DEC 2 2002

IN THE MATTER OF AN ARBITRATION

BETWEEN:

WEST FRASER MILLS LTD.
(SKEENA SAWMILLS DIVISION)

(the "Employer")

AND:

IWA-CANADA, LOCAL 2171

(the "Union")

Re: Grievance of P. Bains

ARBITRATOR:	Judi Korbin
COUNSEL:	Don Jordan, Q.C. for the Employer
	Sonny Rioux for the Union
DATE OF HEARING:	December 4, 2002
PLACE OF HEARING:	Vancouver, BC
DATE OF AWARD:	December 12, 2002

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The parties are agreed that I am constituted with the jurisdiction as an arbitrator under the provisions of their Collective Agreement to hear and determine the matter in dispute.

This case concerns a grievance filed by the Union on behalf of the Grievor, Pargat Bains, alleging the Employer violated the provisions of the Collective Agreement when it refused to allow him to return to work March 5, 2002. The Union seeks that the Grievor be paid from March 6 to 12, 2002.

The Agreed Statement of Facts is set out herein:

1. Mr. Pargat Bains has been an employee of the Employer since September 27, 1973.

2. Mr. Bains had been off work on Workers' Compensation benefits, due to ongoing back problems. He was absent from January 26, 2001 until May 28, 2001 and from November 6, 2001 until March 25, 2002.

3. On March 4, 2002, the Employer received a note (Exhibit 1) from Mr. Bains' physician stating that Mr. Bains was fit to resume work on March 5, 2002.

4. On March 5, 2002, the Employer wrote to Mr. Bains (Exhibit 2) indicating that the brief medical note of March 4, 2002 was not sufficient to permit him to return to work. The Employer requested a more detailed medical report.

5. Dr. G.A. Appleton wrote a letter in response to the Employer's March 5, 2002 letter, which was received by the Employer on March 13, 2002 (Exhibit 3). In this letter, Dr. Appleton provided information regarding Mr. Bains' medical condition and the treatment he had received. Dr. Appleton stated that Mr. Bains was capable of returning to work in a position that did not involve much lifting, bending or otherwise use of his back.

6. On the basis of this more detailed medical report, from Mr. Bains' physician, the Employer agreed to allow Mr. Bains to return to work.

7. Mr. Bains returned to work on March 25, 2002.

8. The Employer paid Mr. Bains his salary from March 13, 2002, the date of receipt of the more detailed medical report.

The letter of March 5 from the Employer to the Grievor referred to in point four above is as follows:

> Dear Sir:
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> We now have had an opportunity to consider the note from your physician dated March 5, 2002. However, due to your lengthy absences from work and your numerous assertions of ongoing back problems, a brief note of his nature will not be sufficient to permit you to return to work. The company owes an obligation to all of its employees to insure (sic) that they can return to work and perform their jobs in a safe and efficient manner, without any risk of further injury to themselves or their fellow workers.
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> In light of the foregoing, we require a detailed medical report from a physician other than your doctor, preferably the orthopedic surgeon in Kitimat or Pr. Rupert, which addresses the following matters:
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> 1. Given your lengthy absences from work, we wish to be advised as to what objective changes in your condition have taken place, which would lead the specialist to believe that your underlying back and knee problems are now resolved and you are safe to return to work.
>
> 2. Would you be capable of returning to any or all of your previously held jobs positions, and if not all, which ones? We would provide the doctor with detailed job descriptions of all jobs that you are trained fro as well as inviting the doctor to attend the worksite to get a first hand observation of your working conditions, prior to preparation of the above mentioned report.
>
> 3. The company is prepared to pay any normal and reasonable fees incurred in the preparation of this report. We require you to advise us as to the arrangements made for the preparation of this report by March 15, 2002.
>
> We would require this report in order to satisfy ourselves that you are able to return to work and work safely in the future.

> Further, we wish to satisfy ourselves that your return to work does not pose a significant potential for recurring absenteeism.

Positions of the Parties

The Union takes the position that the first paragraph of the Employer's March 5, 2002 letter (above) is incorrect in that the Grievor's Medical Aid Report records only four incidents involving his back, three of which did not result in any time lost from work.

The Union also submits that in the circumstances the terms of the final paragraph of the Employer's March 5, 2002 letter are not reasonable with respect to the Employer requiring satisfaction that the Grievor's return to work would not pose a "significant potential for recurring absenteeism".

Moreover, argues Mr. Rioux on behalf of the Union, the Employer never received the detailed report from a second doctor it requested, but rather accepted a second note from the Grievor's own doctor, which did not meet their specific requests, but which they accepted for the Grievor's return to work. The Union submits this same information could have been obtained by permission of the Grievor, with a phone call to the Grievor's doctor, on March 5, 2002 which could have allowed him to return to work on the date he initially requested to do so.

The Union relies on the following authorities in support of its position: *Doman Forest Products Ltd., Cowichan Bay Sawmill Division -and- IWA-Canada, Local 1-80,* unreported (July 2, 1992) (Kelleher); *Mill & Timber Products Ltd. -and- IWA-Canada, Local 1-3567,* unreported (December 5, 1995) (Kelleher); *Re Nelsons Laundries Ltd. -and- Retail Wholesale Union, Local 580* (1997), 64 L.A.C. (4th) 120 (Somjen)

The Employer, on the other hand, argues that the onus is upon an employee returning to work from an illness or injury to satisfy an employer that he can do so safely without a threat either to himself or other employees. Mr. Jordan submits that a consideration of the facts of each case will dictate the level of medical information which will satisfy that

onus. For example, for an employee returning from a cold, a simple doctor's note would be sufficient, whereas after a complicated illness or injury, the Employer is entitled to more detailed information.

The issue in this case is whether, upon receiving the first note from the Grievor's doctor, it was reasonable for the Employer to ask for more. If not, that ends the matter. If it was, the next issue becomes who bears the loss for the time period it took for the Grievor to provide the second doctor's note received by the Employer on March 13, 2002.

The Employer argues that as the grievor had been off for ten months on a WCB claim, and had surgery, he had obviously experienced a significant injury. In the circumstances, the information on his doctor's first note, stating he was fit return to work was simply too sparse. It isn't reasonable in such circumstances for one to conclude the Grievor has met his onus to satisfy the Employer of his fitness to return to work, submits Mr. Jordan. So, the Employer wrote to the Grievor requiring more information and explained why this was needed.

The Grievor's doctor's second note created a real dilemma for the Employer. While it didn't fulfill the requirements set out in the Employer's letter of March 5, 2002, it did provide the Employer with new facts. The doctor obviously had the Grievor's job described to him. His doctor identified he has a "low back injury of soft tissue in nature that is improving". There is no special treatment available for the injury beyond routine stretching, exercise, etc. and the Grievor "is capable of working in any position that does not involve a lot of lifting, bending or otherwise use of his back". Further, "referral to an orthopedic surgeon was not clinically indicated".

On the basis of this new information from the Grievor's doctor, the Employer concluded it was not reasonable to continue to require information from the Grievor, as he had now satisfied the onus required to establish he was fit to return to work.

In the circumstances, contends Mr. Jordan, the Employer paid the Grievor retroactively to the date it received the second note, but is not responsible for the time between March 6 and 12, as the Grievor had not met his onus at that time.

The Employer relies on the following cases in support of its position: *Re Firestone Tire & Rubber Co. of Canada Ltd. -and- United Rubber Workers, Local 113* (1973), 3 L.A.C. (2d) 12 (Weatherill); *Noranda Mines ltd. -and- United Steelworkers of America, Local 7852 (Dave Smith Grievance)*, unreported (December 13, 1982) (Chertkow); *North Central Plywoods -and- Pulp, Paper and Woodworkers of Canada, Local 25 (Grievance of Rocky Purych)*, unreported (September 14, 1987) (Munroe); *Overwaitea Foods Ltd. -and- United Food and Commercial Workers Union, Local 1518 (M. Turner Grievance)*, unreported (December 22, 1995) (Glasner); *Hospital Employees' Union -and- Hospital Employees' Staff Union*, unreported (December 16, 1996) (Sanderson); *Re Thompson General Hospital -and- Thompson Nurses M.O.N.A., Local 6* (1991), 20 L.A.C. (4th) 129 (Steel); *Re Masterfeeds -and- United Food and Commercial Workers International Union, Local 1518* (2000), 92 L.A.C. (4th) 341 (Kinzie); *Skeena Cellulose Inc. v. Christian Labour Association of Canada, Local 44*, [2001] B.C.C.A.A.A. No. 164 (A-100/01); and *Money's Mushrooms Ltd. -and- Retail Wholesale Union, Local 580*, [1998] B.C.C.A.A.A. No. 71 (A80/98).

Decision

I am satisfied, based on the nature of the Grievor's workplace injury of January 26, 2001, his subsequent surgery and his resulting ten months of absence from work that the Employer was reasonably justified in asking for more medical information prior to his return to work than the doctor's note the Grievor submitted on March 4, 2002.

I then turn to consider the issue of who should bear the loss for the time period between March 5, when the Employer requested further medical information and March 13, 2002 the date on which the Employer received that information.

No evidence was lead on either the Grievor's status with the WCB at the time or why the March 7 letter from the doctor (the second doctor's note) did not arrive in the possession of the Employer until six days later.

Therefore, I am left with the fact the Employer sought further medical information, as was its right after the sparse doctor's note of March 4 was submitted, and received nothing further until March 13, 2002 - six days after it requested more information.

On these facts can it be said that the liability for the delay in supplying the doctor's note can be visited on the Employer? I think not.

A similar situation was dealt with by 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). In that case the learned arbitrator said the following:

> In the course of argument, I raised the following additional question: Assuming a finding that the grievor was not disabled at the material times, who should bear the financial burden of the decision to hold the grievor out of service for the period October 1-22, 1986 -- i.e., while the further medical evidence was being gathered? It will be recalled that October 1 was when the grievor presented himself for work, armed with the note from Dr. Carter. As the grievor acknowledged in cross examination, October 1 was the first date on which he specifically sought clearance from a physician to return to work. And his attendance on Dr. Carter on that date was by reason by the Diebolt award's statement that the company would be "...first entitled to receive medical evidence establishing that the grievor is physically capable of doing his job on a full time basis and that he can maintain an acceptable level of attendance.
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> Simply put, the question is whether the company assumed a financial risk by its rejection of Dr. Carter's note as a sufficient basis for a return by the grievor to his former job – i.e., by its insistence on further medical evidence as to the Grievor's fitness. Given that the additional evidence was confirmatory of the original evidence – ie., the evidence offered by the grievor on October 1 – shouldn't the company

> automatically be required to pay the grievor the wages lost from October 1 to October 22?
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> While an affirmative answer to that question may be enticing, I have concluded, in the final analysis, that counsel for the company is correct in his submission that it all depends on whether the company acted reasonably. It is clear that an employee who returns to work following an absence due to illness or injury bears the initial onus of showing that he is fit to resume his duties in full measure. Depending on the circumstances, that onus may be satisfied, in the sense of shifting the evidentiary onus to the employer, by the mere presentation of oneself for work and the assertion of a readiness to return to the job. In the absence of contractual provisions signifying a different intent, employers are not automatically entitled to demand that the returning employee go through a process of "lie detection", dignified only by the fact that it is administered by the medical profession. See for example, Monarch Fine Foods Co. Ltd. (1978), 20 L.A.C. (2d) 419.
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> 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.

In this case, there was no compelling evidence presented that the Employer acted in any way improperly or in violation of the Collective Agreement and therefore, no liability falls on the Employer.

While the Grievor clearly saw his doctor immediately upon receiving the Employer's request of March 5, 2002, (the doctor's second letter is dated March 7, 2002) and

cannot be faulted for any delay in so doing, it is nonetheless uncontradicted that the Employer did not receive this letter until March 13, 2002. And it wasn't until the Employer received this letter that the real and substantial questions concerning the Grievor's ability to perform were resolved.

In the result the grievance is dismissed.

It is so ordered.

Dated at the City of Vancouver in the Province of British Columbia this 12th day of December, 2002.

JUDI KORBIN, Arbitrator