IN THE MATTER OF THE ARBITRATION BETWEEN

MITTAL STEEL USA
MINORCA MINE

And Roger Shoen Discharge

UNITED STEELWORKERS-USW
UNION

OPINION AND AWARD

Background

This case from Minorca Mine concerns the discharge of Grievant Roger Shoen for violation of the Company's attendance policy. The case was heard in Duluth, Minnesota on February 12, 2007. Grievant was injured at work on August 20, 2004, and subsequently filed a workers' compensation claim. That case is still pending and is not part of this case. However, some of the medical evaluations conducted in connection with industrial claim have a bearing on the contractual issue of just cause, which involves, in part, whether Grievant's absences were excused. Grievant was suspended subject to discharge on October 12, 2006, and the suspension was converted to discharge on October 19, 2006. The Company relied on Offense 5.1 of the Disciplinary Rules and Regulations, which provides for a written warning for the fourth unexcused absence in a 12 month period; a one-day layoff for a fifth unexcused absence; a two-day layoff for a sixth unexcused absence; and suspension subject to discharge for a seventh unexcused absence.

Grievant's disciplinary record leading to the discharge included a step 1 discipline on January 17, 2005 as a result of an AWOL (failure to call in an absence) on January 7, 2005. He received another step 1 discipline the same day – January 17, 2005 – for his fourth unexcused absence within 12, including one on January 11, 2005, which precipitated the notice. On September 28, 2006, the Company gave Grievant a step 2 discipline for an unexcused absence that occurred on September 20, 2006. On the same day, he received a step 3 discipline for an absence on September 27, 2006. On October 11, 2006, the Company imposed a step 3 discipline (2 day lay-off) for an unexcused absence on September 22, 2006. The Company imposed a step 4 discipline – suspension subject to discharge – on October 11, 2006, as a result of an unexcused absence on September 25, 2006. The September 22 and September 25 absences also resulted in discipline for AWOL.

The principal issue in the case is whether the absences should have been excused as a result of medical documentation furnished by Grievant. The Section 5.4 of the Rules says:

> After considering an employee's illness record during the past twelve (12) months, and taking into account whether the employee has had three separate illness absences, future illnesses will be treated as unexcused absences (unless the employee is able to verify the illness with a doctor's written excuse.) (underlining in original)

Through the testimony of Labor Relations Representative Gary Kleffman, the Company entered a number of exhibits that show a chronological progression of Grievant's treatment and condition during the period of the absences in question. Company Exhibit 1 is a letter dated November 15, 2005, from Dr. David Wallerstein, Grievant's treating physician. The letter indicates that Grievant told Dr. Wallerstein he had sought treatment from another physician (identified as someone in Dr. Wilson's office, who, presumably, was Dr. Hoyal, mentioned below) and that he felt better after some rehabilitation work there. Dr. Wallerstein noted that Grievant had missed several scheduled physical therapy sessions. He also said Grievant did not

want to see him again, but wanted to continue with the other physician. Dr. Wallerstein concluded by saying, "Clearly favoring passive treatment and changing physicians when we have him scheduled for treatment in the future makes me suspicious he is buying time." Wallerstein also suggested an independent medical exam (IME) and a determination of maximum medical improvement (MMI).

Company Exhibit 2 is a report to the Company's workers' compensation third party administrator, Liberty Mutual, from Dr. Paul Cederberg, an orthopedic surgeon. Dr. Cederberg provided the IME suggested by Dr. Wallerstein. Dr. Cederberg examined Grievant on February 7, 2006, and also examined his previous medical records, which he summarized in his report. He said Grievant's condition was not a result of the work injury. This conclusion may be relevant to the workers' compensation claim, but it is not relevant to this case. The issue before me is whether Grievant was able to work and whether he had sufficient medical documentation to excuse his absences, summarized above. That inquiry does not depend on whether his absences were caused by a work-related injury or some other reason.

Dr. Wallerstein said there were no "objective findings to correlate with [Grievant's] symptoms in his neck, upper back and low back." His opined there was "symptom magnification," that no further treatment was "reasonable or necessary," and that Grievant could return to work "without restrictions." He also concluded that there was no objective evidence of any permanent injury and said Grievant's right shoulder – which he hurt in the accident – had "reached an end of healing" by October 20, 2004. Dr. Wallerstein also noted that there were symptoms of "a pre-existing cervical disc situation at C5-6, which was uninjured at the time of the accident." Subsequently, the Company asked Dr. Wallerstein's opinion about when Grievant reached MMI for all of his conditions, and not just the shoulder injury. These conditions

included right lateral epicondylitis, shoulder, neck and low back pain. Dr. Wallerstein concluded that Grievant would have reached MMI for all of these conditions as of April 1, 2005.

As noted in Company Exhibit 1, Grievant told Dr. Wallerstein that he planned to see a different doctor. In February 2006, the Company began receiving reports from Dr. Neil Hoyal concerning Grievant's condition. These were introduced as Company Exhibit 4. A February 23, 2006 report said Grievant had no lifting or movement restrictions, and limited his work to 3 hours a day, 5 days a week. The March 9 report continued the same restrictions. The March 29 report said there were no physical restrictions but that Grievant could only work 5 hours a day. On April 6, Dr. Hoyal said Grievant could work 6 hours a day, beginning in two weeks. On April 14 he continued the same restriction, although he noted it as 5 hours a day. The April 27 report was the same, and the work time was increased to 6 hours a day on May 17, 2006, which was continued in the June 2 report. However, the June 23 report said Grievant was unable to work from June 23 to July 6. The report itself does not indicate the reason for the disability. The next report, dated July 18, said Grievant could work 6 hours a day without restrictions. On August 2, 2006, Dr. Hoyal said Grievant could work 8 hours, but for only 3 days a week. He continued that restriction on September 19, noting "Although patient states his pain is too severe to work at all despite medication!".

Dr. Hoyal's last report is not dated, although it concerns an appointment on September 21. The report does not list any hours limitations like those in the previous reports. Rather, it says, "Pt unable/unwilling to work [due to] intolerable pain." The Company introduced Dr. Hoyal's clinical notes from that visit. They indicate that Grievant said the pain was spreading to his back and arms and said "I can't stand the pain," and "We must be missing something."

Grievant also asked for a referral. Dr. Hoyal's assessment said that Grievant's pain was "out of proportion to exam."

Dr. Cederberg reexamined Grievant on February 2, 2007. He said that since his previous examination on February 7, 2006, Grievant had "developed a plethora of symptoms unrelated to" his industrial accident. The 2007 examination revealed "mild right carpal tunnel syndrome," and "very mild ulnar neuropathy at the left elbow and cubital tunnel." He also said the records indicated that Dr. Hoyal had diagnosed Grievant with "chronic pain syndrome," although he said there was "symptom magnification." Dr. Cederberg also said that Hoyal had "essentially agreed with my findings at the time of my original report." Dr. Cederberg concluded that Grievant was capable of "full-time sustained gainful employment." He also said the injury itself reached MMI on October 20, 2004, and that there was no evidence of any permanent partial disability, "regardless of causation."

On cross examination, Kleffman agreed that the Company had arranged for the examination by Dr. Cederberg, although he said Cederberg was not the Company's doctor but, rather, an independent medical examiner. He also agreed that the September 21, 2006 examination by Dr. Hoyal does not say Grievant was able to work, and that Grievant had not been able to see other physicians because Liberty Mutual cut off his benefits.

Robert Hudson, Grievant's Shift Manager, said when Grievant returned under Dr. Hoyal's time limit restrictions, he initially assigned Grievant to the tool room and had him work on small items. Later, he returned him to the shop to work on small jobs. Hudson said Grievant began to miss work in 2006 and that some of the absences were unexcused. From January to the time of discharge in mid-October, Grievant had 299.50 unexcused hours, or a total of 37.44 days. This includes 8 hours for every scheduled day missed after August 24, 2006, which was

Grievant's last day of work. There were also seven instances of AWOL. On cross examination, Hudson said Grievant had a good work ethic and that Grievant had been working on grader transmissions right before the period in July, when Dr. Hoyal took Grievant off work for two weeks.

Scott Harrison, Pit Manager, said Grievant's level of absenteeism cannot be tolerated. The Company does not schedule extra employees, so an absence affects the amount of work accomplished, and any shortfall can only be made up on overtime. Harrison agreed that Grievant had asked for a more challenging assignment, which was when he worked on grader transmissions. But Harrison said Grievant did not tell him the work caused physical problems. On cross examination, Harrison said the Company suspended Grievant subject to discharge for his unexcused absences from September 21, 2006 through September 25, 2006. Harrison pointed in particular to Dr. Hoyal's September 21 note that said Grievant was "unable/unwilling" to work.

Grievant identified the results of his MRI, dated February 7, 2005, which indicate annular bulging of the C3-4 disc, the C4-5 disc, and the C5-6 disc. It also indicates degeneration and dehydration of the L5-S1 disc and annular bulging of the L5-S1 disc. Grievant said the MRI had been done in early January. Dr. Hoyal's clinical notes from the August 20, 2006 exam note that he was trying Grievant on various medications including Lortab, a Lidocaine patch, and Relafen. Grievant said he objected to the medication because the drugs were "mind altering" and the dosages were getting "heavier and heavier." The clinical notes attached to Dr. Hoyal's September 13 report (also part of Company Exhibit 4) contain the notation "Not going to work!" which I understand to mean that Grievant had not been working. The notes also indicate that Grievant told him the pain created a "daily torture" and that he "can't do it." Under those

comments is the notation "no work x 2 wks." This appears to reflect the fact that Grievant had not worked for the two weeks prior to the examination, most of which was covered by vacation. This report continued the prior restrictions (8 hours, 3 days a week), but also recorded that Grievant said his pain was too severe to work. Dr. Hoyal also commented, "Pain out of proportion to PE."

As noted above, Dr. Hoyal's September 21, 2006 report says, "Patient unable/unwilling to work [due to] intolerable pain." Grievant said he understood this to mean he was unable to work because of the pain and that he was unwilling to work because of safety concerns caused by his pain medication. The clinical notes indicate that Grievant asked for referrals, which Dr. Hoyal made. However, Grievant said he was unable to keep the appointments because he did not have medical coverage. He also said Dr. Hoyal left Dr. Wilson's practice a few days after the September 21 examination.

On December 12, 2006, Grievant returned to the same medical office, apparently in connection with his workers' compensation claim. Because Dr. Hoyal was no longer there, Grievant saw Dr. Wilson. The report completed by Dr. Wilson said Grievant was totally unable to work. This was based on Dr. Hoyal's evaluations, the most recent of which had been on September 21. Dr. Wilson apparently had not examined Grievant. Dr. Wilson also checked "yes" to a question that asked whether it was necessary for Grievant to leave his employment because of the injury. The form asks for an explanation, but none was provided. Grievant said he asked the doctor to explain, but he did not.

On February 5, 2007 (three days after Dr. Cederberg examined Grievant and two days before Cederberg's report), Dr. Wilson wrote a letter that Grievant said was intended to clarify

Dr. Wilson's September 21, 2006 comment that Grievant was "unable/unwilling" to work. The letter says Grievant had been treated at the clinic and continued:

> [Grievant's] restrictions continue to be more limited because of increasing symptoms. By 9-21-06 he was also experiencing significant sedation from his pain medications, and from that day onward he was not able to safely work because of these side effects.

Dr. Wilson examined Grievant on January 23, 2007. Dr. Wilson concluded that Grievant was unable to work from that date until March 23, 2007. His notes says, among other things, that there was "some degree of degenerative disc disease aggravated by deconditioning." Grievant said when he was off work from June 23 to July 6 he did not call in every day, but simply faxed to the Company the report that said he could not work during that period. He said he did the same thing with the September 13 and September 21 reports, the latter of which he thought had taken him off work.

On cross examination, Grievant agreed that there were times after September 21 when he did call in, although he later said the Union had told him to do so. He also said he had seen at least seven physicians and seven physical therapists. Grievant agreed that even though Dr. Wilson looked at Dr. Hoyal's September 21 report and concluded Grievant was totally unable to work, Dr. Hoyal's notes do not say drug side effects would make it unsafe for Grievant to work.

Positions of the Parties

The Company says this is not a classic Doctor vs. Doctor dispute, where physicians clash about an employee's ability to work. Here, Dr. Cederberg, an independent medical examiner, made a very thorough report in which he concluded that Grievant could work. He also said there was symptom magnification and no objective findings to correlate with the symptoms. With two exceptions, Dr. Hoyal's reports over a substantial time period did not say Grievant was unable to

work. The Company says the Union is relying on the reports of September 13 and September 21 to create enough doubt to get Grievant reinstated. The September 13 reports says "not going to work" and "no work x 2 wks." But the Company says this was not a direction to Grievant that he was not to work but, rather, reflects that Grievant told Hoyal he wasn't going to work. The Company also notes that in the same report Hoyal said there was symptom magnification. Dr. Hoyal also mentioned symptom magnification in his September 21 report, where he said Grievant was "unable/unwilling" to work. The Company argues that nothing in either of these reports indicates that Hoyal changed his mind from earlier reports, in which he allowed Grievant to work an increasing number of hours as time went on.

The Company discounts the reports from Dr. Wilson, who did not see Grievant when he wrote a report indicating that he could not work after December 12, 2006. Later, Dr. Wilson examined Grievant and said he could not work from January 23, 2007 until March 23, 2007. But Dr. Cederberg evaluated Grievant at the same time and concluded that he was able to work.

The Company says it has been fair with Grievant. It asserts it could have relied solely on Dr. Cederberg's initial report and refused to excuse every absence after that. But instead, it followed the restrictions in Dr. Hoyal's reports, evaluating him under his doctor's report, not the IME. The Company argues that the record shows Grievant has not worked since August 24, 2006, even though the reports indicate he could have. It also says the only issue in the case is the question of just cause, and that I have no authority to consider workers' compensation matters.

The Union notes that after the third unexcused absence, future absences are to be unexcused unless there is a doctor's note. Grievant had doctor's notes excusing his absence, yet the Company considered the absences unexcused anyway and terminated him. The Union suggests that the Company's action was a way of getting rid of Grievant because of his workers'

compensation claim. The Union says that even though the Company relied on Dr. Hoyal's reports, it failed to credit the one that said Grievant was unable to work and also unwilling to work, which Grievant said was because of safety concerns resulting from drug sedation. The Union asks that Grievant be reinstated, and says no back pay is involved because Grievant has not been cleared to return to work.

Findings and Discussion

The Union relies on reports from Dr. Wilson to support its contention that Grievant was unable to work in late September, 2006. The first report, Union Exhibit 7, was written on December 12, 2006, and it apparently concerned Grievant's workers' compensation case. Dr. Wilson checked the box that said Grievant was "totally unable" to work. But Dr. Wilson did not examine Grievant before writing that report. Grievant had not been examined at all since his September 21 appointment with Dr. Hoyal. Dr. Wilson did not say when the disability began – that is, whether he believed Grievant was unable to work as of December 12, the date of the report, or whether he thought the disability began on September 21. The form asks Dr. Wilson to explain his conclusion, but he did not, even though Grievant apparently asked him to do so. Presumably, Dr. Wilson relied on Dr. Hoyal's September 21 report and the accompanying clinical notes. But he did not explain why he read them to mean Grievant was unable to work on September 21, if, indeed, that is the period he intended the note to cover.

On the day before the arbitration hearing, February 5, 2007, Dr. Wilson wrote a letter that said Dr. Hoyal's September 21 report meant Grievant was not able to work safely from that day forward because of the sedative effects of his medication. But the September 21 clinical notes do not mention the sedative effect of pain medicine; in fact, the notes do not mention medication

at all. The September 13 clinical notes say Grievant complained that his medication was ineffective, but it does not mention any sedative effect. And this is true even though, as Grievant pointed out, his medication was increased after the August 2 appointment. On August 17, Grievant's pain medication was modified after an adverse reaction to one of his drugs, but the report says nothing about a sedative effect. It may be that Grievant was unable to work because of sedative side effects as of the day Wilson wrote the February 5, 2007 letter, and even before then. But the record does not support a conclusion that Dr. Wilson could have an informed opinion about whether Grievant was too sedated to work on September 21, 2006. Dr. Wilson did examine Grievant on January 23, 2007, and concluded that he was unable to work. But this was four months after the days in question and cannot be taken as proof that Grievant could not have worked in September 2006.

Dr. Cederberg's reports are similarly limited. Dr. Cederberg concluded in February 2006 that Grievant was magnifying his symptoms and that he could return to work without restrictions. But those conclusions were clearly related to what Dr. Cederberg understood to be the effects of the in-plant injury, which is evident from his conclusion that "there is no objective evidence of any permanent injury as a result of the incident of August 20, 2004." On April 12, 2006, Dr. Cederberg wrote another letter in response to a request asking when Grievant would have reached MMI for all of his conditions, including shoulder, neck and low back pain. He responded with a date of April 1, 2005, which was a year prior to the letter, and 10 months before the February 7, 2006 examination. But even if Dr. Cederberg's estimate is correct, the fact that Grievant was at MMI on April 2005 does not mean that he would have been able to work in September 2006. Maximum medical improvement does not mean someone is able to work; rather, it means he will not get any better. Nor does the April 12 report support a

conclusion that Grievant was able to work 5 months later, although it is not irrelevant to that inquiry. Also of some relevance is Dr. Cederberg's February 5, 2007 letter (written the day before the hearing) reporting the results of a February 2, 2007 examination. He said Grievant had "exaggerated response" to light touches to the neck and back. Dr. Cederberg concluded that Grievant could work without restrictions.

These reports are of limited relevance to this case. The Company terminated Grievant on October 19, 2006, as a result of absences in late September 2006. The issue before me concerns whether those absences should have been excused because of medical reports indicating that Grievant was unable to work. The most recent reports from around the time of the arbitration hearing are relevant only to the extent that they may shed some light on Grievant's medical condition in September 2006; whether Grievant could work as of January or February of 2007 is not central to that determination. In addition, there is no issue in this arbitration case about whether the August 20, 2004 accident caused or contributed to Grievant's medical condition in September 2006. The issue before me is whether Grievant was physically able to work, whatever the cause of the claimed disability might have been.

During the hearing, the parties debated principally the absences on September 20, September 22, and September 25. These are the absences that led to the step 2, step 3 and step 4 levels of discipline. On September 13, 2006, Dr. Hoyal reported that Grievant was able to work 8 hours a day, 3 days a week, the same restriction he had imposed on August 2, 2006. The September 13 report noted that Grievant told Hoyal his pain was too severe for him to work, despite his medication. The Union finds some support in the clinical notes from that appointment that say "no work x 2 wks" and "not going to work," which it suggests mean Hoyal did not want Grievant to work for two weeks. However, those comments merely reflect the fact

that Grievant had not worked for the previous two weeks, most of which was covered by vacation. I cannot interpret the notes as a direction that Hoyal did not want Grievant to go to work or that he wanted Grievant to remain off work for two weeks. Such a conclusion would be inconsistent with Dr. Hoyal's other notation that Grievant's pain was "out of proportion to his physical examination."

The case really depends on an interpretation of the September 21 report from Dr. Hoyal since all three absences at issue are affected by that assessment. This is the report that says Grievant was "unable/unwilling to work." I reject Grievant's claim that this meant Dr. Hoyal thought Grievant was physically unable to work, and that Grievant was also unwilling to work because of safety concerns. The clinical notes for that report indicate that Grievant told Dr. Hoyal his back pain was spreading and that his pain had increased the day before the exam. Dr. Hoyal's only comment about pain was that it was "out of proportion" to the exam, the same comment he had made on September 13. But rejecting Grievant's interpretation does not clarify the language.

Obviously, unable and unwilling do not mean the same thing; nor do I understand Hoyal to have used the words in the alternative, as in "and/or." If Grievant had been unable to work, there would have been no reason for Hoyal to say he was also unwilling. I can interpret the words only in the context of Grievant's previous evaluations, particularly Hoyal's assessment on September 13. As the Company argues, Hoyal had increased Grievant's work hours slowly over a six month period. There were no physical restrictions other than the time limit, which suggests that Hoyal, like Cederberg before him, found no physical impairment and no condition that would have been aggravated by normal work. On September 13, Hoyal discovered that Grievant had not gone to work for two weeks because he said the pain was "daily torture." Yet, despite

Grievant's complaint, Dr. Hoyal noted that Grievant's pain was "out of proportion," and he continued the restriction that Grievant could work 8 hours per day, 3 days a week, although he also said Grievant claimed the pain was too severe for him to work. I cannot ignore the fact that Grievant's own physician discounted his level of pain, especially when Grievant told him during the appointment that the Company was asking him to resign.

By September 21, Dr. Hoyal seems to have recognized that Grievant did not intend to go to work despite Hoyal's opinion that he could do so. Nothing in the September 21 report indicates that Hoyal believed there had been any change in Grievant's condition from the previous week, when he said Grievant could work 3 days a week. In context, then, his assessment means that Grievant was unable to work because he was not willing to do so.

I cannot say that Grievant is not in pain now, or that he was free from pain in September 2006. Pain is a subjective sensation and its presence is sometimes difficult to confirm. My responsibility is not to make an independent evaluation, but to interpret the available medical documentation. Throughout his ordeal, Grievant produced no documentation that said he was unable to work in September 2006, save Dr. Wilson's after-the-fact interpretation of Dr. Hoyal's notes. Dr. Wilson did not examine Grievant at that time, and his conclusion is not of significant weight. Dr. Wilson examined Grievant in January 2007 and concluded he was unable to work. But, as noted above, this opinion does not mean Grievant was unable to work in September 2006. Moreover, even if after-the-fact examinations are to be credited, Dr. Wilson's opinion was contested by Dr. Cederberg. I understand the Union's claim that Cederberg is really a Company doctor and not an independent examiner. But Dr. Wilson is clearly the Grievant's doctor, so the same skepticism must greet his opinion. Moreover, I must evaluate Dr. Wilson's conclusions in the context of a previous attempt to excuse Grievant from work without even examining him. I

also must consider the fact that three different doctors – Wallerstein, Cederberg and Hoyal – thought Grievant was either "buying time" or exaggerating his symptoms. Two of these, Hoyal and Wallerstein, were Grievant's treating physicians.

In these circumstances, I conclude that Grievant has not submitted sufficient medical documentation to excuse his absences on September 20, 22, and 25. Given Grievant's record of unexcused absence – totaling almost 300 hours in the first 10 months of 2006 – I also find that the Company had just cause for discharge. The grievance will be denied. Nothing said in this decision should be understood to express an opinion on Grievant's workers compensation claim. My decision is that as a matter of contract, the Company had just cause to discharge Grievant.

AWARD

The grievance is denied.

Terry A. Bethel
April 4, 2007