In the Matter of Arbitration Between

OHIO DEPARTMENT OF HIGHWAY SAFETY
DIVISION OF STATE HIGHWAY PATROL

and

FRATERNAL ORDER OF POLICE
OHIO LABOR COUNCIL, INC.
BARGAINING UNIT 1

Re: Gr. 15-03-910903-094-04-01
Tpr. E.M. Escola

Hearing held February 12, 1993 in Columbus, Ohio

Decision issued March 11, 1993

APPEARANCES

State
Anne K. Van Scoy, Advocate
Terri Decker, Second Chair
Lt. James Walker, Staff Lieutenant

Union
Kay Cremeans, General Counsel FOP/OLC
Tpr. Eric M. Escola, Grievant

Arbitrator
Douglas E. Ray

I. BACKGROUND

Grievant has been an Ohio State Highway Patrol Trooper for 16 years. His duties include investigating crashes, enforcing the traffic laws, arresting motorists, investigating crimes on State institutions or on State property, providing security to the Governor and other duties. On June 11, 1991, he fell and injured his right wrist while representing the Highway Patrol in a football game at the Annual Police Olympics. He went to a medical clinic the next day and missed work for a few days due to the injury. Grievant returned to work on June 22, 1991, and applied for occupational injury leave for the six days missed. This request was denied on the basis that the injury was received while Grievant was voluntarily participating in an off duty event.

On July 14, 1991, Grievant was injured while on duty. Working the 6 am to 2 pm shift, he was driving north on interstate 77 en route to provide Governor security in Cleveland. He stopped to assist a disabled motorist and the two young women in the car asked for his help in changing the tire. While attempting to remove the lug nuts, which Grievant testifed were rusted and had apparently not been removed for a number of years, he injured his right wrist, forearm and elbow. He completed his shift and sought medical attention the next day. Due to this injury, he missed a number of days of work, not returning to work until November 7, 1991.

On July 18, 1991, Grievant filed an application for occupational injury leave. Although recommended by the Post and District Commanders, the application was disapproved by the Superintendent after a review of the records. Grievant filed a grievance dated September 3, 1991, requesting that the injury be approved as Occupational Injury Leave. The grievance was processed through the steps of the grievance process without resolution until it reached arbitration before the undersigned arbitrator. An arbitration hearing was held February 12, 1993 in Columbus, Ohio. At hearing, the parties stipulated that the matter was properly before the arbitrator.

II. ISSUE

The parties stipulated that the issue is:
Based on Article 46.05 of the collective bargaining unit agreement, was Tpr. Escola's July 18, 1991 request for occupational injury leave reasonably denied? If not, what shall the remedy be?

III. COLLECTIVE BARGAINING AGREEMENT

Article 46 of the collective bargaining agreement provides for occupational injury leave under O.R.C. 5503. It provides for 1500 hours occupational injury leave at the regular rate per independent injury incurred in the line of duty, with the approval of the superintendent. In Section 46.02, it provides that injuries incurred while on duty shall entitle an employee to coverage and that an injury on duty which aggravates a previous injury will be considered

an independent injury. Under Section 46.03, occupational injury leave may not be used within seven days of the date of the injury (normal sick leave is to be used) and Section 46.05 provides that "Authority to approve or disapprove any request for occupational leave rests with the Superintendent. Requests for O.I.L. shall not be unreasonably denied." Under Section 46.06, an employee's assigned post is to make reasonable efforts to arrange for light duty for employees experiencing partial disability.

IV. POSITIONS OF THE PARTIES

The parties made a number of arguments at hearing. They are briefly summarized below.

A. The Union

The Union argues that Grievant met the contractual conditions for occupational injury leave and that the grievance should be sustained. The Union stresses that the contract gives 1500 hours occupational injury leave if the injury occurs on duty. The Union asserts that the injury in question occurred on duty while Grievant was assisting two teenaged stranded women motorists to change a tire. Grievant was hurt because the lug nuts were "practically molded to the wheel."

The Union argues that whether or not the July 14 injury aggravated the June 11 injury or not is immaterial because Section 46.02 of the contract specifically states that an injury on duty which aggravates a previous injury will be considered an independent injury.

With regard to management arguments that Grievant went back to work too soon, the Union points to his testimony that he could perform the duties listed in his job description and that, after returning to work, he had assisted other stranded motorists, changed a tire, pushed a car and lifted an individual into an ambulance without problems. The Union notes that the clinic that released Grievant to return to work did not request him to work light duty and that he worked three weeks without problem before the injury occurred.

The Union argues that it was the intent of the contract to provide O.I.L. in situations like this for on duty injuries and asks the arbitrator to sustain the grievance and award the occupational injury leave Grievant would have received had his application not been denied.

B. The State

The State argues that the occupational injury leave was properly disapproved and asks that the grievance be denied. The State stresses that the contract provides that the decision is to be made by the Superintendent and that an arbitrator does not have power to add to or subtract from the provisions of the contract. The State asserts that the Union has failed to carry its burden of proof to establish that the decision to disapprove was unreasonable.

The State notes that these were two injuries in close proximity and that Grievant had been having problems just 4 days before the second injury when he consulted a Dr. Knell.

Dr. Knell's report indicates a discussion of limited duty and the State notes that the Superintendent would have had authority to put Grievant on light duty.

The State requests the arbitrator to review all the medical documents and asserts that, after doing so, the arbitrator should find that the denial was reasonable. The State argues that allowing the grievance would put the State in a position of financing off duty injuries at 100 % of pay. Here Grievant received disability pay at the 70% rate and the State asserts that this was reasonable. In summary, the State argues that Grievant was injured off duty, returned to work before he was healed and aggravated the same off duty injury when performing a work duty. The State asks that the grievance be denied.

V. DECISION AND ANALYSIS

The arbitrator has reviewed the collective bargaining agreement, the testimony of witnesses, the exhibits and the arguments of the parties in reaching a decision in this matter. At the outset, the arbitrator notes that he is convinced of the good faith of both parties to this proceeding and finds this a difficult case.

Section 46.01 states that occupational injury leave is to be granted "with the approval of the superintendent." Section 46.05 states that "Authority to approve or disapprove any request for occupational leave rests with the Superintendent. Requests for O.I.L. shall not be unreasonably denied." Thus, an arbitrator should not

generally interfere with the authority of the Superintendent in this area. Only if the Union can prove that the request was "unreasonably denied" may the arbitrator intercede.

After fully reviewing the record and the contract, the arbitrator believes that this is one of those extraordinary cases where the Union has established that the denial was not reasonable. The reasons for this ruling follow.

1. Grievant's injury was caused by a specific traumatic incident that would be likely to lead to sudden injury. This is not a case of a gradual aggravation of an off duty condition. Grievant testified credibly that the lug nuts were rusted or corroded and that the driver of the car indicated that they had not been removed for years. Testimony about the worn condition of the tire (down to the cord) would be consistent with the wheel not being removed for years. Similarly consistent was Grievant's testimony that he went to his car to get his own tire iron when the tire iron from the disabled motorist's car proved insufficient. Anyone who has tried to remove a lug nut under similar conditions knows that it can can take an extraordinarily hard and sudden pull to loosen it. As the supervising sergeant on the scene put into his Supervisor's Accident Report, "Employee was using the necessary force to loosen the tightened lug nuts when he sustained the injury." The "necessary force" required in such a situation could easily cause injury without regard to the degree of prior impairment.

2. Grievant was on duty and was performing this task in the line of duty.

3. The medical records, while indicating that Grievant might have used better judgment to protect himself, also contain much information that is consistent with Grievant's testimony. For example, although Dr. Knell's 7/10/91 report (4 days before the incident) indicates that Grievant was still experiencing discomfort, the report also noted that Grievant indicated the pain had "gradually been quieting down." The report further notes that "Grip presently is pretty good . . .," a notation consistent with Grievant's testimony that his original injury had healed enough so that he was able to do his job. After the second injury, by contrast, medical records indicate that Grievant's grip from the injured hand was very weak. Dr. Knell indicates in his July 10 report that he thought "it should have been immobilized right when he first did it." The problem with relying too much on Dr. Knell's diagnosis to fault Grievant's decision to return to work is that Dr. Knell was not the original treating physician for Grievant's first injury. When Grievant was injured in June, he went to StatCare. StatCare x-rayed and found no fracture, dislocation, joint abnormality or soft tissue calcification. When Grievant returned to work, he was still in the care of StatCare and had not yet received any advice or treatment from Dr. Knell. There was no indication that StatCare recommended that Grievant not return to work. Further, even

Dr. Knell's July 10 report states that "we'll check him back here for followup in 4-5 weeks. If it doesn't start quieting down then I would suggest that we put him back off work." Thus, just 4 days before the injury, Grievant had a strong grip and looked like he had a good chance that the remaining discomfort might "start quieting down."

4. This does not in any way look like a case in which Grievant is trying to malinger or avoid duty while receiving benefits. Nor did it seem that he in any way sought to avoid duty by injuring himself. He returned to duty after his first injury as soon as he thought he was able. After the second injury, he wanted to go back to work before the doctor would let him. Dr. Knell's October 4, 1991 report indicates that Grievant wanted to return to work October 14 but that the doctor would be keeping him off work for another month.

5. Given the nature of the State Highway Patrol as an elite force in which physical fitness is a requirement and a source of pride, it is not surprising that a member would wish to return to work rather than sit at home on disability leave. If a person is to be, in effect, punished by the denial of occupational injury leave for returning to work before all symptoms of a previous injury might be totally gone, he should at least be on notice of this possible consequence. There was no evidence of any warning, regulation or notice indicating that a person with a previous injury will be denied occupational injury leave if

he reinjures the same part of his body. Nor was there any evidence of any warning, notice or regulation indicating when employees were expected to request light duty or that a failure to request light duty would result in a denial of occupational injury leave.

VI. AWARD

The grievance is sustained. The Employer is directed to make Grievant whole for the improper denial of occupational injury leave. The arbitrator will retain jurisdiction for 60 days after this award in the event that the parties are unable to agree as to its implementation.

March 11, 1993

Sylvania, Ohio, County of Lucas

Douglas E. Ray, Arbitrator