weight than on its admissibility. These considerations govern Employer Exhibit 2. On balance, the

> record is better served by symmetry on this issue than by more formal considerations. I could reject Employer Exhibit 2 and preserve it as an offer of proof. To do so, however, leaves Union Exhibit 3 as an admitted exhibit, thus lending it the appearance of greater weight to the record than it deserves.
>
> The alternative is to reopen the record. I do not feel this does the record any appreciable good. I do not want to dictate what you may choose to enter by way of post-hearing argument. However, I do not believe that further hearing can enhance any argument that draws on Union Exhibit 3 or Employer Exhibit 2. Arguments may be available, but I do not believe they are sufficiently central to a determination of this matter to justify the cost and delay inherent in further hearing. That I do not consider either exhibit to bear directly on a determinative issue means that the absence of cross-examination on Employer Exhibit 2 should not work any prejudice to the Union. Whatever opinions the two exhibits embody will neither be enhanced nor undercut by further questioning. The exhibits do no more than underscore the testimony of the direct participants to the underlying incident and its evaluation.
>
> Thus, I take the January 10, 2003 letter into the record . . .

Janice L. Harter-Weisser prepared a transcript of the hearing, filing with the Commission on January 21, 2003. The parties filed briefs and reply briefs by March 31, 2003.

ISSUES

The parties did not stipulate the issues for decision. I have determined the record poses the following issues:

> Did the Company violate the Collective Bargaining Agreement when it discharged the Grievant?
>
> If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

Article 4
Hours of Work/Overtime:

. . .

Absenteeism:

F. Effective February 15, 1998, the following attendance policy will be applied to all employees covered by this agreement:

6 incidents in a rolling 12-month period = verbal reprimand
8 incidents in a rolling 12-month period = written reprimand
10 incidents in a rolling 12-month period = 3-day unpaid suspension
11 incidents in a rolling 12-month period = termination of employment

An "incident" is defined as any occurrence of scheduled work time that is missed, including voluntary overtime. Bereavement leave (defined by this contract), civic duty, authorized Family/Medical Leave (per the Family/Medical Leave Act of 1993), scheduled vacation, personal days (defined in this contract) or authorized company release shall not count against the employee's attendance record for disciplinary purposes. . . . Employees with recurring absenteeism reprimands or employees with less than 12 months of employment having multiple incidents may be placed on more restrictive written attendance expectations than those outlined above. Being placed on these more restrictive attendance expectations does not restrict an employee's access to the grievance procedure outlined in this agreement.

Effective April 1, 2001, employees receiving two (2) absenteeism reprimands at the same level within a rolling twelve (12) month period will be placed on a rolling (18) month program instead of the rolling 12 month program. Once they have gone 12 months with no absenteeism reprimands they will return to a rolling 12 month program.

. . .

Article 12
Management Rights:

. . .

B. Management Prerogatives

. . . The Company shall have the right to discipline or discharge employees for just cause . . .

BACKGROUND

The Union filed the grievance on July 29, 2002 (references to dates are to 2002, unless otherwise noted). The grievance form alleges "wrongful termination" and seeks the Grievant "be made whole in every way." Mark Berg, the Company's Human Resources Manager, filed a first step response to the grievance that states:

> . . . (The Grievant) has a history of poor absenteeism and on 9/18/01 she was placed on more restrictive attendance guidelines in order for her to maintain her employment at Greenheck. In March of 2002 she was suspended for 3 days based on the restrictions and reminded that if she has one more absence before 9/18/2002, she will be terminated. On 7/19/02 (The Grievant) told her supervisor 20 minutes after she came to work that she was sick. Later in the shift the supervisor took (the Grievant) to the emergency room out of concern for her health and the doctor prescribed medication so she could not return to work. Her absence was not work related nor did it qualify for FMLA. Therefore the absence does count against her. It is a no fault attendance policy and the absence does not become an excused absence because the supervisor took (the Grievant) to the hospital. (The Grievant) violated the terms of her attendance restrictions and therefore her termination is justified.

The Company hired the Grievant on April 27, 1998, and discharged her on July 25.

As administered by the Company, an absence on consecutive days traceable to a single cause counts as a single incident. The Company issued the Grievant a verbal reprimand for absenteeism on November 8, 1999; a written reprimand for absenteeism on December 1, 1999; and a verbal reprimand for absenteeism on March 26, 2001. The March 26, 2001 reprimand form states:

> (The Grievant) has had seven occurances of absenteeism in the past 12 month period. This is excessive and must be brought under control. Since (the Grievant) finished her probationary period in the last half of 1998, she has had a poor attendance record. This is her 3rd reprimand for absenteeism in the past 1 1/2 years. If this poor absenteeism record continues, (the Grievant) will be placed under more restrictive guidelines as allowed by our contract.

On September 19, 2001, the Company issued the Grievant a written reprimand for absenteeism. The reprimand form states:

> (The Grievant) has had eight occurances of absenteeism in the past twelve month period. In March (the Grievant) was given a verbal reprimand for excessive absenteeism. At that time it was stated that if this continues that she would be placed under more restrictive guidelines as allowed by our contract. Since then (the Grievant) has had two more occurances. This is (the Grievant's) fourth reprimand for absenteeism. At this time we will be putting her under those new guidelines, which are as follows. If (the Grievant) has one or more occurances in the next 30 working days, two or more occurances in the next 6 months, or 3 or more occurances in the next year, further disciplinary action will be taken, up to and including discharge. This will be effective on the date this reprimand was given.

On March 12, the Company imposed a three-day suspension on the Grievant for absences on February 11 and 25. On July 25, the Grievant received a Reprimand Sheet that documented her discharge, and which states:

> (The Grievant has been given several reprimands for absenteeism in the past year. She was put on special restriction on 09/19/01. Which explained to her that if she misses 1 day or more in the next 30 working days, two or more in the next six months, or three or more in the next year further disciplinary actions will be taken up to and incuding discharge. Since then (the Grievant) was given a suspension on 03/1/02 for violation of these restrictions. She now has another occurance which was not work related and resulted in two days away from work.

Scott Wisnewski was the Grievant's immediate supervisor for the third shift, from 11:00 p.m. through 7:00 a.m., for the two years preceding her discharge.

The events of the Grievant's shift that started at 11:00 p.m. on Thursday, July 18, prompted the discharge notice. The core of those events is not disputed. It was a warm and humid evening, and sometime early in the shift, the Grievant had a conversation with Wisnewski in his office. During the conversation, she noted that she was not feeling well and asked if he could approve her use of vacation for the balance of the shift. Wisnewski informed her he could not. She returned to work.

Sometime later, Eric Kaiser passed the Grievant's work station, and stopped to talk to her. Kaiser is one of the Company's First Responders. A First Responder is an employee who has received sufficient training in first aid and emergency medical response to administer basic first aid within the Company's facilities. The Company posts a list, including pictures, of its First Responders so that employees are aware of who is available to provide assistance. First Responders do not diagnose medical problems, but can recommend to supervisors the provision of further care.

Kaiser asked the Grievant how she was feeling, stating that she looked pale. She responded by describing in detail how she felt. Kaiser stated he would check in on her again. He returned perhaps forty-five minutes later, and on learning that she did not feel better, informed her that he did not think it was safe for her to continue working. He took her to a supervisor's office that was air-conditioned. Kaiser called Devlin Verley, a Union Steward, to the office. Verley arrived and discussed the situation with Kaiser. Kaiser left the room and asked Verley to watch the Grievant. Verley thought she appeared pale, and asked her how she felt. She informed him that she had a headache and felt somewhat disoriented. He felt her cheek and arm, and perceived her skin to be clammy. Kaiser returned with an ice pack and some wet paper towels. They applied the ice pack to the back of her neck and the paper towels to her forehead.

Verley contacted Randy Kurth, another Union official, to determine if the Grievant could go home without creating an incident under the Policy. Kurth advised Verley to see if Wisnewski would approve of her staying in the air conditioned office for a half-hour or so, and if that was not possible to see if Wisnewski could do something else for her. Verley contacted Wisnewski, asking him to come to the office, and tried to reach the Grievant's husband.

Wisnewski came to the office and spoke with Verley and Kaiser. Kaiser stated he was concerned that the Grievant might be suffering from heat exhaustion, and recommended that she be taken from the facility for treatment. Wisnewski accepted the recommendation and took the Grievant to the emergency room at Wausau Hospital, indicating to a nurse that the problem might be work related. The Grievant remained in the hospital for roughly three hours. Wisnewski waited for her treatment to be completed. A nurse asked the Grievant about her symptoms, took her blood pressure, and had her lie down in a dark room. A physician ultimately assessed her and attempted to administer fluids. The Grievant could not keep the fluids down. The physician prescribed Vicodan for her headache and Phenergan for her nausea. Because the Grievant thought she might be pregnant, the physician gave her a pregnancy test before administering the medication. Ultimately, the Grievant returned to the emergency room, and Wisnewski drove her back to the facility. The Grievant was unable to reach her husband, and could not drive due to the medication. Wisnewski took her home.

Wisnewski documented the incident on a form entitled "Supervisor's Accident Investigation Report." Under the heading "Treatment administered" the form sets out boxes to be checked, including one for "First Responder" and one for "Transported to medical facility by cab accompanied by" that also included a blank line for completion. Wisnewski did not check the "First Responder" box, but checked the latter box, adding his first name to the blank line. He completed a form entry for "Describe, in detail, what happened" thus: "Severe headache and dissiness. Possible heat exhaustion????" He attached to this form a form generated by Wausau Hospital that had been completed by the treating physician, and given to Wisnewski on the Grievant's discharge from the emergency room. The physician completed the form entry

"Diagnosis/Impression" thus: "Headache." The physician completed the form entry "Nursing instruction" thus: "No driving or dangerous work for 12 hours after Vicodan or phenergan." The physician completed the form entry "Unable to work until" thus: "7/19/02."

The Company employs two nurses, Jeanne Klemm and Patricia Heckel. Klemm received Wisnewski's report and the attached document shortly after the start of her shift at 6:00 a.m. on July 18. Klemm decided that Wisnewski's note regarding possible heat exhaustion could not be squared with the emergency room form, and she decided to speak to the treating physician. She phoned the emergency room, identified herself to the nurse who took the call, and indicated that she wanted to learn if the illness was work related. The nurse left, came back, and then told Klemm she had spoken with the treating physician, who said the illness was not work related since the Grievant had awoken with a headache prior to the start of her shift. Klemm then asked if the Grievant could be expected to work her shift on July 19 and the nurse answered in the negative. Klemm phoned Mark Haase, the Company's Operations Manager, and left a voice mail to the effect that the illness was not work related. Sometime after this, the Grievant phoned Klemm and they discussed the situation.

On July 19, after receiving Klemm's message and discussing the matter with Wisnewski, Haase phoned Jon Krueger, the Company's Vice-President of Human Resources. Haase informed Krueger that the Grievant had missed work and had reached the point where the Policy indicated termination. Haase informed Krueger that Berg was on vacation, and unavailable for discussion. Krueger reviewed the Grievant's personnel file and discussed the situation with Haase and with Union officials. He also consulted Heckel. Klemm left a note for Heckel concerning the Grievant because Klemm left on vacation at the end of her shift on July 18. During the course of these discussions, Krueger learned that Kurth had discussed the Grievant's situation with Berg, and believed that Berg had excused her absence. Krueger deferred final determination of the matter until he could speak to Berg.

The Grievant did not report to work on the shift that ran from the evening of July 18 through the morning of July 19, which was her final scheduled shift for the week. She did report for her next four scheduled shifts. Sometime during this period Berg called into the Company and he and Krueger discussed the situation. Berg informed Krueger he had not authorized the Grievant's absences.

At roughly 6:30 a.m. on July 25, Verley summoned the Grievant from her work station for a meeting with Krueger, Haase and Wisnewski. Verley did not know what the meeting was about. Krueger informed her that her absence on July 18 and 19 was not work related, and could not be excused under the Policy, which thus demanded her termination. The Grievant took the position that the illness was work related as demonstrated by Wisnewski's taking her to the Hospital, and had been excused by Berg. Krueger responded that the final absences brought about the termination only because of her history of absenteeism.

The Grievant did not pay any of the costs for the emergency room treatment, believes the costs were paid by the Company's Worker's Compensation Insurer, and has documentation indicating payment was made for a work related condition. The Company and its Worker's Compensation insurer believe the payment was made in error and the absence should be treated as a not work related illness.

The background stated above is essentially undisputed, and the balance of the background is best set forth as an overview of witness testimony.

Jon Krueger

Krueger stated that the Company does not permit an employee to use vacation to change an incident under the Policy into an excused absence. The creation of more restrictive expectations under the Policy resulted from situations in which an employee with recurring absenteeism problems would push the Policy to its limits in each rolling one year period. The Policy was negotiated into the labor agreement to specify what had before been administered as a matter of practice.

Scott Wisnewski

Wisnewski testified that the Grievant approached him sometime around 11:10 or 11:15 p.m. on July 17. She asked him if he could approve a vacation day for her because "she wasn't feeling well" (Transcript [Tr.] at 61). He responded that he was not allowed to do that. She responded by questioning whether she had "to fall down behind my line or by my line to get an excused absence" (Tr. at 71).

Sometime around 12:45 a.m. on July 18, Verley or Kaiser called him to the Plant 3 Office. He found Verley, Kaiser and the Grievant in the room. The Grievant had ice packs on the back of her neck. Kaiser told him that he thought the Grievant might have heat exhaustion, and needed further attention. He took Kaiser's advice and transported the Grievant to the emergency room. After treatment he took the Grievant back to the plant, and then home. They did not discuss the treatment in any depth, but the Grievant did ask him if the absence would count against her record. Wisnewski told her that "it will have to be determined through the Nurses and HR (Tr. at 66). The determination that it was not work related was not made until July 23, after discussions involving Krueger, Haase and Heckle.

Wisnewski has placed at least two other employees on special attendance guidelines. This is the first incident in which he had to convey an employee on those restrictions from the plant for medical care.

Mark Berg

Berg spoke with Kurth by phone on July 18. Kurth did not identify the subject of the call, but asked if an employee who left work on a work related illness would incur an incident under the Policy. He indicated there was some urgency to the question because the affected employee had to make a decision regarding reporting for work that night. Berg responded that work related illness did not count as an incident under the policy. He repeated this response during the processing of the grievance.

Randy Kurth

After his phone conversation with Verley at 12:45 a.m. on July 18, Kurth left the facility. Around 3:00 p.m. on July 18, he received a phone call from the Grievant. She informed him of the events of that morning, and asked what she should do. He informed her to wait until he spoke with Berg. He described the Grievant's situation to Berg and asked what he should tell her to do. Berg asked for time to contact the nurse, and indicated he would call back. By 4:30 p.m., Berg had not called back, and Kurth phoned Berg. He informed Berg that he had to "get an answer because this woman has to know whether she has to come in tonight or not" (Tr. at 115). He relayed this to Berg because the Grievant had informed him that Klemm had told her if she did not report to work, the July 18 absence would count as an incident. Berg responded, "tell her it won't count against her, and if anybody says anything, tell him Mark Berg said so" (Tr. at 115). Kurth then phoned the Grievant and told her to stay home.

Kurth noted that he informed Berg that the illness was work related.

The Grievant

The Grievant stated that a thermometer at her work station recorded about ninety three degrees on the evening of July 17. At roughly 11:45 p.m., she went to Wisnewski's office to secure parts for a blower that she was working on. As Wisnewski searched his computer, she sat down and told him to take his time, since the office was air-conditioned. She then told him she had a bad headache, and asked him if she could take a vacation day and go home without incurring an incident under the Policy. He said he could not approve that use of vacation, noted he could not find the part and told her to work on something else. She returned to work.

After Wisnewski drove her home, the Grievant went to sleep. When she arose, she called Klemm to advise her that the physician had told her not to work that evening. Klemm informed her that she had phoned the emergency room and determined the absence would not qualify as an FMLA absence, and that if she could not report for work that evening, it would count as an incident. Klemm acknowledged that the doctor's orders made a return to work impossible for that evening unless she was cleared to do so by another physician. The Grievant responded that

her car was at the Company's facility, her husband was at work and she had no way to get to a doctor. She then phoned Kurth to seek his advice.

She testified that no one told her that the absence of July 18 would constitute an incident. She added, "Had I known that, I would have never left the building" (Tr. at 132). The treating physician did not tell her she had heat stroke or heat exhaustion, but did tell her that her symptoms indicated the illness was related to work. The Grievant acknowledged that she did not and could not document that the illness was work related. She noted that no one from the Company discussed her symptoms or her view of the incident prior to the discharge meeting on July 25. No one from the Company sought any documentation from her, or the release of any of her medical records.

Further facts will be set forth in the **DISCUSSION** section below.

THE PARTIES' POSITIONS

The Company's Brief

After an extensive review of the record, the Company contends that arbitral precedent firmly establishes the standards defining just cause, and that "absenteeism may satisfy the just cause standard and form the basis for discipline." Similarly, arbitral precedent establishes that "no fault" absenteeism plans are consistent with the just cause standard "so long as the attendance policy incorporates traditional just cause principles, such as notice, progressive discipline, equal treatment, and a fair investigation which confirms that a violation occurred."

The record establishes that the Company met each of these elements. A review of the Grievant's work record establishes that she received numerous items of discipline concerning her attendance. On September 19, 2001, the Company issued a written reprimand that confirmed the Grievant's placement on "more restrictive guidelines." The Union did not grieve the reprimand or the imposition of more restrictive guidelines. In March of 2002, the Company suspended the Grievant for three days for an absence that could have provoked discharge. The Company's use of progressive discipline could not alter the Grievant's pattern of excessive absenteeism.

Even though the Company's use of progressive discipline establishes it afforded the Grievant ample notice of the disciplinary consequences of her conduct, her testimony "proves that she understood how the absenteeism provision was applied." This is true regarding the July 18 absence, since the Grievant asked Wisnewski if leaving Greenheck to go to the hospital would count as an incident under the Policy. Thus, no Union argument that the Grievant was an "unwitting employee who was tricked by the deceptive employer" can be proven.

When informed of the July 18 incident, Krueger undertook an investigation "to determine whether the absences were incidents under the absenteeism provision or whether they qualified for one of the exceptions." Krueger reviewed the Grievant's personnel file, including her placement on more restrictive guidelines. This review established that "the critical determination . . . became whether the Grievant's absences qualified as exceptions under the absenteeism provision." After consulting Heckel, Krueger concluded that the July 18 absence "was not caused by a work-related injury or illness." Krueger thus determined discharge was the appropriate sanction, and he determined to withhold implementing the discharge until he determined whether Berg had excused the absence. When he determined Berg had not excused the absence, Krueger's investigation was complete.

The investigation was fair, establishing that the Grievant's headache preceded her shift on July 18, and that the treating physician did not consider the absence work-related. The Grievant's attempt to leave work earlier in the shift confirms this, as does her failure to supply the Company with any information establishing that her July 18 illness is work-related.

In light of the investigation's conclusion that the July 18 absence was not work related, the Company "had to determine what level of discipline was appropriate." Given the Grievant's disciplinary history and the imposition of more restrictive guidelines, discharge was appropriate. The absenteeism Policy rests on collective bargaining, and discharge is firmly rooted in the Policy's provisions as well as arbitral precedent.

Since discharge "satisfies the elements of just cause," the grievance should be denied "in its entirety."

The Union's Brief

The Union states the issues for decision thus:

Did the Employer have just cause to discharge the Grievant?

If not, what is the appropriate remedy?

After a review of the evidence, the Union focuses on the parties' conflicting statements of the issues, and asserts that the "Employer's proposed issue would effectively preclude the Arbitrator from applying the just cause standard." This "mechanistic application of the attendance policy" should not be read to defeat the application of just cause. The language of the attendance Policy, including that authorizing more restrictive expectations, demands the rejection of the Company's mechanistic approach.

The Union contends that the Company's investigation was "insufficient and failed to yield a valid factual basis to justify the discharge under the just cause standard." Whether or not a discharge is based on misconduct, arbitral precedent places the burden of proving just cause to terminate on an employer.

The Union does not dispute that the Grievant worked under more restrictive expectations or that she reported to work on July 18 with a headache. The basic facts underlying the grievance are also uncontested. She became ill during the course of her shift, working in high heat and humidity, becoming pale, nauseous and light-headed. These are symptoms of heat exhaustion. The Company's investigation "reflects a very shallow, flawed, careless and incomplete inquiry and record." Wisnewski's report neglects to mention treatment by a First Responder or specific symptoms. Klemm was unaware of First Responder intervention and never contacted anyone with first hand knowledge of the Grievant's symptoms. No Company employee sought medical records or contacted the Grievant. Viewed as a whole, the Company "was focused on justifying its discharge decision rather than focusing on making the right decision."

This incomplete investigation cannot establish just cause to discharge. The Company "should have handled (the Grievant's) removal from work on July 17-18, 2002 as an 'authorized company release' under the contractual attendance policy" and in any event the absence "was certainly a constructive 'authorized company release' under the undisputed circumstances of the incident." The Company trains employees regarding the symptoms and treatment of heat exhaustion, and the Company expects employees to use First Responders. This establishes the significance of the symptoms manifested by the Grievant on July 18. A First Responder treated the Grievant for possible heat exhaustion. By transporting the Grievant to the hospital, Wisnewski effectively affirmed an authorized company release. Krueger's after-the-fact assertion that she assumed the risk of losing her job by leaving the facility cannot be considered a reasonable assessment of the facts. It undercuts the First Responder program and established Company training, and puts a disincentive on administering the care that can prevent the worsening of heat exhaustion symptoms.

The contrast to Company authorization of absences due to car or weather related problems is stark. The Grievant did no more on July 18 than was expected of her, and the Company should not be permitted to excuse a mechanical breakdown more readily than "a breakdown of the employee's health while on the job."

Beyond this, the "preponderance of the evidence is that (the Grievant's) illness was 'work related.'" That the Grievant reported for work with a headache "cannot be treated as conclusive evidence" that her leaving the facility "was not work related." Application of Worker's Compensation precedent indicates that a "preexisting condition" can still result in compensation. Whether or not such precedent is considered, it "is far more likely than

unlikely that (the Grievant) was suffering from the early stages of heat exhaustion and that the quick action taken by the First Responder averted a more serious situation." The Company should not be permitted to "retroactively reconsider the decision of its supervisor on the recommendation of its First Responder."

The Grievant's personnel record as a whole cannot obscure that the July 18 incident must be evaluated "on a stand alone basis." That incident "does not constitute an occurrence within the meaning of the Collective Bargaining Agreement . . . nor form the basis for a discharge with just cause."

The Company's Reply Brief

The Company notes that arbitrators have stated the standards defining just cause in various ways, but that the Union's sole citation overstates commonly accepted statements of the appropriate burden of proof, including those I have applied in past cases. A review of the record demonstrates that the Company proved that the Grievant's non-work related illness of July 18 constitutes an incident under the Policy. When viewed against the Grievant's work history, this establishes a significant enough disciplinary interest to warrant discharge. Nor does the Union's anticipation of the Company's "mechanistic" application of the Policy hit the mark. Rather, the Company's application of the Policy incorporates the traditional standards of just cause, and the Grievant's placement on more restrictive expectations was not grieved. Thus, the Union's view "conflicts with the clear language in the Agreement."

The Union's view of the investigation misstates its purpose and its performance. The purpose of the investigation was to determine whether the July 18 incident was an incident under the Policy or one of its exceptions. The reliability of the investigation is established by the Union's inability to produce evidence contradicting any of its conclusions. An examination of the Union's assertions establishes that they are "all factually incorrect." Klemm did speak with the Grievant, and Krueger's delay to speak with Berg worked to the Grievant's advantage. The evidence establishes the Company "did not make its final decision until it obtained all of the relevant facts."

Since a legitimate illness that causes an absence constitutes an incident under the Policy, the Union "must transform the Grievant's headache which caused her absence . . . into a work-related illness." The Union failed to do so. Wisnewski's testimony establishes that no employee other than the grievant left work due to the heat or humidity of July 18. The Grievant's attempt to get a vacation day earlier in the shift belies the Union's contention. Nor can the Union's focus on a First Responder obscure that the treating physician was the sole competent person to diagnose the Grievant's condition.

That Wisnewski drove the Grievant to a hospital falls short of qualifying the incident as an "authorized company release." To credit the Union's argument creates the "ridiculous" situation where an employee can report to work ill, then secure a First Responder's assistance to force a supervisor to transport an employee to a medical facility thus excusing an inexcusable incident under the Policy. Company determination of an "authorized company release" is an act of discretion, and should be overturned only if it is arbitrary or capricious.

A review of the evidence establishes that the Grievant's past conduct created her predicament of July 18. That conduct warranted her termination, and the grievance should be denied in its entirety.

The Union's Reply Brief

To treat the Grievant's past disciplinary record as more than background to the events of July 18 makes the discipline for the incident double jeopardy. The issue is whether the absence is an "incident" within the meaning of the Policy and whether discharge is the appropriate sanction.

Nor can the Company obscure that its investigation ignored the existence and the significance of a First Responder's attention to the Grievant's symptoms. The Company's training programs and its creation of the First Responder program precludes minimizing the significance of the Grievant's symptoms unless a double standard is to govern employee health and safety issues concerning heat exhaustion. Company assertions concerning the Grievant's documentation of her condition cannot obscure the flaws in its own investigation. Nor can those assertions obscure that sustaining the discharge puts the job of any employee who follows established procedures regarding heat exhaustion at risk. This conclusion "is contrary to common sense and to any reasonable application of the just cause standard."

The Union does not dispute that absenteeism can constitute just cause for discharge or the existence of the Grievant's disciplinary history other than the events of July 18. The Company's discharge cannot, however, be persuasively rooted in those events. Its investigation ignored Wisnewski's concurrence in the First Responder's recommendations. Krueger's after-the-fact attempt to reopen the decision is not credible.

The treatment afforded the Grievant belies the assertion that she suffered from a "headache" that has not relation to work. An examination of the precedent cited by the Company manifests no authority governing this grievance, since the Union does not dispute that the attendance policy, if properly administered, complies with the just cause standard. The evidence will not support a conclusion that it was properly administered. That the Grievant knew of the Policy's strictures falls short of establishing that she knew that she placed her job at risk by accepting a ride to the hospital. The evidence establishes that Wisnewski did not so inform her and that had he done so she would have remained at the facility.

The Company's investigation was fatally flawed under relevant precedent. At best, the investigation shows that the Grievant reported to work with a headache, and sought to leave work early in her shift. This shows no more than that she sought to avoid the strictures of the Policy's application, and says nothing about the symptoms of heat exhaustion that she experienced and was treated for. That heat exhaustion is work related is beyond dispute. The Company's investigation sought to document an already-made decision to discharge rather than to determine whether discharge was appropriate. Against this background "the arbitrator should order that the Grievant be reinstated with a full make-whole remedy."

DISCUSSION

I have adopted the Company's statement of the issues as that appropriate to the record. The Company's is broader to highlight that the labor agreement includes the Policy and a just cause provision. There is no dispute that each must be given effect, but the Company's statement of the issues makes this explicit.

The Company also notes the standard I apply to define just cause:

> (W)hen the parties do not stipulate the standards defining just cause, two elements define it. First, the employer must establish conduct by the Grievant in which it has a disciplinary interest. Second, the employer must establish that the discipline imposed reasonably reflects its interest. This does not state a definitive analysis to be imposed on contracting parties. It does state a skeletal outline of the elements to be addressed, relying on the parties' arguments to flesh out that outline.

The Union cites the Daugherty standards, but the parties have not stipulated to their application. The Company also persuasively argues that this is not a case that turns on burden of proof constructs. The record is amply set forth and argued.

The parties' arguments pose, in my view, a single determinative point. The Company persuasively contends that an incident under the Policy put the Grievant at the threshhold of discharge. If the July 18 absence constitutes an incident under the Policy, then the Company has established each element of the cause analysis, since it has a contractual disciplinary interest in an incident and since an incident puts the Grievant's position at risk.

The determinative point of contention is whether the July 18 absence should constitute an "authorized company release." If it does not, it is an incident under the Policy. In my opinion, the Company's arguments are persuasive with a single exception that precludes labeling the July 18 absence as an incident. The Company's determination that the July 18 absence counts as an incident is an act of discretion, not a Policy mandate. Its exercise of

discretion rests solely on one part of the Grievant's statements that is inconsistent with the Grievant's statements viewed as a whole. There is no other factual support for it, thus leaving the act of discretion as an abuse of discretion.

That placing the Grievant on more restrictive expectations and the specific sanctions for violation of those expectations is an act of Company discretion is explicit in Krueger's testimony and implicit in the testimony of all the Company witnesses. The essence of the Company's case is that the treating physician's statement that the July 18 absence was not work related removed any discretion from the matter and established the absence as an incident.

The difficulty with this position is that even if the statement accurately states a physician's diagnosis, it does not displace the Company's discretion. The form attached to Wisnewski's report states "headache" as the cause of the illness, but this states a symptom, not a diagnosis. Treatment for nausea means something more than a headache was at issue. Whether the physician concluded the headache was a migraine or something else, the fact remains that there is no diagnosis of the illness.

More significantly, even if treated as a diagnosis, the physician's conclusion that the absence was not work related turns solely on the Grievant's statement that she reported to work with a headache. This is a fact that the Grievant freely admitted to everyone who asked her, including Wisnewski. If this fact alone established an incident, it is impossible to understand why Wisnewski told her to return to work when she first complained of it. Similarly, it is impossible to understand why Wisnewski deferred to the First Responder's recommendation of further treatment, if the headache, standing alone, constitutes an incident.

Plainly the headache did not stand alone, and the Grievant was charged with an incident because she left work. She did not, however, leave work on her own volition, but on Kaiser's recommendation, in which Wisnewski at least acquiesced. The Company contends that this absence became an illness when the emergency room nurse reported to Klemm that the absence was not work related.

The difficulty with this assertion is that it ultimately states an act of the Company's discretion, not the physician's. The physician informed Klemm no fact beyond that already known to the Company. The Grievant also testified thus:

Q. Did any doctor ever tell you that you had heat exhaustion?
A. No.
Q. Did any Doctor ever tell you that you had heat stroke?
A. No.
Q. Did any Doctor ever tell you that this was related to your work?
A. Yes (Tr. At 137).

This exchange highlights the fundamental factual ambiguity in this case. The Grievant's account is treated as credible to the point at which a medical diagnosis becomes an issue, then rejected. This presumes that the testimony of the emergency room nurse establishes reliable proof of a medical diagnosis. It does not. It does no more than affirm that the physician accepted the Grievant's statement of the headache's inception as fact, as did everyone else who spoke to the Grievant. It underscores the reliability afforded her testimony, but this accentuates the ambiguity in the record. Why should the Grievant's credibility be rejected concerning the statement that the physician also indicated the symptoms were work related?

This underscores that the Company exercised discretion in crediting part of the Grievant's account, but discrediting others. The difficulty with the record is that there is no factual basis to support this act of discretion. Rather, the Company asserts that it had no discretion but to treat the matter as an incident. This line of argument permits Wisnewski to accept the First Responder's recommendation of further attention and thus avoid possible complications if the First Responder's recommendation was accurate, then summarily reject it the following Tuesday, when he and Haase reviewed the matter. However, Klemm offered them no facts to rebut the symptoms observed by Kaiser, Verley and freely available for Wisnewski's observation. The fact that the headache predated the July 17 shift rests only on the Grievant's statements. How is the rest of her testimony concerning the symptoms to be rejected, without any opposing facts?

In sum, the fundamental ambiguity posed by the grievance is that the Grievant reported for work, then left work as recommended by a First Responder and as approved by a Supervisor. To assert the absence is not an "authorized company release" under the Policy, it is necessary to conclude that the treating physician entered a diagnosis that the matter was not work related. There is no evidence of a diagnosis absent the Grievant's testimony, which also indicates that the physician informed her there was a tie to work, and that she suffered symptoms consistent with heat exhaustion. Thus, the Company's conclusion that the absence constitutes an incident under the Policy rests on crediting part of the Grievant's account while discrediting other parts of it. There is, however, no reliable factual basis for doing this, and thus no factual basis for the Company's act of discretion. In the absence of a factual basis, the conclusion is an abuse of discretion, and this precludes considering the absence an incident under the Policy. There is, then, no demonstrated Company disciplinary interest in the July 18 absence. As testimony establishes, the Grievant's absence on the shift that started on the evening of July 18 poses no issue beyond those addressed above.

This is a well-argued case, and it is necessary to tie the conclusions stated above more closely to the arguments. Whether or not the absence is compensable under Chapter 102, Stats., plays no role in the resolution of the grievance. It is apparent that the Company and its insurer hold a good faith belief that the July 18 absence is not compensable under Worker's Compensation. The Union holds a good faith belief to the contrary. The parties have not

mutually sought a contractual view of this statutory matter, and I can see no persuasive reason to offer one. The contract does not demand it, and it is unlikely the evidentiary record will support it. This grievance does not, in my view, pose any issue concerning when or how the Company can choose to bind itself to a physician's opinion of what is work related under Chapter 102, Stats.

Rather, the issue is when and how the Company chooses to exercise its discretion concerning an "authorized company release" under the Policy. The conclusions stated above must be restricted to these facts. The Company's assertion that its supervisors are not bound by the recommendations of a First Responder is persuasive, and this decision should not be read to contradict this. However, no less persuasive would be the Company's assertion that it is not bound to the opinion of any particular physician. If, for example, the Grievant had seen a personal physician the Company had no faith in, it presumably could exercise its discretion not to treat the diagnosis as binding on it. In either event, the act of discretion is the Company's, and in either event, the review of the discretion must turn on the supporting facts.

Here, the July 18 absence was unprecedented. It was not like prior illnesses, in which an employee could not or would not report for work. As the Company points out, such illnesses count as incidents under the Policy, without regard to cause. In this case, the Grievant did report for work, and never chose to leave. Rather, she followed Kaiser's and Wisnewski's lead. If Wisnewski believed Kaiser, Verley or the Grievant was being less than honest, he could have declined to follow the recommendation or further investigated either on his own or through further discussions with the treating physician. He deferred the matter to Klemm and to Human Resources. This is not inherently wrong, but highlights that an exercise of discretion was made, analogous to permitting an employee to leave work early in the face of bad weather. The Policy permits such discretion.

The difficulty with the discretion exercised here is that the Company asserts there was none to be exercised, due to a nurse's statement of the physician's views to Klemm. As noted above, this discretion is flawed as a matter of fact. No diagnosis was made, and accepting the assertion treated by the Company as a diagnosis rests solely on the Grievant's testimony. That testimony is reliable, but once credited undercuts the Company's assertion of the diagnosis. This fundamental ambiguity cannot be resolved on this record, for there are no facts to rebut the Grievant's testimony on her symptoms or on the physician's response to them. That difficulty cannot be held against the Grievant, and highlights that treating the absence as an incident under the Policy renders the reference to an "authorized company release" meaningless. The Company chose not to excuse the absence, and the absence of support undercuts the Company's discretion.

The Company argues that this view can encourage bogus use of First Responders. The risk of fraudulent claims is ever-present, but I do not believe the conclusions stated above will have the asserted affect. A First Responder does not bind the Company, and a First Responder who embellishes a recommendation puts their own position at risk. Beyond this, such a recommendation will be subject to the review of a medical professional who is beyond the control of the First Responder or the employee. The point of the conclusions stated above is that the Company must exercise its discretion. In this case, Klemm, Wisnewski or any other Company representative could have put the inquiry to the physician more pointedly. In my view, not even the physician can bind the Company unless the Company chooses to be so bound. This means the basis of the physician's opinion is vital.

The Company's decision to accept that part of the physician's diagnosis that it chose to be bound by does not necessarily reflect a poor investigation. Rather, it reflects the Company's exercise of discretion. It chose to view the absence as an incident. This is a good faith act of discretion. The choice, however, deliberately ignored the factual basis for the "diagnosis." This act was factually flawed, given that the diagnosis rests on the credibility of the person whose statements beyond that point were neither sought nor credited. The Grievant's testimony thus assumes significance it might not have if the basis of the diagnosis had been examined in detail.

Berg's and Kurth's recall of their conversation concerning the July 18 absence differ, but the difference affords no reliable guidance to resolve the grievance. Berg's response assumed the matter was work related. Whether he specifically authorized the absence does not affect the conclusions stated above.

The parties have not argued the remedial issue. The Award thus states general make whole relief, since the event precipitating the discharge cannot be counted as an incident. This leaves the Grievant on enhanced restrictions, but expunges any reference to the absences of July 17 or 18 as incidents under the Policy.

AWARD

The Company did violate the Collective Bargaining Agreement when it discharged the Grievant.

As the remedy appropriate to the Company's violation of Article IV, Section F and Article 12, Section B, the Company shall reinstate the Grievant and make her whole by compensating her for the difference between the amount she earned and the amount she would have earned but for the Company's treating her consecutive shifts starting on July 17 and July 18 as an incident. The Company shall also amend the Grievant's personnel file(s) to expunge

any reference to the July 25 discharge, and to reflect that her absences on her consecutive shifts starting on July 17 and 18 are authorized company release days.

To address any issue regarding the implementation of the remedy set forth in this Award, I will retain jurisdiction over the grievance for not less than forty-five days from the date of this Award.

Dated at Madison, Wisconsin, this 17th day of June, 2003.

Richard B. McLaughlin /s/

Richard B. McLaughlin, Arbitrator

RBM/gjc
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