Award No. 778
OPINION AND AWARD
In the Matter of Arbitration Between
INLAND STEEL COMPANY
and
UNITED STEELWORKERS OF AMERICA
LOCAL UNION 1010
Grievance No. 22-S-3
Appeal No. 1389
Arbitrator: Herbert Fishgold
October 23, 1987
Appearances:
For the Company
R.V. Cayia, Arbitration Coordinator, Union Relations
Dr. Henry L. Feffer, Director of Medical Research, Health Care Systems, Inc.
Dr. J.B. Lange, Medical Director, Inland Medical Department
Dr. R. Hooker, Section Manager, Inland Medical Department
D. Guadagno, Supervising Safety Engineer, Safety and Protection Services Department
J. Mayberry, Section Manager, No. 4 Slabbing Mill/Steel Auxiliaries Department
J. Dobson, Representative, Union Relations Department
X. Flores, X-ray Technician, Inland Medical Department
For the Union
W. Trella, Staff Representative
Gavino Galvan, Chariman Grievance Committee
Martha Barry, Interpreter
Alan Paquin, Assistant Griever
Jose Cruz Madrigal, Grievant
Antonio Sanchez, Witness
Daniel Gutierrez, Witness
Ben Rhynearson, Griever
Statement of the Grievance: "Cruz Madrigal, #7808 seniority rights are being violated by the company placing him on medical layoff"
Relief sought: * Put back to work and pay all monies lost.
Contract provisions cited: * The Union cites the Company with alleged violations of Article 3, Section 1; and Article 13, Sections 1 and 8 of the Collective Bargaining Agreement."
Statement of the Award: * The grievance is denied.
CHRONOLOGY
Grievance No. 22-S-3
Grievance filed: November 20, 1986
Step 3 hearing: December 30, 1986
Step 3 minutes: February 4, 1987
Step 4 appeal: February 9, 1987
Step 4 hearing(s): June 5, 1987
Step 4 minutes: August 14, 1987
Appeal to Arbitration: August 18, 1987
Arbitration hearing: August 28, 1987
Award issued: October 22, 1987
Cruz Madrigal (hereafter "Grievant") was laid off for medical reasons from his job as a laborer by the Inland Steel Company (hereafter "Company"). The Grievant suffers from a degenerative back condition and a permanent alteration of his spine.
Briefly stated, in August, 1985, the Grievant had a laminectomy performed and had two discs removed from his back. (The details of the Grievant's medical condition will be discussed below). As a result of this surgery, the Grievant has lost some shock absorption capacity in his back and there is a real question about the Grievant's ability to engage in any significant lifting or bending.
On June 9, 1986, the Grievant's Orthopedic Surgeon, James J. Chen, M.D., released the Grievant to work with the restrictions that he not engage in any bending, lifting or extended walking. On August 6, 1986, the

Grievant was given another work release which stated that the Grievant should be cautious. On that day, the Grievant was examined by Rex R. Hooker, M.D., Section Manager of the Company's Medical Department. The Grievant stated that he still suffered from discomfort with his lower back. Dr. Hooker placed the restrictions on the Grievant that he could occasionally lift less than twenty pounds and could frequently lift less than ten pounds. However, the Grievant was not brought back to work at this time because there were no jobs available. The United Steelworkers of America, Local 1010 (hereafter "Union") does not dispute the Grievant's layoff during this period.

The instant grievance relates to the period beginning October 6, 1986 when the Grievant was given an unconditional work release by Dr. Chen. However, Dr. Hooker examined the Grievant, and although the Grievant stated that he was free of back pain and discomfort, Dr. Hooker placed the Grievant on a permanent medium lifting restriction which can involve occasional lifting of fifty pounds and frequent lifting of twenty-five pounds. In light of these restrictions, the Company had continued the Grievant's layoff because the Company claims that there are no appropriate jobs available.

Issues

The issues in this case are: (a) whether the medical restrictions placed on the Grievant's work activities were based on a reasonable medical judgment; and (b) whether the Company properly continued the Grievant on medical layoff because there were no appropriate jobs available.

Discussion

(a) It is clear that an employer can require that an employee be physically fit to perform all of the duties of his job. As stated in Auer Register Co., 62 LA 235, 238-39 (Perry, 1974):

Management has a right to look further than "a fair day's work." It has a right and obligation to look to the physical well-being of its employees and the condition of the firm's physical plant. The true test is whether it appears to management that the employer can safely give a fair day's work on the job assigned to him without endangering either his own health or safety, the health and safety of his fellow employees, or the physical plant of the Company.

The Company's determination that the Grievant is not physically fit for certain tasks must not be arbitrary or capricious. Rather, the determination to place restrictions on the Grievant's work activities must be supported by fair and reliable medical information. Electric House and Rubber Co., 59 LA 570 (Kerrison, 1972). Moreover, the Company cannot rely on its own judgment but, instead, must rely on medical opinion. Id.

In the instant case, the Company claims that the medical restrictions were reasonable in light of the findings of Dr. Hooker, who examined the Grievant, and the expert medical testimony of Dr. Henry Feffer. On the other hand, the Union claims that, despite the above, the Grievant should be returned to work without restriction because of the unconditional work release from Dr. Chen, the Grievant's Orthopedic Surgeon.

At the hearing, the Company presented the expert medical testimony of Dr. Feffer, an acknowledged expert on the lower back and the use of appropriate impairment ratings in the industrial setting. Dr. Feffer is also the co-author of a medical text entitled, Industrial Low-Back Pain, which was used by Dr. Hooker in formulating the restrictions on the Grievant's work activities.

Dr. Feffer testified about how he developed the standardized, diagnosis-related work restrictions for individuals afflicted with a lower back condition (See Table II, Company Exhs. 11 and 25). These recommended restrictions, according to Dr. Feffer, are actually the consensus opinion of 75 of the nation's foremost orthopedic specialists who, like Dr. Feffer, are members of the International Society for Study of the Lumbar Spine. Dr. Feffer discussed the need for standardized restrictions and explained that this was an appropriate mechanism to improve the medical care for the industrial worker.

Dr. Feffer also described in detail the surgical procedures that were performed on the Grievant and how the laminectomy and discectomies permanently altered the bio-mechanics of the Grievant's spine. According to Dr. Feffer, the Grievant's back is not as strong as it was prior to surgery and he is much more susceptible to re-injury. The intervertebral discs function as "shock absorbers" and the Grievant's susceptibility to further injury is especially increased since he had two discs removed.

Dr. Feffer also testified regarding the conclusions that he was able to draw from the report by Dr. Chen. Dr. Feffer stated that Dr. Chen's mention of a bulging disc in the report was an indication that the Grievant suffered from degenerative disc disease. Dr. Feffer also noted that Dr. Chen stated in the report that the varicose veins were quite abnormal and quite bloody around the disc space. Dr. Feffer explained that the profusion of blood in this area would hamper visibility during the surgery and was an indication that some nerve damage occurred as a result of the surgery. Moreover, this damage would result in the formation of

scar tissue which would decrease the flexibility in the Grievant's back and in all likelihood would cause pain and discomfort in the future.

Because of the degenerative nature of the Grievant's back condition and the permanent alteration of his spine, Dr. Feffer stated that things the Grievant is currently physically capable of doing, he will be unable to perform in 6 or 12 months and that this degenerative process will continue. Dr. Feffer stated, that in his opinion, the restrictions imposed by the Company were, if anything, too liberal and that he would not return the Grievant to anything but light work. Moreover, according to Dr. Feffer, eventually the Grievant should be doing nothing but sedentary work. Finally, Dr. Feffer stated that Dr. Chen's unconditional work release is totally unsubstantiated and is inconsistent with current medical practice.

The Company also offered the testimony of Dr. Hooker who had conducted several physical examinations of the Grievant. Dr. Hooker explained his rationale for disagreeing with Dr. Chen's unconditional release of October 6, 1986. Dr. Hooker applied the recommended restrictions set forth by Dr. Feffer in his book, and Dr. Hooker explained that he restricted the Grievant to medium work because the Grievant's surgery was successful, and that the Grievant was asymptomatic as of October 6, 1986. Dr. Hooker concurred with Dr. Feffer regarding the permanent alterations to the bio-mechanics of the Grievant's spine as a result of the surgery, and explained that this condition is the reason for his opinion that these restrictions are permanent.

The Company also presented the testimony of Dr. J.B. Lange, Director of the Company's Medical Department. Dr. Lange testified that he reviewed the Grievant's case with Dr. Hooker and concurred with Dr. Hooker's decision to impose the work restrictions.

Dr. Lange introduced the report of Dr. Gluek, a local orthopedic specialist who examined the Grievant in late July, 1987 (Company Exh. 15). The Union objected to the introduction of the exhibit on the ground that this information was not timely raised by the Company since Dr. Gluek's examination took place subsequent to the date of the Step 4 Hearing in this case. The Union also claimed that Dr. Gluek's examination only occurred because the Company rescheduled this case from the July docket to the August docket, so that the Company could have Dr. Gluek's opinion to help its case.

On the other hand, the Company claimed that Dr. Gluek's report was timely and should be admitted into the record because the report was mentioned in the Step 4 Minutes, and that according to M.P. 7.6 of Article 7, Section 1 of the Labor Agreement, the record of a case is not closed until the Step 4 Minutes are published. Moreover, the Company claims that its request to reschedule this hearing from the July docket to the August docket was solely because of Dr. Feffer's unavailability for the July hearing dates.

In light of the other overwhelming medical evidence, it is unnecessary to resolve the conflicting claims over the admissibility of Dr. Gluek's medical opinion. Based on the other testimony and evidence produced at the hearing, it is clear that there was a sufficient medical basis to place the restrictions on the Grievant's work activities.

First, the expert testimony of Dr. Feffer is clearly credible and based on sound medical practice. Although Dr. Feffer did not personally examine the Grievant, Dr. Feffer was certainly qualified to review the Grievant's medical records and to form an opinion. As an expert in impairment ratings, Dr. Feffer determined that, based on his review of the Grievant's records, Dr. Hooker's restrictions were, if anything, too liberal. In addition, Dr. Hooker testified that his restrictions were based on his own expertise in industrial medicine and disability evaluations, as well as his examinations of the Grievant. Moreover, Dr. Hooker relied on Dr. Feffer's text, which is recognized in the field of impairment ratings. Finally, Dr. Lange reviewed Dr. Hooker's findings and concurred with the restrictions which were imposed.

The Union, on the other hand, offered no credible medical testimony to contradict the above. Dr. Chen, the Grievant's surgeon, did not appear at the hearing and, thus the Union relied solely on the unqualified work release from Dr. Chen. This release, however, is severely undermined by the letter from Dr. Hooker to Dr. Chen outlining conversations where Dr. Chen told Dr. Hooker the unqualified release was given so that the Grievant could be returned to some type of work activity (Company Exh. 9).

In light of the clear and convincing evidence, there is no question that the work restrictions were based on fair and sound medical opinion. Accordingly, there is no basis for this Arbitrator to second-guess the medical testimony offered by the Company. See, Electric Hose and Rubber Co., supra.

(b) The Arbitrator turns next to the question of whether the Company properly continued the Grievant on medical layoff because there were allegedly no appropriate jobs available. The parties stipulated that because of the permanent closing of the Grievant's former department, the Grievant's continuous service would only entitle him to be placed in a laborer occupation in the plant based on the seniority pool bumping system. The Company claims that there are no jobs, for which the Grievant qualifies, that are appropriate in

light of the Grievant's work restrictions. On the other hand, the Union claims that there are some available jobs which the Grievant can perform even with his restrictions.

The Company introduced the testimony of Supervising Safety Engineer, D. Guadagno, who, based on his eighteen years of experience working throughout the plant, has become familiar with the range of tasks performed by laborers in the various operating departments. Mr. Guadagno has had numerous occasions to observe laborers performing tasks as part of his responsibility to administer a department's safety program through the use of safety contacts and observations, and the development and use of J.S.A.'s (Job Safety Analysis) which are step by step procedures on the proper way to perform a task.

Based on a series of photographs depicting laborers performing strenuous work (Company Exhs. 17-A through 24-B), Mr. Guadagno testified that the tasks depicted in the photos were regularly performed by laborers. Mr. Guadagno also stated that these tasks were representative of the kinds of heavy manual work commonly performed by laborers.

On the other hand, the Union presented the testimony of several witnesses who testified that, when they worked as laborers, they did not have to lift items weighing more than fifty pounds. According to these witnesses, laborers either had jib cranes which were available to minimize or avoid lifting and, moreover, fellow laborers were available to assist whenever someone had to lift items weighing more than fifty pounds.

Notwithstanding this conflicting testimony, it is apparent from the record that the types of jobs depicted in the Company's photographs exceed the Grievant's physical limitations. First, Mr. Guadagno's testimony is credible because of his extensive knowledge and experience of the range of the various laborer positions. Dr. Feffer concurred in Mr. Guadagno's opinion about the work depicted in the photographs. All of the Union's witnesses, on the other hand, admitted that they were not as familiar with the full scope of duties required of laborers. Moreover, two of the Union's witnesses, Bert Rhynearson and Gavino Galvin, were not laborers, but were a Welder and Heater, respectively.

Furthermore, there is no guarantee that the Grievant would be able to get the assistance of a fellow laborer when necessary. Indeed, the testimony appeared to indicate that such assistance was generally as a convenience, whereas in the Grievant's case it would always be a necessity. Moreover, the Grievant's restriction only allows him to occasionally lift up to fifty pounds and nothing over twenty-five pounds on a regular basis. Many of the items handled by laborers weigh more than twenty-five pounds and there are several items which weigh more than fifty pounds. Thus, it is clear that the Grievant is not physically capable of performing any laborer jobs which require such strenuous lifting.

Nonetheless, the Union identified two jobs which it claims involve no heavy manual work or lifting. These jobs are janitorial work and the clothing distribution job in No. 2 BOF Department.

Mr. Guadagno stated that the Grievant could not perform a janitor's job because a janitor must lift items which exceed the Grievant's medical restrictions. These items included ladders, coils of rubber hose, garbage cans, pails of water, containers of wax and detergent, and floor buffing machines. Dr. Feffer testified that the Grievant should not be carrying or lifting any of the above objects, and stated that it would be a disservice to the grievant to return him to a job where he would be required to do the kinds of tasks performed by a janitor because to do so would only aggravate the Grievant's condition.

With respect to the clothing distribution assignment at No. 2 BOF, Mr. Jim Mayberry, Section Manager, No. 4 Slab Mill, stated that, in his experience at No. 2 BOF Department, the clothing distribution assignment was not a full-time position and that the individual was also required to load and unload heavy material and equipment. The laborer performing this job must unload and store safety equipment, cleaning supplies including five gallon containers and 55 gallon drums of soap, wax and other solvents, pallets of boxed paper and sweeping compound containers. Mr. Mayberry did state, however, that the heavy lifting was not regularly required although the need to lift occurred throughout the year.

Based on the record presented, it is not as clear to the Arbitrator that the clothing distribution job or a similar position would be beyond the Grievant's physical limitations. Thus, if this job or a similar job were available, the Grievant might be entitled to the position.

However, even assuming arguendo that the Grievant might be qualified for a job in a clothing distribution or any other similar job, the Grievant did not bid on any such job. With respect to any job covered by the plant seniority pool bumping system in Article 13, Section 17 of the Labor Agreement, the Grievant is only entitled to a covered job if the incumbent has less continuous service than the Grievant. In the instant case, the present incumbents of the clothing distribution jobs appear to have significantly greater years of continuous service over the Grievant.

Accordingly, for the reasons stated herein, the Company was justified in continuing the Grievant's medical layoff because there did not appear to be any appropriate jobs available for the Grievant, consistent with his medical restrictions, and for which he bid.

Notwithstanding the above, should the Grievant subsequently elect to bid on and found to be entitled to an available position, the Company would be justified in requiring the Grievant to undergo a physical examination to determine whether, at that time, the Grievant's degenerative condition does not render him incapable of performing the work.

AWARD

For the reasons stated herein, the grievance is denied.

/s/ Herbert Fishgold
Herbert Fishgold
Arbitrator
Washington, D.C.
October 23, 1987