CHAPTER 4

HEALTH AND MEDICAL ISSUES IN ARBITRATION, EMPLOYEE BENEFIT PLANS, AND THE DOCTOR'S OFFICE

I. MEDICAL AND HEALTH ISSUES IN LABOR ARBITRATION

MARLIN M. VOLZ*

Introduction

One must be mindful that an arbitrator's decision depends upon the facts and contractual provisions applicable to the particular grievance. Also, one must be mindful that what the parties have done in the past and are doing presently, by way of bargaining history, practice, grievance settlements, side agreements, and the like, may supply omissions in the express contractual language or important guidance to the interpretation of ambiguous wording. The general principles set out below must be considered with these caveats in mind.

Physical or Mental Inability to Perform the Work

Termination

Where Discipline Is Inappropriate. In some instances an employee may be discharged where the evidence is persuasive that any unsatisfactory work performance or defective workmanship was not due to carelessness, indifference, poor attitude, or lack of conscientious application, but rather to a lack of physical or mental ability consistently to achieve the result obtainable by the average employee. In this type of case, demotion or transfer, unless prohibited by the contract, is a more appropriate remedy

*Member, National Academy of Arbitrators; Professor of Law, University of Louisville, Louisville, Kentucky.

Editor's Note: Alan A. McLean, M.D., Eastern Area Medical Director, International Business Machines Corp., and President-Elect, American Occupational Medical Association, also was a member of the panel but did not present a formal paper.

than discipline, assuming that a job exists to which the employee may be demoted or transferred. As a general rule, the quality of an employee's work must meet reasonable standards, and his or her overall productivity and efficiency must approximate that of the average employee in his or her classification.

In exercising managerial authority to deal with this situation, a distinction must be recognized between inability consistently to perform the work in question in an acceptable manner and an unwholesome, or careless, attitude which results in substandard performance. The latter may be correctable by progressive discipline; the former cannot. Arbitrator McKelvey offers this clear explanation of the difference:

> ". . . an incompetent worker is one who is unable to do a job because of mental, physical or emotional deficiencies. In a case of proved incompetence, arbitrators rarely upset a discharge penalty because discipline cannot correct these types of deficiencies.
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> "On the other hand, in cases charging negligence arbitrators are more inclined, if the proof supports the charge, to require a Company to adhere to a program of corrective discipline, that is one of warnings and disciplinary suspensions, prior to invoking the final penalty of discharge. The theory behind this well-accepted rule is that employees who are inattentive, careless or negligent have a behavior problem which may well yield to disciplinary correction."[1]

On the other hand, it is understood that discipline cannot induce a person consistently to work beyond his or her capability. An employee must have sufficient ability to get the job done in an acceptable manner. Discipline cannot overcome a deficiency in ability where the employee is doing his or her best to succeed. Nevertheless, discharge or termination is permissible where the employee demonstrates physical or mental inability to do the work in an acceptable manner and where demotion or transfer is not possible.

Temporary vs. Permanent Disability. Temporary disability must be distinguished from permanent disability. A temporary disability normally is to be accommodated by the attendance, or leave, policies or provisions of the contract. As to the right of an employer to terminate a permanently disabled employee, Arbitrator Epstein explained in *Goss Co.*:[2]

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[1] *Riverside Book Bindery, Inc.*, 38 LA 586, 592 (1962).
[2] 43 LA 630 (1964).

> "The difficulty with this position is that in the process of establishing his disability rights, there is a medical report that he is permanently disabled. The arbitrator cannot find that the Company was unreasonable in relying upon Dr. Harshfield's statement as a basis for determining that the grievant should be terminated from his employment because it had reasonable grounds to believe that he was now on a permanent, rather than a temporary, disability basis. Under the circumstances, there was no necessity for the Company to seek additional medical advice when the grievant's own doctor indicated permanent disability."

In one of my opinions where the employee was terminated for being allergic to a substance used in the company's printing plant, I upheld the termination and wrote:

> "It is a familiar principle that the employment of an employee in a proper case may be terminated for non-disciplinary as well as for disciplinary reasons. One example of the former, which is applicable here, is that an employee must possess sufficiently good health to be able to perform the usual duties of his job in the ordinary manner with satisfactory attendance and without undue risk to his own health. Justification for termination must be tested against a standard similar to the 'just cause' standard, in that the question must be judged largely by the reasonableness of managerial actions under the facts of the particular case. . . .
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> "In a very similar case Arbitrator Duff wrote in *Kurtz Bros., Inc.*, 43 LA 678 (1964): 'The physical disability . . . has been diagnosed as allergic bronchial asthma. . . . The medical testimony fails to indicate whether Grievant's allergic condition can ever be cured. When a worker's health is permanently impaired and he lacks the physical ability to regularly attend his job and perform his assigned work duties, his condition will justify a non-disciplinary discharge for just cause.' "

Failure to Disclose Physical Defect in Job Application. In *Hughes Aircraft Co.*,[3] the employee omitted to mention a bad back condition in her job application. The employer refused to reinstate the employee after a sick leave. Arbitrator Doyle found its action to be justified, finding (1) the employee did not make full disclosure of her back condition in her application for employment, (2) the employer would not have employed the employee initially had it possessed complete medical information, and (3) the uncontradicted professional opinion was that the employee was physically incapable of performing the full range of the duties of her job.

[3] 49 LA 535 (1967).

Assigning the Employee to Other Work

An example of a contract provision in this area is the following:

- If an employee becomes unable to perform the duties of his particular job classification satisfactorily due to physical disability or infirmity, he may displace a junior employee in seniority in a job classification whose duties he can satisfactorily perform, provided he produces proof of such physical disability or infirmity and provided he can perform the job he claims satisfactorily, which proof is acceptable to both the Employer and the Union.
- In the event an employee receives a permanent occupational injury or illness during the course of his employment with the Company that prohibits him from doing his regular job, and his permanent injury has been substantiated by the Company Medical Department, the Company and Union Executive Board may mutually agree on a job that he may be placed in. In placing the permanently injured employee on a new job the same process will apply as if he were being laid off and he may bump or bid into an agreed job or jobs regardless of his seniority. If an employee completely recovers from his disability and the Company Medical Department releases him from any restrictions, he may then exercise normal bidding rights.
- Any employee who has been incapacitated at his regular work because of industrial injury, or who has sustained serious disabling injury while in the service of the Armed Forces of the United States may displace any lower seniority employee in the plant on a job he is capable of doing.

In the absence of controlling federal or state law and of a specific provision, such as that set out above, the company is limited by the seniority, job-bidding, and other provisions of the usual labor agreement in any desire to find, or make, a job for an incapacitated worker. Generally, it must act within the framework of the existing contract. The arbitrator has no authority to direct the company to do that which the contract does not obligate it to do. Arbitrator Rubin noted in *Midland-Ross Corp.*:[4]

[4]64–1 ARB, ¶ 8017 (1963).

> "The return of [grievant] can be imposed upon the Company only if it will take upon itself the construction of a job he can safely do. But the Agreement does not give me authority to instruct the Company to do this, nor does general industry practice provide for such care of incapacitated employees. . . ."

Unless applicable federal or state law or the contract otherwise provides, an employer is under no obligation to make a special job for the grievant or to assign him to light work except to the extent that his contractual rights entitle him to bid for, or request, assignment to a lighter, existing job.[5]

Overweight

An employee must have the ability to perform the usual duties of his or her job in an acceptable manner. Ability includes physical fitness. An employee is physically fit to perform a job when he or she has the physical strength, dexterity, endurance, soundness of limbs and senses, quickness, and health to perform the duties of the job throughout the workday, day in and day out (including reasonable amounts of overtime), at the normal rate of production, with regular attendance, with reasonable safety to himself or herself and other employees, and without unduly jeopardizing his or her health. Extreme overweight on a job that requires physical activity, movement, and exertion may be considered a disqualification where it prevents the employee from performing the job in an acceptable manner or where it reasonably can be found to be the cause of chronic health problems and a poor attendance record. Dismissal should be preceded by a course of progressive discipline designed to induce the employee to correct his or her overweight condition.

The labor agreement seldom excuses an employee on the basis of age from being physically fit to the degree necessary to perform the work in a satisfactory manner. Age alone is not responsible for obesity.

Underweight

For certain jobs, the company may prescribe a minimum weight qualification, such as 150 pounds. In some instances, the company may use a weight minimum as a guideline in selecting

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[5] *See Standard Oil Co.*, 18 LA 889 (1952); *Kroger Co.*, 37 LA 127 (1961); and *Glass Containers Manufacturing Institute*, 66–3 ARB, ¶ 804 (Dworkin, 1966).

employees for particular jobs where the weight of the employee reasonably assists him in performing the job or is deemed to be a necessity for safety reasons. Such a requirement is more easily applied to new hires than to an existing employee seeking the job by bumping, transfer, or bidding, particularly if the employee is a female. Such a weight limitation must be applied with discretion since it is impractical to require the employee to weigh in at the beginning of each shift. However, it can reasonably be required that an employee, once qualified for a job, maintain those qualifications. Therefore, a periodic weighing of the employee or employees on the job is permissible, assuming that the minimum-weight guideline or requirement is found to be sufficiently job-related to be reasonable.

In one instance the company imposed a 150-pound weight requirement for operators of water-blasters so that they would be able to withstand the back thrust. In upholding the requirement under the particular facts, I wrote:

> ". . . no provision of the Labor Agreement prohibits the Company from establishing reasonable job qualifications. . . . An employee to be qualified for a job must have the necessary ability to do the work. A prescribed job qualification should relate directly to the issue of ability. . . . Physical ability also means being of sufficient weight, where weight is a factor in ability to perform the work. Considerations of safety clearly were the dominant motivation for imposing the 150 pound weight requirement. It pertains to safety as well as being a job qualification. . . . The Company has an overall responsibility for safety and may apply a reasonable and applicable safety rule even though the employee may be willing to assume whatever risk might be involved. . . . A high pressure water blaster, as the past record of injuries attests, can be a dangerous instrumentality in the hands of someone physically incapable at all times of holding its nozzle with safety to himself and others.
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> "On the issue of discrimination, the weight requirement does not concern itself with irrelevant considerations, such as that a man can do the work and the woman cannot, or that a Catholic can and a Protestant cannot, or that a white person can and a black cannot, or that an Irishman can and an Englishman cannot. However, the weight of an employee is a relevant consideration where weight along with proper stance is needed to counterbalance the back thrust on the hose.
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> "Because the possibility of serious injury is present, the Company has relied on its judgment based on the investigations and recommendations of its experts rather than on experience based on trial and error. One must be impressed with the extreme care which the Company has exercised in formulating operating procedures for water blasting."

Effect of Worker's Compensation Award of Permanent Partial Disability

Is an employer justified in refusing to reemploy an employee who offers a statement from his physician that he is now fully recovered from injury and able to return to work even though he has been awarded a 25-percent, or so, disability under worker's compensation to that part of his body which he must use in his work? The question is whether, despite such determination of disability, the employee has the physical ability to perform the normal duties of the job in the ordinary manner for a full eight-hour shift. This holds true even though the disability resulted from an injury received in service for the employer and even though a second-injury fund, or similar provision, protects the employer from any increased susceptibility of the employee to further injury or an aggravation of the previous injury. Generally, worker's compensaton laws do not impose a duty upon the employer to reemploy a disabled worker beyond that imposed by the labor agreement between the parties.

The decision largely turns upon the nature of the injury, the treatment that was received, the opinion of competent medical personnel as to the prognosis for the future, the extent of the recovery of the use of the injured part of the body, the extent to which he has not regained full use of such part, and the effect that such impairment reasonably will have on his ability to perform the work. Disagreement may exist in the medical evidence. If the opinion of a physician seems to be factually supported that no further injury to the employee is likely to result if he is returned to the job, a possible solution is to give him a reasonable trial to see if he can do the work in an ordinary way for the full period of the shift.[6]

Sick Leave

Meaning

The key words in the usual contractual provision are "sick days" or "sick leave." They clearly contemplate that an employee may draw upon his accrued sick leave only to cover hours

[6] *See* this arbitrator's award in *Corhart Refractories Co.*, 39 LA 141 (1962), and also *Standard Oil Co.*, 18 LA 889 (1952); *American Smelting and Refining Co.*, 24 LA 857 (1955); *Dolan Steel Co., Inc.*, 49 LA 197 (Seitz, 1967); *Bethlehem Steel Co.*, 39 LA 600 (Crawford, 1962).

or days when he or she is too sick to perform the regular duties of the job. A day when the employee is healthy enough to perform such duties is not a "sick day." Arbitrator Davey, in *Station KMTV,*[7] set out the general view when he wrote: "It is well-established that sick leave should be taken only when an employee is not capable of performing his normal job duties."

It is well established that sick leave is not obtainable for the asking. One must, in fact, be sick or injured so as not to be able to perform one's usual duties. The purpose of a paid sick leave is to protect the earnings of an employee during a period of illness or injury and not to grant days off with pay. Arbitrator Sembower commented in *Board of School Trustees, City of Gary, Indiana:*[8]

> "The Arbitrator is aware of a number of situations in which somehow it has become 'understood' between employees and their employers that sick leave is merely another way of saying that the employees have those days off sometime during the year. Such cynicism toward the categorizing of reasons for excused days off is impossible to justify. For one thing, it requires the employee to 'perjure himself' by claiming that he is ill when actually he is not."

The words "sick leave" generally also include absence due to injury. The words "renew sick leave annually" mean to take some meaningful action within the year to advise the company of the employee's intent to have his or her sick leave extended.

Returning From Sick Leave: Proof of Recovery

Apart from the company's legitimate concern and duty in the health of an employee, a distinction must be made between a situation where the question of physical ability or health arises while the employee is on the payroll and in active employment and where he or she is not. In the former situation, the burden is on the company to show that the employee's physical ability or health is such as to justify demotion, suspension, leave, or termination. However, where the employee has been on sick leave or off work due to illness for an extended period of time, the burden shifts to the employee to establish that his or her health has improved, or been restored, to the point where he or she can resume his or her regular job duties and perform them

[7] 39 LA 324 (1962).
[8] 70-2 ARB, ¶ 8860 (1970).

in the usual way without undue risk to his or her own health. Normally, the presentation of a doctor's statement indicating that the employee is able to return to his or her regular work without any restriction is satisfactory evidence of his or her ability to do so. In the absence of an established practice or contractual authorization to require more, management must have good and sufficient reason to question such statement and to delay his or her return to work until further proof can be elicited. In *A.M. Castle & Co.*,[9] Arbitrator Sembower held that under the facts the employer should have accepted a statement from the physician performing the surgery that the employee was able to return to work without limitation.

Sometimes the doctor's statement is ambiguous, as where it simply states that the employee was seen by the doctor without any opinion as to whether he or she is able to return to work. In other instances, especially where the illness is suspected of being job related, as an allergy, the employer may not be certain from the certificate that the doctor understood the nature of the working conditions or environment to which the employee was returning. In such instances it is permissible for the company to request the employee to obtain clarification or, with his or her consent, preferably to contact the physician directly. In *Roadway Express, Inc.*,[10] Arbitrator Short held that the employer properly delayed the return to work of an employee with a bad back until he presented a complete and unequivocal medical release.

Working at Other Jobs During Sick Leave

Management may use its disciplinary authority to control abuse of sick, accident, and other insurance benefits and of the utilization by an employee of a medical leave of absence. The purpose of the benefits is to soften the impact of loss of income during a period of illness or injury; the purpose of a leave is to authorize time off from work during the period of recuperation. It is assumed that the employee will cooperate fully in this process and will not do anything that will jeopardize or prolong the period of recovery and a return to work. To the extent that engaging in other employment while on medical leave does so, it is an abuse of the medical-leave procedure; and to the extent

[9] 41 LA 391 (1963).
[10] 38 LA 1076 (1962).

that such leave permits and results in greater outside earnings, it represents an abuse of the sickness- and accident-insurance program. Depending on the nature of illness or injury, light work during a medical leave may have therapeutic value and may not delay recovery.

Sometimes the employee operates his own business. Devoting a substantially greater amount of time and effort to this endeavor made possible by being on leave, with a corresponding increase in earnings, would be an abuse of the sickness- and accident-insurance program. The question of eligibility for such payments is separable from the issue of the propriety of continuing the medical leave or of requiring a new request for permission to be on leave. In *Corn Products Co.*,[11] the grievant was discharged for working at his own drive-in cafe while drawing nonoccupational sickness and accident benefits. Arbitrator Coffey concluded that just cause did not exist for discharge, but that the receipt of sickness and accident payments had been improper. He ordered reinstatement "expressly conditioned on reimbursement by him for the full amount he received as S & A benefits."[12]

Recovering Sick-Leave Overpayment

In the usual case, a company's recovery of sick-leave overpayments to employees is governed by the applicable state law and not by the collective bargaining agreement. The general rule is that money paid by mistake under circumstances that would provide the recipient with a windfall may be recovered by the company. Arbitrator Kesselman stated the usual rule in *General Telephone Co. of Illinois*,[13] when he wrote: "It is beyond dispute in law and in industrial practice that an employer may rightfully recover wage or benefit payments erroneously made to any employee." Repayment may be obtained by deductions from future

[11] 44 LA 127 (1965).

[12] For a similar holding, *see American Tobacco Co.*, 71-2 ARB, ¶ 8597 (Jaffee, 1971), where the grievant worked at his riding stable while receiving sick benefits. *See also Rock Hill Printing & Finishing Co.*, 64 LA 856 (Whyte, 1975); *Cowles Tool Co.*, 74-2 ARB, ¶ 8473 (Van Pelt, 1974); *Standard Brands, Inc.*, 52 LA 918 (Trotta, 1969); *Danbury Cemetery Ass'n*, 42 LA 446 (Stutz, 1964); *Mercoid Corp.*, 74-2 ARB, ¶ 8491, 63 LA 941 (Kossoff, 1974); *Armstrong Rubber Co.*, 57 LA 1267, 58 LA 827 (Williams, 1972); *Kaiser Steel Corp.*, 70-1 ARB, ¶ 8191 (Roberts, 1969); *Quaker Oats Co.*, 74-1 ARB, ¶ 8176 (Sabella).

[13] 49 LA 493 (1967).

wage payments, but not by resort to the company's disciplinary authority.

It is stated that the right to restitution is conceived in equity and may not be had if it would be inequitable. The burden is upon the company to establish that it would be inequitable and against good conscience for the employee to retain the alleged overpayments. This is a fact question and must be decided on the basis of all the attendant and relevant circumstances.

Returning From Sick Leave With Medical Restrictions

Examples of contract provisions in this area are the following:

- When an employee returns from a leave of absence, the company will place the employee in accordance with the employee's physical fitness and the provisions of Article VIII.
- The reinstatement rights of an employee returning at the expiration of an authorized leave are as follows when such employee has experienced no impairment which would render him unqualified to do the work and has not been guilty of misconduct during the leave which would have been proper cause for discharge.

In one case heard by me, an employee, after a back injury, presented a statement from her treating physician containing the following work restriction: "25 pounds lifting, pushing, or pulling; 8 hours per day, 5 days per week; and the wearing of a brace." The company's policy as to medical restrictions was expressed as follows: "If the job would accommodate a particular set of work restrictions, then that individual would be allowed to return to work. If due to the nature of the restriction, the individual could not fulfill the requirements of the job, then the individual would not be allowed to return to work."

The employee was denied a right to return to work because overtime work was necessary on the job and the restriction prevented her from meeting this requirement. In upholding the company, this arbitrator wrote:

> "A distinction must be made between a situation where bona fide illness or physical disorder is offered as an excuse for refusing a particular overtime assignment and one where a blanket medical restriction prevents the employee from working any overtime. In the latter situation it is generally held that management does not abuse its inherent managerial discretion in directing the work force if it determines that the employee is not qualified to perform the work.

> That it is contemplated that overtime work is involved . . . is implicit from a reading of Article V and the Addendum. Neither provision of the Labor Agreement directs that management must retain an employee whose work restrictions prevent him or her from performing any overtime work. . . .
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> "In *National Vendors Division of U.M.C. Industries, Inc.,* 72-1 ARB, ¶ 8272 (1972), Arbitrator Leo C. Brown had before him the question: 'How should the situation be handled in the future when an employee assigned to work overtime produces a doctor's certificate that says he can't work overtime?' Arbitrator Brown concluded: 'When an employee presents a doctor's certificate to the effect that he or she is unable to work the overtime scheduled on his or her job, the employer may require such employee to take a leave of absence until such time as he or she presents a doctor's certificate stating that the employee is able to work the overtime scheduled for his or her job.'
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> "As Arbitrator Brown points out in the above case, if employees could obtain a blanket exemption from overtime work by obtaining medical certificates, soon the scheduling of overtime work in an equitable manner would become impossible."

Arbitrator Teple agreed in *Standard Oil Co.*[14] that the proper procedure is to continue an employee on sick leave rather than placing him or her on layoff when no job is available when the employee is ready to return to work. He observed: "It seems to the Arbitrator that it was evident to the Company at that time that the grievant was unable physically to work on anything available within the bargaining unit. This hardly presented a layoff situation."

In *Cit-Con Corp.,*[15] the employer assigned the employee to light work. His doctor said he was physically unable to perform it; the employer's doctor said he could. Arbitrator Foster agreed with the employee in view of the nature and severity of his injury and placed him on sick leave until his physician released him for work.

Duty of Employee to Seek Medical Treatment: Illness as Excuse for Absence

Disciplinary measures cannot correct the unavoidable or make an employee well when he is too ill to work. In the usual case, illness is an excuse, or a mitigating circumstance, for ab-

[14] 65-1 ARB, ¶ 8043 (1965).
[15] 37 LA 575 (1961).

sences unless it is shown that the employee intentionally abused or was careless with his health. However, it is implied in the employment relationship that an employee will possess sufficiently good health to perform his or her assigned work in the usual manner and with regular attendance. If an employee has demonstrated over a long period of time an inability, due to chronic bad health, to maintain an acceptable attendance record, the company is justified in terminating the relationship, particularly when counseling and the use of corrective discipline have proved to be ineffective in improving his attendance. In determining the appropriateness of disciplinary action, one of the principal considerations is the likelihood of the continuance of a poor attendance record. If the evidence discloses that the employee's condition or attitude is such that in all probability his or her attendance will not significantly improve, the employer cannot be expected to continue the employment relationship indefinitely to the detriment of efficiency and of the other employees. And, where the circumstances warrant, the employer may discharge the employee during an absence which normally is unavoidable, such as a gall-bladder attack, where such absence is the final act or "last straw" in a long record of unsatisfactory attendance.

Several factors are relevant on the question of whether the employee is capable of achieving satisfactory attendance, the most important of which is whether the conditions causing excessive absences have been corrected or eliminated. In this connection, a distinction must be recognized between situations where excessive absenteeism is due to a series of short illnesses of different types, evidencing chronic bad health, and instances where a correctable long-term, or other, illness or condition is involved. If medical evidence indicates, for example, that the condition may be corrected by surgery, management, or an arbitrator in his or her award, may place or continue the employee on sick leave where contractually permitted on condition that, if the medical procedure is not undertaken during a specified time period, termination will result or be upheld. In a case where medical evidence indicated that surgery for the removal of the gall bladder would restore the employee to good health, this arbitrator stated in his award:

> "If surgery can restore him to another period of useful service to the Company, much will be gained and a career may be saved.

> . . . However, since he does not appear to be capable of returning to work with regular attendance, it would only be appropriate to place him on sick leave and not to reinstate him to his former job. Also, since the facts indicate a tendency on the part of the grievant to procrastinate in seeking cures for his medical problems, a time limitation upon his sick leave would appear to be indicated."

In that award, a sick leave of two months was granted ending as of midnight, May 17, 1974. The award concluded:

> "On or before May 17, 1974, each party is to submit to the arbitrator a written report as to the health of the grievant as of that date. The arbitrator will then make a further determination as to his status. For this purpose the arbitrator finds that it is appropriate for him to retain jurisdiction."

Two additional factors that often are relevant are the efforts which the employee has made to relieve his or her health problems through medical treatment and the extent to which absences were avoidable if the employee had taken better care of his or her health. In *National Annealing Box Co.*,[16] Arbitrator Teple summarized:

> "Neither the Union nor the Company can be blamed for the grievant's failure to seek prompt medical attention. . . . It seems evident that the grievant had not received medical attention when many of his earlier absences occurred, and on the last occasion, after he had been absent for an entire week, the grievant still had not consulted his own doctor. . . . With such a record, the grievant has only himself to blame."

Reasonable warnings by management to an employee to secure medical assistance have been upheld by arbitrators. In *Ferro Manufacturing Corp.*,[17] Arbitrator Rehmus noted:

> "He was told a number of times that he should see a doctor and that he usually replied he was 'afraid of doctors.' The Company also warned him strongly that if he continued in his absences he would either have to bring a doctor's excuse or see a Company doctor. The Company never carried out these warnings and never made it necessary for him to seek medical help if he was to retain his job."

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[16] 65-2 ARB, ¶ 8732 (1965).
[17] 59 LA 1111 (1972). *See also Western Electric Co.*, 38 LA 233 (1962).

Requiring Medical Statement to Cover Absences: Where Sickness Is Offered as Reason

An example of a contract provision in this area is the following:

- Upon return to duty, the employee shall report to the office nurse and give an account of the nature of his or her illness. If such account is not acceptable to the office nurse, it shall be incumbent upon the employee to furnish satisfactory additional proof before being entitled to sick-leave pay.

A supervisor, or other representative of management, is permitted to make reasonable inquiry and to require reasonable supporting evidence in order to determine whether a particular absence is excusable. Where the employee has a poor attendance record and where some of the reasons offered are questionable, the unilateral requirement of a statement from a physician to support a claimed illness may be reasonable. It must be kept in mind that it is an easy requirement to impose, but not infrequently it may be difficult or a serious hardship to fulfill. This arbitrator has heard a number of cases where the matter of obtaining a statement personally signed by a physician took several trips to his office and delayed the return of the employee to work. Arbitrator Daugherty, in *National Lead Co.*,[18] outlined some of the problems as follows:

> ". . . it is a fact of general knowledge that physicians are always scarce and that their scarcity over weekends is especially high. . . . And it is a fact that, since the grievants had become 'normal' by said Saturday morning, any doctor, if available, would have had to perform the morally questionable feat of testifying to a Friday evening heat prostration condition that he could not have observed (not that it hasn't often been done)."

In passing upon the question of reasonableness of a requirement of a doctor's statement as a prerequisite for an excused absence, one must also be mindful of the burden placed upon the faithful employees in imposing procedures to curb those who would offer phony excuses of illness or injuries. Rather than suffer the inconvenience and expense of seeing a doctor for each illness, the faithful employee sometimes may find it prefer-

[18] 52 LA 427 (1969).

able to accept an unexcused absence or to report for work when he or she should stay home.

Where a responsible representative of management, such as an employee's immediate foreman, has actual knowledge of the genuineness of an illness or injury and the need to be absent for the period in question, the requirement of a doctor's certificate normally must be viewed as an unnecessary and unreasonable burden upon the employee. If, for example, during the epidemic of a 24-hour flu, an employee with the usual symptoms reports ill to the plant nurse and obtains a pass to go home from the foreman, he or she should not be required to obtain a doctor's certificate before returning to work a day or so later. Arbitrator Ipavec, in *Geauga Plastics Co.*,[19] expressed a common view when he wrote:

> "To establish a bona fide illness as an excuse, a doctor's certificate is usually accepted as evidence; however it is not the only evidence which would prove an illness. In the opinion of the arbitrator, the Company has a right under the Agreement between the parties, to require good probative evidence to support a reasonable excuse for not working on days surrounding a holiday, but it does not have the right to unilaterally decide that the only 'reasonable excuse' which will be accepted will be an illness supported by a doctor's certificate."

Arbitrator Duff expressed the same general view in his opinion in *Wheatland Tube Co.*:[20]

> "There is a serious practical problem with regard to what substantiating evidence should be deemed acceptable by the Company. Basic justice requires that any reasonable proof of illness be accepted. It is a common experience, in a single day's absence that a doctor's certificate is not available, because many genuine illnesses are of short duration and require no professional medical diagnosis. In such a case a written statement by the employee involved describing the nature of the illness and any treatment taken constitutes adequate proof that a genuine illness existed."

Under the doctrine of reasonableness, the judgment of management, while entitled to much weight, is not controlling; but the adequacy of the supporting proof must be determined by what the moderately cautious and prudent person, acting objectively and without bias, would accept as proof of the existence

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[19] 72 ARB, ¶ 8229 (1972).
[20] 67-1 ARB, ¶ 8038 (1966).

of an abnormality in the human body causing so much discomfort as to persuade an employee, reasonably diligent as to his attendance, to stay home from work. The company can require a written statement from the employee describing the nature of his or her illness and what he or she did to effect a cure. Unless the employee has a bad absentee record or another compelling reason exists, a requirement of a doctor's statement for a one-day illness commonly must be considered to be unreasonable. Such a requirement may well mean persuading a doctor to accept a last-minute appointment and waiting in his office when the employee might be better off in bed. Obtaining the statement at a later date after the employee is healthy would require the doctor to attest to an illness that he had not observed.

Arbitrator Platt set out the following guidelines in *Republic Steel Corp.*:[21]

> "Although normally the employee's explanation by itself satisfies the Foreman, the Company need not in every instance accept the bare assertion that he was sick. Some proof may occasionally be required. It need not be in any particular form; it need not be the strongest and best proof possible. But it should consist of some reasonable verification of the employee's statement of fact. What that verification might be is difficult to say. A doctor's letter would almost always be appropriate but cannot be an absolute requirement since there may be illnesses without medical attention. A druggist's prescription might be adequate. A written statement from the employee's wife, neighbor, or fellow worker might suffice. And sometimes the employee's bare statement should satisfy the foreman as it has in the past. In short, the nature of the proof must be left to the exercise of reasonable discretion. It must ultimately depend on the facts and circumstances of each case as it comes along."

Employer's Right to Require Physical Examination

Examples of contract provisions in this area are the following:

- Employees shall be scheduled for routine physical examination in the Medical Department each two years on an optional basis. Because of work assignment, some employees may be scheduled for required physical examination more often if deemed necessary by the Medical Department. The employee shall be verbally informed of the results of such examinations by the Medical Department. Upon a written

[21] 28 LA 897, 899 (1967).

request of the employee the results of an examination shall be mailed to his personal physician.

a. Before entering the employ of the Company, each person will be required to pass, to the satisfaction of the Company, a physical examination by a physician designated by the Company. The Company will pay the physician for all such examinations.

b. Before returning to work from a leave of absence for personal illness, an employee may be required to provide a statement from his physician attesting that the employee is physically, emotionally or mentally capable of performing his work. Such statement will be obtained on the employee's own time and expense.

c. The Company may require a medical examination of an employee at the time of his recall from layoff or return from any type of leave of absence or at any time during his employment for the purpose of determining whether or not he is fit for his employment. If requested, the Company's doctor will confer with the employee's doctor regarding the employee's fitness for his job.

- Persons who have been on leaves of absence may be required to take a physical examination prior to reemployment.

Under its general managerial authority, an employer may determine the initial and continued qualifications of its employees to perform their work, and it also has power (if not an obligation) to make reasonable provision for the health and safety of its employees subject, in each instance, to any limitations contained in the total contractual relationship between the parties. Except to the extent that it is restricted by the labor agreement, the employer may use physical examinations to assist it in exercising the above authority. Arbitrator Larkin expressed the general rule when he wrote in *Miles Laboratories Inc.*:[22] "Since it is management's primary responsibility to promote efficiency, safety and health, and the avoidance of accidents, as well as to determine job qualifications of employees, the arbitrator has no authority to rule against the Company's use of medical examinations as a general procedure and practice."

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[22]68-2 ARB, ¶ 8416 (1969).

As to periodic physical examinations of crane operators, this arbitrator wrote in one case:

> "The periodic physical examinations required of Crane Operators reasonably relates to their health and safety while working in the plant and to the safety of other employees working in the vicinity of the cranes. No change has been made in the nature of the examination, in the group of employees covered by it, in the fact that the Company makes arrangements for the giving of the examination and for the payment of it, and in the use which is made of the results obtained. The purpose of the examination, now as before, is to determine whether a Crane Operator is physically qualified to perform the work. If he is not so qualified, he has no contractual right to remain in the classification. For a job as directly involving safety as that of Crane Operator, an annual physical examination is not unreasonably often."

Duty of Employer to Protect Health of Employee

Generally, it is the duty of the employer to provide a safe place to work and one which does not present a health hazard beyond uncorrectable conditions inherent in the nature of the work. Elkouri and Elkouri write:

> "It would seem to be a corollary to this right that it is the duty of the employer to protect the health of his employees despite their willingness to perform heavier duties. In this regard, Arbitrator Joseph M. Klamon has stated: 'Indeed, the Company might incur a legal liability for failure to exercise due care and reasonable judgment to protect the health of operating employees. The ability to perform a job cannot be disassociated from the health hazards involved . . . and action the Company takes in this regard is definitely within the inherent rights of Management to operate the plant safely and efficiently.' "[23]

Just as a company may not order an employee to undertake a task involving an unreasonable risk to his safety or health not inherent in his job, it may remove him from a job which medical opinion establishes would be seriously injurious to his health.

In a case where progressive deterioration of eyesight impaired the ability of the employee to work with safety to himself, Arbitrator Stashower observed in *Chrysler Corp.*:[24]

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[23]In How Arbitration Works, rev. ed. (Washington: BNA Books, 1973), at 406.
[24]45 LA 464, 466 (1965).

"It must be stated that there is nothing in the labor contract which compels the Company to retain employees at work who have become physically unable to perform the duties of a classification which they hold. It is clear that the Company has found work for some such employees, but the difficulty with the situation, so far as the grievant is concerned, is that the Company has concluded, and the Chairman thinks justifiably so, that there is just no job within the plant at which it would be safe for the grievant to work."

Weight to Be Given to Medical Opinion

Management may act in a number of situations based upon medical reasons, such as terminating an employee for physical inability to perform the work or in passing over him or her for promotion. In any decision involving the physical or mental ability of an employee to do the work, competent medical evidence is of the utmost importance. In *Collins Radio Co.*,[25] Arbitrator Hebert stated: "The arbitrator believes that the only safe and reliable guide to follow in a case of this nature (allergy) is to give great weight to the medical evidence." Where the employer has employed competent medical personnel who, on the basis of the accepted methods of examination and testing, make a recommendation based on their medical findings, such recommendation is entitled to great weight. In such instances, the employer acts reasonably in following their trained and professional judgment. Arbitrator Belshaw observed in *Thompson Grinder Co.*:[26] "A company's medical staff, as the company's agent, should be allowed to exercise trained, professional judgment in dealing with an employee's health and safety."

As to whether an employee has the physical ability to do the work, the decision is to be made by a good-faith and objective evaluation of the relevant evidence, which includes principally the employee's past work history, any instances of prior or present physical difficulty, his general state of health, and medical opinions and recommendations. Where the only reliable evidence consists of the conflicting opinions of the company's medical adviser and the employee's physician, it is usually held by arbitrators that the company properly may rely upon the findings and recommendations of its own medical expert, especially where they evidence a thorough understanding of the

[25] 45 LA 718 (1965).
[26] 70-2 ARB, ¶ 8821 (1970).

employee's condition. Arbitrator Doyle expressed this view in *Hughes Aircraft Co.*[27] when he wrote:

> "It is axiomatic that the initial judgment in matters of this kind belongs to management. The judgment of the plant physician is entitled to great weight. He is conversant with the requirements of the occupation involved and the risks inherent in such work. It is generally held that where there is a conflict in the views of qualified physicians, whose veracity there is no reason to question, the Company is entitled to rely on the views of its own medical advisers."

However, the task of the company is to consider all relevant evidence of physical ability and not to rely solely on the advice of its physician, particularly where, due to the nature of the diagnosis, medical science cannot express a positive prognosis but must state opinions in terms of probabilities. One additional fact to be considered is the extent to which the employee demonstrated ability in the past to perform identical or similar work.

An employee has a right to consult a physician of his own choice and to submit the latter's findings to the company.

In an excellent analysis of the weight to be given by an arbitrator to conflicting medical testimony, Arbitrator Traynor made the following statements in *General Mills, Inc.*:[28]

> "In my view, medical evidence is not to be lightly disregarded. It should be given great weight. . . . In arriving at a decision here then, it is incumbent to analyze the doctors' reports. There seems little doubt, at least upon the record, that after the auto-truck accident in 1967 the Grievant worked regularly every day, did not see a doctor concerning his back, and made no complaints to the Company about back problems. . . .
>
> "I don't intend to impugn the abilities or reputations of the doctors who made these reports. Before they can be persuasive enough to be determinative of the issue in this case, there must be more than mere conclusions. There must be facts presented to me from which I can concur in those conclusions. These reports do not do that.
>
> "I also have to take judicial notice of the fact that these doctors operate in a climate where there is an ever-present threat of malpractice action if they are wrong. This threat tends, and rightfully so, to make them cautious and guarded in their diagnosis and prognosis. It is better to find that he is able to work on a restricted basis rather than permitting him to work on an unrestricted basis, with the possibility ever present that he might injure himself."

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[27] 49 LA 535 (1967).
[28] 69 LA 254 (1977).

In the above case, Arbitrator Traynor also comments on the conclusions of the employee's physician, whom he described as a "friendly" doctor to a long-time patient and friend.

Reference is made here to the excellent talk on "Expert Medical Evidence" by David P. Miller at the 22nd annual meeting of the National Academy of Arbitrators.[29] Among other points, he stressed that a distinction must be drawn between medical fact and medical opinion, and he suggested that in cases of differing medical opinions, the task of the arbitrator is to find some intelligent and fair basis on which to make a decision.

Referral to Neutral Physician

Examples of contract provisions in this area are the following:

- If the Company's doctor and the employee's doctor disagree, the dispute may be referred to the _____ Clinic for final determination as to whether or not the employee is fit for his job. The fees of the _____ Clinic shall be borne equally by the Company and the employee; the Company shall pay the fees of its own doctor and the employee shall pay the fees of his doctor. All examinations will be conducted on the employee's time.
- A statement from an impartial medical source, if required, shall be considered as reasonable proof necessary for this Section. If an employee is reinstated as a result of the statement of such impartial medical source, the fee charged by such impartial medical examiner shall be borne completely by the Company and the employee shall be paid for all time lost because of having been refused the privilege of returning to such available job.

In one of my cases involving the second of the above contractual provisions, I wrote:

> "On the merits the arbitrator cannot make confident findings on the evidence presently before him as to whether the grievant has the ability to perform an available job within the plant. The medical evidence is in dispute. In such instance the parties themselves have provided the method for resolving the question. In the last sentence of Paragraph N-108, the parties agree: 'A statement from an impar-

[29] In Arbitration and Social Change, Proceedings of the 22nd Annual Meeting, National Academy of Arbitrators, eds. Gerald G. Somers and Barbara D. Dennis (Washington: BNA Books, 1970), at 135.

tial medical source, if required, shall be considered as reasonable proof necessary for this Section.' Since such section includes the matter of ability to perform an available job, as well as the question of continuance on a leave status, the report of the impartial medical source is to be regarded as reasonable proof as to each. Neither the parties nor the arbitrator have had the benefit of such 'reasonable proof' in a meaningful way.

"Accordingly, the arbitrator directs the parties to select an impartial physician, preferably one who might be considered an industrial physician, who is to give the grievant another examination and, in the presence of a representative of each of the parties, is to visit the plant, particularly areas devoted to the tasks mentioned in Dr. Davis' letter of October 31, 1973. Such impartial physician is to make findings or express opinions as to what, if any, jobs the grievant is presently able to perform within the plant; and, if he finds that he is presently unable to perform any job, he is also to express an opinion as to whether the grievant can reasonably be expected to improve sufficiently within the foreseeable future to be able to perform an available job so as to warrant continuation on a leave status. The arbitrator will retain jurisdiction should either party desire to submit to him the statement of the impartial medical source. In that event the arbitrator will decide the grievance on the merits, regarding such statement as reasonable proof, and will determine how the impartial physician's fee shall be allocated between the parties."

David Miller also referred to this question in his talk, when he commented: "Use of a third medical expert in such cases is merely handing the coin to someone else to flip."

Emotional Disturbances or Mental Condition[30]

In *Consolidated Foods Corp.*,[31] Arbitrator Casselman was called upon to decide a discharge case involving a highly skilled employee with 22 years of service who then was described by his doctors as a manic-depressive with no clear prognosis. He wrote:

"The state of the medical profession and the nature of mental illness are such that it is viewed the same as a physical condition, except that predictability of correction is less certain. . . . Fault has no place in this situation. Since Grievant was helpless to prevent what he did while mentally ill and since Management could not reasonably be expected to tolerate his conduct, it would seem more reasonable to remove him from the work place until one of two things occur.

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[30] *See* Don Sears's talk, *Observations on Psychiatric Testimony in Arbitration,* in Arbitration and Social Change, *supra* note 29, at 151.

[31] 58 LA 1285 (1972).

"1. He fully recovers and can establish his recovery to the reasonable satisfaction of Management's physicians, or to a board of those psychiatrists chosen jointly by a physician selected by Management and a physician designated by the Union on Grievant's behalf.

"2. He reaches retirement age. If he reaches retirement age first, he should be retired under the pension plan then current. . . ."

Allergies

Medical evidence is particularly important in resolving any dispute involving a claim that an employee is unable to perform the duties of a job by reason of being allergic to a substance or condition with which he must work. Among the factors to be considered are the following:

1. Is management's decision based on competent medical opinion?
2. What medical tests were made? What is the extent of agreement among the examining or treating physicians?
3. How does the allergy manifest itself?
4. How has it affected the employee's attendance, his ability to do the work?
5. How long has the employee been suffering from this condition? Has it been improving, getting worse, remaining about the same?
6. Is there another job in the plant in which the employee would be completely free from the offending substance or condition? If so, can he or she contractually be transferred to such job?
7. Is the only known cure complete avoidance or exposure to the offending substance or condition?
8. Would placing the employee on sick leave be helpful?
9. Would the health problem reoccur upon returning to work after sick leave?

Arbitrator Duff explained in *Kurtz Bros., Inc.*:[32]

". . . where an allergy or similar physical condition prevents an employee from working in an industrial environment where certain substances such as printers dust and ink are present, and the allergic condition persists for many years and it appears to be a permanent disability as far as work at this plant is concerned, it constitutes proper cause for termination of employment. The Grievant cannot

[32]43 LA 678 (1964).

carry out the required work duties for which she was hired, and Article II does not require that a sick leave be extended beyond a reasonable length of time."

Alcoholism[33]

An example of a contract provision in this area is the following:

- Without detracting from the existing rights and obligations of the parties recognized in the other provisions of this Agreement, the Company and the Union agree to cooperate at the plant level in encouraging employees afflicted with alcoholism to undergo a coordinated program directed to the objective of their rehabilitation.

Alcoholism is sometimes given as the cause of absenteeism or of other work-related offenses. It is now generally considered that alcoholism, which has taken control of an individual's free will, is an illness that usually requires a program of assistance for a cure as well as rigorous self-discipline. Not all absences due to excessive use of alcoholic beverages fall into this category. A distinction must be made between the individual who is master of his drinking and the compulsive drinker who has lost control of his ability to keep himself in check.

An employee falling into the latter category is not unlike the chronically ill employee. One of the considerations is whether the "just cause" standard contemplates greater efforts at rehabilitation for alcoholics than those expended for individuals suffering from some other forms of chronic illness. Unlike some employees in the latter category, the alcoholic who conquers the drinking habit often restores himself or herself to good health and is able to regain status as a useful employee. One of the primary considerations in cases of this type is the future prospects of the employee if he or she is reinstated after discharge. On this question of future prospects, rehabilitation efforts after discharge may be considered. In *Texaco, Inc.,*[34] Arbitrator Prasow concluded: "Some risks are certainly involved, but the gains from success are of such inestimable value to the person, his family, to the Company, and to society as a whole that they seem

[33] *See* Chapter 5 on alcoholism in Arbitration—1975, Proceedings of the 28th Annual Meeting, National Academy of Arbitrators, eds. Barbara D. Dennis and Gerald G. Somers (Washington: BNA Books, 1976), 93–137.

[34] 64-2 ARB, ¶ 8443 (1963).

worth the effort. It is for this reason that the Review Board, or a majority thereof, believes that a modification of the discharge penalty is warranted."

In one case in which I was not persuaded that the grievant presently possessed the physical ability to perform the work in an acceptable manner with regular attendance, I issued the following award:

> "Mr. _____ is to be placed on a medical leave of absence without pay for 60 calendar days from the date of this award, which leave may be extended by the mutual agreement of the parties. At the end of such period of leave if it is shown that he has attended AA meetings regularly, that he has fully cooperated with its members who are endeavoring to help him, that he has not partaken of any alcoholic beverages during the period of leave, and that he is physically able to return to work, his discharge is to be set aside and he is to be reinstated to his former job without back pay but without loss of seniority. If he is unable to meet these conditions, the discharge is upheld."

However, where the evidence shows that the employee offers little or no hope for successful rehabilitation, Arbitrator Kesselman concluded in *American Synthetic Rubber Corp.*:[35]

> "On the other hand, it is also generally recognized that there are limits to what a company can and should do to help an alcoholic employee overcome his problem. It is unreasonable to expect any company to carry indefinitely an employee whose chronic overindulgence presents a potential danger to himself, fellow employees or plant equipment or who, because of his drinking problem, cannot perform his work duties in a responsible and efficient manner. The time does come when an employer may reasonably conclude that its efforts to encourage rehabilitation have failed and that prospects for substantial improvement are so slim that the employment relationship must be terminated."

Unhealthy Working Conditions

Extra Pay

An example of a contract provision in this area is the following:

- Environmental differentials, as set out in Appendix J, are authorized for exposure to an unusually severe physical hardship under circumstances which cause significant phys-

[35] 73-1 ARB. ¶ 8070 (1973).

ical discomfort or distress not practically eliminated by protective devices.

- Such pay is also authorized for exposure to an unusually severe working condition under circumstances involving exposure to fumes, dust or noise which cause significant distress or discomfort in the form of nausea, or skin, eye or nose irritation or conditions which cause abnormal soil of body or clothing, etc., and where the distress or discomfort is not practically eliminated.

An Excuse for Insubordination

Much weight must be given to the opinion of experienced supervisors that a particular working condition is safe and not harmful to the health and well-being of the affected workers. However, their opinion is not conclusive; and they exceed their authority, in the absence of an emergency, when they order employees to continue working under conditions that pose a significant hazard to health or safety beyond that inherent in their usual duties. It is well recognized that under such conditions employees are not insubordinate when they refuse the work assignment, and in such instances they are not guilty of participating in a strike or a work stoppage even where the refusal may involve group action. If employees act in concert in refusing work under conditions injurious to their health and which are not inherent to their jobs, they are only asking the company to do what it is contractually obligated to do, namely, excuse them from working under such conditions, and are not through concerted action withholding their labor in order to put economic pressure upon the employer for the purpose of achieving some contractually improper concession. Thus, the initial question is whether the grievants were justified in refusing to obey direct orders to return to their machines. If not, and if they were sent home for such refusal, they are not entitled to pay for the unworked hours.

The standards for judging whether fear of injury to health justifies such refusal are well established. First, an objective standard based on the circumstances, and not the expressed subjective feeling of the employee, is controlling. As Arbitrator Teple observed in *Ohio Edison Co.*:[36] "This is not to say that an

[36]70-2 ARB. ¶ 8445 (1970).

employee may claim that any task is dangerous and, on this basis alone, safely ignore his instructions. The circumstances must appear to furnish a reasonable basis for the claimed apprehension. . . ."

Second, the question of reasonableness must be judged by the facts existing at the time. Thus, a reasonable basis for a fear to personal health must be predicated upon a present danger and not upon an abated past danger or the supposed possibility of a future danger. The defense must be based on the circumstance existing at the time the order to perform the work in question is refused.

Third, the matter is to be measured by the standard of a normal, ordinary person and not by any finding that a particular employee may be overly cautious or unusually daring.

Fourth, the fear must be real and genuine and not feigned for the purpose of offering an excuse for refusing to obey a supervisor's order.

Fifth, the fact that the particular task may subsequently have been performed without incident is not determinative of the question, nor is the fact that supervision believed and stated at the time that it could be performed without danger to the employees. The question is whether the grievants, individually or collectively, as normal, ordinary persons, honestly believed, with a reasonable factual basis for such belief, that the performance of the work order involved a danger to their health beyond that inherent in their normal job duties.

Slowing Down in Productivity or in Learning New Procedures After Long Service

May an employer select an employee for layoff from a group of employees in a classification on the ground that he or she no longer meets the qualifications necessary for the work where new methods and procedures are being introduced and he or she has generally "slowed down" after working many years for the company? In answering the question in the negative, I reasoned on the basis of the facts in the case:

> "The protection of the seniority clause is one of the most valuable rights of an employee. It is often referred to as a property right. It assumes that if an employee is faithful in his work and reasonably skilled and if the volume of business permits, the employee will have employment until his retirement for age, per-

sonal preference, or ill health. The clause implies that a worker will go through the normal cycle of learning, the period of greatest efficiency, and a gradual slowing down after the peak in life has been reached. Unless the Contract clearly compels, the cloak of the seniority clause should not be cast off during the autumn of life so long as the employee has not reached the retirement age and has the ability to perform the work usefully for the full eight-hour shift at an acceptable pace for one of his years of service and without unduly impairing the efficiency of his department.

"Allocation of work is a prerogative of management, and the arbitrator has no desire to suggest how maintenance in the bottling plant should be handled. But it seems to him that the work can be so distributed as to keep grievant fully employed within his classification on work which he is qualified to do."

Employing the Handicapped

One of the federal laws concerning the employment of handicapped individuals is found in 29 U.S.C. Section 793. It provides in part:

"§ 793. Employment under Federal contracts. Amount of contract or subcontracts; provision for employment and advancement of qualified handicapped individuals; regulations.

"(a) Any contract in excess of $2,500 entered into by any Federal department or agency for the procurement of personal property and nonpersonal services (including construction) for the United States shall contain a provision requiring that, in employing persons to carry out such contract the party contracting with the United States shall take affirmative action to employ and advance in employment qualified handicapped individuals as defined in section 706(6) of this title. The provisions of this section shall apply to any subcontract in excess of $2,500 entered into by a prime contractor in carrying out any contract for the procurement of personal property and nonpersonal services (including construction) for the United States. The President shall implement the provisions of this section by promulgating regulations within ninety days after September 26, 1973. Affirmative enforcement; complaints; investigations; departmental action.

"(b) If any handicapped individual believes any contractor has failed or refuses to comply with the provisions of his contract with the United States, relating to employment of handicapped individuals, such individual may file a complaint with the Department of Labor. The Department shall promptly investigate such complaint and shall take such action thereon as the facts and circumstances warrant, consistent with the terms of such contract and the laws and regulations applicable thereto."

A lengthy quotation is appropriate from Arbitrator Dworkin's excellent analysis on the employability of the handicapped in *Glass Containers Manufacturing Institute.*[37] He wrote that, in the absence of any controlling federal or state law:

> "No distinction is warranted in the employment of handicapped persons; the same standards should be used in evaluating the handicapped person's qualifications as related to the job under consideration. . . .
>
> "It has been established by widespread experience in the entire spectrum of American industry that physically handicapped persons are employable, and that their employment is consistent with sound business principles, as well as desirable from a human standpoint. . . .
>
> "The President's Committee on Employment of the Physically Handicapped studied this problem and arrived at several conclusions which dispel the myths that have long militated against hiring of the handicapped. Among the conclusions arrived at are:
>
> "1. Handicapped workers are *not* unsafe; when properly placed, trained and supervised, they are as safe as or safer than non-handicapped workers. In fact, the U.S. Department of Labor survey concluded that, 'impaired persons have fewer disabling injuries than unimpaired ones when exposed to the same work habits.'
>
> "2. The hiring of handicapped workers does not affect workmen's compensation rates. If handicapped persons experience a high accident rate over a period of time, workmen's compensation rates would be affected; however, the same is true of non-handicapped workers.
>
> "3. Absenteeism among handicapped workers is no greater, and often less, on the whole, than among non-handicapped workers.
>
> "4. Handicapped workers generally produce at the same rate as other workers; when properly placed in jobs they can handle, handicapped workers as a group produce at slightly higher rates than unimpaired workers on the same jobs.
>
> "5. Employer surveys have shown that handicapped workers often have unusually good morale and work attitudes, perhaps because they find it difficult to get work and are grateful when they do.
>
> "The American Federation of Labor has issued a policy statement on the hiring of handicapped workers, which the arbitrator feels is particularly applicable to the subject matter under consideration: 'America's handicapped workers are entitled to prove their merit. Our industries and trades should benefit from maximum employment of their skills. Handicapped workers when placed on the right job are capable workers. Studies have proven that they are productive and efficient. Too often the practice has been to consider partially disabled workers capable of only the unskilled, routine type of

[37] 66-3 ARB, ¶ 8999, 47 LA 804 (1966).

work. The skilled mechanic who suffered a severe injury was offered a watchman's job on his return to work. Today a new attitude must be developed—consideration of the worker on the basis of all of his abilities, not rejection for his disability.'

"The stated policy of the National Association of Manufacturers is as follows: 'The American system of private competitive enterprise should provide every opportunity for the handicapped person who is willing and qualified to perform the job. Employers know from experience that the handicapped individual, when matched to the requirements of the job, is no longer handicapped. Employers should continue to make every effort to provide still wider employment opportunities for the handicapped by adhering to those personnel policies which promote the hiring, retention and advancement of these individuals on a sound and fair basis. Thus the human and economic needs of the handicapped are best served while they, on their part, can become self-supporting and thereby make their contribution as self-reliant members of society.'

". . . The arbitrator was urged by the parties to himself study the available jobs throughout the plant for the purpose of determining whether there existed any work or job to which the grievant could be assigned. The arbitrator, in the company of the parties and the grievant, toured the plant and observed the various jobs and operations. . . .

"After a careful survey of the plant operations and the available jobs, the arbitrator was convinced that no job is presently being performed which could satisfactorily be handled by the grievant and which he could perform without danger to himself from moving parts and equipment and without subjecting fellow employees to unusual hazards."