VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 11-14
ROBERT McMAHON	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On February 9, 2011, the Vermont State Employees Association ("VSEA") filed a grievance on behalf of Robert McMahon ("Grievant"), alleging that the State of Vermont Agency of Transportation ("Employer") violated Articles 5, 15 and 31 of the collective bargaining agreements between VSEA and the State of Vermont for the Non-Management Bargaining Unit, effective July 1, 2008, to June 30, 2010, and effective July 1, 2010, to June 30, 2012 (hereinafter collectively referred to as "Contract"); and Section 3 of State Personnel Policies and Procedures, by ordering Grievant to attend a fitness for duty evaluation, and by preventing him from working in his position until he did so.

A hearing was held in the Labor Relations Board hearing room in Montpelier on July 14, 2011, before Board Members Linda McIntire, Acting Chairperson; Louis Lacroix and Alan Willard. Abigail Winters, VSEA Associate General Counsel, represented Grievant. Assistant Attorney General Kurt Kuehl represented the Employer. Grievant withdrew his claims that Articles 5 and 15 of the Contract, and Section 3 of Personnel Policies and Procedures, were violated at the July 14 hearing.

At the July 14 hearing, the Board established July 28 as the deadline for filing post-hearing briefs. The Employer brief was filed in a timely manner on July 28. Grievant's brief was not filed until July 29, and has not been considered by the Board pursuant to Section 12.16 of the Board *Rules of Practice*, which provides: "Failure to file

a brief when due shall mean the Board will consider the party to have waived its right to file a brief and such brief shall not be considered by the Board." Woodstock Union High School Teachers Organization, Educational Support Personnel Unit and Woodstock Union High School District, 22 VLRB 186 (1999). Grievance of Joel Davidson, 30 VLRB 337, 351-352 (2009).

FINDINGS OF FACT

1. The Contract provides in pertinent part as follows:

. . .

ARTICLE 5
NO DISCRIMINATION OR HARASSMENT;
and AFFIRMATIVE ACTION

1. **NO DISCRIMINATION, INTIMIDATION OR HARASSMENT**
In order to achieve work relationships among employees, supervisors and managers at every level which are free of any form of discrimination, neither party shall discriminate against, intimidate, nor harass any employee because of . . . disability

. . .

ARTICLE 31
SICK LEAVE

. . .
2. **POLICY**
. . .
(b) Use of sick leave
. . .
(6) An appointing authority, or delegated representative, may require, when there is sufficient reason, the submission of a certificate from a physician or other evidence to:
. . .
(ii) furnish evidence of good health and ability to perform work without risk to self, co-workers, or the public as a condition of returning to work.
. . .
The State may require an employee to be examined by a physician designated by the employer, at State expense, for the purpose of determining the employee's fitness for duty.
. . .

2. Grievant has been an employee of the Agency of Transportation since November 2005. At all times relevant, Grievant was employed as an AOT Maintenance Worker IV in District 3.

3. The position description for AOT Maintenance Worker IV has provided at all times relevant in pertinent part:

> **Class Definition:**
> Maintenance work for the Agency of Transportation involving a variety of tasks relating to the state transportation system. Incumbents are often responsible for routine maintenance and repair work. Duties typically require the use of a variety of tools and vehicles. Overtime work is required, particularly during the winter months, and is considered a condition of employment. A newly hired employee must complete all training requirements and demonstrate knowledge and skills in a minimum of six areas of maintenance or construction activities. Work is performed under the supervision of an AOT Area Maintenance Supervisor.
>
> **Examples of Work:**
> Operates and maintains the highway maintenance equipment and vehicles. Performs year-round maintenance duties that may include: backhoes, loaders, skidsters, excavators, bucket truck, heavy snow-blower, roller, grader and large snow plow truck, with or without wing spreader. Does basic paving, painting, patching potholes and surfaces, bridge washing, sweeping, flagging traffic, mowing, repairing road shoulders, cleaning the roadsides, cutting trees and brush, and cleaning drains. May oversee the work crews. Performs routine maintenance and daily inspections on equipment assigned. Duties may involve serving as a member of the work crew and using laboring, and hand tools and power equipment to complete assigned tasks. Inspects sections of highways for hazardous conditions and encroachments and reports them to the supervisor. May assist with or perform bridge construction or repair, or airport or railroad crossing maintenance. Prepares and repairs culverts, guardrails, and ditching. May perform computer operations. Performs related duties as required.
>
> **Minimum Qualifications:**
> . . .
> <u>Special Requirements</u>
> A Class A Commercial Driver's License (CDL) with tanker endorsement is required.
> . . .
> (State's Exhibit 1)

4. On April 30, 2008, Grievant sustained a traumatic brain injury at work after he fell down stairs. He does not remember the events immediately preceding or subsequent to the injury (State's Exhibit 3).

5. Grievant received medical care at Dartmouth Hitchcock Medical Center in Lebanon, New Hampshire. He remained there for approximately a week, and then was transferred to Mt. Ascutney Hospital for rehabilitation. He remained at Mt. Ascutney for two weeks. Following the injury, Grievant was prescribed Keppra, which is an anti-epileptic and anti-convulsant drug. Subsequently, he was weaned from Keppra and prescribed Tegretol, which also is an anti-epileptic and anti-convulsant drug (State's Exhibit 3).

6. Grievant received Worker's Compensation benefits because his injuries occurred as a result of his work. The State Department of Buildings and General Services ("BGS") employs claims adjusters and attorneys to defend worker's compensation claims. In the latter part of 2009, BGS claims adjusters and/or attorneys required Grievant to attend an appointment with a doctor of their choosing, Dr. Richard Levy.

7. Dr. Levy, a Board certified neurologist, sent a letter dated December 9, 2009, to Attorney William Blake, an attorney retained by BGS, which provided in pertinent part:

> On November 19, 2009, I performed an independent medical evaluation on Robert McMahon per your request. . .
>
> Mr. McMahon is a 57-year old white left-handed male employed by the State of Vermont, Department of Transportation doing maintenance work. He told me that he works on roads and bridges and does plowing. . .
>
> As you know, he sustained a head injury but he could not remember the details. What he told me was information that he got subsequent to the fall from other parties. He told me that he fell down some stairs and had a couple or seizures and

was unconscious and helicoptered to Dartmouth Hitchcock Medical Center and subsequently was transferred to Mt. Ascutney Rehabilitation Hospital. He thinks he was in the hospital at one facility or another for at least a month. The accident happened on a Wednesday and the first thing that he can remember before the accident was being at church on Sunday. He has lost three days of retrograde recall. He then remembers some things at Dartmouth Hitchcock Medical Center.

Subjective complaints consist of some double vision corrected by a prism lens. . . He complained of feeling tired and requiring naps. Finally, he complained of "auras". This is a sense of perceiving a "whooshing". I am not sure if that is a noise or a feeling of movement. It wasn't clear. He also said in conjunction with this, his lips and fingers would become numb. He told me that he had one episode of confusion. He was on Keppra, was taken off of that and placed on Tegretol. He didn't know the dosage except he remembered that he was taking one pill 3 times daily and he takes Lexapro. Now these "auras" are controlled.

Mr. McMahon was able to remember that he broke his neck and had a traumatic brain injury in 1991. He thinks that a Dr. Cowell was the surgeon who took care of him. He told me that five or six years ago he was rear-ended at a high speed and had a concussion and doesn't remember the injury and then two years ago he hit his head with a stick and was badly dazed and nauseated.

The claimant claimed that his health was otherwise excellent. He is a nonsmoker, nondrinker.

RECORD REVIEW: Old records from 1991 would indicate that Mr. McMahon was employed as a bus driver when a large luggage compartment door landed on his head and neck resulting in the sudden onset of severe neck and left arm pain. There was no broken neck, as far as I could tell, and he was diagnosed as having a mild traumatic brain injury. . . Because of persistent neck pain, fluoroscopy was done and it was felt that there was instability at C5-6 with widening of the spinous process with flexion which would suggest that he had a significant ligamentous injury and so a C5-6 fusion was done by Dr. Pierce on July 6, 1994.

Mr. McMahon had problems with vertiginous feelings and was seen as MGH as well as Dartmouth Hitchcock Medical Center. . .

Mr. McMahon had persistent neck pain and some radiculopathic symptoms and did some pain management interventional techniques at MGH in 1996. These didn't help a great deal. . .

In 1997, Mr. McMahon was still complaining of dizziness and craniocervical pain. . .

Mr. McMahon had a very thorough independent medical evaluation in August of 1998 done by a Dr. Bucksbaum. He noted loss of cervical motion and some loss

of motion of the left shoulder, some motor and sensory impairments consistent with a C8 radiculopathy. He also felt there was a “sensory vestibular dysfunction”.
. . .
Mr. McMahon had more vestibular testing in October of 1999 at the Cleveland Clinic. . . Dr. Oas . . ultimately diagnosed a post traumatic disorder causing chronic pain and dizziness.

In March of 2000, the patient saw Dr. Cowell at the Center for Neurological Recovery. . . Dr. Cowell concluded in general that Mr. McMahon had a post concussive syndrome.
. . .
In May of 2002, Mr. McMahon had a permanent impairment rating rendered by Dr. Brigham. In general, he concluded that Mr. McMahon had a traumatic brain injury with residual cognitive and memory deficits, loss of smell, double vision, loss of taste, headaches, chronic neck pain, depression, and the final conclusion was that there was a 71% whole person impairment rating.

The claimant also had a car accident in March of 2004, had loss of consciousness with chronic headache, loss of appetite, insomnia, more forgetfulness, more neck pain.

This brings us up to the most recent injury.

Mr. McMahon fell down about 13 stairs, hit his head and was found unconscious but breathing. He was . . . transported to Dartmouth Hitchcock Medical Center. . . a MRI did reveal two punctuate foci consistent with bleeding at the gray-white junction in the parietal lobes. This would be consistent with a shearing mechanism of injury. Mr. McMahon was hospitalized until May 5, 2008, which was about six days post injury and then he went to rehab at Mt. Ascutney Hospital . . . until May 19, 2008.

. . . Because of possible seizures, Mr. McMahon was hospitalized from March 10, 2009 through March 14, 2009 and he was weaned from Keppra. In spite of having some spells, EEG revealed no ictal abnormality. It was thought that Mr. McMahon’s symptoms could be referable to “psycho somatization”. He actually was put on Tegretol and has since done well.

Dr. Hebben’s neuropsychological tests were interesting, particularly because she had the ability to compare tests from 2004, 2008 and 2009. . . Dr. Hebben concluded that Mr. McMahon showed good neurological recovery and that his most recent neuropsychological testing did not reveal ongoing cognitive impairment that could be causally linked to the most recent brain injury. There was . . . actually some improvement relative to test results obtained before his most recent accident. One could argue that the most recent accident, therefore, helped Mr. McMahon’s cognitive function.

. . .

ASSESSMENT

Mr. McMahon sustained another traumatic brain injury in his occupational accident of April 30, 2008. He has recovered well as evidenced by the test results of Dr. Hebben.

I will now address your specific questions.

1. Based upon objective testing, Mr. McMahon does not suffer from epileptic seizures. His subjective symptoms of whooshing and numb lips and fingers are likely psychophysiologic as indicated by his treating practitioners.
2. The present diagnosis relative to the accident of April 30, 2008 was that of a traumatic brain injury resulting in some shearing forces delivered to the brain. This produced punctuate bleeds, as summarized above. The patient has made a good recovery and is back to baseline.
3. As far as I can tell, Mr. McMahon's current complaints are very similar to his complaints dating back even to the 1991 accident. I, therefore, cannot link Mr. McMahon's current symptomathology to his most recent accident.
4. Mr. McMahon has reached maximum medical improvement as it pertains to the April 30, 2008 injury.
5. There is no impairment rating applicable to Mr. McMahon's case as it pertains to the April 20, 2008 accident.
6. Mr. McMahon's work capacity is full except that I do not believe he should operate snow plows. Even if his spells are psychophysiologic in origin and even if they are controlled on Tegretol, I don't feel comfortable with him driving a snow plow.

(State's Exhibit 3)

8. Debra Fournier, Advanced Practice Registered Nurse at Dartmouth-Hitchcock Medical Center whom had been involved in Grievant's medical treatment since his April 2008 injury, completed a Medical History and Referral Form for Adaptive Driving Associates on October 22, 2009. Fournier requested on the form that Adaptive Driving Associates evaluate the ability of Grievant to drive without fatigue and vertigo. Fournier answered "yes" to a question on the form whether Grievant had seizure disorder. She also indicated on the form that Grievant had dizziness or syncope. At this time,

Grievant still had episodes of fatigue and vertigo. Also, some balance issues remained (State's Exhibit 11).

9. Bonnie Goodman and Bruce Renfro of Adaptive Driving Associates conducted a clinical occupational therapy assessment of Grievant on December 15, 2009, to determine his candidacy to return to driving following his traumatic brain injury. Grievant reported a "clinical complaint of mild vertigo if he moves too quickly and continued fatigue". Goodman and Renfro performed a vision screening of Grievant, and determined that his vision met the state standard to drive and had no visual concerns. They also identified no physical concerns. They performed a series of visual perceptual and cognitive tests to determine whether Grievant displayed deficits that could affect his overall driving performance. They concluded that his performance on the tests were within the norm. They also conducted an on-road evaluation of Grievant. This consisted of one and one-half hours of residential, urban, downtown, interstate highway and rural roads driving, progressing from low density to moderate density traffic and speeds from 15 to 65 miles per hour. Goodman's and Renfro's report of the clinical occupational therapy assessment of Grievant concluded with the following "Summary / Recommendations":

> Concerns identified clinically were not readily evident in-car. Functional brake reaction time was clearly demonstrated, as was smooth braking. Time/space management skills were adequate.
>
> Based only on his performance today in clinical and on-road evaluation, it is our recommendation that Robert resume driving at this time.
>
> The results and recommendations included in this report are based on Robert's performance during the period of the evaluation and should not be relied on as absolute predictors of future performance.
> (Grievant's Exhibit 1)

10. Nelson Blanchard became the AOT Manager IV responsible for AOT District 3 in January 2010. At the time Blanchard assumed these duties, Grievant's job duties were modified to preclude driving. The Employer prohibited Grievant from driving at work after receiving Dr. Levy's report.

11. Fournier and Dr. Krzysztof Bujarski, Grievant's treating physician at Dartmouth-Hitchcock Medical Center, issued a memorandum dated April 6, 2010, "To Whom It May Concern", which provided:

> Mr. Robert McMahon has been followed at DHMC for injuries sustained in a fall in the work setting on April 30, 2008. His mental status was altered following the fall with emergency responders scoring him as 7/15 on the Glascow Coma Scale. He was also witnessed to have some tonic-clonic movements at the scene, concerning for possible seizure activity. Initial CT of the head did not reveal evidence of traumatic hemorrhage; however MRI of the brain one month later revealed areas in the right parietal lobe consistent with shearing injury.
>
> Mr. McMahon has been followed by Psychiatry, Neurology and Rehabilitation Medicine Services at DHMC and continues to participate in therapies to address symptoms related to his traumatic brain injury. His progress however is such that he now has very few symptoms that would limit his return to his previous level of employment expectations. Fatigue, vertigo and shoulder pain require him to pace certain activities. Of note is that after extensive outpatient and impatient studies, as well as over a year of clinical monitoring, Mr. McMahon has not experienced any seizure, nor has he had any episodes of loss of consciousness. He has been evaluated by an independent service (Adaptive Driving Associates) and determined to not demonstrate any deficits which would impair his ability to be a safe driver. This evaluation was reviewed by the team, and it is agreed that there are no restrictions to Mr. McMahon's ability to drive in the work setting. Although climbing ladders may precipitate some brief vertigo, climbing into a dump truck or onto heavy machinery, where seating and hand rails are available, does not pose a safety risk greater than that of his job-matched peers.
>
> Please feel free to contact us through Ms. Mary Helen Bentley, MSW, with additional questions or concerns regarding Mr. McMahons's condition and plan of care.
> (Grievant's Exhibit 2)

12. Fournier issued another memorandum dated August 2, 2010, "To Whom It May Concern", which provided:

> At the request of Mr. McMahon and Ms. Mary Helen Bentley, I have reviewed our own history and outside evaluations related to Mr. McMahon's ability to resume driving in the work setting.
>
> November 19, 2009, Mr. McMahon was evaluated by Dr. Levy, (Neurologist) for an IME. Dr. Levy concluded that Mr. McMahon had reached maximum medical improvement, and had no persistent deficits related to April 30, 2009(sic). He stated that there were no deficits still present from this injury that were not already present from prior traumatic brain injuries. Dr. Levy determined McMahon was at full work capacity however did not think he should operate a snow plow. No additional explanation was offered.
>
> Mr. McMahon completed an assessment with Adaptive Driving Associates on December 15, 2009. This in-vivo assessment included vehicle control skills, driver interaction skills, visual search skills, vehicle operations, and safety checks. Mr. McMahon did not demonstrate any concerns during this evaluation to warrant any limitations on his ability to drive any vehicle, passing all tests.
>
> Mr. McMahon was last seen in our clinic on 4/23/10. He was cleared at that time to resume the driving activities of his previous job description. He was then limited only by rehabilitation for his shoulder surgery. It is my understanding that this has now been completed. There are no additional symptoms or concerns that have come to the attention of this office to limit Mr. McMahon's ability to return to the full scope of his duties as they were prior to April 30, 2008.
>
> Please feel free to contact me with any additional questions or concerns regarding Mr. McMahon's care.
> (Grievant's Exhibit 3)

13. Based on the conflicting medical opinions regarding Grievant's fitness to operate a snow plow, Blanchard decided to require Grievant to attend a fitness for duty evaluation to determine whether he could operate a commercial vehicle in a safe manner. In making this decision, Blanchard only considered the conflicting medical conclusions provided by the medical professionals. He did not consider the basis for the medical conclusions. He did not attempt to do so because he is not a medical practitioner and did not believe he had the expertise to evaluate the basis for the medical conclusions.

14. Libby Trott, Human Resources Administrator assigned to the Agency of Transportation, sent a letter to Grievant dated September 11, 2010, which provided in pertinent part:

> You reported an injury at work on August 7, 2007. We are requiring you to be examined by a physician designated by the Agency of Transportation, at State expense, for the purpose of determining your fitness for duty and the ability to perform your duties without risk to yourself, or others. The first appointment has been made for you with Dr. Verne Backus from Bluewater Center and is scheduled for Monday, September 20, 2010, at 1:00 p.m. Please contact Dr. Backus . . . to confirm this appointment with him. . .
>
> Until this evaluation is complete and we have evidence of your ability to perform your job without risk to yourself or others, we(sic) are to remain on relief from duty status with pay, which was effective August 3, 2010. . .
> . . .
> This action is being taken pursuant to Article 31, Section 2, (6) (1) of the Non-Management Agreement between the State of Vermont and the Vermont State Employees' Association. This is not a disciplinary action and should not be construed as such; however, your failure to follow the instructions in this letter could lead to disciplinary action, up to and including dismissal.
> . . .
> (State's Exhibit 2)

15. On or about September 20, 2010, Grievant attended the fitness for duty appointment with Dr. Backus.

OPINION

Grievant contends that the Employer violated Article 31, Section 2 (b) (6) of the Contract by ordering Grievant to attend a fitness for duty evaluation, and by preventing him from working in his position until he did so. Grievant asserts that while Article 31, Section 2 (b) (6), allows the employer to seek "evidence of good health and ability to perform work without risk to self, co-workers, or the public as a condition of returning to work," the employer must have "sufficient reason" for requiring such evidence. Here, Grievant states that his treating medical providers repeatedly cleared him for a full return

to work without restriction. Grievant contends that the unexplained statement by Dr. Levy, retained by the Employer's worker's compensation adjusters, that he did not "feel comfortable" with Grievant driving a snow plow, after declaring him free from any permanent impairment, did not provide "sufficient reason" for the Employer to order Grievant to attend the fitness for duty evaluation.

The Employer contends that the conflicting medical reasons regarding Grievant's fitness to operate a snow plow without risk to himself or others constituted "sufficient reason" to require Grievant to attend a fitness for duty evaluation to resolve the conflict and determine his ability to operate a snow plow without risk to himself or others.

In interpreting the provisions of collective bargaining agreements in resolving grievances, the Board follows the rules of contract construction developed by the Vermont Supreme Court. A contract will be interpreted by the common meaning of its words where the language is clear.[1] If clear and unambiguous, the provisions of a contract must be given force and effect and be taken in their plain, ordinary and popular sense.[2] The Board will not read terms into a contract unless they arise by necessary implication.[3] The law will presume that the parties meant, and intended to be bound by, the plain and express language of their undertakings; it is the duty of the Board to construe contracts; not to make or remake them for the parties, or ignore their provisions.[4]

Article 31, Section 2 (b) (6) of the Contract provides that the employer "may require, when there is sufficient reason, the submission of a certificate from a physician or other evidence to . . . furnish evidence of good health and ability to perform work

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[1] In re Stacey, 138 Vt. 68, 71 (1980).
[2] Swett v. Vermont State Colleges, 141 Vt. 275 (1982).
[3] In re Stacey, 138 Vt. at 71.
[4] Vermont State Colleges Faculty Federation v. Vermont State Colleges, 141 Vt. 138, 144 (1982).

without risk to self, co-workers, or the public as a condition of returning to work", and that the "State may require an employee to be examined by a physician designated by the employer . . . for the purpose of determining the employee's fitness for duty". "Sufficient" means "as much as needed; equal to what is specified or required; enough".[5]

The Employer received conflicting medical opinions regarding Grievant's fitness to operate a snow plow after the traumatic brain injury he suffered at work in April 2008. Dr. Levy concluded in December 2009 that Grievant should not operate snow plows even though he determined that Grievant had received maximum medical improvement as it pertained to the traumatic brain injury he received in April 2008. Dr. Levy referenced Grievant's psychophysiologic "spells" in support of his conclusion that he did not "feel comfortable" with Grievant "driving a snow plow" even if the spells were controlled by the medication Tegretol. Grievant's medical providers at Dartmouth Hitchcock Medical Center concluded to the contrary subsequently in 2010 that there were no restrictions to Grievant's ability to drive in the work setting and that he was cleared to resume the driving activities required by his job.

Based on these conflicting medical opinions, we conclude that the Employer had sufficient reason to require Grievant to be examined by a physician designated by the Employer to determine Grievant's fitness for duty. There was enough of a question whether Grievant could operate a snow plow safely without risk to himself or others for the Employer to require an examination by a physician before allowing Grievant to resume his full job duties. It was reasonable for the Employer to not weigh the merits of the conflicting medical opinions, and instead seek a third medical opinion to resolve the conflict.

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[5] Webster's New World College Dictionary, 4th Ed., Wiley Publishing Inc. (2006).

We recognize the difficult situation faced by Grievant. He had attained medical improvement after a lengthy rehabilitation period so that he was able to perform the technical driving functions of his job, but was not allowed to resume these duties. The Employer possibly could have explored other avenues rather than seeking a third opinion, such as having further communications with Dr. Levy and Grievant's Dartmouth Hitchcock medical providers to seek to reconcile their conflicting opinions. However, the Contract did not require such attempts by the Employer. It requires "sufficient reason" for examination by a physician designated by the employer to determine an employee's fitness for duty. This standard allows the employer reasonable discretion in deciding what action to take in the face of conflicting medical opinions, and the Employer reasonably exercised its discretion here.

ORDER

Based on the foregoing findings of fact and for the foregoing reasons, it is ordered that the Grievance of Robert McMahon is dismissed.

Dated this 16th day of September, 2011, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Linda P. McIntire

Linda P. McIntire, Acting Chairperson

/s/ Louis P. Lacroix

Louis P. Lacroix

/s/ Alan Willard

Alan Willard