

IN THE MATTER OF THE ARBITRATION BETWEEN

ARCELORMITTAL USA
INDIANA HARBOR WORKS

And

ArcelorMittal Case No. 77

UNITED STEELWORKERS
INTERNATIONAL UNION AND
LOCAL UNION 1010-06, USW

OPINION AND AWARD

Introduction

This case from the Indiana Harbor Works concerns Grievant Jennifer Bell's discharge for alleged violations of Company Rule 2.L, "Theft or attempted theft," and Rule 2.M, "Falsifying ... of personnel records, including but not limited to ... sickness and accident claims." The case arises under the Agreement covering the Office and Technical employees bargaining unit. The case was tried in the Company's offices in East Chicago, Indiana on April 7, 2016. The parties agreed there were no procedural issues and that the case was properly in arbitration. They also agreed that the issue on the merits is whether the Company had just cause for the discharge and, if not, what the remedy should be.

Background

Grievant went off work on June 13, 2014, due to depression and anxiety. The Salary Continuation Benefits (SCB) in the Company's PIB requires that an employee "be unable to work as a result of a disability caused by illness ... or mental illness so as to be prevented from performing the duties of your employment." An employee receiving SCB "may not be

employed elsewhere.” Employees must also be under the care of a licensed physician. The SCB also says:

You may be required to provide medical evidence of your disability during the first fourteen (14) days of your absence. To continue to receive salary continuation benefits after the first fourteen (14) days of your absence you must furnish proof of your continuing disability and that you are under the care of a licensed physician.

The Company’s medical department was notified that Grievant was off work on June 23, 2014, and it contacted Grievant on June 27 to start the proof of disability process. This entails submitting a Form-18, headed “Physician’s Report,” which includes an employee’s authorization for release of medical records and a section to be completed by a physician identifying the employee’s disabling condition and, if the disability is temporary, the expected return to work date.

Grievant’s physician, Dr. Yu-Fleming, completed Grievant’s form on July 14, 2014, indicating that Grievant was suffering from anxiety and depression, that she had seen Grievant on June 19 and July 9, and that she had referred Grievant to a psychiatrist. The form also said Grievant’s next appointment was August 21, 2014, and that her expected return to work date was August 22, 2014. The August 21 appointment was with a psychiatrist, Dr. Samir Gupta. The medical notes from the Company’s clinic indicate that a nurse practitioner contacted Grievant on August 19 and arranged for her to come to the clinic on August 22 “for follow up and possible return to work.” This was apparently based on Dr. Yu-Fleming’s notation in the Form-18 that Grievant’s expected to return to work date was August 22.

Grievant did not appear at the clinic on the morning of August 22. Scarlett Spain, a nurse practitioner in the clinic, called Grievant at 8:45 a.m., and left a message asking Grievant to call back. Spain spoke to Grievant at 10 a.m. Grievant said she had seen her psychiatrist for the first

time the day before (August 21), and that he had changed her medicine. Grievant said she had started the new medicine that morning, that she "felt drunk," and that she did not think it was safe for her to drive to the clinic. Spain spoke with Grievant again at 10:30 a.m. Grievant again said that she "feels drunk" and that she could not get out of bed. Grievant told the nurse "she only leaves the house when she has to," and that "she only leaves to grocery shop and other activities of daily living." Grievant said she had been OK to drive until the day before (August 21). Grievant said she was not able to get anything done outside the house, and that she would "fax over current notation regarding needed time off work per Dr. Gupta." Spain said the clinic did not receive the fax, so the finishing department issued a 7-day letter telling Grievant she was required to verify the reason for her absence and present documentation of her illness and treatment. A failure to comply, the letter said, would result in suspension preliminary to discharge. The Company says this is a common procedure the Company uses to obtain compliance with an employee's obligation to establish a disability.

No one from the clinic heard from Grievant or her physician until September 3, when Grievant called Spain and said the clinic was harassing her. Spain told Grievant the clinic needed documentation to extend her SCB. Grievant said she could not come to the clinic that day because she "hardly leaves the house." She said her husband would have to fax the documentation, and that she would report to the clinic the next day, September 4, when her mother was available to drive her. On September 4, Grievant met with RN George Troksa. She presented a note from Dr. Gupta dated September 2 saying he had seen Grievant that day and that he made medication changes "to help [with] severe depression." He also said "will be re-evaluated in two weeks time." Grievant told Troksa she slept poorly and was anxious because of her son's illness. She was also having problems with her husband and financial problems.

Grievant told Troksa she cooked and cleaned, but had stayed inside until recently because it made her anxious to leave the house. She said she walked her dogs, but otherwise stayed in the house. She also said her mother had been doing her grocery shopping, but now insisted that Grievant accompany her twice a week.

Grievant said she had another appointment with Dr. Gupta on September 22. She scheduled a follow-up appointment in the clinic on September 24. Troksa told Grievant to bring in documentation from the Gupta appointment, including a timeframe for any restrictions Gupta ordered.

Spain testified that she had extended Grievant's SCB based on her representations about her condition, pending some confirmation from Dr. Gupta. Spain testified that she ordinarily would not have extended benefits without a physician's advice that an employee was still disabled, but that she believed Grievant and wanted to help her. Spain testified that she had no reason to doubt what Grievant had told her. Spain said the September 2 note did not say Grievant was unable to work. She also identified another note from Gupta that she believed Grievant received on September 5. The note says, "[patient] seen today, medications are being tried. Patient will benefit from time off for two weeks, 9/5/14. Pt will be re-evaluated in 2 weeks." At the time she was talking to Grievant about her condition, and the time the Company received the Gupta notes, Spain said she was not aware that the Company had started an investigation of Grievant's activities.

Cheree Leffel, Senior Labor Relations Representative, said a manager told her in early August 2014 that Grievant had opened a business in Portage. Leffel reported this to her boss, who told her to investigate. Leffel said she called the number for the business and Grievant answered the phone. At this point, the Company decided to conduct surveillance on Grievant.

Anthony Killeen, an investigator employed by the Company, began his investigation on August 12. Killeen visited Grievant's furniture store called Butterfly Effect at 1:20 p.m. on August 12. Grievant was one of two women in the store, the other apparently being Grievant's mother. Killeen said Grievant was painting a table. She greeted Killeen and said to let her know if he had questions. Killeen asked Grievant if she stained furniture, and Grievant said she did not. He also asked if she bought furniture for the store, and Grievant responded that it depended on the type and size. Grievant also told Killeen that she would give him an estimate if he came back with pictures of items he wanted painted. She said the store was open Tuesday through Saturday from 10 a.m. to 6 p.m.

Killeen returned to the store on August 14 and was again greeted by Grievant. He told her he was interested in buying a hutch and having it painted. Grievant told him she could use regular or chalk paint, and took him to the back of the store to show him a dresser she was painting with chalk paint. Killeen then identified the hutch that he was interested in and, after thinking a few seconds, Grievant quoted a price for the hutch and the painting job. She wrote the quote on a business card that included her name and her husband's. Killeen said he asked Grievant how it was to run your own business and she said, "It consumes you, it really does." She also said the painting was "a lot of work." The Company points out that these exchanges occurred while Grievant was off on SCB, with Dr. Yu-Fleming having certified that she was totally disabled.

Killeen returned to the store for a third time on August 22, the day after Grievant's first appointment with Dr. Gupta. Killeen said he arrived at 3:33 p.m., and Grievant was in the store talking to two other people. She told him the hutch he was interested in had been sold, but she pointed to another one in the store and said it would cost about \$160 to buy the hutch and have it

painted. They discussed what color he would want, and Killeen left, telling Grievant that he would let her know.

The Company points out that August 22 was the same day Grievant told NP Spain that she could not keep her clinic appointment that morning because she had started a new medication and felt drunk. She also said it was not safe for her to drive to the clinic, and that she could not get out of bed that morning. She said she only left home to go to the grocery and that she could not get anything done outside the house. Grievant testified that Dr. Gupta prescribed new medicine for her at her August 21 appointment, and she took it for the first time that evening. She said she did not remember all of the phone calls she received on the morning of August 22, when she was trying to sleep off the effects of the drug, which made her feel drunk. She said she woke up at about 2:30 p.m., and felt better, so she went to her store and was there when Killeen came in at 3 p.m.

Killeen was assigned to conduct further surveillance on September 2. There were no vehicles at Grievant's house when he arrived at 9:12 a.m., so he parked across the street from her store. Just before 10 a.m., a woman – again, apparently Grievant's mother – opened the store. Grievant arrived at 10:30 a.m., went inside briefly, and then returned and carried a small table from her car to inside the store. She came back and retrieved a can of paint. Grievant left the store at 12:13 p.m., drove to her home, arriving two minutes later at 12:15. She reappeared at 12:20 and returned to the store, which she entered at 12:23. Grievant remained in the store until 1:41 when she left and drove a mental health services facility. She left the facility at 3:02 p.m., went through a CVS drive-through, and drove to a Meijer's store, arriving at 3:18. She left the store with bags of groceries in a shopping cart at 4:28 p.m. She loaded the bags in her Jeep, left the parking lot, again went through the CVS drive-through, and then returned home at 4:58 p.m.

Grievant left her home and arrived back at her store at 5:10 p.m. The "open" sign was turned off at 6:36 p.m., and Grievant left the store and went home.

The Company points to Grievant's telephone call with Spain the next day, September 3, when Grievant said she could not get to the clinic, that she barely leaves the house, and that she could come in the next day, when her mother was available to drive her. Grievant testified that Dr. Gupta prescribed some new medicine at her September 2 appointment, and that she filled the prescription at the Meijer store on that same day. She said she did some grocery shopping while she was waiting for the prescription to be filled. She did not explain why she went through the CVS drive-through twice if she filled her prescription at the Meijer store. Grievant agreed that she told Spain she was unable to come to the clinic on September 3 and that she could hardly leave the house. She was feeling better on September 4, Grievant said, probably because of the new medicine. She decided she would be able to drive herself to her appointment at the clinic.

On September 4, 2014, Grievant left home at 7:02 a.m. to take her son to school, a drive of about four minutes. She returned home and, according to Killeen's report, left again at 8:19 a.m. to take two other children to a different school, also about four minutes away. Grievant left the school, stopped at a gas station, and arrived back home at about 8:33. Grievant left home again at 9:18 a.m., stopped at a bank from 9:21 to 9:30, and arrived at the Company's Health Services Building at 9:45. She left the building at 10:25 and drove to the Majestic Star Hotel. She parked in front of the main entrance at 10:34 and went inside. She met another employee and stayed in the hotel until about 12:23, then left the hotel and went to the casino and played blackjack for about 5 hours. She met her husband inside the casino and the two of them played slot machines. Killeen left for the day at 7 p.m., at which time both Grievant's car and her husband's car were still in the parking garage. On September 5, Grievant arrived at her store at

9:40 a.m., and, except for a brief visit to a nearby gas station, remained there until 5:34 p.m., when she went home.

During her meeting with nurse Troksa in the Company clinic on September 4, the Company reminds me, Grievant said she had not been leaving the house because it made her very anxious, that she stayed in the house except to walk her dogs or go grocery shopping with her mother, and that she had crying spells, suicidal thoughts, and anger issues.

Grievant testified that she and her husband had been talking about opening a business for about six months before they opened Butterfly Effect, which was before Grievant went on sick leave. Both of them took out loans from their 401K to finance the endeavor. She also said painting was a hobby and that she found it therapeutic; while painting, she could get lost in her thoughts and work things out. Grievant's mother testified that she did most of the work in the store, and Grievant said her contribution after she started sick leave was to paint. In addition, she said she would sometimes "hang out" with her mother in the store. Her time there varied, Grievant said, from half an hour to a couple of hours. She also pointed out that it only took two or three minutes for her to drive from her house to the business. Grievant said the nurse she spoke with during her September 4 clinic appointment did not tell her the notes from Dr. Gupta were deficient or that the Company needed more information to extend her SCB. Grievant testified that she understood the notes to mean that she needed two more weeks off work.

Grievant's mother testified that Grievant had a history of anxiety and depression since she was sixteen years old. She said Grievant could be "like a tornado"; you "never knew what you were going to get." She said Grievant had improved somewhat recently. Grievant's husband described her as a "rollercoaster."; she was fine one day and the next day she did not want to get out of bed.

Grievant had a follow-up appointment with Dr. Gupta on September 22. He gave her a note that said she was "progressing well," and that she could return on "reduced hours to see if she can work without decompensating." Griever Tim Trtan testified that Grievant took the note to a meeting the Union had asked for on September 24, but the Company would not take it. Trtan told Grievant to take the note to the clinic, but they refused to take it, too, because they said Grievant had already been discharged. Grievant's 5-day suspension pending discharge letter was dated September 18, 2014, and the suspension was converted to discharge on September 29, 2014.

Positions of the Parties

The Company says its procedure is periodically to review the condition of employees on SCB to determine whether they are still disabled. There is no question, the Company says, that Grievant was covered by her Form-18 from Dr. Yu-Fleming until August 22, 2014. But she had an obligation to furnish information about her level of disability after that which, the Company contends, is when she began to lie. On August 22, Grievant said she would fax a document to the Company, but the Company still had nothing from her on September 3. On September 4, Grievant submitted the September 2 note from Dr. Gupta saying that he had given her some new medicine and that he would see her again in two weeks. Although the Company argues that the note itself did not certify that Grievant was still disabled and unable to work, it nonetheless extended her SCB because Spain believed Grievant's representations that she was unable to leave the house or accomplish much of anything outside the house. It is important to realize, the Company says, that Spain did not know about the Company's investigation at the time she made

this decision. Thus, she did not know Grievant had been lying about her condition and her activities.

The Company insists that Grievant also lied in the arbitration. She claimed that all she did was paint and that she was only at the store for brief periods. But it was clear from the investigation that Grievant was the owner, that she was there for longer than she claimed in her testimony, and that she was "the face of the business." The investigation revealed, the Company says, that Grievant did more than paint because she also showed merchandise to Killeen and gave him price estimates. And, even after the Company revealed the investigation to her, Grievant did not explain how she could accomplish such activities if she was disabled and could not work.

The Company dismisses the Union's claim that it should have sought the opinion of a second physician. That applies only when there is a disagreement between the Company's doctor and an employee's doctor. But there is no such disagreement here, the Company argues, because there was no information from Grievant's physician certifying that she was unable to work. Grievant was kept on SCB only because Spain believed Grievant's story, which the investigation determined to have been a lie. Moreover, the Company says that neither in the grievance procedure nor in the arbitration did Grievant furnish any medical evidence of how her lies and her malingering were consistent with her medical condition.

The Union argues that Grievant was under the care of a licensed physician and that there is no dispute that her disability was certified to August 22. Grievant met with the Company on September 4 and presented notes from her doctor that should reasonably have been interpreted to mean that her disability continued. No one told her the notes were not sufficient or that she needed to submit additional information. Instead, Grievant was told that if restrictions were

imposed as a result of her September 22 appointment with Dr. Gupta, the doctor needed to make them specific. The Company used surveillance and the medical notes as an attempt to cast doubt on Grievant's credibility. But, the Union contends, that is a red herring, since the real issue is whether Grievant was still disabled. If the Company had doubts about the doctor's statement that she was, then the PIB required it to seek the opinion of a third physician. But, the Union points out, the Company had not even had its own physician examine her.

The Union argues that Grievant's involvement in her secondary business does not support the Company's claim that she was no longer disabled. Her contribution to that business was minimal. The facts are, the Union says, that Grievant was under the care of a licensed physician who said she was disabled, and Grievant was not working elsewhere; thus, she was entitled to salary continuation. And, the Union asserts, not once during its case did the Company argue that Grievant was capable of performing her job. Finally, the Union says that there were no physician restrictions that prevented Grievant from doing any of the things she was observed doing on the video.

Findings and Discussion

The Company advances three positions: first, that Grievant never submitted any medical certification that she was disabled after August 22, 2014; second, that Grievant lied about her condition, which caused Spain to continue her SCB beyond August 22 without medical certification; and, third, that Grievant was employed elsewhere while she was collecting SCB from the Company, which constituted fraud. As noted in the Background, there is no issue about Grievant's status prior to August 22 -- Dr. Yu-Fleming had certified on a Form-18 that Grievant was unable to work and that her expected return to work date (RTW) was August 22, 2014. It is

fair to believe, as the Union claims, that Dr. Yu-Fleming set the RTW date as August 22 because she knew Grievant had an appointment with Dr. Gupta on August 21, and a certification of any continuing disability would come from him. Grievant also had an appointment at the clinic on August 22, for “followup and possible return to work,” which presumably would depend on Dr. Gupta’s opinion about whether Grievant continued to be disabled.

Grievant saw Dr. Gupta on August 21, but she did not return to work on August 22 and she did not keep her appointment at the clinic, explaining that she did not feel well enough to drive, and could hardly get out of bed. Between August 22 and September 3 – when Grievant missed another clinic appointment – the Company tried to elicit information from Grievant concerning her condition; however, no one from the clinic heard from Grievant again until September 3, when Grievant said she was being harassed. On August 22, Grievant said she would fax information from Dr. Gupta concerning her need for time off work. The Company still had not received any information by September 3, and on that day Grievant for the second time said she would fax the information from Dr. Gupta, although her husband would have to do it because she did not leave the house. The Company did not receive the fax that day or the next. Nurse Troksa met with Grievant in the clinic on September 4.

There was some confusion at the hearing about when the Company received what was referred to as the “September 5 note.” The note is not actually dated September 5. Nor did Grievant ever claim that she saw Dr. Gupta on September 5. This is important because the note says: “[patient] seen today, medications are being tried. Patient will benefit from time off for two weeks, 9/5/14. Pt will be re-evaluated in 2 weeks.” The most reasonable interpretation of the facts is that Grievant obtained the note from Dr. Gupta at her August 21 appointment. She obviously received the note on a day when she had an appointment (“Pt seen today”) and the

record does not reveal any appointments between August 22 and September 2, or any appointments between then and September 22. Moreover, Grievant already had a note from the September 2 appointment. If Grievant received the "September 5 note" at her August 21 appointment with Dr. Gupta, Grievant's "additional two weeks off work" would have begun on August 22, since she was obviously already off work on August 21. Friday, August 22 was exactly two weeks from Friday, September 5.

This interpretation is also consistent with Grievant's claim in her August 22 telephone call with Spain, in which she said she would fax the clinic information "regarding needed time off work per Dr. Gupta." Unless Grievant was lying, this indicates that on August 22, Grievant actually had some documentation from Gupta about needing additional time off work. There were only two notes from Gupta (not counting the September 22 note issued after Grievant had been suspended) and one of them was dated September 2. Thus, if Grievant had information from Gupta on August 22, as she claimed, it had to have been what the parties referred to as the "September 5 note."

It is not clear why Grievant would not have given the "September 5 note" to the Company earlier, especially since it seemed to certify a continuing disability from August 22 to September 5, the principal period at issue in this case. Grievant not only failed to send the note to the clinic, but she also complained she was being harassed when the Company sought to obtain the information. She also offered no testimony about when she obtained the note, other than to say she understood the two notes to mean that she needed two more weeks off work. Contrary to the Company's interpretation, I think the "September 5 note" – the one that says she would "benefit" from two more weeks off work – was sufficient to indicate that Dr. Gupta believed Grievant was still disabled; otherwise, he would not have held her off work. There is

no requirement that an employee submit a new Form-18 every time she seeks to extend SBC; rather, as explained by Spain, the employee must furnish something indicating that the doctor believes the employee continues to be disabled.

Grievant's September 2 note does not say Grievant needed to remain off work. It says she was having some medication changes and that she would be evaluated in two weeks. However, it seems clear from reading the nurse's note from Grievant's September 4 clinic appointment that he assumed she would remain off. The nurse mentioned Grievant's claims that she had to accompany her mother grocery shopping twice a week, that she stayed in the house except to walk her dog, and that she had crying spells and suicidal thoughts. The nurse also said Grievant would follow up with Dr. Gupta on September 22 and then return to the clinic on September 24. In addition, Grievant was told to have Dr. Gupta be specific about any restrictions imposed in the September 22 appointment, and to have him include a timeframe. The message conveyed by the nurse's record on September 4 is that the nurse believed Grievant would remain off for another two weeks, and then report back with more information from Gupta. There is nothing in the record that suggests he told Grievant to submit more information certifying that she had a disability from September 2 onward.¹

Despite the notes from Dr. Gupta, the record is more than sufficient to establish that Grievant lied to the Company repeatedly about her condition. She testified that she went to her business sporadically and that she usually stayed for a half-an-hour to two hours. She also said

¹ I have some concern about whether the nurse's conclusion was influenced in part by the "September 5 note." That note is not dated, and Grievant clearly did not give it to anyone from the clinic prior to her September 4 appointment. If she submitted it that day, or within a short time thereafter, then it may have been seen as support for Grievant's claim that Dr. Gupta wanted her to remain off work for another two weeks, beginning September 2, the date of her appointment with Gupta. Grievant testified, in fact, that during her September 4 appointment, the nurse did not say her "*notes from Dr. Gupta were deficient*" or that he needed more information. (*italics added*). However, on this record I am unable to conclude that Grievant used the "September 5 note" improperly.

her mother was operating the store. The record indicates that Grievant's mother played a role in running the store, but it does not convince me that Grievant's participation was minimal or that all she did was paint. Killeen visited the store three times, and on each occasion Grievant waited on him, showed him merchandise, and gave price estimates. She also showed him paint samples. And, in response to Killeen's question, Grievant said that owning a business "consumes you."

Although Grievant said her store visits lasted up to two hours, Killeen saw Grievant at the store for more than two hours on several occasions. On September 2, she arrived at 10:30 a.m. and, except for a trip home that lasted only ten minutes, remained there until about 1:40 p.m. when she left for a doctor's appointment and grocery shopping. She returned to the store at 5:10 p.m. and stayed until it closed at 6:39 p.m. In all, then, Grievant was at the store for about four-and-a-half hours that day. On September 3, Killeen found Grievant's car outside her store at about 10 a.m. At 12:13 p.m., Grievant left for 12 minutes, returning to the store at 12:25 p.m. Grievant remained in the store until 4:14 p.m., when she left for the day. In total, Grievant spent about six hours at her store on September 3. September 3 was the day Grievant told Spain she could not keep her clinic appointment because she barely left the house, and that she would come in the next day if her mother could drive her. On September 4, Grievant told the clinic nurse that she had seldom left the house until recently, although her mother now made her go shopping twice a week. She also said she had started walking her dogs, but otherwise stayed in the house. But this was the same day Grievant left the clinic and drove to the casino, arriving at about 10:30 a.m. She was still there when Killeen left for the day at 7 p.m. Finally, on September 5 – which Grievant claims was the start of a new two week period of disability certified by Dr. Gupta – she was at her store for about eight hours.

The Union argues, however, that Grievant had a certification of disability from Dr. Gupta, and the Company did not prove either that she lied to him or that her activities were inconsistent with her disability. The Union points to USS-45,723 et.al. as support for its position. In that case, the employer did not submit sufficient evidence to prove that the employee's activities captured during surveillance showed that he was capable of performing his job. Although the surveillance recording showed the employee lifting what appeared to be heavy objects, the Board of Arbitration said the objects only marginally exceeded the lifting restrictions but, more importantly, the Board noted that the certification of disability was based primarily on other medical conditions. The Board said the employer had not taken "adequate account of these other potentially disabling conditions" in deciding that the employee was falsely claiming an incapacity to work." There is some similarity in the instant case, especially since the Company did not have its own physician examine Grievant, as the Board of Arbitration said the employer could have done in USS-45,723 et.al.

But it is also notable that in USS-47,723 et.al. the employer had no evidence the employee had misrepresented his other medical conditions, like sleep apnea and significant diabetes symptoms. In the instant case, however, Grievant lied to the Company about her ability to even leave the house, which was clearly inconsistent with her claim that she was unable to work. Nor did Grievant claim in arbitration that Dr. Gupta had told her it was consistent with her disability to go shopping, work in her store, or spend the day at a casino. Indeed, had he done so, there would have been no reason for Grievant to lie about her activities. She did not testify in arbitration that her doctor had advised her it was permissible to leave the house for extended periods; instead, she continued to insist that she spent very little time at her store, an assertion flatly contradicted by the surveillance report.

Union also points to USS-45,258, where, like here, the employer conducted surveillance of an employee who claimed to be so depressed she “often just curled up in a ball” and that there were times she could not even lift her head off the table. Her physician said she was unable to work at all. The employer terminated the employee because it had video evidence of her working on her family’s blueberry farm during two days in July. The Board of Arbitration said the employee’s disability had been certified by a licensed physician, and that he had not been contradicted by any other medical professional. The Board also said it was not convinced that the small amount of video tape was irreconcilable with the employee’s or her psychiatrist’s representations. The Board noted that it did not have to defer to a doctor’s representations when “the evidence as a whole convinces us that the disability did not exist,” although the evidence was not sufficient to meet that threshold in that case. There is significantly more evidence of Grievant’s activities in the instant case than existed in USS-45,258. This included surveillance over seven days, often for several hours at a time. Moreover, it showed Grievant engaging in numerous activities inconsistent with her assertion that she seldom left the house and spent little time at her store.

Finally, the Union points to USS-45,172, where an employee on sickness and accident leave was observed working in his bowling alley, which the employer said proved he was not totally disabled. On the issue of disability, the Board of Arbitration’s conclusion was similar to USS-45,258: the employee was certified as disabled by a licensed physician and the physician’s findings were not questioned by another medical professional. Moreover, the Board said the employer’s evidence did not establish that the employee’s actual condition differed from his representations, which probably cannot be said about Grievant in the instant case. More important, however, was the Board’s treatment of the employer’s claim that the employee had

fraudulently misrepresented his condition and then worked at his bowling alley. The Board said the employee had made “no attempt to conceal from the medical risk manager that ... he was spending time at his bowling alley.” But that is not true in the instant case.

In addition to having a physician certify that an employee is totally disabled from performing the duties of her employment, the PIB says that an employee “may not be employed elsewhere” while receiving SCB. The record supports the Company’s claim that during the period of her disability, Grievant was employed. Although she may not have been “the face of the business,” as the Company claimed in its closing argument, the evidence shows that in addition to painting, Grievant met with Killeen, showed him merchandise, and made estimates. Moreover, during the period Grievant told the Company she could hardly leave the house, she spent several hours a day at the store. She was observed in the store on numerous occasions performing several tasks, and she told Killeen that running a business “consumes you.” Because she participated in the normal activities of the store, it is clear that Grievant, as the owner, performed those tasks with the expectation of financial gain.

Although there may be cases in which employees on SCB engage in outside employment without committing fraud, that was clearly not the case here. Grievant lied to the Company about her condition on numerous occasions, claiming symptoms that, if true, would have prevented her from working elsewhere. Moreover, even in arbitration, Grievant lied about the amount of time she spent working in the store. A finding of fraud distinguishes this case from USS-47,172, where the employee made no effort to hide his activity at his bowling alley. In contrast, Grievant tried to obscure her activities by claiming that she was unable to do much of anything, and that she seldom left the house. It is not clear exactly what Grievant told Dr. Gupta

about her condition,² or even what he told her she was able to do while she was on SCB. The point is that Grievant knew, or should have known, that she could not work elsewhere while she was receiving SCB, yet she continued to take money from the Company by misrepresenting her condition, obviously with the hope that the Company would not learn she was working in her store. Her attempt at concealment while she was also collecting benefits amounts to fraud, which is a very serious offense. In these circumstances, I find that the Company had just cause to discharge Grievant.

AWARD

The grievance is denied.

Terry A. Bethel

Terry A. Bethel
May 13, 2016

² If the Company wanted to prove that Grievant was not actually disabled or that she lied to Dr. Gupta about her condition, then it should have had someone from the medical staff talk to Gupta or have had another physician examine Grievant.