

#1694

**IN THE MATTER OF AN ARBITRATION
BETWEEN**

**THE OHIO STATE TROOPERS ASSOCIATION,
IUPA/AFL-CIO**

THE UNION.

AND

**CASE NO: 15-00-020806-0117-04-01
Arbitrator: Jerry B. Sellman
DECISION DATED: August 27, 2003
GRIEVANT: ARTHUR E. WOOD**

**OHIO DEPARTMENT OF PUBLIC SAFETY,
DIVISION OF THE OHIO STATE HIGHWAY PATROL**

THE EMPLOYER,

APPEARANCES:

FOR THE UNION:

Herschel M. Sigall, Esq. - General Counsel, Ohio State Troopers Association IUPA/AFL-CIO,
Representing the Grievant
Elaine N. Silveira - Assistant General Counsel, Ohio State Troopers Association
IUPA/AFL-CIO, Assisting in the Presentation
Dennis Gorski - Staff Representative, Ohio State Highway Patrol, IUPA/AFL-CIO
Trooper Arthur E. Wood - Trooper, Ohio State Highway Patrol, Grievant, Witness

FOR THE EMPLOYER:

Lt. Reginald Lumpkin - Office of Human Resources, Ohio State Highway Patrol, Representing
the Employer
Brian Landis - Office of Human Resources, Benefits Unit, Ohio State Highway Patrol, Witness

I. Nature of the Case:

Occupational Injury Leave; Post Traumatic Stress Disorder As Injury. This labor arbitration proceeding was conducted pursuant to the provisions of the Collective Bargaining Agreement (hereinafter referred to as the "Agreement") between the Ohio State Troopers Association Unit I (hereinafter referred to as the "Union") and the State of Ohio Department of Public Safety, Division of the Ohio State Highway Patrol (hereinafter referred to as the "Employer"). This proceeding concerns a grievance filed by Trooper Arthur E. Wood (hereinafter referred to as the "Grievant"). The Grievant challenges the Employer's decision to deny his request for Occupational Injury Leave benefits under Article 46 of the parties' Agreement. The Grievant claims that a qualified doctor determined that he suffered from Post Traumatic Stress Disorder and the condition constituted an "injury" under Article 46 of the Agreement. The Employer does not dispute the diagnosis, but maintains that Occupational Injury Leave benefits are available to troopers only if a physical injury occurs; benefits are not available for work lost due to psychological/psychiatric conditions, such as Post Traumatic Stress Disorder.

The issue in this proceeding is as follows:

Did the Employer violate the provisions of the Collective Bargaining Agreement by denying the Grievant's application for Occupational Injury Leave?

If so, what shall the remedy be?

The applicable provisions in this proceeding are as follows:

COLLECTIVE BARGAINING AGREEMENT

ARTICLE 20 - GRIEVANCE PROCEDURE

Section 20.08(5) - Limitations of the Umpire

Only disputes involving the interpretation, application or alleged violation of a provision of this Agreement shall be subject to arbitration.

The umpire shall have no power to add to, subtract from or modify any of the terms of this Agreement, nor shall the umpire impose on either party a limitation or obligation not specifically required by the language of this Agreement.

ARTICLE 46 - OCCUPATIONAL INJURY LEAVE

Section 46.02 - Injuries

Injuries incurred while on duty acting within the scope of his/her authority and job classification description shall entitle an employee coverage under this Article. An injury on duty which aggravates a previous injury will be considered an independent injury. O.I.L. is not available for injuries incurred during those times when an employee is in the act of arriving or departing from his/her assigned facility if not responding to an emergency or called in by a supervisor, when an employee is engaged in activities of an administrative or clerical nature, when an employee is on a meal or rest break, or when an employee is engaged in any personal business.

OHIO REVISED CODE

O.R.C. 5503.08 - OCCUPATIONAL INJURY LEAVE

Each state highway patrol officer shall, in addition to sick leave benefits provided in Section 124.38 of the Revised Code, be entitled to occupational injury leave. Occupational injury leave of one thousand five hundred hours with pay may, with the approval of the superintendent of the state highway patrol, be used for absence resulting from each independent injury incurred in the line of duty, except that occupational injury leave is not available for injuries incurred during those times when the patrol officer is actually engaged in administrative or clerical duties at a patrol facility, when a patrol officer is on a meal or rest period, or when the patrol officer is engaged in any personal business. The superintendent of the state highway patrol shall, by rule, define those administrative and clerical duties and those situations where the occurrence of an injury does not

entitle the patrol officer to occupational injury leave. Each injury incurred in the line of duty which aggravates a previously existing injury, whether the previously existing injury was so incurred or not, shall be considered an independent injury. When its use is authorized under this section, all occupational injury leave shall be exhausted before any credit is deducted from unused sick leave accumulated under Section 124.38 of the Revised Code, except that, unless otherwise provided by the superintendent of the state highway patrol, occupational injury leave shall not be used for absence occurring within seven calendar days of the injury. During that seven calendar day period, unused sick leave may be used for such an absence.

When occupational injury leave is used, it shall be deducted from the unused balance of the patrol officer's occupational injury leave for that injury on the basis of one hour for every one hour of absence from previously scheduled work.

Before an officer may use occupational injury leave, he shall:

- (A) Apply to the superintendent for permission to use occupational injury leave on a form that requires the patrol officer to explain the nature of his injury and the circumstances under which it occurred; and
- (B) Submit to a medical examination conducted by a physician selected by the superintendent. The physician shall report to the superintendent the results of the examination and whether or not the independent injury prevents the patrol officer from attending work

II. SUMMARY OF THE TESTIMONY AND POSITION OF THE PARTIES:

The facts in this proceeding are not in dispute; it is the application of those facts to the parties' Collective Bargaining Agreement which is in dispute.

The Grievant, Arthur E. Wood, was involved in, or responded to, four (4) job-related critical incidents between October 20, 2000 and April 15, 2002. The incidents included a fatal shooting where shots fired by the Grievant struck the deceased; a subsequent (several months later) high-speed

motor vehicle pursuit at the same location and with extraordinary similarities as the first high-speed pursuit; a fatal motor vehicle crash/fire involving a young man who was trapped in his car and who horribly burned to death in the presence of the trooper; and a motor vehicle fire involving the Grievant's patrol car from which he narrowly escaped severe injury. The Grievant suffered emotional difficulties as a result of these traumatic events and was unable to work. He eventually sought treatment, was diagnosed with Post Traumatic Stress Disorder and received treatment necessary to facilitate his return to full duty.

During the course of the previously stated events, the Grievant applied for Occupational Injury Leave because he had been diagnosed with Post Traumatic Stress Disorder. The Employer reviewed the Grievant's application for Occupational Injury Leave and found no medical documentation to support a physical injury¹. The Employer denied the Grievant's request for Occupational Injury Leave because he failed to provide proof that he had been physically injured in any of the instances related to the Post Traumatic Stress Disorder.

The Employer acknowledged that the Union had provided substantial evidence that the Grievant was involved in four (4) grizzly and horrifying instances over an eighteen (18) month period that would rattle the emotional well-being of most individuals. It points out, however, that in order for the Grievant to be compensated for his time off under the Occupational Injury Leave provisions of the Collective Bargaining Agreement, he must suffer a physical injury, not an emotional injury.

The position of the Union is that any trooper suffering from Post Traumatic Stress Disorder is entitled to Occupational Injury Leave, because it meets the intended definition of the term "injury".

¹The Employer additionally claimed that the application did not include documentation supporting the diagnosis of Post Traumatic Stress Disorder. It is clear, however, that it would have denied the Application even if such documentation was attached.

It argues that Post Traumatic Stress Disorder is an anxiety disorder that can develop after exposure to a terrifying event or ordeal in which grave physical harm occurred or was threatened. Post Traumatic Stress Disorder is an injury to living tissue caused by an extrinsic agent. The injury results in a disordered psychic or behavioral state. The Grievant experienced many of the standard symptoms of Post Traumatic Stress Disorder including sleeplessness, nightmares, night sweats, panic attacks, shortness of breath and reliving the traumatic incidents. Under these circumstances, the Union argues that it is absurd to conceive of a rational Occupational Leave Injury policy where the trooper would receive Occupational Injury Leave due to incapacitation resulting from a trauma to the head in a crash, but not for incapacitation resulting from a crash that yielded a disordered psychic or behavioral state, *e.g.* Post Traumatic Stress Disorder.

The Employer argues that in order for a trooper to be entitled to Occupational Injury Leave, he or she must sustain a physical injury. To find otherwise, the Employer argues, the Arbitrator would be adding to or otherwise modifying the terms of the Collective Bargaining Agreement, which action is prohibited pursuant to Article 20 of the Agreement.

The Employer maintains that a physical injury requirement, as a condition precedent for benefits under the Occupational Injury Leave Provisions of the Agreement, is supported by three (3) factors. First, Occupational Injury Leave is governed by the provisions of Chapter 5503 of the Ohio Revised Code and the Ohio Revised Code infers a physical injury. Ohio Revised Code Section 5503.08 requires that in order to use Occupational Injury Leave, the following must occur:

- (1) The trooper must apply to the superintendent for permission to use Occupational Injury Leave; and
- (2) That trooper must submit to medical exam.

It points out that neither Article 46 of the Collective Bargaining Agreement nor Section 5503.08 of the Ohio Revised Code includes psychological or psychiatric exams in determining a qualifying injury.

Secondly, the Employer argues, the Collective Bargaining Agreement differentiates between medical exams (for physical injuries) and psychological or psychiatric exams (for mental or emotional conditions). Article 39 of the parties' Collective Bargaining Agreement, which refers to circumstances under which the Employer may require an employee to submit to a medical examination, includes the right to require a medical examination or a psychological or psychiatric examination. It reasons that since the parties were aware of the differences between a medical and a psychological or psychiatric examination, the omission of any language requiring a psychological/psychiatric examination in Article 46 by definition excludes Occupational Injury Leave benefits for anything other than a physical injury detected pursuant to a medical examination.

Third, the Employer argues that its past practice regarding the approval of Occupational Injury Leave has been consistent in requiring that troopers demonstrate that they have sustained a physical injury. In two (2) instances dating back to June 1997, the Employer denied Occupational Injury Leave to two troopers who were suffering from Post Traumatic Stress Syndrome and had applied for benefits under Article 46 of the Agreement. In both cases, the Employer denied benefits because the inability to work was not due to a physical injury.²

²One of the troopers involved in the 1997 instance did receive Occupational Injury Leave benefits, but those benefits were related to an actual physical injury which resulted from being shot. When those injuries were healed, the Employer refused to extend the Occupational Injury Leave benefits for psychological or psychiatric reasons. The other officer who witnessed the shooting was denied benefits under Occupational Injury Leave because she did not suffer any physical injury.

III. DISCUSSION AND OPINION:

The issue in this proceeding is not whether the Grievant suffered Post Traumatic Stress Disorder to such a degree that he was prevented from performing the duties of his job; the issue is whether this type of condition can be deemed an "injury" as set forth in Article 46 of the Collective Bargaining Agreement.

Entitlement to Occupational Injury Leave under Article 46 of the Collective Bargaining Agreement is governed by rules promulgated on the subject and the provisions of Ohio Revised Code Section 5503.08. Ohio Revised Code Section 5503.08 provides as follows:

Each state highway patrol officer shall, in addition to sick leave benefits provided in Section 124.38 of the Revised Code, be entitled to occupational injury leave. Occupational injury leave of one thousand five hundred hours with pay may, with the approval of the superintendent of the state highway patrol, be used for absence resulting from each independent injury incurred in the line of duty...

. . .

Before a patrol officer may use Occupational Injury Leave, the patrol officer shall:

-
- (1) Apply to the superintendent for permission to use Occupational Injury Leave on a form that requires the patrol officer to explain the nature of the patrol officer's independent injury and the circumstances under which it occurred; and
 - (2) Submit to a medical examination.

. . .

The superintendent shall appoint to conduct medical examinations under this division individuals authorized by the Revised Code to do so, including any physician assistant, clinical nurse specialist, certified nurse practitioner, or certified nurse-midwife.

Pursuant to this mandate, Article 46 of the parties' Agreement provides for Occupational Injury Leave. Section 46.02 provides the qualifying language for Occupational Injury Leave benefits:

"Injuries incurred while on duty acting within the scope of his/her authority and job classification description shall entitle an employee coverage under this Article."

There are several exclusions to entitlement to these benefits, but for purposes of this case, none of those exclusions apply.

While both the Ohio Revised Code and the Collective Bargaining Agreement base entitlement to Occupational Injury Leave on an injury being sustained, neither the statutory nor contractual provisions provide a definition of the term "injury". Without a clear definition contained within the provisions, an Arbitrator must ascertain and give effect to the mutual intent of the parties in construing the written Agreement. Here the parties dispute what that mutual intent is and, in order to resolve this dispute, the Arbitrator must apply certain standards for interpreting contract language accepted in the industrial community.

One of the standards used in contract interpretation is giving words their ordinary and popularly accepted meaning in the absence of anything indicating that they were used in a different sense, or that the parties intended some special colloquial meaning. An injury is defined in *Taber's Cyclopedic Medical Dictionary, 18th Edition*, as: "Trauma or damage to some part of the body." At Page 998. In that same publication, trauma is defined as follows: (1) "A physical injury or wound caused by external force or violence" or (2) "An emotional or psychological shock that may produce disordered feelings or behavior."

Under the above definitions, the primary interpretation of injury is physical in nature; it

secondarily includes psychological shock which would include conditions such as Post Traumatic Stress Disorder.

In determining the intent of the parties, one should not only examine the normal and technical usage of words, but should also consider other standards of contract interpretation to make sure that he or she is properly performing his or her duties in not adding to, subtracting from or modifying any of the terms of the Collective Bargaining Agreement.

Another standard for interpreting contract language is to construe the written instrument, not solely from a single word or phrase, but from the instrument as a whole. By doing so, the true intent of the parties is best served. In this regard, the Employer argued that for an injury to qualify for Occupational Leave, it must be a physical injury and not a psychological injury, because of the type of examination required. Under Article 46, in order to be entitled to Occupational Injury Leave, a trooper must submit to a medical exam. Neither Article 46 of the Collective Bargaining Agreement nor Section 5503.08 of the Ohio Revised Code includes psychological/psychiatric exams to determine a qualifying injury. It only requires a medical exam. Article 39 of the Agreement gives the Employer the right to require employees to submit to medical *or* psychological/psychiatric examinations under certain conditions. If any medical conditions are discovered as a result of examinations conducted in accordance with this Article, the employee is be referred to the Employee Assistance Program for medical treatment, as appropriate.

Under the above interpretation, it appears that medical conditions, which would include injuries, as well as psychological conditions, are to be referred for medical treatment. The Arbitrator believes the parties did contemplate differences between medical and psychological examinations.

A third standard in contract interpretation is examining past practice and custom of the

parties. The Employer presented evidence at the hearing concerning its past practice of reviewing applications for Occupational Leave benefits. The Employer submitted the case history of two troopers who requested occupational injury leave for Post Traumatic Stress Disorder. The one trooper's case file revealed that an assailant shot her in the chest and she sustained physical injuries, even though she was wearing a bullet-proof vest. This trooper applied for Occupational Injury Leave on June 30, 1997, which application was approved because she was hospitalized due to her physical injury. She applied for and was granted an extension of Occupational Injury Leave in December of 1997 because her physical injury had not healed. After her injuries healed, even though she was still unable to return to work because she was suffering from the effects of Post Traumatic Stress Disorder, her Occupational Injury Leave was terminated in February 1998.³

In the second instance, another trooper, who was the first backup officer to arrive at the scene of the prior trooper's shooting, found the trooper lying on the ground after being shot in the chest next to a dead suspect. This trooper was eventually diagnosed with Post Traumatic Stress Disorder. This trooper's application for Occupational Injury Leave was not approved because she was not physically injured during the incident that was related to her Post Traumatic Stress Disorder.

After applying the above three standards of contract interpretation to this case, the Arbitrator concludes that a physical injury is a pre-condition to any entitlement to Occupational Injury Leave benefits under Article 46 of the Agreement. Emotional or psychological shocks that may produce disordered feelings or behavior, such as Post Traumatic Stress Disorder, were not intended by the parties to be included in the definition of "injury."

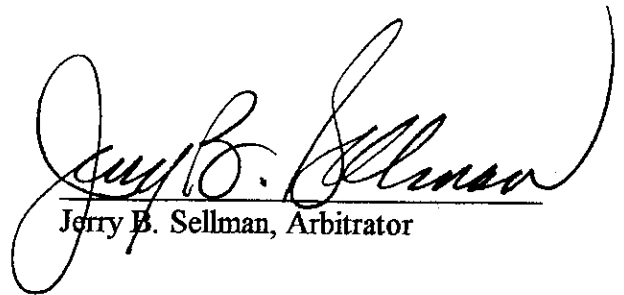
³The Employer testified that even though the Employer terminated her Occupational Injury Leave benefits because her physical injuries had healed, it did work with her in helping to facilitate approval of her Post Traumatic Stress Disorder claim with the Bureau of Worker's Compensation.

The Arbitrator would agree with the Union that Occupational Injury Leave is meant to recognize the dangerous aspect of particular jobs within state service that create a greater risk to health than other jobs. As stated by the Union Advocate, "The usage of sick leave accrual to meet these potential absences caused by the hazardous nature of elements of the job is obviated. Unlike sick leave or other disability provisions, O.I.L. provides for limited time period a "full paycheck", to the officer who is injured in the line of duty." While it would appear in the broader sense that psychological injuries should be included in the definition of "injury" for entitlement to Occupational Injury Leave benefits, the Agreement itself provides otherwise. The current Collective Bargaining Agreement became effective in 2000. At the time of its effective date, the practices of the parties was such that occupational injury leave was granted only when evidence of a physical injury was presented. That was demonstrated through the denial of two applications in 1997. Had the parties intended to include injuries other than physical injuries, it could have included language to that effect in the new (existing) Agreement. They chose not to do so.

Unlike many professions, highway patrol troopers can expect throughout their career to be faced with, from time to time, situations which would cause any normal person emotional and psychological stress. Since these situations have occurred in the past, and troopers have suffered from Post Traumatic Stress Syndrome from them, it would appear that such language would be included in the Agreement if the parties intended it so to be. The parties' past practice and custom indicates to the contrary.

IV. AWARD

For all the reasons and conclusions set forth hereinabove, the Grievance is denied.



Jerry B. Sellman
Jerry B. Sellman, Arbitrator