

April 1987

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Recommended Citation

Marlin M. Volz, *Medical and Health Issues in Coal Arbitration*, 89 W. Va. L. Rev. (1987).
Available at: <https://researchrepository.wvu.edu/wvlr/vol89/iss3/11>

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MEDICAL AND HEALTH ISSUES IN COAL ARBITRATION

MARLIN M. VOLZ*

I. INTRODUCTION

Health and safety issues continue to bulk large as a causative factor in disputes between workers and management in the coal industry. Apart from the twenty-seven sections of the National Bituminous Coal Wage Agreement of 1984 ("1984 Agreement") relating to health and retirement benefits and the dental plan, twenty-eight sections are directly concerned with health and safety matters. This Article will discuss those sections which have been involved in decisions by the Arbitration Review Board ("ARB") or by district arbitrators.

In considering the role of the arbitrator in deciding disputes, one must be mindful that an arbitrator's decision depends upon the facts and contractual provisions applicable to the particular grievance. The arbitrator must decide each case based on its own facts as developed by the parties at the arbitration hearing or in their joint statement. One must also be mindful that a coal arbitrator's discretion in deciding a case is severely circumscribed: (1) by applicable contractual provisions and governmental laws and regulations; (2) by what the parties have done in the past in the day-to-day administration of their collective bargaining agreement; and (3) by prior decisions relating to the same or a similar question which may be binding upon the arbitrator or which are to be given considerable weight.¹

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¹ The National Bituminous Coal Wage Agreement of 1984 [hereinafter cited as "1984 Agreement"], art. XXIII, § (k) states that "[a]ll decisions of the Arbitration Review Board rendered prior to the expiration of the National Bituminous Coal Wage Agreement of 1978 shall continue to have precedential effect under this Agreement to the extent that the basis for such decisions have not been modified by subsequent changes in this Agreement."

The National Bituminous Coal Wage Agreement of 1978, art. XXIII, § (k), read in part that "[c]ases appealed under the provisions of the National Bituminous Coal Wage Agreement of 1974, resolved by the Arbitration Review Board after the expiration of that Agreement, shall not constitute a precedent under this Agreement." In the 1981 Agreement, such provision was changed to read as it does in the 1984 Agreement.

In Decision 78-25, the Arbitration Review Board ("ARB") held that decisions of the "Interim" Arbitration Review Board were not binding as a precedent, explaining that the "precedent Decisions of the Board are those numbered 1 through 126." The ARB added:

Those decisions of the Board on cases arising under the 1974 National Agreement and decided in Decisions 127 and higher are those decisions of the "Interim" Board and are not

II. PHYSICAL OR MENTAL INABILITY TO PERFORM WORK

A. Termination

In a proper case, the employment of a worker may be terminated when the facts clearly show the inability to perform the regular duties of his or her job at an acceptable level because of physical, mental, or emotional deficiencies. This is especially true when transfer to another job within the employee's capability is not contractually permissible. Furthermore, the employment of a worker may be terminated in a proper case for nondisciplinary as well as for disciplinary reasons. For example, an employee may be terminated for nondisciplinary reasons when he or she does not possess sufficiently good health and physical and mental ability to perform the usual duties of the job in an ordinary manner with satisfactory attendance and without undue risk to his or her own health. Justification for termination must be tested against a standard similar to "just cause" in that the question must be judged largely by the reasonableness of the managerial decision under the facts of the particular case.

One of the considerations which the company properly may take into account is the effect which continued employment is reasonably calculated to have upon the well-being of the employee.² Depending upon the nature of the em-

accorded precedent effect in interpreting the 1978 National Agreement. That is to say, the decisions of the "Interim" Board—those Board Decisions Nos. 127 to 415—are to be accorded respect as panel arbitrator decisions . . . but they are not binding as precedent interpretations for application in cases arising under the National Agreement.

ARB Decision 78-25, at 19.

A decision of the "Interim" Arbitration Review Board can be identified by its form. It typically is limited to a bare affirmation, modification, or reversal of the panel arbitrator's decision. The "Interim" Board Decision quoted in ARB Decision 78-25 stated simply that "[w]ithout agreeing or disagreeing with any of the rationale expressed in the Panel Arbitrator's Opinion, we affirm the result reached in the opinion based upon the specific facts before the arbitrator." ARB Decision 78-25, at 18.

Three other provisions of article XXIII of the 1984 Agreement are to be noted. Section (c)(4) provides that "[t]he arbitrator's decision shall be final and shall govern only the dispute before him." Section (h) directs that "[s]ettlements reached at any step of the grievance procedure shall be final and binding on both parties and shall not be subject to further proceedings under this Article except by mutual agreement." However, section (c)(1) states that a settlement or withdrawal at step one of the grievance procedure "shall not constitute a precedent in the handling of other grievances."

This Article will cite only arbitration decisions which fall in the category of having been published, which include ARB decisions, both precedential and nonprecedential.

² F. ELKOURI & E. ELKOURI, *HOW ARBITRATION WORKS* (4th ed. 1985), states that

The prevailing view of arbitrators would appear to be that management has not only the right but also the responsibility to take corrective action when an employee has a physical or mental disability which endangers his own safety or that of others. Such action may take the form of . . . even termination, depending upon the extent and nature of the employee's disability

Id. at 722.

ployee's physical or mental incompetency, the use of corrective discipline need not precede termination. A distinction must be recognized between consistent inability to do work in an acceptable manner and an unwholesome, careless, or indifferent attitude resulting in substandard performance. The latter may be remedied by corrective discipline; the former cannot.³ Discipline cannot overcome a substantial deficit in ability when the employee is doing his or her best to succeed.

To warrant termination for lack of physical or mental ability, the condition should be one that is not medically treatable or correctable within a reasonable period of time. For example, in Arbitration Review Board Decision 124⁴ the employee was brought out of the mine on a stretcher suffering from diabetes mellitus after about one month of working in an underground mine. Three physicians confirmed the diabetic condition and advised against his employment in an underground mine as long as the condition remained uncured. In upholding termination, the ARB concluded that "the evidence is clear both that it would be foolhardy to direct the grievant's return to employment in the mine and that there was no shortage of medical authority in relation to what is contemplated by article III, section (j)."⁵

B. *Temporary Disability*

A temporary disability normally is accommodated by the attendance or leave policies or provisions of the contract. Since injury or sickness ordinarily does

³ Arbitrator McKelvey wrote that

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.

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 suspension, prior to invoking the final penalty of discharge.

Riverside Book Bindery, Inc., 38 Lab. Arb. (BNA) 586, 592 (1962) (McKelvey, Arb.).

⁴ ARB Decision 124. See also ARB Review Case 78-202 (discharge justified when employee was excessively absent due to chronic bad health and lack of physical stamina and ability); ARB Decision 225 (other employment offered to vehicle and equipment operator when physical examination disclosed blindness in one eye and other physical problems).

⁵ ARB Decision 124, at 3. 1984 Agreement, art. III, § (j) provides in part:

(3) That once employed, an Employee cannot be terminated or refused recall from a panel or recall from sick or injured status for medical reasons over his objection without the concurrence of a majority of a group composed of an Employer-approved physician, an Employee-approved physician, and a physician agreed to by the Employer and the Employee, that there has been a deterioration in physical condition which prevents the Employee from performing his regular work

(4) Where an Employer challenges the physical ability of an Employee or panel member to perform his regular work and is subsequently proven wrong, the Employee shall be compensated for time lost due to the Employer's challenge, including medical examination expenses incurred in proving his physical ability to perform the requirements of the job.

not involve sufficient fault on the part of the employee to warrant a just cause discharge, he or she should be continued on a sick or leave status until recovery permits return to work. Three situations will be discussed briefly.

In the first situation, a layoff occurs while the employee is on sick or leave status. The 1984 Agreement provides that "[f]or purposes of this Realignment Procedure only, any Employee on sick or injured status who otherwise has the ability to perform available work will not be denied a job under this procedure solely because of his sick or injured status."⁶ Thus, in a layoff, the employee is to be treated like any other employee for retaining or acquiring through realignment a job to return to upon recovery from the illness or injury. If placed on layoff, even though off sick or injured, the employee is to complete the standardized panel layoff form.⁷ Furthermore, such employee is to be considered for every job to which he or she wishes to be recalled,⁸ and will be presumed to have bid on each such posted job listed on the layoff form.⁹ If the employee is awarded a job during the continued period of disability, the job may be filled by temporary assignment until it can be claimed upon the employee's return to work.¹⁰ The 1984 Agreement provides that "[a]ll employees absent from work due to illness or other legitimate reason during the posting period shall be notified by management of the vacancy."¹¹

In the second situation, a sick or injured employee wishes to grieve the decision to place him or her on layoff status. When does the time for doing so begin to run? The usual rule, announced in the 1984 Agreement, provides that "[a]ny grievance which is not filed by the aggrieved party within ten (10) working days of the time when the Employee reasonably should have known it, shall be denied as untimely and not processed further."¹² This rule must be interpreted and applied based on the particular facts of the case, which will include the illness or injury and its effect upon the time when the employee reasonably should know that he or she had a grievance. The 1984 Agreement also permits the parties to waive the time limitation.¹³

In the third situation, a condition begins as a permanent disability but later, because of improvements in his or her condition, the employee receives a physician's release to return to work without restrictions or with acceptable restrictions. This situation was presented to the district arbitrator in Case Number KD-81-17-111. In evaluating the grievant's industrial injury, the physician had

⁶ 1984 Agreement, art. XVII, § (b)(2)(d).

⁷ *Id.* at art. XVII, § (c).

⁸ *Id.* at art. XVIII, § (d).

⁹ *Id.* at art. XVII, § (i).

¹⁰ *Id.* at art. XVII, § (i)(5); *Id.* at XIX, §§ (c)-(e).

¹¹ *Id.* at art. XVII, § (i)(4).

¹² *Id.* at art. XXIII, § (d).

¹³ *Id.* at art. XXIII, § (j).

written: "I know of no treatment that will help this man. I think he has reached maximum improvement, there is permanent disability and I think it should be placed at 50%. He should be trained for some type of sedentary occupation."¹⁴ Nearly three years later, upon examination by a different physician, the grievant secured "a slip to return to work as of 6/23/81, with no limitation." Contending that the grievant had been physically able to return to work at an earlier date, the company terminated him for absenteeism under section (i) of article XXII. The district arbitrator held that an employee cannot be absent until he has returned to work and has been scheduled to work.¹⁵

C. *Permanent Disability*

Permanent disability may result from a disease, such as diabetes, black lung, or silicosis, or from an injury. The disability must be established by adequate proof and must be sufficiently disabling so as to prevent the employee from performing the usual duties of the job in an ordinary manner with reasonably satisfactory attendance and without undue risk to his or her own health.¹⁶ In such a case, a nondisciplinary termination of the employee is justified, unless assignment to a job within the capability of the employee is available and contractually permissible. One of the considerations which an employer properly may take into account is the effect which continued employment is reasonably calculated to have upon the safety of others and upon the employee's own health and safety.¹⁷

D. *Failure to Disclose Physical Defect in Job Application*

In Arbitration Review Board Decision 124, in affirming the district arbitrator, the ARB noted that the grievant had not disclosed his diabetic condition

¹⁴ Case No. KD-81-17-111.

¹⁵ *Id.* at 11. The arbitrator explained:

Before Article XXII(j) can be invoked, in the opinion of the arbitrator, the employee must be scheduled to work, or be scheduled to work but fail to report for work or for a scheduled medical examination preparatory to starting to work. Then, if an absence of two consecutive days are missed without proof of illness and without consent of the employer, the employee may be discharged. In this case, the company cannot invoke Article XXII(j) against an absence of the grievant, until the grievant returns to work and is actually scheduled to work . . . Here, the medical evidence clearly showed that the grievant was absent due to a disability.

Id. at 11-12.

¹⁶ If the employee objects to the determination of permanent disability, the three-physician procedure outlined in the 1984 Agreement, art. III, § (j)(3), may be invoked.

¹⁷ In ARB Decision 124, the district arbitrator, in upholding termination of an employee suffering from diabetes mellitus, explained: "The biochemical balance is such that under certain conditions of stress, grievant may suffer a violent insulin reaction. On an occasion, if grievant is working around complicated machinery which may be used in every mine, the danger of causing harm to himself or another is just too great." ARB Decision 124, at 16.

on his application form. The ARB wrote:

[T]he Board is not prepared here to quarrel with Mr. []'s application of Article XXIV and thus to consider what rights e.g., seniority, holiday pay, vacation pay are preserved for a miner who becomes incapacitated. The reason is that the grievant's hire never should have taken place in the first place, and that the grievant . . . in withholding the fact of his diabetic condition was as much to blame for the fact of his hire as was the inadequacy of the Company's pre-hire medical examination.¹⁸

In *Hughes Aircraft Co.*,¹⁹ the employee omitted a back condition in her job application. The employer refused to reinstate the employee after sick leave. The arbitrator found the employer's action to be justified, in that (1) the employee did not make full disclosure of her back condition in her application of 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 duties of her job.

E. *Ability to Perform Work Includes Physical Fitness*

In the 1971 Agreement, seniority was to be recognized on the basis of "[l]ength of service and qualification to perform the work."²⁰ In the 1974 Agreement and in subsequent Agreements, the meaning of the words "qualification to perform the work" was clarified by substituting the words "the ability to step into and perform the work of the job at the time the job is awarded."²¹ The Arbitration Review Board has held that such requirement includes physical fitness²² to do the work at the time the job is awarded and not at a subsequent date when the senior bidder has recovered from a work-related injury.

In Arbitration Review Board Decision 78-65, the district arbitrator held that: if an employee is off from work due to a work-related injury and, but for his

¹⁸ *Id.* at 34.

¹⁹ *Hughes Aircraft Co.*, 49 Lab. Arb. (BNA) 535 (1967) (Doyle, Arb.).

²⁰ National Bituminous Coal Wage Agreement of 1971, art. XIII, § (a).

²¹ The 1984 Agreement, art. XVII, § (a), provides that "[s]eniority at the mine shall be recognized in the industry on the following basis: length of service and the ability to step into and perform the work of the job at the time the job is awarded."

²² In *Volz, Medical and Health Issues in Labor Arbitration*, 31 NAT'L ACAD. OF ARB. 156, 160 (1979), I gave the following definition of 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.

absence due to the work-related injury, would be the successful bidder on the job, then the Employer must award the job to that employee and hold it for him until he has recovered from his injury and returned to work.²³

Finding that the clear and unambiguous language of article XVII, section (a), required a reversal of the district arbitrator's conclusion, the ARB wrote that "[t]he absent employee may bid a job, but must according to the clear contractual intent, have the actual ability to do the job when it is awarded."²⁴

Under its general authority to direct the work force, confirmed by section (d) of article IA, management has the initial responsibility to apply the contract, particularly article XVIII, section (a), in a nondiscriminatory way in selecting from among the bidders for a job. In doing so, management properly may consider all available evidence as to the senior bidder's physical fitness to perform the usual duties of such job. Actual performance on prior jobs is an important consideration, but physical ability is to be judged by the physical demands of the particular job.²⁵ Under article XVII, section (a), the concern is not for the status of an employee already at work, but for one who bids on a vacant job in competition with others.

F. *Assignment of Light Work*

In the absence of controlling federal or state law, specific contractual provision, or binding past practice, an employer is limited by the seniority, job bidding, and other provisions of the 1984 Agreement in finding or making a job for an employee physically unable to perform the usual duties of his or her classified job. The arbitrator has no authority to direct an employer to do that which the contract or binding past practice does not obligate the employer to do. While the Arbitration Review Board in earlier decisions, particularly in Decisions 78-2 and 78-3, has considered the obligation of an employer to provide light-duty work to a disabled employee, its leading decision is 78-14. In its

²³ ARB Decision 78-65 at 2.

²⁴ *Id.* at 3. In ARB Decision 78-65, the ARB quoted with approval the following language from a district arbitrator's opinion:

The only reasonable interpretation of the job bidding procedure of Article XIV, is that within five production days after the end of the posting period, the employee with the greatest length of service and the ability to step into and perform the work of the job at that time, must be selected from the applicants and awarded the job.

Id. at 2.

²⁵ Management also must be mindful of the emphasis placed upon the health and safety of workers by the 1984 Agreement. For example, in art. III, § (a), the parties recognized as their highest priorities "the health and safety of the Employees." Under art. III, § (g), employees are directed to comply with an employer's reasonable rules and regulations "for the protection of the persons of the Employees." In art. III, § (o)(9), the parties used mandatory language in directing that "[n]o employee shall be required to lift more weight than he or she is physically capable of lifting."

synopsis to that decision, the ARB summarized:

No provision in [the] National Agreement requires an Employer to furnish light-duty work or other than regular work. Whether work is available is within sole discretion of [the] Employer, reasonably exercised. Such principle is [a] factor of substantial weight in factual determination [of] whether [the] Employer has ceded managerial prerogative in creating a prior practice which requires [the] Employer to furnish other than regular work for [an] employee injured in [a] mine-related accident.²⁶

The ARB explained that the only contractual provision expressly dealing with light-duty work²⁷ cannot be construed to require an employer to furnish such work since the provision becomes applicable only "[i]f . . . his Employer offers him a light-duty classified job."²⁸

In ARB Decisions 78-2, 78-3, and 78-14, the ARB recognized that past practice can require an employer to provide light-duty work to an employee while disabled by a work-related injury.²⁹ In ARB Decision 78-14, the grievant was placed on light work after initial injury to his knee in an accident on his regular job in the mine. Sometime thereafter, he was returned to his regular job where he suffered a recurrence of his injury. The ARB decided that past practice required the assignment of light work following the initial injury but not following a recurrence of the same injury. This was held to be a situation not within the scope of the past practice.

It should be noted that article XVII, section (i)(10) of the 1984 Agreement provides an exception to the job bidding provisions for an employee holding a

²⁶ ARB Decision 78-14, at 2.

²⁷ 1984 Agreement, art. XI, § (b) provides:

If, during a period when an Employee receiving Sickness and Accident Benefits is recovering from his disability, his Employer offers him a light-duty classified job, the Employee shall have the option to accept such employment, and Sickness and Accident Benefits shall terminate if he does so. For the purposes of this Article, "light-duty" shall be defined as including any job in which occupational hazards, lifting of weights, and exposure to extremes of temperature, dampness, and dust are substantially less than those of the job held by the Employee at the time of his disabling accident or illness.

²⁸ ARB Decision 78-14, at 10.

²⁹ In writing about past practice, the ARB commented:

[I]t has long been a tradition in the mines—often completely misunderstood by industrial physicians—that employers do not generally provide light-duty work around a mine; there simply is so little such work available in the ordinary application

. . . .

In the case at hand, the principles of Decisions 78-2 and 78-3 are to be applied first by requiring that the grievant and the union, claiming the practice, have the burden of establishing not only the existence of the practice claimed, but also that it has the scope to include the particular situation of this grievant

Id. at 10-11.

letter from the United States Department of Health and Human Services confirming that the employee has contracted black lung disease. He or she has the option of transferring to a less dusty area of the mine.³⁰

G. Effect of Workers' Compensation Award of Permanent Partial Disability.

Is an employer justified in refusing to reemploy a worker who offers a statement from a physician that he or she is now fully recovered from injury and able to return to work even though the worker has been awarded twenty-five percent disability under workers' compensation for a part of the body which must be used in his or her 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 liability for employee's further injury or aggravation of the previous injury. Generally, workers' compensation laws including a second injury fund, do not impose a duty upon an employer to reemploy a disabled worker beyond that duty imposed by the labor agreement between the parties. Although requiring that each employer maintain workers' compensation coverage, the 1984 Agreement does not expressly address this question.

The employer's decision to reemploy such a worker largely turns upon the nature of the injury, the medical treatment received, the opinion of competent medical personnel as to the employee's prognosis for the future, the extent of recovery of use of an injured body part, and the effect which any such impairment reasonably will have on the employee's ability to perform the work. Disagreement may exist in the medical evidence. If there is factual support for a physician's opinion that no further injury to the employee is likely to result if he or she is returned to the job, a possible solution is to give the employee a reasonable trial period to determine if the work can be performed in an ordinary manner for the full period of the shift.³¹

H. Employer's Right to Require Physical Examination

Under its general managerial discretion, as confirmed in article IA, section (d), the company has the authority to determine the initial and continued qual-

³⁰ See ARB Decision 6 (interpreting and applying art. XVII, § (i)(10)).

³¹ See *Corhart Refractories Co.*, 39 Lab. Arb. (BNA) 138 (1962) (Volz, Arb.); *Standard Oil Co.*, 18 Lab. Arb. (BNA) 889 (1952) (Pollard, Miles & Maguire, Arb.); *American Smelting & Refining Co.*, 24 Lab. Arb. (BNA) 857 (1955) (Ross, Arb.); *Dolan Steel Co.*, 49 Lab. Arb. (BNA) 197 (1967) (Seitz, Arb.); *Bethlehem Steel Co.*, 39 Lab. Arb. (BNA) 600 (1962) (Crawford, Arb.).

ifications of its employees to perform their work. It also has the power, if not the obligation, to make reasonable provision for the health and safety of its employees, subject to any limitations contained in the total contractual relationship between the parties. Except to the extent restricted by the Agreement, an employer may use physical examinations in exercising such authority. Arbitrator Larkin expressed the general rule in *Miles Laboratories, Inc.*, stating that “[s]ince 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.”³²

The key contractual provision relating to physical examinations is section (j)(1) of article III.³³ It obligates an employer when requiring a physical examination to use such examination only “to determine the physical condition or to contribute to the health and well-being of the employee The retention or displacement of Employees because of physical conditions shall not be used for the purpose of effecting discrimination.”³⁴ This provision must be construed with other sections of article III which emphasize the duty of all parties to be mindful of the safety and health of employees.³⁵

Thus, if there is reasonable doubt as to whether lifting required by the usual duties of a job might constitute “a potential hazard to himself [the employee] or others,”³⁶ a physical examination is permissible. If an employee refuses to

³² *Miles Laboratories, Inc.*, 69-1 Lab. Arb. Awards (CCH) ¶ 8416 at 4422 (1969) (Larkin, Arb.).

³³ 1984 Agreement, art. III, § (j) provides:

(1) Physical examination, required as a condition of or in employment, shall not be used other than to determine the physical condition or to contribute to the health and well-being of the Employee or Employees. The retention or displacement of Employees because of physical conditions shall not be used for the purpose of effecting discrimination.

(2) When a physical examination of a recalled Employee on a panel is conducted, the Employee shall be allowed to return to work at that mine unless he has a physical impairment which constitutes a potential hazard to himself or others.

(3) That once employed, an Employee cannot be terminated or refused recall from a panel or recall from sick or injured status for medical reasons over his objection without the concurrence of a majority of a group composed of an Employer-approved physician, an Employee-approved physician, and a physician agreed to by the Employer and the Employee, that there has been a deterioration in physical condition which prevents the Employee from performing his regular work. Each party shall bear the cost of examination by the physician it designates and shall share equally the cost of examination by the jointly designated physician.

(4) Where an Employer challenges the physical ability of an Employee or panel member to perform his regular work and is subsequently proven wrong, the Employee shall be compensated for time lost due to the Employer’s challenge, including medical examination expenses incurred in proving his physical ability to perform the requirements of the job.

³⁴ *Id.* at art. III, § (j)(1).

³⁵ See *supra* note 25.

³⁶ 1984 Agreement, art. III, § (j)(2).

submit to such a physical examination, he or she waives the three-physician procedure set out in section (j)(3) of article III.

It is appropriate for an employer, as well as an arbitrator, to consider the potential danger to the grievant and other employees. In ARB Decision 78-39, the Arbitration Review Board stated that "in evaluating the question of whether there has been a 'deterioration in physical condition which prevents an employee from performing his regular work,' it is proper to inquire as to both potential risk as well as present capabilities."³⁷ Affirmed by the ARB, the district arbitrator held that "[s]ince two of the three doctors did not specifically state the grievant is unable to perform his regular work, the Company did not meet the requirements of Article III (j) of the Agreement and the grievance is sustained."³⁸

In Review Case 78-402, the ARB affirmed the district arbitrator's dismissal of the grievance for untimeliness under the ten-day requirement. The grievant had been sent by the company to an eye specialist and upon recall, employment from layoff was deferred pending receipt of the doctor's report. The employee grieved for back pay for the interim period. The district arbitrator found that the time for grieving had begun to run from the date that the manager of industrial relations advised him that he would receive no back pay for the delay and not from the date that a subsequent paycheck indicated the shortage.³⁹

As to sickness and accident claims, the 1984 Agreement grants to the employer or its insurance carrier "the right to take reasonable steps to investigate the factual aspects of an Employee's claim, including examination of the Employee by a physician at the Employer's or carrier's expense, in the event of a dispute over medical evidence."⁴⁰ In the exercise of its options, management may not discriminate and single out one employee for a physical examination when under like circumstances it has not done so as to other employees.⁴¹

³⁷ ARB Decision 78-39, at 4. In this case, the employee had sustained a major injury to his fourth lumbar vertebra and associated structures with a potential for aggravation and susceptibility to future low back difficulty.

³⁸ *Id.* at 3.

³⁹ ARB Review Case 78-402, at 7.

⁴⁰ 1984 Agreement, art. XI, § (f).

⁴¹ Arbitrator Kossoff observed in *Atlas Metal Parts Co.*, 67 Lab. Arb. (BNA) 1230, 1235 (1977) (Kossoff, Arb.), that "[a]rbitrators have consistently upheld the right of an employer to insist upon medical corroboration by its own physician although the employee has been released to return to work by his physician"

In ARB Decision 225, the ARB affirmed the result reached by a district arbitrator in reinstating a grievant to his classification who had been found blind in one eye by an employer-approved physician. The arbitrator commented that "[t]here seems to be a ring of arbitrary action on the part of the Company. All employees have not been afforded a physical examination. The Grievant seems to have been singled out. His work record was satisfactory." ARB Decision 225, at 5.

A doctor's statement indicating that the employee is able to return to his or her regular work without restrictions interfering with full work performance generally is sufficient evidence of the employee's ability to do so. In the absence of an established practice or contractual authorization requiring further evidence, management must have good and sufficient reason to question such a statement and delay the employee's return to work until additional proof can be elicited. Sometimes, in such circumstances, it is a well-recognized policy to refer the employee to the employer's physician. However, when a physical examination is conducted of a recalled employee from a panel, the 1984 Agreement specifies that "the Employee shall be allowed to return to work at that mine unless he has a physical impairment which constitutes a potential hazard to himself or others."⁴²

III. PERSONAL OR SICK LEAVE

Personal or sick leave as a benefit was first included in the 1974 Agreement as section (e) of article IX. The 1974 language and section number have been continued without change in subsequent Agreements. The primary contractual provision is found in paragraph (1) of that section which, during the calendar years 1984, 1985, 1986, and 1987, grants to "each classified Employee with one year or more classified service with his Employer . . . Personal or Sick Leave, at his regular rate . . . for any five (5) working days on which the Employee is absent from work for reasons of sickness, accident, emergency, or personal business . . ."⁴³ As stated by the Arbitration Review Board in Decision 78-40, "Article IX (e) . . . has inspired a considerable volume of controversy."⁴⁴ Board decisions have resolved a number of disputes under this provision. The ARB has held:

(1) An employee who has satisfied the year-or-more service requirement is entitled to five days of leave during the following year. The entitlement is immediate as of the start of the following year; the days are not "earned" on a pro rata basis, and the leave from work may be taken at any time. Payment in lieu of leave, however, is available only at calendar year-end.⁴⁵

⁴² 1984 Agreement, art. III, § (j)(2).

⁴³ *Id.* at art. IX, § (e)(1). Section (e) also contains four additional paragraphs: paragraph (2) specifies that the leave "shall not be utilized for any period of less than one (1) full regular workday"; paragraph (3) requires the employee to give the notice prescribed therein to his immediate supervisor; paragraph 5 directs that such leave days, with an exception, "shall not be counted as part of the seven (7) day waiting period under the sick and accident pay program"; and paragraph 4 provides that "[i]f, at the end of any calendar year, an Employee has not exhausted the paid Personal or Sick Leave for which he becomes eligible under this section, he shall receive pay in lieu of such leave at his regular rate, including regularly scheduled overtime as provided in paragraph (1) above."

⁴⁴ ARB Decision 78-40, at 1.

⁴⁵ ARB Decision 78-40. In this case, the employer, having lost its permit to operate the mine, laid

(2) The leave benefit covers leave from work. If an employee is already off work, or if the employment relationship has been terminated, he or she may not claim leave days under section (e)(1).⁴⁶

(3) If the employee has worked during that year and has foregone the use of some or all leave days, however, his or her absence from work because of layoff or illness at the calendar year-end does not deny the employee entitlement to the payment of unused days under section (e)(4). If the employee quits, or if the employment relationship has been otherwise finally terminated, there is no right to year-end payments.⁴⁷

(4) The leave days may be utilized for any reason at any time. While there are reasonable notification requirements, the employer's permission is not a prerequisite to the leave.⁴⁸

off most of its work force on January 31, 1979. The grievants then sought immediate pay for any unused personal or sick days in 1979. The ARB held that "the claim for year end payments in January was premature". *Id.* at 7. The ARB explained that "[a]rticle IX(e)(4) begins with the qualifying statement 'If, at the end of any calendar year . . .'" The parties were precise as to the time involved. "In lieu' payments are made at year end, not before." *Id.* at 6.

The ARB rejected the district arbitrator's conclusion that the laid-off employees should be given a pro-rated accrual, stating that "[t]he short answer is that he is not given such pro-rated accrual. He is eligible for the leave days by virtue of prior service and need not 'earn them' during the succeeding year." *Id.* at 6.

⁴⁶ ARB Decision 78-41 involved a grievant who was injured in an on-the-job accident in May 1977 and was off work from that time forward. In April 1978, still off work, he requested pay for five personal or sick leave days for calendar year 1978. In denying the request, the ARB reasoned:

Article IX is constructed, in the overall, with reference toward absence from what would otherwise be a day of work. It is cast in terms of "leave." . . . Thus, the over purpose is to compensate employees from loss of days on which, but for sickness, accident, emergency or personal business, the employee would have worked and drawn a day's pay. The parties agreed that, to the limit of five days, income protection would be provided to cover lost wages. But the essence of the provision, it must be remembered, was a protection against loss. If there has been no loss of wages, there is no cause for their recoupment.

ARB Decision 78-41, at 3. *See also* ARB Decisions 78-4; ARB Decision 78-10.

⁴⁷ ARB Decision 78-42. In this case, the grievant had three unused personal days remaining when he was laid off in a reduction in force on October 30, 1978. It was held that he was entitled to year-end pay for the three days. The ARB reasoned:

If an employee had worked during the year he could have availed himself of leave days at any time. The critical fact in this case is that he did not and his having foregone them by working instead means both that the employee had earned the payments and the employer had gained the benefit of his attendance.

Id. at 3.

⁴⁸ In ARB Decision 78-43, the district arbitrator had concluded that permission was required for an employee to avail himself of personal or sick leave days. In reversing, the ARB wrote:

The Agreement does not confine the leave days to a particular use. In providing that the leave taken may be for "personal or sick" purposes, the parties established broad boundaries. Taken together with the concept that such days may be taken for "any five (5) working days," it is apparent that the parties intended virtual blanket discretion on the part of the employee. Surely,

(5) The twenty-one day period for giving written notice of disability pursuant to article XI, section (e), is not extended by the use of personal or sick leave days to cover some of the absences.⁴⁹

(6) An employer's policy is unreasonable if it requires the employee to utilize personal or sick leave to cover days of any absence from work unless he or she has requested floating or graduated vacation days to cover the absences.⁵⁰ Since the option to use or not use personal days rests with the employee, an attendance control program is unreasonable if it requires the employee to use such days before absences will be excused.

(7) Unless an employer accepts the request, an employee may not apply personal or sick days retroactively to excuse consecutive absences resulting in termination under article XXII, section (i)(4), if the employee did not have the consent of the employer for such absences and did not offer proof of illness.⁵¹

A. *Returning from Sick Leave—Proof of Recovery*

Apart from the company's legitimate concern and duty in the health of an employee, the question of physical ability or health may arise when the employee is not on the payroll and in active employment. If the employee has been on sick leave and away from work for an extended period of time due to illness, the burden is on the employee to establish that his or her health has improved or is restored to the point that he or she can resume regular job duties and perform them in the usual way without undue risk to his or her own health.

an employer may reasonably require some advance notice of an employee's intention to take the time off; scheduling necessities require at least that much But permission to take the particular days is not required.

ARB Decision 78-43, at 2.

In this case, the ARB agreed with the company that when permission was refused, the employee's obligation was to work the days and grieve later.

⁴⁹ ARB Decision 79-05 held that the twenty-one day period began after the day claimed as the first day of disability and was not tolled for the period of the personal or sick leave. *See also* ARB Review Case 78-234.

⁵⁰ In ARB Decision 79-02, the Board wrote:

The rules, however, may not go so far as to mandate that a leave be taken where none has been requested since the leave itself is an Employee benefit given by the contract and it is the Employee who initiates the request for the leave when he knows that he will be unable to report for scheduled work. The Employers' proper role is to respond to the request for leave, not to initiate the request on behalf of the Employee. For the same reason, the Employer may not properly require that the Employee initiate a request for a leave of absence from employment. That choice remains with the Employee and any Employer rule or policy which denies that choice and gives it to the Employer must be held to be unreasonable.

Id. at 6.

⁵¹ ARB Review Cases 78-12 & 78-131. In ARB Review Case 78-131, the district arbitrator upheld an employer's policy requiring that at least one day during the calendar year be worked prior to a personal sick day request.

Normally, a doctor's statement indicating that the employee is able to return to regular work without any restriction is satisfactory evidence of the employee's ability to do so. Absent an established practice or contractual authorization requiring further proof, management must have good and sufficient reason to question such a statement and delay the employee's return to work.⁵²

The doctor's statement sometimes may be ambiguous, such as when it simply states that the employee was seen by the doctor without rendering any opinion as to whether the employee is able to return to work. In other instances, especially those in which the illness is suspected of being job-related, such as an allergy, the employer might not be certain from the certificate that the doctor has understood the nature of the working conditions or the environment to which the employee is returning. In such instances, it is permissible for the company to ask the employee to obtain clarification or, preferably with the employee's consent, for the company to directly contact the physician.⁵³

The above discussion must be read in conjunction with article III, section (j), paragraphs (2) and (3). Paragraph (2) directs that a recalled employee is to be allowed to return to work at a mine unless a physical examination reveals a "physical impairment which constitutes a potential hazard to himself or others."⁵⁴ An appeal to three doctors may be made under paragraph (3) by an employee who has been "terminated or refused recall from a panel or recall from sick or injured status for medical reasons."⁵⁵

In ARB Decision 78-39, the grievant sought to return to work following extensive back injuries sustained in an on-the-job accident after suffering prior serious injuries to his back in an automobile accident. The company refused his return-to-work slip from a chiropractor and had him examined by its physician, who reported that "returning to employment in the mines . . . must be done on the basis of understanding of the potentials of aggravation of his pre-existing pathology by his employment. He would be well advised to seek employment outside the industry."⁵⁶ The company, nevertheless, permitted him to return to work. The district arbitrator commented that "the Company erred in its adherence to the Contract. If they thought the Grievant had a physical impairment which constituted a potential hazard to himself, the Company should not have permitted the Grievant to return to work at this time."⁵⁷

⁵² In *A.M. Castle & Co.*, 41 Lab. Arb. (BNA) 391 (1963) (Sembower, Arb.), Arbitrator Sembower held that under the facts, the employer should have accepted a statement from the physician who had performed the surgery that the employee was able to return to work without limitation.

⁵³ In *Roadway Express, Inc.*, 38 Lab. Arb. (BNA) 1076 (1962) (Short, Arb.), Arbitrator Short held that the employer properly delayed the return to work of an employee with a bad back until he had presented a complete and unequivocal medical release.

⁵⁴ 1984 Agreement, art. III, § (j)(2).

⁵⁵ *Id.* at art. III, § (j)(3).

⁵⁶ ARB Decision 78-39, at 2.

⁵⁷ *Id.* at 3.

B. *Working at Other Jobs During Sick Leave*

Management may use its disciplinary authority to control abuse of illness, accident, and other insurance benefits and an employee's utilization of a medical leave of absence. The purpose of the former is to soften the impact of loss of income during a period of illness or injury, and the purpose of the latter is to authorize time off from work during the period of recuperation. It is assumed that the employee will fully cooperate in this process and will not prolong the period of recovery or jeopardize return to work. The 1984 Agreement expressly states that sickness and accident benefits "shall not be payable . . . while the Employee is engaged in employment other than classified employment with his Employer."⁵⁸ It adds that "[b]enefits shall be terminated in the event that the Employee . . . accepts employment with another signatory Employer or with any employer not signatory to this Agreement."⁵⁹

C. *Returning from Sick Leave with Medical Restrictions*

Except to the extent that light work has been offered pursuant to article XI, section (b), of the 1984 Agreement, an employee on sick leave has no contractual right to return to a job unless the employee establishes that he or she has the physical ability to perform the job's usual duties. The 1984 Agreement refers to "ability to step into and perform the work of the job";⁶⁰ specifies that in a realignment "any Employee on sick or injured status who otherwise has the ability to perform available work will not be denied a job";⁶¹ makes reference to "ability to perform the work of the job" in recalling persons on layoff status;⁶² and recognizes challenges by an employer to "the physical ability of an Employee or panel member to perform his regular work."⁶³ The 1984 Agreement also specifies that upon objection from the employee, the question of ability is to be determined by the concurrence of two of the three physicians listed therein.⁶⁴ As a general proposition, if the regular duties of an employee's job can accommodate a particular set of work restrictions, the individual should be allowed to return to work on that job.

Sometimes the restriction will state that no overtime work is to be performed. A distinction must be made between a situation in which a bona fide illness or physical disorder is offered as an excuse for refusing a particular overtime assignment and one in which a blanket medical restriction prevents the

⁵⁸ 1984 Agreement, art. XI, § (b).

⁵⁹ *Id.*

⁶⁰ *Id.* at art. XVII, § (a).

⁶¹ *Id.* at art. XVII, § (b)(2)(d).

⁶² *Id.* at art. XVII, § (h)(2).

⁶³ *Id.* at art. III, § (j)(4).

⁶⁴ *Id.* at art. III, § (j)(3).

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. The involvement of overtime work is implicit from a reading of article IV, section (d). The 1984 Agreement contemplates mandatory Saturday idle day work⁶⁵ and directs that “[i]dle day work must be equally shared in accordance with past practice and custom.”⁶⁶ Arbitrator Brown pointed out in *National Vendors Division of U.M.C. Industries, Inc.* that if an employee could obtain a blanket exemption from overtime work by obtaining a medical certificate, the scheduling of overtime work in an equitable manner soon would become impossible.⁶⁷

D. *Duty of Employee to Seek Medical Treatment*

If medical evidence indicates that a medical condition may be corrected by surgery or other medical treatment or procedure, management, or an arbitrator in his or her award, may place or continue the employee on sick leave if contractually permitted. This may be done on the condition that, if the medical procedure is not undertaken during a specified time period, termination for excessive absenteeism will result or be upheld. Two additional factors which 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 own health.⁶⁸ Reasonable warnings by management to an employee to secure medical assistance have been upheld by arbitrators.⁶⁹

⁶⁵ *Id.* at art. IV, § (d)(5).

⁶⁶ *Id.* at art. IV, § (d)(7).

⁶⁷ *National Vendors Div. of U.M.C. Indus., Inc.*, 72-1 Lab. Arb. Awards (CCH) ¶ 8272 at 3922 (1972) (Brown, Arb.). Arbitrator Brown concluded that the employer could “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 schedule for his or her job.” *Id.*

Arbitrator Teple, in *Standard Oil Company*, 65-1 Lab. Arb. Awards (CCH) ¶ 8043 (1965) (Teple, Arb.), held that the proper procedure is to continue an employee on sick leave when no job is available and the employee is ready to return to work.

⁶⁸ In *National Annealing Box Co.*, 65-2 Lab. Arb. Awards (CCH) ¶ 8732 at 5688 (1965) (Teple, Arb.), 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.

⁶⁹ In *Ferro Mfg. Corp.*, 59 Lab. Arb. (BNA) 1111, 1113 (1972) (Rehmus, Arb.), Arbitrator Rehmus noted:

[The employee] 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.

E. *Medical Statements*

1. Requiring when Illness is Offered as a Reason

A question as to form of proof arises frequently in proving sickness under section (i)(4) of article XXII⁷⁰ or in supporting an excused absence for illness under an attendance control program or policy under section (i)(2) of that article. Neither provision prescribes the method of proof deemed to be adequate; particularly, no mention is made of a doctor's statement.⁷¹ Therefore, the matter falls within the reasonable exercise of managerial discretion to direct the work force as confirmed by section (d) of article IA. Since a question of reasonableness is involved, the authority of an employer to require a medical statement cannot be decided in the abstract, but rather must be determined based upon the circumstances and facts in each case.

Although a doctor's statement generally is regarded as the best evidence and usually is accepted as such, it is not the only evidence which can prove an illness.⁷² As stated by the arbitrator whose award was reviewed by the Arbitration Review Board in Decision 134, "[t]his arbitrator has repeatedly taken this position that there is nothing in the Agreement, in the absence of a contrary past practice, which requires that an employee prove his illness under Article XXII, Section (i), by a doctor's slip, or if such be used, what that statement must contain."⁷³

⁷⁰ 1984 Agreement, art. XXII, § (i)(4), reads in part: "When any Employee absents himself from his work for a period of two (2) consecutive days without the consent of the Employer, other than because of proven sickness, he may be discharged."

⁷¹ The district arbitrator, in ARB Decision 76, explained:

It is noted that the Contract does not say that a doctor's slip must be furnished for each day of absence or even that it must be furnished at all. The Contract uses the words "proven sickness" and while a doctor's slip is the customary and best way of proving sickness, the Contract does not say it is the only method.

Id. at 6-7.

⁷² Arbitrator Ipavac in Geauga Plastics Co., 72-1 Lab. Arb. Awards (CCH) ¶ 8229 at 3781 (1972) (Ipavac, Arb.), expressed a common view when he wrote that "[t]o establish a bona fide illness as an excuse, a doctor's certificate is usually accepted as evidence; however it is not conclusive evidence nor is it the only evidence which would prove an illness."

Arbitrator Duff elaborated in Wheatland Tube Co., 67-1 Lab. Arb. Awards (CCH) ¶ 8038 at 3133 (1966) (Duff, Arb.):

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.

⁷³ ARB Decision 134, at 5. In this case, the grievant returned to the doctors' office three times and obtained three different slips, but none was accepted in that they failed to state that he had been unable to work on the two consecutive days of absence.

Under the doctrine of reasonableness, the judgment of management, although entitled to much weight, is not controlling. 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 an abnormality causing so much discomfort as to persuade an employee, who is reasonably diligent as to his or her attendance, to stay home from work. A stricter form of proof may be required of an employee with a poor attendance record.

It has been generally established by arbitral decisions that management may require appropriate corroboration of the employee's claim of illness. On this point, Arbitrator Platt explained in *Republic Steel Corp.*:

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 illness 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.⁷⁴

2. Imposing Criteria upon Acceptability of Medical Statement

In the absence of contractual specifications, the standard of reasonableness circumscribes managerial discretion in prescribing the content of doctor statements. In Case 81-23-81-5P, the district arbitrator upheld as reasonable the four requirements for a medical certificate imposed by the employer. These requirements included:

- (1) The statement must identify by name and address the medical practitioner, clinic, or hospital visited.
- (2) The statement should specifically set forth the date or dates of any medical visits.
- (3) The statement shall state that the employee was examined and the doctor found that the employee was unable to work on the date or dates in question.

⁷⁴ Republic Steel Corp., 28 Lab. Arb. (BNA) 897, 899 (1957) (Platt, Arb.). In ARB Decision 123, the arbitrator found that illness had been sufficiently established when it was shown that the grievant "was bogged down in the shunting process from one doctor to another" and that "his wife applied some home remedies to his back." ARB Decision 123, at 10. In ARB Decision 341, the company policy was to accept medical reports from anyone in the health field, including aphysical therapists. The district arbitrator, in Review Case 78-189, refused to accept as a reliable corroboration the testimony of the grievant's wife and son when the testimony of the three was inconsistent and there was no medical testimony to support grievant's claim of serious back injury. The grievant's testified only that he was in bed during the entire period.

(4) The statement shall be signed by the doctor who conducted the examination or provided the treatment.

In Case 81-17-KD-102, the district arbitrator found that the employer was not justified in unilaterally adding to a standard form of doctor's statement, which had been used for many years, a requirement that it contain a statement "that the employee was unable to work during the dates covered by the medical slip." The arbitrator concluded that there were "circumstances to which the unable-to-work requirement cannot be applied even though genuine sickness exist[s]." ⁷⁵ As examples he listed:

twenty-four (24) hour flu, some kinds of diarrhea, diagnosed conditions with recurring symptoms for which a prescription has been provided on an as-needed basis, etc., may temporarily disable an employee from being able to work, but in circumstances in which the employee knows the therapy to be applied from prior medical treatment, and which therefore does not necessitate a fresh examination by a doctor. ⁷⁶

3. Employer's Right to Investigate Genuineness of Illness.

Article XI of the 1984 Agreement provides, in part, that "[t]he Employer or his insurance carrier shall have the right to take reasonable steps to investigate the factual aspects of an Employee's claim, including examination of the Employee by a physician at the Employer's or carrier's expense, in the event of a dispute over medical evidence." ⁷⁷

In the award considered in ARB Decision 47, the union maintained "that the doctor's certificate is conclusive and that the Company is precluded by the contract from making an independent investigation to determine an employee's illness." ⁷⁸ The district arbitrator disagreed. "[T]he Company should [not] be precluded from making an independent determination of illness. Clearly, the Company should have the right to determine whether a doctor's certificate is genuine." ⁷⁹

A district arbitrator observed in Case 81-17-KD-102 that "[m]anagement also remains free to challenge the genuineness of a claimed sickness, including the genuineness of a doctor's slip, and to contact the doctor directly when such a challenge is being investigated." ⁸⁰

⁷⁵ Case 81-17-KD-102, at 8.

⁷⁶ *Id.*

⁷⁷ 1984 Agreement, art. XI, § (f).

⁷⁸ ARB Decision 47, at 6.

⁷⁹ *Id.*

⁸⁰ Case 81-17-KD-102, at 6.

In Review Case 78-352, the grievant revoked previous authorization to the company to secure medical information concerning him. The ARB agreed with the following directive of the district arbitrator: "The Grievant is instructed not to interfere in any manner with the Company's verifying any of his future absences. Further, the Grievant must comply with the normal accepted industrial criteria for illness or injury stating the nature of the illness or injury that prevents the Grievant from working."⁸¹

4. Medical Slips Found to be Inadequate

The following medical statements have been found to be inadequate in proving illness:

(1) A slip stating "no more than that he [the grievant] had visited the doctor for a cold on the day of his absence" without acknowledging "any illness which caused the Grievant to miss work."⁸²

(2) A slip stating that the grievant was seen by the doctor on May 3, 1977, that he was able to report to work on May 4, 1977, and that the grievant had not been under his care during any previous period, but making no statement that he was unable to report to work on April 28 or 29, 1977.⁸³

(3) A slip which was not the result of grievant's seeing the doctor or the nurse, but was based entirely upon his representations to the nurse after he had been suspended with intent to discharge.⁸⁴

(4) A slip stating nothing and not indicating that the grievant was under the doctor's care.⁸⁵

(5) A blank slip signed by the doctor and filled out by a physiotherapist on November 19 to cover the absences of November 13 and 14.⁸⁶

(6) A claim of a "bad case of nerves" unsupported by a valid doctor's excuse.⁸⁷

⁸¹ ARB Review Case 78-352. As to a doctor's slip not signed by the doctor, the district arbitrator in ARB Review Case 78-389, explained:

in the absence of proof to the contrary, it would be assumed that, on the basis of applicable legal principles, including "common experience" or judicial knowledge, that the employees in doctors' offices act pursuant to the doctors' directions . . . and . . . a doctor's slip given by an employee of the doctor must be accepted as the doctor's slip in the absence of proof that it was given without the doctor's authority . . . or that the statements thereon were incorrect.

⁸² ARB Review Case 78-352.

⁸³ ARB Decision 112.

⁸⁴ ARB Review Case 78-174. The district arbitrator observed that "[t]he excuse may have been accepted even though the nurse signed the doctor's signature but only if the employee had been treated by the doctor." *Id.* at 9.

⁸⁵ ARB Review Case 78-131.

⁸⁶ ARB Review Case 78-339.

⁸⁷ ARB Review Case 78-391.

(7) A letter “from a doctor which is not based on an actual physical examination has little probative value.”⁸⁸

(8) The doctor sees the grievant after the last absence, and simply provides a statement of what the grievant has told him.⁸⁹

(9) A slip stating that “he seems to have a knee sprain” obtained five days after the last absence.⁹⁰

(10) A slip written when the grievant saw the doctor seven days after the absence not for the purpose of treatment, but to get a slip.⁹¹ The district arbitrator wrote:

The required proof must be that the grievant was unable to work on the day in question, not that he told the doctor he was not able to work seven days later. It would appear to the arbitrator that, if the grievant had been truly incapacitated on August 31, he would have sought medical aid on the day, not seven days later. In fact, the testimony of the grievant indicated that he did not go to the doctor to seek aid, but did in fact go to the doctor only to obtain a medical slip.⁹²

(11) A slip obtained from a doctor, investigation of whom showed that he gave slips without examining the patient, and which merely stated that the grievant had been under his care for a period of time.⁹³ The district arbitrator commented that “[i]n order for an excuse of a medical nature to have validity it must contain a statement from the doctor that in fact the grievant or employee is unable to work for the period of time under which he has been under the care of the physician.”⁹⁴

(12) A slip stating that the “patient had appointment June 29, 1978; Return to work 7-12-78.”⁹⁵

(13) A slip which stated that the employee was “released to return to work on 11/29/77” and was under the doctor’s care on the two days in issue, but neither statement indicating that the grievant had been unable to work.⁹⁶

(14) A slip by a doctor after the employee had been released from jail stating that “[d]uring those two days, he was also incarcerated in jail. After release

⁸⁸ ARB Review Case 78-13 at 6-7.

⁸⁹ ARB Review Case 78-267.

⁹⁰ ARB Review Case 78-264.

⁹¹ ARB Review Case 78-354.

⁹² *Id.* at 9.

⁹³ ARB Decision 102.

⁹⁴ *Id.* at 10.

⁹⁵ ARB Review Case 78-29.

⁹⁶ ARB Decision 134.

from jail, he felt better and was medically able to return to work on 9/29/77."⁹⁷

F. *Absenteeism Due to Illness—Grounds for Discipline*

In the usual case, illness is an excuse or a mitigating circumstance for absences. However, disciplinary action may result from four situations:

(1) When the employee gives no notice or insufficient notice of intent to be absent;⁹⁸

(2) when the employee absents himself or herself from work for two consecutive days and sickness is not proven;⁹⁹

(3) when the employee violates an applicable attendance control program;¹⁰⁰ and

(4) when the employee has been excessively absent for all causes, including illness.¹⁰¹

Inasmuch as the giving of notice and medical proof apply generally to absences, they will be discussed first.

1. Notice of Intent to be Absent

Section (e) of article IX provides in part:

To the extent practicable, the Employee shall notify his immediate supervisor at least twenty-four (24) hours in advance of the shift or shifts for which he will be unable to report. In the event of sudden sickness, accident, or emergency, the Employee shall make a reasonable effort to notify his immediate supervisor at least two (2) hours in advance of the shift on which he is scheduled to work.¹⁰²

Three of the terms contained in this paragraph were defined by the district arbitrator in an award which was affirmed without opinion by the Arbitration Review Board in Decision 275. The phrase "to the extent practicable" was defined to mean "to the extent feasible; capable of being accomplished."¹⁰³ A "reasonable effort" was held to mean "such efforts as men ordinarily use, apply or exercise in their own business to protect their rights and interests, and such

⁹⁷ ARB Decision 128.

⁹⁸ 1984 Agreement, art. IX, § (e)(3).

⁹⁹ *Id.* at art. XXII, § (i)(4).

¹⁰⁰ *Id.* at art. XXII, § (i)(1)-(2).

¹⁰¹ *Id.* at art. IA, § (d), art. XXIV, § (a).

¹⁰² *Id.* at art. IX, § (e)(3).

¹⁰³ ARB Decision 275, at 9.

other efforts as are within their realm of reason and logic under the circumstances . . . or such efforts as are reasonable under the circumstances."¹⁰⁴ With regard to the meaning of words "sudden sickness" the arbitrator explained, "[s]udden doesn't mean instantaneous; it can mean an incident happening without previous notice or with very brief notice. It is a relative term, depending on the circumstances Each case will have to be viewed on its own particular facts."¹⁰⁵

In ARB Decision 227, the questions for decision were whether the grievant had made a reasonable effort to notify the company at least two hours in advance and, if not, whether disciplinary action could be taken. It was found by the district arbitrator, and the result affirmed by the ARB, that the five-day suspension was not warranted since, under the circumstances, notice had been given "to the extent practicable." Fifteen minutes before starting time, the grievant decided that he should not go to work because of chest pains. He used a neighbor's telephone (having none of his own) and talked with a fellow employee at the job site who reported the conversation to the grievant's foreman well after the shift had begun. Under certain circumstances, an employee may give notice through another employee or other person, but must bear the risk of nonperformance.¹⁰⁶

2. Two Consecutive Days of Absence

In the 1978 Agreement, section (i) of article XXII read: "When any Employee absents himself from his work for a period of two days without the consent of the Employer, other than because of proven sickness, he may be discharged."¹⁰⁷

In the 1981 Agreement, this language was changed to its present form by making two modifications. The days of absence were changed to "two (2) consecutive days" and the following sentence was added: "This provision shall apply to all locations regardless of whatever attendance control program (if any) is elected or retained at any location."¹⁰⁸

¹⁰⁴ *Id.* at 9.

¹⁰⁵ *Id.*

¹⁰⁶ In an award considered in ARB Decision 112, the district arbitrator wrote:

The Union also contended that the fellow employee who transmitted the grievant's message to the Company transmitted it incorrectly and only asked for one personal day rather than three. It is the employee's responsibility, in this case the Grievant's, to notify the Company when he wishes to take personal days. The Grievant must bear the risk of the fellow employee not giving the message to the company officials, or giving it to them incorrectly.

ARB Decision 112, at 6.

¹⁰⁷ National Bituminous Coal Wage Agreement of 1978, art. XXII, § (i).

¹⁰⁸ National Bituminous Coal Wage Agreement of 1981, art. XXII, § (i)(4).

This sentence reinforces what previously had been implicit. Article XXII (i)(4) constitutes an independent ground for disciplinary action separate from “just cause” and other provisions of the Agreement. When the arbitrator is reviewing a discharge under this section, he or she cannot modify the penalty imposed but is limited to deciding whether the grievant was absent for two consecutive days; whether such absences were with the consent of the employer; and, if not, whether the grievant has proven that they were caused by sickness. An employer, in its discretion, determines the penalty, which may be less than discharge.¹⁰⁹ If the penalty is discharge, the arbitrator must uphold it or set it aside and make the employee whole when article XXII (i)(4) has not been violated.¹¹⁰ The Arbitration Review Board stated:

The key point there made [in ARB Decision 97], for purposes of this discussion, is that Article XXII, section (i) is an independent provision under which an employee may be discharged, and that the provision is not to be mixed with the “just cause” requirement of Article XXIV for other forms of discipline and discharge for other causes, including absenteeism. The sense of the “independent” treatment for Article XXII, section (i) by construction in Decision No. 97 is that the provision does stand separate and distinct from other forms of discipline authorized¹¹¹

Article XXII, section (i), as interpreted, makes it clear that an arbitrator has extremely limited discretion in reviewing a company’s decision.¹¹² However, he or she can evaluate the evidence and resolve disputes as to “consent” and “proven sickness.”¹¹³ Generally, an employee is entitled to be informed at the

¹⁰⁹ ARB Decisions 97, ARB Decision 78-25. In ARB Decision 97, the ARB explained:

It does not follow, however, that Management is estopped from considering an employee’s past record in determining whether to proceed against him under Article XXII, Section (i). The provision rather than say “will be discharged” or “must be discharged”, says “may be discharged”. We believe that this adds up to the retention of discretionary authority by Management as to whether or not to discharge an employee who has made himself subject to discharge under the provision.

ARB Decision 97, at 4.

¹¹⁰ In its leading decision interpreting art. XXII, § (i), the ARB explained in ARB Decision 97: Stated otherwise, the provision is one which itself defines what is cause for discharge. This being so, the question under Article XXII, Section (i) must be whether the specified conditions were or were not present. If they were, the discharge must be upheld—for the discharge penalty is already declared to be proper in that event. Contrarily, if the specified conditions were not present in the case, the answer must be that Management erred in invoking Article XXII, Section (i) and that the grievant must be reinstated with full restitution for all that he lost by virtue of the wrongful invocation of the provision. Lacking is the general and undefined “just cause” standard which permits an arbitrator to make an independent assessment as to severity of penalty.

Id. at 3.

¹¹¹ ARB Decision 78-25, at 25.

¹¹² ARB Review Case 78-391.

¹¹³ ARB Review Case 78-389.

time of discharge as to the specific days involved so that he or she can direct preparation and proof to those days.¹¹⁴ Progressive discipline is not a consideration unless voluntarily utilized by management.¹¹⁵

Article XXII, section (i)(4), excuses absences caused by proven sickness. Can an employee prove sickness of a member of his or her family as the cause for his or her own absences under section (i)(4) of article XXII? The answer depends largely upon the interpretation which the parties in practice have placed upon the wording. Past practice may be used as an aid to the interpretation of ambiguous contractual language. Under the plain-meaning rule, however, it may not be used for this purpose if the language being interpreted is plain and unambiguous. Section (b) of article XXVI provides that prior practice and custom is to be continued only when "not in conflict with this Agreement."

Section (i)(4) of article XXII is not so clear on its face as to preclude past practice as an aid to interpretation. Its purpose is to excuse absences when proven sickness is the cause. Sickness may be considered the cause of an employee's absences when he or she misses work to take an ill child or spouse to the hospital if no other means of transportation can be feasibly arranged. Absences also may be excused when the circumstances require the employee to stay with a very sick member of the family, to the same extent as when the employee is the one ill. Such meaning properly may be given to section (i)(4) by the parties

¹¹⁴ ARB Decision 134.

¹¹⁵ In Decision 78-25, the ARB summarized the different situations in which absences due to illness are involved, as follows:

"Proven Sickness" is a defense to discharge discipline asserted only under Article XXII, section (i). The provision has no application to prohibit discipline for absenteeism under other provisions of the Agreement where some of those absences are caused by "proven sickness".

Illness-caused absences may be used in determining excessive absenteeism for purpose of discipline under Absentee Control Programs or policies, subject, however, to the assessment whether the disciplinary action and procedures used comply with the standards of just cause as outlined in this Decision, Part II.

Since illness-caused absences may be utilized in determining excessive absenteeism under Absentee Control Programs or policies, such Programs or policies must be examined and interpreted to determine how and in what manner illness-caused absences are to be "counted" as exempt or nonexempt for purposes of disciplinary action under the Program or policy in accordance with its announced or specified terms and conditions.

In recognition of reserved management prerogative, such Absentee Control Program or policies will generally be interpreted as "counting" illness-caused absences for determining excessive absenteeism and cause for discipline unless the Program or policy expressly exempts such absences or the facts show actual or implied excuse or permissions to be off work for each such illness-caused absence.

Id. at 31.

in their day-to-day administration of the provision in practice. Neither ARB decisions nor the language of that section makes clear that the words "proven sickness" cannot be extended to family members. Whenever feasible, prudence suggests that the employee should contact his or her supervisor in advance to obtain consent for such absence.

3. Duty of Employer to Give Notice of Attendance Policies

An employer has a duty to define clearly the terms of its attendance policy or attendance control program and to inform employees fully and adequately of its contents and of the consequences resulting from violations. In ARB Decision 76, the district arbitrator wrote: "I have said in numerous opinions that I think an Employer has the right to promulgate reasonable rules pertaining to repeated single-day absences. In my view, 'to be reasonable, such rules must be absolutely clear so an employee can know what he must not do.'"¹¹⁶ Progressive discipline is applicable to the offense of excessive absenteeism and, as the final step, the employee should be warned that further absences may result in possible discharge.

Arbitrator Roberts, in ARB 81-12-83-799, concluded that when the following elements are present, nondisciplinary termination will lie if:

- (1) The absenteeism is so excessive that it impairs the essence of the employment relationship because the employee is unable to fulfill the duty to be reasonably reliable in attendance;
- (2) there is no prognosis that the cause for the excessive absenteeism can or will be removed within a reasonable period of time; and
- (3) the employee has received proper warning of the consequences of continued excessive absenteeism.

4. Excessive Absenteeism as a Separate Disciplinary Offense

Excessive absenteeism is recognized as a disciplinary offense separate from those involved in article XXII, section (i). Authority to discipline for this offense is found in management's authority to direct the working force contained in section (d) of article IA. A limitation upon its exercise is present in the "just clause" requirement of article XXIV, section (a).¹¹⁷ The Arbitration Review Board explained in Decision 78-25 that "[i]llness-caused absences may be used in determining excessive absenteeism for purposes of disciplinary action under Ab-

¹¹⁶ ARB Decision 76, at 6.

¹¹⁷ The 1984 Agreement, art. XXIV, § (a), provides, in part, that "[n]o Employee covered by this Agreement may be disciplined or discharged except for just cause."

sentee Control Programs or policies, subject, however, to the assessment whether the disciplinary action and procedures used comply with the standards of just cause as outlined in this Decision.”¹¹⁸

An employee may be discharged if he or she makes “a habit of laying off for single days other than for good cause or proven sickness and continues to do so after having been warned by Management.”¹¹⁹ This provision does not limit action which may be taken under an attendance control program to the situation mentioned therein. Instead, the parties evidence a contrary intent when they direct that “[r]egular work attendance shall be required for all Employees and all absences must be accounted for.”¹²⁰

If absences covered by medical slips, regardless of how many and over how long a period, were a complete defense, regular attendance by the chronic offender would not be encouraged. The parties apparently intended to control irregular work patterns and discipline under article XXII, section (i), and to discipline for excessive absenteeism for illness and any other causes under article XXIV, section (a).¹²¹ The separate disciplinary offense of excessive absenteeism may include the aggregate of all excused and unexcused absences during the period at issue.

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 counselling and corrective discipline have been ineffective in sufficiently improving the employee’s attendance. Absences due to illness do not

¹¹⁸ ARB Decision 78-25, at 31.

¹¹⁹ 1984 Agreement, art. XXII, § (i)(2).

¹²⁰ *Id.*

¹²¹ The district arbitrator explained in Review Case 78-43:

An employee’s personal affairs, domestic crises, and other needs may often excuse isolated absence from work or late attendance or a series of both, but when a pattern, as here, of repeated absences continues over a long period, a point must eventually be reached when the reason for the absence becomes immaterial and the question becomes simply whether the Company can properly be required to retain on its payroll an employee who cannot reasonably be relied on.

An employer should not be obligated to retain an employee who is employed to perform full time work and who because of multitudinous repetitive and intermittent reasons establishes a record of considerable absences thereby becomes in effect a part-time employee, and this regardless of the legitimacy of the underlying causes. To compel an employer to retain a part-time employee when it is clearly contemplated that the employment was intended as a full-time employment would be contrary to and violative of the reserved rights of management to successfully and efficiently manage and operate its business.

Id. at 11.

become excessive for termination until they have fallen outside the range of acceptable attendance for an unreasonably long period of time. Unreasonableness depends on the circumstances, including the employee's previous attendance record, length of service, desire to be a faithful employee, and effort to improve his or her record. Other factors to consider include the nature of the absences and length of time they have exceeded the norm; the effect of the employee's absences upon the efficiency of company operations; the disruption caused to other employees and the effect upon their morale or incentive to be regular in attendance; the reasons for the absences (whether due to a variety of short-term causes indicating chronic bad health or indifference to attendance, or occasional illnesses, each lasting a long time but resulting in a restoration to health); and the prospect for the attainment of a satisfactory level of attendance.

IV. 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 or she 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 the allergy affected the employee's attendance, and ability to do the work?
- (5) How long has the employee been suffering from this condition? Has it been improving, getting worse, or 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 of 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 Brothers, Inc.*:

[W]here 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 carry out the required work duties for which she was hired¹²²

V. ALCOHOLISM

Alcoholism is sometimes the cause of absenteeism or other disciplinary offenses. When it has taken control of one's free will, alcoholism is generally considered an illness requiring 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 or her drinking and the compulsive drinker who has lost control of the ability to keep himself or herself in check.

An employee in the latter category is not unlike the chronically ill employee. One of the considerations is whether the "just cause" standard contemplates additional efforts at rehabilitation for alcoholism than are expected for some other forms of chronic illness. Unlike some chronically ill persons, the alcoholic who conquers the habit often restores himself or herself to good health enabling him or her to regain status as a useful employee.

One primary consideration is the future prospect for the employee if reinstated after discharge. On this question, rehabilitation efforts after discharge may be considered. However, if the evidence shows that the employee offers little or no hope for successful rehabilitation, it is recognized that an employer is limited in what it can and should do to help an alcoholic employee overcome the problem. As Arbitrator Kesselman pointed out in *American Synthetic Rubber Corp.*, "[i]t 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."¹²³

As to being on the job under the influence of intoxicants, the district arbitrator in ARB Decision 130 wrote with reference to West Virginia law:

It is interesting to note that Section 22-2-57(c) of said laws prohibits any person from entering any mine "under the influence of intoxicants." There was some indication at the hearing that the Company feels that consumption of any amount of alcohol prior to entering the mine constituted being "under the influence." While this writer seriously questions the wisdom of consuming any alcoholic beverage at such a time, nonetheless, the term "under the influence of intoxicants" is quite generally understood to suggest more than some slight degree of ingestion of an alcoholic beverage.¹²⁴

¹²² Kurtz Bros., Inc., 43 Lab. Arb. (BNA) 678, 682 (1964) (Duff, Arb.).

¹²³ American Synthetic Rubber Corp., 73-1 Lab. Arb. Awards (CCH) ¶ 8070, at 3277 (1973).

¹²⁴ ARB Decision 130, at 12.

VI. WEIGHT TO BE GIVEN 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 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.*, Arbitrator Hebert stated that “[t]he 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.”¹²⁵ When the employer has competent medical personnel who, on the basis of accepted methods of examination and testing, make a recommendation based on their medical findings, this recommendation usually is entitled to weight.¹²⁶ In such an instance, the employer acts reasonably in following the trained and professional judgment of medical personnel.

As to whether an employee has the physical ability to do the work, the decision should be based on a good faith objective evaluation of the relevant evidence, which principally includes the employee’s past work history, any instances of prior or present physical difficulty, his or her general state of health, and medical opinions and recommendations. When the only reliable evidence consists of the conflicting opinions of the company’s medical adviser and the employee’s physician, arbitrators usually hold that the company properly may rely upon the findings and recommendations of its own medical expert. This is especially true when they evidence a thorough understanding of the employee’s condition, subject, of course, to a request by the employee for evaluation by a panel of three doctors pursuant to article III, section (j)(3). Arbitrator Doyle expressed this view in *Hughes Aircraft Co.*, 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.¹²⁷

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 if 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

¹²⁵ *Collins Radio Co.*, 45 Lab. Arb. (BNA) 718, 722 (1965) (Hebert, Arb.).

¹²⁶ *Thompson Grinder Co.*, 70-2 Lab. Arb. Awards (CCH) ¶ 8821 at 5757 (1970) (Belshaw, Arb.) (“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.”).

¹²⁷ *Hughes Aircraft Co.*, 49 Lab. Arb. (BNA) 535, 539.

to be considered is the extent to which the employee has demonstrated ability in the past to perform identical or similar work. An employee also has a right to consult a physician of his or her own choice and to submit the findings to the company.¹²⁸

¹²⁸ In an excellent analysis of the weight to be given by an arbitrator to conflicting medical testimony, Arbitrator Traynor explained in *General Mills, Inc.*, 69 Lab. Arb. (BNA) 254, 262-64 (1977) (Traynor, Arb.):

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.

See Miller, *Expert Medical Evidence: A View from the End of the Table*, 22 NAT'L ACAD. OF ARB. 135 (1970). Among other points stressed in the article is the distinction between medical fact and medical opinion. The article suggests 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.