#1772

IN THE MATTER OF THE ARBITRATION BETWEEN

OHIO STATE TROOPERS ASSOCIATION

and

OHIO DEPARTMENT OF PUBLIC SAFETY,

DIVISION OF THE OHIO STATE HIGHWAY PATROL

AFL-CIO

OCB# 15-00-030529-0075-04-01

Grievant: Michelle M. Depto

Arbitrator: Robert Stein

Advocate for the Employer:

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INTRODUCTION

This matter came on for hearing before the arbitrator pursuant to the terms of the collective bargaining agreement (herein "Agreement') between the Ohio Department of Public Safety, Division of the State Highway Patrol (herein "Department") and the Ohio State Troopers Association, IUPA/AFL-CIO (herein "OSTA"). This agreement is effective from 2003 through 2006. The matter was assigned to Robert G. Stein to arbitrate pursuant to Step Four of the grievance procedure, as defined in Article 20.07 of the Agreement. His chronological selection as the specific arbitrator to review the current grievance was completed in compliance with Article 20.08.

A hearing on the matter was held on May 18, 2004. The parties mutually agreed to that hearing date and were given a full opportunity to present both oral testimony and documentary evidence supporting their respective positions. The hearing was closed on June 10, 2004 upon receipt of the parties' post-hearing briefs submitted in lieu of making closing arguments.

The parties have both agreed to the arbitration of this matter pursuant to Article 20.08 of the Agreement. There are no issues of either procedural or jurisdictional arbitrability, and the matter is properly before the arbitrator for a determination on its merits.

ISSUE

Did the employer violate Article 46.02 of the Agreement by failing to approve more than 590 hours of Occupational Injury Leave for the Grievant? If so, what shall the remedy be?

RELEVANT CONTRACT LANGUAGE

Article 20
Article 46.02

BACKGROUND

Ms. Michelle Depto (herein "grievant") was an employee for the Ohio State Highway Patrol (herein "OSHP") since she graduated from high school in 1991, working first as a dispatcher until her graduation from the OSHP training academy. She continued to work as an OSHA road trooper until she was involuntarily separated from service due to disability on December 13, 2003. The current grievance does not raise any issues regarding the grievant's involuntary separation from employment.

The only issue sought to be resolved in the current grievance concerns the grievant's eligibility to receive compensation for 856 additional hours of Occupational Injury Leave (herein "OIL") based on injuries she allegedly sustained in an on-duty motor vehicle accident,

which occurred on September 27, 2002. Testimony and documentary evidence both indicated that the grievant's patrol cruiser was struck in the back driver's side by the vehicle of another motorist, who failed to see the grievant's cruiser located in the right berm area of the highway on which construction work was being completed, despite the operation of the red and blue flashing cruiser lights. After the accident, an emergency squad delivered the grievant to a local hospital, where she was treated based on her complaints of left-sided neck pain, left rib pain, left upper-abdominal pain, and left hip pain. (Mgmt. Ex. 15).

The grievant's initial application for OIL was approved and made effective as of October 5, 2002, after the requisite seven-day waiting period had passed. The grievant returned to work on December 2, 2002 and continued to receive part-time wages and OIL benefits for performing the alternative light-duty administrative duties that she had been assigned and continued to perform until March 26, 2003. The Department denied the grievant's application to continue to receive any additional OIL benefits after March 26, 2003, and the Department also did not permit the grievant to continue to do the alternative light-duty administrative work after April 25, 2003. The grievant had surgery involving her left shoulder on May 14, 2003. The surgery was a "left shoulder arthroscopy with arthroscopic excision of the distal clavicle and subacromial decompression for post-operative diagnosis of the left

shoulder A-C joint and post-traumatic arthritis." (Mgmt. Ex. 13). Any and all claims for additional OIL payments both before and after the grievant's surgery were denied prior to her involuntary disability separation on December 13, 2003, more than fourteen months after her September 27, 2002 accident. During that period of time, the grievant had been granted OIL leave for 586 total hours out of the maximum 1500 hours of injury leave available to each OSHP employee for each independent injury incurred in the line of duty, with the approval of the superintendent of the OSHP. (Article 46.01 of the Agreement).

SUMMARY OF THE UNION'S POSITION

The grievant contends that the Department has violated Article 46 of the Agreement by refusing to grant her any of the remaining hours of OIL benefits to which she claims she is entitled to receive as a result of her on-duty accident on September 27, 2002.

The grievant's medical history reflects that, in addition to and prior to the September 27, 2002 on-duty accident, the grievant has also been involved in two other off-duty motor vehicle accidents. The first of those accidents occurred in April, 1997, and the second accident was in August, 1999. The record indicates that, as a result of the second accident, the pain in the grievant's left shoulder increased, and she was

off-duty for one week before surgery and for three months after the first surgery on the grievant's left shoulder, which was performed initially in March, 2000 and included acromioplasty and an impingement release procedure based on a recognized shoulder impingement problem. (Mgmt. Ex. 14). Dr. Kevin Trangle's review of the grievant's medical history indicated: "[T]his individual had long-standing problems of the left shoulder that dated back to 1997." (Mgmt. Ex. 16)

The grievant contends that the September 27, 2002 on-duty accident resulted in her continuing disability since that date. As discussed, *infra*, the Department's procedure and established practice for establishing OSHP employees' eligibility for OIL benefits is dependent upon prior cognition under workers' compensation procedures that an OSHP employee has incurred either a new disabling injury or an aggravation of a preexisting condition, as determined by Workmen's Compensation administrative officials, and is entitled to receive OIL benefits. She asserts that the Department has acknowledged that she was disabled from performing her normal work as a trooper as a result of the accident by having placed her in the transitional work program and ultimately separating her from her employment. The grievant insists that the accident was the cause of her claimed injuries, which prompted her application for OIL benefits.

The grievant and OSTA seek to have the arbitrator award compensation to the grievant for all of the remaining hours of OIL benefits from the 1500 maximum hours to which the grievant is eligible to be compensated. The arguments of the grievant and OSTA, taken directly from its post-hearing brief, are as follows:

ARGUMENT

In this case, the Employer took the position that the Grievant was denied the continuation of OIL benefits because DAS sets the standards for recovery from specifically identified injuries. It was the Employers contention that Trooper Depto's identified injury would not support additional O.I.L. as such would exceed the standard. The employer stated that the identification of the injury to be referenced by a designated recovery period was established by Workers Compensation and that Trooper Depto's approved injuries limited her qualification for O.I.L. to that already granted by the Employer. Actually, there is just such a document called "Disability Standard Recovery Periods For Agency Approval" (See Appendix). When presented with the document during his testimony, Lieutenant Brian Landis (HRM Benefits Chief), fumbled with it declaring that he could not locate the recovery period relied upon by the Employer in the instant case.

The Employer's reluctance to present the DAS document is understandable when you consider that it sets a sixteen-week period for return to heavy/very heavy duties of employment following the "traumatic amputation of a lower extremity". Other such guidelines are of course similarly inapplicable to the duties of an OHP Trooper that might involve physical confrontation with multiple subjects in the normal course of employment. The Step Two response of the Employer to the Depto Grievance states in denying the Grievance 'O.I.L. approvals are based upon a 'standard recovery period' used by the Department of Administrative Services; therefore the Grievant's recovery period was based on the allowed (workers compensation) conditions and was given the standard recovery period for the strains and sprains". "The Grievants O.I.L. was based upon the allowed claim through BWC."

We were not privy to hearing in evidence what "the standard recovery time" was for Trooper Depto. We do know that she cooperated in entering into a light duty transitional work program that required her to work part-time doing duties other than normal Trooper duties. We also know that the Employer cited the fact of her continued inability to return to full assignment as a road Trooper in electing to terminate her light duty transitional work. So apparently it was not an issue of her continuing "disability" that prompted the denial of her OIL or the discontinuance of her light duty. She was acknowledged by the Employer to be disabled from service as a road Trooper. It was, undeniably, the fact that the BWC claim did not establish an independent injury sufficient to grant additional O.I.L. based upon the DAS Disability Standard Recovery Periods chart.

No argument was made or evidence introduced at the Arbitration Hearing to establish that the Employer was bound to the DAS Standard Recovery Periods, or that the standards represented bore any significant relationship to the duties required of road Troopers as opposed to other classifications within the State of Ohio. By the time of the Arbitration Hearing, the Employer sought to distance itself from its earlier justification of the denial of O.I.L. based in any way upon the DAS Standard Recovery Periods.

Instead, the Employer advances the contention that O.I.L "mirrors" Workers Compensation law. The "mirror" effect arguably reflects back the argument that because Michelle Depto has been unsuccessful in establishing either a rotator cuff tear or of posttraumatic arthritis as directly caused by the 9/27/02 crash, the Employer is justified in denying her Article 47 O.I.L. benefits. The Employer brought in the adversarial lawyer who opposes Michelle Depto in the workers compensation case. An expert in workers compensation law he recited chapter and verse just how The Industrial Commission determined not to grant the torn rotator cuff or the posttraumatic arthritis.

I am of course tempted to argue Michelle Depto's workers compensation case. Her representation before the Industrial Commission was not exactly exemplary. In disallowing the claim for posttraumatic arthritis of the left shoulder, counsel for Depto submitted unsigned reports from a highly credentialed surgeon of the Cleveland Clinic. The Commission in its Order disallowing the claim stated, "None of the reports from Dr. Anderson are signed and ...do not constitute competent medical evidence. The Commission dismissed a requested authorization for treatment as not having been properly presented. Kyle Martin advised Lieutenant Landis "Depto's attorney is not following proper protocol when attempting to request additional allowance...that she will likely be denied due to this lack of proper filing".

I should, however, avoid the trap of arguing the workers compensation case. The issue is not whether Michelle Depto has a torn rotator cuff or posttraumatic arthritis. There are major ramifications within the workers

compensation law that relate to a determination of either. There are pecuniary issues of temporary total disability payments; permanent partial disability payments predicated upon the degree of the disability; permanent total disability and I am sure many other qualitative financial considerations that attend the determination of a specific injury.

The issue is not what is the proper designation of the injury or injuries sustained by Trooper Depto. The issue is did she in fact sustain injuries in the September 27, 2002 crash that were disabling. The Employer acknowledges in its Step Two response that the Industrial Commission allowed a claim for sprain and contusion to the left shoulder. The Commission Hearing Officer states that his decision "specifically does not address the issue of aggravation of pre-existing left shoulder arthritis." The question presented has to be, was she injured and was the injury disabling? Dr. Anderson, in exasperation, wrote in longhand to the Secretary of Lt. Landis who had e-mailed that Depto's O.I.L. had been denied because there "appears to be no casual (sp) relationship to the current condition linking it to the on duty crash". Dr. Anderson wrote the following: "She was asymtomatic prior to the 9-27-02 work related injury. Since that time she has had a painful shoulder. This makes surgery directly related to the 9-27-02 accident."

While the DAS Standard Recovery Chart does not take into consideration the issue of an identified injury aggravating a preexisting injury, O.I.L. speaks precisely to that issue. The O.I.L. statutes contains the following provision: "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. For purposes of O.I.L. it doesn't matter if the prior injury was subject to workers compensation.

Actually it is well settled within the workers compensation law that aggravation of a preexisting condition entitles participation in the workers compensation fund. The Supreme Court of Ohio decided the controlling case in Schell v. Globe Trucking (1989), 48 Ohio St. 3rd 1. A unanimous decision held "that a work-related aggravation of a pre-existing condition does not have to be of any particular magnitude in order to entitle the claimant to a determination of benefits under the State Insurance Fund". Six years later the Supreme Court revisited the issue where a fall at the work place activated a dormant case of MS. The case State ex rel. Mead Digital Sys. v. Jones (1996), 77 Ohio St.3d 30, held that the aggravation of pre-existing multiple sclerosis resulting in an award of permanent total disability by the Industrial Commission was not an abuse of discretion.

It does not matter one iota to this case whether or not Trooper Depto's disability arose in whole, as opposed to in part, due to the injury sustained by her on September 27, 2002. What matters is whether or not Trooper Depto was in fact injured and suffered a disability as a result of the crash.

The record discloses that Michelle Depto in April of 1997 was involved in an off duty automobile accident. In August of 1999 she was involved in an additional crash and was off work for a week. After returning to work she experienced neck and shoulder swelling and went on disability until September of that year. In March of 2000 she had surgery performed on her shoulder. She was released for full duty in May of 2000 without restriction. She had been steadily working without interruption for two and one half years as of September 27, 2002.

Her testimony was that shortly after the accident she found her shoulder and lower back to be throbbing. She called her doctor and saw him as soon as his schedule would permit. She never worked another day as a road patrol Trooper. Can anyone seriously doubt the causal relationship between the trauma of the accident and the ensuing disability?

Even Dr. Trangle, the Employer's doctor, grudgingly acknowledges the issue of aggravation of a previous shoulder condition by stating " one should consider this claim, which is allowed for left shoulder contusion, should be additionally allowed for aggravation of arthritis of the left shoulder as well as instability of the left shoulder."

Of course the issue before us is limited to Trooper Depto's access to 1500 hours of O.I.L. It is not related to any broader questions of permanent disability. Not a single bit of testimony or medical evidence contests the fact that Michelle Depto was disabled from the date the of the crash forward to this day. She is not a malingerer and to the credit of the Employer I did not hear an undercurrent of that contention. She worked the part time assigned to her in duties that would not normally be considered transitional to a return to her road patrol. She tried hard to do everything requested of her. The one thing that everyone can agree upon is that Michelle Depto was disabled from performing as an OHP Trooper.

I submit that she has been seriously abused by the system and that the Employer bears some of the responsibility of that abuse. The determination to no longer grant her O.I.L. was in fact not premised upon any chart or any determination that she was not in fact disabled. Lt. Landis was directed to curtail O.I.L. by the lawyer opposing Depto's workers compensation claim. Not for the reason that workers compensation law "mirrors" the provisions of O.I.L. but because "it wouldn't look good" for the workers compensation case. She struggled for direction from her Employer. Look at her letter to Lt. Landis of May 2, 2003. In it she says that she scheduled her operation using her medical insurance "per your instructions". Lt. Landis had told her that she couldn't draw simple temporary disability which would have provided her a major portion of her regular income because hers was a work related injury. He then

opines that what she should do is file for "disability retirement". This way she would be drawing a check. Landis had received reports that pretty well established that she could not be expected to return to the road patrol. On May 8 she Michelle writes Landis "I have filed for disability retirement per your instructions".

Imagine, she was denied Occupational Injury Leave; but thereafter was disability separated without pay on he basis of the Employer's concluding that she was permanently disabled. She then was denied paid disability retirement by the OHP Retirement System, which found that she is was not permanently disabled. Had she of received the full O.I.L. to which she was entitled she would have at least have received 856 more hours of paid time than she did receive.

Again, we are not trying the Workers Compensation case here. OIL does not "mirror" Workers Compensation. It shares but one factor, and that is that you can't receive payments for lost time in excess of your total wages. If you elect to pursue the O.I.L you cannot contemporaneously draw workers compensation lost wages benefits. You can't receive more than 100% of your pay. That is the extent that workers compensation affects OIL. You are permitted under some circumstances to draw more than workers compensation alone would yield. You are able to add to workers compensation payments enough O.I.L payments to have a check equal to 100% of the wages you would normally draw. I think part of the pain of this case is the representation that Michelle Depto has had during the course of her Workers Compensation hearings. The Industrial Commission was forced to rule against Depto more than once because her counsel didn't present her case consistent with the requirements of the BWC.

You almost get the feeling that the BWC was dropping seeds for counsel in writing specifically that in denying her claim they did not rule on the issue of whether or not the injury she sustained on Septembers 27, 2002 aggravated a preexisting condition.

Workers Compensation is a legal field of land mines. If you don't ask for it correctly, or do not use the proper form, you don't simply get a lesser award. You get nothing and are told to try again and do it right this time.

The Collective bargaining agreement speaks to the fact that being a Trooper in the field is a dangerous job and one that exposes the Trooper to extensive risks of injury. While Workers compensation is available along with sick leave and disability benefits for all state employees only a few classifications have available to them O.I.L. Even our Troopers are not subject to receiving OIL for disability if they are doing administrative work at the time of the injury.

The Employer acknowledges that Trooper Depto was disabled as a result of the accident of 9/27/02. So, when did she become no longer disabled? At what point? The employer put her in a transitional work program that recognizing that she could not perform the work of the road trooper. The Employer later no longer permitted her to work that light duty job which although taxing was less demanding than her road Trooper job would have been. The Employer ultimately separated her from her employment as a Trooper because she was "disabled". No one says she isn't disabled. No one says she wasn't trying to come back to work? No one says that she wasn't cooperating with everyone and trying to whatever necessary to comply with the maze of rules and regulations in which she found herself.

What is the exact nature of the disability that caused her to no longer be able to go to work after 9/27/02? It certainly matters for workers compensation purposes. It does not matter for our purposes as long as the accident and attendant injuries are the proximate cause of her temporary disability that was reflected in her application for OIL.

CONCLUSION

Mr. Arbitrator Michelle Depto characterized her experience in attempting to satisfy the shifting standards imposed by her employer as a nightmare from which she could not seem to awake. At this point I don't believe she can be made whole. I believe she is permanently damaged from the experience and I am not referring solely to the physical injuries sustained in the crash.

However, if her injuries were real, regardless of how described, identified or characterized; and if her disability was real regardless if it was 80% the result of the instant crash alone or 20% the result of the crash of September 27, 2002 alone and 80% the result of the cumulative effect of the instant crash and preceding injuries; and if in fact she was injured in the performance of duties non administrative in nature; then she is entitled to O.I.L. for the length of the disability up to a maximum of 1500 hours.

If on the other hand O.I.L. can be administered as it was here, subject to shifting rationales and changing standards that do not relate the central issue of job caused disability, we have severely injured all of our Troopers. Being a law enforcement officer is a hard, tough and dangerous job. There really are few "perks" and the benefits are far from compelling. The creation of O.I.L. was not a perk. It was in recognition that the Troopers job is fundamentally different from nearly all other state employees. The Trooper places herself in physical danger as part and parcel of her daily job performance. Troopers have the right to take some comfort from the fact that if injured on the job they will suffer no loss of pay for up to 1500 hours of the resulting disability.

Michelle Depto deserves to receive the remaining 856 hours of O.I.L. she was denied. She is equitably entitled to it and she is guaranteed it by the terms of the contract. I wish I could ask you for more on her behalf.

Based upon the above, the grievant and OSTA urge the arbitrator to sustain the grievance.

SUMMARY OF THE DEPARTMENT'S POSITION

The Department flatly refutes all of the contentions asserted by the grievant and OSTA and insists that the Department did not violate Article 46.02 of the Agreement by denying the grievant's petition for additional OIL benefits. The Department asserts that the grievant had requested to have additional OIL benefits applied for conditions which included a left rotator cuff tear, post-traumatic arthritis to the left shoulder, and an annular tear to her spine. The Department points out that those requests were either refused by the Industrial Commission or withdrawn by the grievant's counsel. The Department contends that it complied with the Industrial Commission's decision on January 22, 2003 by paying OIL benefits for the grievant's cervical and lumbar strains or sprains and contusions to her left chest wall and left shoulder (Mgmt. Ex. 5).

The Department presented evidence indicating that the grievant was examined by Dr. Nazim Jaffer, her primary care physician, on both July 19, 2002 and August 19, 2002 for cervical strain, left rotator cuff tendonitis, and left neck and shoulder pain. (Mgmt. Ex. 8). The Department insists that Dr. Jaffer's notes indicate that the grievant's

current shoulder problems predated her September 27, 2002 on-duty accident and resulted in her having received a medical deferral from the bench press exercise requirement imposed on all other OSHP troopers.

The Department further insists that the "side swipe" crash into the grievant's cruiser on September 27, 2002 was not a serious crash and that the mechanism of the crash could not have actually caused the grievant's alleged left shoulder injuries, including a left rotator cuff tear or strain, and did not support aggravation or instability problems, based on the analysis of Dr. Kevin Trangle (Mgmt. Ex. 16).

The Department points out that any OSHP employee's right to OIL benefits is dependent upon approval by the OSHP Superintendent pursuant to Ohio Rev. Code Ann. § 5503.08 and Section 46.05 of the Agreement, and the benefits "may be used for absence resulting from each independent injury incurred in the line of duty." Because the grievant has never filed a C-86 motion requesting a workers' compensation hearing officer's consideration of her eligibility for benefits due to an alleged aggravation of a previous injury or condition, the Department contends that the grievant has failed to provide substantial and credible medical evidence that her on-duty accident did, in fact, cause either an independent new injury or the aggravation of a previous injury.

The Department's arguments, as presented in its post-hearing brief, include the following:

Argument

I. Grievant's forthrightness regarding her previous injuries ruins her credibility.

Attorney Kyle Martin was retained by the Employer as special counsel on Grievant's workers compensation claim. He stated that his firm was brought into this case because of the Employer's concerns over her previous injuries related to an off duty crash and subsequent surgery. He testified that a hearing was held on January 22, 2003 and was attended by Ben Crider, another attorney with his firm. Mr. Martin testified that the information provided by Mr. Crider showed that Grievant was less than honest during the Industrial Commission Hearing. Mr. Martin testified that according to the file notes, Grievant denied having any neck or shoulder problems since May of 2000. Mr. Martin testified that he knew this was not the case. When his office received the packet of medical documents from Dr. Jaffer's office concerning the crash of September 27, 2002, there was also an entry for August 19, 2002 (Management Exhibit 8). This entry indicates that Grievant was seen for cervical strain and left rotator cuff tendonitis less than six weeks before the crash. Information was also received that Grievant had seen Dr. Jaffer on July 19, 2002 for left neck and shoulder pain (Management Exhibit 8). It was at this time that she received a medical deferral from the bench press. Troopers are required to do a minimum of one repetition bench press for the health and physical fitness examination that is conducted once every two years. Grievant would have you believe (as Dr. Anderson noted on his report dated March 23, 2004) that she only sought the medical deferral because she was "afraid" she would hurt her shoulder (Union Exhibit K). It is obvious from reading Dr. Jaffer's notes that Grievant's shoulder was troubling her in July and August **prior** to the on-duty crash in September. Dr. Anderson is only reiterating what was reported to him by the Grievant. However, what she reported to Dr. Trangle was very different. If you look at Dr. Trangle's independent medical evaluation that was conducted on July 22, 2003, it clearly states that Grievant reported no problems with her shoulder:

> According to the patient she had her last follow up visit in October of 2000 with her doctor. From June of 2000 through the accident of 9/27/02 she had no problems with her shoulder. According to her she had no further medical follow-up, complaints or discomfort with the shoulder. She states she was fine. There are no records available at this point in time from her treating physician from that time or from St. Luke's Hospital to verify this (Management Exhibit 14).

Mr. Martin sent Dr. Trangle a letter along with additional medical documentation asking for any and all causes of the left shoulder pain and discomfort. After reviewing the additional medical documentation, Dr. Trangle stated:

> This individual has had long-standing problems with her left shoulder. This dates back to 1997 and to the previous operation she has had. Prior to her accident and pre-dating it by at least two months she developed problems with her left shoulder, diagnosed as left rotator cuff tendonitis or tear. This necessitated a minimum of two visits to Dr. Jaffer including one within a few weeks prior to this accident, which was diagnosed as rotator cuff tendonitis.

Looking at the pictures from the crash you can see that it was not a serious crash (Union Exhibits A, B and C). It was a sideswipe crash. These types of crashes generally do not cause severe damage or injury. In fact, the driver of the Lexus that struck Grievant claimed no injury. Both vehicles were coded as disabling but the only disabling damage was the flat tire on each car (Union Exhibit N). This exhibit also reveals that the car did not spin as Grievant described on direct examination and later denied on cross-examination. Dr. Trangle also stated that the mechanism of the crash would not cause the alleged injury Grievant is claiming. He stated,

> The mechanism of injury reflects also that she would have, at most, contusion of the shoulder against the window of the car. There is no evidence of any hyperextension, flexion, torsion or movement of the shoulder in any other way. The mechanism of injury would not support rotator cuff tear or strain of the rotator cuff as I had mentioned previously. Furthermore, as to her request to have the claim additionally allowed for aggravation of underlying arthritis and instability secondary to the accident, I would state as I had previously that my opinions remain unchanged. The mechanism of injury would not support aggravation or instability problems (Management Exhibit 16).

In fact, when she was cross-examined on the claim that the vehicle was spinning she denied ever testifying to it. If Grievant's memory was proven faulty in the brief period of time between direct examination and cross-examination, the Employer has concerns about her testimony covering the span of almost two years ago. The Employer would argue that it is not a faulty memory but instead a pattern of behavior. This pattern of dishonesty began at the Industrial Commission Hearing when she denied having any previous problems with her left shoulder. Her dishonesty continued with Dr. Trangle when she claimed no shoulder problems after the surgery and subsequent rehabilitation of her shoulder.

II. The issue before the arbitrator

The only issue agreed to by the parties and brought to the arbitrator concerns whether the Employer violated the contract by not approving more than 590 hours of OIL. The Union brought irrelevant information into the hearing. You heard how Grievant was disability separated based on her doctor's determination that she was permanently disabled. You heard how she was denied a disability retirement based on an Ohio State Highway Patrol Retirement System physicians recommendation that she was not permanently disabled. This information should not be considered for this particular hearing as it has nothing to do with her OIL claim or the statement of issue agreed to by the parties. The Union only brought this information forward in an attempt to raise some pity for the Grievant.

III. The link between OIL and Workers Compensation

Lt. Landis and Kyle Martin both testified that there is a link in that workers compensation and OIL mirror each other. As they both testified during the hearing, OIL and workers compensation benefits are both wage continuation programs. Grievant can not receive OIL and workers compensation benefits at the same time. Lt. Landis stated he received an Accident or Illness Report at the same time he received the request for OIL (Joint 3 p. 38). On page two of the Accident or Illness Report there is a caption to record the date it was faxed or called into the Managed Care Organization. Lt. Landis testified he reviewed this caption due to the fact that the Managed Care Organization works directly with Workers Compensation when there is an on duty injury. Another form that is completed when an on-duty injury occurs is the First Report of Injury (Union Exhibit M, p. 8). This form is a BWC form that was also filed at the time of injury. (It is important to note in the "Type of injury" column there is no mention of pain to the left shoulder or lumbar region.) It is clear that there is a direct correlation with OIL and Workers Compensation benefits.

Ohio Revised Code (ORC) Section 5503.08 clearly links these two benefits together. It states, "Occupational injury leave pay made according to this section is in lieu of such workers' compensation benefits as would have been payable directly to a patrol officer..."(Union Exhibit T)"

The Union would have you believe that any on duty injury suffered by an employee should automatically entitle that employee to 1500 hours of OIL. The Union failed to provide any cases where the Employer automatically approved 1500 hours of OIL. In fact, if an employee's physician forwarded documentation that an employee was fit for full duty after receiving 100 hours of OIL, this Union would have you believe that they are still entitled to use the remaining 1400 hours. This would definitely be a poor practice on the part of the Employer and an injustice to the taxpayers of Ohio. Grievant is entitled to 1500 hours of OIL benefits **with the Superintendent's approval (Emphasis added).** In this case, the superintendent approved 590 hours of OIL for sprains, strains, and contusions. This decision was based on the recommendation of counsel and the fact that the Bureau of Workers Compensation and the Industrial Commission have not approved any other motions or conditions. As Lt. Landis testified, the Benefits Unit deals with both OIL claims and workers compensation claims. Would it make sense for the superintendent to approve additional OIL benefits if the Workers Compensation claim was being contested? Absolutely not! There is a conflict of interest. Lt. Landis and Mr. Martin both testified that if the Employer had approved additional OIL benefits for the alleged injuries, Grievant could have used that information in the BWC hearing. She could have simply stated, "Look, the Employer believes I have a valid on duty injury because they are paying OIL benefits." It would be very difficult to argue the BWC claim if OIL was approved. Arbitrator Stein, you asked Mr. Martin to go over the advice he gave to the Employer reference OIL. In great detail, Mr. Martin explained the medical documentation as well as the interconnection between the BWC and OIL claims; thus sufficiently explaining the Employer's just rationale in presently denying additional OIL benefits.

ORC 5503.08 specifically states that "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" (Union Exhibit T). Management Exhibit 11 introduced by Kyle Martin specifically shows Grievant is requesting an allowance for post-traumatic arthritis in the left shoulder. According to Mr. Martin, the only other "appropriate" motion listed on the claim was "Payment of temporary total from March 26, 2003 to present." Even though these two motions were appropriate to consider, they were not approved by the BWC. Consequently, an Industrial Commission Hearing was heard by District Hearing Officer Jim Barko on February 5, 2004. As Kyle Martin testified, the C-86 motion filed by Grievant was denied (Management Exhibit 12). The hearing officer noted he did not have "competent medical evidence" from Dr. Anderson. He also relied on the reports from Dr. Trangle and Dr. Mease. He further stated that he did not address the issue of aggravation of pre-existing left shoulder arthritis. An appeal was filed by Grievant and another Industrial Commission hearing was held on March 22, 2004 (Management Exhibit 17).

The Staff Hearing Officer affirmed the order of the District Hearing Officer. He also relied on the report of Dr. Trangle and stated an aggravation of a previous injury was not considered because the District Hearing Officer did not consider it and it was not requested in the C-86 motion. Grievant filed a third and final appeal to the Industrial Commission. This appeal was reviewed by two staff hearing officers and refused without having a hearing (Management Exhibit 18). As Mr. Martin testified, Grievant has no pending motions filed with the Bureau of Workers Compensation. She has no pending Industrial Commission Hearings and has not filed with the Court of Common Pleas. Mr. Martin testified that Grievant filed a C-86 Motion with BWC for an annular tear but that has since been withdrawn. Grievant has never filed a C-86 for an aggravation of a previous injury. Grievant has failed to provide any substantial, credible, medical evidence that the crash on September 27, 2002 caused the alleged injuries **or aggravated** a previous injury.

The facts of the case are complex, the exhibits entered were numerous, but the answer is quite simple. Section 46.05 of the contract states, "Authority to approve or disapprove any request for occupational injury leave rests with the Superintendent. Requests for O.I.L shall not be unreasonably denied." ORC 5503.08 states, "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..."
Grievant was approved for OIL benefits for the strains, sprains, and contusions that were causally related to the crash on 9-27-02. Suspicions were raised and counsel was hired when Grievant began requesting allowances for shoulder pain; a shoulder that was injured off duty in 1999 and required surgery in 2000. The Employer required an independent medical evaluation and the result indicated that Grievant has had ongoing shoulder problems since the surgery in 2000. Grievant failed to prevail in her BWC motions or Industrial Commission hearings. Accordingly, the Superintendent used his discretion and consistent with the medical documentation, denied additional OIL benefits.

IV. Conclusion

The Union has the burden of proof in this case and has failed to carry that burden. To date, Grievant has provided **no** reliable medical evidence to support continued OIL benefits for an alleged shoulder injury stemming from the September 27, 2002 crash. The bottom line is that if Grievant can prove to the Bureau of Worker's Compensation or to the Industrial Commission that the alleged injuries or aggravation of a previous injury were causally related to the crash, the Superintendent will approve additional OIL hours accordingly. The Employer will ask that you deny the grievance in its entirety.

Based upon the above, the Department requests that the grievance be denied.

DISCUSSION

The arbitrator's authority is limited by the language of Article 20.08(5) of the Agreement, which specifically prohibits the arbitrator from straying from the Agreement's provisions and the obligations clearly articulated there. That section, entitled "Limitations of the Umpire," specifically provides:

> 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 the Agreement, nor shall the umpire impose on either party a limitation or obligation not specifically required by the language of this Agreement.

"It is generally recognized that the primary function of an arbitrator in construing a contract is, of course, to find the substantial intent of the parties and to give effect to it. Presumptively, the parties' intent is expressed by the natural and ordinary meaning of the language employed by them . . . to the end that a fair and reasonable interpretation will result." *NSS Enterprises, Inc. and Int'l Union, United Auto.,, Aerospace & Agric. Implement Workers of America, Local 12*, 114 Lab. Arb. 1458 (2000).

As indicated in the parties' arguments at hearing and also in their post-hearing briefs, there is no dispute that the grievant was, in fact, involved in an on-duty accident while she was acting within the scope of her authority as an OSHP trooper. The parties' major disagreement centers on the issue of whether the grievant incurred either an independent new injury or the aggravation of a previous injury as a direct result of the September 27, 2002 accident to satisfy her burden of proof and to entitle her to additional OIL benefits under Article 46.02. It is the arbitrator's finding that the grievant has not met that burden.

The grievant has failed to provide sufficient evidence to substantiate her claim that the on-duty vehicular accident caused either a new and independent injury or an aggravation of a preexisting condition or injury to merit an award of additional OIL benefits. It is a well-established principle of arbitration that a party petitioner or grievant bears the burden of proof. *Indiana State Pers. Div. and American Fed'n of State, County, and Mun. Employees, Council No. 62*, 75 Lab. Arb. 924 (1981). This principle apples directly to cases involving the straightforward application or interpretation of a collective bargaining agreement or personnel rules. In grievances, which involve the interpretation and application of a contract, the preponderance of the evidence is sufficient to merit a favorable award. Ibid. Based on the evidence presented by the grievant and OSTA in the instant grievance, the arbitrator finds that it is not reasonably clear that the September 27, 2002 accident caused either an aggravation of a preexisting injury or a new injury unrelated to any previous diagnosis and/or treatment.

The arbitrator has given no credence to the Department's claim that the initial treatment report, from the hospital emergency room where the grievant was taken after the September 20, 2002 accident, included no specific reference to any claimed pain or injury involving the grievant's left shoulder. It is generally recognized that not all injuries resulting from motor vehicle accidents are immediately manifested or noticeable to an

accident victim but become more apparent with the passage of some time. Nevertheless, the grievant here has failed to establish that the accident on September 27, 2002 was the proximate cause of either a new injury or the aggravation of a preexisting condition. Proximate cause must be established by the reasonable probability, not mere possibility, based upon expert medical testimony. *Stiller v. Leaseway of Ohio, Inc.* (8th Cir., 1986), Lexis 3919. The grievant is required to prove that a causal connection existed between the motor vehicle accident and her claimed injury or aggravation and to establish that the new injury or aggravation was proximately caused by the work-related injury. The evidence provided must establish a probability and not a mere possibility of that causal connection. *Gabriel v. Conrad*, (5th Cir. 1991), Lexis 6446.

At the arbitration hearing, the Department sought to establish that the grievant's ineligibility for the additional OIL benefits was based upon the application of the purported standard procedure, which requires a final determination under the Ohio workers' compensation law by the Bureau of Workers' Compensation that the grievant's claimed injury arose out of her employment before her request for injury leave was reviewed by the Department. The first paragraph of Article 46 of the Agreement provides: "Occupational injury leave shall be governed by the Rules promulgated on this subject and the Ohio Revised Code § 5503." Section 5503.08 (2004) makes no reference to any participation by the Bureau of

Workers' Compensation or the Industrial Commission or the application of any workers' compensation procedures or legislation. No identified rules or policies were submitted to the arbitrator either at hearing or subsequently. Even though no issue was raised about the consistent and equitable application of the "Rules" regarding the grievant's claim, the arbitrator recommends that incorporation of these "Rules" into the language of the collective bargaining agreement, perhaps in an appendix or in an employee manual, would serve to eliminate confusion and misinformation among other potential claimants, who are not apprised of the full scope of review of an OIL claimant's application for benefits. Additional information would also assist in clarifying the use of materials, such as the disability job classification description form (Union Ex. J) provided by the Ohio Department of Administrative Services, as applied to an OSHP employee's OIL benefit application.

The evidence indicated that the grievant made visits to her primary care physician, Dr. Jaffer, on July 19 and August 19, 2002, complaining of cervical strain, left rotator cuff tendonitis, and left neck and shoulder pain. (Mgmt. Ex. 8). These visits are documented, despite the grievant's affirmation that she had experienced no left shoulder problems for at least two years prior to the September 27, 2002 accident. Recognition of this documented left shoulder discomfort, which the grievant complained of several weeks before the September 27 accident, certainly does not

refute the Department's assertion that the injuries the grievant claims entitled her to additional OIL benefits may have actually resulting from one or more intervening causes that remain unidentified. Also, as mentioned, *supra,* based on the mechanism of injury described as arising from the September 27 "side swipe" accident, the grievant's alleged injury or aggravation was not substantiated by medical evidence as having been causally related to the actual accident. In fact, Dr. Trangle found that there was no new aggravation, instability of an underlying arthritic condition, or ongoing inflammation resulting from the accident. (Mgmt. Ex. 16).

Certainly the arbitrator is sympathetic to the grievant's frustration in not having qualified for either the additional OIL benefits, as well as permanent disability income benefits through the Bureau of Workers' Compensation and the Industrial Commission. Moreover, the stark reality of having to suffer the discomfort of physical injuries, having to give-up one's career, and find another calling in life is a life-test that can only be understood from those who have endured it. Yet, the reality of this case is that the authority of the arbitrator is limited to enforcing the Agreement based on the evidence presented, which does not prove a violation of the Agreement.

AWARD

The grievance is denied.

Respectfully submitted to the parties on July 23, 2004

Robert G. Stein, Arbitrator