

**Arbitration Decision and Award in the  
matter of Arbitration between:**

**State of Ohio, Department of Mental Health**

**and**

**The Fraternal Order of Police**

**Ohio Labor Council**

**Unit two**

**Grievance #: 23-06-050818-0023-05-02**

**Grievant: Guillermo Zarate**

**E. William Lewis, Arbitrator**

Hearing date:	June 5, 2006
Briefs received:	July 19, 2006
Decision issued:	August 1, 2006

**Representing the Employer:**

**Mr. Brian D. Walton, ODMH  
Labor Relations Administrator  
30 East Broad Street  
Columbus, Ohio 43215**

**Representing the Union:**

**Mr. Paul L. Cox, Chief Counsel  
FOP/OLC Inc.  
222 East Town Street  
Columbus, Ohio 43215**

The Hearing was convened on June 5, 2006 at 10:10am, in the FOP/OLC offices, Columbus, Ohio.

In attendance for the Union:

Mr. Paul Cox	Chief Counsel
Mr. Joel Barden	Sr. Staff Representative
Ms. Renee Engelbach	Paralegal
Mr. Guillermo Zarate	Police Officer 2 (witness)

In attendance for the Employer:

Mr. Brian D. Walton	Labor Relations Administrator
Ms. Buffy Andrews	OCB/LRS
Mr. Brian J. Henry	Workers Compensation Risk Manager (witness)
Ms. Jesse R. Keyes	OCB/LRS

The parties were asked to submit exhibits into the record. The following were stipulated to by the parties and submitted as Joint Exhibits.

Joint Exhibit #1	Agreement, State of Ohio-Fraternal Order of Police, Ohio Labor Council Inc., Unit 2
Joint Exhibit #2, composed of:	A-GRIEVANCE REPORT FORM, Dated, 08/18/05, Step II Grievance Response, dated October 5, 2005  B--TVBH-Police Investigation Report, Case # 215-03-05-03-26-05  C—Police Investigation Report, Case # 317-04-05, dated 04-27-2005 Plus follow-ups  D—BWC-First Report of an Injury, Occupational Disease or Death. With accompanying medical supporting information.  E—Accident or Illness Report, with Employer & Employee Statements, dated 4/27/05 & 4/29/05  F—Memo dated 5/3/05, from BWC to Caroline Reavish Re: Guillermo Zarate  G—Occupational Injury Leave- employee Application of Guillermo Zarate, dated 05/05/05  H—Dr. James Hick's- Return to work Recommendations, dated 4/28/05 & 5/5/05

H-1—Occupational Injury Leave  
Benefits Report- Approval for 4/28  
thru 5/15

I—ProScan Imaging Report, Re-Mr.  
Zarate, dated 5/16/05

J—Dr. Hick's-Return to work  
Recommendations, Re- Mr. Zarate  
dated 5/16/05

K—May 17, 2005, letter to Mr.  
Zarate-approving Occupational  
Injury Leave, thru May 15, 2005

L—Occupational Injury Leave Benefits  
extension request of Mr. Zarate, dated  
05/17/05

M—Supplemental Physician's State-  
ment (OIL)-Dr. Hicks- 5/18/05; Occup-  
ational Injury Leave- Supplemental  
Employer —dated 5/20/05 extending  
benefits thru 6/30/05

N—May 23, 2005 letter to Mr. Zarate  
Approving OIL benefits thru 6/30/05

O—memo from Ms. Green(Nurse Case  
Mgr.) updating Mr. Zarate's status

P—OIL Benefits, Dr. Hick's Supplemental  
dated 6/27/05-Estimated Return to work  
of 9/1/05, includes supporting data

Q—OIL Benefits Extension Request, by  
Mr. Zarate, dated 06/28/05

R—OIL Benefits-Supplemental Employer  
Statement, dated 7/5/05- Requesting 7/1

thru 8/31/05 with Independent Medical exam scheduled for 7/14/05

S—7/13/05-Memo regarding Mr. Zarate's OIL Benefits Application

T—Letter dated June 30, 2005, to Guillermo Zarate, advising him of his 7/14/05 Medical exam by Dr. Writesel. Letters to Mr. Zarate advising him of OIL Benefits thru 7/28/05 & his Independent Medical Exam

U—Letter dated August 4, 2005 from Dr. Writesel to Ms. Amy Ahmer(MedQuest Evaluations) Re: Guillermo Zarate addressing allowed conditions & alleged conditions

V—Corrected letter to Mr. Zarate regarding his approved hours for OIL benefits, dated August 8, 2005

W—August 8, 2005, corrected letter to Mr. Zarate regarding his approved hours for OIL benefits.

XYZ—Letter dated August 8, 2005 to Mr. Zarate, that his OIL benefits will not be extended past July 28, since Dr. Writesel Exam indicated that Maximum Medical Improvement had been reached

Mc—Fx dated August 18, 2005, to Ms. Karen Green from Provider Physicans East (Dr. Dorado) stating that Mr. Zarate had been seen on 8/5/05 & cleared him to work & transferring treatment from Dr. Hicks. Included a letter to Mr. Henry from

Mr. Zarate requesting OIL benefits from 7/29 thru 8/7, when he returned to work, per his Doctor's order.

The following were submitted as Management Exhibits:

Management Exhibit #1	BWC MOTION, dated 9/12/05, by D. Reinhard—Add HNP- C6-7 & T 1 & 2
Management Exhibit #2	November 1, 2005, letter to Industrial Commission of Ohio, from Dean Reinhard withdrawing MOTION of 9/12/05
Management Exhibit #3	Industrial Commission of Ohio-RECORD OF PROCEEDINGS- acknowledging the withdrawal of the MOTION
Management Exhibit #4	BWC letter dated 5/10/2006, requesting a 6/14/06 exam of Mr. Zarate, for determination of % of permanent partial
Management Exhibit #5	BWC-form describing clam status/ diagnosis info. Re: Mr. Zarate
Management Exhibit #6	PHYSICIAN REVIEW- dated 9/25/05- Regarding Mr. Zarate, by Dr. Cunnungham

### **BACKGROUND:**

The State of Ohio, Department of Mental Health, hereinafter known as the Employer, provides in-patient and out-patient mental health services. The particular installation involved in this case is the Twin Valley Behavioral Healthcare Facility (TVBH). The Fraternal Order of Police, Ohio Labor Council, hereinafter known as the Union, represents Police Officers 1 & 2, servicing this facility.

The grievant, Guillermo Zarate, has been employed by the Department of Mental Health at the TVBH since November 3, 2003. Mr. Zarate was at the time of the grievance, and is currently, classified as a Police Officer 2.

On two occasions, March 26, 2005 and April 27, 2005, Officer Zarate was involved in patient control incidents. Those incidents resulted in him receiving on the job injuries. The March incident did not result in Officer Zarate losing any meaningful work time. However, on April 27, Officer Zarate responded to a code blue and a code yellow alert and was injured by a charging, out of control patient (Jt. 2C). Officer Zarate reported that he had injuries to his jaw, neck and back.

Officer Zarate was initially treated by Dr. James Hicks on April 28, 2005. He was diagnosed with a sprained left shoulder, sprained left elbow, sprains to the lumbar and thoracic regions, and a sprained left jaw. An Occupational Injury Report was filed with the Bureau of Workers Compensation on April 28, by Dr. Hicks (Jt-2D). Officer Zarate made his initial request for Occupational Injury Leave Benefits (OIL) on May 5, 2005. The initial OIL request was approved by the Employer through May 15, 2005. Additional OIL benefits were requested and approved through July 28, with the grievant receiving an MRI and being treated by frequent visits to Dr. Hicks.

Although the OIL benefits were approved by the Employer through July 28, 2005, they requested an Independent Medical Exam of Officer Zarate. The Exam was initially scheduled for July 14, however, due to alleged communications mix-ups it was rescheduled to July 28, 2005. The results of the Independent Medical Exam were issued to the Employer on August 4, and the examining Doctor stated that Officer Zarate had reached maximum medical improvement for the allowed conditions (Jt. 2U). The Employer denied continued OIL benefits past July 28, 2005.

Officer Zarate filed a grievance on 8/18/05, claiming that the Employer violated Article 42 (Occupational Injury Leave) of the Collective Bargaining Agreement. The grievant requested that his OIL benefits be reinstated for the periods of 7/29 through 8/7. The grievance also requested that the sixty hours of other leave time be returned, since it was used when OIL benefits were unjustly denied. The grievance was moved to Step II and a hearing was held on September 15, 2005. On October 5, 2005, the Employer denied the grievance claiming that the Union had failed to show that the Contract was violated. The grievance was appealed to arbitration by the Union, and the parties stipulated that it was properly before the arbitrator.

## **ISSUE:**

The issue was jointly stipulated to by the parties as follows:

Did management violate Article 42 when denying the Grievant an extension of his Occupational Injury Leave benefits beyond July 28, 2005? If so, what shall the remedy be?

## **RELEVANT AGREEMENT PROVISIONS:**

### **ARTICLE 42 – OCCUPATIONAL INJURY LEAVE**

#### **42.01 Establishment**

Occupational injury leave (O.I.L.) shall be governed by this Article and rules established by the Employer consistent with this Article. All employees in the bargaining unit shall be entitled to use O. I. L.

#### **42.02 Maximum Hours of Occupational Injury Leave**

Each employee shall be entitled to nine hundred and sixty (960) hours of O.I.L. at the total rate of Pay per independent injury incurred while on duty.

Employees shall be entitled to an additional nine hundred and sixty (960) hours, at the regular rate of pay, for injuries which meet 42 USC Section 3796 Federal guidelines on permanent and total disability resulting from a catastrophic personal injury sustained in the line of duty.

#### **42.03 Injuries**

Injuries incurred while on duty shall entitle an employee to coverage under this Article. An injury on duty which aggravates a previous injury will be considered an independent injury unless the aggravated injury occurs within six (6) months of return to work from the last date of O.I.L. coverage. O.I.L. is not available for injuries incurred during those times when an employee was engaged in non-law enforcement maintenance activities, 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 unless the injury is the result of unprovoked aggressive acts or unforeseen mechanical or vehicular accidents beyond the control of the employee.



Aggressive acts may include unprovoked physical injury inflicted by clients, residents, inmates, public citizens, and/or animals. Necessary restraint will not be regarded as provocation. Unforeseen mechanical or vehicular accident injury must occur in the course of authorized law enforcement activity.

#### **42.04 Time Frame**

A qualifying Occupational Injury Leave shall be paid from the first day of absence, providing that the leave exceeds seven (7) calendar days. For occupational injuries resulting in absences of seven (7) or fewer calendar days, unused sick leave may be used. However, if any employee is immediately hospitalized and admitted overnight by a medical doctor due to a qualified on-duty injury, no loss of sick leave shall occur.

#### **42.05 Requests for Occupational Injury Leave**

Requests for O.I.L. shall be submitted through established channels following the procedures set forth by the Employer.

#### **42.06 Authority to Approve or Disapprove**

The Director of each Agency or his/her designee shall have the authority to approve or disapprove requests for O.I.L. Requests for O.I.L. shall not be unreasonably denied.

#### **42.07 Transitional Work Programs**

Agencies and the Union may mutually develop transitional work programs designed to encourage a return to work for employees experiencing partial disability, and on occupational injury leave, Workers' Compensation, sick leave or disability leave. During the time the employee is in a transitional work program, the employee will be assigned duties which the employee is capable of performing based upon the recommendation of the employee's attending physician. Upon request of the Employer, employees must participate in the transitional work program unless precluded from participation by their attending physician.

The employee may be assigned to a location beyond fifty (50) miles, if the Employer provides transportation or travel reimbursement in accordance with Article 59. If the new location requires travel time greater than the employee's normal travel time, the

additional time shall be counted as time worked and the employee's work day shortened accordingly.

#### **42.08 Procedures**

1. Each department shall establish procedural rules for the administration of this program, to include but not limited:
  - a. The timely reporting of incidents causing claims;
  - b. The requirement for claims to be medically evaluated by an independent physician, if applicable;
  - c. The obligation for each employee to obtain prompt and continuing Medical treatment:
  - d. The coordination of benefit and leave programs:  
and
  - e. The approval or disapproval of claims.


#### **42.09 Continuation of Benefits**

If the employee remains disabled upon the depletion of the nine-hundred And sixty (960) hours, and does not meet the requirement for an additional nine-hundred and sixty (960) hours; or remains disabled upon depletion of the additional nine-hundred sixty (960) hours, he/she is entitled to all compensation and benefits, without a waiting period pursuant to Section 4123.55 of the Ohio Revised Code based upon the injury received, for which he/she qualifies pursuant to Chapter 4123 of the Ohio Revised Code. Compensation shall be considered from the date that the employee ceases to receive his/her total rate of pay pursuant to this section.

**JOINT STIPULATED FACTS**  
**Grievance #23-06-050818-0023-05-02**  
**Grievant: Guillermo Zarate**  
**June 5, 2006**  
**Arbitrator William Lewis**

1. This grievance is properly before the Arbitrator.
2. Guillermo Zarate has been employed as a Police Officer 2 at Twin Valley Behavioral Healthcare since November 3, 2003.
3. Mr. Zarate was injured while on duty on March 26, 2005 and April 27, 2005.
4. After receiving his injuries on April 27, 2005, Mr. Zarate applied for Occupational Injury Leave benefits pursuant to Article 42. He was approved for and received O.I.L. benefits from April 28, 2005 to July 28, 2005, for a total of 520 hours.
5. Mr. Zarate also submitted a workers' compensation claim for the injuries incurred on April 27, 2005. His workers' compensation claim (#05-338434) was approved for the following injuries: Sprain Left Shoulder; Sprain Left Elbow; Sprain Neck; Sprain Thoracic Region; Sprain Lumbar Region; Sprain Left Jaw.
6. Mr. Zarate was scheduled for an independent medical examination at the employer's request on July 14, 2005. Mr. Zarate did not attend the examination on July 14, 2005.
7. Mr. Zarate's independent medical examination was rescheduled to July 28, 2005. Mr. Zarate was informed by Brian Henry in a letter dated July 18, 2005, that his O.I.L. benefits were extended to July 28, 2005 pending the outcome of this examination. The examination was conducted on July 28, 2005 by Dr. Kenneth Writesel.
8. Dr. Writesel issued a report of his examination on August 4, 2005.
9. Mr. Zarate was notified via a letter from Brian Henry dated August 8, 2005, that his O.I.L. benefits were not extended beyond July 28, 2005.
10. Mr. Zarate returned to work on August 10, 2005.
11. Mr. Zarate used 60 hours of leave (50 hours of vacation and 10 hours of sick leave) to cover the period between the termination of his O.I.L. benefits and his return to work.
12. Mr. Zarate's attorney (Dean G. Reinhard) filed a motion to have additional conditions (HNP C6-7 and T1 & 2) added to his workers compensation claim #05-338434 on September 12, 2005. On November 1, 2005 Mr. Reinhard withdrew this motion. The additional conditions were not added to Mr. Zarate's workers compensation claim.

  
For FOP/OLC, Unit 2

  
For the Ohio Dept. of Mental Health

## **UNION POSITION:**

The Union claims that there were two work injuries that occurred, one in March 26 and the other on April 27, 2005 with accompanying injury reports. The grievant sought medical treatment immediately after the April 27<sup>th</sup> injury. Requests for O.I.L. extensions made by Officer Zarate were related to both injuries, argues the Union. His attending physician, Dr. Hicks, on 6/27/05 certified the grievant to be off work until 9/1/05, states the Union. The only test for Occupational Injury Leave benefits is the on the job activity injuries, argues the Union.

The Employer, declares the Union, confuses this issue (OIL) with Workers' Compensation. The Contract contains no direct connection between Occupational Injury Leave and Workers' Compensation, and entitlement to O. I. L. is not related to Workers' Compensation, argues the Union. Article 42, Section 42.07 separately lists Workers' Compensation and Occupational Injury Leave, and they are different kinds of leaves, claims the Union. Therefore, the Employer does not have the authority under the Contract to deny O.I.L. benefits.

The Union requests that the arbitrator grant the grievance in its entirety.

## **EMPLOYER POSITION:**

Officer Zarate was injured on the job on April 27, 2005 and applied for O.I.L. benefits, in lieu of Workers' Compensation, and they were approved effective April 28, 2005. Because the injuries were on the job, a claim was filed and approved by the Bureau of Workers' Compensation (BWC), states the Employer. The medical diagnosis of the injuries, by his attending physician, were: sprained left shoulder, sprained left elbow, sprained neck, sprains to the thoracic and lumbar regions, and sprained left jaw. The diagnosis was approved by the BWC.

Mr. Brian Henry, the Director's designee, is responsible for managing Workers' Compensation and O.I.L. claims, declares the Employer. Mr. Henry approved the grievant's O.I.L. claim and extension requests through June 30, 2005. The goal of Mr. Henry's position, according to the Employer, is to return employees to work as quickly as possible. When O.I. L. extensions were requested beyond June 30, Officer Zarate was scheduled

for an Independent Medical Exam (IME). This IME is not uncommon when there is more than a two month period without medical progress, states the Employer.

The IME examining physician determined that Officer Zarate had reached maximum medical improvement, for the injuries allowed on the claim, per the Employer. When the Employer received the IME results they notified Officer Zarate that O.I.L. benefits were terminated, as of the examination date (7/28/05).

According to the Employer, the grievant claimed that he was suffering from a herniated disc (not part of the original claim), and should have his O.I. L. benefits extended. Per the Employer, the Union was told, at the Step 2 grievance meeting, that if the herniated disc was added on as an allowed condition, they might reconsider the request for added O.I.L. benefits. The grievant did return to work soon after learning of the O.I.L. benefits cancellation.

The Employer claims that Article 42, Section 42.06, specifically states that the Director of each Agency or his/her designee shall have the authority to approve/disapprove requests for O.I.L. Requests for O.I.L. shall not be unreasonably denied. The Union cannot show that the Employer's decision was unreasonable, and therefore, the Employer requests the arbitrator deny the grievance in its entirety.

## **DISCUSSION:**

Matters of this nature are frequently a problem for Employers' and employees to resolve. There is so much third party intervention and opinion to be considered. An Occupational Injury Leave benefit is very valuable for injured employees. However, it is a very costly benefit for an Employer to provide. Both parties need to treat the benefit and the administration of it with respect. It is the duty of the Employer to ensure that it is being used for legitimate purposes. It is also the duty of the employee to request leave benefits when absolutely necessary.

Evidence and testimony showed that Officer Zarate had two on the job incidents that resulted in him being injured. On March 26, 2005 an incident occurred injuring Officer Zarate, causing an emergency room visit. The ER

diagnosed him with a cervical strain (Jt. 2B). Officer Zarate was advised, by the ER, to not work for two days and consult his own physician to obtain his release for work. No evidence was presented to verify that he consulted a personal physician. The second incident causing injury to Officer Zarate occurred on April 27, 2005. Again an out of control patient attacked Officer Zarate causing him to be severely injured (Jt. 2C). The next day he sought treatment by Dr. James Hicks. He diagnosed Officer Zarate with: sprain of left shoulder, sprain/strain of left elbow, cervical strain/sprain, thoracic sprain/strain, lumbosacral sprain/strain, and left jaw strain/sprain (Jt 2D). Doctor Hicks reported the work injury to the Bureau of Workers' Compensation (BWC).

On May 5, 2005, Officer Zarate applied for Occupational Injury Leave with accompanying Attending Physician Statement (Jt. 2G). O.I.L. was approved through 5/15, initially (Jt. 2H). On 5/16/05 Dr. Hicks certified Officer Zarate unable to work through 5/31, and that he was awaiting MRI results (Jt. 2J). May 18, Dr. Hicks, through a Supplemental Physicians Report, certified Officer Zarate Temporarily Totally Disabled through 6/30, with a return to work date of 7/1/05. Doctor Hicks also referred him to an Orthopedic Surgeon, referencing MRI results revealing 2 HNP's (Jt. 2M).

O.I.L. benefits were approved by the Employer with a letter to Officer Zarate (5/23/05). The letter requested him to have Dr. Hicks indicate any physical restrictions, for a possible return to work July 1, 2005 (Jt. 2N). No evidence was submitted that Officer Zarate responded to the Employer's request for work restrictions. A Supplemental Physicians Report was submitted by Dr. Hicks on 6/27/05 estimating a return to work on 9/1/05 (Jt. 2P).

The Employer, on June 30, notified Officer Zarate, through CompManagement, that he was scheduled for an independent medical exam on July 14. The letter also stated that depending on the IME his O.I.L. benefits would or would not be extended beyond July 14 (Jt. 2T). The IME did not occur until July 28, 2005, due to communications issues. The Employer also notified Officer Zarate (7/18/05) that continuation of O.I.L. benefits beyond July 28 would depend on the IME (Jt. 2T).

The IME conducted by Dr. Writesel determined that Officer Zarate was not temporarily and totally disabled based on all the conditions either recognized or alleged (Jt. 2U). He released him to modified duty and recommended a

sedentary work status, refraining from forceful movement of the cervical spine. As a result of the IME the Employer notified Officer Zarate that O.I.L. benefits were terminated as of July 28, 2005. Officer Zarate returned to work at his regular job on August 10. Dr. Dorado, Officer Zarate's new attending physician released him to work without restrictions, and he has continued to work to this date (Jt. 2Mc).

Per the Employer's opening statement, they advised the Union during grievance discussions that O.I.L. benefits could be reconsidered if the alleged conditions (neck herniation) were medically determined to be part of the work injuries (Jt. 2A). A BWC MOTION was filed by the grievant's attorney, regarding the herniations, however, the MOTION was subsequently withdrawn (ME 1&2).

### **OPIOION:**

Article 42, Section 42.01, states that all employees in the bargaining unit shall be entitled to use O.I.L., which entitles Officer Zarate to be eligible for those benefits. However, Section 42.03 states that the incurred injuries must have been incurred while on duty. The question is, did all the alleged injuries incur while on duty? If they did then the O.I.L. denial of benefits from 7/28 through 8/7 would be in violation of the Agreement.

On 5/23/05, the Employer notified Officer Zarate to contact his attending physician regarding a return to work under the Transitional Work Program(TWP)(Jt. 2N). However, there was no evidence presented that showed any employee contact with the attending physician. According to Section 42.07, employees must participate in the TWP unless precluded by their attending physician.

In the arbitrator's opinion, with no Officer Zarate responses to the TWP request, it certainly was logical for the Employer to schedule him for an independent medical exam, in accordance with Section 42.08. The independent medical exam determined that the patient was capable of returning to modified duty (Jt. 2U). Officer Zarate was notified by the Employer that continued O.I.L. benefits would be contingent on the independent medical exam (Jt. 2T).

The Union's argument that the herniated disc in his neck, should be considered as part of the injuries on the job, was not substantiated by

medical evidence. The independent medical examiner noted that the herniations were only casually related to the work injuries (Jt. 2U). Further examination by a BWC selected doctor, clarifies that the disc changes detected in the MRI were expected changes in an adult (ME-6). Although O.I.L. benefits are not Workers' Compensation benefits, eligibility for them requires that the injuries be incurred while on duty (42.03). Medical examination and opinion are the accepted procedures to verifying the injury relationship to the job activity.

I do not find a preponderance of evidence that the Employer unreasonably denied the grievant's request for O.I.L. benefits.

**AWARD:**

The grievance is denied.

This concludes the arbitration decision.

Respectfully submitted, this 1<sup>st</sup> day of August 2006.

A handwritten signature in cursive script, reading "E. William Lewis".

E. William Lewis  
Arbitrator