OPINION AND AWARD

In the Matter of Arbitration

Between

Ohio State Troopers Association, Inc.

And

The State of Ohio, Department of Public Safety

Case Designation

15-03-20120301-0015-04-01 (DPS-2016-05124)

Date of Briefs: December 4, 2017
Date of Award: January 18, 2018

APPEARANCES

For the Union
Elaine N. Silveira, Esq., Advocate
Jeremy Mendenhall
Robert Cooper

For the Employer
Lieutenant Jacob D. Pyles, Advocate

The Parties agreed to submit this case to the Arbitrator on briefs and joint exhibits; no hearing was held. The stipulated issue before the Arbitrator is as follows: "Did the Employer violate Article 46 of the collective bargaining agreement, by denying Grievant's application for Occupational Injury Leave (OIL)? If so, what shall the remedy be?" Joint Exhibits submitted into the record are as follows: Collective Bargaining Agreement (J1), Grievance Trail (J2), 2001 BWC Claim Information (J3), 2013 BWC Claim Information (J4), 2013 Wage Advancement Agreement (J5), DPS Calendar of Wages 1/30/13-5/18/13 (J6), Workers Comp Earnings Worksheet – Claim #01-303783 (J7), BWC Payments (J8), DPS Policy 501.30 (Occupational Injury Leave) (J9), ORC 5503.08 (OIL) (J10), ORC 4123.01 (Workers Compensation Definitions) (J11), Armstrong v. Jurgensen (J12), McCrone v. Kielmeyer (J13), Wood v. OSHP (J14).

RELEVANT CONTRACT PROVISIONS:

Negotiated agreement between Ohio State Troopers Association, Inc. and The State of Ohio effective 2012 – 2015.

ARTICLE 38 – REPORTING ON-DUTY ILLNESS OR INJURY

38.01 Reporting

Members of the bargaining unit shall promptly report an on-duty injury or illness to his/her supervisor. The employee and the Patrol shall complete the appropriate report forms and submit the reports to the Employer. The Employer shall provide a copy of the forms and any accident investigation report to the employee upon the employee's request.

38.02 Workers' Compensation

The Employer shall comply with the provisions of the Workers' Compensation law of the State of Ohio. The Employer shall provide copies of Workers' Compensation claim forms and any medical information related to the claim to the employee upon the employee's request.

38.03 Agency Responsibility

If a bargaining unit member is injured on the job the Employer will secure medical attention and, if necessary, provide transportation to the nearest medical facility. Bargaining unit members who experience work-related illness or injury on the job will be paid their regular rate for the balance of their shift or an employee who is injured on the job and reports immediately to family physician, an emergency room or an urgent care facility for emergency treatment shall remain in active pay status until the emergency treatment is conducted. In the case of such injuries and with the approval of the Employer, an employee undergoing medical treatment, making visits to medical practitioners and attending therapy sessions as the result of the injury shall be excused from work with pay at the regular rate for the time of the treatment, visit or session. Employees shall not be paid for more than forty (40) hours for any one injury under this Section. In accordance with the commuting rule in Section 26.04, travel time to and from the site of the treatment, visit or session shall also be paid. No overtime entitlement arises by the operation of this Section. The Employer may adjust work schedules to avoid the payment of overtime when an employee uses the provisions of this Section.

When bargaining unit members are no longer able to perform the reasonable and substantial duties of their position after sustaining on-the-job illness or injury they will be placed on the appropriate leave effective with the following shift.

ARTICLE 46 – OCCUPATIONAL INJURY LEAVE

Occupational injury leave shall be governed by the Rules promulgated on this subject and the Ohio Revised Code 5503 as they exist on March 26, 1989, except as modified in this Article. All employees in the bargaining unit shall be entitled to occupational injury leave.

46.01 Maximum Hours of Occupational Injury Leave

Each employee, in addition to normal sick leave, is entitled to two thousand eight (2080) hours of occupational injury leave at the regular rate per independent injury incurred in the line of duty, with the approval of the superintendent.

46.02 Injuries

To be eligible for O.I.L., an employee must have filed and have an approved or pending Worker's Compensation claim.

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 available for an employee who is injured while performing his/her approved, personalized "fitness plan" as described by the health and wellness section of the Academy. O.I.L is not available for injuries incurred during those times when an employee is on meal or rest break or when an employee is engaged in any personal business.

46.03 Waiting Period

Occupational injury leave may not be used within seven (7) days of the date of injury or date of reactivation. Normal sick leave may be used during this time period.

However, if an employee is treated at a hospital/urgent care treatment facility by a medical doctor due to a serious on-duty injury who orders the employee not to work, no loss of sick leave shall occur.

46.04 Requests for Occupational Injury Leave

The request for occupational injury leave will be submitted through established channels following the procedure as outlined by the Employer.

46.05 Authority to Approve or Disapprove

Authority to approve or disapprove any request for occupational leave rests with the Superintendent. Requests for O.I.L. shall not be unreasonably denied.

46.06 Transitional Return to Work Program

The Employer shall arrange for work to provide a transition return to full duty for employees experiencing partial disability and on occupational injury leave, sick leave or disability leave for a period of up to one year subject to the following:

a. The employee is examined by a physician selected by the Employer and found to be able to participate in transitional return to work program, and;
b. A return to full duty is reasonably believed to occur within one year of the date of the examination.

Such efforts will be made at the employee's assigned post, or at the divisional facilities as determined by the Employer. All living expenses incurred as the result of a transitional return to work assignment to another divisional facility in cases where the Employer cannot allow a daily commute to the employee's residence will be paid by the Employer. Light duty may only be assigned at the employee's normal report-in location or at another location up to a maximum of fifty (50) miles from the employee's residence. Specialized training of a disabled employee is not considered an assignment.

46.07 Geographic Limitations

No geographic limitation on the use of occupational injury leave shall be imposed if:

1. A doctor has certified that travel will not prolong the recovery period or cause additional injury prior to the travel;
2. travel will not interfere with previously scheduled therapy of doctor's exams;
3. travel will not interfere with activity such as court dates;
4. the Employer has been given seven (7) days notice of the travel, and;
5. notify the Employer of the location and phone number so the employee can be reached.

However, if the request for occupational injury leave follows a denied leave request for the same period of time, the Employer may require documentation of the occupational injury leave request and may impose geographic restrictions.

46.08 Health Insurance

Employees receiving Worker's Compensation Temporary/Total (TT) wage loss benefits who have health insurance shall continue to be eligible for health insurance at no cost to the employee not to exceed 24 months. Further, pending the certification of a Workers' Compensation award, the Employer shall continue group health insurance coverage at no cost to the employee, including the employee's share of such costs, for a period not to exceed 24 months. The Employer has the right to recover such payments if the Worker's Compensation claim is determined to be non-compensable.

ARTICLE 47 – DISABILITY LEAVE

47.01 Disability Program

Eligibility and administration of disability benefits shall be pursuant to current Ohio Law and Administrative Rules of the Department of Administrative Services except for the following modifications and clarifications:

A. Any full-time permanent employee with a disabling illness, injury or condition that will last more than fourteen (14) consecutive days AND who has completed one (1) year of continuous state service immediately prior to the date of the disability may be eligible for disability leave benefits.

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BACKGROUND

The Grievant is Lee Sredniawa, an Ohio State Highway Patrol Trooper hired in February 1994. On January 11, 2001 the Grievant was involved in an on-duty patrol car pursuit which resulted in a crash that was fatal for the other driver. On March 1, 2001, the Bureau of Workers' Compensation approved the Grievant's claim for a wrist sprain and contusion of the chest wall (J3). The Grievant applied for, was approved for, and used 1224 hours of O.I.L benefits. On August 26, 2001 the Grievant was granted a disability retirement from the Ohio State Highway Patrol Retirement System. On June 24, 2002 the Bureau of Workers' Compensation approved the Grievant's claim for prolonged post-traumatic stress (J3). The Grievant's PTSD had been diagnosed in January 2001 (J4).

In January 2006 the Grievant applied for and was granted a reinstatement to his former position as a State Trooper. On January 30, 2013, the Grievant was removed from active duty at which time the Grievant applied for O.I.L. benefits. The request for O.I.L benefits was denied on February 20, 2013 because the request was based on his diagnosed condition of PTSD rather than a physical injury. The instant grievance was filed on February 21, 2013. On March 22, 2013 the BWC reactivated the Grievant's 2001 claim and approved medical benefits for treatment of PTSD based on the determination of a causal relationship between the 2001 claim and the 2013 claim (J4). On May 24, 2013 the Grievant was disability separated by the Employer and in September 2013 the Grievant was granted a second disability retirement by the Ohio State Highway Patrol Retirement System.

POSITION OF THE UNION

It is the Union's position that the Grievant has complied with all requirements of Article 46 pertaining to the particulars of application and approval of O.I.L. benefits. The Grievant has an approved Workers' Compensation claim as documented by Joint 4. The Grievant's injury was incurred while on duty and acting within the scope of his authority and job classification, as evidenced by the fact that BWC has approved the causal relationship between the 2001 claim and the 2013 claim documented in Joint 3 & 4. Article 46 also establishes that an injury on duty that aggravates a previous injury will be considered an independent injury. This being the case, the Grievant is entitled to receive O.I.L. benefits for 609 hours of leave (273 hours of sick leave and 336 hours of leave without pay) from the time of his removal from active duty on January 30, 2013 to his disability separation on May 24, 2013.

The Employer has restricted O.I.L. benefits to occurrences of physical injuries. However, this is an incorrect interpretation of the contract language. There is no reference to 'physical' injuries in either Article 46 of the CBA or the Department's Occupational Injury Leave Policy (DPS-501.30). Injuries can be both psychological and physical. The Grievant's PTSD is as much an injury as were his wrist and chest injuries in 2001. The Ohio Supreme Court in Armstrong v. Jurgensen held that to be compensable for Workers' Compensation benefits Armstrong's PTSD must be causally related to compensable physical injuries. Although the Grievant's case is dissimilar in that it is not a dispute over compensable BWC claims, the case can be read to support the Grievant's position because BWC has established a causal link between the Grievant's 2001 compensable physical injuries and the 2013 claim for PTSD. Two other cases presented in the joint exhibits also relate to Workers' Compensation and are inapplicable to the instant case regarding O.I.L. benefits.

The Union has met its burden to show that the Grievant is eligible for O.I.L benefits. The Employer's denial is based on the erroneous restriction of benefits to physical injuries only, when it is clear that neither the CBA nor the Department's policy modify the word injury with 'physical', therefore both psychological and physical injuries are eligible for benefits.

POSITION OF THE EMPLOYER

This is a classic example of the "plain meaning rule" which instructs those reading a contract provision to attach the plain or usual meaning to words that appear as clear and unambiguous. Article 46 repeatedly uses the word "injury" when referring to that which qualifies for O.I.L benefits. The Article does not refer to disorders, or illnesses, or any other term that describes a condition other than a physical injury. By contrast, the CBA, in reference to Workers' Compensation coverage refers to both injuries and illnesses. Likewise, CBA references to disability benefits also refer to disabling illnesses, injuries and conditions (including mental disorders, psychosis, mood disorders and anxiety). Although O.I.L, Workers Compensation and Disability are all different benefits, what is significant is that together they show the parties' intent to cover different circumstances. "Injuries" are clearly physical, whereas illnesses and disorders are expansive terms that can incorporate other than physical conditions. Article 46 only refers to "injuries", which means the benefit only covers physical injuries. Had the parties

intended to include psychological conditions in the O.I.L. benefit they would have added these other words as they did in reference to Workers' Compensation and Disability benefits. Furthermore, the decision to approve or deny an O.I.L. application rests with the Superintendent of the State Highway Patrol. In this case the Superintendent's decision was neither arbitrary nor capricious, but based on the language of both the CBA and ORC 5503.08. Therefore, the grievance must be denied.

DISCUSSION

The essence of this case is a dispute over the reading and application of the word "injury" in the Occupational Injury Leave article of the CBA. As such it is a case of contract interpretation and thus the burden of proof lies with the Union. To meet its burden the Union has methodically outlined the Grievant's compliance with the requirements of the contract article and the Employer's policy. They have demonstrated that the Grievant's claim arises out of his employment, that he has an approved Workers' Compensation claim, and that the current claim is causally related to a prior approved Workers' Compensation claim which had involved a wrist and chest injury. However, these characteristics of the claim are not the heart of the dispute between the Union and Employer. The question for the Arbitrator is whether the current approved BWC claim for PTSD qualifies for O.I.L. benefits. The Union's position on this question is a resounding, "Yes" based on the belief that the word "injury" can refer to either a physical injury or a psychological injury, and that without limiting modifiers in the existing contract language, the word "injury" must be read broadly and inclusively. The Union cautions the Arbitrator not to add to or modify the existing contract language by limiting O.I.L benefits to only physical injuries. The Employer on the other hand answers the same question with a resounding, "No" based on a reading of the word "injury" in its common usage which is to convey the meaning of physical harm or damage. The Employer cautions the Arbitrator not to find ambiguity where there is none.

Although the parties have provided three Joint Exhibits of Ohio court cases pertaining to Workers' Compensation, both parties in their respective briefs dismiss the cases as dissimilar from the current case and not particularly relevant. The possible exception being that in Armstrong v. Jurgensen, the Ohio Supreme Court held that for Armstrong's PTSD to qualify as a compensable injury it had to be causally related to compensable physical injuries. In the case at hand, the Grievant's PTSD has been causally linked to prior physical injuries and thereby approved as compensable by BWC. The Union argues that approval of O.I.L. benefits in this case would be consistent with how Workers' Compensation handles PTSD claims.

Despite 14 Joint Exhibits and 15 stipulated facts, there is scant evidence in the record to support either party's position. The Employer expressly relies on the "plain meaning rule" which requires that the meaning of contract language be determined solely by attaching the plain or usual meaning of words that appear clear and unambiguous. The plain meaning rule can be used to exclude extrinsic evidence such as notes from the bargaining history that could shed light on the parties' intent, or evidence of a past practice that has developed around a particular provision. The 'plain meaning' argument works to the advantage of the Employer in this case because there is no such extrinsic evidence offered by either party.

Absent any extrinsic evidence of the parties' intent, the Arbitrator must work within the four corners of the contract to suss out a reasonable reading of wording that can be susceptible to more than one interpretation. In so doing the Arbitrator must look to how the parties have expressed themselves when using the same word(s) in related contract articles. As the Employer has pointed out, throughout the contract, in related articles (e.g., Article 38 – Reporting On-Duty Illness or Injury, Article 47 – Disability Leave, Article 48 – Sick Leave) the parties used more than the single word "injury" to establish the breadth of covered circumstances. Beyond the word "injury" the parties have been expansive and descriptive using the words illness, condition and mental disorder when setting forth compensable, qualifying circumstances for Workers' Compensation or Disability Leave. This being the case, the use of the word "injury" in Article 46, without modifiers or without listing other explanatory words, is a strong indication that the parties negotiated a restricted benefit – one that does not cover every possible circumstance.

In Section 46.02, the parties negotiated language to include injuries that occur while performing an approved, personalized fitness plan. No doubt this language is provided to clarify **when** an employee is considered to be performing 'on-duty' activities, but it can also be read to illustrate **what** type of injury O.I.L is intended to cover – those that result in physical damage.

Article 46 also states, "Occupational injury leave shall be governed by the Rules promulgated on this subject and the Ohio Revised Code 5503 as they exist on March 26, 1989, except as modified in this Article." Like Article 46, ORC 5503 only uses the word "injury" to identify eligible and covered circumstances. The word is not modified nor is it accompanied by a list of other covered circumstances such as illness or condition. The Departmental Policy (DPS-501.30) which sets forth the rules governing O.I.L is drafted the same way as Article 46 and ORC 5503; it only refers to "injuries." Like Article 46, the Policy includes injuries that occur while performing an approved personalized fitness plan. In addition, the Policy contains an extensive section (applicable to the Ohio State Highway Patrol only) pertaining to physical therapy allowances. The specificity of this aspect of the Policy strongly suggests that the intent of the O.I.L. benefit is to cover physical injuries. The silence of the Policy with respect to other possible forms of therapy serves to tip the scale in favor of reading the word "injury" as meaning physical injury.

Post-Traumatic Stress is commonly referred to as a condition or a disorder rather than an injury. In its brief, the Employer provides a definition of PTSD from the American Psychological Association (APA) – "an anxiety problem that develops in some people after extremely traumatic events, such as combat, crime, and accident or natural disaster." There is currently a debate among the APA and various advocacy groups to change from PTSD (disorder) to PTSI (injury). Those lobbying to make the change do not seek to change the underlying diagnostic criteria, rather to change a label that is seen by some as stigmatizing. The issue is far from settled. The outcome of this arbitration case in no way addresses that debate, nor does it address the legitimacy of PTS trauma. Acknowledgement of the debate and reference to it here is simply to illustrate that PTS is not commonly referred to as an 'injury' whether or not it technically is an injury.

The negotiated language of Article 46 ties eligibility for O.I.L. benefits to an approved or pending Workers' Compensation claim. However, this language only establishes an essential prerequisite for

eligibility; it does not require that all Workers' Compensation claims be approved for O.I.L. benefits. In Section 46.04 the parties have allowed the Superintendent of the State Highway Patrol to make the decision on approval or disapproval of requests for O.I.L. benefits. The Superintendent's authority is regulated by reasonableness – "Requests for O.I.L. shall not be unreasonably denied." There is no evidence in the record to suggest that the Superintendent has acted unreasonably in this matter. There is no evidence of a past practice by which to judge the instant case, there is no evidence of discriminatory treatment of the Grievant, and there is no evidence of a failure to consider all relevant information pertaining to the Grievant's claim. The Arbitrator must therefore conclude that the Superintendent has acted rationally within the scope of authority provided for in the contract. The fact that the Grievant has an approved Workers' Compensation claim for his PTSD is not probative evidence of eligibility for O.I.L benefits.

CONCLUSION

The Arbitrator must work within the four corners of the contract to illuminate the meaning of disputed contract language when there is no extrinsic evidence to shed light. In this case, the use of the word "injury" in Article 46 without modifiers or additional descriptive words, as are found in other related benefit articles, indicates that the parties have negotiated a limited Occupational Injury Leave benefit – one not intended to cover every possible on-duty circumstance. A narrow reading of the word "injury," to mean those circumstances that involve physical damage or harm, is also consistent with the common usage of the word in today's society and culture. The CBA gives authority to the Superintendent of the State Highway Patrol to approve or disapprove O.I.L. benefits and in this case the record is void of any evidence that the Superintendent failed to act rationally within his authority.

AWARD

For the reasons herein stated the grievance is denied.

Respectfully submitted at Columbus, Ohio, January 18, 2018.

Felicia Bernardini, Arbitrator