IN THE MATTER OF AN ARBITRATION

BETWEEN:

GREATER VANCOUVER REGIONAL DISTRICT
(the "Employer")

AND:

GREATER VANCOUVER REGIONAL DISTRICT
EMPLOYEES' UNION
(the "Union")

JOZEF OTTO ANTALIK GRIEVANCES

BOARD OF ARBITRATION:	WAYNE MOORE, CHAIR RAY HAYNES, UNION NOMINEE RANDALL KAARDAL, EMPLOYER NOMINEE
COUNSEL FOR THE EMPLOYER:	ALAN HAMILTON Q.C., CRAIG MUNROE & RYAN NEELY
COUNSEL FOR THE UNION:	CRAIG BAVIS
PLACE OF HEARING:	VANCOUVER, B.C.
DATES OF HEARING:	JUNE 1, 2, NOVEMBER 5, 2004, FEBRUARY 22, 25, 28, MARCH 17, 18, APRIL 14, 15, MAY 16 & JUNE 2, 2005

DATE OF DECISION: AUGUST 2, 2006

Introduction

Jozef Otto Anatalik (the "Grievor") is an approximate sixty-year old millwright who on April 24, 2002 had been in the Employer's employ for about three years. On that day while working on ventilation ducting at the Employer's Iona Waste Water Treatment Plant ("Iona") he began to feel ill and as a result left work early. He has reported a number of symptoms and ailments including headaches, burning sensations and breathing problems. He filed a claim with the Workers' Compensation Board ("WCB") that was ultimately denied. While that claim was outstanding and under consideration the Employer paid Antalik short-term disability benefits for a six-month period. The Grievor also filed a claim for long-term disability ("LTD") payments which was denied by the plan carrier. The Grievor, under the guidance of his family doctor, sought to determine the cause and obtain treatment. The Employer sought to obtain its own medical assessment of his fitness for work. The Employer, the Union and the Grievor had meetings to address the possibility of his return to work. Finally, in October of 2003 the Grievor was terminated after the Employer directed him to report to work.

Out of these circumstances, which will be more fully detailed below, three grievances were filed by the Union. First, it grieves the failure to provide LTD benefits. Second, it grieves the termination. Third, it grieves an alleged failure to accommodate the Grievor's medical disability. Only the first two grievances are before us. The LTD related grievance was originally assigned to another board of arbitration. As part of the agreement to consolidate the hearing of the first two grievances before this board the parties agreed that we would have the jurisdiction to determine the "factual issue" of whether the Grievor met the requirements contained in the collective agreement for the receipt of LTD benefits. The third grievance has not as yet been referred by the Union to arbitration. Although some of the evidence we heard is potentially relevant to the third grievance any determinations we make are only with respect to the LTD benefits and termination grievances. Similarly, our determinations are not intended to and cannot have any consequences with respect to the outstanding WCB matter or any claim related to damages as we have no jurisdiction with respect to any such claims by virtue of the WCB legislation.

Evidence

Different parties bore the burden of proof with respect to the two grievances. Although there was an agreement that all the evidence we heard could be considered for both grievances, in order to respect the respective onus obligations counsel agreed upon an order of adducing evidence that in some instances necessitated the same witness being called twice. The Union proceeded first with the LTD benefits grievance and called the following witnesses; Bill Eastwood its President, the Grievor, and Dr. Janice Pearl. The Employer's witnesses with respect to the first grievance were; Linda Kinney its Benefits Advisor, Amzad Ali its Mechanical Maintenance Superintendent, Dr. Thomas Milby and Dr. Daniel Gouws. In rebuttal the Union called Francis Pichette an Operator at Iona. The Employer went first with respect to the termination matter and called Johnstone Hardie its Divisional Manager of Human Resource Management. The Union called; Eastwood, the Grievor and Brian Northam an electrician for the Employer and a member of the Union's Executive Board and its Occupational Health and Safety Officer. In addition to this oral testimony we took a view of the bar screen room at Iona where Antalik was working on April 24, 2002.

Despite the bifurcated manner in which some of the testimony was presented we will recount it largely in chronological order while at the same time addressing various evidential themes, thus causing some overlapping of time lines. Drs. Pearl and Milby presented expert opinion evidence in the field of toxicology and their evidence in that regard will be addressed separately. Finally, where there were differences between witnesses' versions of events we will in this part simply record the conflicting testimony and where necessary and appropriate set out our conclusions in that regard in the analysis and decision portion of the award.

Antalik commenced employment at Iona in 1999 as a millwright (MMIV). Prior to that he had worked for some twenty years in a supervisory role in a window cleaning business. Before immigrating to Canada he had worked as a millwright. In the approximate three years leading up to April of 2002 he had no disciplinary record. In the same period he had a number of generally fairly minor incidents and injuries at work. This included working in a "strange smell" in June of 1999. The Employer's record of that incident indicates that an increasingly severe headache developed and that the Grievor saw a doctor as a result. Antalik

testified that the doctor said he had had a toxic exposure. He filed a claim with the WCB which was accepted. He could not recall how long he was off work. As well in March of 2000 the Grievor was splashed with possibly contaminated water from a hose. He may have swallowed some and reported pain in his tongue and on the inside of his cheek. Discolouration was observed and he visited a doctor.

The Grievor was working in the bar screen room April 24, 2002. The Employer's records indicate that in his three plus years at Iona the Grievor had worked in that part of its operation less than ten times. The bar screen is the point where the wastewater or sewage enters the plant and its function is to remove solid debris from the wastewater stream. The room has a negative pressure ventilation system. There are also a number of sensors and alarms, both auditory and visual, for the purpose of detecting and warning of the presence of toxic gases or dangerous concentrations of substances in the air. Two hydrogen sulphide ("H_2S") alarms are located four and one-half feet up the wall above the wastewater channels containing the bar screens. There are two oxygen sensors on the ceiling. Finally, there are two LEL sensors on the end walls of the room. As we understand it the latter two types of sensors relate to potentially explosive concentrations of gases. The H_2S sensors are material to the case at hand. The alarms are regularly tested and calibrated in accordance with WCB requirements.

Antalik testified that for a short time prior to April of 2002 he had been complaining about ventilation problems in the bar screen room. The minutes of the February 2002 monthly maintenance crew meeting at Iona indicate a concern was raised about the exhaust system. The supervisory comment was that preventative maintenance would be performed on the exhaust fans to ensure they were operating properly and that a smoke test would be conducted. Reference was also made to ensuring that the doors to the room were closed including roll-top doors over the wastewater channels. We observe in passing that the concerns in this regard are that if the doors are not fully lowered over the incoming channels it would impact on the efficiency of the negative pressure exhaust system and may allow for the ingress of gases from the outside.

Ali who was present at the meeting testified that he could not recall but assumed that it was Antalik who raised the concern as to the ventilation system. He attributed the supervisory comments to George Hansford, the Maintenance Supervisor at Iona. Ali did not know if the proposed actions

were in fact done. A similar concern was raised at the March 2002 monthly maintenance meeting. Identical supervisory comments are recorded in the minutes with the additional notation of them being "ongoing".

On April 22, 2002 the Grievor submitted a Hazard Identification Report with respect to the ventilation system in the bar screen room. He identified the problem as relating to holes that were cut in the ventilation ducting to allow for the installation of electrical cables and hydraulic hoses as well as the presence of those lines in the ducts. Hansford's response, which was dated the same day, was to prepare a work order for the covering of the holes and to direct planning for the removal of the cables and hoses from the ductwork.

The work order for the repair of the ducting was given to Antalik. Ali testified that work orders in response to Hazard Reports are usually given to the reporting party, as he would be aware of the nature of the problem and the appropriate remedial approach. Antalik's shift commenced at 7:00 a.m. and he started by first laying down some plastic sheeting in the area of the repairs. For part of the day he worked with Ian Sheppard another maintenance employee. The holes in the ducting were located close to the floor adjacent to an open waste water channel that flows below floor level. He had a fifteen-minute coffee break at 9:00 a.m. After that he noticed a burning sensation and began to feel "funny" and "dizzy". He did not notice an unusual smell. By lunch he had a headache and took two Tylenol Extra Strength pills. At 1:30 he left the bar screen room and went to see the First Aid Attendant. The Grievor testified that he reported that "something had hit him" and that his face, tongue and throat were burning. The Attendant told him that he looked "reddish". Antalik declined the offer of oxygen and an opportunity to lie down. Instead he decided to leave and to see a doctor. The Employer's WCB First Aid Report show the Grievor was complaining of sore eyes, throat and tongue as well as a headache. No unusual redness was observed in his mouth.

That afternoon Antalik attended a walk-in medical clinic close to his home. The doctor provided him with a note indicating that the Grievor could be off work for the next one or two days "due to toxic inhalation injury". Antalik testified that he was told to see a doctor the following day if he was not feeling better. As he was feeling worse the next day he went to the office of his family doctor, Dr. Bacchus. In the latter's absence he saw an associate. The Grievor testified that that doctor also indicated a toxic

exposure and suggested that he see Dr. Bacchus in two weeks if he was still not feeling better.

The Grievor's condition did not improve and Dr. Bacchus then referred him to a number of specialists. The first was Dr. Harvey Strecker, an otalaryngologist, who saw Antalik in June of 2002. His examination of the Grievor indicated amongst other things; healthy oral cavity mucous, submandibular glands were palpably normal, intranasal mild rhinitis, mild and diffuse non-specific erythema of the larynx and hypopharanx and slightly thicker than normal mucous but without mucopus, polyps, tumors, nodules or other disease. He diagnosed an "upper aerodigestive mucosal irritation" which he attributed to an "episode of irritation . . . with exposure to something". He noted that superficial mucosal irritations generally spontaneously heal and that long-term symptoms would normally be associated with full thickness mucosal injuries. He suggested a follow up examination in four weeks.

In July of 2002 the Grievor saw Dr. Rita Wittmann a respirologist. The Grievor had seen this doctor within the year preceding the April 2002 incident complaining of dyspnea or breathing difficulties. Dr. Wittmann noted that the breathing problems reported by Antalik sounded the same as those reported previously and that "when pressed, he admits as much". Based upon a review of recent tests as well as her examination and tests performed in her office Dr. Wittmann indicated that the Grievor's problems may have an "emotional or psychogenic basis" but recommended further testing before reaching that conclusion. Finally, Dr. Wittmann indicated that the Grievor was "reluctant" when she suggested that he try to return to work. In his testimony Antalik disagreed with Dr. Wittmann's view that his problems were the same as before.

In July the Grievor saw Dr. Strecker again. Dr. Strecker in his report to Dr. Bacchus indicated that as he was not an expert in noxious gases and chemicals the Grievor might benefit from a referral to someone with that expertise. A further follow up examination with Dr. Strecker occurred in September of 2002. His reporting letter indicates that the Grievor presented him with "several hundred pages of research he had done on the internet on toxic chemicals" and inquired as to the utility of an MRI. Dr. Strecker indicated that although one of the Grievor's majors concerns was lesions on the submandibular glands he was confident based upon a recent CT scan that there were no lesions and accordingly a MRI was not needed.

Respiratory testing of the Grievor was conducted in August of 2002. The results were found to be "compatible with mild asthma".

In September of 2002 Antalik was referred to Dr. John Sehmer who practices Occupational and Industrial Medicine. In his assessment Dr. Sehmer states that the Grievor's "symptoms could be explained by a low level hydrogen sulphide exposure". However, he noted that the "irritant effects of H_2S resolve over a period of days and would be unlikely to cause long-lasting effects". Dr. Sehmer also observed that Antalik "has considerable anxiety regarding possible hazards at his work place".

Going back in time Antalik filed a WCB claim in May of 2002. By letter dated November 1, 2002 the WCB rejected the claim stating it was "unable to conclude that your alleged exposure to noxious fumes on April 24, 2002 resulted in a disease or injury". It also noted that his "respiratory symptoms predated April 24, 2002". The Grievor has appealed this determination and at the time of the hearing the matter was outstanding. The Employer paid the Grievor short-term disability payments for the first six months while his WCB claim was outstanding intending to recoup the money from the WCB if the claim was allowed. The short term benefits had run out by the time the claim was disallowed and the Employer has not sought repayment of the short-term benefits from the Grievor.

Shortly after April 24, 2002 a joint Union-Management investigation was conducted at the work site. It recommended that the duct repair be completed and that an outside contractor be retained to evaluate the ventilation system. The contractor provided a preliminary report in May of 2002 indicating amongst other things that the ducting was "very dirty" and there was a problem with the negative pressure required for the ventilation system. The final report, submitted in June of 2002, observed that the ducting was "approximately 10% efficient" and recommended that the system be cleaned at an approximate cost of $24,000.00. This work was performed.

A contractor was also engaged to conduct a hazard assessment with respect to the air quality of the bar screen room. This assessment included 11 days of on-site monitoring in May and June of 2002. The limit for the presence of H_2S in the air set by the WCB is 10 parts per million ("ppm"). The monitoring in the bar screen room showed the level of H_2S to be well

below the WCB ceiling. The highest readings (3-4 ppm) were in the eyewash area and were attributed to the inadequate trapping of a sink drain. Other readings of 1-2 ppm were made in the vicinity of the roll-top doors over the channels of wastewater at their point of entry into the bar screen room. Some significantly higher readings were taken in the siphon manhole slots located outside of the bar screen room where the channels enter the building. The readings varied from channel to channel and ranged from 0-99 ppm. The report prepared based on these readings described the higher levels "as a potential threat to the screen room". The degree of the threat was indicated to be dependent on whether the doors were lowered to the level of the wastewater flow as that would limit the accessibility of gases. The report indicates that current practice was to maintain the gates at flow level although prior practice had been variable. We note in passing that there was no evidence of the level of the doors in the morning of April 24, 2002. Pichette, an operator, testified that there was no policy in place with respect to the placement of the doors. His practice was to keep them at the surface of the wastewater channels. Some others had a different practice.

Ali testified that sometime after the incident, perhaps in 2004, he canvassed other employees who had been in the bar screen room on April 24, 2002, including Sheppard, and none of then reported any problems that day. No other complaints were received with respect to the bar screen room on that day and the alarms did not go off.

In addition to these investigations and repairs the Employer, in the person of Kinney, also maintained contact with the Grievor. In addition to serving as a Benefits Advisor, Kinney's responsibilities include facilitating the return to work of sick or injured employees. Over the approximate first three months of Antalik's absence Kinney made periodic contact with the Grievor to enquire about his condition and his return to work. During this period Antalik advised Kinney that he was seeing specialists and that his return to work would depend on his doctors. We note that from the outset of this contact Kinney also sought to have the Employer's Form 100 filled out by Antalik and/or his physicians. This form is part of the Employer's relatively new at the time attendance program and the subject of disagreement between the Union and the Employer. Although it was never filled out we do not believe its history to be relevant to the issues before us and will not further canvass its evidential history. We also note that although it was not part of her area of responsibility Kinney was aware that the Employer was contesting the Grievor's WCB claim. Under cross-

examination she agreed that she did not advise Antalik of the Employer's position stating that her focus was on his return to work.

Kinney testified that the Employer's usual practice was to encourage employees to apply for LTD after three or four months of absence in order to avoid a gap or break in payment after the short term benefits ceased at six months. At the same point in time the Employer also usually sought an Independent Medical Evaluation ("IME"). She raised both of these possibilities with the Grievor. When the IME was first raised in July of 2002 the Grievor indicated that he would discuss the matter with the Union. Kinney then discussed the issue with Eastwood who indicated that the Employer had no right under the collective agreement to an IME when the Grievor was on WCB.

Kinney continued to press for the filing of a LTD claim. In early September she sent a copy of the application form to the Grievor as well as sending the completed Employer's portion of the application to the plan carrier. By letter dated December 9, 2002 the carrier denied the claim on the basis of "a lack of objective evidence of functional limitation". In January of 2003 Antalik initiated a review of this decision of the carrier. This review was terminated at the request of the Grievor in March of 2003 when he believed that his return to work was imminent.

Kinney testified that in late October of 2002 she spoke to Antalik about going for an IME by an Occupational Health doctor located in Victoria that had experience with chemical sensitivities. The Grievor declined saying that he had already seen an Occupational Health doctor who had indicated that a toxic inhalation had occurred. In November, after the WCB claim had been rejected, Kinney again spoke to the Grievor about an IME. By letter dated November 23, 2002 she advised Antalik that an appointment had been made with an Occupational Health doctor in Vancouver with the possibility of a referral to the Victoria doctor. The letter states that in response to the Grievor's concern that the assessment could hurt him a copy of the report would be forwarded to his family doctor. This letter along with a consent form and the *curricula vitae* of both doctors was delivered to the Grievor's home. Antalik declined to attend the IME. In a letter outlining the history to date the Grievor indicated that he had requested the information about the doctors in order to determine if they were "qualified and certified" in toxicology. As they were not he was refusing to attend as they "cannot help me with my health problems". The letter

recounts earlier requests by him to have the Employer arrange and finance his examination by a certified toxicologist in either Canada or the United States. The letter concludes by requesting that that any response from Kinney be in writing.

In December of 2002 the Grievor wrote to Eastwood about the Employer's request for an IME. In that letter he indicated that he had "not refused any appointment while receiving benefits" because the Employer's November request came after they had stopped. Nonetheless he indicated a willingness, regardless of his benefit status, to see a "qualified medical toxicologist" and to return to work if he received medical clearance to do so. The Employer received a copy of this letter.

By letter dated December 12, 2002 Hardie, the Employer's Human Resource Services Division Manager, advised the Grievor of the Employer's position with respect to an IME in the following terms:

> We require a greater understanding of the basis for this extended workplace absence as well as understanding of what considerations will allow for your appropriate return to work. We do not presently regard you as eligible to return to work, until this requirement has been fulfilled. I am asking Ms. Kinney to arrange for an independent medical examination to be set up for you in order to address both satisfactory explanation for your absence as well as return to work considerations.
>
> I strongly urge you to attend the examination described above. Beyond providing an understanding of any return to work strategies that may be available, it will help to validate an extended period of absence that has not yet been meaningfully supported.
>
> Your priority attention to this examination is essential. A failure on your part to co-operate will leave the GVRD with the conclusion that you have abandoned your position. Should this conclusion be reached, the employer will be required to terminate your employment.

Antalik responded in writing indicating, amongst other things, that he was willing to attend an IME "under protest" as he did not feel that it would be of any use unless it done by a toxicologist. He stated that he was willing to return to work at Iona if provided a written assurance from a doctor that he was fit to do so.

Antalik testified that he was not satisfied with the expertise of the doctors to whom he was being referred. He described the process as a "patch up job". He was of the view that he needed to see a toxicologist. His internet research indicated that the closest toxicologists were located in Washington State. He made contact with Dr. Janice Pearl who is certified in toxicology. Antalik, accompanied by his wife, saw Dr. Pearl on December 26, 2002 and she prepared a report for Dr. Bacchus dated December 27, 2002 which will be canvassed in greater detail below. Dr. Pearl examined the Grievor and testified that he had redness in his throat and cheeks. In her report she also noted hyperactive reflexes which is medically described as hyperreflexia. She took a medical history from the Antaliks. Her stated impression was that "it is highly likely that Mr. Antalik inhaled a significant amount of HYDROGEN SULPHIDE on 4/24/02". She recommended that an MRI be conducted to assist in any decision about returning to work. She also noted that he should wear a respirator if he did return to work.

In January of 2003 Kinney attempted to arrange an IME. In this process she learned that Antalik had seen a toxicologist. An IME was arranged for February 6, 2003 in Vancouver. Upon receiving notification of this appointment Antalik requested gas, parking, meal allowance and mileage money to attend the IME. Hardie responded by couriering $20.00 to the Grievor. That money was returned by the Grievor as inadequate and he shortly thereafter commenced an action in Small Claims Court against the Employer seeking compensation for parking, mileage, meals gas and eight hours wages. This claim was ultimately dismissed, apparently for want of jurisdiction.

In any event, Antalik did attend the IME on February 6, 2003. We note that on the same date he also attended a Functional Capacity Evaluation ("FCE") conducted by a Kinesiologist. The IME was conducted by Dr. Daniel Gouws an Occupational Medicine physician working out of Viewpoint Medical Assessment Services Inc. ("Viewpoint"). Viewpoint had previously performed IMEs for the Employer. Antalik testified that when he met with Dr. Gouws he raised the issue of his expertise or qualifications with respect to toxicology. His reason for doing so was that if Dr. Gouws was not qualified he was not entitled under the law to examine him other than in an emergency. Dr. Gouws did not remember being questioned as to his qualifications. In the course of this examination Dr. Pearl's report was discussed. Antalik had not brought the report with him and was not prepared to allow the Employer access to the report because it had declined

his earlier requests for an examination by a toxicologist and as a result Antalik had had to pay for the examination and report. In exchange for the provision of the report Dr. Gouws agreed, in writing, not to release the medical information to the Employer or to include it in his report.

Dr. Gouws was qualified before us as an expert in Occupational Medicine. His report dated February 20, 2003 answered the question posed by the Employer in the following manner:

1. *What symptoms/limitations is Mr. Antalik experiencing and how are they preventing Mr. Antalik from reporting to his normal job duties?*

   Mr. Antalik experiences a sense of restriction of his breathing with a tightness in his throat. Sometimes he feels as if his throat closes up and he tends to get very short of breath. He experiences generalized weakness. He also experiences tiredness and reduced exercise tolerance. He experiences night sweats. He tremors and has some problems with locking of his pinky of his left hand.

   A Functional Capacity Evaluation was performed on Mr. Antalik and he was found to have significantly reduced exercise tolerance, poor aerobic fitness level, and reduced upper body strength.

   From his history, it is apparent that Mr. Antalik believes his symptoms are brought on by certain exposures.

2. *Is further medical intervention required?*

   Mr. Antalik agreed that he would send me some further background information regarding his medical assessments to date. It is my impression, however, that Mr. Antalik has been thoroughly investigated to look for possible causes of his symptoms. At this stage he is still slated for further medical investigations with the last tests booked for March 28, 2003.

3. *What is the expected return to work date for Mr. Antalik?*

   Mr. Antalik's present limitations are for Environmental Conditions: exposure to gases associated with sewage and exposure to strong volatile substances such as perfumes, etc. From a physical standpoint, Mr. Antalik is able to do sedentary or light physical duties with intermittent rest periods. There is no contraindication for Mr. Antalik to return to alternative duties immediately. It would be my opinion that a graduated return to work would be suitable starting with approximately four hours of work per day.

4. *Is Mr. Antalik fit to return to his pre-disability position? Is Mr. Antalik fit for modified work?*

> At this stage Mr. Antalik is not fit to return to his pre-disability position. Mr. Antalik did, however, indicate that he would abide by the advice he is getting from one of his treating physicians and that if the results of his medical tests are negative he would be prepared to return to his previous occupation. He may, however, need accommodation in terms of having the use of a ventilator/respirator while doing this work. Mr. Antalik is fit for modified work with the restrictions set out above. Mr. Antalik indicated he would have a problem using public transportation but that he always drove to work, as they live on an acreage away form public transportation.

5. *What is the prognosis for a successful and sustained return to work?*

> It is my opinion that if Mr. Antalik is placed in a position where he does not feel that he is put at undue risk for worsening his medical condition, that his prognosis for a successful return to work would be good. An Occupational Health Case Manager could be appointed to oversee his return to work.

Gouws testified that his answer to the fourth question was prefaced "at this stage" because he did not have complete information at that time. He was thus unable to declare him fit. On that basis he described his report as "inconclusive" and "preliminary". Under cross-examination he agreed that he did not in his report describe it as either "preliminary" or "interim". But stressed that it was clear that further medical evaluations were forthcoming to him. He stated that his workplace limitations were designed to keep Antalik safe until further medical assessments were made.

Antalik testified that after receiving Dr. Gouws' report he felt that he was going to be returning to work. It was at this point that he ceased his appeal of the disallowance of the LTD claim. By letter dated March 16, 2003 he forwarded Dr. Pearl's report to Dr. Gouws. In that letter he instructed Dr. Gouws not to directly contact Dr. Pearl as he felt that someone was leaking information regarding his medical condition to the Employer and that by controlling the disclosure of the information he was trying to determine the source of the leak.

On March 10, 2003 Antalik wrote a letter to Kinney. After setting out Dr. Gouws' report to the effect that he was immediately able to return to alternative sedentary or light duties the Grievor advised the Employer as follows:

> I must remind you that this is the same opinion I gave you and the WCB long before this assessment and I am awaiting your call back to work under the conditions specified, beginning with four hours per day at eight hours pay. You were very adamant about the urgent need for me to undergo this evaluation but you seem to see no urgency in abiding by the results.

A meeting to discuss a return to work was then held on April 2, 2003. present for the Employer were Kinney, Hardie and Tom Land the Divisional Manager. The Grievor was present along with Eastwood and Beaumont from the Union. Kinney testified that in the course of the meeting the Grievor advised that he was not fit for work. He had another appointment with his toxicologist later that month and would follow her advice as to his fitness. In his direct examination Antalik testified that he did not remember the Employer suggesting any possible work at this meeting. In cross-examination he stated that he asked the Employer if it had a job for him and was told no. He was willing to work as long as it was not at Iona but in light of the reply to his question he decided to wait until he was cleared by Dr. Pearl. He agreed that when the Employer requested a copy of Dr. Pearl's report he indicated that he would only provide it for a fee.

The Grievor saw Dr. Pearl on April 24, 2003. In a reporting letter dated that day she indicated that the Grievor could return to modified duties starting with four hour days and with access to a respirator. On May 8, 2003 Dr. Bacchus wrote to the Employer advising that Dr. Pearl was in agreement with Dr. Gouws and that the Grievor could now return to sedentary work beginning with four-hour shifts. The following day Antalik conveyed this information to the Employer in a letter and inquired as to his return to work. A meeting was then held at the Lake City site of the Employer on May 20, 2003. In attendance were Kinney and Ali for the Employer, Eastwood and Northam for the Union and the Grievor.

Kinney took notes of the meeting and her testimony was in accordance with and largely based upon those notes. She indicated that the Employer suggested "transitional" work first tagging machinery at the Lions Gate site for two to three weeks and then working in Stores Department at Iona. Antalik then indicated that he could not work at Iona. Eastwood referred to the February 20, 2003 IME and indicated that the Employer knew that Antalik could not work at the plant. A discussion then ensued between Eastwood and Kinney as to whether the restriction to sedentary work

necessarily implied that the Grievor could not work at Iona. The Employer reiterated its earlier request for Dr. Pearl's report to which both the Grievor and Eastwood responded that it was not going to be provided because Antalik had paid for the report. Other possible jobs or areas in which he could work were discussed and ruled out including some painting work and some work at the Capilano bleach plant which Antalik indicated could be problematic due to fumes. The one potentially suitable area was in the Employer's park system. The meeting was adjourned without any resolution being reached.

Ali testified that it was with respect to the May 20th meeting that he first put his mind to possible job alternatives for the Grievor. His original suggestions related to the tagging of equipment which he expected would take approximately two weeks, followed by helping in Stores with the receiving of goods and the picking of orders. He could not remember why the tagging work or the painting were considered unsuitable. It was at this meeting that he first learned of the Grievor's position that he could not return to Iona.

The Grievor's recollection of the meeting was that he was offered work at the shop at Iona but he fell the smell of the gases would irritate him. He was also offered warehouse work at Lake City and painting at the Seymour Dam but he refused the latter as the "fumes would kill me".

Eastwood testified that Kinney's evidence and notes with respect to the report of the toxicologist were a fair summary. As to the issue of returning to Iona, Eastwood agreed that the IME did not specify the plant as being unsuitable but noted that the report referred to the environment and stated that the Employer's suggestion that the Grievor return to Iona ignored the issue of the environment because anyone working at the plant would potentially be exposed to gases. Eastwood was concerned that the Employer was not listening to or paying heed to the concerns of the Grievor.

On June 6, 2003 Hardie again wrote to the Grievor indicating in part as follows:

> Although the results of this toxicological examination have not been made known to the GVRD, I thank you for your May 8, 2003 letter from Dr. Bacchus advising that you are fit to "begin gradual return to work immediately". Unfortunately the February 9, 2003 Independent Medical

> Examination advised us that you are not yet fit to return to a Wastewater Treatment Plant environment (eg. to your previous position as MMIV at the Iona WWTP).
>
> As a result, the GVRD is attempting to identify alternate transitional work, which may precede your return to normal duties.
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> To the extent that you can find alternate duties, we will compensate you according to the hours worked. The GVRD will not provide employer paid wages for hours not worked.
>
> We look forward to collaborating on return to transitional duties as they can be identified and hopefully to your return to normal employment responsibilities.

The next meeting was held on June 9, 2003 at the Employer's Seymour Watershed site apparently as a result of Eastwood's suggestion that the Grievor may be able to do security patrol work in the watershed. Present for the Employer were Kinney and Ken Juvik its Watershed Forester, for the Union Eastwood, Beaumont and Northam and the Grievor. Kinney's testimony and her notes indicate that a fairly detailed discussion occurred with respect to the job duties of a Security Patroller and how they fit within Antalik's limitations and abilities. Kinney then advised Antalik that he could report the following day and that he would be paid for four hours for that day June 9th. This in turn led to Antalik asking how much he would be paid when he returned to work. When Kinney replied that he would be paid for the four hours he worked a disagreement arose with both Antalik and the Union insisting that he should be paid his full bi-weekly salary. The Grievor advised that it would not make economic sense for him to report to work for only four hours pay given the cost of travel between the watershed and his home. The Union raised examples of other employees who had been paid full salary on reduced hours to which Kinney replied that those circumstances related to top-ups from either LTD or WCB matters neither of which circumstance applied in this case. When Kinney advised that she did not have the authority to authorize a top-up to full salary Eastwood indicated that he would contact Linda Shore the Employer's Manager of Human Resources and the meeting ended on that basis.

That same day, June 9th, Eastwood sent a letter to Shore. After outlining a history of the events to date, some of which are disputed by the

Employer, Eastwood recounted the events following the May 20th meeting as follows:

> Subsequent telephone conversations with Ms. Kinney led to me suggesting temporary assignment to work in the Watershed Security department. Ms. Kinney made arrangements with Mr. Ken Juvik, Watershed Forester, and a short notice meeting was called for this morning in the Seymour watershed. Mr. Antalik and both management and Union representatives attended the meeting. The work presented to Mr. Antalik was viewed as acceptable to all who were present and at least in the interim it seemed as though Mr. Antalik could return to work. His initial hours of work would be four hours per day four days a week, or 16 hours in total. When Ms. Kinney was asked to confirm that Mr. Antalik's salary would be preserved in full she said he would only receive pay for hours worked. Naturally Mr., Antalik and the Union found this to be unacceptable. The meeting ended abruptly when Ms. Kinney claimed she did not have the authority to discuss wage top-up. The Union considers that both the Employer's refusal to preserve the bi-weekly salary during return to work as well as the inordinate delay by the Employer associated (sic) Mr. Antalik's claim going back to February 6th, 2003 has left Mr. Antalik with substantial wage loss. The Union is seeking lost wages for the above noted period mentioned above and an immediate graduated return to work for Mr. Antalik at his full bi-weekly salary.

When the Union did not receive a timely response to this letter it wrote to Mr. Mark Leffler the Employer's Manager, Labour Relations, on June 23, 2003 advancing the grievance to the second stage. Shore then provided a response in a letter dated June 26, 2003 which stated, in part, as follows:

> My apologies for the delay in responding to your letter dated June 9, 20003. I have had an opportunity to review this matter and, aside from disagreeing with some of the factual details described in your letter, I respectfully suggest that the union and Mr. Antalik consider the following approach;
>
> - Given that your grievance letter indicates that the modified duties role within the Watershed division was viewed by all parties as an acceptable accommodation on an interim basis, I suggest that we encourage Mr. Antalik to take up those duties as promptly as practical.
> - That we allow flexibility for Mr. Antalik to consult with his Doctor and the appropriate Watershed Operations Supervisor, in order to allow for an expansion of hours up to normal weekly hours, should he be sufficiently fit to do so.

- That ongoing efforts are made to determine when and under what conditions Mr. Antalik's return to his normal worksite and normal duties (or modified duties at the normal worksite) can be achieved.

Regarding the question of compensation, I can confirm that Mr. Antalik will be paid for the hours that he works. While I understand that Mr. Antalik has exhausted all of his short-term sick leave benefits, I do not find a reasonable basis to believe that he is entitled to any further sick leave benefit or other supplementary payment from the employer for hours not worked. In any event placing Mr. Antalik in this modified role appears to be the most reasonable first step in providing him with an opportunity to return to the workplace, and I hope you will encourage him to do so.

This in turn lead to a response from Eastwood to Leffler dated July 4, 2003 which stated:

Further to my letter to you dated June 23, 2003, forwarding the above grievance to you at second stage. I have received a response from Ms. Linda Shore since sending my letter to you and her response has broadened the field of discussion with regard to Jozef Antalik. Ms. Shore has asked that she be given the opportunity to review a further report from Dr. Gouw (sic) that is expected early next week before fixing her response to our grievance. We are prepared to await Ms. Shore's response and in the meantime put into abeyance our appeal at the second stage in the grievance procedure. I will advise you of the outcome of our discussions with Ms. Shore.

One of the primary concerns of the Union and Mr. Antalik is the lack of coverage for lost wages during the time Mr. Antalik has been off sick. It has become apparent from our discussions with Ms. Shore that the Employer does not intend to pay Long Term Disability benefits to Mr. Antalik because the GVRD's LTD carrier has refused his claim. We feel that that is an inadequate response and we believe the GVRD has a contractual obligation to provide LTD coverage to our Members who are unable to perform the duties of their position where medical verification has been provided. So regardless of the outcome of our common efforts to return Mr. Antalik to the workplace the Union will proceed with a grievance challenging the Employer's refusal to provide Long Term Disability benefits.

This we understand to be the origination of the first grievance before us.

Dr. Gouws prepared an Addendum Report dated July 7, 2003. Kinney testified that approximately two weeks earlier she had called Dr. Gouws

seeking an update. The Addendum Report included a review of the FCA testing as well as well as commenting on the "validity of effort" made by the Grievor in this testing. In its summary it states:

> It is my opinion that Mr. Antalik gave a somewhat varied effort during this assessment and that he may be capable of more than he demonstrated.
>
> On the basis of this assessment, considering the medical history, the medical documents available, the occupational health examination and the functional information, Mr. Antalik's current Physical Activity status, in accordance with the national Occupational Classification, is estimated to be:
>
> - V3 – Capable of near and far vision.
> - C1 – capable of colour vision.
> - H2 – Capable of hearing for verbal interaction.
> - B3 – Capable of sitting, standing and walking.
> - L1 – Capable of upper limb coordination.
> - S3 – Capable of *medium physical demand* – lifting, pushing and carrying up to 20 kilograms occasionally.
>
> A pulmonary function test was performed on Mr. Antalik, and was found to be normal with most parameters in the 100 or 100 plus percentile.
>
> My recommendations for light sedentary duty were made on the basis that this would simply be an interim measure until further medical information became available, and were made to avoid placing Mr. Antalik at undue risk. Once this has been cleared, Mr. Antalik can do medium to heavy duties.

A copy of this report was sent to Dr. Bacchus and the Grievor. In his testimony Antalik strongly disagreed with Dr. Gouws' comment with respect to a "somewhat varied effort". For his part Dr. Gouws indicated that this term connotes an inconsistent effort perhaps caused by pain and was not intended to suggest that the Grievor was malingering.

On July 9, 2003 Shore sent another letter to Eastwood largely reiterating the contents of her June 26th letter. She indicated that the offer of modified duties in the watershed would remain in place only until July 14th in light of the need for operational certainty. She also suggested that the toxicological reports be submitted to the LTD carrier as it "may have an impact on benefits coverage".

Kinney testified that in order "to move things along" she called the Grievor in late July and left a message on his answering machine requesting that he attend another IME. This resulted in a telephone call from Eastwood advising that the Grievor requested that all communications from her be in writing and further that the Grievor would not go to the watershed.

The Employer then scheduled another IME with Dr. Gouws for September 23, 2003. Hardie, by letter dated August 28, 2003 notified the Grievor of this appointment stating in part:

> A July 7, 2003 Addendum Medical Report was completed by Dr. D. Gouws pertaining to your capacity for return to work. I understand that this report was sent to you and your family doctor.
>
> This report appears to conclude that you are fit to return to work. The purpose of this anticipated Independent Medical Examination is to further clarify the conditions of your return to work.

This letter lead to the Grievor writing to Dr. Gouws the following letter dated September 2, 2003:

> Before I see you on September 23, 2003 I want a written guarantee that you will send a copy of your report to me, Jozef O Antalik, via Dr R Bacchus.
>
> I also wish to have my wife present for the exam, to take notes and record the exam with a tape recorder. The reason for this is that your Addendum Report prepared for Ms Linda Kinney on July 7, 2003 contained a "few differences" from the original report you wrote on February 6, 2003. Your Addendum Report is not very "Independent".
>
> Please reply in writing as soon as possible.

Dr. Gouws testified that it was not his practice to directly contact persons he was examining in these circumstances so he advised Kinney of the letter and his position in that regard. Kinney then wrote the Grievor on September 12, 2003 advising that the Employer would forward a copy of Dr. Gouws' report to Antalik and Dr. Bacchus, that Dr. Gouws was agreeable to the presence of his wife and the taking of notes, but that tape recording was not acceptable.

On September 8, 2003 Eastwood wrote Hardie requesting a meeting to discuss mileage reimbursement for Antalik's attendance at the September

23rd IME. On September 13th Antalik sent a letter to Eastwood, copied to Hardie, suggesting that he obtain a return to work letter from Dr. Bacchus instead of Dr. Gouws as it would be "less expensive and more convenient" for him to attend at Dr. Bacchus' office. He went on to state;

> Neither Dr Gouws nor Dr Bacchus is experienced in "medical toxicology" so it should not make a difference which doctor does the assessment.
>
> Dr Gouws' report on the February 6, 2003 IME, page 3, section 3 stated that I could return to work starting at 4 hours per day at modified duties. Because the GVRD did not give me a reasonable opportunity to return to work 4 hours per day how is Dr Gouws going to know what should be next for me. If the GVRD did not have a suitable job for me at that time they could have sent me for "rehabilitation" or "retraining" such as short computer courses.
>
> If the responsible person could not understand the plain and simple English in Dr Gouws' report that person should not be qualified to make the decision on how to facilitate my return to work. If they cannot understand Dr Gouws' conclusion how can we be sure they have the training, knowledge or experience to avoid sending one back to work "in harm's way".
>
> Thus, how do we know the person is going to understand the second report? Is it because the people involved in my back to work program are acting in "Bad Faith"?

On September 17th Hardie wrote to Antalik in response to the issues raised in that letter. He reinforced the importance of the IME and agreed to reimburse mileage and receipted parking costs.

On September 17th Antalik wrote another letter to Dr. Gouws. He complained that Dr. Gouws had not responded to his letter of September 2nd and that Dr. Gouws' office had not called to confirm his appointment as was the common practice of specialists to whom he had been referred. Finally, he reiterated his earlier requests that the report be sent directly to him and that his wife be allowed to accompany him to take notes and tape record their conversations.

By letter dated September 18, 2003 Antalik advised Kinney that he had received her letter of September 12th and Hardie's letter of September 17th by courier in the afternoon of September 17th. With regard to the September 12th letter Antalik stated:

> If Dr Gouws does not wish me to tape record the examination I still want to have my wife there taking notes with pen and paper. I also want an elected Union representative there as a witness. I would also agree to the GVRD sending an independent observer. I do not have a problem with strange people listening to my medical problems and taking notes.
>
> I have one concern with Dr Gouws' qualifications as a physician. On my February 6, 2003 visit to Dr. Gouws I did not see any medical certificates on the walls. I asked him where his doctor's diploma was. He said it was in his box and he did not have time to unpack it. I hope by now he has unpacked his boxes and his medical diplomas are hanging on the wall.

With respect to the last paragraph Dr. Gouws testified that he recalled Antalik asking about his credentials with respect to toxicology at the first examination. He could not recall any discussion as to his diplomas. He does not maintain a regular office at Viewpoint Medical Assessment Services where the examination took place. He has never stored them in a box there and they hang in his home office.

On September 18th Kinney wrote to Antalik addressing the conditions he was seeking with respect to his attendance at the IME. She confirmed her earlier advice that his wife could attend to take notes but not tape record and that the Employer would forward a copy of the report to him and his family doctor. In addition she informed the Grievor that Dr. Gouws did not agree to the presence of a Union representative. Further, he was advised that he would be required to sign a consent for the medical examination and that if he did not do so the IME would not take place.

The Grievor did attend at Dr. Gouws' office on September 23rd but an examination did not take place. Dr. Gouws testified as to the events of that day in a manner generally consistent with his written report to the Employer dictated the same day and dated September 26, 2003 which stated:

> Mr. Antalik was initially seen on February 20, 2003 on a request for an Independent Medical Evaluation. At that stage, he was found to have a normal physical examination and his Functional Capacity Evaluation was thought to be in the normal range for a 57-year-old male.
>
> A pulmonary function test was also done on this occasion which was found to be within normal limits (if not better than average). At this assessment, Mr. Antalik, informed me that he felt his problems were

related to environmental exposure that had taken place at the workplace. He further informed me that he had sought a professional opinion in this regard. At that stage, I was not in possession of any of these reports and I was of the opinion that I could not make an informed decision about Mr. Antalik's ability to perform his job without the very specific background information. My report made recommendations on the assumption that Mr. Antalik would send me further medical background information and test results to review before I would give a final opinion on his fitness to work. The recommendations I made at that time were made with this very specific understanding and were done to accommodate Mr. Antalik and not to place at any undue risk. It was my understanding that these further results would be forthcoming shortly and it was my expectation that my recommendations would serve as interim recommendations until a final decision could be made.

I subsequently have not received any further medical or background information from Mr. Antalik. He has corresponded with me on more than one occasion to discuss details other than further medical investigations.

Mr. Antalik was booked for another Independent Medical Evaluation of September 23, 2003. Prior to this appointment I received another letter from him asking for a written guarantee that he would receive a copy of my report on the medical examination conducted on this date and also request that his wife accompany him to take written notes and to tape record the examination. A letter was also written to Ms. Linda Kinney, Benefits Advisor, on September 18, 2003 indicating that he wanted an elected Union Representative to attend as a witness. He also indicated concerns with my qualifications as a physician and mentioned the fact that I did not have any medical certificates on the wall.

I also received a signed copy of a letter to Mr. Antalik, dated September 12, 2003, from Linda Kinney, Benefits Advisor, indicating that the GVRD would forward a copy of my report to him personally, and also forwards a copy of my report to the family physician, Dr. R. Bacchus, and that I would be agreeable to his request for his wife to attend the assessment and take notes but that I was not agreeable to have the examination tape recorded.

Mr. Antalik did attend on the morning of September 23, 2003. He was presented with an "Examinee Data Collection Form" and asked to sign a consent form that would allow me to examine him and write a report. Mr. Antalik flatly refused to sign any consent. At this stage, I was called by the receptionist to discuss the matter with him.

> Mr. Antalik started off the conversation with questions about the amount of my payment, whether I had been paid and who pays me which I thought were quite irrelevant to our discussion. We went on to the discussion of whether the reports would be sent to himself and his family doctor. I assured him that this would be the case and that I had indeed received a letter from Ms. Kinney indicating this. I subsequently showed him this letter, to which he responded that he does not trust anyone at the GVRD and that he does not trust Ms. Kinney to forward copies of my report.
>
> At this stage, I phoned Ms. Kinney to verify matters for Mr. Antalik. Mr. Antalik subsequently spoke to Ms. Kinney on the phone and as this was in an open office, I had to close the door, as Mr. Antalik was loud and abrasive on the phone.
>
> Mr. Antalik subsequently came out of the room, took his jacket and said that he was not prepared to deal with us any longer. Mr. Antalik then left without further discussion.
>
> I subsequently phoned Ms. Kinney and she indicated that Mr. Antalik had slammed the phone down in her ear. Ms. Kinney also indicated to me that she would have been amenable to me sending a copy of my report directly to Mr. Antalik but that he had not given her an opportunity to convey this to him.
>
> I wish to indicate that I have done my best to treat Mr. Antalik in a civil and professional manner throughout all of my contacts with him. I have also gone out of my way in the first place to give consideration to his health concerns and have made very sure not to place his health at any undue risk. My agreement with Mr. Antalik was also that I would give him the benefit of the doubt and that I would wait for further information to be supplied before making a final medical decision on his fitness to work.
>
> Mr. Antalik has never supplied this information to me and as such I have no objective medical evidence to substantiate any of his claims. My conclusion at this stage is that there are no objective medical findings that would make him medically unfit to return to his previous occupation as Maintenance Mechanic IV at the Iona Waste Water treatment Plant and that he has not provided any evidence that would indicate that he was unfit for full duties when I saw him the first time.

In addition to confirming the contents of this letter Dr. Gouws recalled advising the Grievor that a new consent was required as the original consent he had signed was date specific. He described the conversation as "slightly heated". He denied that he told the Grievor that he was either going to get

him or that he was going to lose. He indicated that he may have raised his voice but did not scream. He was angry that he was not able to perform the examination. He did not recall seeing the Grievor's wife.

Kinney testified that when she spoke to the Grievor over the telephone from Dr. Gouws' office he indicated that he did not trust her to send the report to his doctor and that the examination was a "trap". He was loud and abrasive and he hung up on her. She denied that she screamed at the Grievor.

Antalik testified that he did not recall much of what was said at Dr. Gouws' office that day. He asked Dr. Gouws for a written guarantee that he would send the report to his family doctor as he did not trust Kinney because she had lied to him before about having a job for him. When Dr. Gouws handed him the telephone to talk to Kinney she started to scream so he hung up although he indicated uncertainty as to his recollection in this regard. He stated that when he asked for a written guarantee Dr. Gouws told him he was going to lose. His reason for inquiring of Dr. Gouws who was paying him was that he had not been paid for his first IME expenses as promised.

Just prior to this appointment and while correspondence was being exchanged in that regard, Eastwood by letter dated September 5, 2003 addressed to Kinney raised the possibility of offering the Grievor the "recently vacated exempt position of Mechanical Supervisor at Annacis Island Wastewater Treatment Plant . . . as a return to work accommodation". On September 10th Kinney responded advising that after discussing the matter with Ali it was determined that Antalik was not qualified for the position. Ali testified that the Grievor was not qualified for the position as it involved long hours of administration and lots of computer work. In cross-examination he stated that he based his conclusion in that regard on an interview he had conducted of Antalik a couple of years prior.

By letter dated September 29, 2003 Kinney forwarded copies of Dr. Gouws' report of September 26th to the Grievor and Dr. Bacchus. Approximately one month later Antalik filed a complaint against Dr. Gouws with the College of Physicians and Surgeons alleging that Dr. Gouws was not qualified to examine him and that Dr. Gouws had lied in stating that he had not supplied the additional medical information. In support of the latter he supplied a registered letter receipt which Dr. Gouws acknowledged was signed by staff at Viewpoint. It appears that the College accepted Dr.

Gouws' explanation that Dr. Pearl's report must have been misfiled. The Grievor's explanation of the College's rejection of the other portion of his complaint was that IMEs were a labour relations problem and he described the College as saying that "who is paying gets a favourable report".

By letter dated Thursday October 2, 2003 and headed "Final Return to Work Opportunity" Hardie advised the Grievor as follows:

> On September 23, 2003 you attended an Independent Medical Exam that was intended to learn more about what (if any) restrictions prohibited you from your return to work. This examination substantially did not occur due to your expressed concerns of not receiving the resulting medical report, in spite of multiple forms of reassurance to the contrary.
>
> The GVRD has now received a short report of this event (copy sent to you and your family doctor). At present we understand there to be no medical basis or reason why you should not be back at work in your normal duties as Maintenance Mechanic IV at the Iona Wastewater Treatment Plant.
>
> After discussions with your supervisors, I want to convey their commitment to assisting you in getting back to work.
>
> You are required to report to work at 7:00 am on Monday October 6, 2003 at the Iona Wastewater Treatment Plant.
>
> Should you not report to work on this date and time, the GVRD will view this as job abandonment by you and your employment will be terminated.
>
> Please contact me if you have any questions related to this matter.

Hardie testified that he sent this letter because the Employer had made a number of attempts to arrange for the Grievor to return to work without success. After the Grievor failed to take part in the September 23rd IME the Employer could see no medical impediment to Antalik's return to work. Under cross-examination Antalik described the letter as a threat and stated that he did not like to be bullied. Although his wife had told him that he would be fired he did not believe that his job was in jeopardy because there was no reason for it to be in jeopardy.

Antalik did not report for work on Monday October 6th. The Grievor testified that after he received Hardie's letter he went to see Dr. Bacchus to get a note with respect to a graduated return to work. That note dated Friday October 3rd indicates that he could return to work for four hours per shift,

that he should avoid exposure and proximity to sewage and smoke and noted that his left hand was "somewhat dysfunctional".

Antalik testified that he wanted to return to work, had been pressing the Employer for some time to provide him with a job and, accordingly, it was his intention to return as directed. However, he had no money for gasoline to get to work. He had received no money for a long period of time and the Employer had not paid him for the expenses associated with the IMEs although it had agreed to do so. Under cross-examination he agreed that he had money for food and local travel but testified that he did not have "extra money" for gasoline to get to work. He was also having family problems and described himself as sitting around arguing with his wife who had earlier been told by Kinney that he was going to be fired. He initially testified that he was not sure what work was being offered and later indicated that the work he was being offered was work he knew that he could not do. Ultimately on Friday afternoon he left a voice mail message for Hansford indicating that he would not be reporting on Monday but would report on Tuesday October 7th. Hansford transcribed the message as follows:

> Hi George. Jozef Anatalik calling. Today Oct 3 approximately 20 after 3PM. I won't be able to make it Monday. I'll be there Tuesday 7 o'clock. Bye

Antalik agreed that this transcription is accurate. On Sunday October 5th Antalik faxed the following message to Hardie:

> I'll be back at Iona Tuesday October 7, 2003. You did not give me enough time.

The Grievor testified that he sent this fax as he did not trust Hansford and Hardie was "on his neck".

Under cross-examination Antalik testified that when he received the October 2nd letter he knew that he would not be able to report on October 6th. When asked why he waited until close to the end of Hansford's shift on October 3rd to advise the Employer that he would not be reporting the Grievor stated that he was still looking for ways to obtain money so that he could afford to report for work. As to why he did not mention a lack of money in the October 3rd message left for Hansford he stated that he hated voice mail and left just a basic message because he was not required to give

an explanation. Further, there was no reason to tell the Employer that he needed money as the Employer owed him money. When asked why he waited until Sunday October 5th to send a fax to Hardie he testified that he was still "researching" how he could obtain money.

Antalik testified that on Saturday October 4th he arranged to have a cow picked up on Monday October 6th to be auctioned off to raise money for gas. In the morning of October 6th while assisting with the loading of the cow he was struck by his bull and injured. He was limping and in pain so he went that day to a local walk-in medical clinic. The doctor he saw provided a note indicating that he should take Wednesday and Thursday off. He then called the Employer and left another message for Hansford which the latter transcribed as follows:

> Hi George, Jozef Antalik calling. Today Monday at 1:00 o'clock in the afternoon, Uh, I was Kick by the Bull this morning, so Dr. he told me to stay at home till Thursday and, UH , we see what happens after that, So I thought I would let you know that I won't be there tomorrow. Bye.

On Tuesday October 7, 2003 Hardie wrote another letter to Antalik this time headed "Attendance at Work/Job Abandonment" which stated:

> The GVRD is extremely concerned about your absence from work on Monday October 06, in spite of clear communication detailing the jeopardy of your employment.
>
> The Maintenance Superintendent has requested that I advise you that:
>
> - You are instructed to show up for work on Thursday October 09 at 7:00 am ready for work.
> - Should you be unable to work, you will present yourself in person to Mr. Amzad Ali and Mr. Jim McQuarrie at the Iona Island WWTP on Thursday October 09 in order to provide a full and satisfactory explanation for your lack of workplace attendance.
>
> Any failure, for any reason, to attend in person will be considered abandonment of your employment by the GVRD and your employment will be terminated.

Hardie testified that by this time he was frustrated by the Grievor's failure to report and wanted to make it clear that he was to attend. The Grievor

responded to this letter with this handwritten message dated October 7th sent by facsimile:

> Monday, October 6, 2003 I was loading cattle to trailer and accidently (sic) I was kick by "Bull".
>
> I called Monday, October 6, 2003 Iona plant aprox. 1.15 p.m, and I left message on George Hansford "voice mail", that I can not work. If you people do not comunicate (sic) then stop harassing and bulling (sic) me.
>
> I did leave message at Iona. Also I am faxing report from Doctor.

As indicated, included with this transmission was the note from the doctor at the walk in clinic. Hardie responded to this note with the following letter dated Wednesday October 8, 2003 headed "Meeting of Friday October 10 at 8:30am":

> The employer has a variety of questions related to your failure to attend work on Monday October 06, 2003. I see that a doctor's note which you have supplied excuses you from working until Thursday October 09th.
>
> Please report to Mr. Amzad Ali and Mr. Jim McQuarrie on Friday October 10th at the Iona island WWTPlant at 8:30am. This meeting represents a last opportunity for you to attend and explain your absence from work. Please understand that no further absence, of any kind, will be recognized as acceptable. Any failure to attend this meeting will result in the termination of your employment.

A meeting did take place at Iona on Friday October 10, 2003. Present for the Employer were Ali and Hardie, for the Union Northam and the Grievor. Hardie testified that Ali opened the meeting by indicating that the Employer was trying to get an explanation it could understand for the Grievor's failure to show up for work on Monday October 6th. The Grievor responded that he had left a message and that he had not received enough notice of his return to work. Although expressing some uncertainty Hardie testified that the Grievor may have mentioned that he should have been provided notice on Wednesday for a return on Monday. Hardie testified that he was having difficulty understanding Antalik's position with respect to notice as he was not aware of any such requirement. At some point Northam observed that as the notice had been given on Thursday, 48 hours had elapsed. Hardie initially testified that the Grievor was asked if he had anything else to say with respect to his failure to attend but did not supply

further information. Later in his direct examination he indicated that his recollection was "muddy" and that at some point Antalik explained the arrangement he had made to have cattle picked up for auction and the kicking incident on Monday. Hardies' brief notes of the meeting indicate that Antalik referred to both the notice issue and the cattle pick-up. Under cross-examination Hardie indicated that he believed that the Grievor said that he needed money.

After approximately 20 to 25 minutes Ali and Hardie left the room to caucus. Hardie testified that they reviewed the earlier efforts made to arrange for the Grievor's return to work and the lack of a satisfactory explanation for his failure to report on October 6th. They decided that Antalik had abandoned his job and that he should be terminated. According to Hardies' notes this break lasted some 13 minutes. Hardie testified that when they returned to the meeting room Ali indicated that they had considered the Grievor's employment history, the efforts to return him to work and his explanation for failing to attend which they viewed as unsatisfactory. After considering all of that they concluded he was terminated. Under cross-examination Hardie testified that he thought Ali referred to the whole employment relationship and not just the failure to report on October 6th. Hardie was more certain that abandonment was mentioned by Ali. Hardie testified that the Grievor said the Employer should have used progressive discipline. Under cross-examination he also recalled that the Grievor wanted to say something at the end of the meeting but that he "may have cut him off". At the conclusion of the meeting the Grievor handed across the table Dr. Bacchus' note of October 4th. Hardie testified that this was the first he was aware of any back to work limitations and Antalik had not communicated any such concerns following his letter of October 3rd.

Antalik testified that the meeting started with Ali asking why he had not reported for work. He described Ali as "agitated", "screaming" and "trying to get me into an argument". Antalik responded that he had sent a note to Hardie and asked Ali if he had seen the note to which Ali responded affirmatively. Antalik said he was "not going to repeat himself", he had "left a message and that's that". Antalik testified that he was not upset but was calm. He did not explain his absence because it was already in writing and he did not want to get into a "yelling match".

Antalik testified that when Hardie and Ali returned to the meeting the former was smiling so he thought they had good news. They did not as he was terminated. He testified that he was not in shock as he expected it based upon what Kinney had earlier said to his wife. He felt he was being fired for complaining. He asked for the reasons for his termination but none were offered. He told them "gentlemen, you are firing a disabled man". He slid Dr. Bacchus' note across the table. Ali would not pick it up but Hardie did.

Under cross-examination Antalik indicated that he did not mention needing 48 hours notice at the meeting. Antalik testified that the 48 hour notice requirement in the collective agreement relates to recalls from layoff not absences due to illness. He stated that after the managers caucused he was told that they had discussed his case and that he was terminated.

Northam described his recollection of the meeting as "muddied" and "hazy". The first part of the meeting involved the Employer asking the Grievor about his failure to report on possibly more than one occasion. The second part related to the Grievor's termination. Northam testified that it was clear to him that the termination was due to the abandonment of his employment and a result of failing to report. He did not recall any discussion about difficulties with respect to earlier attempts to arrange his return to work. He indicated that if this had been discussed he would likely have recalled it because of his OH & S role in the Union and the fact that he had attended earlier meetings with respect to Antalik's return.

Under cross-examination Northam initially indicated that the discussion focused on the termination letter which was handed to them at the meeting and read out. He later acknowledged that he could have been confused about the letter. He did recall Antalik mentioning 48 hours notice and thought that it was a "strange" comment. Finally, he recalled Ali being "hot under the collar" and frustrated.

Hardie testified that the following termination letter dated October 10, 2003 was written after the meeting was concluded and subsequently provided to the Grievor:

> Further to our meeting this morning, this confirms the employer's decision to terminate your employment with the GVRD, effective today's date.

> Please review the attached benefits information summary as you may wish to make alternate benefits coverage arrangements.

On October 20, 2003 the Union grieved the termination. The Third Step grievance meeting was held on November 19, 2003 involving Hardie, Johnny Carline the Employer's Chief Administrative Officer, Eastwood, Beaumont and the Grievor. Eastwood described Carline as the Employer's person with final authority with respect to grievances. He would come to the cases "fresh' and both sides would present their positions to him. The parties agreed that it was appropriate in this case for us to hear evidence of what happened at the Third Step meeting but did not concede this issue for future cases.

Eastwood testified that as the October 10th letter had not said much about the cause for termination he hoped at this meeting to determine the Employer's reasons. Accordingly, he asked Hardie why the Employer was terminating the Grievor stating that "surely it was not failing to show on Monday". Hardies' response was that that was the reason. Eastwood testified he put the issue to Hardie in two or three different ways and that was the only reason he received. He indicated that he did not recall Hardie saying anything about other return to work difficulties although they may have been a slight reference to the attempts to arrange a return to work. Eastwood made the following notes of the meeting within a couple of hours of its conclusion:

> Primary thrust of the Union's questioning was to determine the Employer's reason for termination.
>
> Chain of events leading up to employment termination on October 10th, 2003 was discussed clarified and agreed upon.
>
> J.A. wanted to revisit everything since his initial sick leave claim. JH and JC were clear that the reason for termination was JA's failure to report to work on Monday October 6th, 2003 as directed by the October 2nd, letter from JH. JH reported that the reason given by JA for not reporting to work was not acceptable and this led to his termination on the Friday of the same week. JH considered that his letter of October 2nd, 2003 was well crafted and stated the Employer's expectations clearly. There was little willingness on the Employers (sic) side to discuss the merits of JA's disability despite JA's repeated and disjointed attempts to raise points from many months past.

> BE and JA put forward the defense of being financially unable to attend the October 2nd meeting and went into some depth regarding the process of shipping cattle to auction including issues around payment for the transport of the cattle. JA made it clear that no money was required up front for the transportation costs and that those costs would be covered by the sale of the livestock. It seemed clear that JH and JC were not sympathetic to the financial impediment argument for not attending the Monday meeting.
>
> There was an argument put forward by BE that JA had done what was proper when he knew that he could not attend work on the Monday morning. He had contacted his Supervisor as is required by the collective agreement. This line of defense was discarded by JH who sighted (sic) his October 2nd letter and implied it's (sic) finality of opportunity with no room for excuses.
>
> The meeting ended at 4:15 pm with JC saying that he felt he had a good grasp of the issues and that he would respond in writing shortly.

Hardie testified that the meeting lasted 45 to 60 minutes. He spent a "considerable" period of time explaining to Carline and the Union the history with respect to the repeated attempts to return to work. Hardie testified that he indicated that it was the Grievor's refusal to obey the order to return to work on October 6th as part of the consistent failure to return to work despite repeated efforts that was the cause for termination. Hardie described the explanation of not having money to transport himself to work as a new explanation, as at the termination meeting he had only mentioned a lack of notice.

By letter dated November 30, 2003 Carline, whom Eastwood described as having the final disciplinary authority within the Employer, advised the Union that the termination would stand.

The Grievor testified that the termination was very stressful for him. He had never been fired before and in his 22 years as a supervisor had only fired one person and then only because he had been ordered to do so. He testified that he was never given a reason and that the Employer had never spoken with him about treatment but had only threatened him. His termination was the "last straw" for his marriage of over 30 years.

He had been able to obtain part time work at the waterfront as both a millwright and labourer as of the summer of 2004. This was a good work

arrangement for him as if he was not feeling up to it he would not seek work that day. He was prepared to return to work with the Employer as long as it was within his medical restrictions. If no millwright work was available he was willing to do other work as long as he was paid his millwright rate.

Under cross-examination Antalik stated that when he applied for work at the waterfront he indicated the same medical restrictions as had earlier been set out by Dr. Bacchus. He did not, however, limit himself to four-hour shifts. Rather, he testified that he kept the restriction in mind and was able to leave early if he was not feeling well. Finally, Antalik testified that when he attended the meeting on October 10th he did not intend to work at Iona. No doctor had said that he could work there and he was not willing to go back to the place that had harmed him.

Expert Toxicological Evidence

Both parties tendered and relied upon experts in medical toxicology.

Dr. Janice Pearl obtained her medical degree in 1963. After completing her residency, which included training in neurology, for approximately twenty years she practiced variously in neurology, neuro-surgery and emergency medicine. During a twelve-year period of private practice within that time frame she estimated that approximately 30% of her practice was related to Occupational Medicine. In the late 1980s she began to undertake studies in the field of medical toxicology. In 1992 she became a Diplomate of the American Board of Toxicology. In 1999 she passed the American Medical Association's sub-board examinations in toxicology. She is one of approximately 240 board certified toxicologists in the United States of America. She currently conducts approximately twenty consultations in Occupational Medicine each week. She is also certified under the American Board of Emergency Medicine.

Dr. Pearl has authored some thirteen articles with five or six of them being with respect to toxicology. None of the articles is with respect to H_2S. She has provided expert evidence in five or six cases with respect to toxicological issues. She provided a list of articles she had read with respect to H_2S that informed her in the preparation of her opinion and the presentation of her evidence. She had also spoken to another toxicologist.

The Employer took no position with respect to the Union's application to qualify Dr. Pearl as an expert in medical toxicology and we were unanimously of the view that she was so qualified.

As noted above Dr. Pearl prepared a report dated December 27, 2002. We reproduce the "present illness" and "impression" portions:

> PRESENT ILLNESS:
>
> Mr. Antalik worked for four years at the Iona Sewage Treatment plant as a mechanic. On 4/24/02 he was working in a bar screen room receiving raw sewage, when just prior to the lunch hour he felt ill and noted burning of his eyes and face as well as his throat and tongue. He also developed a headache and felt dizzy.
>
> He left the area, went to see the First Aid attendant and ultimately went home planning to follow up with his family physician, Dr. Bacchus.
>
> He noted an odor but is not sure of the nature of the odor.
>
> His wife reports that his clothes and car always smell of raw sewage and olfactory fatigue may explain his difficulty in being specific about the odor.
>
> His wife describes his appearance as having very red eyes and red swollen face.
>
> The following day his throat felt swollen and in addition to his other symptoms he developed abdominal pain
>
> At 72 hours he recalls he remained dizzy, had a headache, and also had numbness of his toes on the left and the 4th and 5th fingers of his left hand.
>
> Over the next six months he gradually improved but still has headache, problems with recent memory, numbness as previously described and most troubling, intermittent episodes of swelling of his throat and neck with intermittent breathing problems, especially with exertion.
>
> Other exposures include working in a coal mine in his native Czechoslovakia in 1964. During this period he had pneumonia but recovered without sequelae.
>
> In the early 1970's he did welding inside boats and did not wear protective equipment. He did not notice any symptoms during this period or

subsequently when he worked supervising window cleaners and had some exposure to TSP.

A year prior to the 4/24/02 incident Mr. Antalik had 2 episodes of dizziness and headache and on one occasion he was hospitalized. He states he frequently would have 3 or 4 glasses of wine of an evening but quit using alcohol after this scare.

Since his exposure on 4/24/02 he states he has been super sensitive to all smells, especially perfumes.

During the past 7 months he has seen Dr. Wittmann, pulmonologist in consultation and Dr. Strecker an otolaryngologist also in consultation. He also saw Dr. Sehmer, an Occupational Medicine physician. These physicians did not have an easy explanation for his problems. Dr. Wittmann noted he had a history of ischemic cardiac disease but she did not think this was related.

IMPRESSION: I believe it is highly likely that Mr. Antelik (sic) inhaled a significant amount of HYDROGEN SULPHIDE on 4/24/02.

As is often the case in this type of exposure he may have inhaled carbon monoxide, carbon dioxide and methane as well.

In this case this is probably an acute on chronic low level exposure complicating the issues.

I challenge Dr. Sehmers (sic) assertion that inhalation of H_2S would be unlikely to produce long lasting effects. There are now many reports in the literature of delayed sequelae of H_2S and a leading textbook of toxicology states "Neurologic outcome can be quite variable from no neurologic impairment to permanent sequelae." (Goldfrank, et al)

Groups in Calgary and CHT Centers for Health Research have recently, working with experimental animals, reported memory and learning problems after exposure to 80 ppm. In humans 200-300 ppm can cause respiratory problems and greater than 700 ppm is usually rapidly fatal.

Since H_2S is an inhibitor of cytochrome oxidase it is most toxic to organs with high oxygen demand like the heart and brain. In the brain it is believed to affect the content and release of neurotransmitters.

Conjuncitivitis and facial edema as described by Mrs. Antelik (sic) are common after H_2S exposure and chest pain, pharyngitis, chest pain,

nausea, headache are common complaints after sub-lethal exposure. Myocardial infarctions have been reported.

Mr. Anteliks (sic) marked symmetrical hyperreflexia concerns me. It could be associated with basal ganglia lesions or anywhere along the upper neuron motor pathways.

You can see this with ALS, but usually the motor weakness precedes the marked hyperreflexia and he does not have impressive extremity weakness at present. (I spent the first 15 years of my career in neurology and neurosurgery)

I have no real good explanation for his fluctuating cervical adenopathy and red palate and uvula other than possible allergic. Surely the study of what multiple chemical and drugs occasion in susceptible individuals is in its infancy. Since this is a difficult case Im (sic) wondering if trying him off Altace might be worthwhile. I've seen 2 cases of ACE inhibitor laryngeal edema with swollen pharynx and difficulty breathing, and allergic reactions to drugs that involved swollen cervical nodes.

I realize that you and Dr. Wittman (sic) have done an extensive pulmonary work-up. The only other thing than might be helpful is an EMG of the diaphragm. Phrenic nerve impairment is a rare complication of some drug allergies. What brings it to mind is his assertion that he likes to walk, and walks without difficulty but couldn't run due to shortness of breath. He quit smoking 10 years ago and keeps in pretty good shape.

I strongly believe he should have a cervical and cerebral MRI.

He asked me about returning to work. I believe the MRI's would not only help with the diagnosis but also with this decision. If he does have subcortical white matter and basal ganglia lesions as have been described with H_2S and CO then he should probably consider another vocation. If he does return to work he should surely use a properly fitting respirator when he works inside.

I don't know if thiosulphate levels in the urine can be obtained in your area. In non-fatal exposures, elevated levels have been helpful in establishing the diagnosis. (With those who die rapidly it is found in the plasma and blood) So if he has another exposure this test should be obtained, if possible.

I would like to see him again after his MRI's. It is a pleasure to participate in the care of this fine man with very challenging problems.

In August of 2004, at the request of Counsel for the Union, Dr. Pearl provided a further opinion, which in part states as follows:

> Comment.
>
> I do not find Mr. Antalik to be a malingerer or someone who exaggerates.
>
> 7 weeks after his exposure Dr. Strecker found a diffuse non-specific erythema of the hypopharynx. On my exam I found swelling and erythema of the posterior pharynx and adenopathy. This was 8 months after the event.
>
> Since Industrial hygienists were not called to test levels at his work site we cannot absolutely prove the offending agent or agents in Mr. Antaliks (sic) case.
>
> Hydrogen sulfide in sublethal concentrations causes headache, fatigue, increased secretions, eye irritation, sore throat, bronchitis, dizziness, poor memory and extrapyrimidal damage. Pulmonary edema is quite common.
>
> Many workers have no recall of odor.
>
> It is generally believed individuals are more susceptible to lower concentrations of H_2S on re-exposure.
>
> Symptoms have been reported many months after acute exposure episodes and that includes exercise induced angina, an issue debated in Mr. Antaliks (sic) case.
>
> It is possible that Mr. Antalik had exposures to several agents including infectious agents on April 24, 2002.
>
> The allegations of Dr. Sehmer that hydrogen sulfide would be unlikely to cause long lasting effects is not accurate. There are many reports in the literature of long lasting effects, especially neuropsychiatric sequelae similar to carbon monoxide.
>
> No one has mentioned or given an explanation for Mr. Antaliks (sic) marked hyperrreflexia, an objective finding.
>
> The physicians who have examined Mr. Antalik do not seem to have significant information on prolonged exposure to toxic agents, sensitization, and individual variation.
>
> An example you might know of is Western Red Cedar workers in B.C. Some develop respiratory problems at 3 years, others can continue to work

> for 10 but none can return to forests once the respiratory symptoms develop. The offending agent is believed to be plicatic acid.
>
> Mr. Antalik described two prior episodes of dizziness and headache and his concerns about working without respiratory protection I believe are valid.

Another examination occurred and a further report was prepared in September of 2004. The examination portion of the report notes that he advised that although his headaches had improved problems persisted with respect to his throat, memory, clumsiness, tremors and fatigue. Her examination showed amongst other things that he had lost weight, muscle mass and motor strength. His throat showed mild erythema. With respect to his reflexes it was noted "marked hyperreflexia at 4+, almost to clonus on the left side, at biceps, triceps, brachioradialis, knee jerks, ankle jerks". The "impression" portion of the report stated as follows:

> My opinion continues to be that Mr. Antalik had acute on chronic toxicity from Hydrogen Sulfide exposure, and he continues to have sequelae.
>
> He also has Chronic Fatigue Syndrome.
>
> Other toxins he was exposed to in the raw sewage such as methane, CO, nitrates, heavy metals, pesticides, pthalates, aldehydes, probably enhanced the toxicity.
>
> Even at 10 ppm of H_2S studies have shown that with exacerbation oxygen uptake goes down and muscle lactate increases.
>
> Studies now show that there are changes in the myelin sheaths of nerves, changes in astrocytes and changes in even smooth muscle of vessels with chronic low level exposure to H_2S, even environmental exposures.
>
> Mr. Antalik has provided me with data that the H_2S levels in the area where he worked were way over 10 ppm on several occasions.
>
> The occupational medicine physicians he has seen have not commented on, either the presence or the etiology of, his striking hyperreflexia which cannot be feigned.
>
> Their assertion that his motor efforts are not exactly equal at all time indicates a lack of consideration of many myathenic and neuropathic conditions where repeated efforts are not equal and this can occur with demyelinating conditions.

Dr. Pearl was extensively cross-examined by counsel for the Employer. The following comments, agreements and disagreements were elicited:

- H_2S would be present virtually every day in municipal sewage.
- To determine the presence of H_2S in the human body testing must be conducted almost immediately as you cannot measure the presence of H_2S in the blood after a couple of hours.
- Other irritants could have contributed to the Grievor's symptoms.
- A person is probably more affected by a second exposure to H_2S.
- She had seen a cumulative effect with respect to carbon monoxide but not H_2S.
- That the abnormality in the bilateral cervical nodes may have some connection to H_2S but there is nothing in the literature that draws such a connection – the abnormality could also result from an allergy including an allergy to H_2S.
- Hyperreflexia is consistent with an H_2S exposure diagnosis.
- Although it is conjecture, on the basis of his symptoms the Grievor's exposure to H_2S must have been acute or serious.
- She agreed that if the alarm was working and did not register greater than 10 ppm that is consistent with no significant exposure.
- She agreed that in *Goldfrank* it is indicated that complete recovery with no permanent sequelae can occur in cases of very serious exposures involving a "knockdown".
- She did not 100% agree that hypoxia (lack of oxygen to the brain) is the cause of permanent sequelae.
- She identified Kilburn, Wasch, Legator and Hirsh as authors who had reported permanent sequelae in the absence of a "knockdown".
- The MRI she suggested to determine if there were lesions in the basal ganglia was negative – if lesions had been present it would have supported the diagnosis of H_2S exposure but their absence did not rule out such an exposure.
- That after she received the MRI report she felt the Grievor could try to work with reduced hours and access to a respirator but the Grievor became anxious in that regard.

Dr. Thomas Milby, a medical doctor for over forty years in the fields of Occupational Medicine and Medical Toxicology was called by the Employer. Early in his career he was involved in occupational health and taught Occupational Medicine at the University of California, Berkley for thirteen years. Since 1983 he has maintained a consulting practice in Medical Toxicology, Forensic Medicine and Occupational and Environmental Medicine. Dr. Milby testified that his primary areas of interest are H_2S and pesticides. He has written over fifty articles, that after peer review, have been published. Seven of these directly relate to H_2S and its effects. Dr. Milby served as a special advisor to the World Health Organization with respect to H_2S and authored the initial draft of its report in that regard.

Dr. Milby has been consulted by both plaintiffs and defendants and has participated in approximately forty legal proceedings relating to H_2S including providing expert testimony in ten to twelve cases. The Union agreed that Dr. Milby met the test for being qualified as an expert and it was so determined.

Dr. Milby was asked by Counsel for the Employer to review Dr. Pearl's reports and the material they were based upon. His first report is dated February 8, 2005. In reviewing her reports and opinions Dr. Milby identified two points he felt were critical. First, that there was no indication that Mr. Antalik lost consciousness on April 24, 2002. Second, that there was no evidence of co-workers falling ill that day although they had been "constantly in and out that day". Dr. Milby testified that even if the latter fact was not borne out by the evidence his opinion would not change. We reproduce the opinion and analysis portion of his report:

> Critique and Opinions – Summary
>
> There is no objective evidence that Mr. Antalik was exposed to hydrogen sulfide gas at all, much less to a toxic concentration. However, one cannot completely exclude the possibility of a very low-level exposure leading to a mild, transitory, acute hydrogen sulfide poisoning. Nonetheless, by applying accepted medical principles, one can argue compellingly that Mr. Antalik does not now, nor did he ever, suffer from sequelae of hydrogen sulfide poisoning (sequelae is defined as a condition following as a consequence of the disease).
>
> Basis of Critique and Opinions

There is no objective evidence that Mr. Antalik was exposed to hydrogen sulfide on April 24, 2002, or at any other time. No air samples were collected and analyzed for hydrogen sulfide or any other contaminant. Mr. Antalik did not mention smelling the distinctive rotten egg odor of hydrogen sulfide, but he did mention detecting an unusual smell on the day of his alleged injury. Mr. Antalik had worked at the sewage plant for four years; it is unlikely that he would fail to detect and correctly identify the distinctive odor of hydrogen sulfide.

Applying generally accepted medical principles to the question of hydrogen sulfide induced sequelae, one can compellingly argue that Mr. Antalik does not now, nor did he ever, suffer from sequelae of hydrogen sulfide poisoning. It is possible that mild, transitory acute poisoning cause some or all of his early symptoms of eye, nose throat and skin irritation. The consensus expressed in contemporary medical/toxicological literature of hydrogen sulfide poisoning in humans maintains that hydrogen sulfide gas in the air in concentrations above about 750 parts per million, if inhaled, can cause sudden collapse and unconsciousness, colloquially referred to as a "knockdown". Usually, the knockdown victim recovers promptly with no lasting ill effects. If however, exposure is not rapidly terminated and unconsciousness is prolonged for more than four or five minutes, there is a danger that apnea (cessation of breathing) may lead to cerebral hypoxia and central neurotoxicity, which in turn can be fatal, or if not fatal, can cause permanent neurological sequelae.

Reported cases of long-term sequelae following excessive exposure to hydrogen sulfide have one thing in common: all experienced a period of unconsciousness and respiratory insufficiency lasting for several minutes, often longer. There is no evidence of which I am aware, whether from my personal experience or from the medical literature that convincingly describes persistent sequelae following hydrogen sulfide exposure insufficiently intense to cause loss of consciousness and cerebral hypoxia.

For clarification I believe it is worth commenting on Dr. Pearl's challenge to Dr. Sehmer's assertion that inhalation of hydrogen sulfide would be unlikely to produce long-lasting effects. In support of this challenge, Dr. Pearl cited a leading textbook on toxicology: Goldfrank's Toxologic Emergencies. I agree with Dr. Pearl that Goldfrank's monograph can aptly be described as a leading toxicology textbook. I also agree that Dr. Pearl accurately cited Goldfrank, to wit "Neurologic outcome can be quite variable from no neurologic impairment to permanent sequelae". However, I cannot agree with Dr. Pearl's interpretation of this statement, which she cites to support her opinion that Mr. Antalik's past and current symptoms are sequelae of hydrogen sulfide poisoning. As I stated above, current medical literature, while not

excluding the phenomenon of post-exposure sequelae, argues convincingly that the exposure must be sufficiently severe to cause knockdown, cerebral hypoxia and central neurotoxicity. Accordingly, he cannot be said to have experienced sequelae caused by hydrogen sulfide poisoning.

Mention should be made here of the brain MRI that I understand was done as part of Mr. Antalik's ongoing medical workup. I have not seen the MRI report, but I'm told that it was negative. MRI imaging of brain injury caused by hydrogen sulfide induced cerebral hypoxia and central neurotoxicity commonly includes evidence of subcortical white matter dymyeliniation and globus pallidus degeneration. The absence of these findings does not definitively exclude the possibility of hydrogen sulfide-induced brain damage, but is suggestive.

Conclusion

In conclusion, it is my opinion, based on a reasonable degree of medical certainty, that Mr. Antalik did not suffer serious hydrogen poisoning as a result of performing his usual job at the Iona Waste Water Treatment Plant on April 24, 2002.

Counsel for the Employer then posed a number of questions to Dr. Milby. His response dated February 15, 2005 was as follows with the question being inserted only where not self evident from the answer:

Please keep in mind that hydrogen sulfide is both an irritant and a chemical asphyxiant; it has no other toxic effects.

The ability of hydrogen sulfide to cause a toxic effect depends upon both concentration of this gas in the air and duration of exposure. Without information on both of these variables -- concentration and duration – one cannot effective discuss the toxic effect of this gas.

Hydrogen sulfide causes permanent neurotoxic sequelae (brain damage) through the mechanism of hypoxia (oxygen starvation), not by a direct neurotoxic effect (directly damaging brain tissue).

Answers to Questions

1. Typical results of exposure to hydrogen sulfide that do not cause knockdown include: transitory neurotoxic effects such as dizziness, headache and incoordination. If exposure is prolonged, the irritative effects of the gas may become apparent, causing eye irritation. For a more complete answer to this question, please review the table on

hydrogen sulfide effects in my paper: Health Hazards of Hydrogen: Current Status and Future Directions.

2. Exposure resulting in brief unconsciousness – less than one minute – usually cause few if any effects.
3. Exposure, with loss of consciousness of more than five minutes, can result in toxic encephalopathy (brain damage). The severity and duration of these effects are dependent upon air concentration and exposure duration. Manifestations including mild, transitory neuropsychological effects to lasting coma and death have been reported. It is important to note here that the five-minute rule refers to five minutes of exposure, not five minutes of unconsciousness. Norwegian professor, Dr. Bjorn Tvedt, a world-renowned expert in the field of hydrogen sulfide toxicity, has suggested this so-called five-minute rule.
4. Persistent neurotoxic effects can result from prolonged exposure with loss of consciousness. Permanent neurotoxic effects are a consequence of hypoxic brain damage. Peripheral nerve damage – peripheral neuropathy – is not cause (sic) by hydrogen sulfide exposure. Dr. Pearl's list of signs and symptoms are not consistent with hydrogen sulfide poisoning unaccompanied by loss of consciousness.
5. The word sequela is a term of art. According to Dorland's medical dictionary, a sequela is "any lesion or affection following or caused by an attack of disease". A more simple definition is "a condition following as a consequence of disease". If one defines the word sequela in its broadest sense, headache lasting several days following exposure to hydrogen sulfide could be termed a sequela. In Mr. Antalik's case, Dr. Pearl has defined sequelae from hydrogen sulfide exposure as a combination of permanent neurotoxic and permanent non-neurotoxic effects. As mentioned above, brief, transitory sequelae such as headache and dizziness are recognized as short-term sequelae of hydrogen sulfide, whether there is knockdown or not. Permanent neurotoxic sequelae are caused by loss of consciousness with ongoing exposure for at least five minutes. Permanent sequelae, whether neurotoxic or otherwise are not known to follow hydrogen sulfide poisoning without loss of consciousness.
6. Mr. Antalik's symptoms are not consistent with brain damage.
7. The term, hyperreflexia, as used by Dr. Pearl in this matter, is meaningless. Hyperreflexia refers to increased reflexes as seen with upper motor neuron lesions, but hyperreflexia may also occur in certain healthy subjects under emotional tension. There is no suggestion that Mr. Antalik has upper motor neuron disease.
8. The MRI imaging of Mr. Antalik's brain is normal. Following severe hydrogen sulfide poisoning with loss of consciousness, certain identifiable changes in the brain MRI can sometimes be demonstrated. The absence of these findings in Mr. Antalik's MRI suggests he was

not exposed to significant amounts of hydrogen sulfide. However, the absence of MRI changes does not positively exclude hydrogen sulfide-related brain damage. The cervical spine MRI, also normal, is of no significance to this matter.

9. [It is a fact that Mr. Antalik only rarely works in the bar screen room. Does this change your opinion in any way?] No.
10. Hydrogen sulfide is a non-cumulative poison. It is cleared from the blood very rapidly (half-life 30 to 60 minutes) by normal processes. In the very large body of scientific data on hydrogen sulfide poisoning, hydrogen sulfide is considered as a non-cumulative poisoning.
11. The makeup of any given sewage stream is dependent upon the activities being carried out in the homes and industries from which the sewage is derived. One cannot meaningfully characterize the toxic qualities of sewage in general terms.

After Dr. Pearl commenced her oral testimony, in the presence of Dr. Milby, Counsel for the Employer posed additional questions to Dr. Milby in relation to her evidence. A number of questions related to the status of the research of Dr. Kaye Kilburn which will be addressed below. The other questions and answers related to hyperreflexia and are as follows:

2. Dr. Pearl stated that hyperreflexia is an indicator of hydrogen sulfide exposure and that "this is reported repeatedly in the literature in relation to even low-level exposures". Dr. Pearl also stated that this was reported in "quite a few textbooks".

(a) Do you agree with Dr. Pearl's statements above?

Answer: No. I have found no evidence that "this is reported repeatedly in the literature in relation to even low-level exposures", nor have I found evidence that it has been reported in "quite a few textbooks". Hyporeflexia (sluggish reflexes) and normal reflexes have been reported occasionally in individuals exposed to hydrogen sulfide. Dr. Pearl cites a paper from the Department of Neurology, University of California, San Francisco (Wasch et al., 1989), in which three cases of hydrogen sulfide exposure were described. One case had mild hyperreflexia, a second case had hyporeflexia, and the third case had normal reflexes. I have been unable to find any reference to hyperreflexia in low-level hydrogen sulfide exposure cases. In my opinion, a finding of hyperreflexia is of little or no help in reaching a diagnosis of or establishing a prognosis for hydrogen sulfide exposure.

(b) Upon a review of the references listed by Dr. Pearl in coming to the conclusion in her report, do any of these articles refer to hyperreflexia as an indicator of hydrogen sulfide exposure?

Answer: No. Hyperreflexia may be demonstrable in the occasional serious case of hydrogen sulfide exposure, but this finding is not an indicator of exposure,

In his oral testimony Dr. Milby set out the effects of H_2S exposure in terms of two variables; concentration and time. At up to 10 ppm a distinct rotten eggs smell is noticeable but no injury is caused. A concentration of 50 ppm for thirty minutes causes eye and nose irritation – he described H_2S at this level as being less of an irritant than household ammonia. At 150 ppm for two to four minutes results in the deadening of the sense of smell. Between 500 and 750 ppm for four to five minutes results in slight dizziness and incoordination which are the effects of oxygen starvation. At 750 to 1000 ppm for two to three minutes, which he described as five to ten breaths or inhalations, knockdown occurs. He described this simply as the "lights go out". Finally, 1000 to 1500 ppm is fatal in the form of sudden death.

In direct examination, in addition to confirming the contents of his written reports, the following points were elicited from Dr. Milby:

- Whether the Grievor did not often work in the bar screen room environment or conversely had been chronically exposed to H_2S are meaningless as there is no cumulative effect of H_2S.
- He agrees with Dr. Sehmer that any effects of a low level exposure to H_2S would resolve in a couple of days and would have cleared up by the time Dr. Pearl examined the Grievor in December of 2002.

Dr. Milby was also extensively cross-examined and the following points were established:

- H_2S is colourless, heavier than air and soluble in fat and water.
- H_2S tends to accumulate in low-lying areas and although Dr. Milby was not aware of its rate of dispersal it does react with other chemicals and oxygen so it would not "just sit there".
- He did not know how tightening of the throat would or could result from an exposure to H_2S.
- He was only aware of facial redness occurring in cases involving knockdown.
- Similarly, shortness of breath would only occur if there was pulmonary edema, ie. fluid in the lungs.

- He had never examined the Grievor and based his opinions on the contents of the various medical reports and the testimony of Dr. Pearl.
- Generally accepted medical principles are the standards accepted by the relevant experts in the field and are determined by looking for a consensus of research published in quality journals.
- In his February 8, 2005 opinion letter he included the word "convincingly" with respect to the presence of no evidence of long term sequelae absent knockdown because he recognized the possibility of a one in a thousand exception in all of the reported cases. The only potential example of this that he was aware of was a case where a person may or may not have been exposed to H_2S had longer term effects although not initially knocked down.
- He agreed that the research with respect to the effects of low level H_2S exposure is limited.

Finally, reference should be made with respect to the research of Dr. Kaye Kilburn. In giving her testimony Dr. Pearl referred to the writings of Dr. Kilburn and others that were based upon his research. She described Dr. Kilburn as among the most knowledgeable experts in H_2S in the United States of America. Dr. Milby strongly disagreed noting that nearly all of his research was done in the context of litigation which gives rise to a greater opportunity for both "investigator and participant bias". He also noted that Dr. Kilburn's methodology is subjective in nature and as noted by Dr. Kilburn is not used by any other scientists in the field. Further, his research is predicated on two beliefs that are not supported by either the research or the literature in the field; first, that a majority of scientists accept that a full recovery does not occur after H_2S exposure and, second, that H_2S is a cumulative poison. In Dr. Milby's opinion both of these statements are simply inaccurate. Dr. Milby provided a number of decisions from courts, both at the trial and appellate levels, in the United States of America where Dr. Kilburn's evidence was either rejected or excluded as it did not satisfy the test for reliable expert testimony.

Failure to Provide LTD Benefits

Union's Arguments

The foundation of the Union's grievance is Article 9.04(5)(a) of the collective agreement:

> Regular Full-Time Employees who *continue to be disabled from fulfilling the requirements of their own occupation* beyond 26 weeks of coverage under the STII Plan, shall receive 66% of the first $2,000 per month of pre-disability salary and 50% of any amount thereafter, for so long as they remain disabled from fulfilling the requirements of their own occupation, to a maximum of two (2) years.
>
> (*emphasis* added)

In the Union's submission it is the emphasized portion that provides the applicable test in this case.

The Union submits that the test in Article 9.04(5)(a) does not require the Grievor to prove that he is totally disabled but only that he is "disabled from fulfilling the requirements of [his own] occupation" in this case as a MMIV at Iona. In making this determination the Union argues that the plan carrier's determination should be accorded no weight as it is not part of the test contained in the collective agreement. It contrasts this to Article 9.04(5)(b) which deals with "any occupation" determinations and makes specific reference to the carrier's determination.

The Union also submits that the collective agreement provision does not require it to prove the cause of the disability as it is the latter and not the former that is the basis for entitlement. This is to be contrasted to the WCB scheme which is dependent on work related causation. For this reason, as well as the fact that the WCB determination is under appeal, the Union submits that no cognizance should be taken of the proceedings before the WCB.

Alternatively, if cause needs to be determined the Union submits that the evidence supports a conclusion, on the balance of probabilities, that Antalik was disabled as a result of exposure to H_2S on April 24, 2002. In that regard the Union points to a number of evidential considerations including:

- While working at floor level near the point where the wastewater enters the bar screen room in an area proximate to potentially high levels of H_2S he began to experience various ill effects.
- He was for all intents and purposes working alone.

- The practice with respect to the levels at which the roll-top doors were maintained over the wastewater channels was varied and, according to the reports tendered by the Employer, presented a potential risk with respect to the ingress of gases.
- Given the density of H_2S and its tendency to accumulate as described by Dr. Milby it could have impacted on the Grievor while working at floor level without activating the sensor/alarms that were located more then four feet above floor level and off to the side from where Antalik was working.
- The ventilation system was operating far below its intended efficiency.

In the Union's submission these facts demonstrate that the Grievor likely was disabled due to exposure to H_2S and that tied in with the fact that he was not cleared to return to work, support a finding that Antalik was disabled from doing his job requirements as a result of that exposure.

As to the expert testimony the Union submits that Dr. Pearl's evidence should be preferred to that of Dr. Milby. It points to her extensive and ongoing experience in examining and assessing patients. In the case of Antalik this included a physical examination, an extensive patient history interview including the Grievor's wife and a review of his medical records. Finally, it notes that she was involved prior to any litigation and is, thus, an independent and credible witness.

In contrast the Union submits that Dr. Milby is not sufficiently independent to be considered unbiased as he was retained after the commencement of litigation for the purpose of refuting the testimony of Dr. pearl. The Union notes that part of Dr. Milby's criticism of Dr. Kilburn's research and opinions is that they are tainted by litigation bias. In the Union's submission this applies to Dr. Milby's testimony in this case. In addition Dr. Milby's practice is limited to assessing patients long after any potential exposures and does not normally include, as did Dr. Pearl's assessment of Antalik, any physical examination. Finally, the Union submits that given the acknowledged need for further study of the effects of low level H_2S exposure and some reports of long term effects of H_2S exposure, absent a knockdown, Dr. Milby's assertion of their being no long term sequelae ought not to be accepted. In this regard the Union made reference to a number of articles, including one by Kilburn, that postulate long term effects may result from non knockdown and in some instances low

level exposures to H_2S. On the basis of these articles the Union argues that contrary to Dr. Milby's view, Kilburn is not the sole scientist to hold the opinion that long term sequelae are not dependent on an H_2S exposure resulting in a knockdown.

With respect to the issue of whether the Grievor was disabled as that term is defined in the collective agreement, irrespective of the cause of disability, the Union submits that that issue is answered conclusively by the February 20, 2003 IME prepared by Dr. Gouws. On the basis of that report it is clear that the Grievor was not at that time able to work full shifts or to work in his classification as MMIV at Iona due to the risk of exposure to H_2S. In the Union's submission in order to fulfill the requirements of his position an employee must be able to perform the normal duties of the position and on a full time basis. Further, the fact that he may be able to perform some of the requirements of his job does not lead to a determination that he is not totally disabled (see *Paul Revere Life Insurance Co. v. Sucharov*, (1984) 5 DLR (4th) 199 (SCC)). In addition the Union relies upon the following quote from *Couch on Insurance* (1983) cited with approval by the court in *Paul Revere*:

> The test of total disability is satisfied when the circumstances are such that a reasonable man would recognize that he should not engage in such activity even though he literally is not physically unable to do so. In other words, total disability does not mean absolute physical inability to transact any kind of business pertaining to one's occupation, but rather that there is total disability if the insured's injuries are such that common care and prudence require him to desist from his business or occupation in order to effectuate a cure; hence, if the condition of the insured is such that in order to effect a cure or prolongation of life, common care and prudence will require that he cease work, he is totally disabled within the meaning of health or accident insurance policies.

In addition to the February 2003 IME the Union also points to the Employer's conduct in converting his payments for the initial six month period from advances against his WCB claim to paid sick leave when the WCB claim was denied, as further evidence of the fact that the Employer accepted that that Grievor was disabled. For these reasons the Union submits that as of October 24, 2002, ie. six months after the April 24, 2002

incident and, thus, the point where LTD entitlement would begin the Grievor was disabled as defined in the collective agreement.

Next the Union submits that the Grievor's disability continued until his termination on October 10, 2003. It argues that once disability has been established by a claimant the onus shifts to the insurer to prove that the employee no longer satisfies the criteria mandating coverage (see *Malkin v. Crown Life Insurance Co.*, (1989) 56 DLR (4th) 296 (BCSC). *Mathers v. Sun Life Assurance Co. of Canada*, [1998] BCJ No. 544 (BCSC) & *Mathers v. Sun Life Assurance Co. of Canada*, [1999] BCJ 1023 (BCCA)).

In this context the Union submits that it is significant that not only did the Employer accept the February 2003 IME of Dr. Gouws but continued to maintain its validity until the summer of 2003 in the face of medical advice that a graduated return to work could be tried. The Employer's position that he was not fit to do his own occupation continued throughout the efforts at accommodation in 2003. The Union submits that the Employer did not take the position that the Grievor was fit to do his job until September of 2003 based upon the report of Dr. Gouws dated September 26, 2003.

With respect to the expert reports prepared by Dr. Gouws the Union submits that based upon the first report of February 2003 the Employer is estopped from arguing that the Grievor was not disabled until at least Dr, Gouws report of September 26, 2003. Further, with respect to that latter report the Union submits that it does not meet the requirements for admissibility as a report of an expert (see *R. v. Mohan*, [1994] 2 SCR 9 (SCC), *British Columbia (Ministry of the A.G. - Sheriff Services) -and- BCGEU*, (1996) 57 LAC (4th) 319 (Greyell – B.C.) & *HEABC (Central City Lodge) -and- HEU*, [1997] BCCAAA No. 387 (Laing – BC)). In the Union's submission the September 26th letter written by Dr. Gouws is primarily a recitation of the events of September 23rd. Although it is admissible for that purpose it ought not to be accepted into evidence as expert opinion evidence. Within the context of the criteria set out in *Mohan* the non-recapilulatory portion of the report as it is not based on either any new information or a new examination is neither "relevant" nor "helpful". Finally, the Union submits that Dr. Gouws by virtue of his association with Viewpoint which in turn had previously provided assessment services to the Employer does not meet the criteria for independence.

The Union seeks full retroactive compensation for all LTD payments from the Employer relying on *Green Valley Fertilizers Ltd. -and- UFCW, Local 1518*, (1991) 22 LAC (4th) 417 (Hope, Wells & Page – BC). We note that for the purposes of this case the Employer does not take a contrary position as to its potential for liability under the collective agreement. The Union's claim is for the period from October 24, 2002 until Antalik's termination on October 10, 2003. In the Union's submission any claim for subsequent compensation should be addressed in the context of either the termination or the accommodation grievances.

Employer's Argument

In the Employer's submission the issue in this grievance is whether the Union has met the onus of establishing that the Grievor was disabled as that term is defined in the collective agreement (see *St Jean de Brebeuf -and- CUPE, Local 1101*, (1977) 16 LAC (2d) 199 (Swan – Ont.), *Rosewood Manor -and- HEU, Local 180*, (1990) 15 LAC (4th) 395 (Greyell, Csiszar & Kilfoil – B.C.), *Pouce Coupe Care Home -and- HEU*, [1997] BCCAAA No. 147 (Hope – B.C.) & *Vancouver Pre-Trial Services Centre -and- BCNU*, [2003] BCCAAA No. 12 (Korbin – B.C.)). This is not a case of a shifting onus, such as addressed in *Malkin* and *Mather*, because no initial determination of disability was ever made. Neither the Employer's initial step of paying monies while the WCB claim was outstanding nor its decision to reclassify it as paid leave should or can be construed as the acceptance of a disability.

The Employer submits that in meeting its onus the Union has presented only one piece of medical evidence; the reports and testimony of Dr. Pearl. In considering that evidence regard must be paid to the medical reports with respect to Antalik that were considered by Dr. Pearl. As well it is necessary to consider the reliability and credibility of the differing expert evidence. In arguing that Dr. Milby's evidence should be preferred to that of Dr. Pearl the Employer notes that in her December 27, 2002 report she took issue with Dr. Sehmer's statement as to the lasting effects of H_2S based upon a quotation from *Goldfrank* which it submits was taken out of context and is misleading. In so doing the Employer submits that Dr. Pearl took on the role of advocate on behalf of the Grievor and lost any claim to independent expert status. Further, the Employer submits that Dr. Milby's involvement and expertise with respect to H_2S is far superior to that of Dr. Pearl. He has researched and written extensively with respect to H_2S while Dr. Pearl has

published no articles in the field of H_2S toxicology. Rather, she has relied on the expertise of others and in particular that of Dr. Kilburn and other supporters of his position and approach. In that regard, the Employer notes that Dr. Kilburn's testimony has been rejected on numerous occasions by U.S. trial and appellate courts on an application of legal tests for the admissibility of novel scientific evidence.

In any event, the Employer submits that in Dr. Pearl's December 27, 2002 report she does not reach a conclusion as to the Grievor's fitness, or otherwise, to return to work. She merely opines that a decision in that regard would be assisted by an MRI and that a respirator should be used for inside work. Further, none of the doctors who had examined the Grievor prior to Dr. Pearl had determined that he was unfit. In July of 2002 Dr. Wittman reports suggesting that he try to return to work but noted some reluctance in that regard. In September of 2002 Dr. Sehmer noted "considerable anxiety" with respect to the work site but expressed no opinion as to Antalik's fitness.

With respect to Dr. Gouws' report of February 20, 2003 the Employer submits that it was clearly preliminary in nature and, as testified to by Dr. Gouws, was intended to give Antalik the benefit of the doubt while waiting for the provision of Dr. Pearl's report. Thus, it cannot be fairly characterized as a determination of medical disability but, rather, is just an interim position taken in contemplation of the provision of additional information. Moreover, the report does indicate the Grievor's willingness to return to his former position dependent on medical advice (from Dr. Pearl) based upon the results of the MRI. This position was confirmed in the April 2, 2003 meeting with the Employer when the Grievor and the Union indicated that his fitness was dependent on the toxicologist's opinion. Further, the Employer submits that the Grievor's unwillingness to return to his prior occupation as a MMIV at Iona, as indicated in the May 20, 2003 meeting with the Employer, is not supported by either the IME of Dr. Gouws' or Dr. Pearl's report. Finally, and in the alternative, the Employer submits that any liability that it may have in this regard ended at the June 6, 2003 meeting when the Grievor refused to take work otherwise suitable for him based on his assertion that he should be paid eight hours pay for four hours work. The Employer argues that this approach is not supported by the collective agreement and is contrary to the approach adopted in *Canada Safeway Ltd. v. RWDSU, Local 454*, [2005] SK No. 119 (Sask. C.A.).

In the absence of any objective medical evidence the Employer submits that the only potential evidence of disability is the self reported symptoms of the Grievor. The Employer argues that his somewhat growing and changing reports of symptoms was influenced by the Grievor's own research into the effects of an exposure to H_2S. Similarly, the alterations in the nature of the initial incident as reported to the doctors he consulted, for example with respect to whether he noticed an odor, were also likely influenced by that research. In any event, the Employer submits that the reported symptoms and effects were not ultimately supported by the objective medical evidence and certainly not to the degree reported by the Grievor.

In summary, the Employer submits that neither the medical evidence or the positions as to his return to work taken by the Grievor nor his testimony with respect to the effects he was feeling demonstrate to the requisite standard that he was in fact disabled from the performance of his own occupation. The medical evidence, including the reliable expert medical evidence, does not prove that the Grievor was disabled from as a result of the exposure to H_2S. If the Grievor was in fact exposed on April 24, 2002 it was not to the extent that it would have disabled him within the LTD claim period. Thus, there is no objective medical evidence to support either the assertion that the Grievor was disabled or his testimony as to symptoms and effects. This combined with his indicated willingness to return to his former position, subject to medical clearance, leads to the conclusions that he was not in fact disabled from the performance of his own job and that with respect to the grievance the Union has not met the onus of showing on a balance of probabilities that he was disabled.

Discussion and Decision

As a result of the agreement between the parties the central issue before us for determination in this grievance is whether, as a matter of fact, the Grievor was disabled as that term is used in the collective agreement as the relevant time so as to entitle him to LTD benefits. The test contained in the collective agreement is one of being "disabled from fulfilling the requirements of their own occupation". We agree with the Union that this test focuses on the state of disability rather than any issue of causation for it. It follows that we also agree that the WCB determination with respect to the Grievor's claim is of no consequence or assistance to us as the statutory scheme under which the issue was addressed is very much focused on

causation and, in particular, the need for work related causation. Further, and in any event, the claim's status of being under appeal renders any reliance problematic. Similarly, and in light of the parties agreement that we would have jurisdiction over the "factual issue" of disability we also agree with the Union that we should place no reliance on the determination of the plan carrier. To do other wise would, in our view, ignore the plain meaning of the agreement of the parties. In fairness, we note that the Employer did not argue the contrary and we do not take it to have disagreed with the Union's submissions or at least its conclusions on these points.

The parties did, however, join issue over the onus of proof in this matter. In short the Union argues that the onus of proof shifts to the Employer in the circumstances while the Employer maintains that the onus of proof of disability is on the Union. In *St. Jean de Brebeuf* Arbitrator Swan stated the proposition that in claims for sickness related benefits the onus is on the grievor to prove the illness upon which the claim is founded. In doing so he relied not only on the general legal principle that the onus of proof falls on the proponent of a claim but also the consideration that in medical matters the employee is generally in the possession of the evidence in that regard. This approach has found favour in this jurisdiction (see *Rosewood Manor & Pouce Coupe Care Home*) and to this point in the analysis we do not understand the Union to be in disagreement. Rather, it argues that as the Employer had accepted that the Grievor was disabled the onus shifts to the Employer to demonstrate why the Grievor was no longer disabled. This argument is based upon a line of civil authorities in "own occupation" cases including *Malkin* and *Mathers*. We do not find the difference in jurisdiction a distinguishing point because the vast majority of disability claim issues, even with respect to insurance plans required by virtue of a collective agreement, are litigated in that forum. Rather, in our view the Union's assertion in this regard fails because we are not persuaded on the evidence that the Employer ever agreed that Antalik was disabled.

We find nothing in the Employer's actions from which it can fairly be concluded that it ever accepted or reached the conclusion that the Grievor was disabled. Kinney testified that while the Grievor's WCB claim was outstanding the Employer paid monies to the Grievor expecting to be repaid if the claim was accepted. This evidence, as well as the Employer's practice in this regard, was not challenged. At the same time the Employer sought, without success, information from both the Grievor and his doctors by requesting the filling out of a Form 100. It also sought, again at least

initially without success, information in the form of an IME. Clearly, in December of 2002 the Employer, as evidenced by Hardie's letter, was still seeking information as to why the Grievor was absent from work. None of these actions are, in our view, consistent with a determination that the Employer had either concluded or accepted that the Grievor was disabled.

The Union placed considerable reliance on the February 20, 2003 IME of Dr. Gouws. While that report does not declare Antalik fit to return to his previous occupation we accept the evidence of Dr. Gouws' that his report was in the circumstances inconclusive and was designed to address the situation pending the provision of additional information. In reaching this conclusion we accept Dr. Gouws' evidence in this regard which, in our opinion, is consistent with both the report when considered as a whole and the circumstances at that time.

Having addressed the onus issue we turn now to the evidence with respect to disability. A convenient starting point is the medical evidence considered in the context of the expert evidence and testimony. The differences of opinion between the experts are stark. With respect to the possibility that the Grievor was exposed to H_2S on April 24, 2002 Dr. Pearl's opinion is that it is "highly likely" that a "significant amount" was inhaled while Dr. Milby saw no objective evidence to support such a finding but could not "completely exclude the possibility of a very low level exposure". While these differences could perhaps be characterized as ones of degree they are dramatically divergent. Even more diverse are their opinions as to whether Anatalik was or could be continuing to suffer consequences from any H_2S exposure. Dr. Pearl's view is that, even as late as 2004, the Grievor continued to have sequelae while Dr. Milby was strongly of the view that even assuming there had been exposure to H_2S, in the absence of an exposure to the level of knockdown, any sequelae would have resolved themselves within days of the incident and no long term or permanent sequelae would have occurred. Opinions so contradictory are not amenable to reconciliation based upon differences of characterization or differences in the understanding of the underlying facts. With respect to the latter we note that any potential factual differences were put to the witnesses without significant impact on the opinions expressed. In the circumstances it is necessary for us to determine which opinion is more credible and reliable.

Both doctors were qualified by us as experts in the field of medical toxicology. However, as is often the case both parties questioned the independence and, thus, the credibility/reliability of the other's expert. With respect to Dr. Pearl we were urged to see her as more of an advocate for her patient than an independent medical expert. In relation to Dr. Milby the fact that he was hired for the purpose of refuting the Union's expert is advanced as a basis for challenging his independence. Many if not most witnesses, not only just experts, who testify can be identified as having an 'allegiance' to a party or an 'interest' in the outcome. The existence of such relationships is but one of many considerations brought to bear in assessing the credibility and/or reliability of their testimony. With respect to experts, while the fact that they are being compensated for their testimony clearly, in the abstract, raises a concern as to independence it cannot as a practical matter be in itself given too much weight. Aside for the fact that this would render most, if not all, expert testimony questionable it must be remembered that the experts have not only taken an oath to tell the truth but have also the additional motivation of maintaining their professional reputations. Thus, ultimately the consideration of the testimony of experts involves much more that just interest alone and requires an assessment of their degrees of expertise and experience.

With those comments in mind we turn to consider in general terms the testimony of the experts particularly as it relates to the suggestions of 'interest'. In the giving of her testimony it was apparent that Dr. Pearl has considerable empathy for the Grievor. Such empathy and compassion is not surprising and arguably to be expected from a treating physician. The Grievor in coming to her was clearly in search of answers. Our concern here, for reasons that will be outlined below, is that Dr. Pearl in seeking to supply those answers may in the final analysis have engaged in supposition rather than science. Dr. Milby, who in terms of his activities may be considered more a scientist than a physician, was not without passion in the giving of his evidence. As a witness he was both firm and forceful in his opinions. Under cross-examination while not being unduly argumentative or overly defensive he was assertive as to the basis of his opinions and his disagreements with the conclusions of others. He demonstrated a clear distain for what he considered to be the unscientific views of Dr. Kilburn and others that had accepted his approach. Overall we view his 'interest' to be one of science rather than economics. Regardless of motivation his passion, like that of Dr. Pearl's, is something that must be considered in assessing their opinions. That said, we wish to be clear that we do not find

the testimony of either Dr. Pearl or Dr. Milby to be anything other than a sincere and genuine reflection of what they believe. Thus, it is not so much an issue of credibility, in the sense of truthfulness, but rather one of reliability.

In assessing the comparative reliability of their evidence we note that although both Dr. Pearl and Dr. Milby were qualified as experts in the field of medical toxicology the latter possesses far greater experience and expertise with respect to H_2S. It is apparent from his resume and list of publications that Dr. Milby is an established expert with respect to the effects of an exposure to H_2S. He has been studying and writing on this topic for over forty years. This is to be contrasted to Dr. Pearl whose report was largely based on reading the research of others and who although she has an impressive and varied medical career testified as to no particular expertise or experience in relation to H_2S beyond that possessed by a certified medical toxicologist.

The Union argues that Dr. Pearl's direct involvement with the Grievor both in conducting a physical examination and taking an extensive history puts her in a better position than Dr. Milby to formulate and express an opinion. In the circumstances we do not agree. This is not a case of an advantage flowing from early access to a patient as Dr. Pearl did not see Antalik until some eight months after the incident. If anything, the traditional concerns about the passage of time impacting on the ability to make objective observations are exacerbated in this case given the nature of H_2S. More importantly both Dr. Pearl and Dr. Milby had access to much the same information including most of the same medical reports including the reports of Dr. Pearl and the other physicians who had seen Antalik. In giving his opinion Dr. Milby does not question the information contained in these reports. He simply opines on the significance of that information. In these circumstances we are not of the opinion that the fact that Dr. Pearl participated in the collection of the medical data puts her in a better position than Dr. Milby with respect to evaluating and commenting on that information.

Taking these comments into account and considering the reports and testimony we are of the view that the expert opinion of Dr. Milby is to be preferred as more reliable than that of Dr. Pearl. We accept that Dr. Milby's opinions are based upon the most reliable scientific research and writings available. We also accept that the preponderant medical/scientific view is

that long term sequelae from H_2S is dependent on an exposure of sufficient magnitude to have occasioned knockdown. Both experts agreed that *Goldfrank* is a leading text with respect to toxicology. Our reading of *Goldfrank*, and in particular the 7th edition, leads us to the view that long term or permanent sequelae are associated with knockdown incidents. We note that the Employer urged us to find that Dr. Pearl's reliance on a quote from the 6th edition of *Goldfrank* was misleading. We do not agree. A comparison of the two versions shows that the 7th edition is substantially reworked and much clearer in this regard. The 6th edition was the one available to Dr. Pearl and the one upon which she relied. We see no evidential basis for concluding that she attempted to mislead.

Finally, in reviewing the evidence of Dr. Pearl we are of the opinion that some of her comments and conclusions were either speculative or based upon supposition with respect to which she was not ultimately able to find credible scientific support. Two examples in this regard are her reliance on the cumulative effect of chronic low level exposure to H_2S and the significance she attached to hyperreflexia. While we appreciate that the exigencies of the hearing process may have limited her ability to further substantiate her views, Dr. Milby in his testimony was able to specifically address theses issues including by references to some of the research and writings relied on by Dr. Pearl. In our opinion he was able to demonstrate that her comments were more speculative than science. While perhaps understandable in the context of trying to provide an explanation to her patient in light of what the Grievor was reporting to her, it does not in our view amount to reliable expert evidence. We also wish to be clear that in seeking answers to what may be inexplicable based upon the reporting of her patient we see a role for speculation, in this case based upon analogies to other toxins, in the practice of medicine. Thus, we do not want to be taken as critical of Dr. Pearl's efforts to find an answer for her patient. However, in the final analysis we do not find that she was able to provide an adequate foundation in the existing scientific knowledge for some of her assertions and conclusions. Finally, we are not persuaded that the limited amount of research with respect to the effects of low levels of H_2S exposure should lead to a different conclusion. While more research is obviously desirable we must decide this issue on the basis of credible and reliable scientific evidence and, as noted above, we are of the view that the evidence which indicates that long term sequelae are associated with higher levels of exposure is preferable.

In the Union's submission our acceptance of Dr. Milby's opinion is not determinative of the issue as it does not need to establish the cause of the disability but only that the Grievor was disabled. While we consider that argument as legally tenable we view it as highly problematic on the facts of this case. The various medical reports generated during the investigatory process undertaken at the direction of Dr. Bacchus say little, if anything, about the Grievor's ability to work. Indeed, the few comments that can be found about his ability to work appear supportive of the view that he was capable of work or at least not incapable of trying to work. As early as July of 2002, within approximately three months of the incident, Dr. Wittmann had suggested that he attempt to return and had encountered reluctance for the Grievor. It appears that that reluctance continued to exist in September when Antalik saw Dr. Sehmer. Finally, Dr. Pearl, even after reaching the conclusion that Antalik had been exposed to H_2S, was not definitive as to his ability to return. She thought an MRI might be helpful in making the decision and that if he did return to work wearing a respirator was appropriate. We do not wish to be taken as being critical of these doctors as it does not appear that any of them were directly asked to provide an opinion as to his ability to do his job. In that context the comments they made, alluded to above, were not necessarily made in the context of the test for disability under the collective agreement and may only amount to comments on whether or not he was able to perform any work.

In any event, it was not until the February 2003 IME of Dr. Gouws that this issue was squarely raised, some four months after the LTD disability period under the collective agreement had commenced. We note that the absence of any evidence in this regard was the result of the Grievor declining the Employer's requests for an IME that started in July of 2002 and which were repeated until the Grievor agreed "under protest" to the February IME. As noted above, in the circumstances we view Dr. Gouws' comments as to fitness to be inconclusive as they were intended to address the provision of additional medical information. In that regard we note, as was quite properly recognized by the Employer, the fact that he never saw that additional information, impacts significantly on his ultimate conclusions as to fitness as stated in his report of September 26, 2003.

In the absence of any medical proof as to disability we are left with the Grievor's evidence in that regard. Many arbitrators have commented on the problems associated with reliance on either the subjective self-diagnoses or self-analyses of employees as to either their medical condition or their

fitness to work. Objective medical observations or findings and the opinions of persons with some expertise are generally preferred for obvious reasons. In this case we have serious concerns as to the general reliability and credibility of the testimony of the Grievor. As this is more relevant to the termination grievance we will address it more fully in that portion of the award. Our comments are, however, applicable to this portion of the award.

We agree with the Employer that both the Grievor's reported observations with respect to the April 24, 2002 incident and the range of symptoms reported to and recorded by the various doctors he visited changed somewhat over time. We believe it probable that this changing landscape was influenced by Antalik's medical research on the internet and his clear belief that he had suffered a serious toxic exposure. As such it does not strike us so much as acts of intentional dishonesty at this stage as an evolving set of recollections largely generated by his frustration with his condition and the way the matter, including the medical explorations, was progressing. It does, however, bring very much into question the reliability of what he was reporting.

Of greater concern and consequence with respect to the proof and determination of fitness is the evidence of the positions taken by the Grievor with respect to his ability and willingness to return to work. It is noteworthy that in December of 2002 in communications with both Eastwood from the Union and the Employer that Antalik indicated a willingness to return to work, including at Iona, subject only to medical clearance. Those comments read in context and keeping in mind the comments and observations about his return to work by the doctors who saw him in this time period, are not so much indicative of a physical disability or unfitness as they are of his personal beliefs as to what had happened to him and his resulting concerns as to safety. While we accept that concerns such as these may very well be legitimate considerations they must, of course, be reasonable in the circumstances and have some objective basis. In this case it is apparent that none of the doctors were clearly of the opinion that he was unable to return to work. Those that addressed the issue believed that at least an attempt to return was warranted. Even Dr. Pearl, who concluded that he had been exposed to H_2S, did not offer a definitive opinion about his return to work did not rule it out but merely suggested that the use of a respirator would be prudent. Considering this evidence as whole we do not view it as sufficient to establish that the Grievor was unable to fulfill the requirements of his own

occupation 26 weeks after the October 24, 2002 incident. The Union's grievance is therefore dismissed.

Termination Grievance

Employer's Arguments

In the Employer's submission it had just cause to discipline the Grievor as a result of his failure to report for work on October 6, 2003. In making its submission in this regard the Employer focuses on the events surrounding and following its request on August 28, 2003 that Antalik attend an IME to "clarify the conditions" for a return to work. It notes that the Grievor raised a number of issues with respect to this examination including; the presence of his wife to take notes, the tape recording of the examination, the provision of copies to himself and Dr. Bacchus, the qualifications of Dr. Gouws and the re-imbursement of expenses. This was followed by his attendance at the Viewpoint offices where he refused to sign the consent form. This, it submits, is particularly noteworthy given the September 18, 2003 letter he received from Kinney which made it clear that he was required to sign a consent and that a failure to do so would result in the evaluation not occurring. This the Employer argues is indicative of a deliberate attempt to foil the IME and deprive the Employer of the information it required to return him to work.

These events led to the Employer directing the Grievor to report for work on October 6th at 7:00 a.m. In the Employer's submission this was a clear and unequivocal order requiring Antalik to report for work on that day and not just for another meeting. On the evidence it is not disputed that the Grievor failed to comply with that order and, thus, the Employer has just cause for discipline. Further, the Grievor's explanations and excuses for failing to report for work at that time are neither credible nor acceptable. In that regard the Employer notes that the original explanation offered by the Grievor was that he had not been provided sufficient notice. That was what was stated in his fax dated October 5th and was again advanced by the Grievor at the meeting on October 10th. At the hearing Antalik acknowledged that there was no such requirement for notice in the collective agreement with respect to these circumstances. By the November 19th meeting the Grievor's explanation had shifted to a lack of funds which continued at the hearing of this matter. In the Employer's submission these excuses reflect nothing more than a deliberate intention to be defiant and

disobey the order to return to work. Thus, it argues that this conduct, when considered in context, amounts to very serious insubordination.

The issue then becomes whether the Employer's decision to terminate the Grievor is excessive in all of the circumstances. The Employer asserts that it is not and argues that the nature of the conduct and underlying attitude which continued to be evident in the hearing renders the employment relationship incapable of restoration. In that regard the Employer relies upon a number of arbitral awards including; *British Columbia Railway –and- CUTE, Local 6*, (1983) 8 LAC (3d) 233 (Hope – B.C.), *Phillips Cables Ltd. -and- Teamsters, Local 213*, (1988) 1 LAC (4th) 242 (Hope, Doerksen & Page – B. C.), *Caradon Indalex -and- USWA, Local 2952*, (1996) 55 LAC (4th) 375 (Albertini, Ritchie & Bennett – B.C.), *Canadian Freightways Ltd. -and- Teamsters, Local 31*, (1996) 59 LAC (4th) 246 (McConchie – B.C.), *Canadian Forest Products Ltd. -and- IWA-Canada, Local 1-424*, (1997) 48 CLAS 58 (Blasina – B.C.), *Pacific Press -and- CEP, Local 115M*, (1998) 69 LAC (4th) 214 (Bruce – B.C.), *Coast Mountain Buslink Co. -and- ICTU, Local 2*, (1999) 57 CLAS 152 (McPhillips – B.C.), *City of Vancouver -and- CUPE, Local 1004*, [2002] BCCAAA No. 81, (McPhillips, Leffler & Varty – B.C.) & *Sobeys -and- UFCW, Local 175*, [2002] OLAA No. 672 (Roberts – Ont.). We do not intend to canvass each case in detail as they were decided on their unique facts. However, some of the cases were stressed and are noteworthy for the observations contained therein.

A number of parallels were drawn to the decision in *British Columbia Railway* where the attitude of a seriously insubordinate employee was considered in the context of a discharge grievance. In that case Arbitrator Hope stated:

> I am bound to say that the principal factor that dictates against mitigation of the penalty was the evidence of the grievor and the manner in which he gave it. Absent from his evidence was any sense of wrongdoing. He was arrogant and continued to press the view that he had been wrongly treated.
>
> . . .
>
> He did not accept any responsibility for his actions and his repeated assertion was that fault lay with his supervisors. He did insist that he would be able to return to the work equipment shop and work under the supervision of Mr. Anderson and Mr.

> McDonald but, apart from that bold statement, nothing in his demeanour or evidence indicated that the incident was uncharacteristic of him or that his attitude had undergone some change.
>
> (at pp. 9-10)

In this case the Employer argues that the Grievor must have known when he was ordered to report for work that his job was in jeopardy. But instead of doing all that he could to comply with the order he made up excuses and was and remains defiant. Given this attitude it is not possible to restore the employment relationship.

The Employer also stresses the elements of deliberate deceit and dishonesty in the Grievor's failure to report for work and the excuses he made and now, in part, maintains. It points to the following comments of Arbitrator M. Picher in *Kennedy House Youth Services Inc. -and- OPSEU, Local 585*, (1996) 53 LAC (4th) 54 at pp. 60-61 as quoted in *Coast Mountain Buslink* at para. 47:

> Where acts of fraud, theft or other dishonesty are at issue, it is incumbent upon a board of arbitration to consider whether they are uncharacteristic, spur-of-the-moment events. It is also important to consider whether there is a candid admission of wrongdoing and an indication of remorse or regret which would be a viable foundation for the re-establishment of the bonds of trust that would follow on the reinstatement of the employee. Needless to say, factors such as the length and quality of the employee's prior service and his or her personal circumstances, including the likelihood of re-employment, may also be considered. It should be stressed, however, that in cases involving deliberate dishonesty, there is a natural onus which falls upon the employee to give board of arbitration some responsible basis upon which to substitute a penalty less than discharge.

In sum, the Employer argues that the Grievor's conduct was not only serious but that the attitude exhibited then and in the giving of his testimony renders the employment relationship incapable of restoration. Thus, it submits that it had just cause for discipline and that discharge is not excessive in all of the circumstances of the case.

With respect to the Union's argument that it has changed or expanded the grounds it relies on for discipline the Employer, in reply, argues that the evidence in relation to the events surrounding the failure to report for work falls within the parameters identified in *Canadian Airlines International - and- CALPA*, (1988) 35 LAC (3d) 66 (Munroe – B.C.) and as such does not represent a new or expanded ground. Those events were referred to in Hardies' October 2nd letter directing the Grievor to report for work and were subsequently discussed at both the October 10th termination meeting and the November 19th Third Step meeting. Further, and in any event, the Employer argues that events outside of the failure to report on October 6th are properly considered with respect to whether the discipline imposed was excessive (see *BC Central Credit Union -and- OTEU, Local 15*, BCLRB No. 7/80 upheld on reconsideration BCLRB No. 299/84 & *Newton Ready Mix Ltd. - and- Teamsters Union. Local 213*, (1985) 17 LAC (3d) 333 (Dorsey, Lippert & Rice – B.C.)).

Union's Arguments

The Union joins issue with the Employer both with respect to cause and, in the alternative, should cause be established, with the degree of discipline imposed.

In relation to cause the Union argues that the Employer ought to be limited to the single event of not reporting for work on October 6th. It should not be allowed to rely on other circumstances to meet its obligation to prove cause. In taking this position the Union asserts that the failure to attend on October 6th was the only reason for termination given at the time of discharge on October 10th and at the Third Step meeting on November 19th. To allow the Employer to rely on other circumstances and in particular difficulties in the accommodation process would be an inappropriate and unfair expansion and alteration of the basis of the discipline that would operate to the prejudice of the Union (see *Canadian Airlines International Ltd., Petro-Canada Lubricants Centre -and- CEP, Local 593*, (2000) 86 LAC (4th) 36 (Marcotte – Ont.), & *Bruce Retirement Villa -and- SEU, Local 210*, (1998) 75 LAC (4th) 256 (Watters – Ont.)). It notes that the grievance with respect to the accommodation remains outstanding and that its conduct of that grievance may have been impacted if it knew that the Employer was relying on the Grievor's conduct in the accommodation process.

With respect to the failure to attend on October 6th the Union argues that it was not an act of insubordination as alleged by the Employer and does not provide just cause for discipline. In the Union's submission the Grievor had a reasonable excuse for his failure to report and in the circumstances acted appropriately and responsibly. It notes that after being off work for approximately eighteen months with a "debilitating medical condition" and without a source on income for a year Antalik was given very little notice of the requirement to report to work. Being without adequate funds to transport himself for work he took immediate steps to raise money and notified the Employer by voicemail and fax that he would not be able to report until October 7th. In the Union's submission this conduct cannot be considered or construed as insubordinate in nature but must be considered in the context of the reality of these surrounding events (see *Houston Forest Products Co. -and- IWA, Local 1-424*, (1984) 17 LAC (3d) 211 (Germaine – B.C.)).

The Union also submits that it is inappropriate to consider the Grievor's failure to participate in the September 23, 2003 IME as the Employer had no contractual right to insist that he submit to this medical assessment. Accordingly, it would be improper to discipline him for any conduct in this regard. See *Riverdale Hospital -and- CUPE, Local 79*, (1985) 19 LAC (3d) 396 (Burkett – Ont.), *Canada Post Corp. -and- CUPWU*, (1990) 11 LAC (4th) 226 (Bird – Can.), *Shell Canada Products Ltd. -and- CAIMAW, Local 12*, (1990) 14 LAC (4th) 75 (Larson – B.C.), *Darmouth General Hospital & Community Health Centre -and- CBRT&GW, Local 606*, (1992) 30 LAC (4th) 115 (North – N.S.), *NAV Canada -and- CATCA*, (1998) 74 LAC (4th) 163 (Swan – Can.), *Masterfeeds -and- UFCW, Local 1518*, (2000) 92 LAC (4th) 341 (Kinzie – B.C.), *Via Rail Canada -and- CAW*, (2002) LAC (4th) 110 (Hope – Can.) & *City of Brampton -and- CUPE*, (2003) 122 LAC (4th) 445 (Kaplan – B.C.).

In the alternative, should just cause be found the Union submits that discharge is excessive and that either a verbal warning or at most a written warning should be substituted in place of the discharge. With respect to mitigating factors the Union submits that the Grievor's lack of a disciplinary record and, thus, the absence of any progressive discipline are the most compelling factors in favour of a reduction of discipline. In that regard the Union notes that failings with respect to the concept of progressive discipline played a role in many of the cases contained in the Employer's brief of authorities including *British Columbia Railway*, *Phillips Cables*, *Caradon Indalex*, *Canadian Freightways*, *National Harbours Board*,

Vancouver -and- ILWU, Local 517, (1974) 6 LAC (2d) 5 (R.N. Munroe – B.C.), *MacMillan Bloedel Ltd. -and- PPWC, Local 8*, (1994) 38 CLAS 61, (McPhillips – B.C.) & *British Columbia Hydro & Power Authority -and- IBEW, Local 213*, [1996] BCCAAA No. 668 (Gordon – B.C.). Similarly, discipline was reduced due to progressive discipline concerns in *Simon Fraser University -and- AUCE, Local 2*, (1990) 17 LAC (4th) 129 (Munroe – B.C.), *Emergency Health Services Commission -and- Ambulance Paramedics of B.C., CUPE. Local 873*, (1999) 82 LAC (4th) 194 (Germaine – B.C.) & *Sunshine Coast Recycling and Processing Society -and- CEP, Local 1119*, (unreported – August 28, 2003) (Moore – B.C.).

With respect to remedy, in addition to either the removal or the reduction of the discipline the Union seeks full back pay with interest. In the Union's submission an award of full back pay less any income earned in the interim is particularly appropriate given the arbitrary and bad faith manner in which the Grievor was terminated by the Employer (see *Wallace v. United Grain Growers Ltd.*, [1997] 3 SCR 701 (SCC) & *Sunset Lodge -and- BCNU*, [2003] BCCAAA No. 299 (Hope – B.C.)). Finally, the Union submits that the reinstatement order should include a provision that Antalik be examined by a doctor of his choosing at the Employer's expense to ensure that he is properly accommodated.

Discussion and Decision

Underlying the somewhat abbreviated recitation of the arguments of the parties are widely divergent views as to the characterization of the events surrounding the Grievor's failure to report for work on October 6th. From the Employer's perspective Antalik's action was a blatantly defiant act of a disaffected and belligerent employee who had no real intention of returning to work. On the other hand the Union views Antalik's failure to report as at worst a minor transgression that when considered in context of his efforts to advise the Employer that he would not be reporting until Tuesday is not deserving of any discipline. These starkly different views require a close consideration of the evidence in order to resolve not only the differences as to the objective events but also as to the appropriate inferences to be drawn.

With respect to the former it should be noted that the evidence in relation to the termination was, for the most part, heard approximately eighteen months after the events at issue. With the passage of that much

time it is not surprising that memories would fade and separate events would blend and become confused. To the extent that the differences in recollection are material they can be resolved by the application of considerations such as their apparent reliability in some circumstances aided by notes and by the application of the inherent probability test set out in *Faryna v. Chorny*, [1952] 2 DLR 354 (BCCA):

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.
>
> (at pp. 356-357)

We will indicate our conclusions in that regard in setting out our factual determinations.

In relation to the latter the focus is not only on the acts but the underlying intentions and motivations primarily of the Grievor. It is therefore necessary to consider and set out in some detail our general conclusions in this regard. We will do so at the outset as our determinations are at the crux of the dispute between the parties.

Due to the bifurcated nature of the proceeding the Grievor gave evidence on two occasions. Both times he spent considerable time under extensive direct and cross examination. We are aware that the process of giving evidence, particularly by someone so directly impacted by the case, can be both emotionally and physically demanding. Thus, in our view, adjudicators should not too easily resort to being overly critical or analytical with respect to the minutiae of the evidence. That said, we are ultimately bound to determine the matter on the evidence before us and with respect to matters of the reliability or credibility of witnesses must consider their testimony as a whole.

The Grievor is an obviously intelligent man who is both strong and firm in his beliefs. These generally laudable traits did not serve him well as a witness. Readily apparent and consistent themes in his evidence were his strong beliefs that he had been injured at work as a result of the misfeasance of his Employer and that subsequently the Employer had been deceitful, dishonest, uncaring and bullying in its treatment of him. While the state of the ventilation system may give some credence to the first of these beliefs on the whole we view his beliefs to be unsubstantiated. His criticisms of the Employer were largely focused on Kinney because of an acknowledged misstatement made early in her dealings with him, her failure to advise him that the Employer was opposing his WCB claim and the belief that she was threatening him when she indicated to his wife that his job may be in jeopardy. In the circumstances we do not consider that these events when considered in context justify the conclusion that the Employer through Kinney was being either deceitful or bullying. It was also apparent that the misfiling of Dr. Pearl's report in Dr. Gouws' office fueled the Grievor's belief as to the misconduct of the Employer. While clearly an unfortunate occurrence the Grievor's persistent and continuing characterization of Dr. Gouws as a liar, in the face of the latter's acknowledgement of the situation as well as his characterization of the findings of the College of Physician and Surgeons, demonstrates a witness that was and continues to be incapable of accepting any possibility inconsistent with his own beliefs and perceptions as to the events.

One or more of the themes identified above would surface in response to virtually every area of evidence sought to be canvassed with him. Often in advancing these themes his answers would be unresponsive to the questions asked including those posed by Union counsel. Under cross-examination he was frequently argumentative or dismissive with respect to questions that he considered inconsistent with his position. Further, even when responsive his description of events was generally based upon his perception or interpretation of events rather than being a recitation of his recollection of the events. Thus, in general terms we find his evidence to be largely unreliable and in some cases incredible.

Before turning to the specific facts and circumstances of the case two other prefatory points should be made. First, as this is a matter of discipline it must be considered and determined within the following framework established by the B.C. Labour Relations Board in *Wm. Scott & Company Ltd.*, [1977] 1 CLRBR 1, BCLRB No. 46/76:

> First, has the employee given just and reasonable cause for some form of discipline by the employer? If so, was the employer's decision to dismiss an excessive response in all of the circumstances of the case? Finally, if the arbitrator considers discharge excessive, what alternate measures should be substituted as just and equitable?
>
> (at p. 5)

Second, the Union's argument with respect to the expansion of grounds should be addressed. As we understand the Employer's submission its initial position is that those circumstances were part of its original determination and were communicated at the time of termination and at the November meeting. The parties join issue with respect to the underlying factual assertion and we will address that below in the context of our factual findings. We do not understand the Union to be arguing that if we find it to be part of the Employer's original reasons that the issue of the expansion of grounds arises. Further, and in any event, the Employer seeks to rely on facts and circumstances predating October 6th for two purposes. It wishes to rely on earlier events, and particularly those surrounding the request for the September IME, to establish the true nature of the Grievor's conduct on October 6th. It also seeks to rely on those events to establish the facts and circumstances to be considered in answering the 2nd and 3rd *Wm. Scott* questions. We are of the opinion that both of these intended purposes are consistent with the law and the evidence in that regard is relevant and properly the subject of consideration for those purposes.

As the Employer focused on the events commencing in or about September of 2003 and there were material differences with respect to those events and what should be inferred therefrom we will focus the recitation of our factual conclusions on that time period. While there were some differences with respect to earlier events we consider them to be immaterial or insignificant to the issues we must decide.

The events relating to the request for an IME in September of 2003 are largely described in the exchange of correspondence between the Employer, Union and Antalik commencing on August 28th and concluding on September 18th. Thus, they are not, at least insofar as the objective events, in dispute. From that correspondence we conclude that Antalik was

both reluctant and resistant to undergoing an evaluation by Dr. Gouws. He advanced the idea of being evaluated by Dr. Bacchus rather than Dr. Gouws. He also sought, in some cases successfully, a number of conditions with respect to his attendance. Throughout this exchange he did not, however, raise an objection with respect to the Employer's right to request the IME. Similarly, the Union did not object to the IME but, rather, raised concerns with respect to the appropriate reimbursement in relation to his attendance. It is also clear from the exchange of correspondence that the Employer was insistent on his attendance at the IME. Further, the Employer made it clear that he would be required to sign a consent form and that failing that the evaluation would not take place.

As to the events of September 20th when the Grievor attended at the office of Viewpoint we accept Dr. Gouws' recitation of those events in his report dictated the same day and dated September 26th. It represents not only a contemporaneous record of the events but is also corroborated by the evidence of Kinney. While there were some internal inconsistencies in the testimony of both of these witnesses they were not significant and of the nature usually associated with the fading of memories with the passage of time. In any event, they were not inconsistent as between each other with respect to the events of that day where they both had knowledge. Specifically we prefer their evidence with respect to the Grievor's demeanour and actions in the telephone call with Kinney. Similarly, we prefer the evidence of each of them to that of the Grievor with respect to the events that only they and Antalik were involved in.

In reaching these conclusions and rejecting the testimony of the Grievor where in conflict with either Dr. Gouws or Kinney we rely on our general observations as to Antalik's evidence as set out at the beginning of this part of the award as well as specific concerns as to his testimony with respect to these events. This was an area of evidence where the Grievor indicated he had very little recollection of what was said. In general terms this is troubling given his much more specific recollection of earlier events which indicates that this is not a matter of a fading memory but more likely one of the avoidance of evidence that he perceived could be harmful to his cause. Particularly telling in this regard are the recollections he did have which are clearly aligned to both his interests and beliefs. Examples of this are his recollections that Dr. Gouws told him that he was going to lose and that he hung up on Kinney because she was screaming at him. Further, his explanation that he asked Dr. Gouws who was paying his fees because he

had not been reimbursed as promised strikes us as highly problematic. A much more likely explanation is that it was raised in the context of his concerns as to Dr. Gouws' independence. In our view, that is much more consistent with both the nature of the question, that is it was not whether he had been paid but who was paying him, and the concern he raised in his letter to Dr. Gouws of September 2nd. We conclude that this is an example of the testimony of the Grievor that cannot be believed.

Considering the evidence with respect to the incident as a whole we accept the Employer's characterization of the Grievor's conduct as an intentional act of preventing the IME. We accept that the Grievor was fully aware that he would be required to sign a consent and that if he did not do so the IME would not take place. Armed with this knowledge, and despite written assurances with respect to many of his requests, the Grievor declined to sign the consent form. That this was an intentional act designed to prevent the IME from taking place is, in our view, largely self evident from the facts as found. Beyond that two other considerations are noteworthy. First, we find the Grievor's reported concern as to the delivery of copies of any report to he and his doctor because the Employer could not be trusted somewhat hollow and artificial. The simple fact is that the earlier reports had been forwarded by the Employer. Second, and perhaps more telling, is the absence of the Grievor's wife on the day in question. Despite Antalik's specific request that she be allowed to attend the IME, which was acceded to by Dr. Gouws, there is no evidence that she attended that day. Dr. Gouws' report makes no mention of the presence of Mrs. Antalik and he could not recall seeing her that day. In the Grievor's testimony with respect to that day, and in particular with respect to his departure from Dr. Gouws' office, he spoke in the first person singular and made no mention of his wife. On the evidence we conclude that Mrs. Antalik was not present that day. In our view that is consistent with a premeditated intention to scuttle the IME and we so find.

We turn now to consider the events surrounding the Grievor's failure to report for work on October 6th. Again many of the objective facts are included in the documentary evidence and not, in that sense, in dispute. The start of this series of events is Hardie's letter of Thursday October 2nd. From the perspective of the arguments made and the issues in dispute certain aspects of this letter are noteworthy. First, it references the Grievor's conduct with respect to the IME planned for September 23rd. Second, it includes a direction to Antalik to report for work on October 6th and the

consequence of termination should he fail to do so. We are of the view that there can be no doubt as to the clear and unequivocal nature of this direction.

The Grievor's response to the Employer was two-fold. First, he left a voice mail message for Hansford at 3:20 p.m. on Friday October 3rd. Its content is not in dispute. Antalik would "not be able to make it on Monday" but would be there on Tuesday. Second, on Sunday October 5th he sent a fax to Hardie advising that he would return on Tuesday and gave his reason as "you did not give me enough time".

The next objective and undisputed event is Antalik's voice mail message left for Hansford at approximately 1:00 p.m. on Monday October 6th. In it the Grievor advises that he would not be reporting on Tuesday as he was kicked by a bull that morning and had been advised by a doctor to stay home until Thursday. This in turn lead to another letter to the Grievor from Hardie indicating the Employer's concern about his absence on Monday October 6th and directing that he report on Thursday October 9th. Again the Grievor is warned as to the potential consequence of termination. The Grievor responded with another fax to Hardie indicating that he had been kicked by a bull and had left a message to that effect with Hansford. He also requested that the Employer stop harassing and bullying him. With this fax he also sent a copy of the doctor's note with respect to the bull incident. On Wednesday October 8th Hardie responded with another letter this time setting the date of his return as Friday October 10th and like his previous letter it reiterated the consequence of termination.

The next significant event is the meeting of October 10th attended by Hardie, Ali, Northam and the Grievor. We note that Ali who conducted the meeting on behalf of the Employer was called as a witness in the portion of the hearing focusing on the LTD claim and did not testify as to the events of October 10th. Northam, whose notes of the meeting had been lost in the course of a home renovation, obviously and admittedly had considerable difficulty recalling the events of that day. With respect to the limited recollections he did have they were apparently largely in the form of reconstruction including being based upon assumptions as to what he would likely recall. Although properly motivated and genuinely attempting to recount the meeting we do not find his evidence to be reliable. We are largely, therefore, left to consider the evidence of Antalik and Hardie. The latter's evidence was no doubt assisted by the brief notes he took at the meeting. Antalik give very little evidence with respect to his recollections of

the events at the meeting. Most of his testimony focused on subjective observations of the individuals involved and his interpretations of the meeting based upon his beliefs and perceptions. As a result his evidence is of little assistance in determining what was discussed at the meeting. In the context of these comments and based upon a consideration of the evidence we make the following findings in relation to the facts and circumstances in issue.

First, we find that the Grievor did rely on inadequate notice and mentioned the need for 48 hours notice in explaining his failure to attend work of October 6th. Despite Antalik's denial at the hearing that he mentioned 48 hours notice, which he seemed to base on the fact that it was not mandated in the collective agreement, we find that he did specifically mention the need for such notice. In reaching this conclusion we note that a reference to 48 hours notice attributed to Anatalik appears a number of times in Hardie's notes and that both Hardie and Northam, with perhaps his only specific recollection, testified as to the issue being raised.

Second, we find that the Grievor also raised the issue of needing to transport cattle to auction on Monday October 6th. It is apparent from both Hardie's recollection and his notes that the sending of a cow to auction was mentioned in the meeting. Based upon Antalik's own description of his willingness to explain his absence we doubt that the explanation was detailed. Nonetheless, and with respect to the question of whether Antalik mentioned his need for money we are of the view, on the balance of probabilities, that it was. Further, our conclusion is consistent with the Grievor's tendency both throughout the history of events canvassed in this hearing, as well as in his testimony, to repeatedly raise issues where he believed he had been wronged by the Employer such as in this circumstance where he believed that the Employer had not properly reimbursed him in the past and had deprived him of income.

Third, we find that after caucusing and in the process of advising Antalik that he was being terminated Ali did mention that the Employer had considered his employment history as it related to the attempts to evaluate him and arrange a return to work. In reaching this conclusion, and in addition to Hardie's testimony in that regard, we observe that his notes make specific albeit brief references to this topic. The bullet points "review of employment relationship" and "you've not fulfilled" are in sequence and spatially joined. Reference is also made to the October 2nd letter. While the

latter reference may only relate to the direction to report and the consequence for failing to do so the letter also addresses the Grievor's conduct in the evaluation process. Taken as a whole we conclude that the issue of his previous conduct was addressed as part of the Employer's reasons for the Grievor's termination. We are also view that conclusion as consistent with the inherent probabilities in those circumstances. Based upon recent events and the contents of the October 2nd letter this was clearly an area of concern to the Employer and Hardie acknowledged his frustration in that regard. Given that, we view it as highly unlikely that it would not have been raised at that meeting.

The next significant event is the meeting of November 19th attended by Carline, Hardie, Eastwood, Beaumont and Antalik. The only significant area of disagreement is whether any event prior to the October 6th failure to report for work were mentioned by the Employer as part of its reasoning for terminating the Grievor and, if so, to what extent. The thrust of Eastwood's oral testimony was that even after repeated questions as to the cause being relied on by the Employer, Hardie identified only one cause, namely, the failure to report on October 6th. Eastwood recognized there may have been a "slight" reference to earlier efforts to achieve a return to work for Antalik. His notes, which are fairly contemporaneous but in their structure appear to be more of a recap or summary as opposed to the usually highly abbreviated 'transcript' form of notes taken during meetings, refers to the "chain of events" leading up to the termination. Conversely Hardie's recollection was that in a meeting lasting up to about one hour he explained the history of the return to work efforts to both Carline and the Union. Further, that history tied in with his failure to report for work on October 6th, was identified as the reason for his termination. Hardie's extremely brief notes refer to "lots of discussion" about the October 2nd letter and he testified that it was in this context that the earlier efforts to secure Antalik's return to work were discussed.

Based upon our consideration of the evidence we conclude that, although it might not have been reviewed in great detail, as least some of the history of past attempts to arrange for Antalik's return to work, particularly the recent events surrounding the failed September IME, were raised and tied into his failure to report for work on October 6th. In our view a contrary conclusion is inherently improbable. We say that for a number of reasons. First, given the nature of the process with both sides setting out their cases to a "fresh" Carline this historical context strikes us as a logical part of any

chronology of events. Second, given the content of the October 2nd letter with its reference to earlier events it seems likely that they would have been discussed. Third, Eastwood's notes indicate that the "chain of events" leading to termination were discussed. Finally, we do not find Eastwood's characterization of the discussion as "slight" surprising in light of his clear focus at both the meeting and continuing at the hearing on the failure to attend work on October 6th as an inadequate and unreasonable basis for termination. In that context any discussion with respect to largely undisputed historical matters would not likely draw his careful attention or be attached much significance.

Based upon our conclusions as to the content of the meetings on October 10th and November 19th it follows that we do not find there to be an expansion of grounds as argued by the Union. In our view, the Grievor's conduct with respect to earlier efforts to facilitate a return were identified in those meetings as part of the Employer's rationale for terminating the Grievor. That being said, we should be clear that the primary cause and, indeed, the trigger for the decision to terminate was the Grievor's failure to report on October 6th as directed. In the view we take of this case it is not necessary for us to decide the Union's argument with respect to the appropriateness of discipline for conduct in relation to the September IME. We reach that conclusion because in our opinion the characterization of the failure to report is the basis upon which this case turns. We also wish to be clear that we are not deciding the issue of whether Antalik could be compelled to submit to an IME.

There is no dispute that the Grievor failed to report for work on October 6th. Rather, what is at issue is the reason for doing so. Was it as the Employer alleges an intentional act of defiance or as the Union asserts an innocent act of an employee unable to afford to report to work. We have concluded on the balance of probabilities it is the former and that the failure to report was motivated by the Grievor's desire to defy the authority of the Employer and as a reaction to his belief that he was being harassed and bullied by the Employer.

By his own admission the Grievor's initial response to the October 2nd letter was that the Employer was harassing and bullying him. His concern in that regard is noted in his fax of October 7th. He was emphatic in his evidence as to his dislike of such conduct which he believed to be ongoing. Antalik also testified that he decided very quickly after the receipt of the

letter that he would not be returning until Tuesday. It is noteworthy that this decision was made well in advance of the decision to auction off a cow to raise money a decision which, on either version of his testimony, was either not made or acted upon until Saturday.

We also view the changes in his explanation to be significant in assessing the true nature of his conduct. His initial explanation was that he had not been provided sufficient notice. On the basis of his assertion of needing 48 hours notice at the October 10th meeting this explanation appears to have been based upon a misapprehension with respect to a notice provision in the collective agreement. When that position met some resistance at the meeting the explanation then shifted to the need to obtain money by auctioning a cow. By the time of the hearing he denied even raising the issue of 48 hours notice, which we have found not to be credible, and in addition to the need for money raised explanations relating to a need for his tools as well as inconsistent positions with respect to the nature of the work he would be expected to perform. If we were to accept that he was operating on a mistaken belief as to the notice requirement in the collective agreement his decision to not report would still run afoul of the 'work now, grieve later' rule. However, his denial of even raising or relying on such an explanation makes such a finding problematic. In any event, we view these shifting explanations as attempts to justify his conduct rather than as the real reason or reasons for that conduct.

While we accept that by October of 2003 the Grievor was in severe financial straights, on the basis of the Grievor's testimony, we view this as more of an opportunity to express his anger towards the Employer than the real reason for delaying his return. He acknowledged in his testimony that he had money for other purposes such as local travel and food. Thus stated, it was in some respects a matter of allocation. His evidence was that the money from the auction would be received on Monday afternoon. In that context the effects of any reallocation would be very short term in nature. In this context and given the changing nature of his explanations we are of the view that while money was understandably a concern of the Grievor it was not his motivation for delaying his return.

Our conclusion that the Grievor's decision not to report on October 6th was an act of defiance is also in part based upon his prior conduct. We have concluded that his action in derailing the September IME, by refusing to sign a consent, was an act of defiance. In that context our conclusion as to his

conduct in delaying his return to work is consistent with that earlier conduct. Moreover, beyond the ultimate act of refusing to sign the consent other aspects of his conduct with respect to the request for the September IME and, indeed, earlier requests for medical information, are troubling and consistent with a finding that his actions in October were motivated by defiance. We refer to a repeated pattern of Antalik insisting upon his own terms for compliance with any request or direction he received from the Employer. It is apparent from this that the Grievor was generally resistant and unwilling to respond positively to any directions from the Employer without first making it clear that he wanted it done on his own terms and conditions. That he insisted upon a guarantee from Gouws as to the delivery of his report demonstrates that this was true even in circumstances where the Employer had previously agreed to and complied with the assurances he had sought. In our opinion, this history is consistent with and supportive of our conclusion that the Grievor was motivated by a desire to push back against what he viewed to be the wrongful actions of the Employer rather than any of the explanations he has proffered.

Taking all of this into consideration we conclude that the Grievor's decision not to report to work on Monday October 6th was an act of defiance in response to his belief that he was being mistreated by the Employer. In making this determination we are cognizant of our earlier comment with respect to the dangers associated with the over analysis of the minutiae of the evidence. However, as stated above, we must ultimately base our findings on the evidence we received. The Grievor's lack of responsiveness and in many instances his unwillingness to fully explain his own conduct other than in terms of assigning fault to others leaves us to deal with the evidence as tendered. It follows from this determination that we are satisfied that the Employer has met the onus upon it to demonstrate just and reasonable cause for discipline. The first *Wm. Scott* question is therefore answered in the affirmative.

We turn next to the second *Wm. Scott* question; is the discipline imposed, in this case termination, excessive in all of the circumstances of the case? A number of factors are identified in that case as potential considerations in addressing this issue. Those factors are not exhaustive. They are also not applicable or of the same weight in every case. The basic thrust of the Employer's submission is that the Grievor's conduct was a deliberate act of serious insubordination followed by deceit that when considered within the context of his current attitude renders the employment

context of termination cases are the seriousness of the offence and the efficacy of the substitution of a lesser penalty in correcting conduct. The former is a recognition that some forms of misconduct are so destructive to the employment relationship that it is incapable of restoration. The latter takes into account whether the substitution of a lesser discipline would reasonably have the effect of modifying the employee's behaviour. Put another way, if it is apparent that the employee after having engaged in serious misconduct has not accepted responsibility for that conduct and after having been significantly disciplined in the form of termination has not demonstrated a willingness to improve future conduct then the termination is not excessive as the employment relationship is incapable of restoration.

Applying those principles and that approach to this case we have concluded that in all of the circumstances of the case discharge is not excessive. We have found the Grievor to be seriously insubordinate with elements of both deceit and defiance involved. Such behaviours in and of themselves do not necessarily support discharge in every case. However, in this case the conduct of the Grievor combined with his testimony leads us to the conclusion that the employment relationship is incapable of restoration in light of the Grievor's continuing attitude towards the Employer. It is readily and consistently apparent that he views the Employer to have been dishonest and abusive in its treatment of him. Neither the passage of time nor the reality of termination have served to provide him a more balanced perspective with respect to the events that have occurred. Rather, his views and perceptions seem to be firmly entrenched. He denies and, thus, accepts no responsibility for his conduct. While he professed a willingness to return to work, it was neither convincing nor unconditional as he would only do so if he received his former level of pay regardless of what work he performed. Although not entirely factually apposite the circumstances of this case are similar to those addressed by Arbitrator Hope in *British Columbia Railway*. In these circumstances we can see no prospect for either an improvement in his attitude or for the re-establishment of the employment relationship. Accordingly, we answer the second *Wm. Scott* question in the negative and the Union's grievance with respect to the Grievor's termination is dismissed.

Summary

The Union's grievance with respect to the failure to pay LTD benefits is dismissed. Mr. Kaardal concurs with this result but not necessarily all of the reasoning. Mr. Haynes dissents.

The Union's grievance with respect to the termination is dismissed. Mr. Kaardal concurs with this result but not necessarily all of the reasoning. Mr. Haynes dissents.

The Chair and Mr. Kaardal have had an opportunity to read the dissent of our colleague Mr. Haynes. With respect, we disagree with his characterization of the basis of our conclusions as we have limited our deliberations to a consideration of the evidence presented and arguments made. Mr. Kaardal has authorized the Chair to sign the award on his behalf.

Wayne Moore, Chair

Dissents

Ray Haynes, Union Nominee

Randall Kaardal

Randall Kaardal, Employer Nominee

DISSENT OF RAY HAYNES

IN THE MATTER OF AN ARBITRATION

BETWEEN: GREATER VANCOUVER REGIONAL DISTRICT
AND: GREATER VANCOUVER REGIONAL DISTRICT EMPLOYEES UNION.

JOZEF ANTALIK GRIEVANCES

It is with considerable regret that I feel compelled to register my strongest disapproval of the actions of my colleagues in their majority decision in the above matter.

I sincerely believe they have allowed their prejudices towards the grievor to colour their deliberations. Even a cursory reading of the majority decision confirms ones observations that they somehow misinterpreted the grievors demeanor, concluding that his somewhat non-cooperative and dismissive responses on the witness stand were, "a blatantly defiant act of a disaffected and belligerent employee who had no real intention of returning to work". My colleagues misinterpreted the grievors lengthy and at times rambling and somewhat unresponsive evidence; making the leap from there to their strong over the top reaction. This made it impossible for them to judge this case in a timely fashion. Ironically on page 91 of the majority decision they treat with the nature of an arbitration case and how difficult it must be for an Employee participating and giving evidence likely for the first time in his life.

> *"Due to the bifurcated nature of the proceeding the Grievor gave evidence on two occasions. Both times he spent considerable time under extensive direct and cross examination. We are aware that the process of giving evidence, particularly by someone so directly impacted by the case, can be both emotionally and physical demanding..."*

Unfortunately my colleagues, in rendering their decision, ignored their earlier observation.

While the Grievor was a difficult witness and appeared to have a chip on his shoulder, one should appreciate all that he had been through prior to his appearance as a witness. This was an Employee who suffered a frightening accident while performing his duties. An accident caused by an improper ventilation system, which was subsequently corrected by his Employer. To make matters worse, over the next considerable period of time Mr Antalik went through a terrible ordeal of trying to get his Employer and even part of the medical community to accept the fact that the accident had seriously affected him and his ability to return to work. He was forced to seek a Specialist in Toxicology only available outside of B.C. He also found that while the Employer was assuring him they were doing everything to assist him, in actual fact they were making presentations to the Workers' Compensation Board, opposing his claim. To add more anguish to his state of mind, an important report from his Toxicologist Specialist was misplaced by Doctor Gouws (chosen by the Employer) who only acknowl-

edged his error after the Grievor produced registered mail receipts proving it had been forwarded to the doctor.

As if the strain of all of this was not enough, then came the hassle with the Employer on the matter of returning to work. With both the Employer's Doctor and the Grievor's Doctor and Specialist saying he was ready for a graduated return to work and despite prodding by the Grievor, (phone calls and correspondence) it was approximately two months before the Employer commenced looking for a suitable position for the Grievor.

As I have demonstrated, my Colleagues ignored their own cautionary note about the pressure a Grievor witness is under in a discharge case. Instead they used phrases like, *"disaffected...belligerent, unresponsive...argumentive* ...(a witness who's evidence is)*...largely unreliable...a witness that was and continues to be incapable of accepting any possibility inconsistent with his own belief and perceptions..."*

Considering all of the above, as I stated earlier, the Grievor did come to the Arbitration with a negative and uncooperative manner. He had suffered health wise and financially. I wish that he could have come before the Board and assisted us in understanding his plight. However, I am not prepared to join in the majority decision and place all of the blame on Mr. Antalik.

Before I move off of my disagreement with my colleagues' in their characterization of the Grievor and his evidence; let me put forth my view that perhaps Mr. Antalik suffered a serious affliction when he inhaled noxious poison at the time of the accident on April 24, 2002. We heard evidence that the research is still inconclusive; and that there can be long term repercussions from poisoning similar to what the Grievor suffered. It is quite possible that Mr. Analiks demeanor and response to questions at the arbitration were caused in part by the incident on April 24th (ie a change in mental/emotional behavior). We heard no evidence that Mr. Antalik had been a difficult person to deal with prior to the accident. Instead we did hear that he was a good employee, with a completely unblemished record during his approximate three years employment with the GVRD.

LTD ENTITLEMENT GRIEVANCE

On February 6, 2003 Dr. Gouws issued a report stating that Mr. Antalik was now fit to return to his work.

> *Mr. Antaliks present limitations are for Environmental Conditions: exposure to gases associated with sewage and exposure to strong volatile substances such as perfumes etc. From a physical standpoint, Mr. Antalik is able to do sedentary or light physical duties with intermittent rest periods. There is no contraindication for Mr. Antalik to return to alternative duties immediately. It would be my opinion that a graduated return to work would be suitable starting with approximately four hours of work per day.*

I am at a complete loss as to how my Colleagues could suggest that the evidence given by Dr. Gouws before the Arbitration Board somehow supersedes his legally written report of February 6th. The Board heard no evidence from Dr. Gouws suggesting he was wrong when he told Mr. Antalik, back on

Feb. 6th., - *You can go back to work.* While he vacillated somewhat in giving his evidence, he clearly refused to say he was wrong in his initial report.

Also significant is that on June 6, 2003, Mr. Johnstone Hardie, Human Resource Services Manager, was also of the mind that Mr. Antalik was fit to return to work. In his letter to Mr. Antalik dated June 6, 2003 he quoted Dr. Bacchus, who on May 8, 2003 said "*...you are fit to begin gradual return to work immediately*"... Mr Hardie then states in the same letter, "*As a result, the GVRD is attempting to identify alternate transitional work, which may precede your return to normal duties...*"

I believe this Arbitration Board erred in rejecting the LTD Entitlement grievance. Article 9.08, Section Five, sub section (a) of the collective agreement reads as follows:

> *Regular Full-Time Employees who continue to be disabled from fulfilling the requirements of their own occupation beyond 26 weeks of coverage under the STII Plan,, shall receive 66% of the first $2,000 per month of pre-disability salary and 50% of any amount thereafter, for so long as they remain disabled from fulfilling the requirements of their own occupation, to a maximum of two (2) years.*

Mr.Antalik, the Employer and the relevant medical people were all suggesting that the grievor was ready for "rehabilitative employment," and not able to return to his regular full time employment. It seems obvious he was therefore entitled to LTD. Based on the above evidence I am at a complete loss to understand how my Colleagues can dismiss the LTD Entitlement grievance.

TERMINATION GRIEVANCE

According to the Employer the Grievor was fired for a variety of reasons, all to do with what I refer to as his demeanor and distrust of the Employers actions and motives, culminating in his failure to return to work on October 6, 2003. While the majority decision attempted to make his refusal to complete the IME on September 20th a major factor in upholding the termination, they eventually recognized that the grievor had no contractual obligation to attend the IME appointment. They concede that he was not fired because of that incident, but say only that his conduct on that occasion was a further example of his defiant and belligerant attitude.

While initially the Employers reason for discharge was his failure to appear for work when instructed to do so, it seems to me it was obvious that during the grievance steps and by the time they came to the arbitration, their case had been somewhat expanded and that a glitany of other reasons had been added to their complaints. Under normal Arbitration jurisprudence, and bearing in mind this employees unblemished length of service, I do not believe that the discharge could be upheld.

I believe that at this point my Colleagues completely went off track, and I repeat again, their dislike and unfair judgement of the Grievors mannerisms and demeanor were no doubt the major contributing factors for their intransigency. Mr. Antalik was a valuable Employee with a clean record over a number of years service. The fact that it was never disputed he inhaled hydrogen sulphide on the job through no fault of his own, and possibly due to negligence by his Employer, deserves a more compassionate look than what my Colleagues seem prepared to do.

However where I am inclined to agree with my Colleagues and the majority decision, is with respect to the matter of the present employment relationship. On page 107 of the majority decision my Colleagues say that the present employment relationship is incapable of restoration and although they throw in exagerated comments about serious misconduct, their view about a questionable future employment relationship has some merit.

I do accept that, after all that had transpired (the actions of the Employer and the Employee) it is questionable as to whether they could ever be a reestablishment of the employment relationship. I believe it is the duty of an Arbitration Board to deal with the real substance of the dispute, which they belatedly did in the closing pages of their decision. It is with this in mind, I would have awarded damages in lieu of reinstatement in the amount of $100,000.00, rather than ordering reinstatement,.

Respectfully submitted this 28th day of July 2006

Ray C. Haynes