

Cited as:

**Forest Industrial Relations v. Industrial Wood and  
Allied Workers of Canada, Local 1-80  
(Bingham Grievance)**

IN THE MATTER OF An Arbitration  
Between  
Forest Industrial Relations (CIPA Lumber Co. Ltd.)  
(the "Employer"), and  
IWA-Canada, Local 1-80 (the "Union")

[1994] B.C.C.A.A.A. No. 142  
Award no. A-133/94

**British Columbia  
Collective Agreement Arbitration  
J. Korbin, Arbitrator**

Heard: (Nanaimo, B.C.) January 13, 1994.  
Award: February 16, 1994.  
(34 paras.)

Re: Grievance of Dan Bingham

**Appearances:**

Lloyd Doidge, for the Employer.  
G.F. Owen, for the Union.

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AWARD

I

¶ 1 The parties agreed that I had jurisdiction under the provisions of their Collective Agreement to hear and determine the matter in dispute.

¶ 2 This case concerns a grievance filed by the Union regarding the non-culpable termination of the grievor, Dan Bingham.

¶ 3 A letter from the Employer to the grievor dated September 13, 1993 sets out the Employer's reasons for discharging the grievor. A subsequent letter of December 10, 1993 corrects and clarifies the original letter. Both are set out herein for the reader's convenience:

September 13, 1993

Dear Dan:

Your excessive absenteeism since working with CIPA has been totally unacceptable. Progressive discipline in the form of official warning letters on your record clearly state the seriousness of excessive absenteeism and the consequences if continued. There has been no trend of improvement and no reasons to believe your excessive absenteeism will not continue.

Your absenteeism record is as follows:

	1987	1988	1989	1990	1991	1992	1993
Sick	5	5	2	16	1	-	-
Absent	2	4	-	6	6	-	-
H/W	14	8	-	-	-	-	-
WCB	12	44	158	23	133	240	162
<b>Total</b>	<b>33</b>	<b>61</b>	<b>160</b>	<b>45</b>	<b>140</b>	<b>240</b>	<b>162</b>
Freq.	10	10	3	14	10	1	1

You are hereby discharged by CIPA on September 13, 1993 for non-culpable absenteeism.

December 10, 1993

Dear Mr. Bingham:

Further to our letter of September 13, 1993 in which you were discharged for excessive absenteeism on a non-culpable basis; we have reviewed your absenteeism record. Upon recovering some clerical errors we have re-calculated your absenteeism record as follows:

	1987	1988	1989	1990	1991	1992	1993
Sick	5	4	1	7	1	-	-
AWOL	-	-	-	-	1	-	-
H/W	14	8	-	8	-	-	-
WCB	12	42	148	14	131	250	162
<b>Total</b>	<b>31</b>	<b>54</b>	<b>149</b>	<b>29</b>	<b>133</b>	<b>250</b>	<b>162</b>

Also, please find included a comparison between your absenteeism rate and the mill average for the duration of your employment period with CIPA Lumber Co. Ltd.

**ABSENTEEISM COMPARISON**

YEAR	D. BINGHAM	MILL AVERAGE
1987	13.96%	5.03%
1988	22.50%	7.08%
1989	62.08%	7.60%
1990	12.08%	5.96%
1991	57.89%	9.01%

1992	100.00%	8.81%
1993	100.00%	14.80%

\* Rates are for WCB/Sick days only. Days "ABSENT" were not counted.

\* MILL TOTAL WCB + SICK DAYS  
AVERAGE # OPERATING DAYS X DAILY MANPOWER  
COMPLIMENT

\* D. BINGHAM'S RATE TOTAL WCB/SICK DAYS  
# POSSIBLE WORK DAYS

¶ 4 The issue in these proceedings is whether the Employer was justified in taking this action against the grievor.

## II

¶ 5 The Employer operates a sawmill in Nanaimo, B.C. Mr. Bingham was hired as a millwright on January 13, 1987. On his original application form, in reply to the question of whether he had ever received compensation for a work-related injury, the grievor indicated that he had had a left knee injury which had not repaired properly.

¶ 6 When the Mill Manager, Lorne Holman, moved to this mill in March of 1989, his priorities were to increase production. He determined to do this by motivating the employees to become more focused on the what the Employer was trying to accomplish. In fact, Mr. Holman's evidence was that he has succeeded in increasing production from 140,000 ft. per shift to 162,000 ft. per shift.

¶ 7 Among other things, in his efforts to improve productivity, Mr. Holman addressed the issue of employee absenteeism. The grievor, and others, had letters on file when he arrived at the mill, but he initiated a program of keeping statistics in order to deal with those employees who had the worst records. At the time, the grievor's file contained the following document:

TO: DAN BINGHAM DATES MARCH 4, 1988

FROM: WILF HALLENDINE

SINCE YOU STARTED YOUR EMPLOYMENT WITH CIPA LUMBER CO. LTD.  
ON JANUARY 14, 1987; YOUR ABSENTEEISM RECORD IS AS FOLLOWS:

March	13, 1987	1 Day Sick (Friday)
April	7, 1987	1 Day Sick (Tuesday)
May	8, 1987	6 Days WCB (Started on Friday)
June	2, 1987	1 Day Leave (Tuesday)
June	12, 1987	1/2 Day Dr. Appt. (Friday)
June	19, 1987	8 Days WCB (Started on Friday)
July	17, 1987	1 Day Sick (Friday)
August	17, 1987	1 Day Sick (Monday)

October	9, 1987	1 Day Sick (Friday)
October	22, 1987	12 Days WCB (Started on Thurs.)
January	20, 1988	8 Days H&W (Started on Wednes.)
Feb.	12, 1988	6 Hrs. Sick (Friday)
Feb.	26, 1988	1 Day Sick (Friday)
March	4, 1988	1 Day Sick (Friday)

BECAUSE OF THE FACT THAT MOST OF YOUR SICK DAYS FALL EITHER ON THE DAY BEFORE OR THE DAY AFTER A WEEKEND; YOU ARE TO BRING A DOCTOR'S NOTE EVERYTIME YOU ARE SICK. YOU WILL NOT BE ALLOWED TO START BACK AT WORK UNTIL YOU HAVE DONE SO. IF THIS ABSENTEEISM RECORD DOES NOT IMPROVE, MORE SERIOUS ACTION WILL BE TAKEN.

(Note Added)

STANDS AS A VERBAL WARNING

April 8, 1988 Personal Problems

¶ 8 As it turned out, May 8, 1987 and June 19, 1987, which were marked as WCB related, were later not granted as WCB time.

¶ 9 When Mr. Holman went through all the employee's records, he concluded that the grievor's record was unacceptable. Mr. Holman testified that, "his (the grievor's) record stood out like a sore thumb:" On August 11, 1989, he met with the grievor and gave him the following letter:

Review of you work attendance shows a completely unacceptable trend. Your excessive absenteeism is totally unacceptable. The following facts clearly illustrate this point:

1. You submitted incomplete information on your application for employment. You stated you received WCB benefits for an injury to your left knee. In fact you had received WCB benefits on seventeen different occasions for different injuries.
2. Since joining CIPA in January 1987 this pattern has not changed. You have been on WCB benefits six times and have missed a total of two hundred thirteen days.
3. You have collected Health & Welfare benefits three times since joining CIPA.
4. On March 4, 1988 you received a verbal warning in regard to absenteeism. Since then you have had three time lost accidents.

You are contractually obligated under the terms of the I.W.A. Master Agreement to work at this mill within acceptable attendance records. You are not living up to this obligation. Your attendance is totally unacceptable and one has to question with the number of injuries you have had as to whether you should look for work which is less physically demanding:

I have explained to you non-culpable discharge. Due to your excessive absenteeism I am putting you on notice that any further, absenteeism will result in you being put on the non-culpable discharge program.

¶ 10 Mr. Holman's evidence was that, when he gave the grievor the letter, he tried to explain that excessive absenteeism would result in termination. He wanted to make sure the grievor thoroughly understood the concept of non-culpable discharge. He attempted to show the grievor the road he was on, and that he had to change to retain his employment. The grievor was asked if he had any personal problems, and was offered EAP assistance. The grievor volunteered at the time that his personal problems were behind him.

¶ 11 On August 14, 1990, the Employer issued another letter to the grievor, as follows:

A review of your work attendance over the past year shows the same pattern of absenteeism as in previous years. We discussed your excessive absenteeism with you in August 1989 and the result was improvement for 4 months. However, since January of this year absenteeism has increased and you are now absent on a regular basis. A review of the 15 payroll periods year-to-date indicates 9 periods showing absenteeism. As of the end of pay period 15 on July 21, 1990, your year-to-date frequency for being absent from work on separate occasions is the worst for all CIPA employees and stands at over 4 times the company average. Your ability to work safely and not injure yourself in a physically demanding sawmill environment is also at question; two lost time accidents year-to-date, one serious, again similar to other years.

Since joining CIPA in January 1987 you have been absent a total of 290 days. The reasons are as follows:

W.C.B.	8 TIMES
H & W	3 TIMES
SICK/ABSENT	23 TIMES
	34 TIMES

We have explained non-culpable discharge to you in the past. Further excessive absenteeism will result in your termination under the terms of non-culpable discharge.

¶ 12 Mr. Holman testified, "when the Employer gave Dan Bingham a letter, he would show three to four months' improvement, then they would start seeing the one or two dayers - that would go for three to four months, and, just at the point where you decide to sit down and discuss the situation with Dan, you would hit one of the big WCB absences - BANGO!"

¶ 13 Over the past year, the grievor had more or less repeated this trend with respect to absenteeism, which was why the Employer chose the phrase at the conclusion of the letter, "further excessive absenteeism will result in your termination under the terms of non-culpable discharge."

¶ 14 The evidence reveals that the grievor processed a grievance in connection with this letter, but no alteration of the letter occurred.

¶ 15 As the record indicates, the grievor, who had been operating as a trimmerman, sustained WCB injuries - first his back, from February 5 to March 8, 1991 and March 20 to April 26, 1991, and then his left knee on August 27, 1991, which kept him off work until September 13, 1993, the date of his termination.

¶ 16 During the Christmas period of 1990, the Employer had replaced an old trimmer with a new one, and introduced certain modifications to the work arrangements. The employees had to pull a lot of pieces of lumber over the 6" that the new trimmer extended beyond the old one, and there were a large amount of cross-ups. The evidence reveals that the grievor had particular trouble with this new trimmer because of his previous knee and back problems, and suggested various procedural modifications to alleviate his concerns, including requesting an adjustable chair to take the pressure off his lower back, and to enable him to sit down and run the trimmer, when tired. The grievor claims his WCB back claims in 1991 were all due to the new trimmer, and could have been avoided. The evidence also reveals that other employees were off on WCB in connection with the introduction of this new trimmer. The Employer did eventually accommodate the trimmermen by providing a seat which allowed them to sit down when tired, but never intended this to be an eight hour, sit down, job.

¶ 17 There was some conflicting evidence as to whether or not the grievor claimed back WCB relief (which was subsequently denied), in September of 1992, but, as I am satisfied that nothing turns on that event, the matter needs no further review.

¶ 18 The Employer's counsel prepared a detailed list of the instances of the grievor's WCB injuries from his original employment from 1987, as follows:

[Quicklaw note: Diagram non-displayable. Please see paper copy.]

¶ 19 The Employer did not challenge the legitimacy of any of these injuries.

¶ 20 The grievor's evidence is that the left knee injury in August, 1991, occurred when he bent down coming out of the trimmermen's booth. He felt the knee pop, and then fell against the wood lying there. In so doing, he ripped off the old repair to his 1981 left knee injury. His doctor advised him to have an operation to install a replacement tendon through the knee joint, or he would have to wear a knee brace all the time. Following that operation, he had physiotherapy, and has undertaken general overall fitness conditioning, which accounts for the length of time he was off work. This conditioning included skating and jogging.

¶ 21 After the Employer turned down his request for a partial return to work in the summer of 1993, he went to the WCB Rehabilitation Centre in Richmond, B.C., concluded a program there, and the WCB discharged him, advising him that he would be fit to return to work on September 13, 1993. When he reported to work on that date, he was dismissed. The Employer rejected the grievor's request for a graduated return to work program, because it had made the decision to terminate him.

¶ 22 The grievor could not claim UIC following his termination because he had been off on WCB leave for more than one year. His wife did not work, so the family has been on social assistance for a time.

¶ 23 The grievor testified that, since September 1993, he has skated, even played hockey, and the strength and usability of his left knee is getting stronger, and is close to what it was before his first left knee injury in 1981. He is suffering no low back pain. Further, when asked about his attitude on a return to work, he said, "I think my work habits and my work need a definite overhaul - I am a little older -

more mature - if I was to be reinstated, I would definitely try to get away from the WCB claims. I don't like that anymore than anyone." He acknowledged he should have taken his warning letters from the Employer more seriously.

### III

¶ 24 Non-culpable termination cases require that there are two tests an Employer must meet to justify a termination. It must establish that both the absenteeism of the grievor is excessive, and that the grievor is incapable of regular attendance in the future.

¶ 25 In this case, the Union acknowledges that the Employer has met the first test and that the grievor has experienced excessive absenteeism. That being the case, my task is to determine whether there is sufficient cogent evidence to establish that this employee will not be able to attend at work regularly in the future.

¶ 26 In that regard, the Employer clearly felt, based on the grievor's record, that, if he came back, there would be some improvement for a short period of time, then some sort of deterioration, and then a long absence. That is because the Employer holds a fundamental belief that the grievor is accident-prone and, no matter what job he is in, he will hurt himself in the end.

¶ 27 The Union argued that there is not sufficient statistical evidence to draw a conclusion as to what will happen in the future. That is because the two years of his absence preceding his termination were all due to one injury, and, in fact, the majority of absences since his last warning letters are due to WCB injuries. Moreover, the grievor accepts his share of the blame, and acknowledges that he did not respond to the Employer's warnings appropriately. He knows he has got to change.

¶ 28 In reviewing the grievor's attendance record, since his final warning letter of August 14, 1990, I find there were a total of four absences, or partial absences due sickness in the latter half of 1990, and two in 1991. The grievor had two absences due WCB for back claim injuries - February 5 to March 8, 1991 - and March 20 to April 26, 1991. Finally, he sustained a repeat left knee injury which rendered him absent due WCB, from August 27, 1991 until the date of his termination.

¶ 29 The grievor's own evidence at this hearing is that he should have treated the entire matter of his attendance more seriously; that he is now more mature, and will do so.

¶ 30 I do not conclude, on a review of all of the evidence, that the grievor is incapable of regular attendance at work in the future.

¶ 31 The grievor is entitled to reinstatement. However, given the particular circumstances of this case, the reinstatement will be conditional on the following:

1. Mr. Bingham will be on probation with respect to his attendance for a period of eighteen months from the date of this Award.
2. During each ninety-day period, his absenteeism must be lower than the average of the employees in the mill, or the Employer will be entitled to dismiss him.

¶ 32 Further, I feel compelled to make one final observation. That is - it is evident, and acknowledged by the grievor, that he is at a crossroads in his employment relationship. This Award should also serve notice on the grievor that, if he continues to have recurring back or knee injuries

during the next eighteen months, it will be tantamount to his inability to fulfill his part in the employee/employer relationship, and will likely result in his dismissal.

¶ 33 I retain jurisdiction regarding the implementation of this Award, including any dispute arising out of the preceding paragraph.

¶ 34 The grievor is entitled to compensation for wages and benefits lost as a result of his termination.

QL Update: 20010514

qp/s/qlmmm