

IN THE MATTER OF ARBITRATION BETWEEN

ELECTROLUX HOME PRODUCTS, INC. )  
"Employer" ) FMCS Case No. 050719-57611-7  
AND ) Discharge  
IAMAW, DISTRICT LODGE NO. 165 )  
"Union" )

NAME OF ARBITRATOR: John J. Flagler

DATE AND PLACE OF HEARING: December 1, 2, 2005

DATE OF RECEIPT OF POST-HEARING BRIEFS: February 10, 2006

**APPEARANCES**

FOR THE EMPLOYER: Keith L. Pryatel, Esq.  
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**THE ISSUE**

Whether the Grievant committed three "major" disciplinary infractions within a six month time period?

If not, what shall be an appropriate remedy?

## INTRODUCTION

To sustain this discharge grievance, the Arbitrator would, inter alia, have to make the following counter-intuitive and anti-arbitral findings of fact:

- A Shop Steward dedicated to the Union brotherhood lied under oath when she testified that the Grievant stubbornly refused to push or pull freezer door carts, and stated that he was only going to make an effort to assemble “small parts.”
- An orthopedic surgeon with 30+ years of experience not only misdiagnosed the Grievant, but similarly lied under oath at the hearing
- That it was perfectly permissible for the Grievant to refuse to abide, or even make bona fide efforts to abide by the Company’s medical restrictions, insisting instead that he would only adhere to those of his own personal physician.

## PERTINENT CONTRACTUAL PROVISIONS

### ARTICLE 1

#### Purpose

Section 1.1 This Collective Bargaining Agreement (hereinafter referred to as the “Agreement”) constitutes the complete agreement between the parties hereto, and no additions, waivers, deletions, changes, or amendments shall be made during the term of this Agreement, except by written agreement of the parties.

### ARTICLE 2

#### Recognition

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Section 2.4 The parties realize that in order to provide maximum opportunity for continuing employment, good work conditions and good wages, the parties must be in a strong marketing position, which means we must produce efficiently and at the lowest possible costs consistent with fair labor standards. The parties assume responsibility for cooperating in the attainment of these goals. The parties therefore agree that they will cooperate to insure a full day’s work on the part of employees, that they will combat absenteeism and any other practice which restricts production; that they will strive to improve production, eliminate waste in production, conserve materials and supplies, improve the quality of workmanship, prevent accidents, and strengthen good will between the employer and the employees, the customers, the union, and the public. All the above to be within the framework of the collective bargaining agreement.

ARTICLE 6  
Management Responsibilities

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Section 6.1. The Company retains the sole right to manage its business, including the right to decide the number and locations of plants, the extent to which its plants or any part thereof shall be operated, shutdown, consolidated, or moved to new locations, to determine the products to be manufactured, the method of manufacturing, the schedules of production, quality, the processes of manufacturing, location of production; to maintain order and efficiency in its plants and operations, to establish and enforce reasonable policies, and to determine production standards, to hire, lay off, assign, transfer and promote employees, subject only to such restrictions covering the exercise of these rights as are expressly provided in this Agreement.

ARTICLE 14  
Arbitration

Article 14.1. If a grievance is not satisfactorily settled when processed through the Grievance Procedure, the grievance may be submitted to arbitration and the moving party will specify the issue to be arbitrated.

Section 14.2. Within ten (10) working days after the decision rendered by the Company Representative in the Section Step of the Grievance Procedure, either party desiring to arbitrate a matter which is subject to arbitration shall notify the other party of its intent to arbitrate and state its nomination to the arbitration board. Within five (5) working days the other party shall nominate a member to the board. The parties may mutually agree to an Arbitrator or apply to the Federal Mediation and Conciliation Service for a list of Arbitrators. Within five (5) working days after receipt of such list, representatives of both parties shall meet to choose one person from such list by alternately striking a name there from, beginning with the party initiating the arbitration until only one name remains and that person shall be the Arbitrator of the case. Either party shall have the option of rejecting the initial list and requesting a second list from which the Arbitrator will be chosen.

Section 14.3. The arbitration board or Arbitrator acting under this Article shall not have the power to add to, to disregard or to modify any of the provisions of this contract, and shall have authority to decide only the issues submitted.

Section 14.4. The expense and compensation of the Arbitrator shall be borne by and divided equally between the Union and the Company.

Section 14.5. Decision of the Arbitrator shall be binding on both parties.

SCHEDULE "2"

Section 1. The following rules are hereby established governing the conduct of Employees during the life of this Agreement:

### Minor Offenses

1. Willfully and without either reason or excuse going to parts of the plant away from assigned work areas.
2. Failure to clock in or out.
3. Soliciting funds or selling tickets in the plant for any commercial purposes.
4. Failure of an employee to report an accident in which the employee is involved.
5. Failure, without reasonable excuse, to give the Company at least thirty (30) minutes advance notice when unable to report for work as scheduled, including overtime.
6. Deliberate loafing.

The penalties for violation for the above rules are:

First Offense	Warning notice
Second Offense	Final warning notice
Third Offense	Three (3) work day suspension
Fourth Offense	Discharge

A warning notice of minor offense will be cleared from the Employee's record after six (6) months.

When an employee is discharged for a fourth minor offense and such discharge is appealed to arbitration, all pending offenses shall be subject to review in such proceedings.

### Major Offenses

1. Insubordination, including refusal to carry out work orders or instructions from Supervisors.
2. Hiding Company tools or parts or secreting them in places where they obviously do not belong.
3. Violation of safety rules.
4. Careless use of Company property.
5. Defacing Company property, marking wash rooms, etc.
6. Reporting for work under the influence of alcohol or illegal drugs, including abuse of legally prescribed drugs.
7. Willful unauthorized entry on Company premises.
8. Deliberately clocking another Employee in or out.
9. Smoking in unauthorized places at unauthorized times.

The penalties for violation of the above rules are:

First Offense	Final warning notice
Second Offense	Five (5) work day suspension
Third Offense	Discharge

A warning notice of major offense will be cleared from the Employee's record after six (6) months.

When an Employee is discharged for a third major offense and such discharge is appealed to arbitration, all offenses shall be subject to review in such proceedings.

## **BACKGROUND**

Production and Maintenance employees of the St. Cloud plant are represented for collective bargaining purposes by District Lodge No. 165 of the International Association of Machinists and Aerospace Workers. Some 1,300 Production and Maintenance employees work at the St. Cloud plant, which operates across three shifts, with the second shift spanning 3:00 p.m. – 12:00 p.m.

The collective bargaining agreement contains no “just cause” disciplinary protections. Instead, the parties have bargained a series of “minor” offenses, “major” offenses, and “offenses subject to immediate discharge.” Any act of “insubordination, including refusal to carry out work orders or instructions from supervisors” is deemed to be a “major” offense that is to be met with termination from employment in the event any three “major” offenses are accumulated within a six month time frame.

Among other tasks, the production processes at the plant utilize operations known as “small parts” and “door stop.” The “small parts” job involves the assembly, at a waist-level work table, of a small lock that is inserted into the side of the freezer doors; application of masking tape over holes pre-drilled into the freezer doors so that when insulating foam is applied, it does not leach out; and shuttling of the pre-loaded freezer doors 30 to 40 feet to the “door stop” staging area. None of these tasks for duties involve overhead lifting of any nature and none involve repetitive or continuous pushing or pulling at shoulder level or above. The freezer doors, which have a maximum, unfoamed weight of 14 pounds are pre-loaded into the movable carts by other departments, and thus there is almost no lifting associated with “small parts.” The handles of the door carts sit 3 feet 9 inches off the ground, and the carts travel along a flat cement surface when being moved to the staging area adjacent to the “door stops.”

The “door stop” job requires an operator standing on an elevated platform to slide the freezer doors from their staged position on the carts, and place them on a series of rubber rollers that sit three feet off the surface of the working platform. This job also does not demand either overhead lifting to any degree, or repetitive pushing or pulling at waist level or above. Once placed on the rubber rollers, a nylon plug is inserted into a pre-drilled hole at the bottom of the freezer door, and a metal doorstop is also affixed to the bottom of the door by use of a self-engaging pneumatic drill. The pneumatic drill is situated just over three feet off the platform floor, so that it can be easily married up to the screw heads that anchor the freezer’s doorstop.

The Grievant began his Electrolux employment on August 29, 2003. In 2003, he claims to have suffered a workplace injury to his right shoulder while placing racks into freezer units. The Grievant came to be treated by Dr. Lori Schaap of St. Cloud Orthopedic Associates, Ltd. Who diagnosed him with “right shoulder impingement” and at various times limited him to “no repetitive motion,” “no overhead reaching,” lifting “limited to 10 lbs.,” or “no repetitive

lifting.” Later, however, the Grievant’s right shoulder condition improved, and by February 10, 2005, the only restrictions Dr. Schaap placed on the Grievant was: “No away from body use of R arm.” Also, in her February 10<sup>th</sup> report sent to Electrolux, Dr. Schaap did not note any lifting, overhead reaching, or repetitive motion restrictions for the Grievant.

On December 3, 2004, Electrolux had an independent medical examination performed on the Grievant by Dr. Richard Strand, an orthopedic surgeon. Dr. Strand issued a four page single-spaced detailed report wherein he concluded:

At the present time, he is certainly able to work and the only restriction that I would have for him would be no repetitive overhead lifting. Down at waist level and below I would not restrict his eight lifting or his pushing or pulling weight. Repetitive pushing and pulling at shoulder level or above would be restricted. He is able to sit, stand, walk, kneel and stoop without restrictions.

On June 8, 2005, a verbal altercation developed on the plant floor between bargaining unit members Viola Massaro, Sandra Montag, and the Grievant. Shift Area Manager Randy Granholm and Feeder Area Manager Stan Schelonka were summoned to the “small parts” area, and quickly interviewed them after hailing a Union Steward. Montag and Massaro, also a Union Steward of the area, stated that the Grievant was refusing to help move the carts of doors. Instead, the Grievant stated he would only put together the small locking units used in the freezers. Montag and Massaro stated that the same refusal by the Grievant had occurred the previous day on June 7<sup>th</sup>. The Grievant, when separately interviewed on June 8<sup>th</sup>, blamed Massaro and Montag for not helping out; denied yelling at them; and stated that some of the work tasks in “small parts” were not consistent with his medical restrictions.

Granholm thereafter contacted Safety Manager, Gary Nierengarten, and read the Grievant’s work restrictions from Dr. Schaap and Dr. Strand. Both Granholm and Nierengarten believed “small parts” to be well within the Grievant’s medical restrictions, but felt it best to send the Grievant home early that evening so that they could double-check their assessments with the on-site Plant Nurse.

The next day, Granholm, Nierengarten, Plant Nurse Jennifer Young and Labor Relations Manager Kelly Fleming met to review the Grievant’s documented medical restrictions and tasks. They agreed that the Grievant could safely perform all of the assigned tasks within “small parts” and “door stops.”

When the Grievant arrived for his scheduled shift on June 9<sup>th</sup>, he was assigned to do “door stops.” After a trainer demonstrated to the Grievant how to perform the job, the Grievant attempted just four freezer doors before announcing that he could no longer undertake the assigned tasks because he believed them to be inconsistent with his own physician’s restrictions. Before the Grievant had performed any tasks in “door stops,” Plant Nurse Jennifer Young had visited that site and personally observed its operations to ensure they were within the Grievant’s medical restrictions from Drs. Schaap and Strand.

After his work assignment refusal, the Grievant was brought into a disciplinary conference where, in the presence of Union Steward Awel Mohammed, he was issued his first “major” warning for insubordination. In the disciplinary meeting, the Grievant demanded the names of those he could hold accountable were he to injure himself in the disputed assignment.

On June 10<sup>th</sup>, the Grievant returned to “small parts,” and again, a on-the-floor dispute developed with his fellow bargaining unit members. He had again refused to push carts to the door stop work station. At the time Supervisor Jenson notified him that as a second warning he was subject to a five day suspension. The Grievant responded that he did not care how many suspensions he got, the Company should fire him because he was not accepting suspension. He left the plant only after Supervisor Granholm threatened to call the police. Thus, the Grievant received his second “major” warning and an accompanying five day suspension for refusing to shuttle the door carts in the “small parts” area and was escorted from the building by Granholm and Union Steward Awel.

On June 17<sup>th</sup>, the first day the Grievant returned from his disciplinary suspension, the Grievant again refused to assist in moving door carts on the “small parts” job. The Grievant again stated that he was unable to do the pushing of carts because of his physical restrictions.

Because he had now accumulated three “major” disciplinary infractions within a six month time span, the Grievant was terminated from employment.

### **POSITION OF THE COMPANY**

Notwithstanding the fact this is discharge dispute, it is the Grievant who shoulders the burden of proof. The labor contract is void of “just cause” disciplinary protections, and the parties have instead negotiated that certain conduct will be met with a greed upon level of discipline. In this regard, “insubordination” is a “major” offense that is to be met with termination if three such infractions are accumulated within any rolling six (6) month time period.

Here, the Grievant freely admitted to his refusal to carry out the production assignment of management, with a claim that such caused him to experience “pain,” and allegedly were at odds with his treating physician’s stated restrictions. Arbitral jurisprudence holds that failure to respond to a proper order by reason of a claim of health condition is insubordination unless the health condition is satisfactorily established by the one claiming it.

The Union submits as support for the Grievant’s physical impairment claim, the testimony of his personal physician, Dr. Schaap. The Company counters with the testimony of Dr. Strand. It is not at all unusual that competent doctors will honestly and in good faith reach different conclusions from the same clinical records and physical exams. Reasonable people can agree to disagree, and Electrolux is willing to concede that both Drs. Schapp and Strand are reasonable individuals.

What is an arbitrator to do when confronted with such “battling of the doctors?” The Company’s conclusion as to when the employee is “physically able” to return to his job should not be rejected by an arbitrator unless the Company’s action is found to be unreasonable under the facts. In the absence of error, unreasonableness, arbitrariness or capriciousness, we feel the employer has the right to use its judgment as to which physician’s opinion it will depend upon as being most reliable,

Electrolux’s relied upon physician, Dr. Richard Strand, may not have been familiar with the tasks and duties within the plant, Nurse Jennifer Young most certainly was, and she relied on Dr. Strand’s written medical report after viewing first hand each of the group of work tasks that the Grievant was asked to undertake. On the other hand, there is no evidence that Dr Schaap knew anything about the Grievant’s required tasks and duties in either the “small parts” or “door stop” jobs.

There remains one other factor for the Arbitrator to consider before reaching the “merits” of this case; to with, credibility. Obviously, a worker’s self report of “pain” when asked to take on work tasks in a production plant is not enough. Neither is the mere assertion of safety concerns enough to establish a defense to refusal to obey a direct work order. So how does an arbitrator go about deciding whether this Grievant really did experience “pain” when Electrolux asked him to perform tasks that he hoped to avoid? The answer is by examining all of the same credibility factors and tests that an industrial arbitrator is traditionally called upon to consider, i.e., (1) which witnesses are the more credible? Or (2) which version of the disputed events is the more believable?

On this score, the record facts decidedly favor Electrolux. Consider the following:

A Shop Steward subpoenaed to the hearing testified that the Grievant stubbornly refused to perform the simplest of tasks on the “small parts” job – shuttling loaded carts of doors to a staging area – because he wanted instead to sit at a table and assemble the small locks that are eventually inserted into the freezer units. Not surprising, this left two of the Grievant’s co-workers (both who happened to be female) visibly upset. When the Grievant’s own treating physician appeared at the hearing and testified after viewing the video clip of the cart shuttling tasks, she stated that such tasks were well within the Grievant’s work restrictions.

Even before this surprising testimony, there was medical evidence that the Grievant was “faking it.” Thus, when Dr. Richard Strand examined the Grievant in his December 3, 2004 independent medical evaluation, Dr. Strand’s 30+ years of orthopedic experience told him that the Grievant was purposely restricting his movements in order to make his right shoulder condition seem worse than it really was. The “cog wheel” movements and active resistance of the Grievant told Dr. Strand that the Grievant was attempting to make his right shoulder condition appear much worse than it was.

The Grievant testified that Dr. Strand spent a mere six minutes examining him before authoring his independent medical evaluation. The precise amount of examination time seemed to fluctuate over the course of the hearing from six to ten minutes. Dr. Strand

strenuously denied this assertion, terming it a bald-faced lie. Dr. Strand explained, a Somali interpreter was needed to assist in the Grievant's medical evaluation, and it would have been impossible to obtain the most fundamental background of the Grievant which exists in the IME report given the time constraints of using an interpreter.

The credibility nod, then, surely goes to the Company in this particular labor dispute.

Viola Massaro, Randy Granholm, and Kelly Fleming, all consistently testified that on two separate occasions the Grievant stubbornly refused to attempt to shuttle carts of unfoamed doors on the "small parts" job. Their testimonies in this regard are not only credible because they are consistent between typically union/company adversaries, but also because they are corroborated by contemporaneous notes.

As both the Grievant's own union steward and own independent treating physician testified, shuttling of the door carts was a task well within the Grievant's medical restrictions:

(by Union Steward Mohammed)

Q: We can agree, looking at those restrictions, the cart movement job was well within his medical restrictions, correct? I know you're up here saying that none of these disciplines related to the cart movement, but we can agree to the extent he had to move these carts those restrictions allowed him to do that?

A: Yes.

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(By Dr. Schaap)

Q: Having viewed that video clip, Dr. Schaap, that individual happened to be doing (cart movements) with his right hand, and if someone was doing it with their left hand and that was Mr. Jama, that would be permissible, right?

A: That would be permissible.

Q: That gentleman in that clip had – the cart was not loaded with doors, but even assuming it was weighted with doors, doing it with his left hand would be permissible also, correct?

A: Would be

To extricate the Grievant from this set of facts, the Union resorted to a theory that all three of the Grievant's "insubordination" disciplines emanated from his refusal to perform "door stops." In other words, their contention was that Union Steward Massaro, Area Manager Granholm, and Labor Relations Manager Fleming all lied, and that Granholm's contemporaneous e-mails were false and fabricated. Not only is the Union's position incredible, it is unsupported by any documentation or corroborating testimony.

With the Grievant's dual instances of refusing to move door carts clearly established as independent acts of "insubordination," then the only issue left for the Arbitrator is his refusal to genuinely attempt to perform the "door stop" tasks. As the Arbitrator recognized at the hearing:

Insubordination is a willful refusal to comply with a proper order issued by an authorized superior, or behavior and conduct so contemptuous of authority as to bring the relationship at risk, place the relationship at risk.

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Dr. Richard Strand unequivocally testified that the Grievant could have fully performed the "door stop" tasks, without risk of injury or harm. Dr. Strand's opinion in this regard was not only backed by his significant expertise in treating shoulder-related workplace injuries but also in his vast experience treating employees in industries where "impingement syndrome" is a common occurrence affecting those whose job entails overhead lifting.

The Grievant, for his part, tried just four unfoamed doors in the "door stop" job before announcing that he would no longer perform those tasks. Additionally, the Grievant announced that under no circumstances would he attempt to perform any tasks inconsistent with those of Dr. Schaap, and would never attempt to perform duties consistent with those authorized by Dr. Strand. That sort of "take it or leave it" proposition is flatly inconsistent with arbitral jurisprudence.

It must also be remembered that this Grievant had more than three "insubordinate" acts before being terminated from employment. Thus, the Grievant refused to shuttle door carts on June 7<sup>th</sup> as well, although Montag and Massaro neglected to immediately report such to the Company. When the Grievant was notified of his disciplinary suspension, he refused to leave the plant premises until security was summoned. When notified of his discharge, the Grievant refused the Company's request to return its plant-accessing property. Having engaged in more than three acts of insubordination, the Grievant's termination was virtually compelled by the text of the labor contract.

### **POSITION OF THE UNION**

The Grievant is of Somalian decent having migrated to the United States November 27, 2001. He lives in St. Cloud, MN with his wife and eight children. He began work at Electrolux on August 28, 2002. He requires the translation of an interpreter but does understand English language to some degree and speaks some broken English.

On July 15, 2003 the Grievant received a work injury to his right shoulder and upper back at Electrolux requiring supervision under doctor's care. The Grievant after consultation with his doctor was issued work restrictions. These restrictions were followed without incident up until June 8, 2005.

The Grievant's supervisor shortly before June 8, 2005, after consultation with the plant nurse, reassigned the Grievant to different jobs which the Grievant informed his supervisor were

out of the work restrictions assigned by his doctor. The Grievant had been seeing his personal doctor for treatment on a regular schedule since the work related injury of July 15, 2003.

The Grievant testified that he indicated to his supervisor that the job assignments were aggravating his already injured right shoulder and upper back which caused pain when attempting to do certain tasks. The Grievant testified he was concerned about who would be responsible for any further injury to his body and voiced his concern to his supervisors.

The Grievant's supervisor determined that he could do jobs assigned as within perimeter of the Grievant's work restrictions. The Grievant's condition subsequently required surgery to alleviate the soreness or pain associated with his prior work injury. The surgery was performed by the Grievant's doctor on June 27, 2005. All these facts were made known to the Company.

The Grievant had no incidents reported by management in this arbitration prior to June 8, 2005 for refusal to perform assigned tasks. Testimony by the Grievant's own doctor clearly indicates that he would have problems doing repetitive work such as the work shown in the video presented by management. Dr. Schaap indicated the "away from body" work on the door stop job where the Grievant was allegedly insubordinate would cause him physical problems performing that task.

The evidence brought forward by testimony of the Grievant's own doctor who has treated this Grievant since day one of the Grievant's work injury, should have dispositive weight in the decision in favor of this Grievant.

Even the doctor that management sent the Grievant to (Dr. Strand) for an evaluation testified that the Grievant would have had pain associated with the work assigned from the injury received. When asked if he (Dr. Strand) had made a visit to the plant to witness and physically go through the motions on the job in question of the door stops Dr. Strand testified he had not and had only seen the video shown in the arbitration hearing.

The Union submits that the disciplinary action taken against the Grievant is clearly one of retaliation toward him. Management did not establish beyond a reasonable doubt that the Grievant refused work assignments without cause. There clearly was a cause why the Grievant requested not to do certain tasks assigned and that was because of the underlying work injury which continued to cause him pain doing certain movements.

Management had other avenues at their disposal to deal with this situation and took the ultimate severe course of action which was the easiest way out for the supervisor by issuing progressive discipline and eventually terminating the Grievant. The bargaining agreement clearly indicates paths of remedy negotiated between the parties to deal with this type of issue for the Company to follow short of disciplinary action (Medical Leave, Short-Term Disability Leave).

Management and its Work Compensation Injury Insurance Company are in denial of the Grievant's work injury compensation claim thereby forcing the Grievant to hire an attorney to fight the denial of his workers' compensation claim. The action taken against the Grievant is an

example of management using termination in an attempt to strengthen their case against the Grievant in future litigation regarding his work related injury.

For the foregoing reasons, the Union is requesting the grievance be upheld and the termination issued to the Grievant be overturned and that the Grievant be fully reinstated and awarded full back pay, restoration of all benefits lost and seniority since his termination of June 10, 2005.

### **DISCUSSION AND OPINION**

Analysis of a discharge for alleged insubordination must begin with identification of the work the employee was charged with refusing to perform. This determination becomes critical in the instant matter in view of the Grievant's affirmative defense that he only refused to perform such work as was covered by his medical restrictions as specified by his personal physician, Dr. Kim Schaap.

The first instance when the Grievant refused a work order took place on June 8, 2005. The event was described in sworn testimony of second shift area manager Randy Granholm as follows:

Q: Okay. Mr. Granholm, you understood or you became aware on June 8<sup>th</sup> of 2005 there was somewhat of a dispute in that area. Tell us what you became aware of in terms of what you learned was being disputed.

A: I was called down there because Jama was not doing the full, the full task of his assigned job. Part of his job is to assemble the locks, small parts we call it, and push the cart of doors up when the buzzer goes off. We have three people there that do that particular job and they all, all three rotate so, like I said, they're not, not one person is stuck constantly running back and forth with the cart of doors. Sandy and Viola had told me that Jama had stated that he's just there to make small parts and do nothing else.

Q: In other words, the pushing and pulling of the carts was, was the task he was refusing to do.

A: Correct (Tr. 27)

Granholm sent the Grievant home at the time while checking whether or not the work he refused to do fell within his medical restrictions. After conferring with other management personnel, Granholm determined that the work of pushing up the carts was not prohibited by the Grievant's medical restrictions but, nonetheless, did not discipline him because he was not sure of this at the time of the incident.

Since no disciplinary action was assessed the Grievant in connection with his June 8<sup>th</sup> refusal to do the cart work, this incident is not included in the three major acts of insubordination relied upon by the Company in its discharge decision. This review covers the June 8<sup>th</sup> incident, however, as showing that management had provided the Grievant with clear and timely notice that it considered cart transport as not within his medical restrictions. The incident further shows

that the Grievant's refusal to perform such work caused discord among his co-workers who complained that he was shirking what was supposed to be a shared duty.

The first of the Grievant's counted major refusals to perform an assigned task occurred on June 9, 2005 and was described in the following testimony by Granholm:

A: On June 9<sup>th</sup> we, around 7:00 brought him up to the foam platform to do the doorstep job. We also had a, the individual that normally performs that job train him in. I was there from about 7:15 until 7:30. He did the job from 7:15 till 7:30. At 7:30, that's our lunch break, he turned around and told us, Bill Jenson and myself, that he wasn't going to do it anymore.

Q: So he tried for about 15 minutes and then stopped.

A: Correct.

Q: And instructed you he would not perform that task anymore.

A: Right.

Q: Now when he was brought out there initially –

THE ARBITRATOR: That task specifically was the wheeling of the cart.

PRYATEL: No sir.

WITNESS: This task is taking the unfoamed door out of the cart, putting it up on the rollers, and then screwing down the bottom hinge, then moving it down.

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On June 9<sup>th</sup>, after he told you that he was not going to perform that job after trying it for about 15 minutes, what did you do?

A: We got a hold of Awel, the union steward. We brought Jama, Awel into the office and we issued out a major warning because he refused to do the job.

Q: Was anybody else present besides the steward, Mr. Jama, and yourself in that meeting when that discipline was issued?

A: Yes. Bill Jenson was aware of it, Stan was there.

Q: And was the warning issued for what was called an infraction of insubordination?

A: Yes, sir. He totally refused to do that job. He said it hurt his shoulder.

Q: Was he allowed to continue to work that evening or was he sent home at that point in time? (Tr. 36, 38)

The second counted major insubordination happened the following day and was described by Granholm in his testimony and documented contemporaneously in the following Exhibit F:

To Whom It May Concern

6/12/2005

In regards to: Jama Ahmed #7063

On 6/10/05 I was at the Door Foamier talking to Bill Jenson about picking up some units in crate with no doors on them. Employee Violet #7011 came up and asked Bill if Jama was to be prepping doors. Bill said yes that is his job. Viola pointed out that Jama was not helping push the carts up to the door foamier. At that time Bill went to talk to Jama, the door prep job is well within his restrictions and pushing the cart up is part of the job.

Jama told Bill he was not going to push the carts. Bill told him to do the job or corrective action will be taken, Jama still refused to do the job.

At that time Bill, Jama, I and Awel, went into the office. Bill gave Jama a major warning, for not doing the job, and told Jama it was the 2<sup>nd</sup> one so he would be suspended for 5 days and the suspension would start today and to come back to work on the 16<sup>th</sup>.

Jama stated he did not care how many warnings he got and that we should fire him and he was not going to be suspended and he was not going home. I asked Awel to explain the rules to him again, on how the warnings work if he is suspended he is not to be on Company property, he will be escorted out. Jama stated he did not care, I told him to get his things and go home, that he is suspended, he refused to go. I told him if he did not go he would get another warning and I would get the police involved, and that would do no one good. Jama stated he did not care again and I gave him a warning and had the guard call the police.

At that time Jama decided to go home, myself and Awel walked him to the door.

The final incident which comprised the Grievant's third major count of insubordination took place the day he returned to work after his five day suspension on June 17, 2005. Granholm's testimony on what task the Grievant refused to perform on that date were memorialized in Company Exhibit B which states:

Tonight Ahmed returned from his 5 day suspension. He was prepping doors in department 20. At approximately 5:20 I noticed that I had not seen Jama push any carts up to our assembly area all night. I went to where Ahmed was working and told him again that pushing carts to the assembly area was part of the job of prepping doors. He said that he can't because of his shoulder. I told him that according to his restrictions he is capable of doing that and asked if he was going to do it. He said he couldn't. After break time I had him and Awel Mohammed clock #6058 who is the union steward and an interpreter come into the office. Stan Schelonka was also present. I explained to Ahmed that I had told him to do something and he had refused so I was giving him a third major warning for insubordination and according to the union contract, the result of a third major warning is termination. I asked if he wanted to sign the warning and he refused. Awel signed as the union steward present and I gave Ahmed his copy. Stan, Awel and I walked Ahmed to the guard shack where he turned in his glasses and picked up his paycheck. Stan told him that he needed to also get his employee badge and he said (through Awel) "No I won't give you my badge, I will go to the union hall and if they say I have to I will give it to them." Stan told him that we had to have the badge and that we would call the police if he refused to give it to us. He again refused and Stan called the police. The guard talked to Ahmed for a minute and Ahmed handed me the badge and left.

Bill Jenson

2<sup>nd</sup> Shift Supervisor Department 20

### Analysis and Conclusions

A well settled arbitral principle advises that where a refusal to perform a particular work task was defended by the medical restriction exception, the primary burden of proof for such defense falls on the “asserter of the proposition” – the Grievant in this case. The Grievant clearly asserted at the time of his refusals that he was relying on his doctor’s written restrictions to avoid the specific work tasks assigned him.

This line of defense collapses in regard to the two incidents involving the pushing/pulling of the refrigerator door transport cart. Both the Grievant’s own treating physician, Dr. Kim Schaap, and the Company’s selected specialist, Dr. Richard Strand, both agreed that the cart work did not exceed the Grievant’s medical restrictions.

Dr. Schaap testified in regard to cart pulling/pushing as follows:

Q: Did he voice any complaints about his left shoulder area to you?

A: No.

Q: So your understanding is that the only problem he had really was related to his right shoulder?

A: Correct.

Q: How about pulling something like a cart with his left shoulder and his left hand: permissible?

A: Sure.

Q: Okay.

THE ARBITRATOR: For my benefit could you ask the next question; how about pushing with the left hand?

THE WITNESS: Again, these restrictions were only related to his right arm so I would say yes.

In like vein, Dr. Strand’s medical opinion on cart work was that neither this task nor any other work assigned the Grievant which he refused to perform falls within his medical restrictions.

### Findings and Conclusions on Assigned Cart Work

This area of medical agreement shows that the Grievant has clearly failed to show that his refusals to perform cart work on June 9<sup>th</sup> and on June 10<sup>th</sup> were subject to substantiated medical restriction. Absent such exception, the only conclusion permitted by the record is that he refused to carry out a proper work order issued by an authorized superior – i.e., that the Grievant was insubordinate on both occasions.

This conclusion leaves only the matter of the Grievant’s refusal to perform the door stop operation on the first shift upon his return from his five day suspension and warning for the insubordination of June 10<sup>th</sup>. The hearing record shows that Dr. Schaap and Dr. Strand disagree with each other’s medical conclusions as to whether the door stop operation should be a restricted work function.

Dr. Schaap testified in connection with this work as follows:

BY MR. NEUMAN:

Q: Okay. Just think of 105 to 110 repetitions per minute – per hour I mean, excuse me, and an eight hour day put on an employee with that type of injury. Do you believe that that job would fall within the restrictions that –

A: Certainly not the way it's set up there. It requires you to pull the door with your right arm. And probably the biggest thing I see on there is having to forcefully use, it looks like a drill or something to drill in the screw or something into a stop. That, having your arm away from your body and having to forcefully use it away from your body would certainly give someone with this problem trouble. (Tr. 1 and 3)

After reviewing a video clip of the door stop operation Dr. Schaap repeated her advice restricting this work in this testimony:

Q: When you looked at the video of the door being placed on the thing, you said one of the things that stuck out in your mind was that taking that drill and putting that part in. Is that because it uses away from the body use of your hand?

A: It is, and it's that sort of forceful pushing against an immobile object that is a great strain on your rotator cuff.

Q: That was the particular concern to you in that video clip.

A: Yeah.

Dr. Strand disagreed with Dr. Schaap on this particular medical restriction as follows:

(Referring to the door stop work shown on the video)

Q: Are you aware of how many repetitions per hour that that job would require? I think that was mentioned.

Q: Roughly between 105 and 120 per hour, movements?

A: Something like that, yes.

Q: Do you think that that would have a worsening effect on the patient's mobility?

A: Not that specific motion, no. That was my opinion, that that would not significantly aggravate him. (Tr. 184)

Dr. Strand expanded on his medical analysis of the Grievant's ability to do the door stop work in the following response:

Q: ...The question – he received a major warning slip which ultimately terminated him on this procedure here and the question before the arbitrator is was it reasonable for him to say hey, he was having pain and he felt he was going to have a problem doing that job because of the pain?

A: It's, was my opinion that he could do that job. I didn't see that that job would aggravate an impingement syndrome.

Q: Day after day, that many repetitions that's been discussed here, you think that he, your personal knowledge, would he have a problem with that? Then by Dr. Schaap?

A: Because he complained about it. Subsequently he did show further signs of impingement and he had the congenital abnormality of the type two acromion, he had some tendinosis, and he did respond to a subacromial cortisone injection. He ultimately met my criteria to doing the surgery. What I'm saying is the surgery was done because of what's, the abnormality in his shoulder, not what he was doing.

Q: But that could, that could have been, that could have developed, what you call – Aggravated his pain?

A: I don't see that, the work as a significant aggravation. I don't see that job as being a significant aggravation of his impingement syndrome, no. (Tr. 187, 188)

Dr. Strand responded to the Arbitrator's question, which centered on his disagreement with Dr. Schaap, in this exchange:

Q: Where the focus of the disagreement comes is where Dr. Schaap says that movements that require, for the shoulder to suffer degrees of aggravation is when it requires it be extended from the body, and it was her judgment that the use of that drill which requires the cocking of the arm (indicating) and the movement of the arm away from the shoulder as well as lifting that door which brings the shoulder temporarily in a high position would aggravate the condition that he had at the time that he refused to do those jobs complaining of pain. Now would you disagree with what she had to say in that regard?

THE WITNESS: Yes, I would. Now if he was doing repetitive overhead work like this, like this in this position (indicating), that's the impingement position. He wasn't doing that. He was bringing it up like that (indicating). He wasn't going that high. Look at the video again.

THE ARBITRATOR: Right.

THE WITNESS: Second of all, down here, doing it down here (indicating) does not put any significant stress on the impingement position.

MR. PRYATEL: And he's got his hand down right now.

THE WITNESS: It's, it stresses the subscapularis muscles and the interdeltoid and the biceps brachialis, and then the hand function, but as far as the shoulder goes, that does not aggravate the impingement. People without known impingement syndromes before they're operated on, I let them lift anything down at this level, I let them push and pull anything at this level. I think to restrict somebody to keep their arm in doesn't make any sense because this is the position that is, that aggravates it (indicating).

MR. PRYATEL: And I want the record to reflect he just had his hand above his head when he said "this is the position." (Tr. 189, 192)

I quote extensively from the conflicting testimony of Dr. Schaap and Dr. Strand to underscore the foundation upon which I reach my conclusion on which medical opinion to favor in this complex case. Choosing between the competing positions of two well credentialed and experienced physicians represents a daunting task, raising the question of what qualifies an arbitrator to make such a judgment.

The Company's proposed standard should be that an employer's discretion to rely on its own doctor's advice on a worker's physical ability to do a job should not be disturbed unless

such advice can be shown to be arbitrary, discriminatory or clearly unreasonable. The Union argues that an employer's doctor, as a recipient of monies for his services, cannot be expected to be totally unbiased, whereas an employee's doctor can be expected to be guided only by the patient's welfare.

I am fully aware of arbitral awards which have drawn from either of these decision-making guidelines. I cannot however endorse either school of thought because both offer infirm rationalizations. One tends to exalt the employer's doctor without serious consideration of the medical opinion at issue, the other tends to demean the "company's doctor" as virtually bought and paid for. In short, neither focuses on such substantive considerations as the differing diagnostic processes and which might yield the more valid medical conclusions.

The substantive aspects of the diagnostic procedures used by Dr. Schaap and by Dr. Strand are of particular significance in this case because of the subjective nature of pain syndrome. In the absence of strong clinical evidence such as X-ray, MRI, EMG data, diagnoses based merely on the patient's self report of the locus and intensity of the pain relies on the veracity of the patient. In situations, including workers' compensation claims, where the patient may perceive his interests are served by misrepresenting the pain symptoms it often happens that self-reports are unreliable.

In such circumstances an arbitrator's skill and experience in credibility resolution has particular value. In the instant case, Dr. Strand specifically raised doubts about the Grievant's veracity while presenting his pain and motion symptoms during his medical evaluation. Dr. Schaap reported no concerns about the validity of the Grievant's self-report of pain symptoms in her examination.

It necessarily follows that if review of the hearing record reveals material lapses in the Grievant's credibility then Dr. Strand who factored this element into his medical conclusions must be found more reliable than Dr. Schaap who did not, in regard to the extent of the Grievant's disability and work restrictions. The record shows several instances where the Grievant's testimony was inconsistent with the provable facts, including the following:

- The claim that Dr. Strand spent merely six minutes examining him before preparing the work restrictions cited by the Company in its determination that the Grievant was physically able to perform the tasks he refused to do.

Analysis: Although the Grievant subsequently amended his estimate of the physical examination to 10 minutes, he still underestimated the examination time. Review of Dr. Strand's Independent Medical Evaluation of December 3, 2004 shows that he interviewed the Grievant extensively about his medical history with Dr. Richard Hill and Dr. Kim Schaap from his original shoulder and back pain injury on July 15, 2003 through to the instant examination. It should be noted that the interview was conducted with an interpreter which certainly added considerably to the amount of time spent on this phase of the examination.

Dr. Strand also extensively reviewed the Grievant's medical records from Dr. Hill and Dr. Schaap which he summed up in the earlier diagnosis of right shoulder impingement and

scapulothoracis dysfunction. He studied the Grievant's MRI which "showed mild narrowing of the glenolumeral space with a mild subacromial bursitis and mild tendonopathy."

His concluding evaluation reads:

DISCUSSION: After reviewing the medical records, it is my opinion that he has had a shoulder strain at work. I see no evidence that anything he did at work which would cause his impingement syndrome. It is my opinion that his impingement syndrome is directly related to the congenital abnormality of his shoulder of a type II acromion.

At the present time, he is certainly able to work and the only restriction that I would have for him would be no repetitive overhead lifting. Down at waist level and below I would not restrict his weight lifting or his pushing and pulling weight. Repetitive pushing and pulling at shoulder level or above would be restricted. He is able to sit, stand, walk, kneel, and stoop without restrictions.

It is my opinion at this point that he is not a candidate for surgery for the shoulder.

In view of his lack of findings related to his scapular strain, it is my opinion that he has reached Maximum Medical Improvement from all of the effects of his injury of July 15, 2003. There is no permanent partial disability and he has no restrictions secondary to the work-related scapular strain.

Dr. Strand's reaction to the Grievant's six minute estimate of the examination time was firm and unequivocal:

Q: Now yesterday there was some testimony from Mr. Jama that that exam consisted of about ten minutes of him waiting in your lobby and about six minutes of you looking at him. That's untrue.

A: Oh, that's fallacious. That's untrue.

Q: Can you tell us how long you spent with Mr. Jama when you examined him?

A: We schedule an hour for these exams and this was an examination with also an interpreter. An interpreter takes twice as long to do the exam and to say that is, you know, I take umbrage to that comment because that's a lie.

### Conclusion:

One straightforward credibility test between the Grievant and Dr. Strand on this question of time spent in the physical examination there can be no reasonable doubt that the doctor emerges as far more credible. Dr. Strand's detailed recordation of his personal observations as well as his in-depth review of the Grievant's MRI and relevant medical records demonstrate the type of conscientious and professional procedures which most certainly took several times longer than the six minute estimate of the Grievant.

I take arbitral notice in reaching this conclusion of the time required for physicians' examinations of similar orthopedic problems I have experienced over the years. I further considered research reports of the HMO where I have served many years on the Patient Grievance Review and Arbitration Committee. These reports disclose that it requires a median time of 28 minutes per patient visit to the orthopedic unit.

My conclusion, therefore, is that the Grievant was untruthful in testifying that Dr. Strand spent a mere six minutes in his examination. Clearly the Grievant's purpose in such misrepresentation was to diminish the credibility of Dr. Strand's evaluation. The Grievant succeeded only in casting serious doubt on his own truthfulness.

- The second claim by the Grievant which undermined his credibility was his flat denial that he ever refused to perform cart pulling/pushing. Instead, he insisted that the only work he refused to continue performing was the mounting of door stops in the bottom of refrigerator doors. The Grievant, according to the testimony of union steward Awel, reported this untruth to his own union representatives.

Analysis: In order to credit the Grievant's misrepresentations concerning the type of work he refused to perform, I would be forced to reject the testimony and documentation of all the supervisors and co-workers who were involved in the four incidents (three of which were counted towards his termination). Viola Massaro testified that on two occasions she and Sandra Montag witnessed the Grievant refuse to move carts.

Supervisor Granholm wrote his disciplinary report stating that on June 10, 2005 supervisor Bill Jenson had ordered the Grievant to move carts. He refused and Jenson gave him the second major warning resulting in the five day suspension.

Bill Jenson issued the third (termination) warning to the Grievant upon his refusal to move carts the very day of his return from the five day suspension. Jenson recorded that "I told him again that pushing carts to the assembly area was part of his job of prepping doors and he said that he can't because of his shoulder." Supervisor Stan Shelanka and union steward Awel were present when this final major was given to the Grievant.

The overwhelming weight of testimony from these many sources compel the conclusion that the Grievant lied when he testified that he never refused to do the cart work assigned him. The fact that the Grievant in at least two critical areas of fact made serious misrepresentations severely damaged his entire credibility.

This finding and conclusion proved dispositive in the determination of which medical evaluation to credit in this matter. I need to make it absolutely clear that I am not making any judgment as to which of the doctors who testified is the more competent. For the record, I must state that I was equally impressed by the credentials and experience of both Dr. Schaap and Dr. Strand.

The important distinction that I draw has to do with self-reported pain as an essential diagnostic tool in osteopathic medicine. Given the credibility damage caused by the Grievant's

untruthfulness at the hearing, his self-reported pain syndrome to both doctors in the course of their medical evaluations raises reasonable doubts as to their respective validity.

Careful review of Dr. Schaap's testimony reveals that with the exception of the MRI, her medical evaluation depended on her subjective trust in the accuracy and honesty of the Grievant's self-reported pain and the activities he described as aggravating his pain. It was, of course, in his perceived self-interest that his claimed job-related disability have medical support. His hearing misrepresentations casts doubts as to whether Dr. Schaap's trust was warranted.

By contrast, Dr. Strand observed certain behaviors in the course of examining the Grievant that caused him to question the veracity of the pain symptoms being reported. The doctor testified as to these actions and how he interpreted them as follows:

Q: ... You stated in your report that "On examination of his shoulders anteriorly I felt he had a full range of motion but he would resist moving it and even resisted the gentle passive range of motion." Do you see that?

A: Yes.

Q: Tell us what you meant by that comment in your report.

A: Well, you watch them move on-off the table, getting, moving around and see how he moves his shoulder. Then you ask him to move it, they won't move it very well, and then do you a gentle assist to do a passive motion and you can feel the muscles resist motion, and that may be for pain, it may be on a conscious level, you make a judgment call, and I made a judgment call that was on a conscious level.

Q: As opposed to pain.

A: Yes. (Tr. 169)

Q: I notice on page three, in the very first complete sentence on that page you made a statement that in testing his muscles he tended to give way on the right. This was a cogwheel giving way on a conscious basis.

A: Yes.

Q: Tell us what you meant by cogwheel and giving way on a conscious basis.

A: Cogwheeling is one of the classic pain behaviors you see in attempts to magnify symptomatology, and it is classic and it is so easy to detect that it's unbelievable. If somebody has a neurologic abnormality and has a true weakness or has a brachial plexus injury or a cut nerve and has weakness in that muscle the give away is in a gentle manner like this and you can feel the difference. A conscious level –

Q: And I want the record to reflect he was flexing his, his right arm forward in a slow motion.

Extending.

Extending.

In a cogwheel you test their muscle strength, and whether it's in the lower extremity or upper extremity, if they give way in a cogwheel manner like that that's on a conscious level. A true weakness does not give way at that level. (Tr. 171, 172)

By so taking into account, the conscious, i.e., deliberate attempts by the Grievant to mislead his diagnostic efforts, Dr. Strand arrived at the more plausible evaluation and determination of appropriate medical restrictions.

Based on this more reliable evaluation and conclusions, Dr. Strand testified without effective contravention that the Grievant was physically able to perform the assigned work which, on three occasions, he refused to perform. Under these facts, such refusal constitutes three major acts of insubordination.

### **DECISION**

Based upon the foregoing evidentiary analysis, the grievance is hereby denied.

3/8/06  
Date

\_\_\_\_\_  
John J. Flagler, Arbitrator