

<b>In the Matter of Arbitration</b>	)	<b>OPINION AND AWARD</b>
	)	
<b>Between</b>	)	
	)	
<b>City of Oakdale, Minnesota, employer</b>	)	<b>BMS case No. 14—PA-0142</b>
	)	
<b>And</b>	)	
	)	
<b>Law Enforcement Labor Services, Inc.,</b>	)	
<b>Local 197, union</b>	)	<b>Issued December 9, 2013</b>

**Appearances:**

For the employer: Mary D. Tietjen, Kennedy and Graven Chartered, Minneapolis, Minnesota.

For the union: Scott A. Higbee, staff attorney, Law Enforcement Labor Services, Inc., St. Paul, Minnesota.

**Procedures:**

The undersigned was selected as arbitrator in the present matter through the procedures of the Minnesota Bureau of Mediation Services. A hearing was held at Oakdale City Hall on November 7, 2013, commencing at 9 a.m. With simultaneous exchange of post-hearing briefs on November 25, 2013, the record in this matter was closed.

**Central Facts: Medical**

On February 23, 2011, patrol Officer T----, responding to a call, slipped in an unplowed parking lot and injured her left ankle. She was subsequently examined by Dr. Javid Akram, MD of Aspen Medical Group-Maplewood, who diagnosed her with a sprained ankle. [Employer Exh. 3] Dr. Akram released her to return to work with no restrictions. [Employer Exh. 4] Officer T---- continued in Dr.

Akram's care, but the injury failed to heal.

As a result of the continuing problem with her foot, grievant came under the care of Doctor Maren Elze D.P.M. on May 16, 2011. One of Dr. Elze's first decisions was to order a Magnetic Resonance Imaging (MRI) exam later in May. This exam showed no significant tendon tearing [Union exh. 4]. As a result, the conservative course of treatment was continued. So also did the grievant's pain continue. From time to time, Officer T---- was given cortisone shots to relieve the pain for a while. Cortisone treatments are subject to limitations on their strength and frequency due to the risks that this steroid poses. (Perhaps the most comprehensible to the lay person is the leaching out of calcium from bones in the neighborhood of the shot, leading to osteoporosis.)

As Officer T----'s "persistent pain"---Dr. Elze's words from Union Exh. 4---continued, the "point of needing to pursue more definitive treatment was reached" (again, Dr. Elze's words). A second MRI was conducted in April 2013. This MRI revealed evidence of a 'low grade partial tearing of the posterior tibial tendon," which "correlated with her symptoms." (Dr. Elze) As a result, a surgical fix was decided upon; that surgery was carried out on June 25, 2013.

**Central facts: contractual**

Article 26.1 of the labor agreement reads as follows:

Any Employee injured on duty through no fault of the Employee, shall receive up to a maximum of ninety (90) working days, seven hundred twenty (720) hours, with pay after the first five (5) days, forty (40) hours, of missed scheduled working hours are deducted from sick leave. During that ninety (90) day period, the Employer shall reimburse the employee the difference between the Employee's regular earnings and Worker's Compensation benefits. For, purposes of calculation of injury on duty benefits, one (1) day shall be defined as one (1) eight (8) hour day.

## **Analysis and Discussion**

The grievant and the union argue that article 26.1 applies straightforwardly to officer T----'s situation. The employer has advanced a variety of reasons to dispute this position. We shall examine these in no particular order.

The employer observes that the grievant is an active person, participating in a variety of athletic and recreational pursuits, including running, volleyball, sledding and snowboarding (or taking pictures of those, perhaps), and kettlebell exercises. The employer argues that some or all of these might have caused the injury which the second MRI detected. The employer submits e-mails written by grievant that indicate she is a vigorous and enthusiastic participant in these events: examples are (1) January 11, 2012: "Body combat plus kettlebells...someone carry me to bed." (2) April 25, 2012: "Holy kettlebells Batman! I hope like hell that no one runs from me tomorrow cause my legs r like Jello n I might just run them over.....just saying" or (3) January 22, 2012: "Ahhh...I love me some volleyballl 3-0 and a new bruise! Totally worth it!" There is more in Employer Exh. 7, but this serves to illustrate.

In its brief, the employer contends that "no reasonable doctor or person could refute on cross-examination that likelihood or possibility [of a second injury]." That sort of conjecture about something that did not happen----cross-examination of Dr. Elze---must be set in opposition to Dr. Elze's clear and convincing confidence that she had gotten it right: the tendon damage was consistent with problems that developed after the February 23, 2011 accident. The conjecture also stands in contrast with Dr. Elze's understanding and experience with issues about MRI reports.

Although Officer T---- saw Dr. Akram a couple of times right after the injury, she has been under Dr. Elze's care ever since May 2011. Dr. Elze is appropriately positioned to discuss Voss's condition and whether it has been worsened by the officer's sports and recreation. T----'s persistent ankle and foot

pain are consistent with the tendon tearing on Feb 23, 2011: so says her podiatrist, a doctor who knows feet. We put that up against conjectural opinions offered by Chief Sullivan and both Capt. Grill and Capt. Kettler. The doctor wins.

But is the doctor's written opinion somehow tainted by the manner of its conveyance? Should the doctor have been testifying in person so she could be cross-examined? This arbitrator has certainly sworn a number of MD's, psychiatrists, etc. over the years in both arbitration and Minnesota veterans' preference hearings, so I was interested to see what Elkouri and Elkouri have to say: "While doctors sometimes testify in person, their testimony is more often offered in the form of written statements or affidavits." [*Elkouri & Elkouri: How Arbitration Works*, 7<sup>th</sup> ed., p.8-66] (The gist of E&E's subsequent discussion is to support giving "full weight" to such statement and affidavits in most cases.)

Was grievant wrong to have followed the conservative course of treatment pursued by Dr. Elze? If we adopt the concept of "reasonable person" approach used sometimes in appraisal of workers' refusal to obey orders when personal safety is involved, or the "reasonable woman" standard sometimes applied to issues of workplace sexual harassment we cannot say that following her doctor's recommendations was unreasonable.

The employer argues that allowing late or much delayed calls on injury on duty cases might open the flood gates to claims by other employees. This seems unsupported by the very evidence used to show that T----'s case is a real outlier, Employer Exh. 11. Capt. Kettler's testimony that this will be "unfair to the taxpayers" may be true, although the scale of that unfairness may be rather small.

It is uncontested that both the surgery and post-operative partial salary replacement have been

covered by workers' compensation. The document offered in support of this (Union Exh. 24) contains the cryptic sentence: "Payment remains subject to eligibility." But the date of the injury (February 23, 2011) and the date of Union Exh. 2 (June 19, 2013) are both right there with no question marks posed. Employer witnesses did not know whether the City opposed or appealed the granting of workers' comp coverage.

The employer contends that grievant failed to keep the department informed of her medical issues and developments. In a July 11, 2013 e-mail in Employer Exh. 8, Chief Sullivan wrote to Officer T---- that "In fact, from the point that I heard you were going to have the surgery to the date of the surgery was only a few days." This may be perfectly true, but as Capt. Kettler testified on direct examination "it was pretty common knowledge that she [T----] was having surgery. The last month or so was spent talking about scheduling." But on cross-examination, Kettler testified: "I told her that she should submit something. We needed something to show that this was a work-related injury." As shown by the discussion earlier, long term observation of the persistent foot and ankle pain by Dr. Elze, continuing attempts to get the problem solved by a conservative course of treatment, but culminating in a recommendation of a surgical fix does show just that. Officer T---- might have saved everybody a lot of time if she had listened to Capt. Kettler and done that herself.

But perhaps communications failure was a two-way street. In a July 10, 2013 e-mail to the Chief, Officer T---- (apparently in response to an earlier e-mail from Capt. Grill to Linda Strand, which discusses the Employer's approach to Article 26.1 and on which T---- is not cc'd), T---- wrote: "And why wasn't this brought up to me when I stopped in [presumably, a few days before the surgery on June 25]?" The answer to that question is simple: nobody had thought about it---the date of the Grill-Strand e-mail is July 10.

## **Conclusion**

Consistent long-term care by Dr. Elze, a commitment to a reasonable, conservative course of treatment, and eventual need for “definitive treatment” resulting in surgery generate both the delay between the accident and its surgical fix and the conclusion that the surgery was not “elective,” but needed to remedy the injury incurred on February 23, 2011.

## **AWARD**

The grievance is sustained. The grievant is due the benefit provided by Article 26.1 of the labor agreement, and shall be made whole for sick, vacation and holiday or other leave which has been used to top up her pay.

**Given this ninth day of December, 2013 at Saint Paul, Minnesota.**

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**James G. Scoville, Arbitrator.**