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IN THE MATTER OF ARBITRATION BETWEEN

KANSAS CITY AREA TRANSPORTATION AUTHORITY, Employer, and LOCAL 1287 AMALGAMATED TRANSIT UNION, Union.	)	Herbst Arbitration (CDL) FMCS No. 060111-01561-7

Appearances:

For the Authority:

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OPINION AND AWARD

The parties stipulated that the matter is properly before the arbitrator for a decision. The parties stipulated that there are no issues of substantive arbitrability, although the Employer maintains that the matter is not procedurally arbitrable in that the grievance was not timely filed, and the parties agreed that the issue of timeliness shall be submitted to the arbitrator. A hearing was held on February 28, 2007 at the offices of the Kansas City Area Transportation Authority in Kansas City, Missouri, at which time the parties were given the opportunity to present evidence including relevant exhibits and to examine and cross-examine witnesses. The parties stipulated that the arbitrator shall retain jurisdiction for the purpose of remedy. Subsequent to the hearing the parties submitted briefs to the arbitrator, at which time the hearing was declared closed.

ISSUE[1]

The Union proposed the following statement of the issue:

Does the Collective Bargaining Agreement permit the Authority to require an employee to attend a Department of Transportation certification physical examination made by a doctor selected solely by the Authority without the Authority paying for any tests requested or required by its doctor in order to make his or her determination regarding certification? If not, what is the appropriate remedy?

The Authority proposed the following statement of the issue:

Did the Authority violate the Collective Bargaining Agreement between the parties when it refused to reimburse the grievant for a $490 deductible payment required under the grievant's voluntarily selected health insurance plan, and when it also refused to pay the grievant for the time the grievant spent in taking a medical test that was a federally required prerequisite to the grievant remaining eligible to drive a public bus? If so, what is the appropriate remedy?

In that the parties were unable to agree upon a statement of the issue, they stipulated that

[1] In their post-hearing briefs, both parties, for good reasons, modified slightly their proposed statements of the issue presented at the arbitration hearing. Those modifications do not materially change the matter presented to the arbitrator, as both parties and the arbitrator understood the issues.

the arbitrator shall frame the issue. The arbitrator frames the issue(s) as follows:

Was the grievance filed in a timely manner pursuant to Section 1.13 of the Collective Bargaining Agreement?

If the grievance was timely filed, did the Authority violate the Collective Bargaining Agreement when it: 1) refused to pay for the cost of a stress test which the grievant was obligated to undergo supplemental to the federally-mandated medical examination necessary for the grievant to maintain a Commercial Drivers License to operate a bus; 2) refused to compensate the grievant for his lost wages incurred when to took time away from work to undergo the stress test? If so, what is the appropriate remedy?

COLLECTIVE BARGAINING AGREEMENT

The Kansas City Area Transportation Authority (herein sometimes referred to as the "Authority") and Local 1287 of the Amalgamated Transit Union (herein sometimes referred to as the "Union") are parties to a Collective Bargaining Agreement executed August 26, 2005 and continuing through December 31, 2007. (Ex. 1)[2] Relevant portions of the labor agreement include the following:

Section 1.12. Management - Discipline.

(a)....

The Authority shall have the right to require appropriate medical examinations from time to time by competent doctors in order to maintain adequate and safe standards of service to the public and to minimize employee accidents; provided that any employee to whom this Agreement is applicable and who may be adversely affected in his position or earnings as a result of an adverse medical report by an Authority doctor shall have the right to present as a grievance, for action in accordance with the grievance procedure hereinafter set forth in Section 1.13, the

[2] All exhibits offered and admitted in this matter were identified by the parties as Joint Exhibits. As a result, exhibits will be identified as simply Ex. #, rather than as Joint Exhibits, Employer Exhibits or Union Exhibits.

question of his physical or mental fitness.

Section 1.13. Grievances.

Any employee to whom this Agreement is applicable and who claims to be aggrieved by any action of the Authority or its officials, whether occasioned by discharge, suspension or other discipline or whether because of alleged unjust treatment or failure to apply to him any of the benefits of this Agreement to which he believes himself entitled, may proceed in accordance with the following grievance procedure.... Saturdays, Sundays and holidays will not be considered in computing the time in the following steps.

1. The Employee, or his accredited Union representative, shall personally and informally present the alleged grievance to the Dispatcher, Foreman or other official immediately superior to him in rank, within seven (7) days after same has come to his attention, otherwise it shall not be considered; and in presenting such alleged grievance, the Employee may be accompanied by a duly accredited representative of the Union if he so desires; and if such alleged grievance is presented in time and is not adjusted to his satisfaction within two (2) days thereafter; then

2. The Employee shall present his alleged grievance in writing on the proper grievance form, either individually or through a duly accredited representative of the Union, to his Superintendent, Lead Foreman, Manager or Director at a time to be agreed upon with the latter, when none of the others exist, within five (5) days after his immediate superior has acted or should have acted. ...

Section 1.23. Physical Examination Pay Time.

Employees, including part-time, required to have physical examinations (except the preliminary examination of an applicant for employment) will be paid the actual time required therefor, including necessary travel time, at their straight hourly rates. Such time spent will be used in the computation of overtime after forty (40) hours of work. All reasonable efforts will be made to schedule physical examinations during work hours or within two (2) hours before or after the start or end of the employee's shift. Employees will not be required to take such examinations on their days off without their consent. The above to include Worker's Compensation cases.

Section 1.37. Chauffeur's and Operator's Licenses.

The Authority will furnish a commercial driver's license (CDL) to all employees, including part-time, who drive Authority vehicles. Licenses shall remain in the possession of such employees. It will be the responsibility of bus and truck drivers to see that licenses are kept current. No employee will operate an Authority vehicle without a valid CDL as required by law from their state of residence.

The parties also entered into evidence a Memorandum Agreement[3] executed on behalf of the Authority and the Union on April 17, 2006. That agreement states in relevant part as follows:

Both Parties to this Agreement agree to the following:

1) Pay requirements in Section 1.23 of the labor agreement will apply to the following required CDL physical examinations with the KCATA designated DOT examining physician, and will not apply to any other CDL related physical examination or medical visit:

   a) The DOT required biennial physical,

   b) One DOT physical examination annually when a medical certification was granted for only one year, and

   c) KCATA will pay time required for a follow-up DOT physical examination at the end of a three -month medical certification, one time every six years, and only if an additional medical certification is obtained as a result of the physical exam.

SUMMARY OF THE CASE

The Kansas City Area Transportation Authority operates the public mass transit system in the greater Kansas City area in both Missouri and Kansas. It employs some 500 bus and van operators, as well as maintenance, custodial and other classifications of employees represented by Amalgamated Transit Union Local 1287. The grievant, Terry Herbst has been a bus driver for the Authority for 31 years.

All bus drivers are required by federal law[4] to hold a valid Commercial Driver's License. (CDL) One of the requirements for a driver to obtain and renew a CDL is a medical examination

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[3] Referred to by the parties as the "Pay Time Agreement."

[4] The federal Motor Carrier Safety Act, as implemented in part by those regulations set forth in 49 CFR 391 (Ex. 24) and further explained in a guide called "The DOT Medical Examination - A Guide To Commercial Drivers' Medical Certification." (Ex. 25)

by a qualified physician who is familiar with the physical demands of the work required of the employee.

In 2004, the grievant was told by the Authority that he had to undergo a medical examination in order to maintain his CDL. The exam was conducted in July 2004 by a physician chosen by the Authority. In the course of the examination, the grievant advised the physician that the grievant had suffered a mild heart attack in 2001. The physician instructed the grievant to undergo a stress test every two years, and the physician orally recommended that the test should be done before the grievant again renewed his CDL license in 2005. The physician certified the grievant for the renewal of his CDL for one year, from 2004 to 2005.[5]

In July 2005, before his CDL was up for renewal, the grievant underwent a stress test at a hospital where he was referred by his private physician. At the time of the test, the grievant paid the hospital $50 as required by the hospital, and was informed that the payment would be applied against the cost of the test. The grievant having passed the stress test, the Authority-designated physician then certified the grievant for his CDL license for another year.

Thereafter, in what appears to be mid-September 2005, the grievant received an Explanation of Benefits Form from his insurance carrier, which noted that he, as the patient, was responsible for the amount of $470.90 toward the cost of the stress test. (Ex. 10) By letter dated October 5, 2005, from Research Medical Center, where the stress test had been performed, the grievant received a bill from the Medical Center for $420.90 (which represents the amount of patient responsibility set forth in the Explanation of Benefits from the insurance carrier, less the

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[5] Most CDLs are renewed for a two year period. In some cases, typically when the employee has health issues that the physician wants to keep a closer eye on, a CDL may be renewed for a shorter period, often for one year although in some instances as short a period as three months.

$50 that the grievant paid when he underwent the stress test.) (Ex. 11)

The Authority offers its employees three insurance plan options, which vary in terms of cost and level of benefits. According to the Authority's insurance broker, Jeff McDaniel, the stress test undertaken by the grievant would have been covered under each of the plans, with the cost to the patient ranging from as low as a $15 co-pay in one plan to as high as a $250 co-pay plus 10 percent of the total cost in a lesser plan. Employees also have the option of opting out of any of the Authority's insurance coverage, and receiving from the Authority the money the Authority would have spent on insurance premiums. That is what the grievant did in 2005 because he could be covered under his wife's insurance plan through her employer. The wife's insurance offered lower benefits, but the cost to the grievant for coverage under her plan was less than his portion of the premium would have been under any of the Authority's plans. As a result of selecting this option, the grievant was paid $3567.94 by the Authority in 2005 which represented the Authority's premium cost. (Ex. 8) According to the grievant, most of that money was spent to purchase his dependent coverage under his wife's insurance plan.[6]

On October 15, 2005, the grievant wrote a memorandum or letter to Robert Kohler, the Authority's Director of Transportation, requesting that the grievant be compensated for the $470.90 he was obligated to pay for the stress test and for approximately $75 in wages, representing his hourly rate for the three hours and 57 minutes he was off the clock on the day he took the stress test. (Ex. 12) The grievant enclosed a copy of the prescription for the stress test which had been filled out by the Authority-designated physician when he certified the grievant

[6] In 2007, the grievant elected to be covered by the Authority's insurance plan. When the grievant underwent another stress test in connection with the 2007 renewal of his CDL, the insurance plan covered the cost of the test, possibly less a $15 co-pay which the grievant may have paid.

for his CDL in 2004. (Ex. 6)

Kohler declined to reimburse the grievant for his medical costs or lost wages. On October 19, 2005, the Union filed a grievance on behalf of the grievant, which requested that he be made whole for his lost wages and costs for the stress test "that was ordered by the Company's doctor to certify me for my CDL." (Ex. 13)

The grievant testified that the first time he realized the Authority was not going to reimburse him for the cost of the stress test was when Kohler refused to pay in response to the grievant's October 15 request. The grievant testified that he did not seek reimbursement for the $50 he paid at the time of the stress test because he wanted to wait until he received the documentation and the total amount of the bill. As to pay for his time spent undertaking the stress test, the grievant acknowledged that he was aware in July 2005 that he had not been paid for his time, but that he did not request payment of his wages until October 2005 because he was "just waiting to put it all together."

The Authority denied the grievance, and further sent the Union's President and Business Agent, William Wilson, a letter dated October 24, 2005, challenging the timeliness of the grievance. (Ex. 14) The letter noted that the Authority has repeatedly notified the Union that it strictly enforces the contractual time limits for processing grievances, which require that a written grievance must be filed within 14 days after the matter has come to the attention of the employee. The Authority recited the history that the grievant had been notified on July 22, 2004 that he would be required to undergo a stress test every two years. On July 11, 2005, the grievant was relieved from work to take the stress test, and he was recertified for his CDL on July 22, 2005 for one year. By his letter dated October 15, 2005 to Kohler, the grievant stated that he wished to be paid for the cost of the medical test and for the time lost from work, and the grievance was filed on October 19, 2005. According to the Authority, the grievant's letter of October 15 and the grievance of October 19 "greatly exceed the 14-day limit based on the July 22 stress test."

In his response at Step 3 of the contractual grievance procedure (Ex. 15), Kohler noted that the Authority is not obligated to provide the required biennial physical examinations, but only to verify that the employees who need CDLs have undertaken the required exams. Further, according to Kohler, the Authority is not obligated by law to pay for the biennial exams, but does so as a benefit to employees. Kohler stated that the Authority had voluntarily undertaken the cost of the initial biennial physical exam only and he went on to state:

> If a potentially disqualifying medical condition is diagnosed during the biennial physical examination, which may obligate employees to comply with periodic recommended evaluations and/or further diagnostics and treatment with subject employees' personal care physicians, Management would strongly urge those employees to take the lead on such personal health issues/matters.

Kohler testified that the Authority has agreed only to pay for the cost of, and for the employee's time spent in connection with, the initial, basic physical examination in connection with CDL certifications. If additional testing or treatment is required, that is the responsibility of the employee, not the Authority. According to Kohler, since the Authority began paying for the basic DOT physical exams in 2004, there have been numerous instances in which employees have been required to undergo additional medical testing before they would be certified for their CDL by the examining physician. Some of those employees, including one employee specifically identified by Kohler during the hearing,[7] have diabetic conditions due to which the examining physician required that they undergo additional blood tests before they could be certified. Other employees have had to undergo stress tests. Some employees have had to undergo sleep studies for possible diagnoses of sleep apnea. Each of these additional tests have been mandated by the certifying physician before he or she would provide the necessary DOT certification, and the Authority has never paid for any such follow-up testing, according to Kohler.

Kohler testified that he is not aware of whether the employees themselves paid for the additional testing, but that it was more likely that most if not all of the tests were covered and paid for by the Authority's insurance plans.

Kohler acknowledged that, under Section 1.12 of the Collective Bargaining Agreement, if the Authority requires an employee to undergo a physical or psychological examination in order to insure public safety, or a functional capacity examination in connection with a Worker's Compensation claim, the Authority pays for such examinations. Such examinations, however, are unrelated to CDL certifying examinations, according to Kohler.

Fern Kohler, the Authority's deputy general manager, negotiated a memorandum entitled "CDL Follow-up Physicals - Pay Time Agreement" with William Wilson on behalf of the Union in April 2006.[8] (Exhibit 4) In that agreement, which addresses employees being paid for time spent undergoing CDL physical examinations rather than the costs of the examination or any

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[7] The employee's name is known to the necessary parties, and it is unnecessary to identify him by name in this Opinion and Award. The same is true of other employees who were identified by name during the course of the hearing. Out of consideration for the private nature of their medical conditions, their names are not being included herein.

[8] This was, of course, some six months after the grievance was filed in the current dispute.

additional testing, the parties agreed that the Authority would pay for the time spent by an employee undergoing the DOT required biennial physical examination or the time spent in an annual physical if the employee's certification had been granted for only one year. If an employee had received only a three month certification, the Authority would pay for the time spent in connection with a renewal exam only one time every six years. The agreement also states that the Authority would not pay for time spent by an employee in connection with "any other CDL related physical examination or medical visit." Fran Kohler testified that was intended to absolve the Authority of any obligation to pay for employees' time spent in subsequent required testing, such as the grievant's stress test.

UNION POSITION

The position of the Union may be summarized as follows:

The grievant's claims both for lost wages on July 11 when he took the stress test and for the $470.90 cost of the test were timely filed in the grievance. The time limits in Section 1.13 of the labor agreement do not begin to run until the employee clearly knew or should have known of the existence of the grievance. That requires at least that the employee have knowledge of the underlying facts and that the employee knows that there exists a dispute regarding those facts or the requested relief. Thus, there should be little dispute to the extent the grievance requests reimbursement for the $420.90 balance of the cost of the stress test, because the grievant was not advised of the remaining balance or the obligation to pay that balance until sometime after he received an October 5 letter advising him. Immediately after receiving that bill, the grievant wrote to Mr. Kohler requesting reimbursement for that expense, as well as the initial $50 he paid and for the $75 for time lost from work in taking the test. Upon learning that the Authority was refusing payment, that was when the grievance came to the grievant's attention and he then filed his grievance in a timely manner.

Although the grievant was aware on July 11 that he had paid the initial $50 for the stress test, and he was aware shortly thereafter that he had lost wages as a result of taking the test, it was reasonable and consistent with the efficient administration of the grievance procedure for the grievant to wait until he had all of the expenses to submit them at one time, which was not until October. Moreover, the Authority has not been prejudiced in any way by the grievant's decision to present all of his claims for reimbursement together, and he should not be penalized for his good faith and well-intentioned actions in submitting all claims in a single grievance.

This case is unusual in that neither party can point to any specific provision of the labor agreement that deals with the issue presented by the grievance. Section 1.13 of the agreement provides that a grievance may be filed by any employee who claims to be "aggrieved by any action of the Authority," including "because of unjust treatment." Thus, what is at the heart of this case is whether the action of the Authority constitutes "unjust treatment" of the grievant.

This case is analogous to those involving and employee's qualifications for a job assignment or promotion. In those cases, arbitrators regularly do not deal with burdens of proof, but rather consider all of the evidence and arguments of both parties and decide whether the Company's determination should be upheld.

Here, the Authority has exercised complete control over the selection of the DOT doctor and the services the doctor is to provide in connection with the DOT examination. No other doctor, regardless of qualification, other than one selected by the Authority, can administer a DOT examination that will be accepted by the Authority. Although the medical examiner exercises his medical judgment in determining whether to issue a DOT certification, who the medical examiner is and what tests or procedures he will be paid to perform by the Authority are entirely within the control of the Authority. There can be no question that the Authority's control over the process results in some benefit to the Authority. The doctors are selected based on a competitive bid, not necessarily on expertise and experience. It is fair to assume that the Authority did not select a group of doctors offering more medical services to Authority employees at a greater cost to the Authority. Further, the employee is not only required to go to the doctor chosen by the Authority, but also to do everything the doctor requires, or else lose his job.

If the Authority wants to exert total control over the process and to reap the benefits of controlling the process, it should be required to pay the costs associated with the exercise of such control.

It is only fair, reasonable and "just" that the Authority be required to pay for tests and procedures required by the Authority's medical examiner. That is consistent with the covenant of good faith and fair dealing implicit in every labor agreement. The Authority's failure to reimburse the grievant can only be characterized as unjust as well as arbitrary, unfair and unreasonable.

Section 1.12 of the labor agreement provides that the Authority has the right to require medical examinations from time to time "by competent doctors in order to maintain adequate and safe standards of service...." These examinations may include both physical and mental examinations and when an employee is directed to be examined, the costs of the examination and any tests or procedures requested by the examining doctor are paid for by the Authority. Thus, when the Authority designates the doctor and requires the employee to see that doctor and only that doctor, the Authority is obligated to pay the costs associated with the examination. If the doctor were an independent medical examiner or was selected by the Union or the employee, the result might be different.

Here, the doctors designated by the Authority for CDL examinations are the Authority's doctors, and the employees are not permitted to go to any other doctors for their DOT certifications. In a case involving an incorrect diagnosis by the company doctor which caused an employee to be held off from work, the arbitrator required the employee to be reimbursed for his lost time because the doctor was an "agent" of the Company.

There is no legitimate distinction between the Authority paying expenses in connection with functional capacity examinations and those required in connection with the DOT physical. The fact that the medical examinations may be required by DOT regulations does not minimize the Authority's obligation to ensure that its operators are examined and receive certifications. There is nothing in the DOT regulations which absolves the Authority from paying the costs of the examinations and related tests or procedures required by its medical examiners. The Authority pays costs of examinations associated with Worker's Compensation under Missouri law; it should similarly pay the costs in connection with the DOT regulations.

Arbitrators should strive to give ambiguous contract language a construction that is reasonable and equitable rather than one that would give one party an unfair and unreasonable advantage. In doing so, arbitrators often consider the equities involved and apply a "reasonable man standard." In considering the language of Section 1.12(a) and the absolute control exercised by the Authority with respect to the examination process, a fair and reasonable solution would be for the Authority to pay a fair price for absolute control, including reimbursing employees for the costs incurred for tests required by the Authority's doctors.

The Union has maintained throughout the processing of the grievance that to the extent insurance is available to cover costs associated with medical procedures that may be required by the Authority's DOT medical examiner, insurance proceeds should applied to those costs, with the Authority paying the remaining expenses. The question here is what happens when the employee does not have insurance or the employee's insurance does not cover the requested procedures or tests. The Authority's insurance broker testified that an insurance carrier may deny coverage, such as for example if the coverage limits the number of tests or procedures that will be covered in a particular timeframe, or because the test or procedure is related to an employee's employment. That apparently was the very problem faced by one employee whose sleep apnea test was not to be covered by insurance until the Authority's Human Resources Director intervened. Thus, the existence or non-existence of insurance should not impact the Authority's obligation to pay the cost of the required tests or procedures.

Further, the grievant did not receive any windfall by declining the Authority's insurance coverage. Of the $290 per month the grievant received for declining coverage, he paid $220 per month for coverage under his wife's policy. Further, the Authority would not have agreed to allow employees to opt out of insurance coverage if there were not an economic advantage for it to do so. The fact that the grievant received a cash reimbursement of the amount of the Authority's premium should not preclude him from being reimbursed for his out-of-pocket expenses.

The parties have entered into other agreements specifying or clarifying the expenses that will be paid by the Authority in connection with DOT examinations and related medical visits. There is a mileage reimbursement agreement (Joint Ex. 3) for employees using their personal vehicles to attend the "biennial physical examination." There is a "pay time" agreement (Joint Ex. 4) identifying the follow-up physicals for which the Authority will pay the wages of employees in accordance with Section 1.23 of the labor agreement for "follow-up physicals." But there was no mutual agreement or discussion regarding the payment or non-payment of other related expenses by the Authority. There was no reason for the Union to have negotiated such an agreement for the simple reason that the problem had not previously arisen. To the extent past problems had arisen regarding payment for tests, those problems were apparently resolved. In cases of medical examinations required by the Authority's doctors in connection with worker's compensation or Section 1.12(a) of the labor agreement, those expenses were paid by the Authority. Under these circumstances, the fact that the Union negotiated agreements regarding some of the costs and expenses related to DOT medical examinations that were incurred by employees should not be held against it.

Finally, Fern Kohler testified that the instant grievance could have been included in the Pay Time Settlement and resolved along with six other grievances that were settled and paid at that time. According to Ms. Kohler, this grievance was not considered in that settlement because the grievant was discharged at that time, and thus it was assumed by the Authority that this grievance would be withdrawn when the grievant's discharge was upheld. It would not be inappropriate for the arbitrator to direct the Authority to settle in full this grievance with respect to his reimbursement for lost wages as it did the other six grievances in the Pay Time Settlement.

AUTHORITY POSITION

The grievance is untimely. The grievance procedure requires that an employee informally present a grievance to his superior within seven days after the grievance has come to the attention of the grievant, and if the grievant is not adjusted to the employee's satisfaction, the grievant is to file a formal written grievance within 14 days of when the grievance came to the employee's attention. The grievance here was filed on October 19, 2005.

The grievant knew on July 11, 2005, that he had paid $50 to obtain his stress test, and thus he was obligated to file a written grievance by July 29 (14 days later, excluding Saturdays, Sundays and holidays). Further, the grievant knew by September 22 after he received the Explanation of Benefits from his wife's insurance carrier that the carrier would cover only a small portion of the cost of the stress test. Thus, at the least, he should have filed a written grievance by October 12. As to the grievant's claim for pay for the time he spent taking the stress test, the grievant acknowledged that he was aware in July that he had not been paid for that time.

Arbitrators are to strictly enforce contractual time limits, particularly where, as here, they are clear and specific and where the parties have consistently enforced time limits. There is no dispute that the Authority has repeatedly put the Union on notice of the Authority's intent to strictly enforce the contractual time limits.

To accept the Union's argument that the grievant was not aggrieved until October 15 when he presented the letter to Kohler requesting payment and Kohler denied the request would render time limits meaningless in any case involving claims for unpaid wages or benefits. A grievant could sleep on his rights indefinitely, finally requesting payment months or even years after the incident in question, and then contend that the contractual time limits only began to run when the grievant finally requested pay. In any pay case, the limitations period must be deemed to begin running when the grievant knew or should have known in the exercise of reasonable care that he or she was required to pay for something the grievant asserts the employer should have purchased, or when the employer fails to provide pay to which the employee asserts he was entitled. Here, the grievant knew in July 2005 both that the Authority had not paid for his time spent taking the stress test and that he had been required to pay for at least a portion of the cost of the test.

Much of the Union's case rests on the mistaken assertion that the Authority required the grievant to take the July 2005 stress test. In reality, the federal government, not the Authority, required the test. The Code of Federal Regulations (CFR) requires that a person must be physically qualified to operate a commercial motor vehicle, and must obtain a medical certification. Medical examiners cannot issue certifications to drivers who have suffered heart attacks or who have had stents implanted unless the driver passes a stress test at least every two years.

The fact that the Authority selected the medical examiner is irrelevant. As set out in the CFR guidelines, any competent medical examiner would have required the same test. Taking the test was a legitimate cost the grievant faced if he wished to maintain his eligibility to operate a bus, whether for the Authority or for any other commercial carrier. There is no inherent reason for the Authority to bear this cost rather than the grievant.

The Authority has undertaken the obligation, as set forth in Section 1.12 of the labor agreement, to pay for fitness for duty examinations, direct threat examinations and functional capacity examinations in a variety of return-to-work situations including Worker's Compensation cases. Those are examinations required by the Authority in its discretion under Section 1.12, unlike the stress test taken by the grievant which was mandated by the federal certification program. Had the Authority created the requirement that the grievant take the stress test in this case, the Authority would have paid for the test.

The Union argues that the Authority ought to be required to pay for any medical test an employee's health insurance does not cover if the test is necessary to maintain the employee's eligibility to drive a bus. That is a legitimate bargaining position, but it is not a legal argument. Payment for an individual employee's medical expenses is a potential employee benefit, but the Authority is not obligated to pay for employee benefits unless it agrees that it will pay for those benefits. The Authority has agreed to furnish initial CDLs to employees, paying for licensing fees and related expenses. Thereafter, it is the responsibility of individual drivers to keep their licenses current under Section 1.37. No contractual language exists which obligates the Authority to pay for the grievant's stress test in this case. The Union is asking the arbitrator to create a benefit not established in the labor agreement.

The Authority has agreed, indirectly, to cover a portion of the costs of the grievant's stress test by providing health insurance to the grievant. The grievant, however, chose to take a cash payment in lieu of health insurance. Even after paying for coverage under his wife's policy, grievant had a net gain of $927.94. When the grievant chose to decline the Authority's health insurance, he already knew he was going to have to take the stress test. And he knew or should have known that the Authority's insurance would have provided better coverage than what was available from his wife's employer. The grievant should not now be heard to complain about the foreseeable consequences of his decision. Further, even after paying the $470 fee for his stress test, the grievant still comes out ahead. In that sense, the Authority already has paid for the grievant's stress test.

The federal regulations leave it to individual employers and their employees to determine who will pay for medical examinations. The Authority has voluntarily undertaken the costs of the basic medical examinations. But operators have the ability to avoid or mitigate many conditions that can interfere with an operator's ability to drive by making lifestyle choices, such as exercise or diet, that could reduce or eliminate the need for further testing. The Authority has no ability to control or monitor those lifestyle choices. When further tests are needed, the medical examiner sends the employee back to his or her personal physician where decisions can be made on how to arrange the tests in way that will reduce the costs or maximize the insurance coverage. Thus, the choice of the health care provider who will administer the additional testing is not one that the Authority can make.

Just as the labor agreement does not require the Authority to pay for the supplemental tests, it does not require the Authority to pay for the time spent by an operator in taking such tests. Section 1.23 of the labor agreement has been applied only to tests required by the Authority, not to tests required by federal regulations or by DOT medical examiners. Dozens of employees have taken follow-up tests afer receiving their DOT physical examinations, and the Authority has not paid for the time those employees spent obtaining the tests.

The Pay Time Agreement (Joint Ex. 4) is not directly controlling in resolving this dispute because the grievance was filed in October 2005 and the parties did not enter into the Pay Time Agreement until April 2006. It did not address this pending grievance. The agreement did, however, express a mutual agreement between the parties about the scope of Section 1.23. The parties agreed that Section 1.23 will apply to certain DOT physical examinations but not to any other CDL physical examination or medical visit. The type of follow-up testing the grievant received is not among those to which Section 1.23 applies, and it therefore should be excluded as an "other" type of physical examination or medical visit. The Authority's consistent and established decision not to pay for employee time spent obtaining supplemental tests ordered during DOT medical examinations, taken together with the subsequent agreement of the parties about the scope of Section 1.23, demonstrates that the grievant is not entitled to pay for his time spent taking his stress test in July 2005.

ANALYSIS

Timeliness of the Grievance.

The first question posed is whether the grievant's claims are time barred as having been filed outside the contractual limitations on the filing of grievances. Section 1.13 of the labor agreement requires that a grievance must be presented within seven business days of the date on which the grievance has come to the attention of the employee. If the grievance is not resolved at that stage, it is to be presented in writing within 14 business days of when it came to the employee's attention.

There is no dispute that the parties have consistently enforced the contractual time limits. Further, the parties do not appear to disagree that implicit in the phrase "come to the attention of the employee" is a requirement that either the employee knew of the existence of the grievance, or that he or she may be charged with such knowledge based on the proposition that with the exercise of reasonable diligence, the employee reasonably should have known of the claim.

Here, the grievant has two separate claims for compensation or reimbursement. One claim is for payment of wages for the time spent by the grievant in undergoing the stress test in July 2005. The grievant's second claim is for the costs of the stress test, in the amount of $470.90.

There can be no question that the grievant was aware in July 2005 that he had not been paid for the time he spent obtaining the stress test. When he received his paycheck covering the date of the stress test, he knew he had not been paid for that time. At that point, he was aware that the Authority had not paid him for those hours, and he was thus aware of his claim. It does not make any difference what the Authority's reason was for not paying him. Even if his pay for that date had been the result of a clerical error which resulted in the Authority shorting the grievant for his pay, that still would have been sufficient to give the grievant a claim which ripened when he received his paycheck which represented non-payment for the time spent by the grievant when he undertook the stress test. Thus, the time limitations set forth in the agreement for the grievant to file a claim for pay began to run, at the latest, when he received his paycheck covering the date of his stress test.

Further, there was no reason for the grievant to withhold his claim for pay until a later date to combine that claim with a claim for the cost of the stress test, which the grievant suggests was his reason for not filing his pay claim at that time.. For one, they are separate claims, neither dependent upon the other. Moreover, presumably the grievant did not know at that point in July 2005 that the Authority would not pay for his stress test, so he cannot credibly contend that he withheld his pay claim in the interests of some efficiency in order to combine it with a claim for the costs of the stress test when at the time he had no reason to know that such a claim for costs might ever exist.

For these reasons, that portion of the grievance which requests payment of wages for the time spent by the grievant undertaking the stress test in July 2005 must be denied for not having been filed within the contractual period for the presentation of grievances.

The question of whether that portion of the grievance which claims that the Authority should pay for the costs of the stress test was timely is more complex than the claim for wages.

When the grievant took the stress test in mid-July, 2005, he paid a $50 co-pay. It is apparent that the grievant advised the medical facility which administered the stress test of his insurance coverage through his wife, because the claim was submitted to the insurance carrier. In mid-September, the insurance carrier sent to the grievant's wife an Explanation of Benefits (EOB) which indicated that the carrier had paid $62.51 of the cost of the stress test, and that the grievant and his wife would be responsible for $470.90, most of which represented a policy deductible of $455.27. The EOB states thereon that it is not a bill. Rather, it is an explanation of what the patient's financial responsibility will be. By letter dated October 5, 2005, the grievant received a bill for $420.90, which represented his portion of the cost of the stress test, less the $50 co-pay he paid at the time of the test. On October 15, the grievant wrote to Robert Kohler, Director of Transportation, requesting that the Authority pay the medical bill and reimburse the grievant for his lost wages for the time he spent taking the stress test. Kohler denied the grievant's request, and the Union filed a grievance on October 19, 2005.

According to the Authority, the grievant's claim for the medical expenses arose either in July when he paid the $50 deductible or, at the latest, in September when he received the EOB which indicated that he was responsible for $470.90 of the medical bill. Thus, according to the

Authority, the grievance of October 19 was not timely because it was not filed within 14 days of either the grievant's payment of the $50 co-pay or of his receipt of the EOB.

An arbitrator is obligated to enforce the time requirements the parties have agreed to in their labor contract for the filing and processing of grievances, where the parties have historically held each other to such time limits. An arbitrator has no discretion to waive such requirements, no matter what the apparent merits of a grievance. The question, then, is one of when the grievance came to the attention of the grievant. That is, the question is when the grievant knew, or reasonably should have known, of the existence of a dispute.

As the Authority points out, it would defeat the purposes of grievance time limits, which is the timely resolution of disputes, if a grievant could somehow revive a stale grievance by merely making a claim that should have been made in a timely manner, and then contending when that claim is denied that it is only then that the matter has ripened into a dispute which begins the running of the clock for the filing of a grievance. That point, although certainly well taken as far as it goes, does not itself answer the question presented here of when the grievant knew or should have known that there was a dispute over who was responsible for the cost of the stress test.

That the grievant was responsible for making a $50 co-pay at the time of the stress test was not in itself sufficient to reasonably put the grievance on notice that there was a dispute over who was to pay the cost of the stress tests. Such co-pays are commonly required by medical providers at the time service is provided and it was reasonable for Research Medical Center to require such a co-pay after it examined the information the grievant provided regarding his insurance coverage. The grievant was asked by the medical services provider to give them information regarding his insurance coverage, and that he did so and then remitted the $50 co-pay does not indicate that the grievant was aware at that time that there was a dispute with the Authority over who would ultimately pay for the cost of the services.

Sometime shortly after October 15, the grievant received the EOB which indicated that he was responsible for $470.90 toward the cost of the stress test. The question raised by the grievant's receipt of the EOB is whether that should have put the grievant on notice that he, as opposed to the Authority, would ultimately be responsible for the cost. If the grievant reasonably should have believed upon receipt of the EOB that the Authority would not assume responsibility for that cost, then the grievance ripened at that point and the filing of the grievance on October 19 was untimely. It certainly would make this a much easier question if the grievant had taken the EOB to Robert Kohler in mid-September. But at that point, the grievant did not yet owe anything; at least he had not yet been billed for the cost. Thus, I cannot conclude that the grievant was contractually obligated to bring the EOB to Kohler at that time, and that the grievance was, as a result, untimely.

What the grievant did do was present the bill to Kohler in a timely manner shortly after it was received by the grievant. Kohler denied the grievant's claim, at which time a dispute clearly existed over which party, the grievant or the Authority, was responsible for the cost of the stress test. Given that the grievant expeditiously presented the bill to Kohler for payment after it was received by the grievant, that the grievant's request for payment was then denied by Kohler and the grievance was submitted within two or three days thereafter, I cannot conclude that the grievance was not timely insofar as it requests payment of the costs of the stress test.[9] It was at the point of Kohler's denial of the claim that there clearly existed a dispute over whether the grievant or the Authority would be responsible for the cost of the stress test. There is nothing in the record to suggest that the grievant knew or should have known prior to Kohler's denial of the grievant's request that the Authority would not pay the cost of the stress test, just as it had paid for the cost of the basic physical examination.

Merits.

Both parties have discussed at length the fact that the grievant declined the Authority's health insurance options during 2005. There is no question that was a voluntary decision made by the grievant, and even if he were obligated to pay the cost of the stress test, then he would still come out financially ahead because the net benefit to the grievant after he paid for coverage under his wife's policy still was greater than the cost of the stress test charged to the grievant.[10] The presence or absence of insurance to cover the cost of the stress test, however, is immaterial to the question presented here of which party has an obligation to pay. If the Authority has a contractual obligation to pay for the stress test, that obligation is not negated by the presence or absence of insurance. Insurance may reduce the cost to the Authority, but it does not affect the

[9] My conclusion that the time limit for filing the grievance began to run upon Kohler's denial of the claim must be tempered by the following caveat. There is undoubtedly a requirement that disputes be presented in a timely manner. An employee cannot sit on a potential claim beyond a reasonable time and then claim that the dispute only ripens when it is finally submitted and denied. Here, if the grievant had not promptly submitted the bill to Kohler with a request for payment by the Authority, I would have no difficulty concluding that the grievance was untimely, regardless of when Kohler denied the claim. But here, the grievant did submit the bill to Kohler in a timely manner after it was received by the grievant.

[10] It was a net benefit to the grievant if only this single insurance transaction is considered.

contractual obligation if one exists.[11]

It does appear evident, however, that the existence of insurance covering most of the Authority's employees has probably been the factor which has prevented the question raised here from coming up sooner. That is, employees were unlikely to question whose obligation it is to pay for such additional testing if the tests are, for the most part, covered by insurance. As a result, although the evidence indicated that the Authority has consistently taken the position that it does not have an obligation to pay for such additional testing since it re-instituted CDL examinations in 2004, there is no indication that the Authority's position has ever before been challenged or that the Union was even aware of the Authority's position. Thus, it cannot be said that the Union acquiesced in the Authority's position. It appears that this issue really is a matter of first impression as between these parties.[12]

The Union cites a case in which an employee missed work due to an incorrect diagnosis by a Company-selected physician. Chris-Kraft Corp., 27 LA 406-407 (Arbitrator William C. Bothwell, 1956). In that case, Arbitrator Bothwell concluded that the physician was an agent of the employer, and thus the employer was responsible for the financial damage to the employee as

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[11] This conclusion may be different if there had been evidence that the parties had negotiated over the obligation for the costs. In such a case, the parties' negotiations may have assumed the existence of insurance to cover the bulk of the costs, with the Authority agreeing to bear the remaining, non-insured but much-reduced costs. In such a case it may be that an employee's decision to decline insurance coverage would have deprived the Authority of the benefit of its bargain and, by declining insurance coverage, the employee thereby assumed the risk that there would be otherwise covered costs that he or she would now have to bear. Here, however, the parties both agree that there were no such negotiations which directly addressed the costs at issue here.

[12] Arbitrator Stuart W. Smith's decision in the Ronald Love grievance (Joint Ex. 22) addressed Love's demand for pay for the period he was taken out of service because he had not undergone the follow-up tests required by the CDL medical examiner. Thus, Arbitrator Smith's decision did not address the issues of payment for the tests themselves, or even any claim by Love for the time he spent taking the tests.

a result of the doctor's diagnosis. That seems a perfectly reasonable conclusion under the facts of that case, and I have little doubt that most arbitrators would reach the same conclusion now, half a century later.

The circumstances raised in the present grievance are decidedly different from those in Chris-Kraft, however. Even assuming for the sake of argument that the physician who directed that the grievant undergo a stress test is an agent of the Authority, that assumption does not in itself dictate who is responsible for the cost of the test under the facts present here. And that is the case even considering the Authority's acknowledgment that if it had mandated the stress test, as opposed to being mandated by the government CDL regulations, it would have paid for the cost of the test. The question here is what are the obligations imposed by the labor agreement between the parties.

Following are some of the undisputed obligations imposed by the applicable government regulations covering CDL medical examinations.

- A bus operator must pass a medical examination administered by a licensed medical examiner;
- The medical examiner is to use his or her professional medical judgment in determining whether the employee has satisfied the physical requirements for the CDL;
- The medical examiner is to be knowledgeable regarding the job to be performed and the physical demands on the employee seeking certification and standards set out by the Motor Carrier Safety Administration;
- The medical examiner may require tests or further procedures if in his or her

professional medical judgment those tests or procedures are necessary to render a conclusion as to whether the employee is medically fit to be certified for a CDL under the regulatory requirements;

- In the case of the grievant, the medical examiner properly exercised his medical judgment to require that the grievant undergo a stress test prior to CDL recertification in 2005.[13]

There can be no serious doubt that, due to the regulatory requirements, the Authority is practically compelled to select certain physicians who will administer CDL medical examinations. It would be virtually impossible for the Authority to fulfill its legal obligation of ensuring that the medical examiners are thoroughly knowledgeable about the requirements of the bus operator position, the physical demands of the job and the regulatory requirements for CDL certification if the Authority did not make arrangements to have a finite group of examiners who had been appropriately briefed on that information. As a practical matter, if employees were permitted to go to their personal physicians for CDL medical examinations, it is unlikely those physicians could satisfy the regulatory requirements.

Under these circumstances, therefore, it makes little sense to base a decision on a determination of whether the medical examiner who directed the grievant to take a stress test is an agent of the Authority. If the medical examiner is a legal agent of the Authority, it is by virtue of necessity based on the statutory requirements. Further, even assuming the grievant could have

[13] It is the Authority's position that the stress test is mandated by the regulations for an applicant for a CDL who has experienced a heart attack, and thus there really was no medical judgment for the doctor to exercise when he ordered that the grievant undergo the stress test. That may very well an accurate construction of the regulations. It makes little difference, however, whether the doctor was required to order the stress test or if the doctor did so in the exercise of his medical judgment, because the grievant and the Union do not challenge the appropriateness of the stress test.

gone to his personal physician, there is no reason to believe that the personal physician would not have ordered the same stress test. In such a case, it is a virtual certainty that the Union still would be contending that the Authority is obligated to bear the cost of the stress test because the test is merely part and parcel of the overall medical certification procedure. Which particular doctor ordered the test would make no difference to the Union's position.

In large part, the Union's position is that the principles of fundamental fairness and justice dictate that the cost of the stress test should be borne by the Authority rather than by the employee, and that those principles are embodied in the labor agreement by the implied covenant of good faith and fair dealing. What those principles require is that neither party to a labor agreement interpret or apply the contract, or abuse the relationship between labor and management, in a manner which would be considered to be arbitrary, capricious or unreasonable. Those are often elusive concepts, and not often susceptible to broad generalizations although they certainly have application to specific circumstances.

But what is presented here is not a question of fundamental fairness or of good faith and fair dealing, but one of allocation of costs and financial resources, subjects routinely matters of negotiations between a union and an employer. It may seem fair on the surface for the employer to pay for all of the costs associated with an employee maintaining the necessary certifications or qualifications for him or her to continue performing work on behalf of the employer. But although the employee is certainly performing services on behalf of the employer, the employee is also working for his or her own benefit as well. Thus, those costs are allocated in the marketplace, in this setting through negotiations between the Authority and the Union.

Such allocations of resources or cost burdens are routine. Among maintenance employees, unions and employers routinely negotiate over whether the employer is required to provide all of the necessary tools, including basic tools, or whether the maintenance employee must bring his or her own basic tools to the job. The same type of negotiations occur with production employees who are required to wear work boots. In many cases, an employer will agree through negotiations to provide a pair of boots per year, or a specified sum of money per year to be applied to boots, but any cost above that sum must be borne by the employee. The cost of health insurance, of course, is typically negotiated, with employees in many settings being required through negotiations to contribute toward those costs.

The Commercial Drivers License is a work tool in that sense, a necessary implement for a bus driver to perform his or her job duties. It is a form of a driver's license. And the parties are free to negotiate over the costs associated with obtaining the CDL, part of which is the cost of the physical examination.

An arbitrator, of course, has no authority to add to or subtract from the language the parties have negotiated into their Collective Bargaining Agreement. Thus, if there is to be an obligation on the part of the Authority to pay for the grievant's costs associated with the stress test, it must be found in the labor agreement itself, or it must be susceptible of a reasonable inference from the language of the agreement that such an obligation was the intention of the parties when they negotiated the agreement.

The parties both acknowledge that the purpose of the cited portion of Section 1.12 is to address fitness to work examinations and such which may be required by the Authority. If an employee is injured, or otherwise appears to possibly be incapable of performing his or her duties in a safe and efficient manner, the Authority may in some circumstances require the employee to undergo some types of medical examinations or tests to determine the employee's fitness to work. In such a case, the Authority will bear the costs. The physical examinations associated with a CDL are something different entirely. They are, as both parties acknowledge, mandated by federal law and regulations, not by the Authority, and the fact that they must be performed by a physician designated by the Authority does not transform them into examinations required by the Authority. Thus, it cannot be inferred from the language of Section 1.12 that the Authority has agreed to undertake the costs of the physical exams associated with the CDL.

In April 2006, the Union and the Authority negotiated a Pay Time Agreement that set forth the time for which employees would be paid in connection with CDL Follow-Up Physical Examinations. (Ex. 4) This agreement, of course, was negotiated after the events giving rise to the grievance presented here. Moreover, on its face, it only deals with the question of paying employees for the time the spend undertaking CDL physical examinations, not the costs of the examinations themselves. Thus, it does not control the question presented here. The Pay Time Agreement, nonetheless, does reflect exactly the kind of negotiations that typically occur between a union and an employer over such costs and pay associated with maintaining qualifications and certifications necessary for an employee to perform his or her work. In the Pay Time Agreement, the parties clearly expressed their intent that the Authority would pay for certain time, although not all time, spent by employees in connection with maintaining their CDLs. Thus, the parties have tacitly acknowledged that the burdens associated with maintaining a CDL are a matter of negotiations between them, with those costs to be allocated as they may negotiate and in some cases even shared between the Authority and the employees.

There is nothing in the Collective Bargaining Agreement that states or from which it may reasonably be inferred that the parties negotiated and agreed that the Authority would bear the costs of supplemental physical examinations or tests which an employee must undertake in order to maintain his or her CDL. As a result, it would be inappropriate as beyond the proper exercise of arbitral authority to impose those costs upon the Authority based solely on what may seem fair or just.

As a result, the Authority did not violate the Collective Bargaining Agreement when it refused to pay the costs associated with the stress test the grievant was required to undertake in connection with maintaining his CDL.

AWARD

The grievance is untimely insofar as it seeks compensation for the grievant's lost wages for the time spent by him undergoing the stress test, and that portion of the grievance must therefore be denied on that basis. The grievance was timely filed as to the dispute over the grievant's request for compensation for the cost of the stress test.

The Authority did not violate the Collective Bargaining Agreement by its refusal to pay for the cost of the stress test which the grievant was obligated to undergo as part of his Commercial Drivers License re-certification in that there is no obligation expressly or impliedly imposed by the Collective Bargaining Agreement that the Authority bear that cost.

For the foregoing reasons, the grievance must be denied in its entirity.

Eric M. Schmitz
Arbitrator
September 3, 2007
St. Louis, Missouri