

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	DOCKET NO. 88-15
)	
CARLYLE LUCE)	

FINDINGS OF FACT, OPINION AND ORDER

On March 24, 1988, the Vermont State Employees' Association ("VSEA") filed a grievance on behalf of Carlyle Luce ("Grievant"). The grievance alleged that the State of Vermont, Department of Mental Health ("Employer") violated Article 38 of the collective bargaining agreement between the State and the VSEA for the Non-Management Unit, effective for the period July 1, 1986 - June 30, 1988 ("Contract"), by failing to pay Grievant injury on the job benefits.

A hearing was held on April 28, 1988, before Labor Relations Board members Charles H. McHugh, Chairman; William G. Kemsley, Sr., and Louis A. Toepfer. Michael Zimmerman, VSEA Staff Attorney, represented Grievant. Michael Seibert, Assistant Attorney General, represented the Employer. At the hearing, in addition to the direct testimony of Grievant, the parties submitted a stipulation of various facts and for admission of exhibits. No briefs were filed by the parties.

FINDINGS OF FACT

1. The Contract provides in pertinent part as follows:

ARTICLE 38

INJURY ON THE JOB

- ... 2. For an injury relating to the performance of a State job under the special circumstances described below, an employee

will be paid the difference between basic weekly salary and workers' compensation...without charge to paid leave;

- a. The injury results from an assault (physical contact) by a person, or by an animal. If injuries result from an incident in which the participants are State employees and willing combatants, this Article shall not apply.
- b. An agency of Transportation employee or a state police officer injured in a highway accident. Payment is barred when it is determined by the VLRB that the employee's negligence equaled or exceeded the negligence or conduct of any other person involved in the accident, or in the absence of such third party, that the employee's negligence was the proximate cause of his injury.
- c. A state police officer or a fish and game warden or a motor vehicle inspector is injured in hot vehicular pursuit.
- d. The provisions of this Article may be extended in other appropriate cases as, for example, to airport firefighters involved in a conflagration.

2. The collective bargaining agreement immediately preceding the Contract, effective for the period July 1, 1984 - June 30, 1986 ("1984-1986 Contract") contained the identical provisions cited above with respect to injury on the job, except that the Contract article was numbered Article 40, not Article 38.

3. At all times relevant herein, Grievant's position title was Psychiatric Technician A, his pay grade was 15, and his workplace was the Vermont State Hospital, Waterbury, Vermont. (Joint Exhibit A).

4. On August 7, 1985, Grievant suffered an on-the-job injury as the result of a patient assault. The injury was to the left side of Grievant's neck and left shoulder. As a result of that injury, Grievant was out of work and received Workers' Compensation benefits

(temporary total disability payments) from August 7, 1985 to February 2, 1986. During that period, Grievant received supplemental injury benefits under Article 40 of the 1984-1986 Contract. (Joint Exhibits B-1, C, D, J [Page 1], and M [Page 1]).

5. Grievant was receiving medical treatment during the period of his absence from work because of the 1985 injury. During the period February 1986 to January 1987, after his return to work, Grievant was under the care of Doctor Honeychurch because of his 1985 injury. Grievant saw the doctor four times during this period. In February or March, 1986, Dr. Honeychurch prescribed pain medication for Grievant and provided him with an electrical impulse machine. Grievant also was undergoing physical therapy due to the 1985 injury until the summer of 1986.

6. Grievant stopped seeing Doctor Honeychurch in January 1987 when she went on leave because of pregnancy. Grievant was not under a doctor's care from that point until May 10, 1987. During that period, Grievant was still receiving medication for pain.

7. When Grievant returned to work in February, 1986, he was placed on light duty on an open ward. He was not required to do any lifting and did not have to physically handle any of the patients. Grievant remained on such light duty until a few weeks before May 10, 1987, at which point Grievant was transferred to a closed ward where he was required to physically handle patients.

8. On May 10, 1987, Grievant suffered an injury on the job to the left side of his neck, left shoulder and left arm. At approximately 10:00 a.m., the ward charge asked Grievant to get a female

patient out of bed and escort her to the shower room. When Grievant attempted to remove the patient from the bed, the patient tried to dig her nails into Grievant. Grievant suffered no injury from that attempt. Grievant spun the patient around and put her in a hold so he could escort her down the hall to the shower room. The patient resisted the move, at times sliding. During the move, the patient suddenly fell to the floor. Grievant fell along with the patient and went over the top of her. Grievant landed on the left side of his neck and his left shoulder.

9. Grievant filed a report of the incident approximately 5 minutes after it occurred. (Joint Exhibit F).

10. Grievant suffered no immediate pain due to the fall, but had an immediate burning sensation and numbness in his left arm and shoulder. Grievant began to have pain later that afternoon, at which point he went to see a doctor. The doctor did not treat the injury. Grievant then left work and went home.

11. On May 13, 1987, Grievant visited Doctor Frederick Fries because he continued to have sharp pains in the shoulder, which pain radiated down his left arm and up the left side of his neck. On his report on the visit, Dr. Fries indicated that the injury was the "exacerbation of chronic pain problem involving left neck, shoulder and upper extremity." (Joint Exhibit J, Page 6).

12. As a result of the May 10 injury, Grievant was out of work and on Workers' Compensation (temporary total disability payments) from May 11, 1987 to April 16, 1988. (Joint Exhibits G, H).

13. On August 7, 1987, Darlene Brown, of the State Agency of Human Services Personnel Unit, sent a letter to Dr. Fries, who was still treating Grievant for the injury. Brown requested whether Grievant's medical treatment was a direct result of the May 10 injury or considered an aggravation of the continuing symptoms of the August, 1985, injury. (Joint Exhibit J, Page 1).

14. At some point prior to September 14, 1987, Dr. Fries informed Brown that Grievant's medical treatment was both a direct result of the May 10 injury and an aggravation of the continuing symptoms of the August, 1985, injury. (Joint Exhibit J, Page 3).

15. Since April 17, 1988, Grievant has been assigned to light duty (i.e., 4 hours per day), and has been collecting temporary partial disability Workers' Compensation benefits. (Joint Exhibits I, T).

16. The Employer has refused to pay supplemental injury benefits under Article 38 of the Contract on the grounds that Grievant's injury was not caused by a patient assault.

17. During the period Grievant was out of work from May 11, 1988 - April 16, 1988, Grievant received weekly Worker's Compensation payments, and received no other payment from the Employer. The difference between the weekly Workers' Compensation payments and Grievant's regular weekly wage was approximately \$114 per week. (Joint Exhibit H).

MAJORITY OPINION

At issue is whether the injury suffered by Grievant on May 10, 1987, "result(ed) from an assault (physical contact) by a person" within the meaning of Article 38 of the Contract.

Grievant claims entitlement to injury on the job benefits pursuant to Article 38 because the May 10 injury was an aggravation of Grievant's previous 1985 injury which resulted from an assault. The Employer concedes that the 1987 injury was caused in part by the 1985 assault. However, the Employer contends that such a conclusion is not sufficient; that the Board would have to conclude that but for the 1985 injury, Grievant would not be entitled to injury on the job benefits subsequent to the 1987 injury. The Employer maintains that such a conclusion is not justified since Grievant was essentially recovered from the 1985 injury prior to the 1987 injury.

We conclude that Article 38 contemplates entitlement to injury on the job benefits when a subsequent injury exacerbates and aggravates a previous injury for which the employee received such benefits. In a previous case, the Board determined that injury on the job benefits applied to a personal injury which required treatment during the term of a contract providing for such benefits, but which was caused by an accident occurring 11 years earlier and before the existence of any such contractual benefit. Grievance of Holden, 8 VLRB 377 (1985). While the circumstances herein differ from the Holden case, since in Holden there was no intervening injury as there is here, the Board ruling in Holden is relevant to this case to the extent that it

establishes that employees with continuing injuries may be entitled to injury on the job benefits.

Here, a sufficient causal connection exists between Grievant's 1987 injury and the 1985 assault on Grievant for us to conclude that Grievant is entitled to injury on the job benefits. The key piece of evidence for us to reach this conclusion is Dr. Fries' determination that Grievant's medical treatment subsequent to the May 10, 1987, injury was both a direct result of the May 10, 1987, injury and an aggravation of the continuing symptoms of the 1985 injury.


Charles H. McHugh, Chairman


William G. Kemsley, Sr.

DISSENTING OPINION

I disagree with the conclusion reached by the Board majority. I am not persuaded by the evidence that the May 10, 1987, injury resulted from an assault by a person within the meaning of Article 38 of the Contract, nor that this injury has a causal connection with the 1985 assault on Grievant.


Louis A. Toepfer

ORDER

Now therefore, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED:

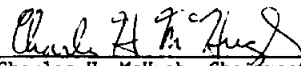
1. The Grievance of Carlyle Luce is GRANTED and the State of Vermont, Department of Mental Health, shall pay Grievant, pursuant to Article 38 of the Contract, the difference between his basic weekly salary and Workers' Compensation received by Grievant, without charge to his paid leave, for the period from May 11, 1987 to April 16, 1988, when Grievant was out of work due to an injury on the job;

2. The interest due Grievant on back pay shall be at the rate of 12 percent per annum and shall run from the date each paycheck was due during the period commencing with Grievant's absence from work subsequent to the May 10 injury on the job, and ending on the date he receives such payment; and

3. The parties shall submit to the Board by June 2, 1988, a proposed order indicating the specific amount of back pay due Grievant, and if they are unable to agree on such proposed order, shall notify the board in writing that date of specific facts agreed to by the parties, specific areas of factual disagreement and a statement of issues which need to be decided by the Board. Any evidentiary hearing necessary on these issues shall be held on June 9, 1988, at 9:30 a.m. in the Labor Relations Board Hearing Room.

Dated the 20th day of May, 1988, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD


Charles H. McHugh, Chairman


William G. Kemsley, Sr.