

The parties agree that this board has the jurisdiction to hear this matter. The Union has grieved the termination of George Rotaru on March 30, 1995 from his job with the Greater Vancouver Regional District for breach of trust, specifically for improperly claiming disability benefits.

FACTS

George Rotaru, the grievor, is now fifty-two years of age. He and his wife (a property manager) separated in the fall of 1995 and they have two daughters, now ages seven and twelve. Mr. Rotaru obtained a Fine Arts Degree at University, served two years in the Romanian Army and then pursued a career as an “artist, painting sculpting and designing”. In 1972 he moved to Montreal, and then to Winnipeg, to Toronto and finally to Vancouver in 1979, the same year in which he was married. He began work for the Greater Vancouver Regional District (“G.V.RD.”) in 1986 in their housing department and indicated at the time that his career goals were in planning and design. He has worked for the G.V.RD. since that time (9 years) and has a clean disciplinary record.

In 1991, he was transferred to work in the sewer department. On February 25, 1992, Mr. Rotaru was injured in an accident at the West Water Treatment Plant on Lulu Island. Mr. Rotaru and his partner were caught in a sewage intake channel when sewage was turned on ahead of schedule. Mr. Rotaru suffered a back injury and applied for and received W.C.B. benefits (75% of wage) plus “injury-on-duty” top-up (25%) providing full pensionable service from February 26 to April 5, 1992. Mr. Rotaru returned to work from April 6 to April 13 and then received three more days of W.C.B. benefits. He then worked from April 17 to May 4 and then went back on benefits from May 5 to August 9, 1992. He commenced receiving sick benefits on August 10, 1992 and then applied for and was accepted on Long Term Disability, effective November 14, 1992. His sick benefits terminated on

January 17, 1993. However, he then had his W.C.B. benefits (plus top-up) reinstated from January 18 to May 9, 1993 on a wrist injury claim. His sick benefits were reinstated from May 10 to September 9, 1993 and then he commenced receiving LTD financial benefits from September 4, 1993.

W.C.B. benefits (plus top-up) again were reinstated on the wrist injury claim until December 21, 1993. From that date until February 25, 1995, Mr. Rotaru once again received wage loss benefits for his back claim.

Once his W.C.B. benefits had expired in early 1995, the Employer decided it would be appropriate to have Mr. Rotaru come into the plant to discuss a possible return to work. A meeting was scheduled for March 14, 1995 with Mr. Rotaru, Bill Eastwood (Union President), Larry Tenney (Plant Manager), Johnstone Hardie (Personnel Administrator) and Keith Arkell (the Supervisor of Health and Safety for the Employer) in attendance. Mr. Arkell, Mr. Tenney, Mr. Hardie and Mr. Eastwood all testified that Mr. Rotaru arrived at the meeting with a cane in one hand and a friend to hold his other arm and help him walk. They testified that Mr. Rotaru walked from the parking lot to the meeting room stooped over with an extremely “slow, deliberate shuffle” and appeared to be in extreme pain. At the beginning of the meeting in the conference room, Mr. Rotaru lowered himself very slowly into his chair. Mr. Hardie testified he was “shocked” when Mr. Rotaru entered the room as he hardly had any mobility and seemed to be incapable of functioning physically.

Mr. Rotaru told the meeting that he was in pain almost all the time although he hoped to be able to be retrained and be able to contribute to society. He indicated he did not take regular medication as he “did not want to become dependent on it”. He also told the Employer that he had not attended the Columbia Pain Institute (a multi-disciplinary rehabilitation centre recommended by the Workers’ Compensation Board) because “they were playing with his mind”. Mr. Arkell indicated that

he felt Mr. Rotaru should pursue vocational rehabilitation with the W.C.B. and Mr. Rotaru said he would try and phone the W.C.B. that day. The impression left on all those present at the meeting was that Mr. Rotaru was severely incapacitated. Mr. Arkell testified that, as there appeared to be no way Mr. Rotaru could work even at light duties, it was agreed that they would all meet again in a couple of months to review Mr. Rotaru's employment options.

Mr. Arkell testified it appeared to him at the end of the meeting that Mr. Rotaru rose from his chair in a normal fashion" without any problems whatsoever and without the use of his cane. Mr. Arkell testified that Mr. Rotaru then suddenly appeared to pause and stoop over once he was standing. Mr. Arkell testified Mr. Rotaru then left the room with the same "slow shuffling gate", aided by his cane and his friend who had been called into the room to help him. Mr. Hardie had proceeded to leave to get Mr. Rotaru's friend to come into the room and Mr. Tenney had also begun to leave the meeting so neither of them saw Mr. Rotaru rise from his chair. Mr. Eastwood testified that in his view Mr. Rotaru's method of standing did not startle him in any way. In Mr. Eastwood's opinion, Mr. Rotaru rose in the same manner as he (Mr. Eastwood) did.

Mr. Arkell was "shocked" and extremely concerned about what he perceived to be inconsistent physical actions on the part of Mr. Rotaru. Later that day, Mr. Arkell spoke with Dennis Shaw, a Vocational Rehabilitation Counsellor at the W.C.B., and then sent Mr. Shaw a letter which inter alia referred to Mr. Arkell's observations at the meeting and asked Mr. Shaw to contact him if and when Mr. Rotaru made contact with Mr. Shaw about rehabilitation initiatives.

Mr. Arkell testified Mr. Rotaru's actions had "set off alarm bells" concerning things he had previously read in the grievor's medical file. The next day (March 15), Mr. Arkell reviewed those medical files. There were a number of comments in the files to the effect there was very little objec

tive medical evidence of any physical disability. There were also references in the reports to “pain magnification”, “give away weakness”, “self limiting activity”, and “functional overlay”, all of which indicated to Mr. Arkell that there was something else going on with Mr. Rotaru. Mr. Arkell decided to investigate further.

On his own initiative he drove out to Mr. Rotam’s home the next day and parked across the street. Mr. Arkell observed the situation for approximately three hours. He returned to work and discussed the matter with Mr. Hardie. As there has been an objection as to the admissibility of a number of pieces of surveillance evidence, at this point I will merely summarize the events from this time on. On the basis of Mr. Arkell’s observations during that three hour period, the Employer decided to hire a professional investigation firm to gather further information. Subsequently, the investigators submitted a written report to the Company supported by a videotape taken during the time of their surveillance. Following the receipt of this information, an investigation meeting with the grievor was held on March 29. Mr. Rotaru was questioned, shown the videotape and then terminated for breach of trust. At the meeting Mr. Rotaru also gave the Employer an application for disability benefits along with a doctor’s statement dated March 15, 1995 indicating that as of the grievor’s last examination on March 13, Mr. Rotaru had “severe limitation of functional capacity; incapable of minimal (sedentary) activity”.

The board was also provided at the hearing with the results of a W.C.B. investigation undertaken in April, May and June, 1995. On the basis of that report and other medical information, the W.C.B. has denied Mr. Rotaru’s claim for a disability pension. That decision is under appeal by Mr. Rotaru.

The Union has grieved Mr. Rotaru’s termination and that matter is now before this arbitration board.

DECISION

In discharge cases, an arbitration board must ask itself three questions:

1. Has the employee given just and reasonable cause for some form of discipline by the employer?
2. If so, was discharge an excessive response in all of the circumstances of the case?
3. Finally, if discharge is considered excessive, what alternative measure should be substituted as just and equitable?

Wm. Scott and Co. Ltd. and Canadian Food and Allied Workers Union Local P162 [1977] 1 Can L.R.B.R. 1

The parties are in agreement that given the nature of the allegations in this case, the Employer must prove its case on the basis of clear, cogent and convincing evidence: B.C.I.T., November 29, 1990 (Glass); Corporation of Township of Langley 20 L.A.C. (4th) 256 (McPhillips); Re Langley Memorial Hospital. 18 L.A.C. (3d) 123 (Thompson).

Given the facts in this case, credibility is a key issue. In that regard this board relies on the following passage from the British Columbia Court of Appeal decision in Faryna v Chorny [1952] 2 D.L.R. 354, at pp.356-7.

If a trial Judge's finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box. On reflection it becomes almost axiomatic that the appearance of telling the truth is but one of the elements that enter into the credibility of the evidence of a witness. Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility...A witness by his manner may create a very unfavourable impression of his truthfulness upon the trial Judge, and yet the surrounding circumstances in the case may point decisively to the conclusion that he is actually telling the truth. I am not referring to the comparatively infrequent cases in which a witness is caught in a clumsy lie.

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 the 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 the probabilities which a practical and informed person would easily recognize as reasonable in that place and in those conditions.

In responding to the first William Scott question, namely whether the employee has given just cause for some form of discipline, I will consider first the evidence that is unrelated to the disputed surveillance activities which occurred between March 16 and 25, 1995 and then proceed to deal with the issue of the admissibility of that surveillance evidence.

In this case, even if one considers only the undisputed evidence the credibility of Mr. Rotaru is all but destroyed.. First of all, Mr. Rotaru's testimony on the stand was often non-responsive and, at times, openly evasive. He refused to acknowledge when he had been caught in outright dishonesty during his evidence. He vacillated repeatedly on whether his mother-in-law could or could not care for his children. He was also not credible on whether or not he had to sleep on the floor due to the pain in his back or whether he consumed alcohol and in what quantity. He also testified that his children were completely unaware of his physical discomfort. That is simply incredulous. If Mr. Rotaru suffered in any way to the extent that he maintained in his testimony as well as in conversations with his doctors over at least the last year and during his meetings with his Employer, it would simply be impossible that members of his own family with whom he lived could be kept unaware of the problem. In sum, Mr. Rotaru's demeanour on the stand, his evasiveness, and his failure to acknowledge the many inconsistencies within his testimony leave this board no choice but to completely doubt his veracity.

There is also other evidence undermining Mr. Rotaru's position. By all reports, Mr. Rotaru gave the appearance of being in serious pain at the March 14 meeting with the Employer and again at the later meeting of March 29. Additionally, he submitted to the Company a medical report dated March 15 which stated that based on an examination on March 13, his level of physical impairment

was a Class S (the highest category) and he suffered from “severe limitation of functional capacity; incapable of minimal (sedentary) activity”. However, Mr. Arkell testified he observed Mr. Rotaru rise from his chair on March 14 as if nothing was wrong and then suddenly adjust his posture. Mr. Arkell appeared to this board to be an honest and straightforward witness and there is no basis at all for this board to doubt his evidence. Mr. Eastwood’s evidence is that he felt Mr. Rotaru got up as if he was a normal person. Given the apparent state of Mr. Rotaru’s health throughout the rest of the meeting, Mr. Eastwood’s evidence indirectly supports Mr. Arkell’s observation that Mr. Rotaru was being inconsistent. It appeared to Mr. Arkell that Mr. Rotaru was not a seriously incapacitated individual and the board accepts Mr. Arkell’s testimony on this point.

There is also medical evidence available to this board at the time of the hearing that independently puts Mr. Rotaru’s contentions concerning his health in March, 1995 into serious question. For example, in late 1994 Mr. Rotaru was examined by three different specialists following which behavioral, medical and physiotherapist assessments were prepared. These reports are replete with comments indicating inconsistencies in Mr. Rotaru’s situation. For example, Dr. Clarice Barver, the Physiotherapist, notes in her report dated December 16, 1994, at p.3:

General Comments:

Throughout the assessment Mr. Rotaru tended to display significant magnification of his pain and demonstrated lack of confidence in many of his movements. He states that he has been told to forget about the pain, get on with his life and to think about something else; he says that he has started to accept this fact. Nonetheless, he was a poor historian regarding the specific details of his medical and pain history. He was cooperative during the assessment but he showed some inconsistencies with his demonstration of pain.

The medical reports in Mr. Rotaru’s file (which is approximately four inches thick) indicate many other inconsistencies. For example, it appears Mr. Rotaru carried his cane in a different hand on some occasions when he visited doctors. As well, there is evidence that he carried a cane at every

meeting with doctors and with the Employer over an extended period of time. Yet, there are many other occasions when a cane has not been necessary (for example, in May and June, 1995 during the W.C.B. surveillance). It is simply incredulous that every occasion over two or three years which involved an assessment of his health corresponded to days when he needed a cane given that he testified (after much vacillation) that he only needed to use a cane two or three times a month.

In July, 1995, Mr. Rotaru underwent a 'Third Party Assessment Clinic' at the request of the Workers' Compensation Board. As indicated above, based on that assessment as well as a W.C.B. investigation report, Mr. Rotaru's application for pension benefits has been denied. The Assessment Team submitted a report to the W.C.B. which is dated July 27, 1995 and states, in part:

Dr. Ian Gummesson, the family practitioner on the team, found Mr. Rotaru's general medical health to be excellent. Mr. Rotaru did, however, exhibit significant pain behaviour during all manoeuvres during his physical evaluation.

Multiple nonorganic findings were noted on his evaluation of the lumbar spine and lower limbs.

Dr. Stephen Maloon, the orthopaedic surgeon on the team, felt that the injury that Mr. Rotaru described was more likely to have resulted in psychological than physical injury. His description of the onset of symptoms were not particular for any known medical condition. Clinical evaluation revealed significant functional overlay and multiple nonorganic findings were noted on examination. Other than mild degenerative arthritis of both knees, no objective evidence of injury to or dysfunction of the musculoskeletal or neurological elements of his spine or limbs was noted. No plain radiographs were available but review of two scans confirmed evidence of mild degenerative changes in the lower lumbar spine but no other more specific pathology was noted. Dr. Maloon felt that Mr. Rotaru may have mild mechanical activity related low back pain but found his exaggerates symptoms to be out of proportion to clinical findings. The persistence of Mr. Rotaru's symptoms together with multiple nonorganic findings and no objective evidence of musculoskeletal injury suggested to Dr. Maloon that there may be a behavioural component to his ongoing problem with his symptoms maintained by potential secondary gain factors.

Dr. Ken Craig performed his psychological assessment and found Mr. Rotaru's complaints of pain to be particularly dramatic. He felt that Mr. Rotaru's reports of pain were at particularly high levels even for somebody who was experiencing acute exacerbations

of pain. He felt that there was a high degree of disease conviction. Dr. Craig felt that Mr. Rotaru's disputes with his employers in the GVRD shortly before the work-related incident and the fact that Mr. Rotaru was shifted from an essentially sedentary occupation to the physical demands of heavy labour must have created considerable strain. Dr. Craig felt that Mr. Rotaru's life circumstances were stable and would not appear to represent strong motivators for him abandoning the invalid role. Psychometric testing revealed the Beck Depression Inventory's score to be within normal limits suggesting no clinical depression. MMPI-2 was characterized by elevation of validity scale indicating Mr. Rotaru represents himself as unrealistically virtuous. There was also striking elevation on the MMPI scales reflecting somatic complaints (scales 1 and 3). Dr. Craig's overall findings were that Mr. Rotaru's presentation was consistent with a stable picture of somatization on the psychometric instruments and denial of interpersonal or personal difficulties.

It was the impression of all three members of the team that Mr. Rotaru presented with symptoms disproportionate to clinical findings. Clinically there was no objective signs to suggest that Mr. Rotaru was anyway physically impaired. Although Mr. Rotaru complained of multiple subjective symptoms, all three members of the team found his complaints of pain to be particularly dramatic. This together with multiple nonorganic findings led the team to place less emphasis on patient's self-report and allowing them to come to the conclusion that Mr. Rotaru was in no way physically disabled.

It is certainly clear from a reading of that portion of the assessment report that, despite Mr. Rotaru's claim of continued significant pain in July, 1995, there was again a great degree of suspicion concerning his honesty among a number of doctors.

With regard to the W.C.B. surveillance evidence (which is not contested), the investigation report (photographs were attached), contains observations made of Mr. Rotaru on April 27, May 4, May 26, June 2 and June 8, 1995. During the period of that surveillance Mr. Rotaru was seen lifting heavy objects, pushing and pulling a wheelbarrow, loading and unloading debris and carrying a piece of carpet on his shoulder. The investigation report concludes:

“Through the many times that I have seen the client and in particular first thing in the morning when he leaves the driveway and takes his child to school, the client never at any time displayed any signs of disability and definitely had no problem in maneuvering his van whether driving forwards or backwards.”

These observations all occurred within one month of Mr. Rotaru's appearances at the meetings

in March with his Employer at which times he appeared to be barely able to move, even with a cane and the support of a friend. He told the Employer in those meetings that even on his best days he could not twist or bend and yet, within a month, he was observed doing just that by the W.C.B. investigator. The observations of the W.C.B. investigator are also completely at odds with the information given by Mr. Rotaru to the Third Party Assessment Team only a month later.

Therefore, within a six month period, Mr. Rotaru had told his doctors in December, 1994, he was in serious pain, presented himself again as seriously incapacitated to his own doctor on March 13 and then to the Company on both March 14 and 29, then appears completely healthy over a six week period in April, May and June and then presents himself as incapacitated to the Third Party Assessment team in July. Mr. Rotaru did not present this board with any plausible explanation for these apparent contradictions. As well, there was no other evidence (friends, family) called to in any way corroborate Mr. Rotaru's evidence about his medical condition. The only evidence made available by Mr. Rotaru are his own assertions and, as indicated above, they cannot be relied upon.

In my view, on the basis of the evidence to this point, it can be concluded that Mr. Rotaru was defrauding the Employer and/or the Workers' Compensation Board.

The board will now turn to the admissibility of the evidence pertaining to Mr. Arkell's observations on March 16, the observations of the professional investigators and the videotape evidence made during the professional investigation.

As I indicated in the Preliminary Award (dated June 12, 1996), I concluded this board should hear all the evidence and deal with the issue of admissibility of the surveillance evidence at the conclusion of the case. The Union has argued that the Employer is not entitled to rely on the information

gathered through this surreptitious surveillance of Mr. Rotaru which constituted an invasion of his privacy. Mr. MacTavish submitted that it was unreasonable for the Employer to conduct the surveillance in the absence of reasonable and probable grounds to believe that Mr. Rotaru was conducting himself in a manner inconsistent with his purported injuries. Further, the Union submitted there were other alternatives open to the G.V.R.D., specifically obtaining further medical evidence and/or confronting the grievor to obtain the information the Employer required. To support its position the Union relied on the following authorities: Privacy Act, R.S.B.C. 1979, c. 336; Canada Port Corp., 10 L.A.C. (4th) 361 (Swan); Canada Post 34 L.A.C. (3d) 392 (Bird); Monarch Fine Foods Co. Ltd. 20 L.A.C. (2d) 419 (Picher); Alberta Wheat Pool, 48 L.A.C. (4th) 332 (Williams); Toronto Star Newspapers Ltd., 30 L.A.C. (4th) 306 (Springate); Doman Forest Products Ltd., 13 L.A.C. (4th) 275 (Vickers) (“Preliminary Award”); Doman Forest Products Ltd., November 6, 1990, (Vickers) (“Final Award”), upheld on an appeal, I.R.C. Decision No. C/76/91, (April 17, 1991); Steels Industrial Products, 24 L.A.C. (4th) 259 (Blasina); Labatt Ontario Breweries (Toronto Brewery), 42 L.A.C. (4th) 151 (Brandt); Esso Petroleum Canada (leo Refinery), May 24, 1990 (McAlpine); Government of British Columbia, 21 L.A.C. (3d) 193 (Kelleher).

On the other hand, the Employer, relying on many of the same cases, has argued that the surveillance evidence should be declared admissible as there was, in the circumstances of the case of Mr. Rotaru, a reasonable basis for the Employer to undertake eye contact surveillance as well as electronic surveillance: Doman Forest Products Ltd., supra; Steels Industrial Products, supra; Alberta Wheat Pool, supra.

There are three principal arbitration decisions in British Columbia which deal with the admissibility of surveillance evidence: Doman Forest Products Ltd. supra; Steel Industrial Products supra;

Alberta Wheat Pool Those cases stand for the proposition that there are two questions to be asked in considering the admissibility of surveillance evidence:

1. Was it reasonable, in all of the circumstances, to request a surveillance, including whether there were other alternatives open to the company?
2. Was the surveillance conducted in a reasonable manner?

In my view, there are no absolutes when dealing with this issue. It is not a case that an employer never should have the right to undertake surveillance nor is it the case that an employer is free to get to the truth about whether there has been an abuse of company benefit plans and W.C.B. payments no matter how badly someone's privacy is invaded. These are genuine competing interests which must be carefully balanced in deciding whether this type of evidence should be admitted.

It is my opinion that prior to March 16 the Company had reasonable and probable grounds to believe Mr. Rotaru was being dishonest. First of all, there were Mr. Arkell's own observation on March 14 that for a brief moment the grievor seemed to be more physically capable than he had been demonstrating (and this observation was not really contradicted by the evidence of Mr. Eastwood). As well, the medical reports available at the time are full of potential grounds for suspicion about Mr. Rotaru's actual condition. There were a number of comments in the files to the effect there was very little objective medical evidence of any physical disability. As well, there were references in these reports to "pain magnification", "give away weakness", "self limiting activity", and "fimctional overlay". Even as early as 1992, Dr. Senton wrote in a medical report about Mr. Rotaru's condition that "at the time of AB examination, it was noted that the examination was normal other than for the signs of pain magnification behaviour, with various inconsistencies in both history and physical examination being well documented." Similarly, on June 15, 1992, Dr. Barnbrook noted that "the claimant has a number of pain magnification behaviours, e.g. he would only forward flex to the mid thigh level and

yet in the long-sitting position he could reach his anides without undue difficulty”. On July 28, 1992, Dr. Neufeld writes that “objective impairments are sparse if any”. In August 1992, Dr. Murray reports the following:

...PHYSICAL EXAMINATION

The claimant is a pleasant, middle-aged gentleman, who initially got up from the waiting room chair with great difficulty and demonstrated a marked limp on walking to the office. However, by the time we had reached the office and after the assessment, the claimant’s gait was completely normal. He moved all of his extremities smoothly and with no evidence of discomfort. He had no difficulty upon rising from the chair following the interview and appeared to be in no discomfort at anytime during the interview.

CLINICAL IMPRESSION

Mr. Rotaru has sustained a soft tissue injury to his lumbar spine and left forearm. He has recovered from these injuries and is fit to resume his usual activities at this time. I am not quite sure where his right arm symptoms fit in, however these appear to be related to a separate work incident on May 4th, 1992. Regardless, today’s physical examination was normal. There were signs of pain magnification behaviour on today’s assessment, and I feel there are several outside factors and secondary gains affecting this claimant’s recovery period. No further treatment is required and I feel it would be in this patient’s best interest to do his usual activities, as his work related injuries have recovered. No further treatment or investigation as far as these injuries are concerned is required.

Moving ahead to February 9, 1994, Dr. Teal observed:

ASSESSMENT

Mr. Rotaru is reporting an increase in his low back pain and some right leg pain. His evaluation is very difficult as he is very slow and resists an easy examination and there is much give-away weakness and seemingly discomfort with all maneuvers, not just nerve root stretch signs. Objectively there is no muscle wasting and his reflexes are symmetric and present. I will arrange for a repeat CT scan to re-evaluate his previously detected disc and to ensure that there is no new problem. In the interim I have encouraged him to continue on with his exercise program.

Therefore, based on Mr. Arkell’s observations and the comments in the medical reports, there was ample ground for the Company to be extremely suspicious of Mr. Rotaru. Additionally, in my view there was little else the Employer could effectively do to obtain the truth. There were not other, less intrusive, reasonable alternatives which would have allowed the Employer to obtain the neces

sary information: Doman Forest Products supra; Alberta Wheat Pool supra; Steels Industrial Products, supra. One suggestion from Mr. MacTavish is that the G.V.R.D. could have confronted Mr. Rotaru. However, his health situation had allegedly persisted for a lengthy period of time and Mr. Rotaru had repeatedly told the doctors and on March 14 had directly informed the Employer that he was essentially incapacitated. In essence, he was already clearly on record over a long period as to the state of his health. This was not a single inconsistent incident for which there might be a ready explanation. What if Mr. Arkell's suspicions had been put to Mr. Rotaru? If Mr. Rotaru had been telling everyone the truth, he would have merely repeated his story; if Mr. Rotaru had been lying all along, under those circumstances he would also have had to merely repeat his story. In my opinion, there was nothing of value that Mr. Rotaru could or would have added if he had been confronted with Mr. Arkell's suspicions.

The Union also asserts that the G.V.R.D. could have sought further medical evidence from a doctor or the W.C.B. if they were entertaining doubts about Mr. Rotaru's condition. That approach would not have made much sense either. The file on Mr. Rotaru which was reviewed by Mr. Arkell on March 14, 1995 was then already in excess of three inches thick. It contained among other things the following medical reports: Dr. A.J. Yorke, May 21, 1992; Dr. R.C. Chan, June 2, 1992, and June 10, 1994; Dr. G.A. Murray, August 6, 1992; Dr. P. Teal, August 6, 1992, September 16, 1992, October 22, 1992, November 3, 1993, February 9, 1994, and April 14, 1994; Dr. N.J. Carr, October 30, 1994; and Dr. J. R. Flint August 3, 1994. There was little reason for Mr. Arkell or the G.V.R.D. to believe a further medical assessment of Mr. Rotaru would shed any new light on Mr. Rotaru's medical condition as the doctors had been relying on Mr. Rotaru's reporting of his condition (as there was no objective medical evidence available in his case). The futility of seeking such further medical

evidence was particularly acute given that there was significant evidence pointing to the likelihood the grievor was being dishonest.

In my opinion then, it was not unreasonable for Mr. Arkell to decide to further investigate by undertaking surveillance and Mr. Arkell's initial method of surreptitious surveillance was the least intrusive possible as he parked on a public street and simply watched the yard and street in front of Mr. Rotaru's residence from a distance down the road. Therefore, his evidence is admissible and, given his observations, there was then even more solid ground to suspect Mr. Rotaru of serious dishonesty. The Employer's decision to hire a professional investigation firm was, therefore, also justified and the three investigators limited their observations to public places and did not observe anything that could not have been observed by an innocent bystander. With regard to the videotape evidence specifically, the tape was relevant, accurate and verified under oath. Therefore, in my opinion the decision to undertake surveillance by the G.V.R.D. and its agents was reasonable, the surveillance was conducted in a reasonable manner and it did not unduly invade the privacy of Mr. Rotaru. For these reasons, this board concludes that all the surveillance evidence is admissible.

Mr. Arkell testified as to his observations of March 16 and the report he submitted to the G.V.R.D. on that date was also placed into evidence. The evidence is that Mr. Arkell arrived across from Mr. Rotaru's residence at 10:24 a.m. on March 16. At 11:17 a.m. the first significant observation occurred. Mr. Arkell's report states:

An adult male recognizable as George Rotaru strode from the front door to the passenger side of the van, approximately 15m, dressed in casual/sport shorts. The gait was even and long, appeared smooth and determined. He returned almost immediately and at one point appeared to bend over to pick something up off the grass. G. Rotaru went inside and the door was closed.

At noon, Mr. Rotaru came out and got into his van on the passenger side, crawled across to the driver's seat and drove away. He returned at 12:25 and then, at 12:29 p.m., Mr. Arkell recorded the

following observation:

G. Rotaru picks up 2 full plastic garbage containers (1 green, 1 brown), one in each hand and carries them to curb side, about a 20m walk. There is no indication of any difficulty, he is not labouring and sets both down at once with ease. G. Rotaru turns, walks about 5 paces back, bends easily to pick up a piece of garbage, and walks two more paces stooped, to pick up another piece. He straightens easily, turns and puts the garbage in the container. There is no indication of any lack of mobility. Movements are smooth and easy. G. Rotaru enters the house (front door).

Mr. Arkell left the Rotaru residence and returned to his office. He arranged to meet with Mr. Hardie and, after considering Mr. Arkell's observations, they decided it would be appropriate to obtain an independent, professional surveillance report. The G.V.R.D. contracted with Canpro Investigative Services Inc. and three employees of that firm carried out surveillance on Mr. Rotaru on Tuesday, March 21, Thursday, March 23 and Saturday, March 25, 1995. The three employees, Shirley Burns, Gladys Javorsky and Gary Wool, made eye witness observations and recorded some of those observations on a videotape lasting approximately one hour and twenty minutes. The board heard evidence from each of the three investigators and reviewed the videotape which supported the oral evidence given by the investigators.

On March 21, Ms. Burns called the telephone number given to her by the G.V.R.D. and a "male with an accent" answered that she had reached a "graphic design company". Around 10:00 a.m. Mr. Rotaru was seen outside his home bouncing a ball, apparently waiting for someone. After a few minutes a friend picked up Mr. Rotaru and his two children and they drove to an auto centre. Mr. Rotaru entered the auto centre and then came out and stood around talking for an extended period. Mr. Rotaru ultimately picked up a Datsun and drove off with his children to a post office. Throughout all these activities, there appeared to be nothing at all wrong with Mr. Rotaru's upper or lower bodily movements and he moved completely naturally.

On Thursday, March 23, surveillance was again undertaken by the investigators but no contact

was made with Mr. Rotaru.

On Saturday, March 25, surveillance commenced at approximately 8:50 a.m. across the street from the Rotaru residence. The investigators followed the grievor throughout the day and their oral evidence, their written report and the videotape itself paint a picture of a completely healthy individual. A selection of comments about activities during this day from the written report include the following:

- 0955 HRS A view directly into the yard is obtained at the ROTARU residence.
VIDEO Video on and off. George ROTARU is observed wearing blue overalls working on and near the van. ROTARU is observed carrying a tool case believed to be a socket set to the rear of the van and proceeds to work on the rear taillights of the van. ROTARU is observed carrying a long blue rod and places this item into the rear cargo doors of the van. The subject comes in and out of view over the next several minutes from the house and to the van. ROTARU is observed walking with around with ease, bending forward from the waist and squatting and kneeling for several minutes at a time. ROTARU moves with ease and has no apparent difficulty in his movements.
- 1032 HRS VIDEO ROTARU repositions the van in the driveway and opens the side passenger doors of the vehicle. He returns to the area of the residence.
- 1040 HRS ROTARU, carrying several foam mattresses over his shoulders places them into the side doors of the van. He is observed moving around on the inside of the van.
VIDEO Video on and off. ROTARU is observed loading several items into the van. He carries a portable barbecue, a propane tank, a camping Coleman lamp and fishing tackle box and rods into the van. It appears he is loading the van for an outdoor trip. ROTARU carries a large square Tupperware box into the van and comes in and out of view from the house to the van.
- 1149 HRS The unidentified male in the Ford Aerostar van returns to the residence. ROTARU and the unidentified male are observed talking in the yard and they look at the fence surrounding the yard. ROTARU is observed pulling on the fence towards him as he talks. ROTARU comes in and out of view in the yard as the male waits in the yard area.

- 1210 HRS VIDEO ROTARU carrying a 25 litre water container and a large Tupperware box, places them into the van. Moments later, the subject carries the blue water container into the yard area and is observed through some small bushes near a watering hose. ROTARU is bent forward from the waist as he rinses off the container and fills it with water. After several minutes, ROTARU, carrying the full water container, walks to the van. He walks with his right hand out at his side for balance as he carries the container in his left hand. ROTARU lifts the water containers and puts it into the back of the van and returns to the area of the residence.
- 1251 HRS A grey Ford full size Bronco, BCL #RJ13 492, with an unidentified male #2 arrives at the residence. ROTARU moves the Dodge van out of the driveway and on to the street while the Ford Bronco parks in the yard and ROTARU re-parks the Dodge van in the driveway.
- VIDEO ROTARU picks up his five year old daughter and places her in the van. The older daughter also boards the van. Both the unidentified males board the Aerostar van and they depart the area of the residence followed by ROTARU driving the Dodge van and his two daughters on board. They proceed eastbound on Highway #1 driving speed in excess of 120 Km at times. They proceed to the PetroCan service station at Exit 96 on Watcom Road.
- 1455 HRS Surveillance is established at the river side where ROTARU and his companions are fishing.
- VIDEO Observe ROTARU at the river's bank. His two daughters are nearby playing and the two unidentified males are both here as well. ROTARU is kneeling on the bank of the river and he has his rod nearby and a coffee cup. He is observed standing around talking. After a while he ties his German Shepherd dog up nearby. After several minutes, ROTARU is observed at his tackle box and has his fishing rod in his hands. ROTARU is observed kneeling and bending forward from the waist.
- 1515 HRS Surveillance is discontinued at this location.
- NOTE: While at the river bank at Sea Bird Island Road, ROTARU engages one of our operatives (Mr. Wool) in a conversation. ROTARU reveals that he lives in a 7,000 square foot house and he has a shop for his drafting business in the basement.. The subject says he runs a drafting business making signs. ROTARU is very talkative and continues the conversation for several minutes before our operative departs the area on foot.

The investigators concluded their report to the G.V.R.D. with the following observations

concerning the state of Mr. Rotaru's alleged physical impairments:

Further to this, our video and observations depict the following:

- Bends at the waist to ground level and back up again several times.
 - Has excellent head, neck and shoulder rotation.
 - Bends at the waist to ground level and back up again several times.
 - Squats to the ground and remains so for several minutes and back up again.
-
- Kneels on the ground for several minutes at a time.
 - Stands for extended periods of time.
 - Lifts the following pieces of equipment - portable barbecue, foam mattresses, a tool kit, a camping lamp, a water container which appeared to be 25 litres full and various other camping equipment.

As indicated, this board had the opportunity to view the videotape at the hearing and the videotape was clear and professionally done. The oral and written evidence of the investigators is completely supported by the contents of the videotape. On the tapes, and particularly on March 25 when Mr. Rotaru is shown fixing his van, he can be seen operating without any physical hesitation or apparent discomfort.

Further discussion of the contents of the March 29 meeting with the Company is appropriate at this point. The Company called Mr. Rotaru in for a meeting on that day and he appeared only slightly better than he had on March 14. When asked about his health at the outset of the meeting, Mr. Rotaru indicated he still felt pain even though he was on pills that day so he could drive himself to the meeting. He reiterated that he did not like to take medication. When told by Mr. Hardie that an

employee of the Company had observed him and that an investigation report and videotape had been made which showed some inconsistencies with the medical condition he had been claiming, Mr. Rotaru's response was that "it might have been my brother". (For the record it should be noted that at this point Mr. Eastwood strongly objected to the Company "spying on the employees".) Part of the video was shown and the evidence is Mr. Rotaru became agitated and began moving around and gesturing with his arms. Mr. Rotaru then indicated he must have been on pain killers all the time that these video segments were made. (Mr. Arkell observed Mr. Rotaru's upper body movements at this point in the meeting were now much better than they had been twenty minutes earlier.) Mr. Rotaru was asked if he had any possible explanations for these apparent contradictions and there were none forthcoming.

Therefore, this surveillance evidence offers this board further support for the earlier conclusion there has been repeated dishonesty on the part of Mr. Rotaru. On March 16, only two days after the first meeting with the Company at which he appeared virtually totally incapacitated and three days after his doctors reported he had severe limitation of functional capacity and was incapable of minimal activity, Mr. Rotaru appears outside his home to be perfectly healthy to Mr. Arkell. There is no possibility that this is just a case of an effect of medication as Mr. Rotaru indicated at the meeting on March 29 (when he claimed he was still incapacitated) that he "was on my pills that day" so he could drive himself to the meeting. He repeated that explanation to this board and then testified to the board that he was also on pills during the March 14 meeting with the Company during which he was even more incapacitated. There was no explanation offered to this board by Mr. Rotaru regarding how these pills could have such different effects on different occasions.

On March 21 the evidence indicates that Mr. Rotaru answered the phone call from Ms. Burns

“graphic design company”. Mr. Rotaru denies this. However, this is consistent with his later comment to Mr. Wool concerning his design business on March 25 and his many comments to doctors over the years that this had been his prior training. He initially denied on the stand that this was his telephone number at the time but was confronted by Mr. Hamilton during cross-examination with documentary evidence to that effect. As well, on March 21, Mr. Rotaru was seen moving about normally doing everyday activities, certainly a far removed picture from the one presented a week before and then a week later to the Company.

The March 25th evidence overwhelming discredits Mr. Rotaru’s veracity. First, his physical actions, particularly climbing in and out of the van and remaining stooped over inside the van for extended periods, portray an individual who is not only not incapacitated but is actually very agile. Mr. Rotaru never gave the board any believable explanation as to why he could move around in this manner on that day. At one point in his evidence, he did assert he took pills that day so he could be with his children but then he could not explain why the same pills did not have any similar effect on March 29 when he was meeting with the Company. There is also Mr. Rotaru’s conversation with Mr. Wool on the river bank. Mr. Rotaru agrees with Mr. Wool’s evidence that he (Mr. Rotaru) told Mr. Wool he had a 7,000 square foot house and that he had a shop for his drafting business in the basement. Under cross-examination, Mr. Rotaru explained that it is true that he has a 7,000 square foot house but that he lied to Mr. Wool about the drafting business because he “made up a story” as a means of “trying to create conversation” with this nice looking, well dressed young man.

In the March 29 meeting when told that the Company had contradictory observations concerning his health, Mr. Rotaru responded “maybe it was my brother”. Not only was this explanation

apparently without any foundation but he never once explained to the Company at the time that he had been fine during the last couple weeks nor offered a reason for his good health at those times.

The other aspect of the surveillance evidence relates to the actual state of Mr. Rotaru 's medical condition. There was some disagreement between Counsel about what the observations and the tapes actually prove. In Mr. MacTavish's submission, the evidence on the tape is "neutral" on its face and does not prove the grievor's medical condition: Lornex Mining Corporation Ltd. January 20, 1982 (Hope); Cominco Ltd., No. A-342/87, December 23, 1987 (Chertkow); B.C.I.T., supra.

In my view, these cases stand for, inter alia the proposition that mere physical activity by an employee is a neutral fact which by itself sustains no inference; rather there is often a requirement for expert medical evidence as to whether an activity is helpful or dysfunctional to the employee's condition. I do not have difficulty with that conclusion in that it is often necessary to medically establish that certain behaviour, whether it be golfing, curling, skiing, is such that it was inconsistent with the incapacity claimed by the employee.

In our case, however, it is the honesty of the grievor which is the principal issue (even with regard to the actual state of his medical condition). Unlike in Lornex Mining, supra there is much evidence in our case that "advances the suspicion that the grievor invented or exaggerated his illness" (p.3 0). It is clear that Mr. Rotaru's actions are absolutely inconsistent with information concerning his medical incapacity he himself had given to the G.V.R.D. and to his doctors.

Therefore, a consideration of the surveillance evidence itself as well as Mr. Rotaru's responses to it result in a number of conclusions. First, it appears that Mr. Rotaru's health was not as he claims it was. Second, it can be concluded that he was running some level of business activity from his home, a fact he never mentioned to his doctors or to the Company. Most important, it confirms

beyond any doubt that Mr. Rotaru has been dishonest in this case. There were inconsistencies in this evidence about whether he wanted to return to work. When one looks carefully at his changing story about his mother-in-law's house, his desire to change job duties, his running of a graphic design from home, and his refusal to undergo rehabilitation treatment, there seems little doubt that this is a man who has attempted to avoid returning to work at the G.V.RD. and is prepared to not only conceal his lack of desire to return to work but to be actively dishonest about his intentions. Unfortunately, Mr. Rotaru cannot be believed about anything that is critical in this case and that includes his medical condition throughout the period in question.

Therefore, when one considers the undisputed evidence together with the surveillance evidence the first Wm Scott question must be answered in the affirmative. It must be concluded on the basis of clear, cogent and convincing evidence that Mr. Rotaru has defrauded his Employer and/or the Workers' Compensation Board and has given the Employer just and reasonable cause for some form of discipline.

The next issue then is the appropriateness of the penalty. The Union asserts in the alternative that, even if Mr. Rotaru did what the Employer alleges, this board should exercise its discretion and substitute a lengthy suspension: *Simon Fraser University 17 L.A.C. (4th) 129 (Munroe)*. In assessing a disciplinary penalty, an arbitration board is mandated by Wm Scott, *supra*, at pp.5-6 to consider at least the following factors:

- (i) How serious is the immediate offence of the employee which precipitated the discharge (for example, the contrast between theft and absenteeism)?
- (ii) Was the employee's conduct premeditated, or repetitive; or instead, was it a momentary and emotional aberration, perhaps provoked by someone else (for example, in a fight between two employees)?
- (iii) Does the employee have a record of long service with the employer in which he proved an able worker and enjoyed a relatively free disciplinary history?
- (iv) Has the

employer attempted earlier and more moderate forms of corrective discipline of this employee which did not prove successful in solving the problem for example, of persistent lateness or absenteeism)?

(v) Is the discharge of this individual employee in accord with the consistent policies of the employer or does it appear to single out this person for arbitrary and harsh treatment (an issue which seems to arise particularly in cases of discipline for wildcat strikes)?

This board has considered all these factors set out by the Labour Relations Board and has come to the inescapable conclusion that the discharge should not be overturned. Mr. Rotaru intentionally and with planning carried out a scheme which defrauded his Employer and/or the W.C.B. (not to mention indirectly his fellow employees) for a considerable period of time. He also lied about the facts to at least the Employer and under oath at the hearing. He has never admitted the inappropriateness of his behaviour nor in any way apologized for it. In my opinion, this is definitely a case where there is no reasonable expectation whatsoever of being able to restore the employment relationship.

As no significant mitigating factors can be found in the grievor's favour, the second William Scott question is answered in the negative. Discharge was not an excessive response in all the circumstances of this case.

AWARD

For all the above reasons, Mr. Rotaru's grievance is dismissed.

Dated this 30th day of September, 1996.

David C. McPhillips Arbitrator