

**IN THE MATTER OF ARBITRATION BETWEEN**

---

<b>METROPOLITAN COUNCIL</b>	)	<b>BMS Case No. 11-PA-0276</b>
	)	
	)	<b>Issue: Discharge for Fraud</b>
	)	
<b>&amp;</b>	)	<b>Hearing Dates: 05/25/11</b>
	)	<b>&amp; 06/13/11</b>
	)	
	)	<b>Award Date: 07/18/11</b>
	)	
<b>Amalgamated Transit Workers, Local Union No. 1005</b>	)	<b>Mario F. Bognanno, Arbitrator &amp; Professor Emeritus</b>
	)	

---

**I. JURISDICTION AND ISSUE**

The parties in this case are the Metropolitan Council (“Employer” or “Council”) and Amalgamated Transit Workers, Local Union No. 1005 (“Union” or “ATU”), who are signatories to a 2008–2010 Collective Bargaining Agreement (“CBA”). (Joint Exhibit 1) The matter at arbitration was heard on May 25 and June 13, 2011, in Minneapolis, Minnesota. At the hearing, the parties waived the CBA’s Article 13 provisions calling for a Board of Arbitration and a decision within 45 days from the date the arbitration hearing is completed. (Joint Exhibit 1) Also, the parties stipulated that the issue in dispute is:

Whether the Grievant was discharged for “just and merited” cause?

If not, what is an appropriate remedy?

(Article 5, Section 1 in the CBA uses “just and merited” language, which is equivalent to the more commonly used “just cause” language found in most CBAs; Joint Exhibit 1) Finally, the parties stipulated that the “Grievant” in this case shall be identified by his initials, “V.M.”

The parties were given a full and fair opportunity to present their cases; witness testimony was sworn and cross-examined; documentary evidence was accepted into the record, including six video discs. (Employer Exhibits 6 and 27) On June 13, 2011, the parties presented closing arguments; the record was closed at that time; thereafter, the matter was taken under advisement.

The Council is a regional planning agency that serves Minnesota's Twin City seven county metropolitan area, plus Sherburne County and 85 cities in the region. The primary services provided are bus and light rail transit and waste water collection and treatment. One of the Council's five divisions is the Transportation Division that includes Metro Transit. Metro Transit employs approximately 1,400 part-time and full-time Bus Operators, one of whom was the Grievant, V.M., who worked out of the Nicollet Garage. V.M. was hired on June 5, 2006. (Employer Exhibit 9)

Effective July 23, 2010, V.M. was issued a notice of discharge, for gross misconduct, in violation of Metropolitan Council Procedure 4-6a (Code of Ethics) and 4-6d (Fraud). (Joint Exhibit 2) In relevant part, Metropolitan Council Procedure 4-6a provides:

## II. Code of Ethics

### A. Acceptance of Gifts or Favors

Employees of the Council,...shall not directly or indirectly receive or agree to receive any payment of expense, compensation, gift, reward, gratuity, favor,...,for any activity related to the duties of the employee unless otherwise provided by law...

### B. Falsification or Misrepresentation of Information

No employee or applicant for employment may intentionally provide information he/she knows to be false to the Council, its employees or agents, or members of the public.

(Joint Exhibit 3) Metropolitan Council 4-6d provides in relevant part:

C. Investigation and Discipline

Any irregularity that is detected or suspected should be reported immediately to the Director of Program Evaluation and Audit, who coordinates investigations with the General Council's Office, Human Resources, and other affected areas, both internal and external.

Willful violation of the Employee Conduct or Fraud Policy is subject to disciplinary action, up to and including termination. Any fraudulent acts committed by employees may also constitute a violation of law may be reported to the proper authorities for potential criminal prosecution.

(Joint Exhibit 4) The Council discharged the Grievant for unethically and fraudulently collecting Workers' Compensation ("WC") when he was allegedly able to work as a bus driver or work light duty assignments.

On July 28, 2010, the Union filed a grievance, challenging the Grievant's discharge. (Joint Exhibit 6) The parties' 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> step grievance meetings were held on July 28, 2010, August 13, 2010 and August 24, 2010, respectively.

(Joint Exhibits 5, 7 and 8) Grievance negotiations failed to resolve the matter; thus, it was appealed to arbitration for final and binding resolution.

**II. APPEARANCES**

**Metropolitan Council:**

Andrew D. Parker  
Marcia Keown  
Ellen Jackson  
Greer Gentry

Tim Becchetti

Attorney-at-Law  
Labor Relations Specialist  
Manager, Nicollet Garage  
Assistant Manager, Nicollet  
Garage  
Claims Representative, Risk  
Management Department

Dana Alexon  
Christy Raily  
Dr. Paul T. Wicklund

Supervisor, Rail Transit  
Director, Bus Operations  
Orthopedic Physician, Aspin  
Medical Group (subpoenaed  
witness; testified on May 25,  
2011)

**ATW, Local 1005:**

Justin Cummins  
V. M.  
Dorothy Maki

Attorney-at-Law  
Grievant  
Vice President, ATU, Local No.  
1005  
Union Steward (testified on July  
13, 2011)

Cliff Bolden

**III. FACTUAL BACKGROUND**

At approximately 6:40 p.m. on April 21, 2010, the Grievant was involved in a “no fault” accident, at the intersection of Nicollet Avenue and 26<sup>th</sup> Street in Minneapolis, MN. The bus he was operating was struck by a car whose driver ran a red light. Said driver was seriously injured; however, none of the buses’ approximately 29 passengers were injured with the exception of a woman who extended her right arm to break her forward motion at the point of impact when the bus came to an abrupt stop, straining her right elbow. (Employer Exhibits 1 and 6 [V.M. Accident Video with Instructions]) No personal injury claims were filed by bus customers. And on the day of the accident, the Grievant did not file a “First Report of Injury.” (Employer Exhibit 7) The accident did result in property damage. The right front light, bumper, fender and wheel housing of the car were extensively damaged and the right front bumper and front fog light of the bus were damaged slightly. (Employer Exhibits 1~5 & Union Exhibit 2)

On April 22, 2010, the Grievant called the Nicollet Garage, reporting that “he has a little stiffness/soreness in his back and neck,” necessitating that he

take the day off work. The Employer made arrangements for him to see a physician on the following day. (Employer Exhibit 7)

On April 23, 2010, the Grievant was examined by Dr. Daniel Lussenhop, M.D. at the Airport Clinic. Dr. Lussenhop's subjective analysis was that the Grievant was "shaken" by the events of April 21, 2010 and the next morning he had "moderately severe discomfort in the neck, upper and lower back." The Grievant also told Dr. Lussenhop that "any time he twists, bends, or reaches out he has pain in those areas." Dr. Lussenhop's objective medical findings were that, except for "mild tenderness," the Grievant's neck, thoracic back and lumbar back were "normal." Regarding tenderness or pain, Dr. Lussenhop's report indicates that the Grievant rated his pain "at about 4 on a pain scale of 10." Ultimately, Dr. Lussenhop returned V.M. to work on his next regular shift, without restrictions; recommended that absent significant improvement within one week V.M. should return for a follow-up evaluation, possibly physical therapy; he prescribed 500 milligrams of Naproxen, as needed. (Employer Exhibit 8)

The Grievant was not scheduled to work on April 24 and 25, 2010; he took a FMLA day to care for his father on April 26, 2010. (Employer Exhibits 30 and 32) On April 27, 2010, the Grievant returned to work but after six (6) hours he stopped driving, complaining that it was aggravating his condition. On this date, he filed a First Report of Injury, indicating that because of the accident, he had "neck & back pain & left wrist [was] swollen 2 days after." (Employer Exhibits 9 and 32)

On April 28, 2010, the Grievant testified that he called the Airport Clinic, requesting to see Dr. Lussenhop. The latter was not available, so V.M. was seen by Dr. William Isaksen, M.D. Dr. Isaksen reported that the Grievant complained of wrist discomfort associated with operating his bus; that he had purchased and was wearing a wrist splint for relief; the Grievant had not complained of wrist pain when seen by Dr. Lussenhop on April 23, 2010; his indicated level of pain was “3/10.” Dr. Isaksen’s objective analysis indicated left wrist “tenderness,” but no evidence that the left wrist was swollen and the x-ray of same was “negative.” Dr. Isaksen recommended that the Grievant take Advil, Aleve or Excedrin; continue to use the wrist splint for protection; may return to work provided that he not engage in “heavy gripping/grasping” (i.e., no driving) through May 1, 2010; he can “resume regular duties without any restrictions...” on May 2, 2010. (Employer Exhibit 10)

V.M. performed non-driving work on April 29, 2010; April 30, 2010 was a “Floating Holiday.” (Employer Exhibits 30 and 32) V.M. testified that on May 1, 2010, he decided to seek injury-treatment at the Aspen Medical Group’s Urgent Care facility because he was “in pain” and he believed the Airport Clinic physicians showed “little concern and attention” to his condition. Thus, on May 1, 2010, V.M. saw Dr. Charles K. Dunham, M.D. for his painful left wrist and lower backache. Dr. Dunham had V.M.’s left wrist x-rayed. Without identifying restrictions, Dr. Dunham recommended the Grievant not work through May 14, 2010; he prescribed a thumb splint that was “always” to be worn for the next two

weeks; he prescribed Tylenol #3 for pain every six hours, as needed.<sup>1</sup> (Employer Exhibit 11 & Union Exhibit 5)

Next, V.M made a May 12, 2010 appointment for himself at the Hyman Chiropractic Clinic because “he wanted to return to work as soon as possible.” The Clinic’s report shows that the Grievant identified the following symptoms: headaches, dizziness/fainting, numbness or pain in leg, arms, or head, stiff neck and pain between shoulders; V.M.’s indicated pain level was 8 on a scale of 10; Grievant reported he had previously broken his left wrist. (Employer Exhibit 13) The only chiropractic medical report in evidence is Employer Exhibit 13, although V.M. testified that he was seen thereafter by a chiropractor who directed him to return as needed. V.M. testified that he cut short his chiropractor visits because Dana Alexon, Supervisor, Rail Transit, told him that the Employer’s insurance would not cover chiropractic visits, an assertion that Mr. Alexon denied in rebuttal testimony.

On May 14, 2010, V.M. returned to the Aspin Urgent Care unit because of continuing left wrist and back pain. He was seen by Dr. Martin C. Umeh, M.D., who concluded from an earlier x-ray that the Grievant’s left wrist had been previously fractured. V.M. told Dr. Umeh that he had broken his wrist several years earlier while playing soccer. Dr. Umeh instructed Grievant to continue to wear his thumb splint; refilled the Tylenol #3 prescription. Without citing restrictions, Dr. Umeh ordered that V.M. not work until after being evaluated by an orthopedic surgeon. (Employer Exhibit 12 & Union Exhibit 6)

---

<sup>1</sup> Although the Acetaminophen with Codeine #3 (i.e., Tylenol #3) was prescribed by Dr. Dunham, it was Dr. Umeh who issued a prescription for same on May 3, 2010. (Union Exhibit 5)

*Per Council policy* medically impaired employees can be placed on either Restricted Duty (“RD”) or Alternate Restricted Duty (“ARD”). RD assignments entail work within the employee’s medical restrictions—RD assignments are also referred to as “modified duty” or “light duty” assignments. In contrast, ARD only requires the medically impaired employee report for duty for a minimum of two hours per day, with no expectation that the employee will actually perform work. This requirement may never exceed two weeks (i.e., ten days) per injury. (Union Exhibit 4)

Mr. Greer Gentry, Assistant Manager, Nicollet Garage, testified that he and V.M. filled out the latter’s First Report of Injury form on April 27, 2010. (Employer Exhibit 9) The workability reports of Drs. Dunham and Umeh, dated May 1, 2010 and May 14, 2010, respectively, showed that the Grievant was totally disabled. (Employer Exhibits 11 and 12 & Union Exhibit 3) Thus, on or about May 14, 2010, Mr. Gentry testified that he directed the Grievant to participate in ARD from May 18, 2010 through June 1, 2010.<sup>2</sup> (Employer Exhibits 30 and 32) Related to this directive, Mr. Gentry stated that he gave the Grievant a copy of the Council’s Disability Management Procedure (Joint Exhibit 12); he explained the difference between RD and ARD to the Grievant; directed the Grievant to call-in weekly with health status updates and to report to him within two hours following each healthcare provider visit. Mr. Gentry also testified that although the Grievant called in weekly, he never called in following healthcare provider visits. Further, Mr. Gentry stated that the Grievant never called in to

---

<sup>2</sup>. Mr. Gentry testified that the Grievant actually worked nine days of ARD, he was sick on June 1, 2010.

report that he could handle RD or light duty work, such as driving a car, sorting mail, handling customer service calls and the like. Rather, Mr. Gentry testified that V.M. always reported that he was totally disabled. Partly contradicting Mr. Gentry's testimony, V.M. testified that he thought ARD and light duty assignments were one and the same; he performed his mandatory ten days of ARD, during which time he occasionally helped out with scheduling.<sup>3</sup>

Dana Alexon testified that he was the Disability Manager at the Nicollet garage at the time of V.M.'s accident. Thus, Mr. Alexon maintained the Grievant's "Weekly Sick Status Report," which contains notes of the V.M.'s daily activities. (Employer Exhibit 32) These notes show that on June 1, 2010, Mr. Alexon and V.M. had a Disability Conference, which occurred about thirty days following his disability, as required by policy. (Employer Exhibit 32 & Joint Exhibit 13) Mr. Alexon stated that he knew about the Grievant's previous ARD activity and presumed that the Grievant knew that he should return to RD, as soon as possible. Nevertheless, he stated that he gave the Grievant a copy of the Council's Disability Management Procedure that, by signature, the Grievant verified receiving; he explained to V.M. that if he was unable to perform any work, he must call his supervisor once a week and within two hours of each healthcare provider appointment, and if able to perform some work, he was expected to perform modified-duty (i.e., RD or light duty) work. (Employer Exhibits 33 and 34 & Joint Exhibit 12) Further, Mr. Alexon asserted that the

---

<sup>3</sup> On cross-examination, V.M. clarified that he helped with scheduling on three occasions while on ARD. He testified to having spent fifteen to twenty minutes performing scheduling work per occasion. Further, he stated that although his supervisor did not direct him to perform this work, he was not directed to the contrary.

Grievant knew his responsibilities under the policy; as required, he did call in weekly; however, he did not report within two hours of seeing healthcare providers and he did not provide healthcare provider paperwork in a timely manner. (Joint Exhibit 13) In partial contradiction to Mr. Alexon's testimony, V.M. testified that Mr. Alexon did not mention that if not totally disabled, he was expected to perform light duty or RD work; he also stated that Mr. Alexon did talk to him about "short term disability." On cross-examination, the Grievant could not explain why Mr. Alexon would mention short term disability since the Employer does not have such a program.

V.M. testified that approximately one week following his May 14, 2010 examination by Dr. Umeh, he called the latter's office to inquire about the scheduling of his appointment with an orthopedic surgeon. (Union Exhibit 6) Subsequently, Dr. Umeh's nurse telephoned the Grievant, informing him that he was scheduled to see Dr. Paul T. Wicklund, M.D. on June 2, 2010. Dr. Wicklund's subjective analysis was that the Grievant complained of left wrist pain as well as upper and lower back pain, caused by the bus/car collision, and that his back pain was being treated chiropractically. He further surmised that V.M.'s left wrist pain may be a "chronic" condition, related to a 2004 left wrist fracture, and not to the collision. Dr. Wicklund sent the Grievant to physical therapy for his left wrist, neck and back pain, recommending a return examination thereafter. (Employer Exhibit 14) Dr. Wicklund's physical therapy referral was to Sister Kenny Sports and Physical Therapy Center; his referral form indicates "patient will schedule" and "ROM and strengthening exercises/2x weekly for 2 weeks."

(Employer Exhibit 15) Two weeks passed before the Grievant began physical therapy.

On June 16, 2010 and June 22, 2010, the Grievant received physical therapy at the Sister Kenny Center. The Center's June 16, 2010 initial evaluation report states in relevant parts:

**Initial Pain Rating:** 8 – Very Severe Pain (Dreadful, Overwhelming, Horrible, Agonizing)

**Precautions:** No driving bus, lifting, twisting, carrying over 10 lbs.

**Physical Therapy Comments:** ... He notes that most of pain is between shoulder blades but also has pain in low back (especially with getting up after prolonged sitting). States that he did go to the chiropractor a few times which seemed to help "a little bit." Reports that he has some numbness in bilateral legs (occasionally)...He describes symptoms as stiff ache. Indicates that in the morning he is "very stiff" and has a hard time getting up. Aggravating factors include bending (low back), reaching overhead, lifting (shoulder blades), carrying/twisting, holding (wrist).

**Joint Screen:** Cervical ROM [Range of Motion]. Restricted in all planes of movement except extension. He reports upper back pain with all movements (although pain is mainly located in left upper back). Wrist ROM. Restricted and painful on radial side of wrist with all movement.

**Goals:** Patient goal (time reference required). "Get better and return to work without pain in 6 weeks." Long term goal: Patient to return to previous function and self manage symptoms in 6 weeks.

**Functional Goals:** ... Patient to tolerate 60 minutes of walking with 2/10 pain for improved function in shopping and general mobility in 6 weeks. Patient to tolerate up to 2-3 hours of sitting with 3/10 pain in 6 weeks.

(Employer Exhibit 16) In relevant parts, the Center's June 22, 2010 evaluation states in relevant part:

**Pain:** 8 = Very Severe Pain (Dreadful, Overwhelming, Horrible, Agonizing)

**Compare to Prior Initial Pain:** 8/10

**Therapist Assessment:** Patient continues to exhibit considerable fascial restriction in both upper and lower back. He has difficulty tolerating light pressure in upper back. Patient was given light exercise and movement for home program. He was advised that using muscles gently will help promote bloodflow, strength and ultimately reduce strain.

**Goals:** ... Patient is to demonstrate correct body mechanics independently for transfers, lifting, and household/work activities in 6 weeks to reduce strain and minimize pain. Patient is to tolerate 60 minutes of walking with 2/10 pain for improved function in shopping and general mobility in 6 weeks. Patient to tolerate up to 2-3 hours of sitting with 3/10 pain in 6 weeks.

(Employer Exhibit 17)

On June 29, 2010, Ellen Jackson, Manager, Nicollet Garage, sent a letter to V.M., confirming an Internal Audit interview with Katie Shea, Director, Program Evaluation and Audit, was set for June 30, 2010. (Employer Exhibit 18) Up to this point, the Grievant had been on total disability. At the June 30, 2010 interview, the Grievant was told that the Council was conducting an investigation on his alleged disability. V.M. was also advised that he would be asked to provide information as part of the investigation and, related thereto, he was given a Data Practices and Garrity Notice, which he signed. (Employer Exhibit 19) Employer Exhibit 20 is a transcription of V.M.'s Internal Audit interview. Relevant parts thereof are quoted below<sup>4</sup>:

\* \* \*

KS: Then you saw Dr. Wicklund on June 2. What did he say?

VM: He told me to take splint off and ordered PT for me to work on my back and wrist at the same time. I do a little exercise at home too. The wrist is better, see, I can move it around more like I couldn't before, but I still can't carry stuff like a heavy garbage bag or anything like that.

KS: So, your current symptoms are still your back and wrist both then?

---

<sup>4</sup> KS, VM and GG designate Katie Shea, the Grievant and Greer Gentry, respectively.

VM: Yes.

KS: We've done some surveillance on you for a couple of weeks, and I couldn't help but notice that you play an awful lot of soccer, like hours of soccer. How can you be totally disabled from work and play soccer like that?

VM: I try to run and play ball. It keeps up the muscles so they are not stiff. It keeps your muscles intact. I talked to the chiropractor and he said you could go exercise a little it (sic) so your back in not so stiff. I do want to come back to work. Staying home is no income, but I've got to wait for a doctor.

KS: OK, so all that kicking and running is good exercise?

VM: Yes, and I need exercise.

KS: OK, I see you on the video carrying 2 20 oz. drinks in bottles in your left hand and one crooked in your elbow.

VM: Oh, yeah, my right hand.

KS: No, your left hand.

VM: They are not full...

KS: Yes, they are.

VM: One is an empty water bottle.

KS: No, they are drink bottles, 20 ounces, and those things are heavy, but you're carrying two in one hand. I wouldn't think you could do that with a bad wrist.

VM: Well, that's not the same as a trash bag, that's really heavy. The wrist is better. I can do some things.

KS: If you can play soccer and use your wrist in a normal way, then couldn't you come back to work, at least for restricted duty type work?

VM: I don't mind doing light duty. There are no benefits to me from staying home, I need money to pay for my bills.

KS: Does Dr. Wicklund know that you're playing soccer?

VM: Yes.

GG: When you were working with Dana, didn't you discuss restricted duty?

VM: No, we weren't discussing anything like that. He didn't ask me or say anything about light duty. I wouldn't mind coming back to light duty.

GG: No, I'm not talking about light duty. That's only for 10 days, and you've exhausted that. I'm talking about restricted duty, coming back to work but with restrictions.

VM: No.

GG: You didn't feel you could return to work in a restricted capacity? Most operators inquire when they feel better and they need to get back to work and get paid. I know it was explained to you. It's in the Disability Management Policy. But you didn't feel as if you could come back?

VM: I didn't look through it or talk to him about it, I guess. If I knew I could do it, I would.

GG: How long have been able to play soccer?

VM: Just a couple of weeks. I've been jogging, getting exercise, getting my muscles loose.

GG: Soccer, running, jogging. Anything else?

VM: That's it. My exercises at home working my shoulders and back.

\* \* \*

(Employer Exhibit 20)

Tim Becchetti, Claims Representative, Risk Management Department, testified that he has managed about 1,000 WC claims throughout his career, including about 50 suspected claims that prompted retention of surveillance vendors who usually found nothing incriminating. As a self-insured and self-administered WC entity, Mr. Becchetti testified that the Council's WC benefits are

paid out of public funds. Regarding V.M.'s April 21, 2010 collision, Mr. Becchetti stated that the Grievant was the only person to have filed an accident-related claim; Grievant's First Report of Injury was completed on April 27, 2010 (Employer Exhibit 9); Grievant's claim was acknowledged by the Department of Risk Management on May 3, 2010 (Employer Exhibit 36); Risk Management accepted WC claim liability on May 11, 2010. (Employer Exhibit 37)

Mr. Becchetti also testified that V.M.'s WC claim was targeted for investigation for three reasons: first, within a period of approximately one month following the accident, V.M. had seen four different M.D.s; second, the two M.D.'s who first examined the Grievant returned him to work without restrictions; whereas, the two M.D.'s he saw next found him to be totally disabled; and third, the Grievant's condition appeared to be getting worse—on April 23, 2010, Dr. Lussenhop concluded that the Grievant's neck and back were "normal;" on April 28, 2010, Dr. Isaksen concluded that the Grievant's left wrist was "tender" and that he should not drive until May 1, 2010; on May 1, 2010, Dr. Dunham concluded that the Grievant ought not work until May 14, 2010, that for the next two weeks he should "always" wear the prescribed thumb splint and he prescribed Tylenol #3 for pain; on May 14, 2010, Dr. Umeh continued application of Dr. Dunham's treatment and further concluded that the Grievant ought not work until seeing an orthopedic surgeon.

On May 27, 2010, the Council retained the services of Northwest Investigations, Inc. ("NII") to record M.V.'s activities. NII began its surveillance activities on June 2, 2010 and ended them on June 19, 2010. (Employer Exhibits

28, 29 and 30) The bulk of NII's surveillance work involved videoing M.V.'s travels. (Employer Exhibit 27, Discs 1 ~ 5) Video surveillance took place on June 2, 3, 4, 11, 12, 14, 15, 17, 18 and 19, 2010, with surveillance discontinued at 9:30 a.m. and 8:45 a.m. on June 12<sup>th</sup> and June 19<sup>th</sup>, respectively. (Employer Exhibit 27, Discs 1 ~ 5 and Employer Exhibits 38 and 39) Among these dates, the Grievant was videoed playing soccer on June 3, 4, 11, 14, 15 and 18, 2010.

The Grievant testified that he is a life-long soccer player; before the April 21, 2010 accident, he played soccer two or three times a week with men in their mid-40s; play was on a field that is one-half the length of a regulation soccer field; play was informal, without time clocks and officiating. He further testified that he stopped playing soccer after the accident, picking it up again on June 3, 2010, immediately after seeing Dr. Wicklund for the first time, and since then has been playing about two or three times a week. Still further, the Grievant testified that he played in pain; he took Tylenol #3 a couple of hours before play to moderate the pain; he played without a wrist brace/splint because to do so would be embarrassing for cultural reasons; he played for its strengthening and exercise value; nobody told him that he could not play soccer while on WC.

On July 6, 2010, the Grievant received physical therapy at the Sister Kinney Center. His physical therapist's report noted:

**Pain:** 3 = Mild Pain, (Bothersome, Annoying, Irritating, Nagging)

**Compared to Prior:** Initial Pain: 8/10

**Patient Goal Status:** Patient reports that he is feeling "a lot better." He states that he has been exercising (i.e., HEP, walking, jogging, playing soccer) at home and that "really loosened the muscles up."

**Therapist Assessment:** Patient tolerates all exercises without increase in pain. He is visibly less guarded today. He exhibits good control of postural strengthening in upper back. Also tolerates wrist strengthening well but fatigues quickly with low back strengthening. He has decreased muscular tenderness in upper/lower back today. Overall, progressing along POC.

(Employer Exhibit 22)

Via a letter dated July 8, 2010, Mr. Gentry informing V.M. that he had been submitting false information about his medical status and was wrongly receiving WC benefits. The Grievant was invited to a pre-disciplinary Loudermill hearing scheduled for July 13, 2010. (Employer Exhibit 31) Mr. Gentry's notes of this hearing indicate that the Grievant said he was unable to work because of the bus/car accident and that he has been on pain medication through May 7, 2010, when he took his last Tylenol #3 tablet. Mr. Gentry's notes also state that the Grievant recalled his May 14, 2010 and June 1, 2010 meetings with Messrs. Gentry and Alexon, respectively, and their disability policy discussions, but the latter did not cover his "responsibility to report and notify us [i.e., the Council] of any change in restrictions, also the possibility of you [i.e., V.M.] being put on a list of names for restricted duty." Mr. Gentry's notes further states that the Grievant was not wearing a brace/splint on his left wrist; Grievant stated that he stopped wearing said brace/splint a couple of day prior to his June 30, 2010 Garrity meeting; Grievant maintained that he still had back and left wrist pain. (Employer Exhibit 21)

Further, Mr. Gentry's Loudermill notes indicate that he played the surveillance video discs for M.V. and, thereafter, asked the Grievant if he ever told his doctors, physical therapists or Dana Alexon about his soccer play. The

Grievant responded “No.” Ultimately, Mr. Gentry concluded that the Grievant was not totally disabled, was able to perform restricted duty, if not operate a bus, and therefore, should be discharged. (Employer Exhibit 21)

On July 14, 2010, the Grievant received physical therapy at Sister Kenny Center. His physical therapist’s report noted:

**Pain:** 1 = Mild Pain, (Bothersome, Annoying, Irritating, Nagging)

**Compared to Prior:** Initial Pain: 8/10

**Patient Goal Status:** Patient reports that he is feeling “a lot better.” He verbalizes compliance with home exercises and that he has been able to play soccer.

**Therapist Assessment:** Patient tolerates all exercises without increase in pain. He is visibly less guarded today. He exhibits good control of postural strengthening in upper back. Also tolerates wrist strengthening well and demonstrates increased control and endurance with low back strengthening. Patient has progressed to meet all goals and has returned to near normal functional levels per report. He notes that he has some discomfort with fast movements but understands that this should decrease over time. Recommend d/c from PT at this time.

**Goals:** [All itemized patient goals are shown to have been “met.”]

(Employer Exhibit 23)

On July 23, 2010, the Grievant was discharged. (Joint Exhibit 2)

On July 28, 2010, the Grievant was seen again by Dr. Wicklund, who returned V.M. to work without restrictions effective July 29, 2010.<sup>5</sup> (Employer Exhibits 24 and 25) On September 27, 2010, Dr. Wicklund directed a letter to the attention of Dorothy Maki, Vice President, ATU, Local 1005. In it Dr. Wicklund noted that V.M. had been his patient and that the latter “has been accused of not

---

<sup>5</sup> Between May 18 and June 1, 2010, the Grievant spent two hours per day on ARD time at work. Otherwise, he performed no work between April 21, 2010 and July 29, 2010, the date Dr. Wicklund released M.V. for unrestricted work: a period of about 13 weeks.

being forthright and honest with his healthcare providers.” *Inter alia*, Dr. Wicklund also notes:

\* \* \*

It was my assumption that he would be on light duty. This would not affect his ability to use his lower extremities, and would not even affect his ability to play soccer for one hour. It was my recommendation that until I re-evaluated him that he not do any driving because of his left wrist pain.

\* \* \*

I hope this information is helpful in resolving whether or not soccer was appropriate. In my opinion, it was perfectly appropriate for him to play soccer one hour a day for physical activity. This would not affect the healing of his left wrist in any way.

(Employer Exhibit 26)

Dr. Wicklund was subpoenaed by the Employer to testify at the May 25, 2010 hearing. Regarding his June 2, 2010 and July 28, 2010 examinations of V.M., Dr. Wicklund testified: he did not realize that V.M. had been referred to him by another physician or that V.M. had been seen by four other M.D.s previously; he focused on V.M.’s left wrist pain, while referring him to physical therapy for the back and neck issues; V.M. did not mention that he was playing soccer on either June 2, 2010 or July 28, 2010; on June 2, 2010, he expected to see V.M. again within two weeks, not more than a month later—on July 28, 2010; he assumed that V.M. had been working “light duty, because he was able to do so;” he would not recommend that the Grievant should play soccer in view of the fact that he reported an “8/10” on the pain scale to his Sister Kenny Center’s physical therapist; and he did not recall telling V.M. to cease wearing a brace/splint on his left wrist at their June 2, 2010 meeting. Dr. Wicklund also stated that when he wrote the September 27, 2010 letter, he: (1) “...did not think that an old wrist

injury should be used as a basis for discharging V.M.; (2) believed, based on his June 2, 2010 examination, that V.M.'s left wrist had "full range of motion" and did not know that a physical therapist, based on the latter's June 16, 2010 examination, concluded that the "range of motion" to the Grievant's left wrist was restricted and painful; and (3) did not know that V.M. had been playing soccer on multiple occasions. In addition, Dr. Wicklund testified that if he had known about V.M.'s daily soccer play and his physical therapist's findings, he would have "...written a different letter." Further, he stated that the foregoing facts are counter-indications of the Grievant's reported level of pain. Still further, Dr. Wicklund testified that the Grievant could have been taking Advil while playing soccer to control for pain and that his "counter-indication" testimony also depended on the number of times per week the Grievant actually played soccer.

The Grievant testified that his father suffered a stroke in 2006; since then V.M. has provided bathing, dressing and shopping, cooking and kindred care for his father; for doing so, he receives payments from the Hmong Home Health Care Agency in the amount of \$350 every two weeks. The Grievant also testified that when he is out of the house, his seven year old son and his girlfriend fill-in for him.

#### **IV. EMPLOYER'S ARGUMENTS**

The Employer initially argues that the Grievant is not credible, pointing to the following instances: (1) on the April 27, 2010 Final Report of Injury form, V.M. indicated that he did not have any other form of regular employment when, in

fact, he has been working for the Hmong Home Health Care Agency for years<sup>6</sup> (Employer Exhibit 9); (2) Mr. Becchetti's May 3, 2010 letter to V.M. states in part, "Any other employment must be reported to your assigned Claim Representative and also noted on the Employee Injury Report"—V.M. did not "recall" receiving said letter (Employer Exhibit 36); (3) on the Final Report of Injury form, V.M. indicated that his "left wrist was swollen"—Dr. Lussenhop's April 23, 2010 medical report makes no reference to a left wrist injury (Employer Exhibit 8); (4) Messrs. Gentry and Alexon both testified that they explained to V.M. that he was to return to work without restriction or return to work on RD once released by his medical provider to do so—V.M. denies that any such explanations took place; (5) V.M. testified that Mr. Alexon and he discussed short-term disability—the Employer does not have a short-term disability program; (6) on June 16, 2010, the Grievant told his Sister Kenny Center physical therapist that his level of pain was an 8/10, which is described on the therapist's form as being "Very Severe Pain (Dreadful, Overwhelming, Horrible, Agonizing)"—V.M. maintained that he never used these terms; however, on May 12, 2010, more than a month earlier, V.M. self-reported on a Hynan Chiropractic Clinic Patient Questionnaire, which he signed, a pain level of 8 on a 10 point scale, where 10 represents "Worst Possible Discomfort"—a description that is analogous to the descriptive terms appearing on the physical therapist's form—V.M. stated that he did not recall filling out the questionnaire (Employer Exhibits 13 and 18); (7) at the June 30, 2010 Internal Audit interview, V.M. replied "Yes," when asked by Ms. Shea

---

<sup>6</sup> The Grievant testified that he did not consider Agency work "regular employment."

whether Dr. Wicklund knew he was playing soccer<sup>7</sup> (Employer Exhibit 20), yet at the July 13, 2010 Loudermill hearing, V.M. stated that he had not reported his soccer play to any of his health care providers or to Mr. Alexon (Employer Exhibit 21); further, Dr. Wicklund testified that he did not know the Grievant was playing soccer until after being approached by Ms. Maki and V..M.; and (8) V.M. and Cliff Bolden, Union Steward, in so many words, testified that Ms. Jackson commented on the amount of FMLA the Grievant was using, suggesting that working for Metro Transit might “not be the job for him”—Ms. Jackson testified that while it is true that V.M. used a lot of FMLA to care for his father, said use had no bearing on the Employer’s decision to discharge the Grievant. (Union Exhibit 1)

Next, the Employer observes that the Grievant self-reported an 8/10 pain level to his physical therapist on June 16, 2010 and June 22, 2010, not mentioning that he was playing soccer but, knowing all along, the implications of reporting such a high subjective pain level. (Employer Exhibit 16 and 17) At the June 30, 2010 Internal Audit interview, V.M. was told that the he had been under surveillance, including his soccer play. Therefore, it is more than coincidence, the Employer argues, that the Grievant began a remarkable recovery. On July 6, 2010 and July 14, 2010, the Grievant reported to his therapist that he was playing soccer and he was feeling “a lot better,” with his self-reported pain levels falling to 3/10 and to 1/10, respectively. (Employer Exhibit 22 and 23) Ultimately, the Employer points out, on July 28, 2010, Dr. Wicklund concluded that the

---

<sup>7</sup> The Grievant testified that he resumed post-accident soccer play on June 3, 2010. If true, for this reason, on June 2, 2010, he would have no reason to tell Dr. Wicklund that he was playing soccer.

Grievant had recovered from his left wrist sprain and was able to return to work without restrictions. (Employer Exhibits 24 and 25)

Further, the Employer maintains that the Grievant was “doctor shopping.” He was in search of medical opinion that would support his subjective, but false claims of pain. Hence, he went from Drs. Lussenhop and Isaksen, both of whom returned V.M. to work without restrictions, to Drs. Dunham and Umeh, both of whom found him totally disabled. With Dr. Wicklund’s examination and the chiropractic and physical therapy services included, the Grievant managed to remain off-the-job for more than three months, with an alleged total disability and during that time he was playing soccer. Still further, Dr. Wicklund acknowledged that the Grievant’s conduct belied the level of pain he said he was in; in pain or not, Dr. Wicklund further testified that from the start he believed that V.M. was working on RD.

Finally, after viewing the accident video and the discs showing the Grievant playing soccer, the Employer concluded that the Grievant was being disingenuous with both the Council and his medical care providers. That is, he was not being truthful about his medical condition, perpetrating a fraud. A pain level of 8/10, even if masked by medication, as alleged, is too severe to cause one to believe that he could not work, even on RD, and yet he could play soccer two or three times a week. The Employer argues that close scrutiny of the Grievant’s soccer play will show him running, kicking, catching, heading, bending, twisting, reaching out and so forth with no hesitation, grimacing or other indications of pain. Surely activities like this would aggravate his left wrist, neck

and back problems, the Employer contends. Yet, these are all physical acts that would most certainly cause the “Worst Possible Discomfort,” or nearly so, or its equivalent, namely, “Dreadful, Overwhelming, Horrible, Agonizing” pain.

For these reasons, the Council argues that the Grievant’s discharge was for “just and merited” cause because he was misrepresenting the true state of his physical condition—a violation of Metropolitan Council Procedure 4-6a, section II.B, Code of Ethics—and/or he was willfully and fraudulently claiming injury and WC benefits—a violation of Metropolitan Council Procedure 4-6d, section C.

#### **V. UNION’S ARGUMENTS**

The Union argues that the Employer is alleging that the Grievant has, through factual misrepresentations about his health status, intentionally defrauded the Council by receiving WC benefits to which he was not entitled. This, the Union points out is “theft,” a criminal offense which, therefore, requires a higher standard of proof than the ordinary discharge case and, specifically, proof beyond any reasonable doubt.

Next, the Union maintains that the Employer failed to meet its burden in this case for a number of reasons. First, the Grievant was involved in a no-fault bus/car accident and although bus passengers were not injured, he was. Second, as required by policy, the Grievant was seen by licensed physicians, each of whom diagnosed his injuries and gave him therapeutic directions, which he followed to a tee, including visits for physical therapy, as prescribed by Dr. Wicklund—V.M. did not go against his physicians’ orders. Third, Grievant’s level of pain level was increasing, requiring more medical attention. Fourth, V.M.’s

mounting pain, as reflected on the 10-point scale used by his health care providers, increased from 3/10 to 8/10; thus, he understandably reported his increasing level of pain, even though he did not use the “words” that appear on health provider medical forms to describe it. Fifth, for several years V.M. has provided paternal care for pay; this part-time work was not an alternate form of “employment” that had anything to do with V.M.’s WC status; V.M. did not benefit from being off work, as his income fell significantly relative to what he made when working full-time. Sixth, as shown on the soccer video discs, V.M.’s play was not “tough play,” he spent as much time walking and sitting along the sidelines as he spent actually playing. Finally, there is a dispute over what was said at the parties’ 1<sup>st</sup> step grievance meeting. The Union contends that during that meeting, Ms. Jackson did make reference to V.M.’s excessive use of FMLA time, suggesting that this was the reason he was fired.

Further, the Grievant has played soccer all of his life; for V.M., it was a form of exercise and relaxation. Nevertheless, he stopped playing soccer after his accident, resuming play on June 3, about five weeks following the Grievant’s bus/car accident. The Grievant played soccer without the thumb splint because the day before Dr. Wickham told him he could remove it; V.M. played soccer about one hour per game and, not surprisingly, in pain that was somewhat alleviated with medication. Whether he should have been playing soccer may be open to question, but it is beyond question that he should not have been operating a bus from eight to ten hours a day with pain. In addition, V.M. reported to ARD for the requisite ten days, in full cooperation and compliance with Mr.

Gentry's order, which he thought absolved him from reporting for RD. V.M. consistently repeated throughout the hearing that he did not understand the distinction between ARD and RD.

For all of the above-discussed reasons, the Union urges that the instant grievance be sustained and V.M. be reinstated and "made whole."

## **VI. OPINION AND DISCUSSION**

In closing argument, the Employer reasserted its claim that V.M. was guilty of misinforming the Council and some of his medical care providers about the extent of alleged pain in his left wrist, neck and back caused by the April 21, 2010 bus/car accident. Said misinformation, the Employer argues, resulted in medical orders that restricted V.M. from working, even on restricted duty, and enabled him to fraudulently collect WC benefits. Therefore, effective July 23, 2010, V.M. was discharged for "just and merited" cause: misinformation and fraud are violations of Council policies. In its closing argument, the Union asserted that the Employer's claim of fraud must be proved "beyond any reasonable doubt" because fraudulent receipt of WC benefits is "theft"—a criminal offense—under Minn. Stat. 176.78, Subd. 1.

Implicitly, the Union was arguing that the Employer in this case is equivalent to a sovereign state and V.M.'s discharge is equivalent to capital punishment; therefore, the Employer, like a sovereign state, must prove its charge beyond any doubt. This analogy is often drawn in arbitrated discharge cases involving crimes or moral turpitude because to be fired for such allegations—theft in this instance—has serious economic and social

consequences and, thus, should be proved by the overwhelming quantum of evidence.

Some labor arbitrators apply this standard, as the Union demonstrated by citing relevant precedent. However, most arbitrators, including the undersigned, tend to apply a lesser standard. The sovereign State/Employer analogy is overdrawn—arbitration hearings are not criminal prosecutions and the grievant’s “liberty” is not at stake. Consequently, as fact finders, most arbitrators hold that allegations of discharges for crimes or moral turpitude, like most civil cases, require a lesser quantum of proof.<sup>8</sup>

**A. Was M.V. notified of his responsibility to report to work, even on restricted duty?**

The Employer maintains that V.M. was properly notified of his responsibility to report to work as soon as he was able to do so, but the Union disagrees. The answer to the foregoing question begins with the recitation of a few facts. First, on April 27, 2010, V.M. filled out a First Report of Injury and Mr. Gentry completed the “supervisor’s sections” thereof. (Employer Exhibit 9) Second, on May 14, 2010, Mr. Gentry directed V.M. to participate in ARD between May 18, 2010 and June 1, 2010, giving him a copy of the Council’s Disability Management Procedure that makes repeated note of “modified duty,” as demonstrated by the following quotes therefrom:

**II. Procedure:**

---

<sup>8</sup> There is empirical evidence in support of this analysis. Among arbitration awards involving crimes or moral turpitude, most (83.01%) make no reference to any specific quantum standard. Those that do most often cite the “preponderance” as the controlling standard (9.06%), followed by the “clear and convincing” standard (7.38%) and “beyond any reasonable doubt” (0.56%). Laura J. Cooper, Mario F. Bognanno & Stephen F. Befort, *An Empirical Study of Discipline and Discharge Arbitration: More Than We Have Ever Known*, (Unpublished Manuscript, 2011), 5-15.

## Work Adjustment:

### B. Process

\* \* \*

5. If the employee is able to perform some work, but not the essential functions of their job, the supervisor determines if modified duty work is available and makes the appropriate arrangements to have the employee work modified duty. The supervisor monitors the work restrictions for progress back to their regular job and conducts disability management conferences every thirty (30) days, these should be done in person with the employee providing an updated Medical Leave Status Report.

6. If the employee is unable to perform work of any kind the supervisor instructs the employee to call them once every week and within two hours of each healthcare provider appointment. ...

\* \* \*

8. If an employee has been away from their regular job, either off work and/or working modified duty for a cumulative six (6) months in a twelve (12) month rolling calendar year, ...

9. An employee's medical leave or modified duty status may be extended beyond six (6) months...

### III. Responsibilities:

#### A. Responsibilities of the Employee:

1. Participate and cooperate fully in the disability management process.

(Joint Exhibit 12; Emphasis Added) Third, M.V. and Mr. Alexon had a Disability Conference on June 1, 2010 when he was given another copy of the Council's Disability Management Procedure. (Employer Exhibit 33 & Joint Exhibit 13)

During these three meetings the parties discussed the April 21, 2010 bus/car accident and the Employer's disability management policy. Messrs. Gentry and Alexon testified that they reviewed the differences between ARD and RD with V.M. as well as his responsibility to report for RD, if unable to perform all

of his bus operator duties. V.M. testified that neither Mr. Gentry nor Mr. Alexon differentiated between ARD and RD and that his ARD responsibility under the Disability Management Procedure was fulfilled. .

The evidence does not favor V.M.'s testimony on point. As a self-insured, self-administered WC entity, it is doubtful that the supervisory personnel responsible for enforcing the Council's Disability Management Procedure would both give a copy of said policy to V.M. without reviewing its content with him. Further, the repeated reference to "modified duty" in the policy highlights the importance of its return-to-work expectation, particularly on RD, which seemingly would provide added impetus for at least one of V.M.'s supervisors to have covered it. Still further, as an allegedly disabled employee, if V.M. had read the policy statement that was given to him, he certainly would have noticed its repeated references to "modified duty" and would have inquired about same, if Messrs. Gentry and Alexon had not explained it. The record does not suggest that V.M. raised this subject and that his supervisors failed to respond to his inquiries. Indeed, during the June 30, 2010 Internal Audit interview, V.M. stated that he did not read the Disability Management Procedure policy. Two copies of the policy were given to him and it was his responsibility to read it. The fact that copies of the policy were in V.M.'s hands is an independent source of "notice" of the policy's expectations.

It is self-serving for the Grievant to claim that the policy was not discussed with him in relevant detail and that he had not read the policy: a conclusion that is reinforced because V.M.'s credibility is open to question. For instance, at the

June 30, 2010 Internal Audit interview, he told Ms. Shea that on June 2, 2010, he told Dr. Wicklund about his soccer play. He then contradicted this testimony at the July 13, 2010 Lauderhill hearing. Further, at the arbitration hearing he testified that his post-accident soccer play resumed on June 3, 2010, after his initial examination by Dr. Wicklund, which further belies his Internal Audit interview response. These contradictions of relevant fact were never explained. Accordingly, the testimony by Messrs. Gentry and Alexon is accepted as fact: the Grievant knew that if he could work, he was expected to work, as soon as possible, with or without restrictions.

**B. Was V.M. able to return to work with or without restrictions prior to June 19, 2010—the last day of surveillance?**

The Grievant was involved in a no-fault bus/car accident on April 21, 2010. On that day neither V.M. nor any of his bus passengers reported injury. On April 22, 2010, V.M. took a sick day, complaining of neck and back “soreness.” On April 23, 2010, he saw Dr. Lussenhop, who diagnosed neck and back “tenderness,” returning him to work without restriction and with a 500 mg of Naproxen prescription. V.M. next reported to work was on April 27, 2010; after six hours he stopped working, complaining of neck and back pain and of a “swollen” left wrist; he filed a First Report of Injury. On April 28, 2010, he was seen by Dr. Isaksen, who returned him to work with restrictions until May 1, 2010, and without restrictions effective May 2, 2010. He recommended Advil, Aleve or Excedrin for the pain.

V.M. saw Drs. Dunham and Umeh on May 1, 2010 and May 14, 2010, respectively. At both visits, the Grievant complained of “pain.” Dr. Dunham told

V.M. to “always” wear the thumb splint he prescribed and to take Tylenol #3 and Dr. Umeh continued this therapy. Dr. Dunham ordered V.M. not to work through May 14, 2010 and Dr. Umeh ordered him not to work until after seeing an orthopedic surgeon. On June 2, 2010, Dr. Wicklund sent V.M. to physical therapy for his reported left wrist, neck and back pain, with a return visit in two weeks. The Grievant did not see Dr. Wicklund again until July 28, 2010—about six weeks later. On June 16, 2010 and June 22, 2010, V.M. underwent physical therapy, reporting severe pain at both sessions—8 on a 10-point pain scale.

For convincing reasons, as outlined by Mr. Becchetti, on May 27, 2010, the Council decided to place V.M. under surveillance, which began and ended on June 2, 2010 and June 19, 2010, respectively. During this period, the Grievant’s travels were videoed on ten days but on two of these days surveillance was limited to the morning hours. On six of the eight full days of surveillance, the Grievant played soccer. The undersigned viewed all of the video discs in evidence and, in his opinion, the videos do not indicate left wrist, neck or back pain or discomfort in the form of guarded or hesitant body movements or facial grimaces associated with the Grievant’s sitting, running, striking the ball, touching one’s toes, twisting/turning/bending and so forth: the Grievant’s reported level of pain was exaggerated.

The Grievant was wearing a brace/splint on his left wrist when he was seen by Dr. Wicklund on June 2, 2010; however, he was never wearing a brace/splint on the dates he was videoed playing soccer. (Employer Exhibit 27, Disc 1 at 12:59 p.m.) For several reasons, the Grievant’s explanation that Dr.

Wicklund told him to discard the brace/splint is not credible: first, at the time V.M. was complaining about a painful left wrist; second, Dr. Wicklund's record of examination does not indicate that he directed the Grievant to remove the brace/splint; and finally, at the hearing, Dr. Wicklund testified that he did not recall telling V.M. to remove the brace/splint.

On the six days the Grievant was videoed playing soccer he usually arrived at the soccer field around 6:00 p.m. and left around 8:00 p.m. The Grievant would not play soccer for this entire two hour period, as the Union pointed out. Some of this time was spent doffing/donning sweat pants and soccer shoes, sitting/standing along the sidelines, doing warm-up exercises, including passing the ball back-and-forth with other players. Also, M.V. spent time taking rest-breaks between periods of play. Nevertheless, while on the sidelines, the videos show that V.M. would effortlessly, without hesitation and without apparent pain, doff/don his soccer shoes from both sitting and standing/bending positions, using both hands to tighten and tie his shoe laces; lift his knees to his chest and externally rotate both knees; while on the soccer field, the videos show V.M. running, abruptly stopping and starting as dictated by soccer play, kicking the soccer ball and bending his neck as he looked over his head for an on-coming soccer ball.

Yet, during the period the Grievant was under surveillance, he told his physical therapist that he was in "very severe pain"—8/10. Indeed, his therapist concluded that the Grievant's cervical range of motion was restricted in all planes of movement, except extension; V.M. complained of upper back pain with all

movements; V.M.'s range of wrist motion was restricted and painful on radial side with all movements. At first blush, the videos of Grievant on the soccer field are counter-indicative of a man in severe pain.

On second blush, the undersigned was unable to identify from the videos any objective manifestation of discomfort or pain stemming from the Grievant's left wrist, neck and back. The Grievant did not favor his right wrist to protect his allegedly painful left wrist; he did not rub or flex his left wrist, as one might expect. The following are examples of surveyed occurrences related to the Grievant's use of his left arm, wrist and hand:

- At 6:57 p.m. on June 3<sup>rd</sup>, while sitting along the sidelines, The Grievant pushed himself up, using both of his arms, wrists and hands, without hesitation or using his right arm, wrist and hand exclusively. (Employer Exhibit 27, Disc 1 at 6:57 p.m.)
- At 8:08 p.m. on June 14<sup>th</sup>, following the soccer game, the Grievant was observed walking up a hill clasping two bottles of liquid and one soccer shoe in his left hand. It appeared as though one bottle contained water, the other orange drink and both appeared to be 16 or 20 ounce bottles. Again, this use of his left hand seemed natural, without any observable evidence of discomfort. (Employer Exhibit 27, Disc 4 at 8:08 p.m.)
- At 6:28 p.m. on June 15<sup>th</sup>, during soccer play the Grievant was tripped by an opposing player. He broke his fall by extending both arms, landing on both wrists and hands, rolling over his left shoulder and then bounced to his feet. The Grievant played the remainder of the evening without any

apparent discomfort to his left wrist, neck or back. (Employer Exhibit 27, Disc 5 at 6:28 p.m.)

- At 8:17 p.m. on June 15<sup>th</sup>, the Grievant was observed sitting on the ground with his arms extended behind his backward-tilted body. The weight of his upper body was being supported by his arms, wrists and hands. Again, as the Grievant assumed this resting position, he did so as naturally and without hesitation as would a person with a healthy left wrist. (Employer Exhibit 27, Disc 5 at 8:17 p.m.)

The Grievant's multiple days of soccer play are inconsistent with his subjective reports of pain. It is concluded that as of June 19, 2010, RD work was certainly within V.M.'s reach.

On June 16, 2010, V.M. reported having "very severe pain." The next day, June 17, 2010, V.M. played soccer; he played again on June 18, 2010. On these days his presence on and off the soccer field was adroit and seemingly pain free. However, a contradictory image emerged following V.M.'s visit to his physical therapist on June 22, 2010. He again reported that he was in "very severe pain" and he:

...continued to exhibit considerable fascial restriction in both upper and lower back. He has difficulty tolerating light pressure in upper back. Patient was given light exercise and movement for home program. He was advised that using muscles gently will help promote bloodflow strength and ultimately reduce strain.

(Employer Exhibit 17)

On June 30, 2010, while allegedly totally disabled, Ms. Shea told the Grievant that his soccer play had been video taped. (Employer Exhibit 19) On

July 6, 2010, approximately one week later, the Grievant told his physical therapist for the first time that he was playing soccer; he was feeling “a lot better;” his pain level had subsided for 8/10 to 3/10. On July 14, 2010, the Grievant told his physical therapist that his pain level had subsided further to 1/10. After learning that his soccer play had been videoed V.M.’s pain began to resolve quickly: facts that are too coincidental, discrediting even more the Grievant’s reports of total disability.

The Grievant did intend to deceive and wrongfully collect WC benefits, when he may have been able to work without restrictions, but most certainly was able to work with restrictions on RD assignments, as Dr. Wicklund assumed he was doing all along. Further, the Grievant himself testified to caring for his father for compensation, while on WC, which entailed activities like bathing and dressing his father, cooking for his father and son and driving his pickup truck to the service station, grocery store and healthcare providers. The record does not suggest that V.M. was candid about this range of activities when dealing with his healthcare providers and his Employer. For instance, among his June 16 and 22, 2010 set of functional goals, as found in his physical therapy reports, is:

Patient is to tolerate 60 minutes of walking with 2/10 pain for improved function in shopping and general mobility in 6 weeks.

(Employer Exhibit 16 and 17) The disingenuousness of this goal is that at that time, V.M. was already playing soccer regularly for about 60 minutes and doing the shopping for his family. There is no question that the Grievant could have performed light duty work at Metro Transit that was no more demanding than the tasks he was performing at home while allegedly disabled.

The Grievant testified that he took medication when playing soccer to mask his pain. At one point, V.M. also testified that he did not play soccer with a wrist brace because it would have been embarrassing to do so for cultural reasons. Later in the hearing, he testified that he was videoed playing without a brace because Dr. Wicklund told him he could discontinue wearing the brace. Which explanation is true? Perhaps both or neither is true. A third explanation is that his wrist was not bothering him at all or not bothering him enough to make any difference. Whatever the answer, the undersigned is wary of taking the Grievant at his word.

**VII. AWARD**

Absent mitigations such as long-service, a good work record and for the reasons discussed above, it is concluded that the Employer had just and merited cause to discharge V.M. The grievance is denied.

Issued and ordered on the 18<sup>th</sup> day of July,  
2011 in Tucson, Arizona.

---

Mario F. Bognanno, Labor Arbitrator