IN THE MATTER OF AN ARBITRATION

BETWEEN:

CANADIAN WOODWORKS LTD.

(The "Employer")

AND:

I.W.A.-CANADA, LOCAL 1-424

(The "Union")

(Gronning Arbitration)

AWARD

Counsel for the Employer:	Gary Catherwood
Counsel for the Union:	Sandra Caffrey
Date of Hearings:	April 3, 2003
Place of Hearing:	Prince George, British Columbia
Arbitrator:	John L. McConchie

This is a grievance by the Union alleging that the employer improperly held the grievor out of service from January 29, 2002 until February 25, 2002. The Union asserts that the grievor, having been off work due to injury in the previous week, should have been returned to work on January 29. The Employer submits that it was justified in delaying the grievor's return until it received better medical information satisfying it as to the grievor's fitness to work. The parties have agreed that I have the jurisdiction to hear and determine the merits of this grievance.

As will be seen, the parties have little if any disagreement on the applicable legal principles. Their dispute is primarily on the facts.

II

The Employer is a lumber re-manufacturing plant. It operates a secondary wood manufacturing plant in Prince George involved in the finger-jointing and upgrading of lower quality wood. In simpler terms, it takes larger pieces of wood with imperfections, cuts out the imperfections, and produces smaller quality boards in the re-manufacturing process.

Mike Creusot is the Production manager. He joined the Employer in June 2001 and took over full plant responsibility in January 2002. He is an experienced manager, having spent almost two decades in upper management.

Dennis Gronning, the grievor, joined the Employer in November, 2000. At the material times in January and February 2002, he was a "packager" operating what was described as a packager saw and a forklift. He had a difficult 2001, suffering several injuries or illnesses, one of which kept him off work for over 5 months.

On January 6 or 7, 2002, Mr. Gronning was operating a forklift when it ran out of propane. He took the empty bottle, exchanged it for a new one and, on his way back to the forklift, slipped and fell back injuring his shoulder. At the time, he did not think that his injury was too severe and so he did not report to first aid. He carried on working and never did miss any work because of the incident. He did, however, see his doctor about it shortly after.

On January 14, a week or so later, he felt pain in his mid-section and mentioned it to the lead hand, who put him on lighter work. The following day, he trained another employee for a period of time and then continued to perform light work. On January 16, he was back to his normal job when he felt pain four hours into his shift. He told the lead hand he had to go home. He did not complete a first aid report. This, he testified, was because he had not had a specific accident at work; he had just begun to feel pain. He went to the emergency department of a local hospital that evening and to his doctor's office the next day.

The next morning, January 17, he called in to speak with Mr. Creusot and told him that he had chest and kidney pain and would be off work for a period of time. Neither the grievor nor Creusot could recall whether the grievor said anything about his shoulder during the conversation or described his pain as having occurred as a result of a workplace injury. Creusot left the discussion with the impression that it was not a workplace injury. The grievor did not provide any further details at that time.

What the grievor could have told Creusot, but did not, was that his chest and kidney pain was most likely the result of a flare-up of a chronic medical condition called "ankylosing spondylitis"(some of the documentation also refers to "ankylo spondylosis", but nothing in the case turns on the differing terminology). The grievor testified that he had first been diagnosed with this arthritic ailment about two or three years previously but had not had the diagnosis truly "confirmed" until he went to see a specialist in Vancouver in 2002. Nevertheless, the medical report from his visit to Emergency on the evening of January 16, 2002 (described in a report dated February 20, 2002 by a WCB entitlement officer) diagnosed `ankylo spondylosis (exacerbated), indicating problem areas as left lateral ribs, left flank, and mid-thoracic to lumbar spine ...' As the WCB officer noted in the WCB report, "[t]his diagnosis means an inflammatory condition, which causes ligaments and tendons to become inflamed at the point where they attach to the bone. It is a form of arthritis."

This is not to imply that the grievor had previously kept his condition a secret. His supervisor in 2001 had been aware of his condition and Creusot himself had previously been made aware of it in passing, although not to the point where he would have connected the grievor's current symptoms to the diagnosis. Creusot testified that when he spoke to the grievor about his pain he did not advert to the possibility that the grievor was suffering from ankylosing spondylitis and no one told him about this until much later.

A day after his discussion with Creusot, on January 18, 2002, the grievor asked his doctor to fax a note to the Employer confirming his condition. The letter read as follows:

> Dennis is currently unable to work due to an injury and will be reassessed next week. At that time, a decision will be made re possible return to part-time duties.

Creusot received the note and was satisfied with it.

In the week that followed, the grievor got together with his mother-in-law for some assistance in preparing a WCB claim relating to his loss of work due to the mid-section pain. In the course of preparing the claim, his mother-in-law suggested he also file a claim for the shoulder injury. He did so, not considering the confusion that this claim was going to engender in the next short while.

On January 24, 2002, Creusot received a letter from the WCB advising of a claim being made by the grievor for compensation due to a left shoulder injury. The letter made no mention of an injury to the grievor's chest or kidneys. Creusot testified that in light of his previous discussion with the grievor he was confused. He contacted the WCB representative on the file who told him that the claim was based on the grievor's assertion that he had slipped carrying a propane tank on or about January 6.

Creusot phoned the grievor the next day, January 25, 2002 to try to sort the matter out. His memory about the date corresponded to a note he made in his diary on the same date. He testified that the grievor told him that that he was not sure what his doctor was putting in his report, whether he was basing the claim on the injury to his left shoulder or to his mid-section. Hearing this, Creusot decided that he would have to do some further investigating to determine what the actual basis for the claim. For his part, the grievor testified that he had no specific recollection of this conversation but he did not deny it may have occurred as Creusot remembered it.

It is at this point in the chronology that the stories of the two witnesses diverge, at least for a time.

The grievor testified in his direct evidence that after having been off work for about a week, he went to his doctor and received his approval to return to work. He then met with Creusot on January 28 to advise him of this and to arrange his return to work. He resisted the suggestion in cross-examination that he was mistaken and that he had not met Creusot on this day. Creusot, said the grievor, told him he should send in a doctor's note and, assuming that was done, he could return to work on the following day, Tuesday, January 29. The grievor then returned to his doctor and a letter from his physician was duly faxed over to Employer during the afternoon of January 28.

The letter read as follows:

> "Dennis is fit to return to his work. He may suffer a re-injury but at this stage he is well enough to resume his work."

The grievor testified that an hour or so after he had faxed the doctor's note to the Employer, in his absence, his eleven-year old daughter received a call from Creusot and was asked to convey a message to the grievor to the effect that he was not to return to work until further notice because the Employer was conducting a WCB investigation. The grievor immediately called Creusot back to discuss the matter. Creusot told him that the company was doing a "WCB investigation" and the grievor was not to return to work until further notice until the matter was "settled." At this point, the grievor testified, he assumed that WCB would go over his file and determine whether he "got it or not." Then he would return to work.

Not having heard back from the Employer, the grievor called in the following week on Monday, February 4 to ask about when he could return to work. In cross-examination, he said that he had probably made the call on February 4 to check on whether the WCB matter had been finalized and he could return to work. However, he did not reach Creusot directly and so left a voice message. On February 5, Creusot called him to talk about the return to work.

In his direct examination, the grievor confessed to having only a vague recollection of his discussions with Creusot regarding his doctor's letter prior to a meeting on February 20. He testified that there "could have been" such a discussion. Creusot, he said, "wasn't happy with [the letter] because it wouldn't guarantee I was 100% better and that I wouldn't re-injure myself."

In cross-examination, the following exchange took place between Employer counsel and the grievor:

> Q: My instructions are that on February 5, Mike [Creusot] called you and told you he didn't want you to come in to work, that the WCB investigation was carrying on and that he read to you from the January 28 letter [from the doctor] and told you that he needed a letter giving you the "all-clear"? Ans: Yes.
>
> Q: This was on Feb 5? Ans: That could be correct.
>
> Q: I am instructed that you said you would get the doctor's letter? Ans: Yes.
>
> Q: Did you go to the doctor? Ans: Yes, probably the same day or the next day.

The grievor testified that his doctor would not give him such a letter. Continuing the exchange in cross-examination:

> Q: I am instructed that the next time you talked to Mike would be on the 19th of February, 2 weeks later? Ans: Probably.
>
> Q: He called and said he wanted to have you come in and prepare an accident report? Ans: Yes.

In his re-direct examination, the grievor was directed once again to the subject-matter of Creusot's request for an "all-clear" letter which the grievor described on several occasions in his testimony as a letter "guaranteeing" he would not be re-injured. The grievor was asked by his counsel how many times Creusot asked for a second doctor's letter and he replied that he only asked for it once. He was also asked how much time passed before he got back to Creusot with his doctor's response when Creusot asked for the revised medical letter. The grievor said: "It could have been the same day."

In his direct evidence, Creusot testified that when he received the faxed doctor's note on January 28, he was troubled. In his experience, most notes from doctors contained statements certifying that the employee was fit to return to work. This was the first such letter he had received that went on to say that re-injury was possible. He concluded that there was something amiss and perhaps the grievor had not completely healed. He attempted to contact the grievor on January 28 but, as he recorded in his diary, there was no answer at the grievor's house.

Creusot denied emphatically that he had a meeting with the grievor on January 28. He agreed that it was possible if not likely that he might have spoken to him at some point about the need for a doctor's note (before he received the January 28 doctor's letter) but, if so, it was not during a meeting. He testified that he did not see the grievor between the time he left work on January 16 to the time of a meeting held on February 20 at which both he and the grievor were in attendance.

Creusot testified that after initially failing to reach the grievor at his home, he did attempt to contact him again some time later and reached a person he took to be the grievor's daughter and left a message with her for the grievor to call to discuss his return to work. He may, he agreed, have spoken about a WCB investigation. Creusot testified that the grievor called back shortly after his own call on February 4 (according to Creusot's diary note) and left a voice mail advising that he wished to know when he could come to work. Creusot reached him the next day by telephone. He told him that under the conditions of the doctor's letter, he could not allow him to return to work. He was not comfortable with the doctor's letter and was looking for an "all-clear" letter. In addition, he told the grievor he would be conducting a further investigation with the WCB because there was a great deal of confusion surrounding his claims. He testified that, in his own mind, he was trying to figure out how the claim for a shoulder injury was related to the kidney and chest pains that had been reported to him earlier.

Creusot testified that this was the last conversation he had with the grievor until he called him in to the office to participate in an investigation on February 20. He was questioned in cross-examination as to the reason for holding the grievor out of service:

> Q: What did you do after you got [the grievor's] message on February 4 inquiring about a return to work? Ans: I got back him shortly after and told him not to come back to work. I needed to have the letter from his physician, something better than the one I had and I was conducting an investigation along with WCB.
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> Q: He would have to wait until after the WCB investigation? Ans: Until I got a hold of him and got a doctor's note.

> Q: What were you going to get a hold of him about? Ans: Once I got a letter from his doctor and what I needed from WCB. I needed to conclude the WCB investigation.
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> Q: I suggest you didn't ask him for a medical note until after the WCB investigation was completed? Ans: Not true.
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> Q: [Cross-examiner points out that diary note of February 5 indicates only there will be no work until "we hear from WCB", saying nothing about a doctor's note] Ans: This [the WCB investigation] was one of the items but I did call him about getting the [doctor's] letter clarified ... I don't always write the full conversation in my diary.

There was considerable controversy in the evidence about precisely what it was that Creusot told the grievor with respect to the improvements he expected in the doctor's letter. As Creusot saw it, his essential message to the grievor was that he needed a letter that said the grievor was fit for work. As the grievor saw it, Creusot wanted a letter that guaranteed that he would not re-injure himself. Creusot disputed emphatically that he had ever asked the grievor for a guarantee. In his cross-examination, he refined his evidence as follows:

> Q: Do you agree you wanted a letter from the grievor that would indicate that he would not be re-injured? Ans: I wanted a letter that said he was fit to work ... period.
>
> Q: What about the re-injury part? Ans: I needed an all-clear letter – one that said he wasn't going to get re-injured again. Dennis agreed to provide it.

If there were differences in the recollections of the two witnesses with respect to the events from January 28 to February 5, there was little if any difference between them regarding what came after. Creusot received another letter from the WCB letter on February 18, 2002, some two weeks later. This particular claim had to do with the grievor's mid-section injury. Creusot testified that he was "really confused" and contacted WCB. The WCB representative in charge confirmed that the two claims filed by the grievor constituted only one claim for lost time benefits.

Creusot called the grievor about February 19 about the claims and spoke to him briefly. He asked him to come in to the office to assist in an investigation. The grievor did so. In the words of Creusot, he was completely cooperative. When asked in cross-examination why it took him until the 20th of February to contact the grievor about the investigation, Creusot said that he needed the time in order to gather information and decided around the 19th that he needed to hear directly from the grievor about his situation.

On February 20, Creusot and the grievor went over the circumstances surrounding both claims.

It was Creusot's testimony that after the meeting, he called the grievor at home to remind him that he still did not have the doctor's note providing him with an "all-clear" to return. The grievor testified that he believed this request came in the meeting itself. In any event, the grievor agreed to get such a note but called back shortly after to say that his doctor was not agreeable to providing it. In his cross-examination, Creusot and Union counsel had the following exchange about what the grievor said when delivering his doctor's message that he would not provide the requested letter:

> Q: When he [the grievor] called you, was it a telephone conversation? Ans: It was a telephone conversation.
>
> Q: He said to you that no doctor will give a guarantee and you said – yes, I have a filing cabinet full of them? Ans: I had a conversation like that.

At the end of their conversation, the grievor invited Creusot to call his doctor directly. Creusot talked to the grievor's doctor on February 21. He told Creusot that no physician would ever be able to say that the employee was not going to get re-injured. Creusot explained that he needed something more substantial than the last letter. His physician went on to explain what was causing the grievor's problem on this occasion, namely, a form of arthritis (this was the ankylosing spondylitis). To this point, no one, including the grievor, had told Creusot about this. The two went on to speak about the various light duty programs available. The physician told Creusot that because of this condition, the grievor was very susceptible to re-occurrences where the symptoms could flare up whether on light duty or otherwise. This, he said, was why had stated in his letter that the grievor "could have a re-injury."

Creusot was satisfied with the explanation. He then contacted the grievor to set up a meeting with himself and a representative of the Union, Neil Megher. This was arranged to take place on February 25. At the meeting, they discussed the grievor's return to work, his medical condition, the expectations of the company of the grievor given his medical condition and how they would accommodate the fact that the grievor might not be able to attend work on a regular basis. The grievor was to make the company aware as quickly as possible when he felt the condition coming on, which would allow the company to perhaps change his work regimen and to have advance warning to arrange a replacement.

The grievor returned to work on February 26.

III

I will present the arguments of the parties in abridged form before moving on to my conclusions.

The Union submits that the principles of law that apply to this situation are straight-forward. An employee returning from a medical leave has the initial onus to establish fitness. This onus can be satisfied in some cases by simply presenting himself or herself for work. At other times, the employer may be entitled to seek evidence from a medical doctor. Here, says the Union, there was no basis for requiring further medical information from the grievor. The Employer cannot refuse an employee the right to return to work on the mere possibility of medical problems in the future: see *Nelsons Laundries Ltd. and Retail Wholesale Union, Loc. 580* (1997) 64 L.A.C. (4th) 120 (Somjen).

Even if the Employer was within its rights to seek further or better medical certification of fitness, submits the Union, it has the obligation to state the grounds for its objection to the medical certificate offered by the grievor and to point out to the grievor what is required before he will be permitted to return. Here, it required the impossible: a guarantee that the grievor would not be re-injured. This was obviously an unreasonable requirement, submits the Union, and one which the Employer could not use to justify holding the grievor out of service.

In any event, submits the Union, the Employer did not hold the grievor out of service merely because of the absence of proper medical certification of fitness. It held the grievor out of service pending the conclusion of a "WCB investigation" which it only concluded as of February 21. There is no basis on which the Employer can hold the grievor out of service pending such an investigation. Even if there was, there was no explanation as to why it took the Employer so long to conclude its investigation.

The Union asks me to conclude that the testimony of the grievor is more in accordance with the probabilities than that of Creusot, noting that the events occurred a while ago and human memory is fallible. The grievor was ready to return to work on January 29 and was held out of service without cause until February 26. It submits that he is entitled to be made whole for that period off work. Alternatively, it says, even if the Employer was entitled to further medical information from the grievor, it could have sorted the matter out within the space of days, as it did once it invited the grievor to the meeting on February 20. Accordingly, the grievor is entitled to be compensated from January 29 to February 20 at a minimum.

In the course of its argument, the Union also relied upon the following authorities: *Fort James Canada Inc. and Graphic Communications International Union, Local 100-M* (2001), 94 L.A.C. (4th) 423 (E. Newman); *Mill & Timber Products Ltd. and IWA-Canada, Local 1-3467*, unreported decision, December 5, 1995 (Kelleher, Q.C.); *Aspen Planers*

Ltd. v. Industrial Wood and Allied Workers of Canada, Local 1-417 (Wahid Grievance), [1995] B.C.C.A.A.A. No. 310, September 13, 1995 (Kinzie).

The Employer takes no serious issue with the legal principles set out in the authorities cited by the Union. It say, however, that the statement of the principles set out by the Union do not take account of the specific circumstances of a partially disabled employee seeking return to work.

On the facts, the Employer asks me to conclude that Mr. Creusot's recollections are more accurate than those of the grievor and more in accord with the probabilities

. Creusot received a letter from the doctor on January 28 which raised more questions than it answered about the grievor's fitness to work and would have set off alarm bells in the mind of any reasonable observer. This would be particularly so given the grievor's history of injuries and the confusion over which injury or illness it was that had kept the grievor off work. As a disabled employee, the grievor was obligated to establish his fitness in unambiguous terms and failed to do so.

It was reasonable for Creusot, submits the Employer, to ask the grievor to provide him with further and better medical information in the nature of an "all-clear" letter, which was simply a layman's way of describing a proper medical certification of his fitness for work. Once the grievor got down to getting the necessary information, the matter was resolved in a very short time. The problem, says the Employer, is that the grievor in effect sat on his hands after receiving the request for the letter from Creusot on February 5.

The Employer asserts that the evidence does not support the conclusion that the return to work of the grievor was held up by the Employer's WCB investigation. This was contrary to the evidence of Creusot which, the Employer says, was not shaken on cross-examination. Indeed, submits the Employer, the return to work was held up because the grievor delayed for reasons unknown in getting his doctor to provide the necessary information. It took the Employer's request for a meeting set for February 20 to spring the grievor into action. The Employer cannot be held responsible for the grievor's own inaction, which followed closely on the heels of the grievor providing a medical certification which was obviously inadequate on its face.

The Employer relied on *Re Victoria Times Colonist and Victoria Newspaper Guild, Loc. 223,* unreported, February 12, 1986 (Hope); *Thompson General Hospital and Thompson Nurses M.O.N.A., Loc. 6* (1991), 20 L.A.C. (4th) 129 (Steel); *Money's Mushrooms Ltd. and Retail Wholesale Union, Local 580,* unreported, March 19, 1998, (Longpre),; *Smallwood Sawmill Ltd. v. Industrial Wood and Allied Workers of Canada, Local 1-3567*, [2002] B.C.C.A.A.A. No. 57 (Korbin); and *West Fraser Mills Ltd. and IWA-Canada, Local 2171* unreported, December 12, 2002, (Korbin).

IV

In the *Mill & Timber Products Ltd.* case, *supra*, Arbitrator Kelleher, Q.C. described the basic obligations of the parties in the return-to-work setting in the following terms:

> When an employee has been ill or injured and wishes to return to work the Employer is entitled to evidence that the employee is medically fit. The nature and the extent of such evidence depends entirely on the circumstances of the case. Often simply presenting oneself for work is sufficient to satisfy the initial onus of establishing fitness. On other occasions an employer is entitled to require evidence from a medical practitioner. Brown and Beatty, Canadian Labour Arbitration, (3rd ed.), put it this way at 8-81:
>
>> In all of these circumstances where the parties are unable to resolve the status of an employee's state of health, it ultimately will fall to the arbitrator to make a finding as to whether the employer's refusal to permit the employee to return to work was reasonable. Characterizing the issue in such a manner, it would seem to follow that the employer must bear the ultimate burden of proving that its decision not to allow the employee to return to work was reasonable and bona fide.

As to when an employer will be entitled to hold an employee out of service pending receipt of further medical evidence, Arbitrator Munroe, Q.C. in *North Central Plywoods –and- Pulp, Paper and Woodworkers of Canada, Local 25 (Grievance of Rocky Purych)*, unreported (September 14, 1987) (cited in *West Fraser Mills Ltd.*, supra) said the following:

> However, there are cases where the mere presentation of oneself for work will not be sufficient to satisfy the initial onus – i.e., where it is entirely reasonable that the employer would want more information before re-introducing the employee to the regime of the workplace, and there appears to be an accord among arbitrators that where an employee has been absent due to illness or injury, the employer is entitled to require further evidence of the employee's renewed medical fitness, and to hold the employee out of service without liability for wages pending the receipt of such further evidence, where the evidence that is offered (whether it be the mere presentation of oneself for work, or a note from a physician) does not reasonably resolve any *real and substantial questions* concerning the employee's ability to perform as required. (My emphasis)

The test for when the employer will be entitled to require such further evidence has also been described in the jurisprudence as requiring "reasonable and probable grounds" or "reasonable grounds" for assuming that the employee is unfit or would present a danger to

himself, his fellow employees, or to company property: see the summary from the authors of Brown & Beatty, *Canadian Labour Arbitration*, (3rd edition) para. 8:3342 set out in *Aspen Planers Ltd., supra*, at para. 56. I do not believe there is a special magic in any particular form of words describing the test. In the end, the employer must have a reasonable basis for concluding that further medical evidence is required to establish fitness.

The case authorities make it clear that the assessment may involve not only the exercise of rights but the observation of duties. The decision in *Firestone Tire & Rubber and U.R.W., Loc. 113* (1973), 3 L.A.C. (2d) 12 (Weatherill) has long been cited for the proposition that the employer has both the right and the obligation to assure itself that an employee returning to work after an illness is fit to assume his or her work.

Where the employer is not satisfied with the certification offered by the employee, and has a reasonable basis for requiring further evidence, the employer has an obligation to describe to the employee what is required before the employee will be permitted to return. This obligation was described in the following way in the *Thompson General Hospital* decision, *supra*:

> Before the employer can place additional requirements on the employee, it must, in accordance with ordinary principles of fairness, state the grounds of its objection to the medical certificate offered by the grievor and must point out to the employee what it requires before it will permit his return. 'If the certificate in itself is not satisfactory, the employee must be advised of that, so [page126] that he may either protest the reasonableness of the company's rejection of it, or request a more ample certificate from his doctor. If a further medical opinion is required, then again the company must advise the employee of that fact.' (*Re Firestone Tire & Rubber Co. of Canada Ltd., infra*, p. 175).

As it has with other areas of law, the concept of "duty of accommodation" has intersected with the foregoing principles in those specific situations where the employee seeking a return to work has a continuing "disability" within the meaning of the applicable Human Rights legislation. In the *Smallwood Sawmill Ltd.* decision, *supra*, Arbitrator Korbin referred to two recent decisions which dealt with situations of this kind and analyzed the obligations of the parties in the context provided by the duty of accommodation. In one of these decisions, *Vancouver School Board -and- United Brotherhood of Carpenters and Joiners of America, Local 1995*, [1999] B.C.C.A.A.A. No 365 (Gordon), Arbitrator Gordon identified the applicable principles as including the following:

> ¶ 125 Arbitral principles relating to an employee's fitness to safely return to work and the onus on an employee to provide medical support for the work she wishes to return to intersect with principles relating to the duty to accommodate. In recent awards arbitrators have held that an employer's obligation to return a

partially disabled employee to work is subject to reasonable satisfaction that the employee is medically fit to perform the assigned work. The onus on a disabled employee wishing to return to work is to present unequivocal and convincing evidence that it would be safe to return to his prior duties or other duties. Conflicting or incomplete evidence will not satisfy this onus. The credibility of an employee's own assessment of his medical condition will be considered if he relies on his own belief that he is capable of performing identified work. That credibility will be tarnished where the employee attempts to ride two horses, i.e., collect wage indemnity benefits on the basis that he is disabled and at the same time represent to the employer that he is fit to return to work.

¶ 126 The disabled employee bears the onus to identify work which she is able to perform together with medical confirmation that she can perform it. In this regard, the physician's opinion must be based on knowledge of the specific physical demands of various alternate jobs. If the employee satisfies this obligation, the onus shifts to the employer to reasonably consider the employee's request during the search for an accommodation.

¶ 127 In this context, a union's demand for an earlier return to work will be viewed as unreasonable. Absent evidence that it would safe to return to work to perform alternate duties, the magnitude of the risk of re-injury constitutes undue hardship on the employer. Additionally, where safety or risk of re-injury are in issue, more time may be required to assess the situation and gather information before the return to work.

Turning to the specific circumstances of the case before me, the grievor here presented a doctor's letter to the Employer on January 28 which the Union asserts constitutes sufficient proof of fitness to ensure the grievor's return to work the following day. The Employer submits that the content of the letter and the surrounding circumstances justified it in refusing to permit the grievor's return until further medical information was obtained.

There are essentially two issues to be resolved. First, was the Employer justified in refusing to accept the January 28 doctor's letter as proof of fitness? Second, if it was, who must bear the loss for the period up to February 26 that the grievor was held out of service? This second issue involves a consideration of whether the Employer met its obligation to advise the grievor of what was required of him and acted reasonably in keeping the grievor out of service for the time that it did.

I will begin by saying that I was satisfied that both witnesses in this case, the grievor and Mr. Creusot, provided honest answers to the best of their ability in their testimony. Credibility, of course, is not solely a matter of determining which of the witnesses is telling the truth in a subjective sense but is instead a matter of determining which of the stories told by the witness most accords with the "probabilities which a practical and informed

person would readily recognize as reasonable in that place and in those conditions." See *Faryna v. Chorney*, [1952] 2 D.L.R. 354.

I am satisfied on a balance of probabilities that although Creusot and the grievor may not have physically met each other on January 28, 2002, Creusot did speak with the grievor and ask him for a doctor's note on or before that date, likely telling him that he could return to work the next day when he had provided it. However, Creusot was expecting quite a different medical letter than what he received on January 28. To his mind, the doctor's letter of January 28 raised a real question about the grievor's actual fitness to work. Whether or not he was justified in that conclusion will be addressed below.

The evidence supports the conclusion that he tried to reach the grievor at his home on the 28th to tell him not to come to work but reached the grievor's daughter instead with whom he left a message to the same effect. Although Creusot testified as to a belief that he had placed that particular call 4 or 5 days after receiving the doctor's note, it is more likely that the call occurred on January 28. January 28 was a Monday and the grievor was expecting to return to work the next day. He had taken special pains to secure the letter on the 28th and fax it the company. It would not accord with the probabilities that he would wait until the following Monday, February 4, before inquiring about what had happened to his return to work. Indeed, unless told to do otherwise, he would have showed up for work on February 29. I conclude that Creusot placed the call on January 28, left a message that the grievor was not to come to work, and the grievor, not having heard from the Employer, called in the next week to find out his status. He had therefore already been off work for approximately one week by the time he and Creusot had their first direct discussion on February 5.

The evidence satisfies me that Creusot told the grievor on February 5 about the need for further medical information. Although it was described in various ways in the evidence, the essence of what Creusot wanted can be simply stated. He wanted a letter like the one he received on January 28 with only the first sentence remaining in the letter. He did not want a letter stating that the grievor could be re-injured. Although he may not have used the term "guarantee", he did want a letter that satisfied him that the grievor was not going to be re-injured on return to work. The evidence supports the conclusion that he explained this requirement to the grievor in the February 5 discussion.

The grievor admitted as much in his cross-examination and that he had not been back in touch with the Employer until February 19. This led to the Employer's assertion in these proceedings that the grievor had "sat on his hands" and thus was the sole cause of the delay. This assertion, however, does not accord with the balance of the evidence of either the grievor or Mr. Creusot. As described in his own diary note of the February 5 discussion, the discussion between Creusot and the grievor on February 5 also centred on the Employer's decision to hold the grievor out of service pending completion of what was described as a "WCB investigation." The evidence compels the conclusion that whether

or not the Employer had received a doctor's note in full compliance with its request, it would have called the grievor into work only once it had sorted out the confusion surrounding his WCB claims.

The evidence supports that conclusion that Creusot's confusion was genuine and, indeed, understandable in that it was based largely on baffling inconsistencies in the information being provided by the grievor himself. In his discussion with Creusot on January 17, the grievor had said that he was off work due to chest and kidney pain. He had not reported any "injury" while at work but instead had advised his supervisor about pains in his mid-section. He had not reported an injury to the first aid attendant. In addition, he had left the impression with Creusot during the January 17 discussion that his absence was not due to an injury.

When the January 18 doctor's letter was produced to the Employer, it was received with satisfaction at that point although it contained the seeds of the coming confusion. First, it described the reasons for the grievor's absence in terms of an "injury" that would require re-assessment in about a week's time. Next, it implied that the "injury" was sufficiently serious that the grievor might be only able to return to work on a part-time basis.

When Creusot received the WCB correspondence on January 24 disclosing the grievor's claim based on a shoulder injury, he was confused and, again, understandably so. The grievor's claim based on a shoulder injury was apparently processed by the WCB ahead of his claim based on mid-section pains, leaving the question of what was causing the grievor's problems very much up in the air. When Creusot called the grievor to discuss it on the 25th of January, he received no useful information. The grievor could not tell him which of the "injuries", his shoulder or his mid-section, his doctor was "putting in for."

The evidence supports the conclusion that the grievor had good reason to believe that his mid-section pains, and hence his absence from work, were due to his pre-existing arthritic condition, ankylosing spondylitis. Whether or not the diagnosis had been "confirmed", it had been the working diagnosis for many of his problems over the previous two or three years and it was the diagnosis identified in the Emergency records from his visit to the hospital on January 16. It was never satisfactorily explained on the evidence why the grievor did not tell the Employer about this and thereby spare the Employer and himself considerable confusion about the root causes of his problem.

In view of his later co-operation, however, there is no reason on the evidence to conclude that the grievor was attempting to actively mislead the Employer about his medical condition. In the grievor's mind, the diagnosis of his continuing disability was not "confirmed" until he visited the Vancouver specialist in 2002. On the evidence, this appears to have likely occurred after he submitted the doctor's letter of January 28. I say this for the following reasons. The grievor testified about seeing two specialists, one at the request of his own physician and the other at the request of the WCB. The second

physician was located in Vancouver. The report of that physician was described in the correspondence of the WCB denying the grievor's claim based on the pre-existing condition of ankylosing spondylitis. The Vancouver specialist's report was described in the WCB correspondence as being made on February 11, 2002. The WCB correspondence did not say whether this was simply the reporting date or the date on which the grievor visited the specialist. In his own evidence, the grievor was unable to shed much light on this other than to say that the visit took place after his departure from work on January 16 and after he had returned to work. Since the grievor returned to work after the WCB correspondence was issued and received, it is not possible that the visit occurred after he left work on January 16 and after his return to work on February 26. His visit to Vancouver and receipt of the final confirmation of his diagnosis must have taken place while he was off work awaiting word from the Employer about a return date.

The evidence suggests that what was occurring between February 5 and February 19 was an investigation by the WCB and not an independent investigation by the Employer itself. Although Mr. Creusot claimed in his evidence to have needed the time to gather information, he did not identify any independent steps, other than receiving and following up on the WCB correspondence, that were taken by the Employer before it decided to invite the grievor to a meeting on February 19. Only once Creusot was satisfied that he understood the nature of the claims being made by the grievor to WCB and their likely outcomes did he move to bring his own investigation to a conclusion.

Having reviewed these matters, it is possible now to return to the questions posed earlier.

Was the Employer justified in refusing to accept the January 28 doctor's letter as proof of fitness? I am satisfied that it was.

First, the grievor was not an employee who, having suffered an injury or illness unrelated to a continuing disability, was returning to the workforce with a certificate of fitness. Unlike the employee in the *Mill & Timber Products Ltd.* case, supra, relied on by the Union, the grievor was an employee seeking a return to work with a continuing partial disability. The grievor, as it turned out, was by the very nature of his disability at risk of re-occurrence of his symptoms and required accommodation from the Employer. While this may not have been "confirmed" in his own mind until his visit to the Vancouver physician, it was the working diagnosis of the Emergency physician and must have been known to his own physician as he was able to later explain the implications to Creusot in a telephone call and secure his ready co-operation in finding ways to reasonably accommodate the grievor.

Second, as a partially disabled employee seeking a return to work, the grievor was obligated to present "unequivocal and convincing evidence" that it would be safe to return to his prior duties or other duties: see *Vancouver School Board* decision, supra.. Whatever might be said about the January 28 doctor's letter, it was not unequivocal and convincing

evidence. I agree with the Employer that it raised as many questions as it answered and was at least implicitly conflicting. The first sentence of the letter was clear enough. The second sentence, however, qualified the first with its caution regarding "re-injury" and use of the phrase "at this stage", implying that there was some kind of a continuum which, at the moment, favoured the grievor's ability to do his work safely but might not do so at some other stage in the near future. In short, a reasonable person receiving the January 28 letter would believe that there was some potential danger lurking in the background of the grievor's situation that was relevant to his ability to perform his work safely. He would be duty-bound to investigate it.

Having said that, the grievor was kept out of service until February 26, almost one month later. Who must bear the responsibility for his loss?

In my view, both the grievor and the Employer must bear responsibility for this delay. My reasons for this conclusion are as follows.

First, there can be no doubt that Mr. Creusot's request of the grievor that he bring in a letter which excluded the possibility of re-injury did not meet the Employer's obligations to the grievor when requesting further medical proof of fitness. I agree with the Union that the law is clear that the mere possibility of medical problems in the future does not permit an employer to refuse to allow an employee to return to work: see *Nelsons Laundries Ltd.*, supra.

However, in the end, it is my conclusion that the specific nature of Creusot's request had very little to do with the delay in returning the grievor to work. To begin with, it was only one of the two reasons why the grievor was being held out of service, the other – and overriding – reason being that the Employer was investigating the matter and would not return the grievor to work until it had completed its investigation. Next, it ultimately proved to present no significant difficulties in arranging the grievor's return to work. Once the grievor had found out from his doctor that the Employer's request could not be fulfilled, and the grievor had communicated this to Creusot, the grievor and Creusot almost immediately settled on an entirely satisfactory way of resolving the medical certification dilemma. The grievor gave his doctor consent to speak directly with Creusot and Creusot followed this up without hesitation. Creusot and the grievor's physician thereafter had a fruitful discussion which resulted in a satisfactory and speedy accommodation of the grievor. If there had been any residual doubt about the bona fides of any of the parties in this matter, that doubt was resolved by the co-operative manner in which they achieved a positive result once all the controversies were resolved.

The "controversies" to be resolved and which had an impact on the length of time the grievor was held out of service arose in large measure because of the grievor's own actions. I have detailed them earlier. The evidence does not support the conclusion that the grievor was attempting to mislead the Employer about his situation. His actions on and

from February 19 belie such a suggestion. However, his actions did lead to a genuine confusion regarding the nature of the injury or illness that had taken him off the job. It was natural that the Employer would require some time to sort things out.

Was the time taken reasonable? Deciding this question is a balancing act. On the one hand, the confusion engendered by the grievor's own actions described earlier, coupled with the ambiguity of the doctor's letter of January 28, 2002, provided the Employer with ample reason to pause to consider its position regarding the return to work. In some cases, it would not be difficult to see why it may take considerably longer than a week or two to resolve difficult issues of accommodation, particularly where a comprehensive medical assessment is required. On the other hand, in the particular case before me, given the co-operation demonstrated by the grievor and his physician when it came to providing the required information, it is hard to see why it took the Employer until February 26 to secure the information that it ultimately secured and to return the grievor to work.

I cannot find fault in the Employer's delay between January 28 and February 5 to consider how it was going to deal with the situation before it. In the same light, I cannot find fault in the delay between February 19 and February 26 in conducting the necessary inquiries, having the necessary meetings and reaching the necessary conclusions regarding what could be done to reasonably accommodate the grievor.

However, the evidence does not satisfy me that it was reasonable for the Employer to wait from February 5 to February 19 before asking the grievor to a meeting to sort out the confusion. The outcome of the WCB proceedings themselves had no direct bearing on the grievor's ability to return to work. His claims could only be for lost income to the point at which he was ready to return to work. He had evidenced a readiness to return to work by January 29, whether or not his medical evidence met the mark. Waiting for the WCB proceedings to be resolved on their merits was not a reasonable exercise of the Employer's rights in these circumstances.

It is my conclusion that the grievor was unreasonably held out of service between February 5 and February 19. He is entitled to be compensated for his loss during that specific period of time. He was not unreasonably held out of service during the other periods mentioned and so no award of compensation will be made in respect of them.

I will leave it to the parties to work out any remaining details and remain seized to assist them if they are unable to do so.

It is so awarded.

DATED AT North Vancouver, British Columbia, this 27th day of June, 2003

"J.L. McConchie"

John L. McConchie
Arbitrator