

STATE OF WASHINGTON
BEFORE THE MARINE EMPLOYEES' COMMISSION

In Arbitration Before
John R. Swanson

INLANDBOATMEN'S UNION
OF THE PACIFIC on behalf of
PAMELA GILL,

Grievant,

v.

WASHINGTON STATE FERRIES,

Respondent.

MEC CASE NO. 16-07

DECISION NO. 536 - MEC

DECISION AND AWARD

APPEARANCES

Schwerin, Campbell, Barnard and Iglitzin, by *Natalie Teague*, Attorney, appearing for the Inlandboatmen's Union of the Pacific.

Robert McKenna, Attorney General, by *David Slown*, Assistant Attorney General, appearing for the Washington State Ferries.

ISSUE

Did Washington State Ferries (WSF) violate the collective bargaining agreement between WSF and the Inlandboatmen's Union of the Pacific (IBU) when it refused to put the grievant (Gill) back to work as an Ordinary Seaman (OS) after her doctor certified she met and could perform the essential job functions of an OS and/or after the employer (WSF) certified she was fit for duty as an Ordinary Seaman?

If so, what is the appropriate remedy?

NATURE OF THE PROCEEDING

The grievant, Pamela Gill, an Ordinary Seaman (OS) while working suffered an on-the-job work related serious back injury. As a result of the seriousness of the injury and potential permanent nature of the injury, the grievant brought a suit against the Jones Act. There was the potential based on the doctor's diagnosis that the grievant may not be able to continue in the work required of an OS. The parties reached a settlement on the lawsuit and settled for \$200,000. After a period of rehabilitation, it was determined by grievant's doctor and others that she could return to her previous job. Grievant's attending physician signed several releases to allow grievant to return to the job as an OS.

WSF representatives initially accepted grievant's return to work release signed by her physician and then for some unexplained reason, failed to apply the agreed upon provisions of the Collective Bargaining Agreement. The grievant contacted the union and a grievance was filed by the IBU against WSF on her behalf. The parties failed in their efforts to settle the issue and the matter was submitted to the MEC for adjudication.

RELEVANT CONTRACT PROVISIONS

2005-2007 IBU/WSF Collective Bargaining Agreement:

RULE 1 - DEFINITIONS

SPECIFIC DEFINITION: Unless the context of a particular section of this Agreement clearly dictates otherwise, the following terms shall have the following meanings:

1.01 AGREEMENT. The term "agreement" shall refer to the present contract, of which this section is a part, as it presently exists between the Employer and the Union.

1.02 EMPLOYEE. The term "Employee" includes all persons in the service of the Employer classified in this Agreement.

1.03 EMPLOYER. The term "Employer" means the Washington State Department of Transportation, an agency of the State of Washington operating the Washington State Ferry System.

1.04 UNION. The term “Union” means the Inlandboatmen’s Union of the Pacific, Marine Division of the International Longshoremen’s and Warehousemen’s Union.

1.05 PARTIES. The term “Parties” means the Employer and the Union.

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RULE 2 - RECOGNITION

2.01 The Employer recognizes the Union as the representative of all employees as classified herein and the sole collective bargaining agency for the purpose of acting for the employees in negotiating and interpreting the Agreement and adjusting disputes.

RULE 6 - SCOPE

6.01 This Agreement shall apply to all vessels and facilities of the Employer engaged in the transportation of passengers, automobiles, and freight on Puget Sound and adjacent inland waters, the Straits of Juan de Fuca, and the waters adjacent to the San Juan Islands and ports in British Columbia. This Agreement shall apply to all unlicensed employees assigned to the Deck, Terminal, Information Departments and Shoreside maintenance.

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RULE 14 – DISPUTES **STEP III – ARBITRATION**

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3. The arbitrator selected shall conduct a hearing at which the facts and arguments relating to the dispute shall be heard. The arbitrator shall have no power or authority to alter, add to, or subtract from the terms of the Agreement. The jurisdiction of the arbitrator shall be limited to rendering a decision solely on the issue(s) presented to the arbitrator.
4. The arbitrator’s decision shall be final and binding on the Union, affected employee(s) and the Employer.

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RULE 30 - LEAVE OF ABSENCE

30.10 Reinstatement for Leaves Beyond Forty-five (45) Days: When an employee is absent from work for a period of more than forty-five (45) days for medical reasons, WSF shall require the employee to have his/her doctor complete/sign the Job Analysis Form which includes certification that the employee meets the essential job functions before the employee may return to work and the employee must meet all necessary administrative and operational requirements in advance of returning to work.

A completed/signed Job Analysis Form will be accepted by WSF so long as the form was completed/signed within two (2) months of the employee's anticipated return date.

The employee shall submit the completed/signed Job Analysis to WSF Human Resources in person, by fax, or by mail.

If the employee is ready to return to work as expected, the employee shall be returned to work within twenty-four (24) hours after WSF Human Resources receives the completed/signed Job Analysis Form, excluding weekends and holidays. For example, if WSF receives the completed/signed Job Analysis Form, which includes certification that the employee meets the essential job functions, at noon on a Friday, the employee would be entitled to return to work by noon on the following Monday. WSF's failure to return an employee to work within twenty-four (24) hours shall be subject to the parties' grievance procedure.

If an employee is ready to return to work sooner than expected, WSF shall ensure that the employee is returned to work as soon as practicable. WSF's failure to return the employee to work as soon as practicable shall be subject to the parties' grievance procedure.

An employee returning to full duty from an authorized leave of absence for more than forty-five (45) days will be reinstated to his/her former position which includes his/her shift, classification, and days off unless otherwise provided for by contract bidding requirements which occurred during the employee's absence which would indicate and qualify the employee for a different shift.

RECORD BEFORE THE COMMISSION

The MEC has the following record before it:

1. The Request for Grievance Arbitration.
2. The Notice of Scheduled Settlement Conference and Hearing.
3. The IBU and WSF Collective Bargaining Agreement for the period July 1, 2005 through June 30, 2007.
4. Transcript of the hearing conducted on October 18 and continued on November 14, 2007.
5. Exhibits of both parties accepted into evidence during the two days of hearing.
6. Post-hearing briefs from both WSF and IBU, filed December 21, 2007, completing the record.

FINDINGS OF FACT

On the basis of the evidence, briefs and record of the proceeding, the Arbitrator makes the following findings of fact.

1. The grievant was seriously injured and declared unable to perform as an Ordinary Seaman.
2. It was determined the grievant suffered what may have been a permanent partial disability.
3. As a result of a suit filed by the grievant and a settlement between grievant and WSF, grievant was awarded \$200,000.
4. Grievant, through rest, therapy, medical treatment and exercise has been rehabilitated and has been medically approved to return to work and able to perform the job functions of an OS. These medical releases are part of the record and confirmed by several physicians in addition to grievant's attending physician and were accepted by certain of WSF representatives.
5. Grievant's employment during her disability was not terminated. She was on an approved leave of absence as a result of the work related injury.
6. The record suggests that the injury was extensive, painful and required extensive therapy and rehabilitation.
7. Both parties, after review of the record and the facts in evidence, acknowledge that the hearing officer will return the grievant to full duty.
8. Both parties are gratified that the grievant has through rehabilitation and treatment fully recovered from the work related injury.

9. The grievant's initial releases to return to work, signed by her attending physician, were for limited part-time duty. Grievant was a full duty employee when she sustained the injury.

10. Grievant's attending physician's initial return to work release for part-time or on-call duty was executed on June 20, 2006.

Following the June 20 release for part-time or on-call duty, grievant's physician and other medical personnel continued to indicate grievant could come back to work either as an Ordinary Seaman in a limited or on-call capacity or as a Traffic Attendant/Ticket Taker.

11. The fact remains that the grievant was required to continue to secure additional unnecessary releases even after her attending physician had released her for full duty in November 2006.

While the Collective Bargaining Agreement does not specifically require limited duty assignments, certainly there may be instances where they are beneficial both to the employee and the employer. This would have been a possibility for the grievant from June through November.

12. During her time off resulting from the injury, the grievant received contractually required maintenance payments; however, the record is unclear regarding how her medical benefits were provided.

13. The record supports an obvious conclusion that WSF at all times during the grievant's injury and rehabilitation and the issues following grievant's release to return to work acted in good faith and what they believed were legitimate concerns regarding the grievant's safe return to work.

CONCLUSIONS OF LAW

On the basis of the complete record before him, the findings of fact and contractual and legal analysis, the Arbitrator makes the following conclusions:

1. The parties' 2001-2003 contract was in force and effect past its stated expiration date at the time the injury was sustained by grievant, as a matter of law (RCW 47.64.280).
2. The Arbitrator has jurisdiction over the parties and the dispute (RCW 47.64.280). The matter is properly and procedurally before the Arbitrator for final and binding decision.
3. The parties are in agreement that based on the record, the grievant should be placed into her Ordinary Seaman position.
4. Any Jones Act considerations or settlement does not limit the grievant's contract rights or benefits except as those limitations are specifically identified in the Collective Bargaining Agreement.
5. The record is confusing as to the exact date when the grievant was released to return to full duty as OS. The record is also clear that WSF could have provided a situation that would have introduced the injured worker back to work on a part-time basis after her physician's limited releases.
6. The Collective Bargaining Agreement references return to work as "full duty" and a certification that the returning "employee meets the essential job functions before the employee may return to work and the employee must meet all necessary and administrative and operational requirements in advance of returning to work."

This provision does not prohibit a limited/restricted return to work following an extended leave for medical reasons when the return would help in the rehabilitation of an injured employee.

7. A conclusion from the agreement and the safety considerations which concern both parties would support a reasonable re-introduction to the job duties following an extensive leave resulting from a work related injury.

8. The Port Captains who denied the grievant's right to return to work may have been well intentioned, but they ignored clear and unambiguous collective bargaining criteria without any apparent investigation.

DISCUSSION

There can be no dispute that

(a) The grievant suffered a serious and painful injury while at work.

(b) The grievant was compensated to some extent for pain and suffering and inability to perform routine activities.

(c) The grievant worked diligently to rehabilitate herself through therapy, exercise and medication.

(d) The grievant was released by her physician for full time duty in November 2006; Health Force physicians confirmed her qualifications to perform the job requirements of an OS in November 2006.

(e) WSF's failure to comply with the Agreement may have allowed grievant to continue her progress in therapy and rehabilitation, providing an unwilling benefit; however, that is no excuse for ignoring the grievant's rights or the employer's obligations outlined in the Agreement.

(f) The lengthy time in the adjudication of the grievant's claim was complicated by the settlement, the process, the complexity of the matter, the limited releases and the mutual concerns of the parties for the safety and well being of the grievant.

DECISION AND AWARD

1. The union's grievance is sustained.
2. The grievant will be returned to work on the first payroll period following receipt by the parties of this Award or a time mutually agreed upon by the parties.
3. The grievant, Pamela Gill, will receive benefits and wages as though she had been returned to work on the crew and vessel she was assigned at the time of the injury the first pay period following November 1, 2006.
4. WSF can recover any maintenance payments made during the period the grievant is to be made whole; however, any payments the grievant made to maintain her benefits, i.e. health and medical benefits, will be reimbursed to the grievant.
5. The Commission will retain jurisdiction of this matter until the Award is implemented.

DATED this 15th day of January 2008.

MARINE EMPLOYEES' COMMISSION

/s/ JOHN SWANSON, Arbitrator

Approved by:

/s/ JOHN SULLIVAN, Commissioner

/s/ ELIZABETH FORD, Commissioner