IN THE MATTER OF THE ARBITRATION BETWEEN

ARCELORMITTAL STEEL COMPANY USA
INDIANA HARBOR WORKS

And Award No. 23

UNITED STEELWORKERS, USW
LOCAL UNION 1011

OPINION AND AWARD

Introduction

This case from Indiana Harbor Works concerns the Union's claim that it was improper for the Company to impose medical restrictions on Grievant Eric Stevenson, thus preventing him from working as a Service Tech in the blast furnaces. The case was tried at the Company's offices in East Chicago on March 7, 2008. Patrick Parker represented the Company and Rick Bucher presented the Union's case. Grievant was present throughout the hearing and testified in his own behalf. The parties submitted the case on final argument.

Background

This case began on August 28, 2006, when Grievant injured his left knee and his right hip while closing the coal hopper door on the coal car at the No. 4 Furnace Highline. Grievant was examined in the Company's Medical Department. Grievant said he explained how he was injured, and also told Medical Department personnel that both his knee and his hip had been replaced. He was referred to St. Catherine's Hospital, where x-rays were taken of both his knee and his hip. The hip x-ray showed no evidence of dislocation, and the knee x-ray indicated that

there was no fracture of the components, and that the components were placed appropriately. Also on August 28, Dr. DeMichael, who was then employed by the Company, placed Grievant on temporary medical restrictions, prohibiting him from working on extremely uneven or slippery surfaces, from doing extreme squatting, from climbing, and from using his feet to close coal car doors.

The Company sent Grievant to be examined by Dr. John Diveris, who testified at the hearing. Dr. Diveris is an orthopedic surgeon who has performed 700 to a 1000 total knee replacements. Diveris testified that Grievant had satisfactory stability, although there were flexibility limitations and a mild limp. In a letter dated September 5, 2006, Dr. Diveris said Grievant was limited to 95 degree flexion, and could fully extend his leg. Diveris recommended permanent work restrictions of no repetitive kneeling involving his left knee and no full squatting with his left knee. Diveris said the restrictions were not the result of Grievant's injury at work on August 28, but were the appropriate restrictions for someone who had undergone total knee replacement. Knee replacement surgery, he said, was intended to alleviate pain and allow normal activity. But getting a replacement knee does not mean patients can resume a full level of activity. Squatting, kneeling and bending can cause the replacement to fail early. A second replacement, he said, has a higher complication rate. Diveris said he tells patients who have labor intensive jobs that a knee replacement is a career ending surgery.

On cross examination, Diveris said he could not comment on opinions from other doctors who said Grievant could work without restrictions. Diveris said he was confident that most doctors would agree with his conclusions. Diveris acknowledged that he had not been to the plant to observe the kind of work Grievant performs.

Chris Schlotman, Operations Manager at the Blast Furnaces on the west side, described Grievant's work area and the activities required by his job. He said Service Techs unload coke from coke cars by opening the door with a utility bar, and they sometimes close the doors by pushing on them with their feet, which is not an approved method. They also bring supplies to the area, they clean up spills in the unloading area, and they clean in and around the furnace area, which causes them to go up and down stairs. Schlotman also identified a series of pictures intended to demonstrate some of Grievant's work areas and the work he performs. These show employees climbing stairs and ladders, and getting on mobile equipment. All of these activities require leg flexion. The pictures also show the employee kneeling, bending and squatting, and cleaning up under equipment, which also requires squatting. They depict an employee standing with his legs on different levels, which requires flexion of one of his legs. Schlotman said Grievant cannot do the work required with his restrictions. He also said he does not have enough supervisors to monitor all of Grievant's activity throughout the day to insure that he does not exceed his limitations. Schlotman expressed concern that if Grievant were injured, someone might question why he was allowed to do such physical labor.

On cross examination, Schlotman denied that Grievant had been able to perform his job without limitations prior to August 28, 2006. He said Grievant limped a little, and that he knew other employees made allowances for him with jobs like changing twyers, which requires heavy lifting. Schlotman acknowledged that Grievant did not have a weight lifting restriction, but he said he was afraid Grievant would injure his back by trying to lift objects without bending his knees.

Ted Niemiec, M.D., is Director of Health Services for the Company. Part of his responsibility, he said, is to determine whether employees with restrictions can perform their

jobs. Niemiec evaluated Grievant's job using information supplied by a number of people, including Grievant. Dr. Niemiec agreed with Dr. Diveris' conclusion that the restrictions placed on Grievant were needed. Niemiec said knee replacements are designed to allow people to engage in simple activities, but they are not appropriate for heavy activities or repeated bending and squatting. Niemiec said his best medical opinion is that Grievant could not perform his regular job without risk of further injury. Grievant's job requires squatting and repetitive kneeling. If Grievant tried to avoid squatting, he would have to kneel, which also takes its toll on an artificial knee. Niemiec said Grievant's restrictions will not improve, although they may become more limiting over time as the knee wears and loosens.

Nick Pappas, Labor Relations Representative, said Grievant returned to work after his knee replacement on September 23, 2005. He injured his shoulder on November 16, 2005, and worked with restrictions until February 8, 2006. He injured his foot on April 14, 2006, and worked with restrictions until May 26, 2006. Grievant worked without restrictions from May 26 until his August 28, 2006 injury that led to this case. The Company's exhibits also showed that Grievant hurt his knee on June 6, 2006 and was sent to a specialist. The Union questioned whether that occurred.

Grievant testified that he had been employed by the Company or predecessors since 1970. He said his knee injury on August 28, 2006, happened when he was using his leg to close the coke car door. He denied kicking the door, and said he had closed it the same way in the past without injury. Grievant said a day or two before he was to return to work, the Company called him and told him to pick up his x-rays and go to Dr. Diveris for an examination. Grievant said Diveris showed "distaste" for the surgeon's work. Grievant said the former Company doctor, Dr. DeMichael, was at the third step hearing, and he described the restrictions as

"precautionary," and said they were not the result of Grievant's injury on August 28. Grievant also denied that his job required repetitive kneeling or full squatting.

The Union introduced a September 19, 2006 letter from Grievant's family physician, Dr. Kendell Oetter, who said he saw no need for any restrictions. A November 30, 2006 letter from Dr. Earl Thornton came to the same conclusion. Neither physician is an orthopedic surgeon. A later letter from Dr. Thornton said Grievant qualifies for ADA accommodation, but has no medical restrictions. Grievant's surgeon, Dr. Titu Aron, released him to work without restrictions on September 14, 2005.

Grievant said the Company knew he had undergone a knee replacement, but said nothing about it until the August 2006 injury. He had no problems with either his knee or his hip prior to that time. He said he had performed the full scope of his job prior to the injury, without exception. Grievant also said he could perform the full range of duties depicted in the series of pictures introduced by the Company. Grievant said there were other employees who worked with artificial knees and hips, and the Union introduced a list of departments where they were employed. Grievant said he did not know if they worked with restrictions. Grievant said he has ridden a bicycle 2000 miles per season since the August 2006 injury. On cross examination, Grievant agreed that he often had to do the work depicted in the Company's pictures, although he said he did not do much squatting or kneeling.

David Lukowski, an MTM at the blast furnace, testified that an MTE on the west side had undergone two knee replacements, and worked a more demanding job than Grievant's. Lukowski said the employee was not present to testify about his day-to-day activities because he chose not to attend the hearing. Larry Fugett is an MTM in the blast furnace who testified that he performs the full scope of his job with two artificial knees. He said it could be that his job

was sometimes more physically demanding than Grievant's. On cross examination, he said his job now is to operate a fork lift, and that he has been doing that for some time. Noah Hatfield is a Service Technician who worked with Grievant. He said he believes Grievant could perform all of the duties of the job, and that he had not asked for help.

Positions of the Parties

The Company argues that its physician-witnesses made it clear that a total knee replacement is intended primarily to keep patients ambulatory – it is not intended as a full service replacement for the injured knee. In particular, both witnesses said knee replacement patients need to avoid squatting and kneeling, two activities required by Grievant's job. The requirements of his job put Grievant's knee in danger of premature failure. If the knee fails, Grievant would have to undergo another surgery, which would be likely to give him a less serviceable knee. It is unreasonable, the Company says, to give Grievant his job without restrictions when the Company's Medical Director has said he cannot perform that work safely. The Grievant's doctor might be willing to let Grievant take the risk, but the Company cannot do that. It has an obligation to insure that employees work safely and without danger of an unnecessary injury. Although Grievant said he worked his job without incident after his knee replacement, he only worked about nine months, and some of that was under restrictions for other injuries. The Company says it is unwilling to allow Grievant to risk further injury.

The Union says nothing in the collective bargaining agreement gives the Company the right to take an employee off of his job as a precautionary measure because something might happen. The issue is whether Grievant has the ability and physical fitness to do the work. Although Grievant's condition came to light because of an injury in August 2006, the injury was

not due to his artificial knee. The Union also says Dr. Diveris' letter does not say that Grievant cannot do the job. There was credible testimony from coworkers that Grievant can perform the requirements of his position. In addition, there are other employees working in the plant with an artificial knee, including an MTM who has been able to do the full range of his duties with two artificial knees. There is no cause to keep Grievant off work, the Union says.

Findings and Discussion

There was little evidence at the hearing about Grievant's artificial hip, which he has had since 1997. The testimony about the effects of heavy labor was concentrated on Grievant's knee replacement. The hip replacement, then, is not an issue in this arbitration. Nor am I able to comment on Grievant's ADA charge. The Union said its contention in this case is that Grievant can do his job without restrictions and that no accommodation is necessary.

Much of the case turns on the medical evidence. There is no reason to question the credibility of either Grievant's doctors or those who testified for the Company. Dr. Diveris was obviously knowledgeable and Dr. Niemiec practices occupational medicine. The Union's medical evidence was not as substantial, but it was still significant. The surgeon's report dates to 2005, before the instant dispute arose. There is nothing in the note that indicates the surgeon was aware of the kind of work Grievant performed. One of the other two notes is from a family physician, who presumably has less expertise in orthopedic medicine than Dr. Diveris. Grievant's third and fourth notes are from Dr. Earl Thornton, who is listed as practicing both Family Medicine and "Physical Medicine." As I understand the physical medicine specialty, it is not dissimilar to occupational medicine. Dr. Thornton's opinion, then, is entitled to weight. The

result is a medical disagreement that it is difficult for an arbitrator to resolve. But the parties have given me the case and I must deal with it as best I can.

Although I understand Grievant's incentive to minimize the physical demands of his job, the Company's evidence – including the pictures – convince me that he would have to kneel, squat and bend his leg repeatedly throughout the day. I am also persuaded by the Company's evidence that this activity could reduce the life span of the replacement, and that subsequent replacements would be less effective. Grievant's physicians said he had no work restrictions meaning, I assume, that he could perform his job with the mobility his knee allowed. But that doesn't mean there would not be long term effects on the life span of the knee replacement.

The Company clearly has a legitimate interest in insuring that its employees work safely and that they not expose themselves to the risk of harm. Dr. Diveris' opinion – not really challenged by Grievant's doctors – is that Grievant's job activities will cause the artificial joint to wear out faster than it would otherwise. Dr. Niemiec said the same thing, but added that if Grievant were to continue working as a Service Tech, he risked further injury. Presumably, by "further injury" he meant the kind of problem that led to Grievant's injury on August 28. There is no evidence that Grievant's knee would collapse or break or fail, which could expose him to injury, especially if he were on a ladder or cleaning out under a rail car. Nor is there evidence that allowing Grievant to work would expose other employees to any danger. The bulk of the evidence establishes that if Grievant is allowed to do his regular job, his knee will wear out faster than it would if he is limited to more sedentary activity.

I agree with the Company's argument that it cannot assign an employee to a job that doctors have concluded he cannot perform safely. But the evidence does not persuade me that Grievant risks an injury to his knee by doing his job, other than an accelerated deterioration of

the joint.[1] There is no evidence in the case that Grievant is presently unable to perform his job, or, at least, that he was unable to do it in late August of 2006. Nor is it clear to me how long it would be before he starts to notice the effects of accelerated wear and tear. At some point, it may be that he would not be able to perform the kinds of physical movements needed to do the work.

Grievant is obviously aware of the risk of remaining as a service technician. The Company has done the most it can to persuade Grievant that he should not press the issue including, according to the grievance record, offering him less demanding positions. I find that the Company is not entitled to disqualify Grievant from the Service Tech position simply because there is evidence that the prosthetic joint will wear out sooner if he does that kind of work. The Company cannot remove him from that position absent evidence of a risk of injury (other than accelerated wear and tear) caused by his the knee replacement, danger to coworkers, or evidence that he could no longer do the required work.

The record indicates that Grievant has not been examined since November 2005. Before it reinstates him, the Company is entitled to insure that nothing has happened in the interim that would affect Grievant's ability to perform. In addition, there is some ambiguity in Dr. Thornton's February 12, 2007 note. The doctor says Grievant had no restrictions, but he also said Grievant qualified for ADA accommodation. However, ADA accommodation presumably would not be necessary if Grievant could perform all of the functions of his regular job. There is also no indication that Dr. Thornton actually examined Grievant in February 2007. Rather, it appears that he simply reissued the earlier note, with the addition of ADA information the

[1]These kinds of effects are not limited to someone in Grievant's position. Other employees no doubt have physical conditions that will worsen because of the demands of their job, but continue to work in them, either because of greater earnings opportunity or the fear of not having a job.

Company had asked Grievant to obtain. These factors influence my decision to require that Grievant be examined before returning to work.

I find, then, that prior to reinstatement, Grievant must undergo examination by an IME. If the IME says no restrictions are necessary for Grievant to perform his job – or that any necessary restrictions would not interfere with his performance – then Grievant will be reinstated. I also find that the Company has a legitimate interest in monitoring Grievant's physical condition to insure that he is not putting himself at risk of an acute injury. Thus, the Company may require Grievant to submit to a yearly examination from an independent medical examiner. Grievant's reinstatement is contingent on agreement to that term.

I will not order back pay. Grievant might have avoided the delay in reinstatement if he had agreed to submit to an examination by an IME, as the Company had offered in the grievance procedure. The second step minutes also say that Grievant refused a temporary assignment to a clerical position with no loss of pay. Presumably, this would not have required him to withdraw his grievance. Grievant cannot refuse work and then seek to recover for lost wages.

If the parties cannot agree on an IME, they can submit a list of at least two physicians to me, along with a description of their background. The list will not identify which party submitted which physician. I will choose one of the physicians to act as IME.

AWARD

The grievance is sustained with the limitations explained in the Findings.

Terry A. Bethel
June 7, 2008