VOLUNTARY LABOR ARBITRATION

In the Matter of the Arbitration	
	ARBITRATOR'S OPINION
-between-	
THE STATE OF OHIO, OFFICE OF COLLECTIVE BARGAINING-OHIO DEPARTMENT OF MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES WARRENSVILLE DEVELOPMENTAL CENTER	**Grievant: a. Ruth Johnson b. Occupational Injury Leave**
	No.24-14 (89-04-11) -0156-01-04
-and-	
OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, LOCAL 11, AFSCME, AFL-CIO	

#133

FOR THE STATE:	**ELLIOT FISHMAN, Esq.** **Advocate** **State of Ohio, Office of Collective Bargaining** **106 N. High Street,** **6th & 7th Floors** **Columbus, Ohio 43215**
FOR THE UNION:	**JOHN T. PORTER** **OCSEA, Assistant Director of Arbitration** **1680 Watermark Drive** **Columbus, Ohio 43215**
DATE OF THE HEARING:	**October 29, 1991**
PLACE OF THE HEARING:	**OCSEA** **1680 Watermark Drive** **Columbus, Ohio 43215**
ARBITRATOR:	**HYMAN COHEN, Esq.** **Impartial Arbitrator** **Office and P. O. Address:** **Post Office Box 22360** **Beachwood, Ohio 44122** **Telephone: 216-442-9295**

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The hearing was held on October 29, 1991 at OCSEA offices, 1680 Watermark Drive, Columbus, Ohio before HYMAN COHEN, Esq., the Impartial Arbitrator selected by the parties.

The hearing began at noon and was concluded at 6:05 p.m. Post-hearing briefs were submitted on January 4, 1992.

* * * * *

The **STATE OF OHIO**, the "**State**" and **OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION**, the "**Union**" are parties to a Labor Agreement. In this grievance, the Union claims that the State has violated Article 34.04 and Appendix K of the Agreement as a result of its denial of Occupational Injury Leave (OIL) to various Grievants.

Article 34.04 of the Agreement provides as follows:

> "**S34.04-Occupational Injury Leave**
>
> Employees of the Department of Mental Health, The Department of Mental Retardation and Developmental Disabilities, The Ohio Veterans' Home, The Ohio Veterans' Children's Home and Schools for the Deaf and Blind. The Department of Rehabilitation and Corrections, and the Department of Youth Services shall be entitled to a total of nine hundred sixty (960) hours of occupational injury leave of year with pay at regular rate. (See Appendix K).

Appendix K of the Agreement is set forth as follows:

> "**APPENDIX K** (1989 Agreement)
> **Guidelines for Occupational Injury Leave**
>
> 1. An employee of the Ohio Department of Mental Health, the Department of mental Retardation and Developmental Disabilities, the Ohio Veterans' Home, the Ohio Veterans' Children's Home and Schools for the

Deaf and Blind, Department of Rehabilitation and Corrections, and the Department of Youth Services who suffers bodily injury inflicted by an inmate, patient, client, youth or student in the facilities of the above agencies shall be eligible for his/her regular rate of pay during the period he/she is disabled as a result of such injury but in no case to exceed 960 hours. This form of compensation shall be in the lieu of Workers' Compensation. The employee may apply for Workers' Compensation while he/she is receiving occupational injury leave. Workers' Compensation may be received, if awarded, by the employee after the occupational injury leave is exhausted.

2. Pay made regarding this leave shall not be charged to the employee's accumulation of sick leave credit.

3. Employees who think they are eligible for this type of leave may apply to their Agency Designee.

4. A statement of circumstances of the injury shall be filed with the Director of Administrative Services by the employee's Appointing Authority. This statement shall show conclusively that the injury was sustained in the line of duty and was inflicted by an inmate, patient, client, youth or student and did not result from accident or from misbehavior or negligence on the part of the employee. A statement by the injured employee recounting the circumstances of the injury shall

accompany the Appointing Authority's statement.

5. The Appointing Authority shall also obtain and file with the Director of Administrative Services the report of a physician designated by the Director of Administrative Services as to the nature and extent of the employee's injury.

6. The employee shall be obligated to receive necessary medical treatment and to return to active work status at the earliest time permitted by his/her attending physician.

7. An employee on Occupational Injury Leave shall be exempt from the accumulation of vacation leave credit and sick leave credit as set forth in Sections 28.01 and 29.01 of this contract.

8. If an employee's injury or disability as covered by the above guidelines extends beyond 960 hours he/she shall immediately become subject to Article 29, 'Sick Leave', of this contract * *."

Article 34.04 is self explanatory. Its terms provide that employees of specific agencies "shall be entitled to a total of nine hundred sixty (960) hours of occupational injury leave a year with pay at regular rate". Article 34.04 does not set forth the meaning of "occupational injury leave"; nor does it establish the manner in which the leave is to be implemented. Eugene Brundige, former Deputy

Director of the State's Office of Collective Bargaining, represented the State in negotiations which led to the inclusion of Article 34.04 in the 1986 Agreement. It is undisputed that during the 1986 negotiations it was agreed by the Union that the State was authorized to draft the guidelines for the implementation of the occupational injury leave program. After the State drafted the guidelines "near the full close of negotiations" Brundige said that it was shown to the Union and included as Appendix K to the 1986 Agreement. It should be noted that a few changes were made to Appendix K in the 1989 Agreement which are not relevant to this dispute.

Paragraph 1 of Appendix K indicates that "an employee" at specifically designated agencies who suffers bodily injury inflicted by an inmate, patient, client, youth or student in the facilities" of such agencies are eligible to receive their regular rate of pay during the period that "he/she is disabled as a result of such injury, but in no case to exceed 960 hours". Brundige explained that the purposes of occupational injury leave are "to make employees whole", and "not charge them with any other leave" because they are disabled due to "bodily injury inflicted by an inmate, patient, client, youth or student in the facilities of the above agencies".

Since its inception, the occupational leave injury program has been administered by the Ohio Department of Administrative Service, (DAS). DAS Claims Administrator Haven Carskadon oversees the workers compensation and occupational leave programs for the State and its agencies.

Carskadon described the process which is utilized with regard to the filing of a claim for occupational injury leave. An employee fills
5 out on an application form which is provided by the "Appointing Authority", or the employer agency. The form is designed, generated and supplied to the agencies by the DAS. Among other things, the form calls for the circumstances surrounding the injury. The back of the application form is filled out by the employee's "treating doctor" who sets forth his diagnosis, observations and the complaints of the employee. The treating doctor also sets forth findings based upon tests which have been administered to the applicant. In his report, the treating doctor also sets forth an estimate of when the applicant can return to light or full duty. After obtaining the treating doctor's report, the applicant returns the form to the Appointing Authority (the Agency) where answers are filled out on the application form to questions, such as, whether the injury was sustained in the line of duty; whether the employee was "on meal or rest period or on personal business when injured", and whether the "injury resulted from accident, misbehavior or negligence on the part of the employee". The form also calls for a recommendation of approval or disapproval by the Agency based upon the information filled in on the application form and supporting documentation. The form along with the supporting documentation is then submitted to the "central office" of the Agency, which in turn sends the documents to the DAS.

Upon receiving the completed application form, the DAS logs it into a computer system in order to determine whether the employee

has filed a workers' compensation claim for a similar injury. If the injury described in the application form is similar to or the same as a previous injury for which a claim has been filed for workers' compensation, the DAS requests its medical consultant to review the doctor's report and findings along with the prior injury which had been covered by workers compensation. If the claim is for a new injury, the claim and report of the supporting doctor is examined to determine if it meets the language of Appendix K. The DAS reviews the proof and if a reasonable recovery period is estimated, the applicant qualifies for occupational injury leave.

When the Appointing Authority indicates that the injury is due to negligence, accident or misbehavior, the DAS "denies the claim at that point". If the completed application satisfies the "threshold requirements" of Appendix K, the DAS reviews the factual description of the circumstances surrounding the injury and "matches it up to the doctor's examination." If, for example, there is a discrepancy between the injury described by the applicant and the injury described by the treating doctor, the "file is suspended for thirty (30) days and a letter is sent to the doctor for clarification. Or, the applicant is given thirty (30) days to obtain new evidence.

If the employee's leave is "unreasonable", the file is sent to the DAS medical consultant, Dr. Wilbur Weddington, who reviews the medical records. At times, the Agency is requested to select a doctor, who is located close to the residence of the employee and an appointment is scheduled so that a medical examination can be

performed on the employee. The employer Agency selects the doctor (e.g. a neurologist, orthopedic surgeon) whose report is submitted to the Agency after which it is forwarded to DAS.

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Carskadon elaborated on the duties performed by Dr. Weddington for the DAS. He said that Dr. Weddington is instructed to review the entire file of the applicant, including the circumstances surrounding the injury, and the doctor's report. Dr. Weddington determines the nature and extent of the claimed injury and "the conditions that are used as the basis for payment". If there are different opinions between the employee's doctor and Dr. Weddington, DAS "complies" with Dr. Weddington's opinion, according to Carskadon.

DISCUSSION

The Union has raised various questions with regard to the application and interpretation by the State of Appendix K. Before considering these questions, it should be noted that the DAS is the State agency that is assigned to administer the program in question even though such duty "is not explicitly spelled out in Article 34.03 and Appendix K". Brundige acknowledged that this intent, which was communicated to the Union, was behind the language contained in Appendix K.

1. MEDICAL ELIGIBILITY

The Union contends that "there are no principled standards for determining whether an employee is disabled, other than the opinion of a single doctor who serves as a medical consultant and reviews files for the DAS". The Union goes on to claim that if the employee's physician certifies that the employe is disabled then the employee meets the occupational injury leave requirements.

Brundige indicated that it was the "intent" of the parties to vest in the DAS the authority to allow or disallow claims for occupational injury leave. In support of such "intent", Brundige referred to Paragraphs 4 and 5 of Appendix K.

Paragraph 4 states as follows:

> "4. A statement of circumstances of the injury shall be filed with the Director of Administrative Services by the employee's Appointing Authority. This statement shall show conclusively that the injury was sustained in the line of duty and was inflicted by an inmate, patient, client, youth or student and did not result from accident or from misbehavior or negligence on the part of the employee. A statement by the injured employee recounting the circumstances of the injury shall accompany the Appointing Authority's statement.
>
> 5. The Appointing Authority shall also obtain and file with the Director of Administrative Services the report

of a physician designated by the Director of Administrative Services as to the nature and extent of the employee's injury."

In light of the language contained in Paragraph 4, I have concluded that it is implicit that the authority is vested in the DAS to determine whether the statement of circumstances filed with it, shows "conclusively" that the injury was sustained in the line of duty and was inflicted by a person in any of the categories set forth in Paragraph 4 and did not result from accident, or from misbehavior or negligence on the part of the employee. In light of the terms of Paragraph 4, I do not believe it is reasonable to infer that the DAS is merely a repository for the filing of such statements of circumstances. Thus, it is the DAS which is to make the determination of a conclusive showing concerning an in the line of duty injury by a person in any of the categories set forth in Paragraph 4 and that the accident did not occur from accident, misbehavior or negligence of the applicant. However, it must be underscored that the DAS is vested with the authority to make these determinations in the first instance. Should the Union disagree with the DAS it may resort to the grievance procedure after which the dispute may be carried to arbitration.

The Union's focus concerns the failure to include medical eligibility standards to qualify for occupational leave injury. It is true that Appendix K is silent concerning medical eligibility standards.

However, the inclusion of Paragraph 5 which Brundige emphasized, indicates that it is the DAS physician who is authorized to determine the nature and extent of the employee's injury. Thus, as Carskadon explained, the DAS medical consultant, Dr. Weddington, reviews the entire file including the report and findings of the employee's physician to determine whether in his medical judgment the employee qualifies for occupational injury leave. I have concluded that it is implicit in Paragraph 5 that such authority is vested in the DAS. To decide otherwise would render the terms of Paragraph 5 meaningless. After the employee's treating physician's report and findings are submitted by the Appointing Authority, the medical consultant's responsibility is not merely to submit a report of the nature and extent of the employee's injury which has already been determined by the employee's attending physician. Such a meaningless task by the DAS could not have been reasonably intended given the terms of Paragraph 5. Thus I have concluded that Paragraph 5 authorizes the DAS by its medical consultant to determine whether the employee comes within the meaning and scope of Article 34.04 and Appendix K.

It is true that Appendix K fails to set forth medical eligibility standards. Thus, Appendix K contemplates that without express standards for determining whether an employee is disabled, the opinion of the DAS medical consultant prevails, despite a different medical judgment by the employee's attending physician. The Union urges the Arbitrator to determine that only the employee's physician shall determine whether an employee is disabled in order to qualify

for occupational injury leave. A corollary to this claim is that the DAS is prohibited from "medically second guessing" or prevailing over the medical judgment of the employee's physician in determining the issue of the employee's disability. To merely replace one (1) medical judgment not based upon express medical standards for another judgment which also lacks express medical standards does not resolve the Union's claim that Appendix K lacks medical eligibility standards. The failure of Appendix K to include express medical standards is not resolved by requiring the medical judgment of the employee's physician to prevail over the medical judgment of the DAS medical consultant. The failure of Appendix K to contain medical eligibility standards is not remedied by the medical judgment of the employee's physician. To be sure, the Arbitrator is not authorized to supply such medical standards. To do so would exceed the proper limits of my contractual authority.

However, this is not to indicate that the employee who is denied occupational injury leave despite his physician's medical judgment, cannot carry his claim beyond the judgment of the DAS medical consultant who disapproves the claim. The matter may be carried to the dispute resolution procedure agreed upon by the parties, namely the grievance procedure and then arbitration. Such issues are not unusual in arbitration. Issues which center on conflicting medical opinions concerning physical or mental condition as a safety hazard at work are similar to the issues that would surface concerning disputes over whether an employee is disabled under Appendix K. See, e.g. *Reynolds Metal Co*, 43 LA 734 (Boles, 1964)--Heart Disease; *Southwest*

Forest Industries, 43 LA 734 (Cohen, 1982)--Obesity; *Hughes Aircraft Co*, 41 LA 435 (Block, 1963)--Fainting Spells; *Great Atlantic & Pacific Tea Co*, 41 LA 278 (Scheiber, 1963)--Visual Problems; and *E.W. Bliss Co*, 43 LA 217 (Klein, 1964)--Diabetes. These cases depend "mainly upon medical evidence and evidence concerning Safety aspects of the grievant's condition as it relates to his work". Elkouri and Elkouri, *How Arbitration Works*, Fourth Edition, (BNA, 1985) at page 722.

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2. RETURN TO ACTIVE WORK STATUS

So far, the discussion has been concerned with whether it is the DAS or the employee's physician who determines medical eligibility under the program. However, Paragraph 6 provides:

> "The employee shall be obligated to receive necessary medical treatment and to return to active work status at the earliest time permitted by his/her attending physician."

Paragraph 6 requires that once an employee is qualified to receive occupational injury leave the employee is required "to receive necessary medical treatment". There still remains the question of when the employee is required to return to work after qualifying for occupational injury leave. I have concluded that the judgment of the employee's attending physician controls if there is a dispute with the State on when the employee is to return to active work status. The

terms of Paragraph 6 are clear and unequivocal in providing that the employee is "to return to active work status at the earliest time permitted by his/her attending physician". Brundige testified that
13 the terms of Paragraph 6 indicated concern for employees not to return too early to work so as not to aggravate pre-existing conditions. Brundige's testimony does not vary the clear and simple meaning based upon the express language of Paragraph 6, that the employee's doctor determines the duration of the leave, once the employee is determined to be eligible to obtain the leave.

A common sense appraisal of the terms of Paragraph 6 indicates that the duration of the leave is to be determined by the employee's physician. Since the employee is "obligated to receive necessary medical treatment" pursuant to the terms of Paragraph 6, it is the employee's physician that will be rendering such "necessary medical treatment". Accordingly, it is the employee's physician, rather than the DAS medical consultant who is in the best position to determine the employee's "return to active work status at the earliest time * *."

3. **WORKERS' COMPENSATION**

The Union indicates that if the Arbitrator rejects the Union's claim that under Appendix K, the employee's physician is authorized to determine an employee's medical eligibility for occupational injury leave, in the alternative, the standards for occupational injury leave should be the same as the standards required for workers' compensation.

Paragraph 1 of Appendix K provides that the compensation received by an employe who qualifies for occupational injury leave
14 "shall be in lieu of workers compensation". The last two (2) sentences of Paragraph 1 then states:

> "* * The employee may apply for Workers' Compensation while he/she is receiving occupational injury leave. Workers' Compensation may be received, if awarded, by the employe after the occupational injury leave is exhausted."

There is nothing in the Appendix to indicate that the standards of Workers' Compensation are to apply to the leave program in question. Whether such standards are applicable to the facts and circumstances of a particular case are within the discretionary judgment of DAS, subject to the grievance procedure and arbitration.

At the hearing Carskadon was asked whether it "is possible for an employee to be eligible for Workers' Compensation benefits but not be eligible for occupational injury leave, where the employee-line-of-duty injury does not arise from the employee's accident, misbehavior or negligence. He answered "yes and no" and provided two (2) scenarios to support his response. As the Union indicates, in some cases, the State utilizes Workers' Compensation standards, and in other cases it does not apply such standards. According to the Union, the State may approve an employee's claim for Workers'

Compensation and yet the same employee may be denied occupational injury leave based upon the same doctor's examination. It may very well be true that the purpose behind occupational injury leave is for an employee to receive 100% compensation, and not the reduced amount of 66 2/3 per cent rate of Workers' Compensation, when such employee has been injured by a person within the designated categories st forth in Paragraph 1 of Appendix K. However, it is a fundamental principle in arbitration, that the bargain be it good or bad for either party is nonetheless the bargain which has been struck by the parties. As the Arbitrator, I am totally and completely without authority to alter and vary the parties' bargain. It is enough to state that were I to establish workers' compensation medical eligibility standards for the administration of the occupational injury leave program, I would be adding to the terms of the contract. Indeed, I would be writing such terms for the parties. No such authority has been given to me by the parties.

4. PRE-EXISTING INJURY

Carskadon indicated that Paragraph 1 of Appendix K "implies a new injury". Carskadon was asked whether an employee who previously underwent a hernia operation and is kicked by a resident some years later would be entitled to receive occupational injury leave. He stated that it "is the doctor's call".

There is nothing in Paragraph 1 which expressly or impliedly provides that only a new injury entitles an employee to receive

occupational leave. Paragraph 1 refers to an employee who suffers a "bodily injury". These terms cannot be reasonably understood to be limited to a "new injury". I have concluded that the terms "bodily
16 injury" may also include an aggravation of pre-existing injury. Had the parties intended "bodily injury" to be limited to "new injury" Appendix K would have expressly provided for such terms. Where there has been a pre-existing injury, which has been aggravated due to the act of a person in any of the categories referred to in Paragraph 1 the employee may be entitled to receive occupational injury leave. To automatically disqualify an employee from the benefits of the program because of a pre-existing injury is unwarranted, in light of the language contained in Paragraph 1. Whether an employee is entitled to obtain occupational injury pay due to a "bodily injury" which aggravates a pre-existing injury" will depend on the facts and circumstances of each case.

CONCLUSION

The Union questioned the quality of medical examinations given by State-assigned doctors. The Arbitrator lacks the authority to set forth in detail the kind and quality of the medical examinations that are given by State-assigned doctors, in light of the factual record in this case.

Moreover, the Union indicates that there is no explicit appeal procedure by an applicant who is determined by the State not eligible to receive occupational injury leave. The Arbitrator is without

authority to write such an appeal procedure into Appendix K. As I have previously established, the grievance procedure, culminating in arbitration may be resorted to, in the event the State disapproves of an applicant for occupational injury leave.

Finally, the Union argues that where the language in Appendix K is ambiguous, its construction should be construed against the author. Thus, since the State drafted Appendix K, the Union, in effect, claims that since the State by exactness of expression can draft language without ambiguity, doubts arising from ambiguity in the language of Appendix K should be resolved against the State.

Brundige's testimony was undisputed on the negotiations preceding the inclusion of Article 34.04 and Appendix K into the 1986 Agreement. He indicated that drafts of Appendix K went to the Union until it was included in the 1986 Agreement. Brundige added that after the parties engaged in the "process of changing words and debating commas", the Union assented to Appendix K. In any event, since a Labor Agreement is negotiated by parties of relatively equal bargaining power, each having the opportunity to clarify its terms, Arbitrators have recognized that "any ambiguity inherent in the signed agreement [is] thus the joint and equal responsibility of both parties". *Crescent Warehouse Co*, 10 LA 1022, 1024 (1948). The evidentiary record establishes that the Union had the opportunity to clarify the terms of Appendix K before it was agreed upon by the parties. As a result, I cannot conclude that any ambiguity in Appendix K is to be construed against the State, which drafted its terms.

AWARD

18 In light of the aforementioned considerations,

1. Pursuant to Appendix K, the DAS is vested with authority to administer the occupational injury leave program.

2. It is the medical judgment of the DAS medical consultant, in the first instance, which determines whether an employee qualifies for occupational injury leave under the terms of Appendix K. If there is a dispute between the DAS medical consultant and the employee's physician concerning eligibility for occupational injury leave, the dispute may be submitted for resolution to the grievance procedure, and then arbitration.

3. The employee's physician determines when the employee is required to return to active work status.

4. There is nothing in Appendix K to indicate that the standards of Workers' Compensation must apply to the occupational injury leave program. Whether such standards are applicable are within the discretionary judgment of DAS. Should a dispute arise between the parties, the employee may resort to the grievance procedure culminating in arbitration.

5. The terms "bodily injury" in Paragraph 1 of Appendix K includes aggravation of a pre-existing injury. Such a determination depends on the facts and circumstances of a particular case.

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6. The Arbitrator cannot assess the quality of medical examinations given by State-assigned doctors. Questions concerning the quality of a medical examination, provided there is adequate evidence, may be made by an Arbitrator, should such a case arise in the future.

7. The Arbitrator lacks contractual authority to establish an appeal procedure when the State rejects a claim for occupational injury leave. As previously stated, the grievance procedure culminating in arbitration may be resorted to, in the event the State disapproves of an applicant for occupational injury leave.

Dated: February 14, 1992

HYMAN COHEN, Esq.

II

THE RUTH JOHNSON CASE

On or about April 11, 1989, Ruth Johnson filed a grievance with the Ohio Department of Mental Retardation/Warrensville Developmental Center, the "State", in which she protested the
20 disapproval of her application for occupational injury leave. The grievance was denied by the State after which it was appealed to Steps 3 and 4 of the Grievance Procedure contained in the Agreement with the Ohio Civil Service Employees, Local 11, AFSCME, AFL-CIO, the "Union". The State denied the grievance at Steps 3 and 4. A "settlement agreement" was entered into between the State and Union which is in dispute and will be discussed later in this decision. On December 28, 1989 the Grievant's claim for occupational injury leave was denied by Haven Carskadon, Claims Administrator, Administrative Services, Injury Pay Section of the Ohio Department of Administrative Services (DAS). The grievance was then submitted to arbitration.

FACTUAL OVERVIEW

Since 1988 the Grievant has been employed by the State as a Hospital Aide at its Warrensville Developmental Center. On February 11, 1989 she was standing near the "xerox machine" in the administration building at the Developmental Center. While talking to a telephone operator, a resident "came down the hall" and approached her at the desk. He then shoved her, causing her "to hit her back against the counter of the telephone switchboard and left". When the incident occurred, the Grievant, who was Chief Steward at the Developmental Center, had permission from her supervisor to obtain

copies of "papers needed for a grievance", and was on "union business".

21 On February 11, 1989, the Grievant filed an application for occupational injury leave and workers' compensation benefits. Denying her application, Carskadon stated: "* * the employee was not performing a service for the employer, rather she was on "union business" per the appointing authority".

On April 11, 1989 the Grievant filed a grievance with the State protesting the denial of her claim for occupational leave. As a result of a Step 3 hearing held on May 10, 1989, the Ohio Department of Mental Retardation and Developmental Disabilities (MR/DD) on June 5, 1989 denied the grievance while stating the following:

> "In any case, the ultimate disposition of this grievance is beyond ODMR/DD's ability to control. The decision to accept or deny an Occupational Injury Leave claim is not made by this agency. For this reason, the conclusion must be that the grievance is not resolvable at Step 3."

At Step 4, Dick Daubenmire, the MR/DD Contract Compliance Chief, denied the grievance, on July 14, 1989, because "at the time of [her] injury, [she] was not performing the duties of her position * *." Thus, according to Daubenmire" [her] injury did not occur while [she] was "in the line of duty".

On September 26, 1989, MR/DD and the Office of Collective Bargaining of the State of Ohio (OCB) and the Grievant and Union representatives entered into a "settlement agreement", which is an
22 issue that is critical to the resolution of the instant dispute and will be considered later in this decision.

After the September 26, 1989 "settlement agreement" was entered into by the parties, the Grievant's application for occupational injury leave was re-submitted on October 24, 1989. Since the Grievant did not receive her regular rate of pay for the time that she was off due to the injury which she suffered on February 11, 1989, she expressed her concern to EEO Officer Ruth B. Lee, who wrote a letter to Supervisor Brian Henry, of MR/DD. In her letter, dated December 11, 1989, Lee referred to the Grievant's concern over the disposition of her occupational injury leave claim "that was won as the results (sic) of a filed grievance". Lee concluded her letter to Henry, by requesting him to advise her "as to the status of claim".

On December 28, 1989, Carskadon denied the Grievant's claim for occupational injury. He stated the basis for his denial of the Grievant's claim as follows:

> "** THE 2/11/89 INJURY WAS HEARD BY THE INDUSTRIAL COMMISSION 7/11/89 AND WAS DENIED BECAUSE THE COMMISSION DETERMINED THE INCIDENT WAS NOT SO SUBSTANTIAL AS TO ESTABLISH A NEW INJURY / WORKERS' COMPENSATION CLAIM. THE INJURY WAS RELATED TO OLD

WORKERS' COMPENSATION CLAIMS (79-472 19 AND 77-38441).

THE DENIAL OF 3/23/89 IS AFFIRMED. EVEN THOUGH
23 NORTHEAST OHIO DEVELOPMENTAL CENTER HAS WITHDRAWN THEIR OBJECTION (BASED ON EMPLOYEE NOT PERFORMING A SERVICE FOR EMPLOYER), THIS EMPLOYEE DID NOT SUSTAIN A NEW INJURY".

In light of this overview of the facts, the grievance went to arbitration.

I.

DISCUSSION

ARBITRABILITY

The State raises a threshold issue which must be resolved before the merits of the instant grievance can be discussed. On September 26, 1989, the Grievant, Union representatives, David Norris who represented the OCB, Edward L. Ostrowski, MR/DD Labor Relations Coordinator and Jason Hooks, Labor Relations Officer, MR/DD, signed a "settlement agreement" at a 4 1/2 step meeting. The State contends that under the settlement agreement, it agreed to withdraw its objection to the Grievant's "OIL claim based on the employee not performing a service for the Employer" in exchange for the Grievant withdrawing her grievance. Whether the State's view of the "settlement agreement" is supported by the evidentiary record, must be thoroughly considered.

It would be useful to highlight several provisions of the settlement agreement. The agreement recognizes that the Grievant
24 and the Union assert the claim that "the Grievant was denied OIL inappropriately". The agreement further indicates that "MR/DD denies any liability in connection with the alleged claim". In order to reach a full and final settlement of all matters arising out of the claim, MR/DD and OCB agree to: "withdrawl (sic) their objection to Ruth Johnson's OIL claim based on the employee not performing a service for the Employer". Moreover, the following printed clause is contained in the Agreement:

> "2. Employee and OCSEA/AFSCME agree to withdraw the aforementioned grievance and waive any and all rights they may currently or subsequently possess to receive any reparation, restitution or redress for the events which formed the basis of the aforementioned grievance or claim, including the right to have the grievance resolved through arbitration, or through resort to administrative appeal or through the institution of legal action."

After carefully reviewing the evidentiary record, and based upon the well established contract principle of "mistake", I have concluded that the settlement agreement may be avoided by the Union and the Grievant. In other words, "where both parties assume the existence of a certain state of facts as the basis on which they

enter into a transaction, the transaction can be avoided by a party who is harmed, if the assumption is erroneous * *. It is the assumed existence of the fact to which the mistake relates as the basis on which
25 the parties bargained, that is important". *International Harvester Co*, 17 LA 592 (Forrester, 1951) which cites "the comment" under Section 510 of the Restatement of the Law of Contracts" for the aforementioned contracts principle of "mistake".

An explanation of how this principle applies to the evidence concerning the settlement agreement is very much in order. The State claims that the withdrawal of its objection to the Grievant's "OIL claim" was based on the employee not performing a service for the Employer". Thus the assumption by the State was that in exchange for the withdrawal of the basis for its objection to the Grievant's claim, the Union and Grievant agreed to withdraw the grievance.

At odds with the assumption by the State, is the assumption by the Union and the Grievant. They assumed that the State would grant the Grievant occupational injury leave compensation by reason of the State's withdrawal of its refusal to grant occupational injury leave to the grievance filed by the Grievant.

The Union's assumption has a reasonable basis. On March 23, 1988 Carskadon denied the Grievant's claim for occupational leave because "she was not performing a service for the Employer, rather she was on "union business" per the Appointing Authority". As a result of Carskadon's decision, the instant grievance was filed with the

State on April 11, 1989 "due to the disapproval of" occupational injury leave. The relief requested by the Grievant in her own words was "to be made whole" or, "paid for my time I lost". At Step 4, Daubenmire, 26 the Contract Compliance Chief, DAS denied the grievance by utilizing the same reason given by Carskadon, namely, that the Grievant's injury did not occur while she was in the line of duty.

In light of these events it is reasonable for the Grievant and the Union to assume that by withdrawing its objection to the grievance because she had not performed a service for the Employer, the State agreed to grant the grievance in favor of the Grievant. If all the State was doing was merely to withdraw the basis for the denial of the grievance that was utilized by Carskadon and Daubenmire, it is nothing less than astonishing that it would enter into a settlement agreement with the Union and the Grievant. Put another way, in effect, the State claims that the State's denial continued but it entered into a settlement agreement by agreeing to withdraw the basis for its denial. However, the State at any time, could have exercised its discretion to withdraw the basis for its denial without entering into a settlement agreement.

Moreover, the instant grievance was filed because the Grievant's claim for occupational injury leave compensation was denied. The grievance was not filed because of the State's reason for the denial of the Grievant's claim for leave; it was filed because the claim was denied. The Grievant's request for relief by the State was not to withdraw its basis for the rejection of her claim for occupational

injury leave; rather, it was to be made whole and be paid for time that she lost.

27 Furthermore, there is the testimony surrounding the settlement agreement which must be considered. The Grievant said that at Step 4 1/2 when the settlement agreement was entered into by the parties, Ostrowski said that "there would be no problem on payment". It is significant that Ostrowski did not contradict the Grievant's testimony that there would be "no problem on payment". He said that he did "not recall" making such a statement. Ostrowski went on to state that he discussed his "intention" in Hook's office with John Hall of the Union's staff and that he could not state whether the Grievant was present at the time. Ostrowski also stated that he had "no idea of what the disposition of the grievance would be * *." Ostrowski said that he signed the settlement agreement "only to remove" the basis for the denial of the grievance.

Norris drafted the settlement agreement. The Grievant incorrectly stated that Norris was not at the step 4 1/2 meeting when the settlement agreement was signed. Indeed, Norris signed the agreement. I do not find the Grievant's testimony that Norris was not at the meeting fatal to the Union's assumption that the State would honor the Grievant's request for relief which was set forth in her grievance. The Grievant's testimony on this aspect of the meeting does not cast any doubt on the Union's reasonable assumption behind the settlement agreement, given the evidence in the record. Norris indicated at the meeting that "the only thing that we were doing is

withdrawing" the objection to the grievance "only because of the union business issue".

28 Moreover, there was a subsequent 4 1/2 meeting held in 1990, when the Grievant said that she "came down for a hearing". She said that Norris was "surprised" to see her. Referring to her grievance, he said "that was settled--you should have gotten your payment". The Grievant said that she responded by asking "where is the paper work". Norris said that he may have expressed surprise at the 1990 4 1/2 step meeting when the Grievant "raised the issue" but he did not say to her that he "was surprised that she did not receive the money". Norris added that his "surprise" was that she raised the issue again which he felt had been resolved on September 26, 1989.

After the settlement agreement was executed on September 26, 1989 the Grievant met with the Developmental Center's "EEO Officer" Ruth Lee. The Grievant related the events which occurred on September 26. As a result, Lee "resubmitted" the Grievant's application for occupational injury pay on October 24, 1989. Since the Grievant had not yet received occupational injury pay, she met with Lee who wrote a letter to Supervisor Brian Henry on December 11, 1989. In her letter to Henry, Lee indicated that at the Grievant's request, she was inquiring about "the disposition of her O.I.L. claim--that was won as the result (sic) of a filed grievance". Thus, the Grievant was under the impression that her grievance was "won" as a result of the execution of the settlement agreement.

Viewing the totality of the evidence in the record, I have determined that the evidence is inconclusive as to the facts underlying the settlement agreement that was executed on September 26, 1989.

29 In light of the entire factual record, I have concluded that it would be unconscionable to enforce the literal language of the settlement agreement. In pertinent part, the agreement states in an unidentified person's handwriting that "the Grievant was denied OIL inappropriately". The agreement then goes on to provide in an unidentified person's handwriting that MR/DD and OCB agree to: "withdraw (sic) their objection to Ruth Johnson's OIL claim based on the employee not performing a service for the employer". Finally, in pertinent part there is a printed clause 2 of the agreement which provides for the waiver by the "Employee and OCSEA/AFSCME of the aforementioned grievance * *." I find these provisions conflicting. In my judgment they constitute "exceptional circumstances, under which even the courts, "following the most strict legal principles of evidence and contract interpretation, will look behind the contract". See, *International Harvester Co*, at page 594. Accordingly, I have concluded that both parties assumed the existence of facts as the basis on which they entered into the settlement agreement. Since the assumption is found to be erroneous, I find that the settlement agreement may be avoided by the Union and the Grievant.

II

THE DAS DECISION

Having established that the settlement agreement may be avoided by the Union and the Grievant and thus, the grievance is arbitrable, I turn to Carskadon's decision denying the Grievant's application for occupational injury pay. In his decision, dated December 28, Carskadon denied the Grievant's claim because she "did not sustain a new injury". As he elaborated in his decision, the February 11, 1989 injury was denied by the Industrial Commission which determined that "the incident was not so substantial as to establish a new injury/workers' compensation claim. The injury was related to old workers' compensation claims (79-47219 and 77-38441)".

There is nothing in Appendix K to warrant the denial of occupational injury pay based upon the denial of a workers' compensation claim because the injury was related to old workers' compensation claims, and was not so substantial as to establish a new injury/workers' compensation claim". Appendix K contains a contractual rather than a statutory scheme with which to administer the program in question. The contractual criteria set forth in Appendix K, including "bodily injury" caused by a person within one (1) of five (5) categories, "in the facilities" of certain agencies, that a person must be "disabled as a result of such injury", and is to receive the "regular rate of pay" but "in no case to exceed 960 hours" is different than the statutory criteria that the Workers' Compensation Bureau is required to follow. Indeed, the last sentence of Paragraph 1 of Appendix K indicates that occupational injury pay and workers' compensation are not synonymous. The last sentence states: "* *

Workers' Compensation may be received, if awarded, by the employee after the occupational injury leave is exhausted". This sentence implies that "after the occupational injury leave is exhausted", 31 workers compensation may or may not be received. This conclusion is based upon the terms, "if awarded" which is contained in the last sentence of Paragraph 1.

I have concluded that the terms "bodily injury" cannot be reasonable interpreted to mean a "new injury". Had the phrase "new injury" been intended by the parties, they could have easily included such terms within Paragraph 1. However, they failed to do so. Thus, an employee of one of the agencies designated in Paragraph 1 may suffer "bodily injury" when a pre-existing injury is aggravated by a person within one (1) of the categories included in Paragraph 1. Whether a "bodily injury" due to an aggravation of a pre-existing injury within the scope and meaning of Appendix K and Article 34.04 has been suffered by an employee must be determined on a case by case basis.

Turning to the evidence contained in the 3rd step hearing response, dated June 5, 1989 by Ostrowski and John A. Beattie, Asst. Deputy Director, ODMR/DD Office of Employee Relations, the response in relevant part, provides as follows:

> "The grievant filed application for Occupational Injury Leave and Workers' Compensation benefits. She first received medical attention for

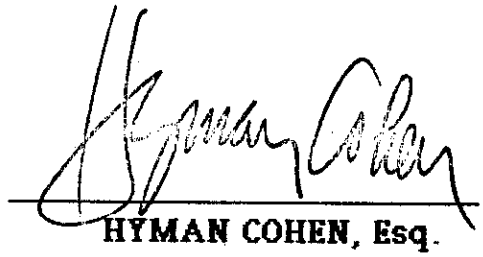
injury on February 20, 1989. Her attending physician, as a result of this February 20, 1989 examination, completed a report on February 27, 1989, in which the grievant was
32 diagnosed as suffering from "Thoracic - lumbar spine strain". In the 17 line section of the physician's report entitled "List Physical Restriction, Results of Objective Testing, any other comments:", the physician used 3/4 of a line to indicate "spasm, tenderness limited range of motion thoracic and lumbar spine." The physician further indicated that the grievant's disability began February 11, 1989 with an estimated return to work on April 1, 1989."

No evidence was produced by the State to contest these findings. Accordingly, I have concluded that the Grievant's attending physician's medical judgment meets the criteria set forth in Appendix K to entitle her to occupational injury pay. The Grievant is entitled to be paid 285 hours of occupational injury pay.

AWARD

In light of the aforementioned considerations, the grievance is sustained.

Dated: February 17, 1992
Cuyahoga County
Cleveland, Ohio



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